IN THE HIGH COURT OF SOUTH AFRICA

(BOPHUTHATSWANA PROVINCIAL DIVISION)

CASE NO: 443/2006

In the matter between:

JACOBUS TAPEDI MASEKA Applicant

and

LAW SOCIETY OF THE NORTHERN PROVINCES First Respondent

LAW SOCIETY OF BOPHUTHATSWANA Second Respondent

APPLICATION FOR LEAVE TO APPEAL

DATE OF HEARING : 18 AUGUST 2006

DATE OF JUDGMENT : 24 AUGUST 2006

COUNSEL FOR THE APPLICANT : ADV T MADIMA

COUNSEL FOR THE RESPONDENT : MR D MINCHIN

JUDGMENT

HENDRICKS J:

A. Introduction:-

[1] This is an application for leave to appeal to the Full Bench of this division against the whole of the order and judgment granted on 01 June 2006.

[2] Mr Minchin, appearing on behalf of the Law Society of the Northern Provinces (First Respondent) raised ***in limine*** the fact that the judgment and order granted on 01 June 2006 is not appealable.

[3] He submitted that the relief that was granted was interim relief pending the final determination of the application.

B. The judgment and order:-

[4] In the introductory paragraph of the judgment I specifically state that:-

> "This is an application …. to have the First Respondent:- (Applicant in this application)
>
> (a) suspended from practice as an Attorney pending an application to have him struck from the roll of Attorneys.
>
> (b) to interdict and prohibit him from operating on his trust account;
>
> [c] to have a curator appointed with certain duties and powers to administer and control the trust account of the First Respondent."
>
> **See**:- paragraph 1 of judgment.

[5] In paragraph [80] of the judgment it is reiterated that:-

> "Although this application consists of two parts namely, at first it is an application for the suspension of the First Respondent and secondly it is an application to strike the First Respondent from the roll of Attorneys, what is now before me is the first part."

See:- paragraph [80] of judgment.

[6] Even the order is unequivocal in its terms, namely:-

> "[1.2] that Jacobus Tapedi Maseka (hereinafter referred to as the First Respondent) is suspended from practising as an Attorney of the above honourable Court, pending the final determination of this application."

See:- paragraph [1.2] of the order in the judgment.

[7] There can be no doubt that the order granted is an interim order pending the final determination of the application to have the Applicant (in this application for leave to appeal) struck from the roll of Attorneys.

C. The Law:-

[8] The question arises as to whether the order granted on 01 June 2006 is appealable.

[9] In **African Wanderers Football Club (Pty) Ltd vs Wanderers Football Club** 1977 (2) SA 38 (AD) it was held that an interdict ***pendente lite*** (pending the final

determination of an action in that case), was not a final and definitive judgment.

[10] In **Zweni v Minister of Law and Order** 1993 (1) SA 523 (A) at 532 J – 533 (B) Harms AJA (as he then was) said the following:-

> "A 'judgment or order' is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings…….. The second is the same as the oft-stated requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief ……. The fact that a decision may cause a party an inconvenience or place him at a disadvantage in the litigation which nothing but an appeal can correct, is not taken into account in determining its appealability."

[11] The matter of **Cronshaw and Another v Fidelity Guards Holdings (Pty) Ltd** 1996 (3) SA 686 (SCA) was also a case where an interdict was granted ***pendente lite***. The court (per Schutz JA) had to consider the reasoning in the **African Wanderers** case, ***supra***. The court held that the **African Wanderers** case was not distinguishable. At 689 J – 690 C

the Court said the following:-

> "The form of the proceedings before Howard J was that of an interdict *pendente lite* in which *lis* the very matters on which the interdict was sought would be in issue; and the balance of convenience was considered in respect of the interim period. This Court held that Howard J had no intention of making a final and definite order, with the result that the order *pendente lite* could not support a finding of *res judicata*.
>
> The plaintiff sought to avoid this conclusion by arguing that because the interim orders were prejudicial and could cause irreparable harm to it, they were not orders *ad servandam causam*, merely to preserve the position until trial, but ones having the force of a definitive sentence.

This argument also was rejected, it being held on the authorities that it is not every kind of prejudice that is relevant, only that which directly affects the issue of the ultimate suit."

The result is that **African Wanderers** does decide the question in this appeal, whether the grant (but not the refusal) of an interdict ***pendente lite*** is appealable, adversely to the appellant.

[12] In **South Cape Corp. v Engineering Management Services** 1977 (3) SA 534 (AD) on page 549 G – 551 A, Corbett JA summarized the principles of determining whether

a order or judgment is appealable as follows:-

> "(a) In a wide and general sense the term 'interlocutory' refers to all orders pronounced by the Court, upon matters incidental to the main dispute, preparatory to, or during the progress of, the litigation. But orders of this kind are divided into two classes:

(i) those which have a final and definite effect on the main action; and (ii) those, known as 'simple (or purely) interlocutory orders' or 'interlocutory orders proper', which do not.

> (b) Statutes relating to the appealability of judgments or orders (whether it be appealability with leave or appealability at all) which use the word 'interlocutory', or other words of similar import, are taken to refer to simple interlocutory orders. In other words, it is only in the case of simple interlocutory orders that the statute is read as prohibiting an appeal or making it subject tot the limitation of requiring leave, as the case may be. Final orders, including interlocutory orders having a final and definitive effect, are regarded as falling outside the purview of the prohibition or limitation.

> (c) The general test as to whether an order is a simple interlocutory one or not was stated by SCHREINER, J.A., in the *Pretoria Garrison Institutes* case, *supra*, as follows (at p. 870):
>
> "….. a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to 'dispose of any issue or any portion of the issue in the main action or suit' or, which amounts, I think, to the same thing, unless it 'irreparably anticipates or precludes some of the relief

which would or might be given at the hearing."

(d) In certain earlier cases the view had been expressed that a relevant criterion was whether the order, when given effect to or executed, might cause a party damage or prejudice irreparable in the final judgment; if it did, then it was not purely interlocutory. This was qualified by SCHREINER, J.A., in the *Pretoria Garrison Institutes* case, *supra*. After referring to the *Globe and Phoenix* case, *supra*, the learned Judge of Appeal stated:

"The earlier judgments were interpreted in that case and a clear indication was given that regard should be had, not to whether the one party or the other has by the order suffered an inconvenience or disadvantage in the litigation which nothing but an appeal could put right, but to whether the order bears directly upon and in that way affects the decision in the main suit."

(e) At common law a purely interlocutory order may be corrected, altered or set aside by the Judge who granted it at any time before final judgment; whereas an order which has final and definitive effect, even though it may be interlocutory in the wide sense, is *res judicata."*

[13] In **Minister of Health v Treatment Action Campaign (No.1)** 2002 (5) SA 703 (CC) the Constitutional Court remarked as follows:-

"The first question that arises is whether the interim execution order is appealable at all. In terms of both the common law and the Supreme Court Act 59 of 1959, an order granting leave to execute pending an appeal is considered to be purely interlocutory and not appealable. There are important reasons of policy why this is so. In

particular, the effect of granting leave to appeal against an order of interim execution will defeat the very purpose of that order. The ordinary rule is that the noting of an appeal suspends the implementation of an order made by a court. An interim order of execution is therefore special relief granted by a Court when it considers that the ordinary rule would render injustice in a particular case. Were the interim order to be the subject of an appeal, that, in turn, would suspend the order."

[14] In **Hassim v Commissioner, South African Revenue Service** 2003 (2) SA 246 on page 252 F – G the Supreme Court of Appeal made the following finding:-

"The main dispute between the parties concerns the validity of the assessments made by the respondent. The decision by the Court *a quo* regarding discovery is incidental to the main dispute between the parties. It regulates the procedure to be followed in order to determine that dispute. It is not a decision that disposes of any issue or any portion of the issue in the main proceedings between the parties or, put differently, it does not preclude any of the relief, which may be given at the hearing of the main dispute. It is, therefore, a purely interlocutory decision which may be corrected, altered or set aside by the Court *a quo* at any time before final judgment. …… It follows that the decision by the Court *a quo* in regard to discovery is not appealable."

[15] It is therefore trite law that an order that is not final and

definitive in the sense that it finally disposed of the issues is not appealable.

[16] Mr Madima who appeared on behalf of the Applicant in this application for leave to appeal submitted that although it is not a final order and judgment that was granted on 01 June 2006, it has the effect of a final order or judgment.

[17] In my view, this submission is with the greatest of respect incorrect. Not only is it clear from the judgment that it is an interim order that was granted but the notice of motion also specifically state that on a future date an application will be made to have the name of the Applicant struck from the roll of Attorneys. (Part B of the notice of motion.)

[18] Even with regard to this part, the Applicant is given an opportunity to oppose this application, if he so desire. Part B is distinctly different from Part A and the difference lies in the fact that Part A is an interim order pending the final determination of the relief sought in Part B.

[19] During argument, I specifically asked Mr Madima whether the Applicant is still practising as an Attorney and he replied in the affirmative. In my view, the only reason why this application for leave to appeal is brought at this stage, is that the operation of the order be automatically suspended in order to allow the Applicant the opportunity to continue to

practice despite of the order that was granted on 01 June 2006. This is clearly an abuse of the processes of Court.

D. <u>Conclusion</u>:-

[20] In my view, the point ***in limine*** should be upheld because the interim order and judgment is unappealable.

<u>Consequently</u>, the application for leave to appeal is dismissed with costs.

R D HENDRICKS
JUDGE OF THE HIGH COURT

Attorneys for the Applicant: MOTLHABANI ATTORNEYS