

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

24/3/17
CASE NO: 5223/2017

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
	
SIGNATURE	24/03/17 DATE

SHOAYB JOOSUB

APPLICANT

VS

EXECUTIVE OFFICER OF THE FINANCIAL SERVICES BOARD -The Registrar

FIRST RESPONDENT

LARA DU PLESSIS: INSPECTOR OF THE FINANCIAL INSTITUTIONS

SECOND RESPONDENT

S HOOSEN: INSPECTOR OF THE FINANCIAL INSTITUTIONS

THIRD RESPONDENT

G VAN DEVENTER: INSPECTOR OF THE FINANCIAL INSTITUTIONS

FOURTH RESPONDENT

J MATHYE: INSPECTOR OF THE FINANCIAL INSTITUTIONS

FIFTH RESPONDENT

W NKADIMENG: INSPECTOR OF THE FINANCIAL INSTITUTIONS

SIXTH RESPONDENT

M MAGAVHA: INSPECTOR OF THE FINANCIAL INSTITUTIONS

SEVENTH RESPONDENT

THE MINISTER OF DEFENCE

EIGHTH RESPONDENT

JUDGMENT

KUBUSHI J

INTRODUCTION

[1] This is an opposed urgent application. The urgency is not in issue. The applicant (Mr Joosub) seeks an order for an interim interdictory relief. The application is presented in two parts, Part A and Part B.

[2] In Part A, Mr Joosub seeks to interdict the first to seventh respondents (the respondents) from exercising their investigative statutory powers. In the first place, an order is sought to postpone the examination of Mr Joosub pending the final determination (including any appeals) of the relief sought in Part B. Secondly, an order is sought interdicting the respondents from taking any steps or exercising any powers in terms of the Inspection of Financial Institutions Act 80 of 1998 (the Inspection Act) in relation to Mr Joosub, pending the final determination (including any appeals) of the relief sought in Part B of this application.

[3] Part B is an application for determination at a later date. In this application, Mr Joosub seeks an order compelling disclosure of the complaints allegedly forming the basis of the inspection as well as other relevant documents. Mr Joosub also seeks an order in terms of the provisions of the Promotion of Administrative Justice Act 3 of 2000 to review and set aside:

- 3.1 The Registrar's decision in terms of sections 2 and 3 of the Inspection Act to appoint the inspectors and initiate the inspection into the affairs of Anglorand Islamic Investments (Pty) Ltd and its associated institutions; and
- 3.2 The Registrar's decision in terms of section 9 of the Inspection Act to refuse to disclose the complaints to Mr Joosub.

[4] Mr Joosub is represented by Adv R Bhana, SC assisted by junior counsel Adv F Hobden. For all the respondents appeared Adv L Sisilana. The eighth respondent is not participating. No relief is actually sought against the eighth respondent who it is said is cited only in respect of his interest in the challenge to the constitutionality of section 8 of the Inspection Act.

[5] Even though the application was on the urgent roll the parties provided me with heads of argument, and I am thankful.

[6] At the end of his address in reply, Mr Joosub's counsel sought to hand up his notes in rebuttal of the respondent's heads of argument. An objection was taken by the respondents' counsel on the basis that the respondents were not privy to the note at the time it was sought to be handed in. This being an urgent court, I am of the view that the note might enable me to speedily decide the matter. I as a result ruled that I will accept the note subject to the respondents' right to respond thereto, if necessary. I gave the respondents time until Friday 3 March 2017 to furnish an

answer (if any) to the 'Applicant's Note in Rebuttal' to the respondents' heads of argument. The respondents furnished me with their answer within the stipulated time.

FACTUAL MATRIX

[7] Mr Joosub, is a director of Anglorand Islamic Investments (Pty) Ltd. During October and November 2016, Mr Joosub received three summonses from the Financial Services Board requiring him, in terms of section 4 (1) (a) (i) of the Inspection Act, to present himself at an examination and to produce certain documents.

[8] In order to prepare for the examination, Mr Joosub requested copies of the complaints that allegedly formed the basis of the inspection. The respondents refused to provide Mr Joosub with the said complaints claiming that the complaints are protected in terms of section 8 of the Inspection Act.

[9] Mr Joosub seeks the postponement of the examination in the interim pending the hearing of the review application. In the review application Mr Joosub seeks to compel the respondents to furnish him with the said complaints and other documents before the examination is held.

[10] The submission by Mr Joosub is that having regard to the inherent probabilities, it is clear that on the current facts before this court, his case meets the requirements for an interim interdict postponing his examination.

[11] The respondents on the other hand, contend that no case for interim relief has been made out by Mr Joosub, who bears the *onus* in that regard.

REQUIREMENTS FOR INTERIM INTERDICT

[12] The requirements for the granting of interim interdict are trite. The test requires Mr Joosub to establish the following jurisdictional facts: (i) a *prima facie* right though open to some doubt; (ii) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; (iii) the balance of convenience must favour the grant of the interim relief; and (iv) there must be no other satisfactory remedy.¹

Prima facie Right

[13] The *prima facie* right that an applicant must establish is said not to be merely the right to approach the court in order to review an administrative decision. The right must be viewed in the light of a right to which, if not protected by an interdict,

¹ See *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton* 1973 (3) SA 685 (A) at 691C – G and *Knox D'Arcy Ltd v Jamieson* 1996 (4) SA 348 (A) at 372E – G.

irreparable harm would ensue. The court in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) para 50, states the law for interim interdicts pending reviews as follows:

“Under the *Setlogelo* test [1914 AD 221], the *prima facie* right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. It is a right to which, if not protected by an interdict, irreparable harm would ensue. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicant should have demonstrated a *prima facie* right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decision did not require any preservation *pendente lite*.”

[14] It is imperative for Mr Joosub, in order to be granted the interim relief he seeks in this application, to establish in his papers a *prima facie* right the effect of which will have an irreparable harm should the interdict not be granted. Due to the interim nature of the application, and the circumstances pertaining thereto, I find it not necessary to resolve the issue of whether Mr Joosub has established a *prima facie* right or not. Having read the papers and listened to argument by counsel, it is evident that most of the arguments traverse issues which by right are meant to be argued before, and determined by the review court. Truth be told, it is not necessary that I at this stage of the application determine the cogency of the review grounds, for to do so, will be to usurp the pending function of the review court and thereby

anticipate its decision.² Mr Joosub's counsel suggest that in order to avoid touching on those issues in my judgment, it would be prudent if I decide this application only on issues of prospects of success and *prima facie* right to a court exercising its powers in terms of section 8 of the Inspection Act. I do not agree. These, in my view, are still issues that go to the merits of the review application and should best be left for determination by the review court. In order for me to avoid traversing that terrain it is my view that this application can be decided only on the other requirements for interim relief, namely, whether failure to grant the interim relief will result in irreparable and imminent harm to Mr Joosub's right which the interdict must protect; and whether the balance of convenience favour the grant of the interdict; and that Mr Joosub has no other remedy. To follow this approach, I have to assume, without deciding, that Mr Joosub has established a *prima facie* right though open to some doubt.

Irreparable Harm

[15] Mr Joosub has to establish a reasonable apprehension of irreparable harm. He must also establish that absent the interim relief, he will suffer irreparable harm which the court ought to prevent by granting interim relief now.

[16] In his founding papers, and as set out in his heads of argument, Mr Joosub relies on his right to fair administrative justice in terms of s 33 of the Constitution as a right that will be irreparably harmed should the interdict not be granted. According to

² See *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) para 31.

him, if the examination is not postponed, he will be forced to give information and answer enquiries without access to any underlying documentation or complaints. His right to fair administrative justice will accordingly be seriously infringed and he will as a result suffer irreparable harm. Mr Joosub goes further to set out in detail what he refers as consequences of his attendance at the examination without access to the complaints. His main gripe, as I understand it, is that the information obtained by the inspectors and inferences drawn during the examination will inform the Inspector's Report to the Registrar. This report will ultimately determine whether any regulatory or criminal action will be taken against him and may be used as evidence in any future proceedings. This is the irreparable and imminent harm Mr Joosub will suffer, so it is argued.

[17] I am inclined to agree with the argument by the respondents' counsel that the imminent harm Mr Joosub refers to in his papers is not irreparable. It is indeed so that what Mr Joosub refers to as irreparable harm is only but consequences of what will eventuate should the examination be carried out. There is no doubt that the Inspectors' Report and any regulatory or criminal action that may be recommended in the report may harm Mr Joosub's right that he wants protected. However, such report and any regulatory or criminal action recommended therein stands to be challenged if there are grounds to do so. In this sense, it cannot be said that the harm, if any, is irreparable. Similarly, it cannot be said that Mr Joosub has no other remedy should the interdict be granted and the examination continued with.

[18] Mr Joosub's counsel in the 'Applicant's Note of Rebuttal', wants to rectify his argument by stating that Mr Joosub relies on a right not to be subjected to unlawful examination. But, this is not what Mr Joosub pleaded in his founding papers. As stated in paragraph [16] of this judgment, Mr Joosub in his founding affidavit relies on his right to fair administrative justice and now wants to rely on the legality of the inspection, that is, a right to be subjected to a lawful examination in terms of the Inspection Act. This is unacceptable.

[19] It is an established principle that an applicant in motion proceedings must stand and fall on her or his founding papers and may not introduce new issues and arguments in reply. It is also trite law that in motion proceedings the affidavits serve not only to place evidence before the court, but also to define the issues between the parties. An applicant must also raise the issues upon which she or he would seek to rely in the founding affidavit. She or he must do so by defining the relevant issues and by setting out the evidence upon which she or he relies to discharge the *onus* of proof resting on her or him in respect thereof.³

[20] Mr Joosub contends in his heads of argument that the requirements for the granting of interim interdict are traded-off against each other. On that score he argues that the stronger Mr Joosub's *prima facie* right, the less the need to rely on prejudice to himself. Counsel, in this regard, relies on the judgment in *Erikson Motors Ltd v Protea Motors* 1973 (3) SA 85 (A) at 691F.

³ See *Singh and Another v Mount Edgecombe Country Club Estate Management Association (RF) NPC and Others* 2016 (5) SA 134 (KZD) para 43 and the cases referred therein.

[21] This, however, is not the law. The authorities are very clear when it comes to interim interdict pending a review. It is trite that a strong *prima facie* case, absent irreparable harm does not assist an applicant for an interim relief. Interim interdicts pending a review are said to prevent irreparable harm *pendente lite*. The Constitutional court in the *National Treasury*-judgment above, has pronounced as much.

[22] In my view, Mr Joosub has failed to establish the requirement for the apprehension of irreparable harm if the interdict is granted. The harm that Mr Joosub will suffer is only consequential and does not require protection. In the same breath, Mr Joosub has in this regard also failed to establish that he has no other remedy available to him should the examination not be postponed.

Balance of Convenience

[23] In satisfying myself that the balance of convenience favours the granting of an interim interdict, I must first weigh the harm to be endured by Mr Joosub, if interim relief is not granted, as against the harm the respondents will bear, if the interdict is granted. All relevant factors must be assessed carefully in order to decide where the balance of convenience rests.⁴

⁴ See *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* above para 55.

[24] In terms of section 3 of the Inspection Act, if the registrar has reason to believe that a person, partnership, company or trust which is not registered or approved as a financial institution, is carrying on the business of a financial institution, he or she may instruct an inspector to inspect the affairs, or any part of the affairs, of such a person, partnership, company or trust. Even though the Inspection Act does not clearly set out the purpose for which the affairs of a financial institution may be inspected it is my view that such an inspection is in the interest of actual or potential investors in the financial institution, or investors who have entrusted or may entrust the management of their investments to it.⁵

[25] I have already made a finding that the imminent harm that Mr Joosub talks about is only consequential. Therefore, on the basis of my view as expressed in paragraph [24] of this judgment, I have to conclude that the balance of convenience in this instance, favours the respondents.

CONCLUSION

[26] In my opinion Mr Joosub has not made out a case for interim interdict and the application ought to be dismissed.

⁵ See Executive Officer, Financial Services Board v Dynamic Wealth Ltd and Others 2012 (1) SA 453 (SCA) para 4.

COSTS

[27] The costs of this application should follow the successful parties, namely, the respondents.

ORDER

[28] The application is dismissed with costs.


E.M. KUBUSHI
JUDGE OF THE HIGH COURT

Counsel for Applicant:

Adv A Rafik Bhana, SC

Adv Frances Hobden

Instructed by:

Knowles Husain Lindsay Inc

Counsel for Respondents:

Adv L Sisilana

Instructed by:

Jay Mothobi Incorporated (For first to seventh respondents)

State Attorney Pretoria (For eighth respondent)

Date heard:

01 March 2017

Date of judgment:

24/03/2017