

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2022-018293

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

20.01.2025

In the matter between:

SORIA MARIA PESTANA MAIN

First Applicant

SONIA MARISSA PESTANA BRANCO AUGUSTO

Second Applicant

and

CARLA CRISTINA PESTANA BRANCO

First Respondent

CARLA CRISTINA PESTANA BRANCO N.O.

Second Respondent

ANDRIES VAN JAARVELD N.O.

Third Respondent

CELINA DE JESUS BRANCO AUGUSTO N.O.

Fourth Respondent

**THE MASTER OF THE HIGH COURT: FREE STATE
DIVISION**

Fifth Respondent

JORGE MANUEL PESTANA BRANCO AUGUSTO

Sixth Respondent

QUILOMBO [PTY] LIMITED

Sevent Respondent

Delivered: 20 January 2025 – This judgment is handed down electronically by circulation to the parties' representatives via email, uploading it to CaseLines and releasing it to SAFLII.

ORDER

1. The interim interdict granted against the first respondent in paragraphs 3 and 4 of the court order of 31 August 2022 under the abovementioned case number is discharged.
 2. The applicants shall jointly and severally pay the first respondent's costs of this application, including costs of counsel on scale B.
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JUDGMENT

BESTER AJ:

Introduction

[1] This matter involves yet another dispute amongst children over the spoils of their late father's toils. The two applicants and the first respondent are the daughters of the late Armando Januario Branco Augusto. Upon his passing in 2007, the Diplomat Hotel ("the Hotel"), which he owned personally, was placed in trust for the benefit of his family.

[2] At the commencement of this litigation, the first respondent was a trustee of that trust, the Masakhane Trust, and cited in that capacity as the second respondent, together with the other trustees as third and fourth respondents. The fourth respondent is the late Mr Augusto's widow.

[3] The applicants obtained an interdict against the first respondent prohibiting her from interfering with the business of the Hotel, pending the determination of the application for her removal as trustee and obtaining a final interdict against the first respondent in terms similar to the interim order.

[4] The first respondent launched this application to have the interim interdict set aside on several grounds.

Background

[5] In August 2022, the applicants brought an urgent application under this case number in which they sought the following final relief:

- “2. Ordering the First Respondent to be forthwith removed as trustee of the Masakhane Trust, a trust duly registered with the Master of the High Court with Master’s Reference: IT523/06 (“the Trust”);
3. Interdicting and restraining the First Respondent from conducting, appropriating and interfering with the business of the Trust, being the hotel known as the Diplomat Hotel (“the hotel”) situated at the corner of Klein and Bree Street, Johannesburg;
4. The aforementioned interdict includes but is not limited to the First Respondent appropriating the hotel’s brand, goodwill (inclusive but not limited to existing clientele), employees, and/or assets;”

[6] At the hearing of the matter, the applicants changed their approach to the application from the Bar and moved for an interim interdict pending the hearing of the application for final relief.

[7] On 31 August 2022, the applicants obtained a court order in the following terms:

- “1. Save for what is set out below, the application under the above case number is postponed to a date to be determined by the Registrar.
2. The Applicants’ non-compliance with the forms and service provided for in the Uniform Rules of Court is hereby condoned, and the application is enrolled and heard as an urgent application under Rule 6(12)(a).
3. Pending the final determination of the application under the above case number on a date to be determined by the Registrar, the first respondent is:
 - 3.1. prohibited from acting contrary to her fiduciary duties as a trustee of the Masakhane Trust, a trust duly registered with the Master of the High Court with Master’s Reference: IT23/6;

- 3.2. interdicted and restrained from conducting, appropriating or interfering, directly or indirectly and whether personally or through a separate juristic person or a third party, with the business known as the Diplomat Hotel (“the Hotel”), situated at the corner of Klein and Bree Street, Johannesburg.
4. The aforementioned interim interdict includes but is not limited to the first respondent appropriating the Hotel’s brand, goodwill (inclusive but not limited to existing clientele), employees, and/or assets.
5. The applicants are granted leave to supplement their answering affidavit within 15 days of delivery of the applicants’ supplementary founding affidavit.
7. The applicants are granted leave to deliver a supplementary replying affidavit within 5 days of the delivery of the respondents’ supplementary answering affidavit.
8. Costs reserved.”

[8] On 4 October 2023, the first respondent resigned as a trustee of the Trust.

[9] Since procuring the interim interdict against the first respondent, the applicants have taken no further steps to have their application finally determined. On 29 November 2023, the first respondent launched this application to have the interim interdict set aside. By then, 15 months had passed since the order was obtained. When her application was heard, a further nine months had elapsed. Even when confronted with the application to have the interim interdict set aside, the applicants refrained from pursuing the finalisation of their application for final relief.

[10] Although the applicants have not pursued their application to finality, the parties were not idle. The court file has become cumbersome, with both sides having launched interlocutory and ancillary applications. The applicants have also commenced litigation against other individuals, which remains pending.

[11] In the light of the propositions advanced by the parties and the view I take of the matter, it is not necessary to traverse the details of these applications, nor is it necessary to delve into the facts underlying the main application.

The parties' contentions

[12] The first respondent advances several reasons why the interim interdict should be set aside:

- a) The order no longer serves any purpose.
- b) The interdict has been in place for an inordinately long time in circumstances where the interim interdict does not achieve the purpose which the applicants intended it to have.
- c) The interim interdict is prejudicial to the first respondent.
- d) The applicants have no intention of pursuing their application to finality.

[13] The applicants, in turn, contend that there is no need to pursue the application to finality because the interim order had become final. They argue that this is a consequence of the first respondent having resigned as a trustee of the Masakhane Trust.

Interim and final interdicts

[14] An interdict prohibits or compels the doing of a particular act in protection of a legally enforceable right which is threatened by continuing or anticipated harm.¹ For practical reasons, interdicts may be granted in two forms: final or temporary relief. The distinction lies at the heart of this matter.

[15] As any legal practitioner learns rather quickly in practice, situations often arise where conduct must be stopped or be insisted upon within time frames that do not allow for the ventilation of a matter in the ordinary course at trial or on motion. In these circumstances, interim relief may be obtained.

¹ *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* 2023 (1) SA 353 (CC) (UDM) in para 47.

[16] Interim interdicts are, therefore, always obtained pending further court proceedings and are generally sought in urgent court.

[17] The tests laid out in *Setlogelo*² have withstood Constitutional Court scrutiny. The requirements for a final interdict are (a) a clear right, (b) an injury actually committed or reasonably apprehended, and (c) the lack of an adequate alternative remedy.³

[18] The requirements for an interim interdict are (a) a *prima facie* right that might be open to doubt; (b) a reasonable apprehension of irreparable and imminent harm to the right if the interdict were not granted; (c) the balance of convenience favourable too the grant of the interdict; and (d) the absence of any other adequate remedy.⁴

[19] A party must prove its case on a balance of probabilities to obtain a final interdict, as in any other civil matter. A final interdict may be obtained on application if it passes the *Plascon-Evans* test.⁵ Thus, where a dispute of fact has arisen on the affidavits in motion proceedings –

“... A final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant’s affidavits, which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the court to give such final relief on the papers before is not confined to such a situation. In certain instances, the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact. ...”⁶

[20] A different approach is followed when a party applies for an interim interdict, as set out in *Webster*⁷ and refined in *Gool*⁸. To determine whether an applicant has

² *Setlogelo v Setlogelo* 1914 AD 221.

³ *Setlogelo* above at 227; *Masstores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd* 2017 (1) SA 613 (CC) in para 8.

⁴ *Setlogelo* above at 227; *Tshwane City v Afriforum and Another* 2016 (6) SA 279 (CC) in para 49.

⁵ *Plascon-Evans Paints Limited v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

⁶ *Plascon-Evans* above at 635 H – I.

⁷ *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189.

⁸ *Gool v Minister of Justice and Another* 1955 (2) SA 682 (C) at 688E.

established a *prima facie* case though open to some doubt, the court would approach the matter as follows:⁹

“The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief.¹⁰

[21] There is a stark distinction between what an applicant requires to obtain a final interdict and an interim interdict. More importantly, the two enquiries pertain to different disputes, as pointed out by the Constitutional Court in *National Gambling Board*¹¹:

“[49] An interim interdict is by definition

'a court order preserving or restoring the status quo pending the final determination of the rights of the parties. It does not involve a final determination of these rights and does not affect their final determination.'

The dispute in an application for an interim interdict is therefore not the same as that in the main application to which the interim interdict relates. In an application for an interim interdict the dispute is whether, applying the relevant legal requirements, the status quo should be preserved or restored pending the decision of the main dispute. At common law, a court's jurisdiction to entertain an application for an interim interdict depends on whether it has jurisdiction to preserve or restore the status quo. It does not depend on whether it has the jurisdiction to decide the main dispute.”

[22] Our courts are thus careful to ensure that interim relief remains just that – temporary relief pending a court's final decision on the parties' rights. It is for this

⁹ Webster above.

¹⁰ Gool above considered that the phrase 'could not succeed' should read 'should not succeed'.

¹¹ *National Gambling Board v Premier, KwaZulu-Natal and Others* 2002 (2) SA 715 (CC) in para 49, quoting LTC Harms in Joubert (ed) *The Law of South Africa* first reissue Vol. 11 para 314.

reason that where an interim interdict is obtained pending the resolution of a dispute at trial, the interdict is not only stipulated to be in place until the action has been determined but typically would also provide the applicant a specific period (in this division typically 30 days) within which to serve its summons, failing which the interim relief will automatically lapse. This ensures that the prospective plaintiff acts timeously and avoids unnecessary applications to court to discharge interim orders because an applicant has not pursued the final determination of their rights.

[23] An applicant often claims final relief on application on the same papers relied on to obtain interim relief. In those instances, the interim interdict is granted until the application is finally determined, and there is no need to create a mechanism to ensure that an applicant brings their application.

[24] What then of the instance where an applicant does not pursue their application for final relief? Although it is open to a respondent to take the necessary steps to ensure the application is finally determined, that is not their only recourse.

[25] The Constitutional Court has stated the legal position succinctly in *UDM*¹²:

“... It has always been open to the applicants to approach the High Court for the discharge of the impugned interim order on the grounds of changed circumstances, discovery of further evidence and that the impugned interdict has endured longer than it was anticipated. It therefore follows that the impugned interim order is capable of being reconsidered by the High Court which issued it.”

[26] The first respondent’s application must be considered within this legal framework.

The applicants’ position and the consequences thereof

[27] In her founding affidavit, the first respondent seeks the inference to be drawn that the applicants are no longer interested in pursuing the application to finality. She based this conclusion on the applicants’ failure to take any further steps in pursuit of

¹² *UDM* above in para [44].

the application despite the lapse of a substantial period. The applicants contend that they initially waited for the hearing and outcome of the first respondent's application for leave to appeal the interim order, which was dismissed, and that they had run out of money to fund the litigation. Little detail is provided in this regard, but it is not necessary to consider these aspects because of the position the applicants take in their answering affidavit.

[28] The first applicant states: -

“... there exists no further issue to be pursued in terms of the existing original application and order. The only outstanding issue (at the time) in the existing order was for the court to decide whether Respondent is to be removed as trustee of the Masakhane Trust. She has now resigned.”

[29] The statement is repeated a further three times, the last of which reads:

“The Order by Strydom J, referred to interim relief, has now reached its conclusion, as the only issue standing over from the original Notice of Motion was achieved when Respondent resigned from the trust.”

[30] In *Eke*¹³, the Constitutional Court approved the formulation of the well-established test on the interpretation of court orders in *Finishing Touch*¹⁴: -

“The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court’s intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention.”

[31] There is nothing contentious about the meaning of the interim order. The interdict was granted pending the final determination of the application. Two issues were not determined at the interim stage and, therefore, postponed for hearing in the

¹³ *Eke v Parsons* 2016 (3) SA 37 (CC) in [29].

¹⁴ *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Limited and Others* 2013 (2) SA 204 (SCA) in [13].

ordinary course, in accordance with paragraph 1 of the interim order: the prayer for the removal of the first respondent as trustee of the Masakhane Trust, claimed in paragraph 2 of the notice of motion, and the prayer for a final interdict against the first respondent, claimed in paragraph 3 of the notice of motion.

[32] Upon the resignation of the first respondent as trustee the relief sought in paragraph 2 of the notice of motion could no longer be pursued. However, the answering affidavits identified this as the only issue that stood over and contended that, for that reason, it is not necessary to pursue the application further. Because the answering affidavit was silent on the interdict, I enquired about the applicants' position on this issue from Mr Broodryk, who appeared for them. He submitted that the interim order became final upon the first respondent's resignation as trustee. He could not provide me with any authority to support his contention, nor could he substantiate it with argument.

[33] The interim interdict was granted until both the issue of the removal and the issue of a final interdict had been finally determined. Hence, if the need for one of those two issues falls away, the interim order will remain in place pending the determination of the other. If the only issue that had to be determined was the first respondent's removal as trustee, as the answering affidavit contends, then the need for the interim interdict ended when that relief was no longer required – on the resignation of the first respondent. In those circumstances, the applicants should have agreed that the first respondent may apply for the discharge of the interim order.

[34] The interim interdict was also granted pending a determination of whether a final interdict should be granted. The applicants seem to take the stance that this relief became obsolete because the interim interdict became final upon the first respondent's resignation as trustee.

[35] An interim interdict cannot transform into a final interdict by the inaction or choice of the party who obtained the interdict in the first place. As pointed out above, the dispute when considering an application for an interim interdict is not the same as for a final interdict. The first respondent has not had the opportunity to be heard on the issue of whether a final interdict should be granted. This breaches the *audi alteram*

partem principle, which requires everyone to be heard before a final decision is taken against them. It is a fundamental principle of fairness that should underlie any just and credible legal order.¹⁵

[36] The applicants do not intend to pursue a final interdict, and the removal of the first respondent as trustee is no longer necessary. The purpose served by the interim interdict, to maintain the status quo pending the determination of the parties' rights, is therefore no longer served. In these circumstances, the current situation is unfair and prejudicial to the first respondent. The first respondent is entitled to have the interim interdict discharged.

[37] I mention that the first respondent sought to set aside the interim order. Setting aside the order would be effective as if the order was never granted. That is not the appropriate order. The interim order should be discharged; that is, it should be terminated at this time because of the changed circumstances. The first respondent made a case for discharge despite the formulation of her relief.

Conclusion

[38] In the circumstances, the interim interdict should be discharged. There is no reason why the costs should not follow the result.

[39] I therefore make the following order:

- a) The interim interdict granted against the first respondent in paragraphs 3 and 4 of the court order of 31 August 2022 under the abovementioned case number is discharged.
- b) The applicants shall jointly and severally pay the first respondent's costs of this application, including costs of counsel on scale B.

¹⁵ *Minister of the Interior v Bechler and Others; Beier v Minister of the Interior and Others* 1948 (3) SA 409 (A) at 451; *Masetlha v President of the Republic of the South Africa and Another* 2008 (1) SA 566 (CC) in para 187 (minority judgment of Ngcobo J); *Walele v City of Cape Town and Others* 2008 (6) SA 129 (CC) in para 27.



A Bester
Acting Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

Heard:	5 September 2024
Judgment Date:	20 January 2025
Counsel for the Applicants:	J Broodryk, J Broodryk Attorneys
Counsel for the First Respondent:	S McTurk, instructed by Rémon Gerber Attorneys Incorporated.