CONSTITUTIONAL COURT OF SOUTH AFRICA

United Democratic Movement and Another v Lebashe Investment Group (Pty) Limited and Others

CCT 39/21

Date of hearing: 2 November 2021

Date of Judgment: 22 September 2022

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.

On 22 September 2022 at 14h00, the Constitutional Court handed-down judgment in an application for leave to appeal against the judgment and order of the Supreme Court of Appeal. The Supreme Court of Appeal struck off its roll the application by the applicants: United Democratic Movement (UDM) and Mr Bantubonke Harrington Holomisa for leave to appeal against the interim interdict granted by the High Court of South Africa, Gauteng Division, Pretoria (High Court) in favour of the first respondent, Lebashe Investment Group (Pty) Limited and the remainder of the respondents.

On 26 June 2018, the UDM and its leader, Mr Holomisa, sent a letter to the President of the Republic of South Africa, Mr Cyril Matamela Ramaphosa, which contained allegations that the respondents had conducted themselves unlawfully in various ways in relation to the Public Investment Corporation (PIC). The letter requested the President to cause these allegations against the respondents to be investigated through the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State (the Judicial Commission). The letter was also published on the UDM's website and Mr Holomisa's social media platforms.

The respondents contended that the statements were defamatory and applied to the High Court for an interim interdict preventing the applicants from publishing such statements, pending the determination of an action for damages against the applicants. According to the respondents, the letter of 26 June 2018 was intended to mean that they were unlawfully and intentionally engaged in a number of schemes which entailed:

fraudulent acts, conspiracies and subterfuges with the result that funds from the PIC were being misappropriated by them or at their instance. And that innocent members of the public, whose moneys are invested with the PIC, were victims of a series of thefts perpetrated by the respondents on "a grand scale; so grand, in fact, it rivals and indeed exceeds the bounds of the Gupta state capture scandal of recent times". They also contended that the letter could only be reasonably understood to bear this meaning.

The respondents contended further that, from an ordinary reading of the letter, it is obvious that much of its content is per se defamatory and injurious to them. They contended that in addition, the manner in which the allegations were stated was provocative, sensational, scandalous and at odds with the stated purpose of the letter, namely, to persuade the President to expand the terms of reference of the Judicial Commission. According to the respondents, Mr Holomisa had no valid reason to make such explosive and inherently inflammatory allegations at that stage. Mr Holomisa used these allegations to further his and the UDM's political interests at the expense of the respondents' good names and dignity.

The respondents also stated that, as a result of the offending letter, adverse publicity and its sequelae in the media, certain investment opportunities were lost. Their bankers, Investec, made enquiries about these allegations which could lead to the development of potentially lethal mistrust and suspicion in the market. According to the respondents, this came about as a consequence of Mr Holomisa's letter of 26 June 2018.

The respondents pointed out that the industry in which they function is extremely sensitive to one's perception of integrity and trustworthiness. They state that companies are in the habit of placing enormous sums of money in their hands to invest wisely and properly as far as they are able to do so and many people's lives and livelihoods depend on the respondents' decisions.

The applicants contended that the statements were not defamatory and that there was a need to establish whether there was improper conduct between the respondents and the PIC. Furthermore, the applicants submitted that the allegations pertained to a perception that there was a conflict of interest which violated the Public Finance Management Act 1 of 1999 (PFMA) and the Constitution, and that they, the applicants, were constitutionally obligated to ensure that corruption in state institutions was exposed.

The UDM stated that it regards the lack of transparency and accountability in the manner in which public funds are utilised in South Africa as one of the greatest threats to the rule of law and the country's democratic establishment itself. As a result, the UDM points out that it regards as of great importance that, where corruption is suspected, it must be exposed publicly and formal steps must be taken to investigate and eradicate it.

The applicants pointed out that the fiduciary duties of accounting authorities, as set out in section 50 of the PFMA, include the duty to:

(a) exercise utmost care in order to ensure reasonable protection of the assets and records of the entity;

(b) act with fidelity, honesty, integrity and in the best interests of the entity in managing its financial affairs;
(c) disclose on request, to the executive authority responsible for that public entity or the legislature to which the entity is accountable, all material facts which may influence the decisions or actions of the executive authority, or the legislature; and
(d) prevent any prejudice to the financial interests of the state.

The applicants also contended that in terms of the Constitution, members of the Cabinet and Deputy Ministers may not act in any way that is inconsistent with their offices or expose themselves to any situation involving the risk of a conflict of interests between their official responsibilities and private interests. This section also provides that such members and Deputy Ministers may not use their position or any information entrusted to them to enrich themselves, or improperly benefit any other person. The applicants contended that the sixth respondent, as a former Deputy Minister of Finance, has placed himself in a position where the risk of conflict of interests has arisen and they say that that is what they asked the President to investigate.

The High Court granted the interim interdict, interdicting the applicants from repeating certain remarks they had made publicly about the respondents. The Court further ordered the applicants to remove the letter and all information relating thereto.

Aggrieved by the order of the High Court, the applicants applied for leave to appeal to the Supreme Court of Appeal. They argued that the order violated the applicants' right to freedom of expression and Mr Holomisa's privilege as a member of Parliament. Moreso, the applicants argued that the statements were true and thus not defamatory in nature. The respondents argued that the interim interdict was not final in effect and therefore unappealable, and that Mr Holomisa's privilege did not extend beyond Parliament, thus his statements were defamatory. Leave was granted.

At the Supreme Court of Appeal, the parties relied on the same arguments. There, in a three-two split the application was struck off the roll on the grounds that the interdict was interim in nature and therefore unappealable. The majority judgment considered whether the interests of justice would be frustrated by the interim interdict if it were to stand until the trial and whether it was appropriate to consider the nature of the allegations at that stage. The Court held that it was unnecessary for it to make a determination about whether the allegations are indeed defamatory and whether the applicants were justified in making them. It struck the application off its roll and held that the order against which the appeal was sought is not appealable. The minority judgment however, held that the interim order was appealable, because there were no reasons why the considerations of the interests of justice ought not to apply in determining the appealability of an interim order, which affects the rights of parties to engage in political activity. Aggrieved by this decision, the applicants sought leave to appeal to the Constitutional Court.

Before the Constitutional Court, the applicants averred that the majority in the Supreme Court of Appeal was misdirected in finding the interdict unappealable. They submitted that the Supreme Court of Appeal relied and applied the wrong test for the

appealability of interim orders. Furthermore, they contended that the Supreme Court of Appeal considered the nature of the order rather than its effect. The applicants submitted that the correct test is that the interests of justice render the order appealable and that, notwithstanding its nature, its effect having been in place for almost three years, is final.

The respondents contended that the majority of the Supreme Court of Appeal was correct in finding the order of the High Court unappealable. They submitted that it is not in the interests of justice that leave is granted as the appeal lacks prospects of success, and that the minority judgment upon which the applicants rely on is wrong, as the continued subsistence of the order does not irreparably harm the applicants.

In a unanimous judgment penned by Madondo AJ, regarding the merits, the Court had to decide: (a) whether the Supreme Court of Appeal has the power to interfere with the decision of the High Court to grant leave to appeal the interdict was appealable; (b) whether the order of the High Court, granting the interim interdict, constituted a decision for the purposes of section 16(1)(a) Superior Courts Act 10 of 2013; and (c) whether the High Court should have granted the impugned interim order.

In respect of jurisdiction and leave to appeal, the Constitutional Court found that the matter raises issues that are of a constitutional nature and arguable points of law of general public importance whether the Supreme Court of Appeal was correct to hold that the interim interdict was not appealable to it. The public interest will be best served by their prompt resolution. Such resolution will help to correct the wrong decision before it has further consequences, on one hand, and to avoid delay and inconvenience resulting from the failure of the Court to hear the appeal, on the other hand. The Constitutional Court found that the evidence is sufficient to enable the it to deal with and dispose of the matter without referring it back to the Supreme Court of Appeal for reconsideration. And that the interests of justice require the Court to entertain the matter as remitting it to the Supreme Court of Appeal for reconsideration will give rise to considerable inconvenience, prejudice and impede the attainment and administration of justice.

On the merits, with regard to the first question, the Court found that in terms of section 168(3) of the Constitution, the Supreme Court of Appeal has jurisdiction to hear and decide appeals on any matter arising from the High Court. When a matter is brought before the Supreme Court of Appeal, it has jurisdiction to determine whether the lower court's ruling in the proposed appeal is a "decision" within the meaning of section 16(1)(a) of the Superior Courts Act. The Court held that the Supreme Court of Appeal was not only entitled but obliged to determine whether the matter was an appeal against a "decision" and thus an appeal within its jurisdiction. Thus, in this regard, the Court found that the Supreme Court of Appeal is not bound by the High Court's assessment and it is entitled to reach its own conclusion on the question.

Regarding the second issue whether interim interdicts are appealable, the Court noted that, in deciding whether an order is appealable, not only the form of the order must be considered but also, and predominantly, its effect. Thus, an order which appears in form to be purely interlocutory will be appealable if its effect is such that it is final and definitive of any issue or portion thereof in the main action. By the same token, an order which might

appear, according to its form, to be finally definitive in the above sense may, nevertheless, be purely interlocutory in effect. Whether an order is purely interlocutory in effect depends on the relevant circumstances and factors of a particular case. The Court held that the operative standard regarding the appealability of an interim order is the interests of justice, as such, whether an interim order has final effect or disposes of a substantial portion of the relief sought in a pending action is merely one consideration. Balancing the rights of the parties, the Court found that the interests of justice favoured the grant of leave to appeal. The Court further held that since there was a likelihood that the life of the impugned interim interdict might be extended even longer than it had already existed, it is sufficiently invasive and far-reaching such that it is in the interests of justice for the grant of the impugned interim order to be treated as a "decision" for the purposes of section 16(1)(a) of the Superior Courts Act, thus appealable to the Supreme Court of Appeal.

The Constitutional Court held that the Supreme Court of Appeal erred in holding that the interests of justice did not render the impugned interim interdict a "decision" within the meaning of section 16(1)(a) of the Superior Courts Act. An interdict restricting free speech constitutes a grave intrusion on a constitutional right. In determining whether the impugned interim interdict was appealable, the Supreme Court of Appeal was not exercising a discretionary power but making a value judgment, thus the Constitutional Court held that it is entitled to make its own assessment and conclude that the impugned interim interdict was a "decision" and thus within the Supreme Court of Appeal's jurisdiction.

Finally, regarding the third point, whether the granting of interim interdictory relief was justified, the Court pointed out that in democratic societies, the law of defamation lies at the intersection of freedom of speech and the protection of reputation or a good name. The law does not allow the unjustified savaging of an individual's reputation. The right of freedom of expression must sometimes yield to the individual's right not to be defamed. In striving to achieve an equitable balance between the right to speak your mind and the obligation not to harm or injure someone else's name or reputation, the law has devised defences such as fair comment, and truth and in the public interest.

The Court found that the ordinary meaning of the impugned statement was that the respondents are thieves, fraudsters, corrupt and dishonest. It found that the statement is defamatory of the respondents and wrongful. The Court also found that the applicants had failed to disclose facts that would sustain a defence of truth and in the public interest. It held that the applicants did not, at the time when they published the defamatory statements, have a lawful basis for so doing. The applicants admittedly stated that the allegations were not yet investigated and confirmed and they, therefore, had no valid reason to believe in the truth of such allegations. The applicants were not entitled to wantonly defame the respondents under the pretext that they were executing a constitutional duty. It was not for the public benefit to publish the unverified defamatory information. The Court held that when a public figure plainly defames members of the public while admitting that he or she does not know the truth of what he or she says, his or her right to freedom of expression may justifiably be limited. It found that the applicants had failed to discharge the onus which rested on them to lay a basis for the defence that the allegations were true and in the

public interest. The publication of the letter on the internet, social media and conventional media sites was, in the circumstances of the present case, unwarranted.

The Court held that on the evidence of the respondents, there was no other alternative satisfactory remedy to prevent the ongoing financial and reputational harm and loss caused to them by the applicants' persistent conduct pending the determination of the action for damages. The applicants contended that an award of damages for defamation action would provide an alternative satisfactory remedy in this regard. Such contention, the Court held, does not hold any water since by the time the defamation trial is finalised, great harm would have already occurred. The respondents, therefore, succeeded in establishing a prima facie right, injury actually committed and reasonably apprehended, and the lack of adequate alternative remedy. Accordingly, the Court found that the interim interdict was the only appropriate remedy that could be granted to protect the respondents' rights and reputations pending the final determination of the action for damages. Therefore, the High Court was correct to grant the respondents the interim interdict.

In this light, the Court granted leave to appeal, set aside the decision of the Supreme Court of Appeal striking the matter off its roll and replaced it with "[t]he appeal against the order of the High Court of South Africa, Gauteng Division, Pretoria, is dismissed with costs of two counsel".