Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No.s 7263/2019
and 5717/2019

Before: The Hon. Mr Justice Binns-Ward

Dates of hearing: 7 May and 3 June 2019
Judgment: 29 July 2019

In the matter in case no. 7263/19 between:

VELOCITY TRADE CAPITAL (PTY) LTD Applicant

and

QUICKTRADE (PTY) LTD First Respondent
HARDUS STORM VAN PLETSEN Second Respondent
VELOCITY TRADE FINANCIAL SERVICES (PTY) LTD Third Respondent

and

in the intervention applications of **Velocity Trade Financial Services (Pty) Ltd** and **Waheed Safa** in the matter in case no. 5717/19 between:

QUICKTRADE (PTY) LTD Applicant

and

VELOCITY TRADE CAPITAL (PTY) LTD Respondent

JUDGMENT

BINNS-WARD J:

Introduction

[1] The matters before the court in these proceedings follow on from, or are related to, the result of an application in the 'urgents' court by QuickTrade (Pty) Ltd ('QuickTrade') against Velocity Trade Capital (Pty) Ltd ('VTC'). The application was brought under case no. 5717/19. QuickTrade sought, and obtained, various heads of interdictory relief against VTC pending the final determination ('including any appeals') of an action to be instituted by QuickTrade within 30 days.

[2] QuickTrade and VTC had been parties to a contract ('the referral contract') concluded in March 2014 in terms of which QuickTrade referred those of its clients who wished to trade in contracts for difference ('CFDs') to VTC. A contract for difference is defined in the referral contract as '*a financial instrument that changes in value by reference to fluctuations in the price of an "underlying instrument", such as, for example, a share, commodity or index*'.[1]

[3] The referral contract was entered into because VTC was able to provide access to CFDs and to a software program that afforded a platform for dealing in them, whilst QuickTrade at that stage could not.[2] QuickTrade was entitled to a commission from VTC in respect of the transactions entered into by the referred clients. The platform to be used for the contemplated transactions was called 'Protrader'. Apparently unbeknown to the person representing QuickTrade when the referral contract was concluded, Protrader was not operated by VTC but by its sister company, Velocity Trade Financial Services (Pty) Ltd ('VTFS').

[4] The evidence suggests that the approximately 15 000 clients referred to VTC in terms of the agreement were persons who had been enrolled as students in a training course on CFDs offered by a training institution operated by the managing

---

[1] In clause 1.1.4. The Johannesburg Stock Exchange website defines a CFD as '*an agreement to exchange the difference in value of a particular asset between the time at which a contract is opened and the time at which it is closed*'; https://www.jse.co.za/trade/derivative-market/equity-derivatives/single-stock-derivatives/contracts-for-difference (accessed on 14 July 2019). An article on the Investopedia website explains '*A contract for differences (CFD) is an arrangement made in financial derivatives trading where the differences in the settlement between the open and closing trade prices are cash settled. There is no delivery of physical goods or securities with CFDs*'; https://www.investopedia.com/terms/c/contractfordifferences.asp (accessed on 14 July 2019).

[2] The deponent to VTC's founding affidavit in case no. 7263/19 explained that VTC might be compared to a public company that issues shares and the software platform to the stock exchange on which a person allotted such shares might trade them.

director of QuickTrade, one Hardus van Pletsen. Indeed, at the time the referral agreement was concluded, QuickTrade had not yet been formally incorporated, and the contract was executed (presumably in terms of s 21 of the Companies Act 71 of 2008) between VTC and van Pletsen on behalf of a company to be formed.

[5] It seems to follow that the persons referred to VTC were not in fact existing clients of QuickTrade in the ordinary sense of the word, that is persons to whom QuickTrade rendered services. The only service that QuickTrade would appear to have rendered to them was to refer them to VTC. But nothing turns on that. In the supporting affidavit in VTC's application in case no. 7263/19, the referred clients are described as the 'mutual clients' of QuickTrade and VTC.

[6] The practical implementation of the referral contract entailed the referred clients in turn concluding mandate agreements with VTC and VTFS, respectively, to regulate the basis upon which their transactions with those entities were to be executed. That VTC and other entities related to it were to establish discrete contractual relationships with the referred clients, and that VTC was not to interact with the clients as QuickTrade's agent, was expressly acknowledged in the provisions of the referral contract.

[7] Clause 2 of the contract provided:

1.1 (sic) *Velocity Trade* [i.e. VTC] *provides the Services and the Referrer has, from time to time, clients requiring the Services.*

2.1 *Velocity Trade has agreed to remunerate the Referrer for referring the Clients for referring the Clients to Velocity Trade upon the terms and conditions set out in this Agreement.*

2.2 *The Parties recognize the mutual benefit of having the Referrer promote the services of Velocity Trade from time to time.*

2.3 *The parties wish to record the terms of such arrangement in this agreement.*

Clause 1.1.8 of the contract gave the following definition of '*Client*', '*any client introduced to Velocity Trade by the Referrer, which at the time of the referral does not already have an existing relationship with Velocity Trade and which is accepted by Velocity Trade as its client*'. (Underlining supplied.)

[8] '*Services*' was defined in clause 1.1.13 to mean '*the non-discretional services namely Stockbroking Services which include settlement and custody services and futures execution and clearing services, CFD Services, FX Services and investments*

in funds services'. (It appears to be common ground that '<u>non-discretional</u> services' denotes services provided in each case in terms of a client's ad hoc instruction.) Clause 5 of the contract recorded that '*The Parties specifically agree that Velocity Trade may contract with various Service Providers to render the Services from time to time*'. '*Service Providers*' was defined in clause 1.1.14 to include '*the Velocity Trade Related Companies*', which, in turn, was defined, in clause 1.1.19, to include VTFS. VTC was required, in terms of clause 7.3, to disclose the nature of its contractual relationship with QuickTrade to the referred clients, and to include in such disclosure an explanation '*that the Client, Velocity Trade and the Service Providers, <u>and not the Referrer</u>,*[3] *are the counterparties to each purchase and sale of the products forming part of the Services to be provided as set out in this Agreemen*t'.

[9] QuickTrade suggests that the disclosure requirement in clause 7.3 was directed at confirming the maintenance of some form of proprietary relationship between itself and the referred clients. In my view, however, especially by virtue of the emphasis in the disclosure clause on the fact that QuickTrade would be a stranger to contracts concluded with VTC and the 'Service Providers' pursuant to the referrals, the purpose of the required disclosure was to satisfy ethical considerations related to the need for transparency in respect of the appropriation of the fees payable by clients on the transactions effected in terms of their contracts with VTC and the 'Service Providers'. This impression is supported by the consideration that the referral contract was drawn up by VTC, its terms are discernibly loaded in favour of VTC, and there is no indication in the deed that QuickTrade had required VTC to include a provision recording any form of proprietary connection with the referred clients.

[10] The income stream to QuickTrade provided for in terms of the referral agreement comprised in essence of a share in the commissions or fees payable by the referred clients on the transactions they did in respect of CFDs acquired by them from VTC.[4] The need for other service providers like VTFS to be engaged to provide referred clients with the services was related to the limiting effects of the licensing requirements under the regulatory legislation on VTC's ability to do so itself. VTC was not a licensed financial service provider, whereas VTFS is. A licence is currently

[3] Underlining supplied.

[4] See clause 8 read with the definition of 'remuneration' in clause 1 and Appendix 1 to the deed of agreement.

not required by the issuer of CFDs, but the business of facilitating the trading in them via access to a software program like Protrader is, according to the evidence, an 'intermediary service' that may be provided only under licence in terms of the Financial Advisory and Intermediary Services Act 37 of 2002 ('the FAIS Act').

[11] It is common ground that the referral contract between QuickTrade and VTC has been terminated. The reason for the termination was that QuickTrade has acquired its own platform ('Metatrader 5') on which CFDs can be traded. Consequently it is now able to earn a commission income on CFD trading transactions in its own right, and is no longer reliant on a commission sharing arrangement such as that provided by the referral contract to be able to generate an income from the CFD trading activities of graduates from Mr van Pletsen's training institution. It would therefore no longer be referring clients to VTC as provided for in terms of the referral contract.

[12] The question at the heart of the application under case no. 5717/19 was the import of a clause in the agreement (clause 14) that was directed at regulating the consequences of any dissolution of the parties' contractual arrangement. Clause 14 of the referral contract provided as follows, under the subheading '**Effect of Termination**':

> 14.1 Upon the termination of this Agreement for whatever reason –
>
> 14.1.1 the parties shall return all Confidential Information, documents, agreements, specifications and other media acquired in terms of this Agreement to the other party;
>
> 14.1.2 all rights granted to the Referrer [i.e. QuickTrade] by this Agreement are withdrawn and the Referrer shall cease forthwith to conduct any activities authorised by this Agreement; and
>
> 14.1.3 the Referrer will continue to receive remuneration for existing clients referred to Velocity Trade for a period of 3 months within which time Velocity Trade will assist the Referrer migrate clients (sic) to a new broker as requested by the Referrer; and
>
> 14.1.4 the rights and obligations of the Parties in respect of all existing clients referred to Velocity Trade by the Referrer, save for 14.1.3 above, shall not be affected and the provisions of this Agreement shall apply in respect of such transactions until all obligations in respect of such Clients have been complied with.

[13] QuickTrade's contention before the duty judge who disposed of the application in case no. 5717/19 was that clause 14.1.3 of the referral contract obliged VTC to cease effecting new transactions with or on behalf of the referred clients and to assist with referring them to the trading platform now operated by QuickTrade. This would entail VTC and VTFS in having to prevail on the referred clients to cancel their existing mandate agreements with those companies, or in any event to cease accepting trading instructions from them.

[14] VTC, on the other hand, contends that the obligation to assist in the migration of clients within the meaning of the sub-clause is limited to cooperating in the migration of those clients who indicate, upon being advised of the termination of the contract between VTC and QuickTrade, that they wish to move their business to a new broker designated by QuickTrade. It rejects what it contends is the notion necessarily implicit in QuickTrade's construction of the contract that the referred clients are proprietary to QuickTrade and susceptible to being dealt with as if they were 'chattels'. It supports the correctness of its construction of the clause by pointing out that implementing its provisions in accordance with the interpretation that QuickTrade seeks to apply would entail both QuickTrade and VTFS in having to breach the terms of their respective financial service provider licences under the FAIS Act. Those licences preclude QuickTrade and VTFS from providing any intermediary service other than in terms of their respective client mandates and furthermore preclude them from furnishing 'advice'. VTC contends that prevailing on clients to transfer their business from VTFS's Protrader platform to QuickTrade's Metatrader 5 platform would necessarily and unavoidably entail furnishing them with 'advice'.

[15] QuickTrade's response was to say that nothing in its understanding of the agreed basis of the consequences of the termination of its contractual relationship with VTC would prohibit referred clients who expressly indicated in writing that they wished to retain their ties with VTC from doing so. It has in the proceedings before me gone further than that. As I understood its counsel, QuickTrade now accepts that clients who failed to give any instructions to terminate their contracts with VTFS would remain on the Protrader platform by default.

[16] Insofar as the proper construction of clause 14.1.3 is central to the dispute between QuickTrade and VTC, one thing about it is clear. That is that whatever it

was that the parties were to do in terms of the sub-clause was to be done within the three- month period following upon the termination of the referral contract. It appears to be common ground that the termination date was 'on or about 15 March 2019'. At this stage of play, after the effluxion of the stipulated period, its meaning can be relevant only in respect of understanding the formulation of the order made in case no. 5717/19, or in respect of any claim for damages for non-compliance with provision.

[17] The substantive relief sought by QuickTrade in its notice of motion in case no. 5717/19 was framed as follows:

> … orders in the following terms:
>
> 2. Directing [VTC] to immediately restore [QuickTrade's] access to the Trade Desk and Admin Terminal Portals on [VTC's] website support@za.velocitytrade.com ("the Portals") relating to the trading of clients referred by [QuickTrade] to [VTC] in terms of the Referral Agreement … (hereinafter referred to as "the existing clients" on [QuickTrade's] Protrader trading platform ("Protrader"), including but not limited to their personal particulars, trading and trading activities, funds, payments requests and other information and facilities provided by the Portals to [QuickTrade] prior to the withdrawal of its access thereto on or about 15 March 2019.
>
> 3. Interdicting and restraining [VTC] from rendering any Services (as defined in the Referral Agreement) with immediate effect to existing clients on Protrader, save for allowing existing clients to close out exiting [*sic*, an obvious mistyping of 'existing'] transactions as at the date of this order ("existing transactions").
>
> 4. Save for communications with existing clients in relation to existing transactions on Protrader and/or the Portals, [VTC] is interdicted and restrained from communicating with the existing clients at all by any means, unless such communication is approved in writing by [QuickTrade] and is necessary to inform existing clients of their migration to [QuickTrade] and what is practically expected of them in that regard.
>
> 5. The orders set out in …, 2, 3 and 4 above shall serve as interim orders pending the institution and the final determination (including any appeals) of any application or action in this Court or arbitration proceedings in terms of the Referral Agreement (as [QuickTrade] may be advised) against VTC within 30 court days of the date of this order, for an orders (sic) declaring that the provisions of clause 14 of the Referral Agreement became operative and enforceable between [QuickTrade] and [VTC] on the termination of the Referral Agreement on or about 15 March 2019 and that [VTC] is obliged to comply therewith, that the interim relief granted be granted as final relief and such other relief as [QuickTrade] may be advised (sic).

[18] VTC was the only party joined as a respondent in the application in case no. 5717/19. Notwithstanding that the relief sought by QuickTrade bore directly on the contractual relationships between VTC and the persons who had been referred to it under the Referral Agreement, none of those parties (the so-called 'existing clients') were joined in the proceedings. This caused VTC to raise an objection, based on non-joinder, to the application being entertained. VTC also pointed out that the trading services rendered to the clients that had been referred to it under the Referral Agreement were rendered not by it, but by VTFS, with which, as mentioned, the clients also had discrete contractual relationships. According to VTC, VTFS also rendered intermediary services to some of the referred clients in respect of other investment opportunities besides CFDs; although, it would seem from the figures provided in reply by QuickTrade, these other services generated only a tiny portion of the income generated for VTC or VTFS by the investing or trading activities of the referred clients. VTC contended that VTFS was therefore also a necessary party in the proceedings in case no. 5717/19.

[19] It is a well established principle that a court will not make any order unless every party whose rights or real interests are liable to be affected by it has been joined as a party or has indicated it will abide the court's judgment; see e.g. *SA Riding for the Disabled Association v Regional Land Claims Commissioner and Others* 2017 (5) SA 1 (CC) at para. 10, where it was remarked '… *it is a basic principle of our law that no order should be granted against a party without affording such party a predecision hearing. This is so fundamental that an order is generally taken to be binding only on parties to the litigation*'. The importance of adequate joinder is such that a court will raise non-joinder *suo motu* if necessary; cf. *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A), in which the Appellate Division raised a point of non-joinder when the matter came to it on appeal.[5]

[20] On 25 April 2019, the duty judge made an order in case no. 5717/19 granting QuickTrade the relief sought in terms of paragraphs 2 – 5 of the its notice of motion

[5] It seems to me that inasmuch as the trading services on the Protrader platform that QuickTrade sought to stop were rendered by VTFS, and not VTC, the relevant defence should have been one of misjoinder, not non-joinder. But in the context of the current proceedings that is a question that bears only on the effectiveness of the order in case no. 5717/19; a matter to which I shall come later in this judgment.

quoted above.[6] The order contained the following additional provisions (in paragraphs 5 and 7 thereof):

> 5. A copy of this interim order shall be brought to the attention of and furnished to the existing clients as defined above, by [QuickTrade], by email to known email addresses of such existing clients and such notification shall inform the existing clients that they are not obliged to migrate to [QuickTrade's] trading platform, Metatrader 5, and that they are entitled to remain on Protrader on their written request to [Quicktrader] to remain on Protrader, in which event, [Quicktrader] shall forthwith in writing inform and furnish [VTC] with such written request from the existing client to remain on Protrader.
>
> 7. That the costs of this application be costs in the aforementioned application, action or arbitration proceedings, and failing the institution thereof that [QuickTrade] be liable for such costs.

(Underlining in the original.)

[21] The order granted in case no. 5717/19 was made without the joinder of the 'existing clients' or VTFS as parties to the proceedings. The necessary implication is that the judge must have rejected VTC's preliminary objection based on non-joinder. The terms of paragraph 5 of the order, which were not foreshadowed in the notice of motion, seem to have been inspired with the rights of the affected clients in mind. But they were not preceded by 'a predecision hearing' of those parties, who had not been given notice of the application.

[22] In the current proceedings, under case no. 7263/19, in which VTC is the applicant and the respondents are QuickTrade, Hardus van Pletsen (the managing director and allegedly the governing mind of QuickTrade) and VTFS, respectively, the questions centrally in contention are the effect of the order granted in case no. 5717/19 and the proper meaning of clause 14 of the referral contract (quoted above). In this connection VTC has sought the following relief in part B[7] of the notice of motion:

> 2. An order declaring the application under case number 5717/19 and this application be consolidated and heard together and that the relief contemplated in [? this] notice of motion be considered in this application as a matter of urgency;

---

[6] In paragraph [17].

[7] I shall address Part A of the notice of motion in case no. 7263/19 later in this judgment. It goes to certain interdictory relief sought against QuickTrade and Mr van Pletsen based on allegations of defamation and unlawful competition.

> 3. That the interim order granted [in case no. 5717/19] be set aside upon the decision of the Court pertaining to the relief set out in prayers 4 and 5 of Part B of this notice of motion;
>
> 4. An order declaring that clause 14 of the Referral Contract … is enforceable and valid;
>
> 5. An order declaring that the word "assist" as reflected in the Referral Contract imposes no more than the duty on [VTC] to close accounts upon receipt of the written instruction of investors who wish to close their accounts.

The prayer for declaratory relief in terms of paragraph 4, quoted above, is redundant because it is common ground between the parties that clause 14 is valid and enforceable. It is over its meaning that they are at odds.

Urgency

[23] The basis of urgency upon which this court is asked to deal with the applications is supported by the practical consequences of the interim order. A matter is urgent if the relief sought could not be obtained effectively in proceedings heard in the ordinary course. To the extent that the interim order is final in substance, as alleged, its implementation pending the final determination of the action instituted by QuickTrade would render the relief sought by VTC in the current proceedings nugatory. I am therefore satisfied that VTC's applications for the declaratory relief sought in case no. 7263/19 and the contingent consequential relief by way of the setting aside of the order made in case no. 5717/19 were justifiably brought on urgency. I am also satisfied that if a case were made out for the relief sought in terms of Part A of the notice of motion (to be described later in this judgment[8]), its efficacy would to a material degree depend on its being obtained without delay. In that respect too, a sufficient case for a hearing on an urgent basis has been made.

Revisiting the order made in case no. 5717/19

[24] Assuming for present purposes that the order made in case no. 5717/19 is indeed an interim order properly so-called, rather than an order having final effect, the only basis upon which the court would ordinarily revisit it would be in the context of altered circumstances sufficiently germane to merit its reconsideration. In the absence of a proper basis to do so, it is not open to me to second guess an interim

[8] In paragraph [91].

order made in this court by another judge. By contrast, if the order, despite its tenor, is final in effect (or if it is on any other basis appealable), the appropriate means of impugning it is to take it on appeal.

[25] There are no facts bearing on the interpretation of the contract before this court that were not before the duty judge when the interim order was made. I was therefore circumspect about entertaining the application to revisit the order in which there had been no relevant changed circumstances since its grant. Having regard to the effect of the order, which appeared to me to be final in substance, it occurred to me that an appeal might be the indicated procedure if it were sought, as it is, to have it set aside. Indeed, QuickTrade, while somewhat equivocal about the appealability of the order, contended that the application for declaratory relief and a consequential revisiting of the interdictory order was in point of fact nothing other than a disguised appeal.

[26] VTC actually contended before the duty judge when case no. 5717/19 was argued that the ostensibly interim relief sought by QuickTrade would, if granted, be final in effect. And, as I understand its heads of argument in that matter, it contended that the application for the interim interdict should be adjudicated as if it were an application for final relief. It also relied on the effectively irreversible effect of the order made in case no. 5717/19, if it were implemented, as the justification for its institution of the current proceedings before me in case no. 7263/19 as a matter of urgency.

[27] It is apparent, however, if regard is had to the manner in which the relief sought in terms of Part B of its notice of motion in case no. 7263/19 has been structured, that VTC, notwithstanding its contentions about the final effect of the order made in case no. 5717/19, seeks a declaratory order on the meaning of clause 14 of the referral agreement as a means of thereby engineering a set of changed circumstances that would afford the required platform for it to be able to ask the court to revisit and set aside the interdict as an interlocutory order. It seems to me that that course is impermissible if the order in case no. 5717/19 is indeed final in effect, or otherwise appealable. The reason is that if the order in case no. 5717/19 is susceptible to appeal, the meaning of clause 14 of the referral contract, which was the central issue in the matter, would be *res judicata* and it would not be appropriate for me to purport to revisit it on the basis invited in the prayer for declaratory relief in the

current application. Put differently, I think that the relief sought in the current application might competently be entertained only if the order in case no. 5717/19 is not susceptible to appeal. VTC cannot have its cake and eat it.

[28] There is in any event another obstacle in VTC's way to being able to obtain the declaratory relief that it requires in order to achieve its practical object of having the order in case no. 5717/19 set aside. QuickTrade has in the meantime, under case no. 7203/19 instituted the action proceedings for the final relief contemplated in terms of paragraph 5 of its notice of motion in case no. 5717/19. On the grounds that the action proceedings flow from those instituted by it in case no. 5717/19 and the order made by the court in that matter, it has raised an objection of *lis alibi pendens* in respect of the declaratory relief sought by VTC in the current matter.

[29] The appealability of the order in case no. 5717/19 and QuickTrade's plea of *lis pendens* are therefore questions that must be determined at the outset and before this court can properly become engaged with the merits of the substantive relief sought in terms of Part B of VTC's notice of motion in the current matter.

Appealability

[30] The position with regard to appealability is inherently unsatisfactory because this court's view on the matter is decisive only of the question whether it should engage with the merits of Part B of the current application, and not whether an appeal would actually be entertained. I am acutely conscious that the determination of whether the order is in fact appealable falls to be made not by this court, but in the first instance by the court that deals with an application for leave to appeal (which ordinarily would be the duty judge who granted the interim interdict) and ultimately, if leave is granted, whether by that court or on further application in terms of s 17(2)(b) of the Superior Courts Act 10 of 2013, by the appellate court. As I shall illustrate presently, those courts may also have regard to other features of the order apart from the finality of its effect or substance, such as the effect on its competence of the non-joinder question and on its legality in the context of VTC's contention that the order puts it (and QuickTrade) at risk of acting in conflict with their respective obligations in terms of the FAIS Act, in making the determination as to appealability. But I have to take a view on the appealability of the order for the purpose of deciding

whether it would be appropriate to enter into the declaratory relief, which as I have explained, is the platform VTC seeks to obtain to revisit the interim interdict.

[31] Counsel on both sides were somewhat wavering about the appealability of the order. My perception, when I raised it from the bench as a pertinent question, was that they each sought to deal with it tactically with an eye to the strategic implications for their respective cases. In fairness, however, their reluctance to commit to an answer was to an extent understandable because eminent judges have acknowledged in any number of cases that appealability can be a vexed question that has not always been answered consistently or entirely satisfactorily.[9]

[32] The unsatisfactory answers that can be forthcoming are in my view most liable to occur where there is a too undiscriminating adherence to established general guidelines like those usefully and most notably distilled in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) without sufficient account of the peculiar circumstances of the given case or acknowledgment that the judgment in *Zweni* expressly stated that it did not purport to lay down any immutable or exclusive rule. If the interests of justice are appropriately taken into account there should not have to be unsatisfactory answers. What is in the interests of justice will depend on the peculiar features of the given case.

[33] In my respectful opinion, the up to date approach to appealability was accurately summed up by Nugent JA in his concurring judgment in *National Director of Public Prosecutions v King* [2010] ZASCA 8; 2010 (2) SACR 146 (SCA); 2010 (7) BCLR 656; [2010] 3 All SA 304 (in which the other four members of the panel, including the principal scribe, concurred) in para. 51, where the learned judge reiterated a point he had made previously in the Labour Appeal Court,[10] saying: *'…while the classification of the order might at one time have been considered to be determinative of whether it is susceptible to an appeal the approach that has been taken by the courts in more recent times has been increasingly flexible and pragmatic.*

---

[9] See, for example, *Cronshaw and Another v Coin Security Group (Pty) Ltd* 1996 (3) SA 686 (SCA), [1996] 2 All SA 435 at 438 (All SA), *Minister of Safety and Security and Another v Hamilton* 2001 (3) SA 50 (SCA) at para. 4 and *Van Niekerk and Another v Van Niekerk and Another* [2007] ZASCA 116, 2008 (1) SA 76 (SCA), [2008] 1 All SA 96 at para. 5. In *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A), [1993] 1 All SA 365, at 531 (SALR), Harms AJA observed that '[t]*he issue whether a decision is an appealable "judgment or order" is complicated by a number of factors and has been the subject of a large number of judgments over many years*'.

[10] In *Liberty Life Association of Africa Ltd v Niselow* (1996) 17 ILJ 673 (LAC).

It has been directed more to doing what is appropriate in the particular circumstances than to elevating the distinction between orders that are appealable and those that are not to one of principle'. The object of the appellate process is the provision or expedition of a final resolution of the substantive issue being litigated. If entertaining an appeal from a decision at first instance is likely to satisfy that object, it must surely be positively indicative of the appealability of the decision in issue.

[34] Whilst frankly acknowledging, consistently with the position adopted by VTC before the duty judge, the respect in which the order made in case no. 5717/19, if implemented, would be final in substance, VTC's counsel expressed concern that the quite recent judgment of the appeal court in *Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation and Others* [2017] ZASCA 134; [2017] 4 All SA 605 (SCA); 2018 (6) SA 440 cast doubt on whether that rendered the order appealable. In my judgment that matter is distinguishable. That case was nowhere nearly on all fours with the current matter.

[35] The order taken on appeal in *Cipla Agrimed* was an interdict *pendente lite* granted in the following terms in March 2016: '*The respondent is interdicted from infringing claims 1 to 7, 18 to 23 and 29 of South African patent 98/10975 pending the final determination of the action instituted by the applicants against the respondent on 18 October 2011 …, provided that the interdict will lapse on the expiry date of the patent if the action has not been finally determined by that date.*'[11] The pending action in that matter involved a claim by the patent holder against Cipla Agrimed (Pty) Ltd, which was the respondent in the interlocutory proceedings, arising out of the alleged infringement of the patent. The patent in issue was due to expire in December 2018. The patent holder's action for final interdictory relief and an enquiry into damages was being defended by Cipla Agrimed on the basis that the registration of the patent was liable to be set aside on the grounds set forth in parallel proceedings instituted on motion by Cipla Agrimed for the revocation of the patent.

[36] The litigation in *Cipla Agrimed*, which commenced in 2011, had taken a tortuous course. By agreement between the parties, Cipla Agrimed's revocation

[11] It seems clear from the minority judgment and implicit in the majority judgment that all of the members of the court in *Cipla Agrimed* interpreted the expression '*finally determined*' in the impugned order to mean the final determination at trial; in other words they do not appear to have understood it to include the determination of any subsequent appeals as expressly provided in paragraph 5 of the order in case no. 5717/19 in the current matter.

application had been heard separately before the patent holder's infringement claim came to trial. It succeeded in the court of first instance, but that result was reversed on appeal in terms of an order that, amongst other matters, expressly certified the patent in question as valid.[12] Cipla Agrimed then applied to amend its plea in the infringement action to introduce a new ground upon which it would seek still to challenge the validity of the patent. That, in the face of the patent holder's contention that the appeal court's judgment in the revocation application had rendered the validity question *res judicata*. It was Cipla Agrimed's refusal to throw in the towel after the ultimate defeat of its application for the revocation of the patent that had triggered the application by the patent holder for the interim interdict. Cipla Agrimed's application to amend its plea, which was opposed, was still undetermined when the interim interdict was granted.

[37] Different from the position in the current matter, the grant of the interim interdict in *Cipla Agrimed* was supported by a reasoned judgment.[13] The judge (J.W. Louw J) favoured, albeit provisionally, the patent holder's contention that the validity of the patent was *res judicata*. He reasoned that the respondent had been obliged to put forward all its grounds for impugning the patent in the proceedings that had culminated in the appeal court and could not advance them piecemeal in the manner it was seeking to do by amending its plea in the action. The judge also considered that the balance of convenience favoured the patent holder and he took into account its undertaking to pay damages to the respondent should it suffer cognisable prejudice in consequence of the interim interdict. There is no undertaking by QuickTrade to pay VTC damages in the current case should its claim be dismissed in the action proceedings, and this court does not have the benefit of insight into the duty judge's reasoning in respect of the balance of convenience.

[38] The appellant in *Cipla Agrimed* acknowledged the interlocutory character of the interim of the interdict *pendente lite* and accepted that interlocutory orders were not ordinarily appealable. In argument before the appeal court, in September 2017, it submitted that its appeal should nevertheless be entertained because, so it contended, the interlocutory order was final in effect '*because the action was unlikely to be*

[12] In *Merck Sharpe Dohme Group v Cipla Agrimed (Pty) Ltd* [2015] ZASCA 175; 2016 (3) SA 22 (SCA).

[13] See *Merck Sharp Dohme Corporation and Others v Cipla Agrimed (Pty) Ltd* [2016] ZAGPPHC 465 (8 April 2016).

determined before the expiry of the patent on 3 December 2018'.[14] There was no suggestion in *Cipla Agrimed*, however, that the interim interdict granted in that matter was in substance final at the time it was made, as appears to me to have been the effect of the order made in case no. 5717/19.

[39] It is perhaps appropriate that I should at this point explain that I consider that there can be a material difference between an order that is final in effect and one that is final in substance. The term 'final in effect' in the relevant context is something of a term of art. It bears the connotation that the order in question is not susceptible to alteration by the court that made it.[15] An interim order that is final in substance, on the other hand, is one that, if it were implemented or complied with when it was made, would in a practical way irreversibly anticipate the substantive effect of the remedy in issue in the pending principal case.[16] There is no bright line of distinction, however. In *King* supra, for example, the two characteristics were weighed together. The appeal court considered the impugned order in that case to be appealable because it was final in substance and because despite the fact that it was theoretically susceptible to alteration by the court that had made it, and therefore not final in effect, the prospect of a situation actually arising in which it might be so altered was farfetched.[17] The appellant in *Cipla Agrimed*, whilst employing the term 'final in effect', nevertheless did not contend that the impugned interim interdict in that case was final in effect in the established technical sense of the expression. As will appear, that was the critical consideration in the decision of the appeal court to refuse to accept that the impugned decision was appealable.

[40] It appears that it might have been argued in *Cipla Agrimed*, on the basis of the approach adopted in *BHT Water Treatment (Pty) Ltd v Leslie and another* 1993 (1) SA 47 (W), [1993] 3 All SA 126, that the court of first instance should in the circumstances have treated the application for interim relief as if it were one for final relief with the effect that the resultant order should on that account be characterised as final in effect. But precisely what was argued in that regard is unclear because the

---

[14] *Cipla Agrimed* at para. 21.

[15] See point 8 in *Zweni* supra, at pp. 532-533 (SALR).

[16] In *Cipla Agrimed*, at para. 40, Gorven AJA appears to accept that there is no difference for the purposes of appealability between an ostensibly interim order that is 'final in effect' and one that is final in substance. The impugned decision in issue in that matter was neither.

[17] See *King* supra, at paras. 43 (per Harms DP) and 52 (per Nugent JA).

court was divided in its appreciation of the character of the argument. Certainly, it was an argument the majority found unnecessary to decide. The court was unanimous, however, that the determinative question on the appealability of the case was whether it was final in effect in the sense explained in *Zweni*. It is apparent from both the majority and the minority judgments that the court's approach to the question on that basis was materially influenced by the way in which the parties in that matter chose to argue the question of appealability.

[41] In the minority judgment, Rogers AJA considered that the interim interdict had been founded entirely on the judge at first instance's view of the *res judicata* point. Rogers AJA thought that point had been susceptible to convenient separation and relatively expeditious final determination by the court in which the infringement action was pending before the other potential issues in the principal case. He held that in order to determine in the given circumstances whether the interim interdict was final in effect '[t]*he correct question* [was] *whether as at 4 March 2016* [the date on which the interim interdict was granted] *it was clear that a final decision on the res judicata point would not be obtained in the* [court in which the infringement action was pending] *in time to obtain the discharge of the interim interdict before 3 December 2018*'.[18] Having determined, for the reason just indicated, that it was not, the learned judge concluded that when it was made the interim interdict was not final in effect, and therefore not appealable.

[42] It is clear that the approach to the question in the minority judgment was predicated on an assessment of the practical effect of the ostensibly interim order at the time it was given. The assessment was predicated on an ex hypothesi acceptance of the principle propounded in *BHT Water Treatment (Pty) Ltd v Leslie and another* 1993 (1) SA 47 (W), [1993] 3 All SA 126 that an application for interim relief *pendente lite* that would be final in substance because it was clear the question in issue would be moot by the time of determination of the principal case should be treated as if it were an application for final relief.[19] Rogers AJA held on the facts that the interim interdict in *Cipla Agrimed* did not meet the requirements of the *BHT* test.

---

[18] *Id*., at para. 26.

[19] Appealability was not an issue in *BHT*; nor was it in *Reddy v Siemens Telecommunications (Pty) Lt*d [2006] ZASCA 135; 2007 (2) SA 486 (SCA), in which *BHT* was referred to with approval.

[43] On the approach taken in the minority judgment, if the practical effect could to any extent foreseeably be remediated by the determination of the principal proceedings, the fact that the interdicted party might suffer irremediable prejudice while the interim order operated would not cognisably derogate from its interlocutory character, and the interim order would not be final in effect in the sense relevant for the purposes of appealability. In essence, Rogers AJA found no reason in the facts of the case to deviate from the requirement stated in *Zweni* that a decision should be final in effect for it to be appealable.

[44] I do not recall that there was any mention of the *BHT* test in the argument before me on appealability in the current matter. But it seems to me that implicit in the approach of the minority judgment in *Cipla Agrimed* would be a finding that the interim interdict in the current matter would appealable if it were apparent that from the moment of its making it was final in substance because, as a consequence of compliance with it, the substantive question in issue would be moot in the contemplated principal case. In my assessment, that is an approach that is closely aligned to the approach, founded in pragmatism and justice, applied in *King* supra.

[45] The other members of the court agreed with Rogers AJA that the interim order in *Cipla Agrimed* was not final in effect and therefore not appealable. They arrived at that result along different lines, however. The nub of the majority's reasoning for holding that the interim interdict in *Cipla Agrimed* was not appealable was founded on the judgment of Schutz JA in *Cronshaw and Another v Coin Security Group (Pty) Ltd* 1996 (3) SA 686 (SCA), [1996] 2 All SA 435. Indeed, the majority went so far as to hold that the appellant's argument in *Cipla Agrimed* was precisely the same as the argument that had been advanced in support of appealability in *Cronshaw*.[20]

[46] The judgment in *Cronshaw* was, in turn, closely informed by the appeal court's earlier judgment in *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) on the distinction between orders that are interlocutory in form but final in effect and those which are truly interlocutory (so-called 'simple' interlocutory orders). The judgment in *African Wanderers* discounted the influence of the prejudicial effect of the order while it operated as a relevant factor in determining whether an ostensibly interim order was final in effect or simply

[20] In para. 47. (Rogers AJA noted his disagreement with that characterisation of the argument at para. 31.)

interlocutory. The distinction was material for the purposes of the case in hand in *African Wanderers* because it was contended in the appeal that a matter that had been decided in an interim interdict application was *res judicata* in the main proceedings, which, of course, it could be only if the order were final in effect. (Ironically, at the time *African Wanderers* was decided there was no question that even simple interlocutory orders were appealable in terms of s 20(2)(b) of the Supreme Court Act 59 of 1959, the only qualification being that the availability of an appeal could follow only with the leave of the court. The statutory position was altered to that which applied when *Zweni* and *Cronshaw* were decided in terms of the amendment introduced in terms of s 7 of the Appeals Amendment Act 105 of 1982, with effect from 1 April 1983.)

[47] The order sought to be taken on appeal in *Cronshaw* was an interim interdict granted in favour of the covenantee in a restraint of trade agreement pending the determination of a pending action by the covenantee for the enforcement of the restraint. By that time interlocutory orders were, in general, no longer appealable, even with the leave of the court. The primary argument advanced by the covenantor in support of the appealability of the interim interdict was that the case was distinguishable from *African Wanderers* because the appeal was being prosecuted with leave obtained from the Chief Justice, after an application for leave to appeal had been refused at first instance on the grounds that the decision was not appealable. The implication of the submission was that the appealability of the decision had thereby been put beyond debate. Having rejected that argument, the court concluded that insofar as the characterisation of the impugned order was concerned, the matter could not be distinguished from the decision in *African Wanderers*, and that the allegedly irremediable harm that the appellants contended they would suffer while the interim interdict operated did not suffice to make what was undeniably an interlocutory order final in effect. The potential injustice that might flow from an interim interdict was, so it was held, a matter to be weighed by any court asked to grant one in the exercise of its discretion in respect of the balance of convenience in the given circumstances, and was something that could also be addressed by the attachment of appropriate conditions to any interdictory relief that might be granted.

[48] The approach in *Cronshaw* was premised on the characteristics of a 'judgment or order' in the sense of those words in s 20(1) of the Supreme Court Act, which were

described in *Zweni* supra, at 532-533 (SALR), as being (1) final in effect, 'final' meaning unalterable by the court whose judgment or order it is, (2) definitive of the rights of the parties in that it grants definitive and distinct relief and (3) dispositive of at least a substantial portion of the relief claimed in the main proceedings.[21]

[49] In *Phillips and others v National Director of Public Prosecutions* [2003] 4 All SA 16 (SCA), 2003 (2) SACR 410, 2003 (6) SA 447 at para. 19, Howie P noted that if the decision in issue had none of those attributes it was 'difficult' – the learned judge was not prepared to put it any higher than that – to see how it could be appealable. Rhetorically posing the question whether all of the characteristics stated in *Zweni* had to be present for a decision to be susceptible of appeal, Howie P answered it in the negative, pointing to the fact that the *Zweni* formulation itself contains the qualification '*generally speaking*'[22] and to the judgment in *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* [1996] ZASCA 2 1996 (3) SA 1 (SCA), in which the appeal court had held that the formulation is illustrative, not immutable, and that a decision having final jurisdictional effect can be appealed against even if it is not definitive or dispositive in the sense meant in *Zweni*.[23]

[50] In *Phillips*, the appeal court held that a restraint order made in terms of the Prevention of Organised Crime Act 121 of 1998 was appealable notwithstanding that it '*is only of interim operation and that, like interim interdicts and attachment orders pending trial, it has no definitive or dispositive effect*'. It did so because '[a]*bsent the requirements for variation or rescission laid down in section 26(10)(a)*[24] *... a restraint order is not capable of being changed. The defendant is stripped of the*

---

[21] It seems to be established that the word '*decision*' in s 16 of the currently applicable Superior Courts Act 10 of 2013 has exactly the same import as the words '*judgment or order*' did in s 20(1) of the repealed Supreme Court Act; see e.g. *Firstrand Bank Limited t/a First National Bank v Makaleng* [2016] ZASCA 169 (24 November 2016), at paras. 10-15, and *Neotel (Pty) Ltd v Telkom SA Soc Ltd and others* [2017] ZASCA 47 (31 March 2017), at paras 12-13.

[22] *Zweni* supra, at p. 536A-C (SALR).

[23] In *Moch v Nedtravel* the appeal court held that an order refusing an application for a judge's recusal was appealable notwithstanding that it in was in no way dispositive of the question in issue in the litigation.

[24] Section 26(10)(a) provides:
A High Court which made a restraint order—
(a) may on application by a person affected by that order vary or rescind the restraint order or an order authorising the seizure of the property concerned or other ancillary order if it is satisfied—
(i) that the operation of the order concerned will deprive the applicant of the means to provide for his or her reasonable living expenses and cause undue hardship for the applicant; and
(ii) that the hardship that the applicant will suffer as a result of the order outweighs the risk that the property concerned may be destroyed, lost, damaged, concealed or transferred;

restrained assets and any control or use of them. Pending the conclusion of the trial or the confiscation proceedings he is remediless'.[25] In the court's opinion '*that unalterable situation*', relative as it was, made the interim order final in the sense required for appealability.[26]

[51] *Phillips* stands as an illustration of two truths. First, that it is not necessary that all the requirements in *Zweni* be satisfied for a decision to be appealable. Second, that the insusceptibility of a decision to being altered by the court of first instance does not have to be absolute for the decision to be considered as sufficiently final in effect to render it appealable.

[52] Whether the interests of justice might on the peculiar facts of the case afford good reason to depart from the norms identified in *Zweni* was not considered in *Cronshaw*. The question of what might be appropriate if the order at first instance had been final in substance was also not a consideration in that case; although Schutz JA did note in passing (at p. 689 SALR) that prejudice '*which directly affects the issue of the ultimate suit*' was cognisable in the determination of appealability. The judgment in *Cronshaw* proceeded on the assumption that the court of first instance granting an interim interdict would have had due regard to the potentially prejudicial effect of the order on the respondent and would have paid attention to that in weighing the balance of convenience for the purposes of deciding whether the grant of an interim order was justified. It did not consider whether an exceptional course might be warranted if it appeared in a given case that the first instance court had materially misdirected itself on the issue of the balance of convenience.

[53] It is apparent that the appeal court in *Cipla Agrimed* would have been able to see in the reasoned judgment at first instance that Louw J had indeed paid proper attention to the balance of convenience when he granted the interim interdict. In that regard I think it is important to bear in mind when considering the majority judgment in *Cipla Agrimed* that Gorven AJA was careful to record that the argument addressed to the court in that matter had not required of it to consider whether in the interests of

[25] At para. 22

[26] Id.

justice an appeal should be entertained notwithstanding that the impugned order was interlocutory and not final in effect.[27]

[54] The judgment in *Cronshaw* stressed the role of judicial policy in the determination of appealability. A consideration of recent judgments of the appeal court and the Constitutional Court makes it apparent that judicial policy in respect of the question has in the constitutional era become notably more nuanced and less inflexible than it was when *Cronshaw* was decided. Section 173 of the Constitution has been influential in this regard. So, for example, in *Government of the Republic of South Africa and Others v Von Abo* [2011] ZASCA 6, [2011] 3 All SA 261 (SCA), 2011 (5) SA 262, Snyders JA noted in para. 17, '*The complications surrounding appealability in any given instance were recently summarised by Lewis JA in Health Professions Council of South Africa v Emergency Medical Supplies and Training CC t/a EMS 2010 (6) SA 469 (SCA) paras 14-19. It is fair to say that there is no checklist of requirements. Several considerations need to be weighed up, including whether the relief granted was final in its effect, definitive of the rights of the parties, disposed of a substantial portion of the relief claimed, aspects of convenience, the time at which the issue is considered, delay, expedience, prejudice, the avoidance of piecemeal appeals and the attainment of justice*'. To similar effect was the statement in the judgment of Farlam JA in *Philani-Ma-Afrika and Others v Mailula and Others* [2009] ZASCA 115; [2010] 1 All SA 459 (SCA), 2010 (2) SA 573 concerning the appealability of an order putting into effect an eviction order that was subject of a pending appeal, in which the notion that only orders that satisfied the characteristics identified in *Zweni* were appealable was firmly rejected. The learned judge held (in para. 20): '*That belief was erroneous. It is clear from such cases as S v Western Areas 2005 (5) SA 214 (SCA) at paras 25 and 26 … that what is of paramount importance in deciding whether a judgment is appealable is the interests of justice. See also Khumalo v Holomisa [2002] ZACC 12; 2002 (5) SA 401 (CC) para [8] … . The facts of this case provide a striking illustration of the need for orders of the nature of the execution order to be regarded as appealable in the interests of justice*'.

[55] In *Director-General, Department of Home Affairs and Another v Islam and Others* [2018] ZASCA 48 (28 March 2018) at para. 10, Maya P, in holding that the

[27] See *Cipla Agrimed* at para. 37.

interim interdict granted in the court a quo in that case was appealable, made a general observation that '[t]*raditionally, under common law, an interim order was not appealable except where it was shown that it was (a) final in effect as it could not be altered by the court which granted it; (b) definitive of the rights of the parties in that it granted definitive and distinct relief; and (c) was dispositive of at least a substantial portion of the relief claimed in the main proceedings. The test has since evolved. So whilst the traditional requirements are still important considerations, the court may in appropriate circumstances dispense with one or more of those requirements if to do so would be in the interests of justice, having regard to the court's duty to promote the spirit, purpose and objects of the Constitution eg where the interim order 'has an immediate and substantial effect, including whether the harm that flows from it is serious, immediate, ongoing and irreparable*' (footnotes omitted).

[56] In *DG, Home Affairs v Islam* the respondent, a foreigner who was married by Muslim rites to a South African citizen, had been refused entry into this country because he was found in possession of a fake spousal visa. He and his wife applied for an order allowing his admission into South Africa ('the Republic') pending the determination of his request to the Minister of Home Affairs, in terms of s 8 of the Immigration Act 13 of 2002, to review the decision to refuse him entry or, in the event that the Minister confirmed the decision, pending judgment in a judicial review application that would be launched within ten days thereof. The terms of the interdict granted by the court of first instance directed the appellants to (a) permit the respondent to enter and remain in the Republic subject to reasonable terms and conditions as prescribed by them, pending finalisation of the matter; (b) re-issue his spousal visa within 21 days from the date of the order; and (c) if they were unable to re-issue the visa, file affidavits stating the reasons for their non-compliance.

[57] In that matter it was found that the impugned order, despite being described as an interim interdict, met '*the traditional requirements*' stated in *Zweni*. But what also weighed with the court was that the order '*was dispositive of the very essence of the relief*' to be sought by the respondent in the contemplated principal proceedings. That, because the relevant provisions of the Immigration Act required the respondent to await the Minister's decision outside the Republic. The order made by the court of first instance was accordingly incompetent because it was contrary to the provisions of the applicable legislation. The appeal court held that because '*... the interim*

interdict was granted in direct contravention of the provisions of the Act, which deal with the control and regulation of the presence of foreign nationals in the Republic… [and] *it disregarded the appellants' executive powers and obligations and the requirements for its grant were not met*', the interdict should not have been granted in the first place and that '*for that reason alone it would be in the interests of justice to hear the appeal*'.

[58] Dependent on the view that could be taken by an appellate court, similar considerations could be held applicable in the current matter in the context of the argument that compliance with the interim interdict would necessarily result in contravention of the FAIS Act.

[59] Returning to the facts in the current matter. The 'interim' order in case no. 5717/19 has the effect of requiring VTC to cease providing any of the services as defined in the referral contract to clients that were referred to it by QuickTrade in terms of the contract unless such clients make a written request to QuickTrade to remain on VTFS's Protrader platform. The practical effect of this, if the order is effective, is that the referred clients who do not address such written requests to remain on Protrader will cease to be serviced by VTC or its 'related companies'. The affected contracts will, moreover, not be restored *ipso facto* if QuickTrade is unsuccessful in the contemplated principal litigation to which the ostensibly 'interim' order is expressly linked. To my mind this does demonstrate that the 'interim' order, to the extent that it is an effective order, is final in substance even if it is not final in effect in the sense that it is, at least notionally, capable of being reconsidered by the court that made it.

[60] I consider the order to be final in substance because if the interim order is complied with there will quite obviously be no affected clients still to be migrated when the contemplated principal proceedings come to hearing. The migration will already have taken place in terms of the 'interim' order. The substantive question in issue between the parties will already have been disposed of in accordance with QuickTrade's interpretation of clause 14.1.3; and whether that construction is the correct one will therefore be academic in the principal proceedings. (It should be remembered in this connection that QuickTrade does not contend that it is entitled to force referred clients who do not wish to migrate from VTFS's Protrader platform to its Metatrader 5 platform to do so, with the result that those of them who give written

notice as provided for in the interim order are not susceptible to being migrated irrespective of the outcome of the principal proceedings.)

[61] Similarly, if VTC's interpretation were to be vindicated in the principal case, irreparable damage would have been done because its contractual relationships with all the referred clients who were active traders would have been severed by the time of the determination of the contemplated principal case. It would be fanciful to conceive that actively trading clients would be content to have their accounts with VTC held in suspension pending the determination of potentially protracted litigation. If the interim order is implemented, a victory for VTC in the principal proceedings will also be of no practical relevance. That much was evident when the order was made.

[62] The only practical purpose of a decisive determination of the import of the contested clause in the contemplated principal proceedings would perhaps be to afford the foundation for a damages claim by one party against the other; which might explain why QuickTrade has indicated in its supplemented answering papers in case no. 7263/19 that it intends to amend its particulars of claim in the action that it instituted in case no. 7203/19 a few days after obtaining the interim order to include a claim for damages.

[63] I consider that regard being had to the character of the interim order as final in substance it would be in the interests of justice for it to treated as appealable if it is an effective order. It also weighs with me in coming to that conclusion that the courts that will have to make the determinative decisions on appealability in this matter may, in addition, have regard in making their decision to other features of the case, such as the non-joinder question and VTC's contention that the order puts it (and QuickTrade) at risk of acting in conflict with their respective obligations in terms of the FAIS Act. They could regard either or both of those features as sufficient, by themselves, to render the order appealable.

The effect of the interim interdict being appealable

[64] If the order is appealable, it would follow, in my view, that the matter of its implementation pending the determination of an appeal would, by law, fall to be regulated by s 18 of the Superior Courts Act, rather than by me revisiting it on the basis invited in terms of Part B of VTC's notice of motion in the current matter. The

noting of an application for leave to appeal against an order that has final effect is to suspend the operation of the order unless the court, on application in terms of s 18(3) of the Superior Courts Act 10 of 2013, otherwise directs.

[65] QuickTrade's counsel, relying on s 18(2) of the Superior Courts Act, submitted however that the order would not be suspended by reason of an application for leave to appeal or any subsequent appeal. As I understood the argument it was premised on the characterisation of the order as (i) interlocutory and (ii) not being final in effect in the technical sense of that term explained earlier. There is no dispute concerning the incidence of the first of those attributes, at least in respect of the form of the order. But it is not clear to me that the second applies. Counsel's argument is predicated on the assumption that the underlined words in the phrase '*an interlocutory order not having the effect of a final judgment*' in s 18(2) denote '*final in effect*' in the *Zweni* sense. I do not accept that is so.

[66] A decision that has the effect of a final judgment is in truth not an interlocutory judgment or order notwithstanding that it might be such in form. That indeed is the import of an established body of jurisprudence, salient components of which were referred to in the majority judgment in *Cipla Agrimed*. There is no logical basis for distinguishing orders that are dressed up as interlocutory but are in effect final, and therefor actually final, from those to which s 18(3) applies. And I cannot conceive of any sensible object that the legislature could be thought to want to achieve by drawing any such distinction.

[67] In my judgment s 18(2) is directed at regulating the position in those exceptional cases in which an appeal is sought to be prosecuted against a simple interlocutory order; cf. *Ntlemeza v Helen Suzman Foundation and another* [2017] ZASCA 93, [2017] 3 All SA 589 (SCA), 2017 (5) SA 402 at para. 25 read with para. 20. I do not think that an order, such as the one in the current case, that from the moment it is made would be final in substance, falls into that category. In my view the latter type of order is one to which s 18(1) would apply.

[68] But even were I wrong in this regard, the considerations that underpin my characterisation of the order in case no. 5717/19 as one to which s 18(1) applies would in that event provide sufficient reason, if there were a relevant application, for an order in terms of s 18(2) to be made.

The effectiveness of the interim order in case no. 5717/19

[69] It will have been noticed that I repeatedly qualified my discussion concerning the appealability of the order in case no. 5717/19 by making it clear that it was proceeding on the assumption that the order was an effective one. If the order is not effective in a practical sense, that would be a factor detracting from it being necessary or appropriate to characterise the order as appealable. There would also be little point in entertaining the application for declaratory relief at this stage, rather than letting the meaning of the contentious contractual provision stand over for determination, if necessary, in the pending action.

[70] The reason for the qualification concerning the effectiveness of the 'interim' order is that it is undisputed that the referred clients trade their CFDs on the Protrader platform operated by VTFS. And that they do so in terms of contracts concluded directly with VTFS. It was also common cause (at least before me, although I gather QuickTrade's position might have been different when the matter was argued before the duty judge) that the 'interim' order does not bind VTFS or the clients because they were not party to the proceedings in case no. 5717/19. It was acknowledged by QuickTrade's counsel before me that this impacted materially and negatively on the effectiveness of the 'interim' order that had been obtained. Counsel who appeared for VTFS and one of the clients in the intervention applications in case no. 5717/19, which were also enrolled for hearing before me, confirmed as much. He made it plain that VTFS would not be complying with the order because it was not bound by it.

[71] After notice of the order was given to the clients, about 800 of them indicated their wish to transfer their business from the Protrader platform to Quicktrader's Metatrader 5 platform. They have already been migrated in accordance with their wishes. Another 500 or so have indicated that they wish to remain on Protrader. The vast majority of the referred clients have not reacted at all. Whatever Quicktrader's position might have been when it sought the interim interdict, its counsel indicated when the matter was argued before me that they accepted that clients who did not take active steps to cancel their contracts with VTFS could not be prevented from continuing to trade on Protrader. The current indication therefore is that the vast majority of the 15 000 or so clients in contention will remain on Protrader irrespective of the order made in case no. 5717/19.

[72] Furthermore, paragraph 2 of the order in case no. 5717/19, which directs that QuickTrade's access to the trade desk and admin portals on the velocitytrade.com website be restored, has to be read and understood contextually. It cannot be read to extend QuickTrade's access beyond the three-month window period after the termination of the referral contract in which, on any approach, those of QuickTrade's clients that were amenable to being transferred to another trading platform might have been expected to continue trading on Protrader before they were migrated. Access to the portals was provided in terms of the contract to enable QuickTrade to monitor the referred clients trading transactions. It was contractually entitled to the access only during the subsistence of the contract, and arguably thereafter during the three-month post-termination period provided in terms of clause 14.1.3. The order could not competently have purported to confer rights on QuickTrade that it did not enjoy under the contract, and it would be wrong to construe it in a manner that would undermine its competence. The three-month period in question had virtually expired by the time argument in the application was completed in early June. As I have described at length, the intended effect of the order was that the migration of clients should occur within the stipulated window period. It was directed (largely ineffectually, as things turned out) at specific performance.

[73] In the circumstances it was not altogether clear why VTC should be so anxious to have the order revisited by way of the current proceedings, attended as they were by an application by VTFS and a referred client to be permitted to intervene in case no. 5717/19 for the purpose of prevailing on the court also to revisit the order. I think that part of the reason may have been because QuickTrade had contended in correspondence that VTC was obliged by the interim order to prevail upon VTFS to do whatever was necessary to enable effective compliance with the terms of the order that required no further trading on the accounts of referred clients other than for purpose of 'closing out existing transactions'. It is also apparent that the existence of the order and the communications that were being addressed to the referred clients about it were regarded by VTC and VTFS as prejudicial to their businesses.

[74] The bifurcated basis for revisiting the order inherent in the applications in case no. 5717/19 for leave to intervene and the application in case no. 7263/19 was, no doubt, the principal basis for the prayer in paragraph 2 of Part B of the notice of motion in the latter matter for the consolidation of the two matters. It has fallen away

for practical purposes because, advisedly, the intervention application by VTFS was not persisted with, and that of the investor, Waheed Safa, not pursued with any vigour. The application for 'consolidation' was in any event strictly speaking misguided because the matters are not susceptible to an integrated hearing. What VTC actually seeks is a determination of its application for declaratory relief, and pursuant thereto, if that is decided in its favour, a revisiting of the 'interim' order so that it may be discharged. It really wants the two applications, which can only be decided consecutively, argued together for convenience. That has, in effect, already happened.

[75] In fairness to VTC it must be acknowledged that many of the aspects in respect of which QuickTrade now acknowledges that the interim order is ineffectual were not clear at the time that the application in case no. 7263/19 and the intervention applications in case no. 5717/19 were instituted. Indeed, as counsel for VTFS pointed out when announcing that his client did not persist in its application for leave to intervene in case no. 5717/19, had VTFS been aware in advance of the concessions that QuickTrade would make about the ineffectualness of the order in its response to the intervention application, the application would not have been brought in the first place.

Lis pendens

[76] This brings me to the *lis alibi pende*ns objection, which would ordinarily be dealt with first. In the light of my conclusion that the application for declaratory relief should not be entertained in this matter because it is sought principally in order to provide a platform for this court to set aside the order in case no. 5717/19 that, if it is to be impugned, should rather be taken on appeal, it is strictly speaking not necessary to deal with the objection. But in case I am wrong on appealability I shall nevertheless do so.

[77] It was not in dispute that the essential requirements of the dilatory plea of *lis pendens*– rehearsed and helpfully clarified in *Caesarstone Sdot-Yam Ltd v The World of Marble and Granite 2000 CC and Others* [2013] ZASCA 129, [2013] 4 All SA 509 (SCA), 2013 (6) SA 499 – are satisfied on the facts. The only matter for decision in this connection being whether this court should exercise its discretion against QuickTrade and decide on the proper interpretation of clause 14 in these proceedings

in case no. 7263/19, when it is also the central issue in the action pending in case no. 7203/19. As I understand *Caesarstone*, the burden of persuasion is on VTC in this regard. The relevant principle is that '[o]*nce a suit has been commenced before a tribunal that is competent to adjudicate upon it, the suit must generally be brought to its conclusion before that tribunal and should not be replicated*' (per Nugent AJA in *Nestlé (South Africa) (Pty) Ltd v Mars Inc* [2001] ZASCA 76, 2001 (4) SA 542 (SCA), [2001] 4 All SA 315 at para. 16).

[78] I have already identified why VTC would seek to have the import of clause 14 declared at this stage, instead of having to await the outcome of the action instituted by QuickTrade. VTC argues that the contract is unambiguous and the meaning of the clause is clear. It emphasises that in any event there is no dispute as to the factual context in which the referral contract was concluded, and evidence by the principals as to what *they* regard the meaning of the clause to be is inadmissible. It has also highlighted that the referral contract contains a sole memorial clause and a recordal that the agreement was not induced by any representations not expressly incorporated in the deed of contract.

[79] The declaratory relief sought in terms of paragraph 5 of the notice of motion is directed at obtaining an indisputably final order in respect of the import of clause 14 of the referral contract, which, as described, is the issue underpinning the interim interdict. If that question were determined in VTC's favour, it would anticipate the determination of most of the relief currently sought in QuickTrade's action in case no. 7203/19. It would not result in the automatic discharge of the interdictory relief granted in case no. 5717/19 because that remedy, according to its tenor, remains in place until the determination of any appeal in whatever forum a final order is obtained. It would, however, by reason of the changed circumstances, afford a basis for this court to revisit the interdict.

[80] QuickTrade contends that it would not be appropriate to determine the proper meaning of clause 14.1.3 on paper. It argues that 'a court with the benefit of full discovery between the parties and a full analysis of how the Referral Agreement came about, the factual context in which it was concluded as well as an unravelling of the relationship between VTC and VTFS, will be better armed to make a final determination of the interpretation of clause 14.1.3.

[81] The argument that discovery might throw up something of value to the proper construction of the contract is not compelling. QuickTrade has not identified anything in particular that it would expect to become available through discovery. I would imagine that both the contracting parties would already be in possession of any documents extraneous to the contract that might be of relevance. I would therefore have expected QuickTrade to have attached such documentation to its supporting papers in case no. 5717/19 and its answering papers in case no. 7263/19.

[82] I do not agree, however, with VTC's contention that the meaning of clause 14 of the referral contract is obvious. Indeed, the very grant of the interim interdict, which must, as discussed, have proceeded on the basis of an interpretation of the contract by the duty judge at odds with that contended for by VTC, suggests the contrary.

[83] I do not intend to entertain the application for declaratory relief, but shall mention just some of the difficulties with clause 14.1.3 that lead me to believe that its interpretation might be assisted by oral evidence about the practical operation of the contract and how that might be wound down. For example, the sub-clause stipulates without qualification that QuickTrade will continue to receive remuneration in respect of existing clients for three months after termination of the contract and yet, at the same time, contemplates the migration of those clients to a new broker *within* that period. That to my mind is an internal contradiction. It certainly does not seem to support the notion that VTC should freeze the clients' accounts upon termination, as the interim order provides in accordance with the relief sought by QuickTrade in case no. 5717/19. But quite what is to happen is by no means clear. Evidence as to the practical implications of that provision in the context of how the contract operated might be useful in resolving the apparent internal contradiction. It is equally not clear to me how clause 14.1.4 works in conjunction with clause 14.1.3. What are the respective rights and obligations referred to in clause 14.1.4? Evidence to identify them might be of assistance in throwing light on the meaning of the two sub-clauses, which, on the express wording of clause 14.1.4, were obviously intended to be understood in conjunction with each other. An insight into the practical implications of clause 14.1.4 might throw light on the meaning of clause 14.1.3. Evidence about the mechanics of the migration exercise contemplated by clause 14.1.3 might also give an insight into the meaning of the sub-clause.

[84] The evidence before me is to the effect that prevailing upon clients to move from one platform to another would constitute a form of advice, which neither QuickTrade nor VTC's related company VTFS, are permitted by their licences under the FAIS Act to furnish. This is something that makes it difficult for me to understand precisely how clause 14.1.3 would work.

[85] The relief sought by VTC is that the court should declare that '*that the word "assist" as reflected in the Referral Contract imposes no more than the duty to close accounts upon receipt of the written instruction of investors who wish to close their accounts*'. It seems to me, however, at least on the face of it, that VTC would be obliged to do that anyway in terms of its contractual relationships with the referred clients. And the declaration contended for implies a duty to react to the request of *the clients*, not QuickTrade. The sub-clause, however, requires VTC to assist *QuickTrade*, not the clients. I suspect that at the end of the day the pertinent question is the meaning of the sub-clause, rather than a particular word in it. It may even turn out that it is incapable of lawful implementation. I am not sure. I think I have said enough to indicate that I consider that providing the answer might be facilitated by oral evidence. That would have been reason enough, if it had been necessary to get that far, to uphold the *lis pendens* objection.

[86] In the result, the relief sought in paragraphs 3 and 5 of Part B of the notice of motion in case no. 7263/19 will be refused.

[87] I do not propose to make a costs order at this stage. I would prefer to do so after the final determination of the principal proceedings in case no. 7203/19. A consideration that weighs with me in that regard is that the application may not have been launched had QuickTrade made its position about the essential ineffectualness of the order in case no. 5717/19 clear at an earlier stage. That is an aspect that might incline me towards making no order as to costs. On the other hand, were QuickTrade to succeed in the principal proceedings, I might look more favourably on awarding them their costs in respect of this part of the current proceedings. I would prefer to keep an open mind on the question for the time being. The parties will therefore be given leave to enlist the matter of costs for determination by me when that stage has been reached, or in the event that those proceedings are not prosecuted to a conclusion, (which strikes me as a realistic possibility) as soon as it becomes clear that they will not be. It can be decided after consultation with me at that stage

whether any further argument on costs should be by way of written or oral submissions.

The applications by VTFS and Waheed Safa for leave to intervene in case no. 5717/19

[88] As mentioned, the application by VTFS was not persisted with. I have already noted that the order in case no. 5717/19 was not binding on either VTFS or the referred clients. I accept, however, that VTFS was concerned about the effect of the order on it in view of the attitude that QuickTrade adopted in correspondence in which it was suggested that VTC was obliged to procure VTFS's compliance with the order. Both of the applicants for leave to intervene were also concerned by the effect of the literal effect of paragraphs 3 and 5, which might be read to freeze the referred clients' trading accounts. By the time the matter was ripe for argument, QuickTrade had clarified its understanding of the effect of the order and made it clear that it now appreciated that it was essentially nugatory.

[89] During argument, QuickTrade's counsel also indicated that QuickTrade would have no objection to an order being made declaring that Mr Safa (the investor who sought to intervene) was not prohibited from acquiring CFDs from VTC. What applied to Mr Safa would obviously hold good for all of the other referred clients. I have no intention, however, of making an order that has not been sought on the papers. It is sufficient for me to record counsel's clarification in the body of the judgment. That, together with the acknowledgment by all concerned that the order in case no. 5717/19 has no effect on the clients' ability to continue trading on VTFS's Protrader platform, makes it clear that if there ever were a need for Mr Safa to be granted leave to intervene, there no longer is.

[90] I think it would be fair in all the circumstances that the intervention applications should be dismissed with no orders as to costs.

The relief sought in Part A of the notice of motion in case no. 7263/19

[91] VTC sought the following substantive relief in Part A of its notice of motion in case no. 7263/19: An order –

1. that QuickTrade and the second respondent (Mr van Pletsen) are interdicted and restrained from defaming VTC;

2. that QuickTrade and the second respondent are interdicted and restrained from competing unlawfully with VTC;

3. that QuickTrade and the second respondent are interdicted and restrained from stating, publishing, communicating or in any way disseminating statements which repeat, or which convey similar assertions to, the following:

    3.1 "They can't trade for any clients we referred to them and the clients must be transferred UNLESS they specifically chose to stay with VT";

    3.2 "When I told them that I bought a Metatrader 5 License they stopped paying QuickTrade its commissions and they tried to hijack the clients";

    3.3 "I don't think they have the R25 million. I am going to do everything I can to put them out of business";

    3.4 "We're going to teach Velocity Trade a lesson";

    3.5 That Protrader clients are obliged or compelled to close their Protrader accounts;

    3.6 That Velocity Trade entities are charging R500.00 as a withdrawal fee to clients who close their accounts;

    3.7 That Velocity Trade's clients are not clients of Velocity Trade and that such clients may not continue to trade with Velocity Trade;

    3.8 That Velocity Trade has ceased paying what is owed to QuickTrade.

The relief sought in Part A was initially sought in the form of a rule *nisi* operating as an interim interdict pending the return date. But in the event by the time the matter was argued QuickTrade had filed a full answer and the application was argued on both sides as one for a final order.

[92] The instances identified in sub-paragraphs 3.1 to 3.8 of the relief sought by VTC as described in the preceding paragraph relate to actual or alleged statements by Mr van Pletsen. The statements were made in the course of a WhatsApp conversation with one Nhlanhla Ndlovu, a former business associate, on 26 April 2018 soon after the order in case no. 5717/19 had been made, and in bulk emails to referred clients, dated 26 March and 28 April 2019, respectively. There was also an exchange of

emails on 28 and 29 April 2019 between VTC and a client who had received an SMS message, apparently from Mr van Pletsen, giving the client to believe that VTC would charge a fee of R500 for the closure of the client's account. They were put up as the basis for the interdictory relief sought by VTC in the wide and undefined terms stated in paragraphs 1 and 2 of the order sought as described in the preceding paragraph.

[93] The statements in the bulk email to which VTC takes exception are:

i. '**Velocity Trade is hijacking QuickTrade's clients.**' (Bold print in the original.)

ii. 'By continuing to trade on Protrader you assist Velocity Trade to act unlawfully and you may soon find yourself in a position where Velocity Trade's Protrader is interdicted from rendering new trading facilities to you.'

[94] The statements fall to be assessed in the context of the email as a whole. It went as follows:

> From: [a no reply email address] On behalf of Hardus Van Pletsen
> Sent: Tuesday, 26 March 2019 08:39
> To: [a referred client's email address]
> Subject: QuickTrade – Notification regarding Velocity Trade (Protrader).
> Dear [referred client]
> As a QuickTrade client, you have the right to know certain facts.
> You received 2 emails from Velocity Trade, stating that QuickTrade will no longer be referring its clients to Velocity Trade to trade on their Protrader platform.
> This is correct.
> QuickTrade took this step for very specific reasons:
>
> - QuickTrade recently became a Licensed Provider of the Metatrader 5 trading platform (MT5), which is used by more than a million people.
> - MT5 is now available for Installation to all QuickTrade's clients, **existing** and new. We therefore no longer need Velocity Trade or its Protrader platform as the "middleman". As you know, using a "middleman" increases costs and leads to inconvenience.
> - QuickTrade specifically chose the MT5 trading platform since, in our view, it better suits the needs of our clients and of our business;
> - Existing QuickTrade clients, who are Protrader users, encountered many administrative frustrations with the Protrader platform, just like QuickTrade did.
>
> QuickTrade's contract with Velocity Trade has now been terminated.

> Velocity Trade's emails to QuickTrade's existing clients, creating the impression that they may continue trading on Protrader under their Client Agreement is a breach of its contract with QuickTrade.
>
> As per the contract, termination compels Velocity Trade to migrate existing QuickTrade clients using Protrader , to QuickTrade. QuickTrade has instructed Velocity Trade to move its clients to QuickTrade.
>
> **Velocity Trade is hijacking QuickTrade's clients.**
>
> Velocity Trade has revoked QuickTrade and our clients' access to the Tradedesk system, which QuickTrade used to track its clients' trading performance. This means that they have made it impossible for us to support clients using the Protrader platform, through our Trading Mentors.
>
> Clients can therefore no longer do withdrawal requests via Tradedesk, they are frustrated when they request withdrawals from their trading account by having to send an email to: support@za.velocitytrade.com
>
> It is your money; Velocity Trade can't stop you from making a withdrawal. Email the FSCA with a complaint if you have the same experience using this email address: fsca@whistleblowing.co.za
>
> By continuing to trade on Protrader you assist Velocity Trade to act unlawfully and you may soon find yourself in a position where Velocity Trade's Protrader is interdicted from rendering new trading facilities to you.
>
> The following is important:
>
> - You only became a Protrader user, because QuickTrade referred you to Velocity Trade.
> - Moving to MT5 will strengthen your relationship with QuickTrade. We will be able to provide you with Support and Training.

[95] In my judgment the only arguably objectionable content in the email is the statement that 'Velocity Trade is hijacking QuickTrade's clients'. The word '*hijack*', used in the context it was employed, bears strong connotations of dishonesty or criminality.[28] That in my view goes beyond the sort of expression of opinion that might be justifiable as 'fair comment' in the established meaning of that concept in the law of defamation.[29] The imputation of dishonesty on the part of VTC was not a reasonable imputation to advance in circumstances where the factual premise is a

---

[28] The *Oxford Dictionary of English* defines the verb '*hijack*' as follows: 'unlawfully seize (an aircraft, ship, or vehicle) in transit and force it to go to a different destination or use it for one's own purposes: *a man armed with grenades hijacked the jet yesterday*. • steal (goods) by seizing them in transit: *the UN convoys have been tamely allowing gunmen to hijack relief supplies*. • take over (something) and use it for a different purpose: *he argues that pressure groups have hijacked the environmental debate*.'

[29] Cf. *The Citizen 1978 (Pty) Ltd and Others v McBride (Johnstone and Others as Amici Curiae)* [2011] ZACC 11, 2011 (4) SA 191 (CC), 2011 (8) BCLR 816 at para. 81 and the earlier authority cited there in the footnote references.

dispute about the construction of a clause in the referral contract. The assessment of the intention behind the statement falls to be seen in the context of Mr van Pletsen's other related conduct in regard to the dispute with VTC, namely his declared intention to run a hostile campaign so that once he was 'done, no one will want to stay with' VTC. And, as I shall discuss presently, that campaign has been demonstrated to have included the deliberate publication of false information about the manner in which VTC dealt with clients wishing to close their accounts. Seen in the broader context, the imputation of dishonesty appears to have been calculated to put VTC in a bad light with the referred clients so as to make them uncomfortable with doing business with the company because of its attributed lack of probity. The statement was not only defamatory, but, in an unacceptable manner, directed at furthering the competitive object of prevailing on clients to close their accounts with VTC and move to QuickTrader's trading platform.[30]

[96] I have approached the matter in the preceding paragraph on the basis of QuickTrade's defence of 'fair comment' notwithstanding my doubts that that defence is applicable in the circumstances because the subject matter in issue does not strike me as being one of public interest. In my view, the appropriate basis for justification of the adverse comment in the bulk email was that it was made on a privileged occasion: One on which QuickTrade had a right or interest in making the statements to persons who had a similar right or interest in receiving them. But the proper categorisation of the defence makes no difference to the reason for not upholding it. That applies equally irrespective of the labelling.[31]

[97] Some of the statements made by van Pletsen in his WhatsApp conversation with Ndlovu are undoubtedly defamatory of VTC; others are merely his relaying to his then friend of his understanding of the content and import of the order that QuickTrade had obtained in case no. 5717/19, or telling him that VTC had not paid its most recently due commission payment to QuickTrade (which was true, although VTC said that it was because the amount was still in the course of being computed). The statements identified in subparagraphs 3.1, 3. 5 and 3.7 in paragraph [91] above are supportable on a reading of the order. There was nothing secret about the order

[30] I take a different view of the use by van Pletsen of the word 'hijacking' in his WhatsApp conversation with Ndlovu. I am not persuaded that it was uttered there with same motive or purpose that it appears to have been employed in the bulk email to the referred clients.

[31] Cf. *Basner v Trigger* 1946 AD 83 at 95.

and van Pletsen was entitled to discuss it with whomsoever he wished. There is also no basis upon which van Pletsen can be prevented from expressing the opinion that QuickTrade 'will teach [VTC] a lesson'. No-one is under any obligation to pretend that there is any love lost between the two companies, or to refrain from remarking on their hostile relationship or intention to compete fiercely for the exclusive custom of clients they once shared.

[98] I would not have been inclined to exercise the court's discretion in favour of granting interdictory relief arising out of the statement by van Pletsen in the course of his conversation doubting that VTC would be able to account to clients for the R25 million (VTC says it was actually R17 million) held in trust. The statement was undoubtedly seriously defamatory because of its primary implication that VTC had misappropriated trust funds and secondary implication that VTC was bankrupt, or at least illiquid. But the fact that this statement was made in the course of a conversation between friends and business associates was no indication by itself that it was likely to be repeated to the client-investors or the world at large, which is the sort of situation to which interdictory relief is appropriately directed; damages being the indicated remedy for wrongs already committed.

[99] VTC's counsel sought to persuade me to a different view with reference to an email, dated 29 April 2019, from one of the clients addressed to van Pletsen and VTC, the body of which read as follows:

> To my knowledge and my agreement with you was no legal payment is involved if you are no longer interested. You promised to trade for me but you did not deliver the service. Now you are bankrupt so you want to cover your problem. You also promised to trade for me. Where is the money that I paid to join?????? Then you can tell me all this nonsense you are talking about

I have not found the email, which was annexed to VTC's replying papers, particularly illuminating. It is incoherent. And it is by no means clear whether the accusations of bankruptcy and possible misappropriation of money contained in it were levied against VTC or QuickTrade or both. It is apparent from other correspondence attached to VTC's supplementary replying affidavit that the circularisation of the terms of the court order in QuickTrade's above-mentioned bulk email, perhaps foreseeably, has caused considerable confusion in the minds of a number of clients. That has probably been detrimental to both companies. It is a consequence of the

litigation in case no. 5717/19. I am not satisfied that the evidence establishes that QuickTrade or van Pletsen have been putting into general circulation that VTC has misappropriated trust money.

[100] VTC did, however, put up evidence establishing that QuickTrade had put it about by means of SMSs sent to at least some of the referred clients that VTC was charging clients who wished to close their accounts a fee of R500. This was having a demonstrably unsettling effect on VTC's customer relationships, and the allegation was false.

[101] QuickTrade has sought to explain itself by asserting in answer that the 'information was obtained from clients'. In my judgment the baldly stated answer is an insufficient explanation. It is unsupported by any corroborative detail. One would expect QuickTrade in the circumstances to be able to identify the alleged sources of the information with particularity, and to do so in its answering affidavits. It cannot escape notice that the false information was spread by SMS more or less contemporaneously with the intimation by Mr van Pletsen in the course of his aforementioned WhatsApp conversation with Mr Ndlovu that he intended to wage a campaign against VTC by email and SMSs to the referred customers, at the end of which, he believed, no client would be prepared to remain with VTC.

[102] In my judgment VTC has succeeded in this respect in proving an instance of unlawful competition by QuickTrade and, in the light of van Pletsen's intimations to Ndlovu, a reasonable apprehension that QuickTrade might persist in its unlawful conduct by disseminating falsehoods about VTC's business practices. It is entitled to interdictory relief to prevent any continuance of the unlawful conduct.

[103] Counsel for QuickTrade and Mr van Pletsen argued that as only the former, and not the latter, was in competition with VTC it would be inappropriate for any interdictory relief based on the delict of unlawful competition to be granted against van Pletsen. I do not agree. It is quite clear on the evidence that van Pletsen is the driving mind behind QuickTrade's campaign against VTC and its principal agent in the execution thereof. He is as answerable as his principal is for the consequences of his unlawful conduct on its behalf and is just as susceptible as the company to a prohibitory interdict to stop its continuance.

[104] Costs will follow the result in respect of the relief granted in respect of Part A of the notice of motion. I think that the employment of two counsel was reasonable in the circumstances, and QuickTrade's counsel did not argue to the contrary. For the assistance of the taxing master I would indicate that in my estimation about 40% of the time spent in the hearing of argument was taken up in respect of the relief sought in terms of Part A of the notice of motion.

Order

[105] The following order is made:

1. In respect of the relief sought in terms of Part A of the notice of motion in case no. 7263/19:

   (a) Leave is granted in terms of rule 6(12) dispensing with the forms, service and time periods provided in the rules of court and for the application to be heard as a matter of urgency.

   (b) The first and second respondents are hereby interdicted from competing unlawfully with the applicant by way of publishing any false information about the applicant's business practices.

   (c) The first and second respondents shall be liable jointly and severally, the one paying, the other being absolved, to pay the applicant's costs of suit including the fees of two counsel.

2. In respect of the relief sought in terms of Part B of the notice of motion in case no. 7263/19:

   (a) Leave is granted in terms of rule 6(12) dispensing with the forms, service and time periods provided in the rules of court and for the application to be heard as a matter of urgency.

   (b) The application is refused.

   (c) Costs shall stand over for later determination on the basis explained in paragraph [87] of the judgment.

3. In respect of the applications by Velocity Trade Financial Services (Pty) Ltd and Waheed Safa, respectively, for leave to intervene in case no. 5717/19:

   (a) The applications are refused.

(b) There shall be no orders as to costs.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Counsel for Velocity Trade Capital (Pty) Ltd:	**Mark Seale SC** **Megan de Wet**
Attorneys for Velocity Trade Capital (Pty) Ltd:	**Hayes Incorporated** **Cape Town**
Counsel for QuickTrade (Pty) Ltd and Hardus Storm van Pletsen:	**George Kairinos SC** **Blane Hansen**
Attorneys for QuickTrade (Pty) Ltd and Hardus Storm van Pletsen:	**W.P. Steyn Attorney** **Johannesburg** **De Klerk Van Gend** **Cape Town**
Counsel for the applicants for leave to intervene:	**Naudé de Wet**
Attorneys for the applicants for leave to intervene:	**Roelf van der Merwe Robertson** **Durbanville** **Hayes Incorporated** **Cape Town**