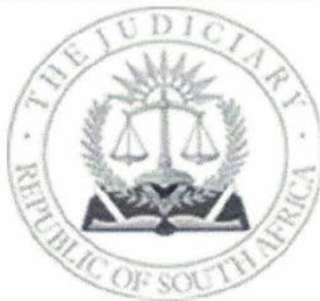


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 131956/2023

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
<u>28/8/2024</u>	
DATE	SIGNATURE

In the matter between:

INNSCOR AFRICA LIMITED

1st Applicant

ZINONA KOUDOUNARIS

2nd Applicant

and

BENSON RUTENDO MATINYARARE

1st Respondent

FRONTLINE STRAT MARKETING CONSULTANCY

2nd Respondent

JUDGMENT

MAKUME, J:

INTRODUCTION

- [1] This matter came before me during the Urgent court motion week of the 20 August 2024. The applicants seeks the following urgent relief:

- 1.1 That the Applicants' non-compliance with the prescribed form, manner of service and time periods is condoned in accordance with the provisions of Rule 6(12) of the Uniform Rules of Court and that the matter be heard as one of urgency.
- 1.2 Relief in terms of Section 18 (1) and (3) of the Superior Court Act 10 of 2013 to the effect that to the extent that the first and second Respondents application for leave to appeal the order made by his Lordship Malindi J on the 16th July 2024 suspends that order that it be directed that the operation and execution of that order is not suspended pending the decision of the application for leave to appeal and any appeal or further application for leave to appeal.
- 1.3 That the orders granted by this court on 9 January 2024, 20 March 2024 and 16 July 2024 are put into operation and be complied with.

FACTUAL BACKGROUND

- [2] On the 9th January 2024 Siwendu J made an order forbidding the first Respondent from publishing any defamatory statements contained in articles and video. That order is common cause was served on the first Respondent.
- [3] Despite that order the first Respondent persisted in publishing and disseminating on social media defamatory statements about the Applicants. This resulted in the second interdict before Wanless J who on the 20 March 2024 made an order "by agreement" in which the first Respondent undertook not to publish and or disseminate directly or indirectly any written articles recordings and videos related to the Applicants and the quality of the first Applicants food until the finalization of the Rule 6(12)(c) reconsideration proceedings.

- [4] In violation of the order by Wanless J between the 8th and 9th June 2024 the first Respondent published articles which related to the Applicants and the quality of the first Applicants' food.
- [5] As a result of this continuing blatant disregard of Court orders the Applicants brought contempt proceedings against the first Respondent before Malindi J who on the 16th July 2024 made the following order:
- “5.1 That the publication by the 1st Respondent of the articles and videos listed in the notice of motion and identified in the founding affidavit were in contempt of the orders by Siwendu J and Wanless J.
- 5.2 That the first Respondent must remove the contemptuous publication from the social media.
- 5.3 The first Respondent be committed to a period of 3 months which committal the Court suspended on condition that the first Respondent does not disseminate directly or indirectly, false and defamatory allegations pertaining to the Applicants or in any manner breach the orders by Judges Siwendu and Wanless.
- [6] Shortly after the order by Malindi J the first Respondent went on a tirade and published videos on his social media in defiance of the orders by Siwendu J Wanless J and Malindi J.
- [7] On the 17th July 2024 the first Respondent filed a notice of application for leave to appeal the judgment and order by Malindi J which application was once more followed by a video clip on his x handle. The application for leave to appeal has not yet been dealt with it is still pending to be heard by Malindi J.

URGENCY

- [8] This matter is clearly urgent it involves a flagrant defiance of 3 Court orders even though the second order was by consent. Secondly, in his second video

the first Respondent declared that he will not stop publishing information in violation of the Court orders if in his opinion the information is factual and has some truth in it.

[9] The first Applicants is a company registered in Zimbabwe. The Innscor Group Manufactures consumer staple and durable goods for the mass market in Zimbabwe. Its business involves the following:

9.1 Light manufacturing distribution and retail of fast moving and durable consumer goods in Zimbabwe and internationally.

9.2 Production of several Zimbabwe iconic brands in the consumer staple product space.

9.3 Milling of flour and maize.

9.4 Production processing and marketing of pork and related food products.

9.5 The production of chicken table eggs and day-old chickens.

9.6 Retail of stock feeds in day old-chicken.

[10] There is a clear case of commercial urgency. No amount of damages will compensate for the long-term reputational damage that the first Respondent is inflicting on the Applicants.

APPLICATION FOR LEAVE TO EXECUTE IN TERMS OF SECTION 18(1) (3)

[11] The Applicants contend that exceptional circumstances exist as contemplated in Section 18 (1) and 18(3) of the Superior Courts Act. It contains that it will suffer irreparable harm should the operation and execution of the order by Malindi J remain suspended pending the application for leave to appeal. Firstly the Applicant maintains that the respondent will not suffer irreparable harm

should the order by Malindi J be made operational and executable pending appeal or any application for leave to appeal.

- [12] The principles applicable to an application in terms of section 18 (3) are as follows:

12.1 first whether exceptional circumstances exist.

12.2 proof on a balance of probabilities by the applicant of:

12.2.1 the presence of irreparable harm to the applicant who wants to put into operation and execute the order

12.2.2 the absence of irreparable harm of the respondent who seeks leave to appeal.

- [13] The Respondents' defense to the application is that according to him firstly the Applicants have not proved exceptional circumstances. Secondly he maintains that the articles are the truth of what is happening in respect of the food processed by the Applicant sold to Zimbabweans. Thirdly the Respondent says he will suffer irreparable harm if he is arrested and incarcerated.

- [14] In **Tyte Security Services CC vs Western Cape Provincial Government and Others (Case number 479/2024 [2024] ZASCA 88 (7 June 2024))** the SCA revisited the existing authorities concerning application for leave to execute at paragraph 9 and 10 the court said the following:

“[9] This Court has examined the requirements for the implementation of an execution order pending an appeal in **University of the Free State v Afriforum 2018(3) SA 428 (SCA)**; **Ntlemeza vs Helen Suzman Foundation 2017 (5) SA 402 (SCA)**; **Premier of Gauteng vs Democratic Alliance and Other [2021] ALL SA 60 (SCA)**; **Knoop vs Gupta 2021 (3) SA 135 (SCA)** and most recently in **Zuma vs Downer**

and Another 2024 (2) SA 356 (SCA). Relying in part on some of the statements made in those judgements, in particular *AfriForum* and *Knoop*, Counsel for Tyte argued that it was for an Applicant for an execution order (in the position of Royal) to establish three separate distinct and self-standing requirements namely: First exceptional circumstances (the first), second that it will suffer irreparable harm if the order is not made (the second) and third the party against whom the order is to be made (in this case Tyte) will not suffer irreparable harm if the order is made (the third)."

- [15] In *Tyte* (supra) the Court whilst observing that each case must be judged on its own facts emphasised that the existence of special circumstances is an absolute prerequisite for the relief in Section 18(3).

EXCEPTIONAL CIRCUMSTANCES

- [16] The first stage of the enquiry in Section 18 (3) is whether exceptional circumstance are present. That inquiry depends on the peculiar circumstances of each case. His Lordship Thring J in *Tyte* (supra) concluded that "what is ordinarily contemplated by the word "exceptional circumstances" is something out of the ordinary and of an unusual nature, something which is excepted in the sense that the general rule does not apply to it, something uncommon rare or different.

- [17] In this matter the fact that the Respondents keeps on defying Court order after Court order is unheard of and is in my view exceptional. Even the threat of incarceration does not seem to have deterred the Respondent who is bent on doing as he wishes in flagrant disregard for the law.

IRREPARABLE HARM

- [18] The SCA in *Tyte* in dealing with the requirements of irreparable harm observed that:

“What constitutes irreparable harm is always dependent upon the factual situation in which the dispute arises, and upon the legal principles that govern the right and obligations of the parties in the context of the dispute.”

- [19] Sutherland J as he then was in **Incubeta Holdings (Pty) Ltd v Ellis and Another 2014 (3) SA 189 GJ** said the following:

“24. The second leg of the Section 18 test in my view does introduce a novel dimensions. On the South Cape test No.4 (cited supra) an even handed balance is aimed for best expressed as a balance of convenience or of hardship. In blunt terms it is asked who will be worse off if the order is put into operation or stayed. But Section 18(3) seems to require a different approach. The proper meaning of that subsection is that if the loser who seeks leave to appeal will suffer irreparable harm the order must remain stayed even if the stay will cause the victor irreparable harm too. In addition if the loser will not suffer irreparable harm the victim must nevertheless show irreparable harm to itself.”

- [20] In this matter the Applicant is a listed company with shareholders, suppliers and finances not only in Zimbabwe but beyond that including South Africa. The ongoing publication of negative material about the Applicants products in violation of Court order will not be capable of quantification if the Respondents are not stopped.

- [21] The media and method used by the Respondents is accessible worldwide on social media which has become a powerful and effective tool of quick dissemination of information. The interdict granted to the Applicant will be rendered meaningless and the Applicant will continue to suffer harm which is irreparable which may include loss of clients and reputation in the commercial world. Food is a commodity of necessity the Applicant is in that business and will suffer irreparable harm if the Respondent is not stopped in his tracks.

WILL THE RESPONDENT SUFFER IRREPARABLE HARM

[22] The Respondents says that he will suffer irreparable harm should he be incarcerated and will lose his liberty and freedom. This argument in my view is flawed the Respondent will only be arrested and held captive if he does not stop publishing defamatory statements about the Applicants. The term of imprisonment will remain suspended for as long as he obeys the court order.

[23] The SCA in Tyte (supra) explained the approach as follows:

“although it has been postulated that the second and third are distinct and discrete inquiries they are perhaps more accurately to be understood as being two sides of the same coin. The same facts and circumstances which by that stage ought largely to be either common cause or undisputed will inform both enquiries. The logical corollary of an Applicant suffering irreparable harm will invariably but not always be that the other party has not.”

[24] The Respondent in his heads of argument has gone at great length and deals with grounds of appeal and very little about the Section 18(1) and (3) requirements and the test to be applied. In the final analysis the Respondent's attempt to prove that prospects of success in the appeal are excellent, in my view prospects of success in this matter are slim or nonexistent and need not even be considered.

[25] In the results and for reasons set out above the Application is granted and I hereby make an order as set out in the draft order marked X attached herein.

Dated at Johannesburg on this 28th day of August 2024


M A MAKUME
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Appearances

Date of hearing : 20 August 2024

Date of Judgement : 28 August 2024

For Applicant : Adv Bothma Sc
Adv S Mahlangu

Instructed by : MV Ratshimbilani Attorneys

For Respondents : Adv Machaba

Instructed by : MJ Maponya Attorneys

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

Case No: 2023 - 131956

BEFORE THE HONOURABLE JUSTICE MAKUME J

Date: 20 August 2024

In the matter between:

INNSCOR AFRICA LIMITED

First Applicant

ZINONA KOUDOUNARIS

Second Applicant

and

BENSON RUTENDO MATINYARARE

First Respondent

**FRONTLINE STRAT MARKETING
CONSULTANCY**

Second Respondent



DRAFT ORDER

Having heard counsel and having considered the matter, it is ordered that:

1. The order of this Court by His Lordship Mr Justice Malindi on 16 July 2024 is of full force and effect pending any appeal to be brought by the first respondent and shall not be suspended in terms of section 18(1) of the Superior Courts Act 10 of 2013 pending such appeal or notice thereof.

2. The first respondent is liable to pay the applicants the costs of this application at scale C, including the costs of two counsel.

BY ORDER

THE REGISTRAR

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