

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NUMBER: 122856/2025

In the matter between

**AL MADAR GENERAL TRADING (PTY) LTD
T/A MAMS CASH AND CARRY
REGISTRATION NUMBER: 2020/02478/07**

APPLICANT

and

**THE CITY OF TSHWANE METROPOLITAN
MUNICIPALITY**

FIRST RESPONDENT

**THE CITY MANAGER OF THE TSHWANE
METROPOLITAN MUNICIPALITY**

SECOND RESPONDENT

DATE OF HEARING (Application for leave to appeal): 26 SEPTEMBER 2025

JUDGMENT – APPLICATION FOR LEAVE TO APPEAL

[1] The first and second respondents in the urgent application apply for leave to appeal to the Supreme Court of Appeal, alternatively the Full Bench of the

above Honourable Court in terms of section 17(1)(a) of the Superior Courts Act, 10 of 2013, against the whole of the judgment and order handed down on 8 August 2025, which found that:

- “[1] The first respondent is hereby directed to within a period of 72 working hours from date of this order, carry out an investigation of the premises at 3[...] T[...], F[...] Avenue, M[...] East, Extension 18, Pretoria, (“the premises”), facility, activities or circumstances at which gave rise to the Prohibition Order, dated 20 May 2020, (“the Prohibition Order”) and determine whether the Prohibition Order is to be withdrawn, or to remain in force as the case may be, in terms of Regulations 4(4) and 4(5) of the Regulations Governing General Hygiene Requirements for Food Premises, the Transport of Food and Related Matters (“the Regulations”), issued in terms of the FoodStuffs, Cosmetic and Disinfectants Act 54 of 1972 (“the FCD Act”).
- [2] The applicant is hereby authorised to trade as a cash and carry business dealing in foodstuffs at the premises, subject to the FCD Act and the Regulations, as if not violating the Prohibition Notice, until the final outcome of the investigations launched in terms of Regulation 4(5) and the first respondent's decision, made pursuant, has been communicated to the applicant as per Regulation 4(6).
- [3] Should the first respondent decide not to withdraw the Prohibition Order, then the applicant is authorised to continue trading until such time as the decision could have been finalised on review before this court, subject to the applicant instituting review proceedings within 1 (one) month of the decision being communicated and received by the applicant.

[4] The first respondent is directed and ordered to pay the costs of this application between party and part, such costs to include the cost of Counsel on Scale B.”

[2] The parties are referred to in this judgment as cited in the urgent application (i.e., the applicant as "the applicant" and the first and second respondents as "the respondents" or collectively as "the Municipality".

THE LEGAL POSITION IN DECIDING IF LEAVE TO APPEAL SHOULD BE GRANTED

[3] Section 17(1) of the Superior Courts Act provides that leave to appeal may only be given where the Judge believes that:

[3.1] The appeal would have reasonable prospects of success; or

[3.2] There is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration.

[4] The prospect of success required in terms of Section 17(1)(a)(i) is to be decided without reference to the parties' wishes.¹ In *Mont Chevaux Trust v Goosen*² the Court held that:

“It is clear that the threshold for granting leave to appeal against a judgment of a High Court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion, ...The use of the word "would" in the new statute indicates a measure of

¹ *Rail Commuter Action Group v Transnet Limited trading as Metrorail (Number 2)* 2003 (5) SA 593 (C)

² 2014 JDR 2325 (LCC)

certainty that another court will differ from the court whose judgment is sought to be appealed against. ...”³

[5] The test of reasonable prospects of success postulates a dispassionate decision based on the facts and the law, that a Court of Appeal could reasonably arrive at a conclusion different to that of the trial Court. To succeed, the applicant must convince the Court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. There must be a sound, rational basis for the conclusion that there are prospects of success.⁴

[6] Leave to appeal is further granted not in respect of the reasons for the judgment but in respect of the order itself. Therefore, the success of the application for leave to appeal must be related to the outcome of the case and not an argument that fails to dispose of the case in the Appellant's favour.⁵

[7] In the matter of *Tecmed Africa v Minister of Health*⁶ the Supreme Court of Appeal held:

“[17] First, appeals do not lie against the reasons for judgment but against the substantive order of a lower court. Thus, whether or not a court of appeal agrees with a lower court’s reasoning would be of no consequence if the result would remain the same (*Western Johannesburg Rent Board v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A) at 354).”

[8] The respondents assert that the issues raised in the application for leave to appeal are of significance to local government. These include the appropriate boundaries of the interim relief granted, the legal implications of out-of-time internal appeals, and the interpretation of regulations issued in terms of the FCD Act. According to the respondents, there exists a well-founded and

³ At para 6

⁴ *S v Smith* 2012 (1) SACR 567 at 570, para 7

⁵ *Goodwin Stable Trust v Duohex (Pty) Ltd* (2) [1996] 3 All SA 119 (C)

⁶ [2012] 4 All SA 149 (SCA) also reported as 2012 JDR 0821 (SCA)

rational basis to conclude that a different Court would arrive at an alternative decision.

GROUND UPON WHICH TO LEAVE TO APPEAL IS SOUGHT

[9] The application for leave to appeal is based fundamentally on the following grounds:

[9.1] First, the judgment misapplied the standard that governs interim interdicts, which restrain statutory powers as articulated in *National Treasury v Opposition to Urban Tolling Alliance*⁷.

[9.2] Second, it relied on *Welgevonden Lodge No 57 (Pty) Ltd v Limpopo Liquor Board*⁸ on inapposite facts because that case addresses administrative inaction, while this case concerns active enforcement.

[9.3] Third, it treated unilateral assertions and documents as compliance, notwithstanding Regulation 4(4) to (6), which requires verification by the competent authority.

[9.4] Fourth, it misconstrued the effect of an interim appeal lodged outside the 21-day period in section 62 of the Municipal Systems Act, 32 of 2000.

[9.5] Fifth, it crossed the separation of powers boundaries by substituting judicial management for administrative discretion in a polycentric public health domain.

[9.6] Sixth, it misdirected itself on costs by penalising a regulator despite material non-compliance with the regulations.

⁷ 2012 (6) SA 223 (CC)
⁸ [2021] ZAGPPHC

IS THE ORDER OF THE 8TH OF AUGUST 2025 APPEALABLE

- [9] An interim interdict, pending the resolution of a substantive action or application, is not conclusive in its effect. The issues determined for the purpose of granting the interim interdict do not acquire the status of *res judicata* and are, accordingly, not typically considered appealable final decisions.⁹
- [10] The purpose of interim relief is to consider the balance of convenience and to do justice. In urgent applications, the Court exercises its discretion upon the evidence available at the time and possibly under circumstances that may be described as “*a necessary imperfect procedure, which is nonetheless usually best designed to achieve justice.*”¹⁰
- [11] The term “*final in effect*” means that an issue in the suit has been affected by the order such that the issue cannot be revisited either by the Court of first instance or the hearing in the pending proceedings.¹¹ However, distinguishing between interim and final decisions, which are appealable, is inherently complex, and making either determination produces some unsatisfactory results.
- [12] In *Andalusite Resources (Pty) Ltd v Investec Bank Limited and another*¹² it was held by Keightley J (as she was then) that the Court has to distinguish between the effect of an interdict on the disputed right itself and its effect on the object of that right. An interim order does not finally dispose of the rights between the parties. The list remains to be disposed of in the pending proceedings. If the granting of the interdict will not have a final effect on the underlying disputed right, it remains interim.

⁹ *Cipla Agrimed v Merck* 2018 (6) SA 440 (SCA) at [19] / 447C and [37] / 453H to 454A and B

¹⁰ *Cipla Agrimed v Merck* 2018 (6) SA 450 (SCA) [44] / 456D to F

¹¹ *Cipla supra* [48 / 4567F]

¹² 2020 (1) SA 140 (GJ)

- [13] In *National Treasury v Opposition to Urban Tolling Alliance*¹³, Justice Moseneke DCJ stated that the Constitutional Court had granted leave to appeal concerning interim orders on the basis that it was in the interest of justice. Mr. Sekwakweng argued accordingly on behalf of the Municipality that, considering the nature of the relief granted against the municipality, it is appropriate for leave to appeal to be given in the interest of justice. However, this argument does not comprehensively consider the necessity for the Court to evaluate all relevant circumstances, including whether the interim order has a final effect or resolves a substantial portion of the relief sought, whether the temporary restraining order has an immediate and significant impact, and whether the harm caused by such orders is serious, immediate, ongoing, and irreparable.
- [14] The high-water mark of the respondents' opposition in respect of serious, immediate, ongoing, and irreparable harm is set out in paragraph 80 of the answering affidavit, which reads as follows:
- “... The public health considerations of the community outweigh the Applicant's commercial interest. The community's right to safe food handling and fire compliance cannot be compromised by the Applicant's financial gain.”
- [15] Apart from the aforesaid bold and unsubstantiated allegation, the respondents did not present any evidence before the Court of a single instance of a health hazard or serious threat to the community.
- [16] Furthermore, Mr. Aucamp, on behalf of the applicant, asserts that Regulations 4(2), (3), (5), and (6) of the Foodstuffs, Cosmetics and Disinfectants Act, 54 of 1972, stipulate that if an inspector, following an inspection of food premises or a facility, forms the opinion that such premises, facility, or activity pose a health hazard and that the continued operation thereof must be prohibited, the local authority “may summarily prohibit the use of the food premises.”

¹³ 2012 (6) SA 223 (CC)

Regulation 4(2) requires the inspector to be satisfied that a health hazard exists that warrants prohibition. In such a scenario, the municipality possesses the discretionary power to act, as evidenced by the use of the word "may" rather than "shall."

- [17] It is the exercise or non-exercise of this discretionary power that forms the core of the dispute between the parties, which the Court has not yet definitively resolved.
- [18] The Court did not make a definitive ruling on any of the contested aspects. The purpose of the relief granted was solely to restore the status quo pending the completion of internal procedures as stipulated by the regulations or the applicant's intended review application.
- [19] Section 18(2) of the Superior Courts Act, 10 of 2013, provides that *"unless the Court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or an appeal is not suspended pending the decision of the application or appeal."*
- [20] For the reasons as set out above, the order of 8 August 2025 is interim and does not have final effect. The order is not appealable. Its operation was not suspended by the filing of the application for leave to appeal. It is for this reason that it is also not necessary to deal with the respondent's applications in terms of s 18 of the Superior Courts Act.
- [21] If I am mistaken on this point, I will review the other main grounds of appeal that have been argued and thoroughly addressed in the heads of argument submitted by the applicant and respondents.

APPEAL LODGED OUTSIDE THE PERMITTED PERIOD

- [22] The respondents assert that the Court erred in its decision regarding the interim appeal, which was submitted beyond the statutory 21-day period

stipulated in the Municipal Systems Act, 32 of 2000. They contend that this delay resulted in the appeal lacking legal effect and did not suspend the operation of the Municipality's Prohibition Order. However, this argument neglects the undisputed facts that, irrespective of the delay, the Municipality considered the appeal and dismissed it on its substantive merits, as detailed in the applicant's replying affidavit. These grounds are unrelated to the issue of timeliness.

SEPARATION OF POWERS HARM

[23] Holmes JA said in *Olympic Passenger Services (Pty) Ltd v Ramlagan*¹⁴:

“Upon proof of a well-grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict – it has a discretion to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience – the stronger the prospects of success, the less need for such balance to favour the applicant. The weaker the prospects of success, the greater the need for the balance of convenience to favour it.”

[24] In *National Treasury v Opposition to Urban Tolling Alliance* (the OUTA judgment)¹⁵ the interim interdict that was granted was aimed at preventing the implementation of a Government Policy decision. This is the first important distinction between the OUTA judgment and the current application. The order of 8 August 2025 does not prohibit or stop the Municipality from exercising its regulatory power. It is trite that the Court does not readily grant applications that concern an application to restrain the exercise of statutory powers. Relief of this nature is only granted in exceptional circumstances when a strong case is made out.

¹⁴ 1957 (2) SA 382 (D) at 383
¹⁵ 2012 (6) SA 223 (CC)

- [25] It is settled that, beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires Courts to ensure that all branches of government act within the law. However, Courts in turn must refrain from entering the exclusive terrain of the executive and legislative branches of government unless the Constitution mandates it. This means, in the words of Justice Moseneke in the OUTA judgment, that the well-known Setlogelo test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. The Court must consider, in granting interim interdicts, that it does so in a way that promotes the objects, spirit, and purport of the Constitution.
- [26] The balance of convenience inquiry must carefully examine whether and to what extent a restraining order will likely encroach upon the exclusive domain of another branch of government. The inquiry must, along with other relevant harm, have proper regard to what may be called separation of powers harm. Our Courts should be wary of self-censorship and should not be afraid to do justice and afford an equitable remedy to those before them, as they are empowered to do. In the words of Cameron J, *“the boogieman of separation of power concerns should not cause Courts to shrink from their constitutional responsibility.”*¹⁶
- [27] The Municipality has and continues to exercise its statutory power, and the interim relief will not thwart the Municipality from carrying out its statutory duties. The interim relief does not, in any way, interdict or restrain the Municipality from exercising and enforcing its regulations. It merely allowed the applicant to continue trading in respect of the specific infringement notices. The interim relief will not infringe upon the Municipality's statutory powers.
- [28] In the premises, I am not convinced that another Court would come to a different conclusion, and I grant the following order:

¹⁶ *Amabhungane Centre v Minister of Justice* 2021 (3) SA 246 (CC) at 306C to 307

- (1) The application for leave to appeal is dismissed with costs.
- (2) The first and second respondents are ordered to pay the costs of the application for leave to appeal, including the costs of counsel on Scale B.

JOHAN VAN DEN BERG
ACTING JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

Appearances

For the Applicant:	Adv S Aucamp Instructed by Jacques Classen Inc Attorneys
For the Respondent:	Adv M.D Sekwakweng Instructed by Diale Mogashoa Attorneys
Date of hearing:	26 September 2025
Date of judgment:	01 October 2025

MODE OF DELIVERY: This judgment is handed down by circulation to the parties' legal representatives by email, and by being uploaded on CaseLines and released to SAFLII. The delivery date and time are deemed to be 01 October 2025, at 14:00 a.m.