**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

**JUDGMENT**

**Reportable**

Case No: 1032/2019

In the matter between:

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| **UNITED DEMOCRATIC MOVEMENT** | **FIRST APPELLANT** |
| **BANTU HOLOMISA** | **SECOND APPELLANT** |

and

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| **LEBASHE INVESTMENT GROUP (PTY) LTD** | **FIRST RESPONDENT** |
| **HARITH GENERAL PARTNERS (PTY) LTD** | **SECOND RESPONDENT** |
| **HARITH FUND MANAGERS (PTY) LTD** | **THIRD RESPONDENT** |
| **WARREN GREGORY WHEATLEY** | **FOURTH RESPONDENT** |
| **TSHEPO DUAN MAHLOELE** | **FIFTH RESPONDENT** |
| **PHILLIP JABULANI MOLEKETI** | **SIXTH RESPONDENT** |

**Neutral citation:** *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* (1032/2019) [2021] ZASCA 4 (13 January 2021)

**Coram:** CACHALIA, MBHA, MOLEMELA and MAKGOKA JJA and SUTHERLAND AJA

**Heard:** 16 November 2020

**Delivered**: This judgment was handed down electronically by circulation to the parties' representatives by email, and by publication on the Supreme Court of Appeal website and release to SAFLII. The time and date for hand down is deemed to be 09h45 on 13 January 2021.

**Summary:** Interim interdict – appealability – whether there is an absence of irreparable harm – per majority judgment: interests of justice do not require that appeal be entertained - per minority judgments: interests of justice do require appeal to be entertained.

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**ORDER**

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**On appeal from:** Gauteng Division of the High Court, Pretoria (Tlhapi J sitting as court of first instance):

1. The appeal is struck from the roll.
2. The appellants, jointly and severally, shall bear the respondents' costs including the costs of two counsel.

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## JUDGMENT

**Sutherland AJA (Cachalia and Mbha JJA concurring):**

### Introduction

[1] When this appeal was heard on 16 November 2020, the matter was struck off the roll. The reason was that the order of the Gauteng Division of the High Court, Pretoria (the high court) against which the appeal lay, was not appealable, notwithstanding leave to appeal having been granted by the high court. The order was an interim interdict pending an action to be instituted by the respondents. The crux of the controversy is whether the order was 'final in effect' and was therefore, indeed, appealable, or, even if its true character was interim, the interests of justice warranted an appeal against it to be entertained.

[2] The circumstances giving rise to the litigation have their origin in a letter sent on 26 June 2018 to the President of the Republic by the appellants, the United Democratic Movement (UDM), a political party, and its leader Mr Bantu Holomisa. The letter contained allegations that the several respondents,[1] who are in business, had conducted themselves unlawfully in various ways in relation to the Public Investment Corporation (PIC). A request was made to the President to cause these allegations against the respondents to be investigated. The letter was also published to the world on the UDM website. The respondents contend the remarks were defamatory. As a result, the respondents sought interim relief pending an action for damages for the alleged defamation.

[1] The first to sixth respondents are: Lebashe Investment Group (Pty) Ltd, Harith General Partners (Pty) Ltd, Harith Fund Managers (Pty) Ltd, Warren Gregory Wheatley, Tshepo Duan Mahloele and Phillip Jabulani Molekethi.

## The orders a quo

[3] On 16 July 2018, Tlhapi J, in the high court granted an interdict against the appellants forbidding the repetition of certain remarks they had made publicly about the several respondents.[2] The order was in these terms:

'1. Pending the determination of an action to be instituted by the applicants against the respondents for damages for defamation and injuria, and the relief ancillary thereto ("the action"), the respondents shall:

1.1 forthwith cease and desist from making or repeating any allegations (whether orally or in writing) against the applicants (or any of them), and/or from defaming or injuring them in their dignity, in any further publications or broadcasts in any form, including but not limited to internet posts, articles, letters, media interviews, "Twitter" and other social media posts and the like, which are the same as, or similar to, or which negatively reflect upon the applicants (or any of them) arising from or based on, any of the allegations or statements appearing in the letter dated 26 June 2018 addressed by the second respondent to the President of the Republic of South Africa, Mr C M Ramaphosa (a copy of which is annexed to the founding affidavit therein and marked "WGW4", referred to herein as "the letter").

1.2 within three (3) hours of granting of this order, remove and delete the letter and, in so far as it lies within their power, any posts regarding the letter (or any of its contents) or responses thereto, from the first respondent's website (www.udm.org.za), from the first respondent's Twitter account (@UDmRevolution), and from the second respondent's Twitter account (@BantuHolomisa);

2. Unless the applicants institute the action within one month of the date of this order, such order shall lapse and be of no further force or effect.

3. . . .

4. The respondents are ordered to pay the costs of this application on the scale as between party and party . . . including the costs attendant upon the employment of two counsel.'

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[2] The proper approach to an order of this nature was considered in *Hix Networking Technologies CC v System Publishers (Pty) Ltd and Another* 1997 (1) SA 391 (A) at 397H-399F. The court a quo adopted this approach see *Lebashe Investment Group (Pty) Ltd and Others v United Democratic Movement and Another* (unreported) (case no 46074/18) paras 41-45.

[4] Thirteen months later, on 8 August 2019 Tlhapi J heard the application for leave to appeal and on 26 August 2019 granted leave to appeal to this Court. The rationale for the order was expressed thus:

'I am not persuaded that the applicants would have prospects of success in terms of section 17(1)*(a)*(i) of the [Superior Courts] Act or that section 96 of the Constitution was applicable to Mr Moleketi after he resigned as Deputy Minister and chairperson of the PIC despite Mr Mpofu's contention that an incorrect authority had been cited by Mr Berger. I am [sic] that a conflict of interest would not be applicable to Mr Mahloele. Furthermore, I am also of the view that the privilege afforded by section 58 of the Constitution is confined to National Assembly and not beyond it.

Despite the above view, Mr Mpofu and Mr Nguckaitobi made compelling submissions why this interim order was appealable and why leave to appeal should be given in terms of section 17(1)*(a)*(ii) of the Act. The general rule as correctly submitted by Mr Berger was that an interim interdict was not appealable for reasons in the authorities he relied upon, in *Cipla supra* at paragraph [19] Rogers AJA does remark that such orders are not *"usually appealable"* which probably makes room for appealability in certain exceptional circumstances, and that for his reasons such consideration did not arise in that matter. In this matter the question is, *is it in the interest of justice and do special circumstances exist for a court of appeal to determine whether the interim order has an element of finality which would prejudice the applicants (a political party and Mr Holomisa leader of the UDM) or does the interim order have the potential to prejudice them by preventing them to exercise their rights as protected by sections 16; 19 and 55 of the Constitution.*

Mr Mpofu reiterated the view that Mr Holomisa's letter to the President was not defamatory and, he contended that the interim order had been prejudicial to the applicants because it had curtailed the Constitutional right as guaranteed by sections relied upon to engage in political activity. It was in the interest of justice to have certainty on the protection afforded by the Constitution to political parties and members of parliament. On the issue of appealability he relied on *Tshwane City v Afriforum* 2016 (6) SA 279 (CC) at paragraph [40] where Chief Justice Mogoeng stated:

"The common law test for appealability has since been denuded of its somewhat inflexible nature. Unsurprisingly so because the common law is not on par with but subservient to the supreme law

that prescribes the interest of justice as the only requirement to be met for the grant of leave to appeal."

The Chief Justice cited with approval the principle as set out by Moseneke DCJ in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 233 (CC). These authorities establish that the traditional principle on appealability of interim and interlocutory orders at common law has in certain circumstances evolved and that where the interests of justice demand, leave to appeal should be considered. Although this was stated in matters before the Constitutional Court, on issues of appeal before that court, *I see no reason why considerations in the interests of justice should not apply to the lower courts when determining the appealability of an interim order, which is said affect the rights of parties such as the applicants to engage in political activity*. Leave in these circumstances should be granted and I am of the view that the issues raised are of importance and for purpose of certainty the matter should be considered by the Supreme Court of Appeal.' (Emphasis added.)

[5] An application for leave to appeal is regulated by s 17(1) of the Superior Courts Act 10 of 2013 which provides:

'(1) Leave to appeal may only be given where the judge or judges concerned are of the opinion that –

*(a)* (i) the appeal would have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;

*(b)* the decision sought on appeal does not fall within the ambit of section 16(2)*(a)*; and

*(c)* where the decision sought to be appealed does not dispose of all the issues in the case, the appeal would lead to a just and prompt resolution of the real issues between the parties.'

[6] We were told from the bar that the action for defamation has since been duly instituted and that the pleadings in that action have closed. The parties are engaged with the further preparatory steps which will entitle them to apply for a trial date.

**The law on the appealability of an order of court**

[7] What is required to render an order appealable is well trodden judicial turf. It is to the law on appealability in this regard we now turn.

[8] Perhaps the definitive pronouncement is that in *City of Tshwane Metropolitan Municipality v Afriforum and Another*.[3] In that matter the question was whether an interim order granted in the high court to prevent the city council from changing street names pending a review of its decision to do so, was appealable. The interim order implicated an inhibiting of an organ of state from fulfilling its statutory functions and this factor was crucial in determining, on the facts, whether the interests of justice required an appeal. Nevertheless, the Chief Justice's remarks on appealability and the criterion of the interests of justice are of wider import:

'The appealability of interim orders in terms of the common law depends on whether they are final in effect. . .

The common law test for appealability has since been denuded of its somewhat inflexible nature. Unsurprisingly so because the common law is not on par with but subservient to the supreme law that prescribes the interests of justice as the only requirement to be met for the grant of leave to appeal. Unlike before, appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All this is now subsumed under the constitutional interests of justice standard. The over-arching role of interests of justice considerations has relativised the final effect of the order or the disposition of the substantial portion of what is pending before the review court, in determining appealability. The principle was set out in *OUTA* [*National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) para 50], by Moseneke DCJ in these terms:

"This court has granted leave to appeal in relation to interim orders before. It has made it clear that the operative standard is the "interests of justice". To that end, it must have regard to and weigh

[3] *City of Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC).

carefully all germane circumstances. Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable."

. . .

What the role of interests of justice is in this kind of application [ie interdicting an organ of state from performing its functions] again entails the need to ensure that form never trumps any approach that would advance the interests of justice. If appealability or the grant of leave to appeal would best serve the interests of justice, then the appeal should be proceeded with no matter what the pre-Constitution common law impediments might suggest. . .

Consequently, although the final effect of the interim order or the disposition of a substantial portion of issues in the main application are not irrelevant to the determination of appealability and the grant of leave, they are in terms of our constitutional jurisprudence hardly ever determinative of appealability or leave. . . .'

[9] Earlier, in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*[4] the Constitutional Court had dealt with a dispute concerning the Minister of Trade and Industry promulgating regulations affecting anti-dumping duties. The appellant had composed recommendations to be submitted to the Minister to abolish the restraints. The respondent, a manufacturer, obtained an interim order interdicting the submission of the recommendations. Several considerations led to the successful appeal. In the course of addressing the controversy about whether the order was appealable, Moseneke DCJ remarked:[5]

'. . . the jurisprudence of the Supreme Court of Appeal on whether a "judgment or order" is appealable remains an important consideration in assessing where the interests of justice lie. An authoritative restatement of the jurisprudence is to be found in *Zweni v Minister of Law and Order*

[4] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2010 (5) BCLR 457 (CC); 2012 (4) SA 618 (CC).

[5] *SCAW* fn 4 paras 50-54.

which has laid down that the decision must be final in effect and not open to alteration by the court of first instance; it must be definitive of the rights of the parties; and lastly, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. On these general principles the Supreme Court of Appeal has often held that the grant of an interim interdict is not susceptible to an appeal.

The "policy considerations" that underlie these principles are self-evident. Courts are loath to encourage wasteful use of judicial resources and of legal costs by allowing appeals against interim orders that have no final effect and that are susceptible to reconsideration by a court a quo when final relief is determined. Also allowing appeals at an interlocutory stage would lead to piecemeal adjudication and delay the final determination of disputes.

After *Zweni*, the Supreme Court of Appeal has recognised that the general rule against piecemeal appeals could conflict with the interests of justice in a particular case. Howie P, writing for a unanimous court in *S v Western Areas,* was required to decide, in an application for leave to appeal in a criminal matter, whether the dismissal of an objection to an indictment was appealable in terms of s 21(1) of the Supreme Court Act. After surveying its case law on the appealability of a "judgment or order" in civil and criminal cases and after referring to the interests of justice test set by this Court in *Khumalo v Holomisa*, he concluded that the general principles enunciated in *Zweni* are neither exhaustive nor cast in stone. He further held that:

"(I)t would accord with the obligation imposed by s 39(2) of the Constitution to construe the word "decision" in s 21(1) of the Supreme Court Act to include a judicial pronouncement in criminal proceedings that is not appealable on the *Zweni* test but one which the interests of justice require should nevertheless be subject to an appeal before termination of such proceedings. The scope which this extended meaning could have in civil proceedings is unnecessary to decide. It need hardly be said that *what the interests of justice require* depends on the facts of each particular case."

More recently, in *Philani-Ma-Afrika v Mailula,* the Supreme Court of Appeal had to decide whether an order of the high court which puts an eviction order into operation pending an appeal was appealable. In a unanimous judgment by Farlam JA, the Court held that the execution order was susceptible to appeal. It reasoned that it is clear from cases such as *S v Western Areas* that "what is of paramount importance in deciding whether a judgment is appealable is *the interests of justice*."

As we have seen, the Supreme Court of Appeal has adapted the general principles on the appealability of interim orders, in my respectful view, correctly so, to accord with the equitable and the more context-sensitive standard of the interests of justice favoured by our Constitution. In any event, the *Zweni* requirements on when a decision may be appealed against were never without qualification. For instance, it has been correctly held that in determining whether an interim order may be appealed against regard must be had to the effect of the order rather than its mere appellation or form. In *Metlika Trading Ltd and Others v Commissioner, South African Revenue Service* the Court held, correctly so, that where an interim order is intended to have an immediate effect and will not be reconsidered on the same facts in the main proceedings it will generally be final in effect.

Lastly, when we decide what is in the interests of justice, we will have to keep in mind what this Court said in *Machele and Others v Mailula and Others*. In that case, the Court had to decide whether to grant leave to appeal against an order of the High Court authorising execution of an eviction order pending an appeal. In granting leave to appeal, Skweyiya J, relying on what this Court held in *TAC (1)*, reaffirmed the importance of "irreparable harm" as a factor in assessing whether to hear an appeal against an interim order, albeit an order of execution:

"The primary consideration in determining whether it is in the interests of justice for a litigant to be granted leave to appeal against an interim order of execution is, therefore, whether irreparable harm would result if leave to appeal is not granted".' (Emphasis added.)

## Analysis

[10] Applying these norms to the facts relevant to the order in this matter, it may be asked how might the interests of justice be thwarted if the interim order stands until trial and, potentially, is then held to have been inappropriate because either there was no defamation after all, or that the appellants conduct is held to be justifiable?

[11] Whether or not a cogent debate can be conducted about the character of the allegations being defamatory, is at this stage, an open question. The very point of

the letter could not avoid being contentious if it was to serve any useful purpose. Indeed, the appellants' case is that the purpose was to report serious unlawful conduct and demand a public enquiry. Whether or not the contentious remarks in the letter are indeed defamatory of the respondents is a matter to be decided by the trial court in due course, and of course, were they to be held by that court, to be defamatory, the question of whether or not the appellants were justified in making them will be decided. The appellants advance a thesis, which they contend, satisfies the legal requirements for justifiability. However, neither in the court a quo, nor in this Court, in these proceedings, was it, and is it, necessary to express a firm view about whether the allegations are indeed defamatory and whether the appellants have a proper justification for making them.

[12] Before Tlhapi J, a quo, the question to be decided was simply whether, *prima facie*, the appellants' published remarks were defamatory and whether an interim interdict inhibiting the repetition of those remarks pending a trial was appropriate. The order granted cannot plausibly be interpreted as having 'final effect' in any accepted sense of that concept. In *Zweni v Minister of Law and Order*, Harms JA held:

'A "judgment or order" is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings *(Van Streepen & Germs (Pty) Ltd* case *supra* at 586I-587B; *Marsay v Dilley* 1992 (3) SA 944 (A) at 962C-F). The second is the same as the oft-stated requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief *(Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and Another* 1992 (4) SA 202 (A) at 214D-G).'[6]

[6] *Zweni v Minister of Law and Order of the Republic of South Africa* [1993] 1 All SA 365 (A); 1993 (1) SA 523 (A) at 532H-532A.

[13] The decision in *Tau v Mashaba*[7] was invoked in support of the contention that the order of Tlhapi J is appealable. That contention is misplaced. Rather, the order of Thlapi J can be contrasted with the order granted in *Tau v Mashaba.* The relevant facts were that Mr Tau, a member of the African National Congress (ANC) and a former Mayor of Johannesburg, in a public meeting, made disparaging remarks about Mr Mashaba, a member of the rival Democratic Alliance who was the then serving Mayor and Mr Tau's immediate successor. Mr Tau made remarks, among others, that Mr Mashaba had indecently accused women in the Johannesburg city hierarchy of prostituting themselves to get their jobs from the ANC and also that Mr Mashaba, a Black man, wished that he was not Black.

[14] Mr Mashaba was aggrieved and sued for an order in these terms:

'Pending the institution of an action for defamation and damages, which must be instituted against the first respondent within 60 days of the granting of the order herein:

1. Ordering the respondents:

1.1 forthwith to retract the offending remarks;

1.2 to refrain from repeating such and/or similar remarks concerning the applicant in future;

1.3 to issue an unconditional apology to the applicant framed along agreed terms; alternatively terms to be imposed by the court;

1.4 to ensure the widest possible publication of the retraction and/or apology envisaged in 1.1 to 1.3 above.'[8]

[15] An order as prayed was not made. Instead, an order was made as follows:

'(a) It is declared that the statement made by the 1st respondent on 28th August 2016 is defamatory of the applicant.

[7] *Tau v Mashaba* [2020] ZASCA 26; 2020 (5) SA 135 (SCA).
[8] *Tau v Mashaba* fn 7 para 4.

(b) The 1st respondent is interdicted and restrained from repeating the statement, or statements to the same effect.
(c) All other issues relating to relief arising in the present application are deferred for decision in the pending action instituted by the applicant against the 1st respondent for damages for defamation.
(d) The 1st respondent is directed to pay the costs of the application, including the costs of two counsel.'[9]

[16] Plainly, the declarator in (a) and the interdict in (b) are undoubtedly final in effect, unlike the order made by Tlhapi J in this matter. The order in *Tau v Mashaba* was therefore unquestionably appealable. Moreover, the question of appealability was not argued, and thus the decision is unhelpful to resolve the controversy in this case.

[17] As regards other characteristics of the order granted by Tlhapi J, it is notable that the effect of the high court's order prevents merely a repeated publication of the allegations for a time, but not permanently. Significantly, the contentious remarks were already in the public domain. The order, for this reason, cannot be described as a 'gagging order'. The appellants were successful in getting their message out to the public. Moreover, although only of marginal relevance, the President responded positively to the letter and caused the issues raised in it to be examined by the commission of enquiry, chaired by retired Justice Mpati, which had already been appointed to investigate other supposedly undesirable activities concerning the PIC. The treatment by that commission of the allegations is not information on record before this Court.

[9] *Tau v Mashaba* fn 7 para 12.

[18] The rationale for the grant of leave to appeal accepted by the court a quo, as cited above, was again embraced by the appellants in argument before this Court.[10] It was contended that the interests of justice required an appeal against the order to be entertained. The thesis advanced was twofold. First, it was alleged that that certain constitutional rights were infringed by the order. These were the rights of freedom of expression in s 16(1),[11] and political rights as framed in s 19(1)*(c)*[12] 'to campaign for a political party or cause'. Second, the lengthy elapse of time – 27 months which had passed between the grant of the interim interdict and the hearing before this Court – demonstrated, so the argument ran, a type of 'final effect' because during this period they could not 'advocate' for the cause of anti-corruption with reference to the respondents' conduct. The two contentions are grounded on the same notion, ie, that political actors whose very function it is to engage in public discourse are severely prejudiced by even an interim order which temporarily silences them while the legitimacy and lawfulness of their controversial utterances are the subject matter of litigation.

[19] Therefore, the sting in the argument is that a reason exists, or ought to exist, which would exempt a class of persons, being political actors, from being subjected to interim orders inhibiting the freedom to express speech of their own choosing, albeit temporarily, during periods while the legitimacy and lawfulness of that speech

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[10] The appellants did not address the question of appealability in their heads of arguments. The respondents addressed the issue at length. Notwithstanding that, the appellants chose not to respond by filing supplementary heads. Mr Ngcukaitobi addressed the court, orally, on the question.

[11] '**Freedom of expression**
16. (1) Everyone has the right to freedom of expression, which includes –
*(a)* freedom of the press and other media;
*(b)* freedom to receive or impart information or ideas.'

[12] '**Political rights** 19. (1) Every citizen is free to make political choices, which includes the right –
*(a)* to form a political party;
*(b)* to participate in the activities of, or recruit members for, a political party; and
*(c)* to campaign for a political party or cause.'

is being tested. The essence of this thesis is that political actors are in a special class subject to rules different from the rest of the population.

[20] It may be supposed that this peculiar status might conceivably be upheld by a court in trial proceedings determining final relief, where the issue may be explored in full, the myriad consequences examined, and the appropriate policy choices made to develop the law and nourish democratic discourse. However, the proper approach to delve into such questions is not by appealing against an interim order. Were an appeal against the interim order to be entertained on such grounds, the findings would unavoidably pre-empt the very enquiry that the trial court is required to examine: ie, whether the appellants, being political actors, were justified in their conduct.

[21] The reliance on the systemic delays in the litigation process in South African courts is, if not on principle, certainly on these facts, misplaced.[13] The fact that 27 months has elapsed since the interdict was granted, and the trial had yet to be set down is not alluded to in the papers and only sketchily alluded to in argument. A grim picture was drawn by the suggestion in argument, not on affidavit, that the lead-time to get a trial date in the high court was expected to be not less than a year. Therefore, it was argued that for an extensive period, the appellants could not publicly canvass their views nor disseminate information they believed was germane to the allegations of unlawfulness by the respondents. This outcome was supposedly at odds with the constitutional guarantees mentioned above. The argument is untenable. What little is known of the facts, points at the parties having leisurely

[13] See: in regard to a measure of intrinsic prejudice in the effect of an interim interdict not being 'irretrievable' in all cases: *Cronshaw and Another v Coin Security Group (Pty) Ltd* [1996] 2 All SA 435 (A); 1996 (3) SA 686 (SCA) at 690G- 691D.

plodded on over the 27 months without any appetite for zeal or expedition. In the absence of proper evidence, the systemic delay argument is stillborn.

[22] It was suggested in argument on behalf of the respondents that it was open to the appellants, if they could contrive some serious harm caused by being subjected to the interim interdict that they were entitled to invoke s 18(2) and s 18(3) of the Superior Courts Act, to apply to have the order suspended. It is indeed correct that an obvious remedy for a litigant who believes it is faced with irreparable harm in having to comply with an interim order, is to invoke s 18(3).[14] No answer to this proposition was forthcoming. Moreover, to the extent that the complaint of the appellants is that time forfeited cannot be revived, the proposition has consistently been rejected as invalid.[15]

[23] The appellants are in addition not denied the opportunity of repeating the allegations in Parliament because s 58(1)*(a)* of the Constitution secures a right to do

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[14] '**Suspension of decision pending appeal**
**18.** (1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.
(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.
(4) If a court orders otherwise, as contemplated in subsection (1) –
(i) the court must immediately record its reasons for doing so;
(ii) the aggrieved party has an automatic right of appeal to the next highest court;
(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and
(iv) such order will be automatically suspended, pending the outcome of such appeal.
(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules.'

[15] *Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation and Others* [2017] ZASCA 134; [2017] 4 All SA 605 (SCA); 2018 (6) SA 440 (SCA) para 47.

so with impunity.[16] The counter argument offered in this regard is that s 19 confers a right to engage in advocacy outside Parliament, no less than within it. Ostensibly, this is indeed the scope of the section, but it is not a cogent answer to why a temporary silence in public discourse will be irreparable, as is required by the principles enunciated in the authorities cited. The appellants do not make out a case that the UDM is a one-issue-organisation and that it will wither if its opinions about the respondents' alleged skulduggery are not constantly heard, while in the meantime, the two parties shuffle their way towards trial.

[24] The temporary restraint under which the appellants rankle is incomparable to the circumstances illustrated in cases like *Machele and Others v Mailula and Others*[17] and *Philani-Ma-Afrika and Others v Mailula and Others.*[18] These two cases dealt with the threat to evict the same body of persons and potentially render them homeless. In the first case, the Constitutional Court entertained an appeal against an order of eviction which had been put into effect despite a pending appeal. The Constitutional Court suspended the execution order. Skweyiya J, after alluding to case law, concluded:

'The primary consideration in determining whether it is in the interests of justice for a litigant to be granted leave to appeal against an interim order of execution is, therefore, whether irreparable

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[16] '**Privilege**
**58.** (1) Cabinet members, Deputy Ministers and members of the National Assembly –
*(a)* have freedom of speech in the Assembly and in its committees, subject to its rules and orders; and
*(b)* are not liable to civil or criminal proceedings, arrest, imprisonment or damages for –
(i) anything that they have said in, produced before or submitted to the Assembly or any of its committees; or
(ii) anything revealed as a result of anything that they have said in, produced before or submitted to the Assembly or any of its committees.
(2) Other privileges and immunities of the National Assembly, Cabinet members and members of the Assembly may be prescribed by national legislation. . . .'

[17] *Machele and Others v Mailula and Others* [2009] ZACC 7; 2009 (8) BCLR 767 (CC); 2010 (2) SA 257 (CC).

[18] *Philani-Ma-Afrika and Others v Mailula and Others* [2009] ZASCA 115; [2010] 1 All SA 459 (SCA); 2010 (2) SA 573 (SCA).

harm would result if leave to appeal is not granted. The applicant would have to show that irreparable harm would result if the interim order were not to be granted. A court will have regard to the possibility of irreparable harm and the balance of convenience.'[19]

In this Court, in *Philani-Ma-Afrika,* the conclusion, similarly, was reached that in a case of eviction an appeal against an interim order was indeed appropriate in the interests of justice. The underlying rationale of irreparable harm is plainly demonstrated in such cases.

[25] The endeavour of the appellants to persist in their efforts to appeal against the interim order is in truth, an attempt to entice this Court to decide issues which lie within the province of the trial court when determining final relief. The appellants can invoke no basis for irreparable harm to support its contentions. A faint passing allegation in the answering affidavit that the balance of convenience favoured the appellants because allegations of corruption ought to be ventilated adds no weight to the argument.

**Conclusion**

[26] In summary:

(a) The order is interim in effect as well as in form.

(b) The interests of justice do not require that an appeal be entertained: in particular:

(i) the effect of the order does not cause irreparable harm;

(ii) the delay in prosecuting the action has not been shown to be the result of circumstances beyond the control of the appellants, and in any event, result in irreparable harm;

[19] *Machele* fn 17 para 24.

(iii) the appellants may articulate their views, in the meantime, in Parliament with impunity; and

(iv) the temporary prohibition, for the interim period, to advocate for their viewpoints on the issue, outside of Parliament, shall not result in the appellants becoming obsolescent.

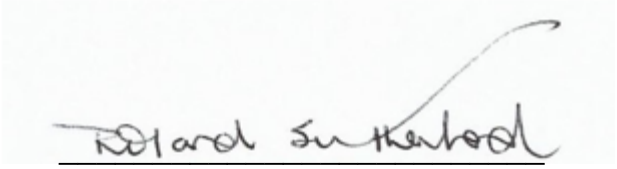
(c) The order is indeed not appealable.

**The Order**

[27] In the circumstances, it is ordered that:

1. The appeal is struck from the roll.

2. The appellants, jointly and severally, shall bear the respondents' costs including the costs of two counsel.



ROLAND SUTHERLAND

ACTING JUDGE OF APPEAL

**Molemela JA (Makgoka JA concurring)**

[28] I have read the judgment of my colleague, Sutherland AJA (the first judgment), and am unable to agree with either its reasoning or conclusion. The appellants' case, on the merits, was that the respondents' application in the court a quo did not meet all the requirements for the granting of an interim interdict. I must mention from the outset that I am mindful of the fact that the merits of the interim order were not canvassed during the hearing of the oral arguments in this matter, as the appeal was struck off the roll. I will, therefore, express no views on whether the respondent's application met those requirements or not, but will allude to aspects that have a bearing on those requirements.

[29] I am alive to the fact that this Court is not under an obligation to entertain an appeal against an otherwise unappealable order merely because leave to appeal was granted by the High Court. What needs to be borne in mind is the observation made in *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*,[20] that a court has a wide general discretion in granting leave to appeal in relation to interim interdicts. Of crucial importance is that there is no absolute bar against subjecting interim orders to an appeal. In this section of the judgment, I focus on why I believe that the court a quo was correct in finding that the interests of justice called for this Court to entertain an appeal against its interim order.

[30] During the exchange with the bench, counsel for the appellants was asked whether the proposition he was putting forward was that interim interdicts relating

[20] *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* [1977] 4 All SA 53 (A); 1977 (3) SA 534 (A) at 545B-546C.

to defamation matters should always be appealable. He submitted that whether or not an interim order is appealable was an aspect that was fact-specific. That view finds support in *South African Informal Traders Forum v City of Johannesburg*,[21] where the Constitutional Court held that when determining whether it is in the interests of justice to appeal an interim order, the court must have regard to and weigh carefully all relevant circumstances. The factors that are relevant, or decisive in a particular instance, will vary from case to case. To my mind, a clear example of when it would not be in the interests of justice to grant leave to appeal an interim order in defamation cases would be where such an order had been granted on an unopposed basis, for the court would not have had the benefit of being apprised of any defence that the respondent intended to raise.[22]

[31] It is well-established that an interim order may be appealed if the interests of justice, based on the specific facts of a particular case, so dictate.[23] That the overarching constitutional standard for appealability of an interim order is indeed whether an appeal would best serve the interests of justice was re-asserted by the Constitutional Court in *City of Tshwane Metropolitan Municipality v Afriforum and Another*, where that court also cautioned that '[i]f appealability or the grant of leave to appeal would best serve the interests of justice, then the appeal should be proceeded with no matter what the pre-Constitution common law impediments might suggest.'[24]

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[21] *South African Informal Traders Forum and Others v City of Johannesburg and Others*; *South African National Traders Retail Association v City of Johannesburg and Others* [2014] ZACC 8; 2014 (6) BCLR 726 (CC); 2014 (4) SA 371 (CC) Para 20.

[22] See *Hix Networking Technologies CC v System Publishers (Pty) Ltd and Another* [1997] 4 All SA 675 (A); 1997 (1) SA 391 (A) at 399B-E above at 399B-E

[23] *Philani-Ma-Afrika and Others v Mailula and Others*[2009] ZASCA 115; 2010 (2) SA 573 (SCA) para 20; *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others* [2014] ZACC 8; 2014 (4) SA 371 (CC); 2014 (6) BCLR 726 (CC) para 20(g).

[24] *City of Tshwane Metropolitan Municipality v Afriforum and Another* fn 3 para 40-41.

[32] It is evident from the judgment of the court a quo that it was alive to the fact that interim interdicts are not ordinarily appealable. Having considered various judgments of this Court and the Constitutional Court as well as the specific facts of this case, it, within its discretion, decided to grant the appellants leave to appeal to this Court on the basis that the interests of justice warranted that its interim order be the subject of an appeal. For the reasons that follow, I think that the court a quo correctly found that the interim order it had granted was appealable. For the same reasons, I am of the view that, against a proper exercise of the court a quo's discretion on this aspect, it was not open to this court to second-guess the reasons advanced by the court a quo simply because it held a different view on the matter. In my opinion, it has not been shown that the court a quo's discretion on that aspect was not judicially exercised. I consequently differ with the first judgment's conclusion that the interests of justice do not require that an appeal be entertained. In the succeeding paragraphs I show why I believe that the court a quo, after a judicial exercise of its discretion, correctly granted leave to appeal in this matter.

[33] It is trite that an interim interdict pending action is an extraordinary remedy;[25] such an interdict is not granted unless all the legal requisites for that remedy have been met.[26] An interdict of the nature sought in the court a quo is seldom granted. In *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape),*[27] this Court stated as follows:

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[25] *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another* [1973] 4 All SA 116 (A); 1973 (3) SA 685 (A) at 691C. In *Economic Freedom Fighters and Others v Manuel* [2020] ZASCA 172 para 88, this court re-asserted that whether any interim relief can be granted will depend on the application of the well-established principles applicable to interim interdicts.

[26] See *Bester v Bethge* 1911 EDL 18 at 19 as cited in J Meyer *Interdicts and Related Orders* (1993) at 53.

[27] *Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecutions (Western Cape)* [2007] ZASCA 56; [2007] 3 All SA 318 (SCA); 2007 (9) BCLR 958 (SCA); 2007 (5) SA 540 (SCA) para 20.

'Where it is alleged, for example, that a publication is defamatory, but it has yet to be established that the defamation is unlawful, an award of damages is usually capable of vindicating the right to reputation if it is later found to have been infringed, and an anticipatory ban on publication will seldom be necessary for that purpose.'

[34] As regards interim interdicts sought to restrain the publication of defamatory statements, it is particularly important to note that one of the considerations to be weighed in the balance is whether the factual foundation emanating from the respondent's affidavit discloses a defence of truth and public benefit. This Court in *Hix Networking Technologies v System Publishers (Pty) Ltd and Another*,[28] approved the following dictum by Greenberg J in *Heilbron v Blignaut*, subject to clarification:[29]

'If an injury which would give rise to a claim in law is apprehended, then I think it is clear that the person against whom the injury is about to be committed is not compelled to wait for the damage and sue afterwards for compensation, but can move the Court to prevent any damage being done to him. As he approaches the Court on motion, his facts must be clear and if there is a dispute as to whether what is about to be done is actionable, it cannot be decided on motion. *The result is that if the injury which is sought to be restrained is said to be a defamation, then he is not entitled to the intervention of the Court by way of interdict, unless it is clear that the defendant has no defence.* Thus if the defendant sets up that he can prove truth and public benefit, the Court is not entitled to disregard his statement on oath to that effect, because, if his statement were true, it would be a defence, and the basis of the claim for an interdict is that an actionable wrong, i.e. conduct for which there is no defence in law, is about to be committed.' (Emphasis added.)

[35] The clarification of this dictum was explained as follows in *Herbal Zone (Pty) Limited v Infitech Technologies (Pty) Limited (Herbal Zone)*:[30]

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[28] *Hix Networking Technologies* fn 22 at 399B-E.
[29] *Heilbron v Blignaut* 1931 WLD 167 at 169.
[30] *Herbal Zone (Pty) Limited and Others v Infitech Technologies (Pty) Limited and Others* [2017] ZASCA 8; [2017] 2 All SA 347 (SCA).

'The clarification was to point out that Greenberg J did not hold that the mere ipse dixit of a respondent would suffice to prevent a court from granting an interdict. What is required is that a sustainable foundation be laid by way of evidence that a defence such as truth and public interest or fair comment is *available to be pursued by the respondent.* It is not sufficient simply to state that at a trial the respondent will prove that the statements were true and made in the public interest, or some other defence to a claim for defamation, without providing a factual basis therefor.'

The dicta in these decisions were recently quoted with approval by this Court in *Tau v Mashaba and Others*[31] in the context of an appeal against orders considered to have a final interdict even though they were granted in an application for interim relief pending an action for damages.

[36] The appellants, laid a factual foundation of a defence of truth and public interest in their answering affidavit. As to whether that defence is sustainable can only be established in the trial, which is the procedure elected by the respondents in so far as they sought a temporary interdict pending a defamation action. The fact remains that, on the correct application of the principle laid down by this Court in *Heilbron v Blignaut*, an interim order ought not to be granted if a factual foundation of the defence of truth and public interest had been laid. This brings me to the appellants' contentions regarding why they considered their utterances to be in the public interest.

[37] The appellants placed reliance on several provisions of the Constitution, which they regard as giving an important context in this matter. In terms of s 93(2) of the Constitution, Deputy Ministers are accountable to Parliament for the exercise of their powers and the performance of their functions. Section 96 of the Constitution

[31] *Tau v Mashaba and Others* fn 7 para 28.

enjoins Cabinet Ministers and Deputy Ministers 'not to act in any way that is inconsistent with their office' and not to 'expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests'. It also forbids the Executive from using their position or any information entrusted to them to enrich themselves or to improperly benefit others.

[38] The appellants contended that the utterances were made in the context of their oversight role on the Executive.[32] It is accepted that political parties have a significant role to play in uncovering corruption and maladministration in government entities.[33] In *UDM v Speaker, National Assembly*,[34] the Constitutional Court stressed that the powers granted to public office bearers should not be used for the advancement of personal or sectarian interests. The court remarked that 'public office-bearers in all the arms of the State must . . . explain how they have lived up to the promises that inhere in the offices they occupy'.

[39] It is also true that public officials have to be held accountable for the actions they take while holding public office. A relevant consideration regarding the appellants' oversight role is that one of the respondents is a former member of the Executive. Furthermore, one of the respondents is an erstwhile employee of the Public Investment Corporation, a state-owned entity. All this is stated to provide essential context; it should not, in any way, be considered to suggest that any of the other respondents had a diminished right to dignity.

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[32] *Democratic Alliance v Speaker of The National Assembly and Others* [2016] ZACC 8; 2016 (5) BCLR 577 (CC); 2016 (3) SA 487 paras 14, 16 And 17.
[33] *Democratic Alliance v Speaker of the National Assembly and Others* fn 32 above; *EFF v Manuel* fn 25 para 76.
[34] *United Democratic Movement v Speaker of the National Assembly and Others* [2017] ZACC 21; 2017 (5) SA 300 (CC) para 8.

[40] It is against the background sketched in the preceding paragraph that the appellants contended that the interim order granted by the court a quo would impact on, among others, their responsibility to expose possible unethical conduct within the contemplation of s 96 of the Constitution. The second appellant also asserted that in so far as the Public Investment Corporation was a state-owned entity, the interim order would impact on the appellants' responsibility to hold public officials accountable by exposing possible contraventions of legislation by those in charge of public funds.

[41] I noted that the court a quo remarked that the attitude of the appellants in refusing to retract the letter and apologise, among other things, 'shows a potential for future comment and further publication'. A retraction and apology are aspects that relate to a final interdict as they presuppose the wrongfulness of the utterances.[35] Notably, in para 1.2, the court a quo ordered the appellants to remove the allegedly defamatory letter addressed to the President from the first appellant's website. That seems to be putting the cart before the horse, as an order of that nature is ordinarily granted when a court is satisfied that the statement made is unlawful, in other words, when the factual foundation laid by the respondent has not disclosed the defence of truth and public interest.[36]

[42] Furthermore, although any patrimonial loss arising from the defamation is an aspect that could subsequently achieve redress by way of an Aquilian action,[37] the commercial loss that could be suffered by the respondents seems to be a factor that weighed heavily with the court a quo when assessing whether there was a reasonable

[35] *Tau v Mashaba and Others* fn 7 para 17.
[36] Compare *EFF v Manuel* fn 25.
[37] *Caxton Ltd and Others v Reeva Forman (Pty) Ltd and Another* 1990 (3) SA 547 (A) at 567G-576B.

apprehension of harm. This obviously has a bearing on the proper assessment of the apprehension of harm as one of the requirements for the granting of an interim interdict.

[43] The first judgment remarks that the order granted by the court a quo cannot be described as a gagging order, given that the contentious remarks were already in the public domain. It is true that the allegations in question were already in the public domain as the second appellant's utterances had already been covered by the media, including social media. Bearing in mind that an interdict is 'not a remedy for the past invasion of rights, but is concerned with the present or the future',[38] and that the respondents had opted to pursue their defamation through action proceedings, it seems to me that an award of damages could conceivably have served as a suitable alternative remedy, under the circumstances.[39]

[44] The first judgment correctly observes that the first appellant is not a one-issue party that would be inclined to raise the same issue over and over again in Parliament. An important aspect raised by counsel for the appellants, is that parliamentary processes are widely covered by the media. That would mean that the intended effect of the interim interdict would simply not be achievable, under the circumstances. This is an aspect that ought to have had a bearing in the exercise of the discretion whether or not to grant the interdict.

[45] For all the reasons set out above, I conclude that the interim order granted by the court a quo was appealable. The court a quo was correct when it stated that there

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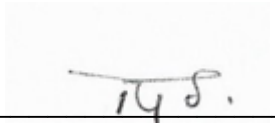
[38] *Lawsa* 2 ed para 390; *Philip Morris Inc and Another v Marlboro Shirt Co SA Ltd and Another* [1991] 2 All SA 177 (A); 1991 (2) SA 720 (A) at 735B-C, approving *Stauffer Chemicals Chemical Products Division of Chesebrough-Ponds (Pty) Ltd v Monsanto Co* [1988] 3 All SA 279 (T); 1988 (1) SA 805 (T) at 809F-G.
[39] Compare *Tau v Mashaba and Others* fn 7 above para 27.

was no reason why the considerations of the interests of justice should not apply when determining the appealability of an interim order that was said to affect the rights of parties to engage in political activity. It correctly granted the appellants leave to appeal. It follows that the appeal should have been entertained by this Court.



M B MOLEMELA

JUDGE OF APPEAL

**Makgoka JA**

[46] I have had the benefit of reading the judgments of my colleagues, Molemela JA and Sutherland AJA. I agree with Molemela JA that the order is appealable. I wish to make the following additional remarks.

[47] The *Zweni* attributes have now been subsumed under the context-sensitive and the constitutionally pliant rubric of the interests of justice. In *Philani-Ma-Afrika v Mailula*[40] this court adapted the general principles on the appealability of interim orders and concluded that what is of paramount importance in deciding whether a judgment is appealable is the interests of justice. This approach received the imprimatur of the Constitutional Court in *International Trade Administration Commission v SCAW.*[41]

[48] In *City of Tshwane v Afriforum*[42] the Chief Justice, writing for the majority, explained the relationship between the common law approach and the Constitution on the appealability of judgments:

'The common law test for appealability has since been denuded of its somewhat inflexible nature. Unsurprisingly so because the common law is not on par with but subservient to the supreme law that prescribes the interests of justice as the only requirement to be met for the grant of leave to appeal. Unlike before, appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed

[40] *Philani-Ma-Afrika and Others v Mailula and Others* [2009] ZASCA 115; 2010 (2) SA 573 (SCA); [2010] 1 ALL SA 459 (SCA) para 20.
[41] *International Trade Administration Commission v Scaw South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) para 52.
[42] *City of Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19; 2016 (9) BCLR 1133 (CC); 2016 (6) SA 279 (CC) para 40.

in the main application. All this is now subsumed under the constitutional interests of justice standard. The over-arching role of interests of justice considerations has relativised the final effect of the order or the disposition of the substantial portion of what is pending before the review court, in determining appealability. The principle was set out in *OUTA* by Moseneke DCJ in these terms:

> "This court has granted leave to appeal in relation to interim orders before. It has made it clear that the operative standard is the interests of justice. To that end, it must have regard to and weigh carefully all germane circumstances. Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relevant and important consideration. Yet, it is not the only or always decisive consideration. It is just as important to assess whether the temporary restraining order has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable."'

[49] It is with this approach in mind that I consider whether the high court's order is appealable. In my view, the specific factors which should be considered to answer that question are the following: the nature of the allegations; the nature and profile of the parties involved; whether the appellants raise a prima facie valid defence; the competing rights; the efficacy of the high court's order; and the weight of the high court's judgment granting leave to appeal. I set out these, in turn.

**The nature of the allegations**

[50] The case concerns allegations of impropriety, corruption and conflict of interests on the part of a former Deputy Minister, who is alleged to have used his position to improperly enrich himself and the politically connected, ie the remainder of the respondents. In a nutshell, the respondents are accused of corruption involving what, essentially, are public funds. It is a notorious fact that in the last decade or so, corruption has taken root in South Africa, both in the public and private sectors. But it is the former sector which has attracted much attention because, in many instances,

politicians and those connected to them, have enriched themselves with public funds at the expense of the citizenry. This explains why any allegations of corruption involving public funds draw closer scrutiny. Recently, in *Zuma v Office of the Public Protector*,[43] this court quoted the United Nations 2004 Convention against Corruption, to which South Africa is a signatory, which describes corruption in the following terms:

'Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish. This evil phenomenon is found in all countries – big and small, rich and poor – but it is in the developing world that its effects are most destructive. Corruption hurts the poor disproportionately by diverting funds intended for development, undermining a Government's ability to provide basic services, feeding inequality and injustice and discouraging foreign aid and investment. Corruption is a key element in economic underperformance and a major obstacle to poverty alleviation and development.'[44]

The allegations made by the appellants were sufficient to move the President of the country to institute a Judicial Commission of Inquiry to investigate them. There is therefore no doubt that this is a matter of significant national and public importance.

**The parties**

[51] Mr Holomisa is the leader of the second appellant, one of the opposition parties represented in Parliament. There is no question that they raise the issues in the public interest. The sixth respondent, Mr Moleketi, is a former politician, who, during the period relevant to the allegations, served as a Deputy Minister. In that capacity, he was the chairperson of the PIC. Reduced to their bare essence, the allegations by the appellants are that Mr Moleketi had used his position as the

[43] *Zuma v Office of the Public Protector and Others* [2020] ZASCA 138.
[44] *Zuma* fn 43 para 1.

chairperson of the PIC to enrich himself and the remainder of the respondents. That is alleged to have endured beyond his tenure as such.

[52] The PIC is no ordinary company. It is a wholly state-owned asset management entity, whose clients are mostly public sector entities, which focus on the provision of social security. Amongst these are: Government Employees Pension Fund (GEPF); Unemployment Insurance Fund (UIF); Compensation Commissioner Fund (CC); Compensation Commissioner Pension Fund (CP); and Associated Institutions Pension Fund (AIPF).[45] Thus, the PIC is funded with public moneys, mainly belonging to public servants. How those moneys are invested and managed, is therefore undoubtedly of great public interest.

**Prima facie valid defence?**

[53] As I understand the appellants' defence, it is rooted in truth and public interest. It is so that the impugned letter is littered with outlandish, perhaps exaggerated, claims and comments. But this is something politicians have to constantly grapple with, and it is in this context that the tone of the letter should be understood. As aptly remarked by Ludorf J in *Pienaar v Argus*:

'[T]he courts must not avoid the reality that in South Africa political matters are usually discussed in forthright terms. Strong epithets are used and accusations come readily to the tongue. I think, too, that the public and readers of newspapers that debate political matters, are aware of this.'[46]

[54] Indeed, when one deals with politicians or political matters, courts have allowed for a good deal of latitude for comment. More than a century ago, Innes CJ remarked in *Crawford v Albu* 1917 AD 102 at 105:

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[45] https://www.pic.gov.za/.
[46] *Pienaar and Another v Argus Printing and Publishing Co Ltd* 1956 (4) SA 310 (W) at 318C-E.

'People who occupy a public position or for any other reason have been so unfortunate as to focus upon themselves the light of public opinion must expect to be criticised. And more particularly must those who, however righteous their motives, place themselves in determined opposition to society generally or to a section of society not be surprised if they find themselves assailed with some vehemence or even exaggeration. All this the law does not prohibit. Free speech and free thought are part of our common inheritance. And the law will not interfere with them. But still there are limits which must not be transgressed. Comment to be fair must not distort or misrepresent facts.'

[55] As pointed out in *Argus v Inkatha Freedom Party*,[47] there is common law reluctance to regard political utterances as defamatory. This reluctance stems from the fact that it is recognised that 'right-thinking people are not likely to be greatly influenced in their esteem of a politician by derogatory statements made about him by other politicians or political commentators'. Accordingly, in a political context, the traditional test of determining whether the words complained of tend to lower the plaintiff 'in the estimation of right-thinking people' is not easily straddled.

[56] Although the high court referred to *Herbal Zone*, it failed to apply the following trenchant passage in that judgment:

'[A]n interdict to prevent the publication of defamatory matter … is directed at preventing the party interdicted from making statements in the future. If granted it impinges upon that party's constitutionally protected right to freedom of speech. For that reason such an interdict is only infrequently granted, the party claiming that they will be injured by such speech ordinarily being left to their remedy of a claim for damages in due course. Nugent JA said in this court:

> "Where it is alleged, for example, that a publication is defamatory, but it has yet to be established that the defamation is unlawful, an award of damages is usually capable of vindicating the right to

[47] *Argus Printing and Publishing Co Ltd v Inkatha Freedom Party* 1992 (3) SA 579 (A) at 588F-589E.

reputation if it is later found to have been infringed, and an anticipatory ban on publication will seldom be necessary for that purpose." .'[48]

[57] As stated above, the appellants rely on the defence of truth and public interest. The appellants do not merely content themselves with bold assertions in this regard. They set out facts from which their allegations can be deduced. Given that, the high court should have been more circumspect in granting the interdict. At the level of principle, I find it disquieting and deeply troubling that a former politician and those with whom he is accused of corruption, should obtain an interim interdict pending the outcome of a defamation action, with the ease with which the present one was granted. As I understand the effect of the passage in *Herbal Zone* referred to above, the threshold for obtaining such an interdict is not that low. Something more compelling is required. The respondents have alleged none.

**The competing rights**

[58] A number of constitutionally entrenched rights are at play here, some potentially pitted against each other. There is, for example, the respondents' rights to privacy and dignity, on the one hand. On the other, one has the appellants' right of freedom of expression, and the public's right to freedom of access to information. The interplay between these rights and how they are balanced against each other, clearly trigger the interests of justice.

**The efficacy of the high court's order**

[59] The purpose of an interim interdict pending the determination of a defamation action is that the dignity and esteem which a plaintiff enjoys in the eyes of the public should not be disturbed in the interim. This is at least as far as a pre-publication

[48] *Herbal Zone* fn 30 para 36.

interdict is concerned. But where, as is the case here, publication has already taken place, and widely so, it must be asked what purpose a subsequent interdict would serve. To my mind, it would serve little, if any, purpose. As stated already, the allegations contained in the letter have been widely published in the mainstream and social media. What is more, the respondents have instituted action for defamation in which the allegations are set out in full. Since pleadings, like all court documents, are public documents to which the media and the public have access, the allegations would be (and likely have been) publicly repeated. In addition, Mr Holomisa is protected by the privileges he enjoys as a Member of Parliament to repeat the allegations in Parliament, which the media would publish, and has most likely done so.

[60] Considering the above, the allegations were already in the public domain in any event. Only the appellants are not permitted to repeat them. An interim order under such circumstances is not only impotent, but artificial. It amounts to no more than what the law calls a *brutum fulmen*.[49] This relates to one of the requisites for an interim interdict, namely the balance of convenience. On this score, it clearly did not favour the granting of an interim order, and the interim order should not have been granted in the first place.

**The weight of the high court's judgment granting leave to appeal**

[61] It is so that the high court's conclusion that the order is appealable, is not binding on this Court. But this does not mean that we can, without more, set it aside. Generally, a court to which an application for leave to appeal is made has a wide general discretion to grant or refuse it. Its decision is not to be lightly interfered with,

[49] A useless thunderbolt.

unless we are satisfied that the discretion was not exercised judiciously, or that it had been influenced by wrong principles or a misdirection on the facts, or that the high court had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles.[50]

[62] In the present case, nothing suggests that the high court had not properly considered the issue of appealability. To the contrary, the learned judge gave careful and anxious consideration to the issue. After noting the overarching considerations of the interests of justice as set out in *Afriforum* and other authorities, the learned judge insightfully said:

'[I] see no reason why considerations in the interests of justice should not apply to the lower courts when determining the appealability of an interim order, which is said to affect the rights of parties as the applicants, to engage in political activity. Leave in these circumstances should be granted and I am of the view that the issues raised are of importance and for purpose of certainty the matter should be considered by the Supreme Court of Appeal.'

One might not agree with these views, but the learned judge cannot be faulted for how she applied the principles to the issue.

[63] Under these circumstances, it is my view that this Court is not at large to revisit that order. The power of this Court to interfere with an order of the high granting leave should be used sparingly, and only where there is a proper juridical basis to do so, and in the clearest cases of an error or misdirection on the part of the high court in granting such leave. In this case, there is neither.

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[50] Compare *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 para 10; *Trencon Construction (Pty) Limited v Industrial Development Corporation of South Africa Limited and Another* [2015] ZACC 22; 2015 (5) SA 245 (CC) para 88.

**Conclusion**

[64] For all the above considerations, I agree with Molemela JA's conclusion that the order of the high court is appealable, and thus it was in the interests of justice to hear the merits of the appeal.

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T MAKGOKA

JUDGE OF APPEAL

Appearances:

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|---|---|
| For appellants: | D C Mpofu SC (with him T Ngcukaitobi SC) |
| Instructed by: | Mabuza Attorneys, Pretoria |
| | Matsepes Inc., Bloemfontein |
| For respondents: | D Berger SC (with him B Slon and T B Makgalemele) |
| Instructed by: | Nicqui Galaktiou Inc., Johannesburg |
| | Claude Reid, Bloemfontein |