

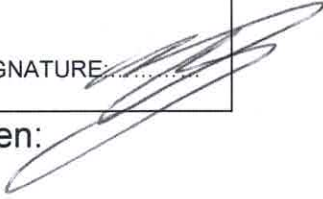
REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

CASE NO: 5909/2020

(1) REPORTABLE: YES/NO
 (2) OF INTEREST TO THE JUDGES: YES/NO
 (3) REVISED.

DATE: 02/10/2020

SIGNATURE: 

In the matter between:

LIMPOPO PROVINCIAL COUNCIL

APPLICANT

and

REMBULUWANI DOLBY GADABENI

RESPONDENT

 JUDGMENT

NAUDE AJ

[1] This is an application for leave to appeal against the whole judgment and order of 18 September 2020 by the Respondent, in

terms of which an interim interdict was granted against the Respondent. The grounds upon which the application for leave to appeal is premised are set out in the written notice of application for leave to appeal.

- [2] In this matter, before determining the necessity, having regard to the grounds of appeal, the first question for determination is the appealability of the order made. It is not in dispute that the order was made “as an interim measure...”, “pending a disciplinary enquiry” concerning the Respondent’s conduct, and the final determination of the application under Part B under case number 5909/2020. Both the Applicant and the Respondent’s Counsel argued that the judgment and order in its form is appealable, although Mr. Moolman on behalf of the Applicant argued that there are no grounds for appeal and another court would not come to a different conclusion and/or finding. I do not agree with the parties’ counsel that the order in its interim form is appealable.
- [3] The law with regard to the appealability of interim or interlocutory orders has been developed over time by our courts and the law regarding the appealability of interim or interlocutory orders are trite. In **ATKIN v**

BOTES 2011 (6) SA 231 (SCA) the Supreme Court of Appeal held as follows at **234B to C**:

*“In **Metlika Trading Ltd and Others v Commissioner, South African Revenue Service 2005 (3) SA 1 (SCA) (2004) JTLR 73; [2004] 4 ALL SA 410** this court held that an interim interdict is appealable if it is final in effect and not susceptible to alteration by the court of first instance. The decision also emphasized that in determining whether an order is final in effect, it is important to bear in mind that ‘not merely the form of the order must be considered but also, and predominantly, its effect. The crucial question in the appeal is therefore whether the granting of the interim interdict was final in effect.’”*

- [4] Corbett JA in **SOUTH CAPE CORP. (PTY) LTD v ENGINEERING MANAGEMENT SERVICES (PTY) LTD 1977 (3) SA 543 (A)** said the following at **549G** in respect of what would constitute an interlocutory order:

“In a wide and general sense the term ‘interlocutory’ refers to all orders pronounced by the Court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation. But orders of this kind are divided into two classes: (i) those which have a final and

definitive effect on the main action; and (ii) those, known as ‘simple (or purely) interlocutory orders’ or ‘interlocutory orders proper which do not.’

- [5] In light of these key principles, in the case of **JACOBS AND OTHERS v BAUMANN NO AND OTHERS 2009 (5) SA 432 (SCA)** at par 9 thereof the court went even further and held that:

“a court determining whether or not an order is final considers not only its form but also, and predominantly, its effect. An order may not possess all three attributes, but will nonetheless be appealable if it has a final jurisdictional effect.”

- [6] Secondly in determining whether the order that is sought to be appealed against is final in effect, the Constitutional Court in **INTERNATIONAL TRADE ADMINISTRATION COMMISSION v SCAW SOUTH AFRICA (PTY) LTD 2012 (4) SA 618 (CC)** held the following at 639F to 640A:-

“The ‘policy considerations’ that underlie these principles are self-evident. Courts are loath to encourage wasteful use of judicial resources and of legal costs by allowing appeals against interim orders that have no final effect and that are susceptible to reconsideration by a court a quo when final relief is determined. Also allowing appeals at an

interlocutory stage would lead to piecemeal adjudication and delay the final determination of disputes.”

The Court went further and said the following at **640F to 641C**:

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

- [7] The order of 18 September 2020 is susceptible to reconsideration on the same facts by the court when final relief is determined.

- [8] The Constitutional Court in **TSHWANE CITY v AFRIFORUM AND ANOTHER 2016 (6) SA 279 (CC)** dealt with the appealability of interim orders and expressed the position as follows at **294B to C**:-

“Unlike before appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application. All this is now subsumed under the constitutional interests of justice standard. The overarching role of interests of justice considerations has relativised the final effect of the order or the disposition of the substantial portion of what is pending before the review court, in determining appealability.”

- [9] The Constitutional Court also referred with approval to the stance taken in the matter of **NATIONAL TREASURY AND OTHERS v OPPOSITION TO URBAN TOLLING ALLIANCE AND OTHERS 2012 (6) SA 223 (CC)** as follows at **231D**:-

“This court has granted leave to appeal in relation to interim orders before. It has made clear that the operative standard is the ‘interest of justice’. To that end, it must have regard to and weigh carefully all germane circumstances. Whether an interim order has a final effect or disposes of a substantial portion of the relief sought in a pending review is a relative and important consideration... It is just as important to

assess whether the temporary restraining order has an immediate effect, including whether the harm that flows from it, is serious, immediate, ongoing and irreparable.”

[10] Although the interest of justice standard becomes the operative standard, it is clear that the question as to whether the order is final in effect or disposes of a substantial portion of the dispute continues to remain relevant. The Constitutional Court in **TSHWANE CITY v AFRIFORUM AND ANOTHER** *supra* and **NATIONAL TREASURY AND OTHERS v OPPOSITION TO URBAN TOLLING ALLIANCE AND OTHERS** *supra*, in alluding to the interest of justice standard, made specific reference to the question of whether the order has an immediate and substantial effect including whether the harm that flows from it is serious, immediate, ongoing and irreparable.

[11] In applying this standard it is in my view clear that the order of the 18th of September 2020 is firstly interim in nature in that it is not final in effect and is susceptible to variation either by the Court that will hear Part B of the application, or by any other Court prior to the adjudication of Part B of the application, upon good cause shown.

[12] Neither the counsel for the Applicant, nor the Counsel for the Respondent satisfactorily addressed this Court on the interest of justice's standard, nor the question of whether the order has an immediate and substantial effect including whether the harm that flows from it is serious, immediate, ongoing or irreparable. As to whether the order results in irreparable harm, this court is of the view in granting interim relief that there was a well-grounded apprehension of irreparable harm if relief was not granted. Counsel for the Respondent argued that the interim order will contribute to the Respondent's financial demise. In weighing up the balance of convenience in respect of the harm the Respondent will suffer if the order is granted, versus the harm the public and interest of justice will suffer if the interim order is not granted, especially in light thereof that the Respondent shows no remorse for his unprofessional conduct and in fact does it seem he will continue with his unprofessional conduct, in my view justifies the interim order granted. I have not been convinced that the interest of justice standard comes to the assistance of the Respondent as there is with respect nothing in substance advanced as to why the granting of the interim relief will result in irreparable harm to the Respondent. On this aspect it must be emphasized that the nature of the interim relief granted is simply to

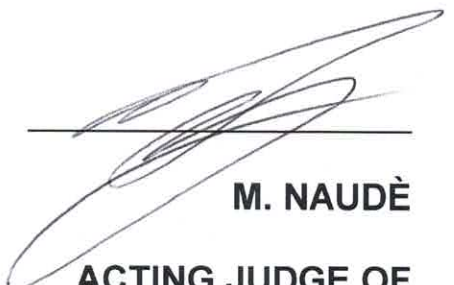
protect the public, and the judicial process as per paragraph 19 of my judgment.

[13] Accordingly, in my view, the order of 18 September 2020 is not appealable. Further, even if this conclusion is incorrect, then when I have regard to the grounds of appeal advanced by the Respondent, they do not convince me that the appeal would have a reasonable prospect of success and would the application for leave to appeal be dismissed on this basis as well.

[14] In the circumstances, I therefore make the following order:

ORDER:

1. The Application for leave to appeal is dismissed.
2. The Respondent to pay the costs of this application.



M. NAUDÉ
ACTING JUDGE OF
THE HIGH COURT

APPEARANCES:

HEARD ON: 30 SEPTEMBER 2020

JUDGMENT DELIVERED ON: 2 OCTOBER 2020

For the Applicant/Respondent in

the application for leave to Appeal: Mr. Moolman

Instructed by: Pratt Luyt & De Lange Attorneys.

For the Respondent/Applicant in

the application for leave to Appeal: Adv. Maluleke

Instructed by: M & M Maiwashe Attorneys