

SOUTH AFRICA / JUDGMENT

Kokatay and Another v Topfin Makelaars Vryburg CC T/A and Others (UM01/23) [2023] ZANWHC 38 (6 April 2023)

[2023] ZANWHC 38

COURT

North West High Court, Mafikeng

BEFORE

Reddy

CASE / FILE NUMBER

UM01/23

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Policy

FLYNOTES:

DEFAMATION AND INTERDICT

CIVIL

LAW – Defamation – Interdict – Former employer
circulating information that applicant had been debarred

–

That a reconsideration application was pending – Applicant
seeking to interdict former employer from defaming
her –

Contents of the email embraced the truth at the time of its
publication – No reasonable apprehension of
future harm –

Application dismissed.

IN THE HIGH COURT OF

SOUTH AFRICA

NORTH WEST DIVISION -

MAHIKENG

CASE NO: UM01/23

Reportable: NO

Circulate to Judges: NO
Circulate to
Magistrates: NO
Circulate to Regional
Magistrates: NO

In the matter between: SUHAIFA
KOKATAY CHECK FIRST
APPLICANT
(ID NO: [...])
TOKKIE FERRIRA BROKERS
(PTY) LTD SECOND APPLICANT
And
TOPFIN MAKELAARS
VRYBURG CC T/A
TOPFIN MAKELAARS
FIRST RESPONDENT
YANNIQUE JESSIE BOSMAN
SECOND RESPONDENT
BRIGGITTA
REINECKE
THIRD RESPONDENT
DATE OF HEARING
19 JANUARY
2023
DATE OF JUDGMENT
06 APRIL 2023

JUDGMENT

REDDY AJ

Introduction

- [1] “Good name in man and woman, dear lord is the immediate jewel of their souls” wrote the renowned playwright William Shakespeare in Othello. It is this good name that the first and second applicant sought on an urgent basis to protect. In pursuance thereto the following relief was framed:
- [1] That the application be dealt with as matter of urgency and that any non-compliance by the Applicants with the Uniform Rules of Court, the time periods afforded in the Uniforms Rules of Court or any other non-compliance be condoned in terms of Rule 6 (12);
- [2] That the Respondent be interdicted and ordered;
- 2.1 not to defame or spread injurious falsehoods about the Applicants;
- 2.2 not to publish any statement or claim, by email, verbally or otherwise, that the First Applicant;

2.2.1 has been debarred in terms of the provisions of the Financial Advisory and Intermediary Services Act 37 of 2002 or any other Law;

2.2.2 lacks the character qualities of honesty and integrity; and

2.2.3 acted illegally or unlawfully or that she has transgressed any Law.

[3] In the alternative to prayer 2, that pending the finalisation of this application on the normal opposed roll that an order be issued with immediate force and effect that:

3.1 the Respondents are interdicted and ordered not to defame or spread injurious falsehoods in respect of the Applicants;

3.2 the Respondents be interdicted and ordered not to publish any statement or claim that the First Applicant has been debarred in terms of the provisions of the Financial Advisory and Intermediary Services Act 37 of 2002 or any other Law, that she lacks the character qualities of honesty and integrity; or

3.3 the First Applicant has transgressed any Law or that she has acted dishonestly.

[4] In the further alternative, pending the finalisation of an action to be instituted against the Respondents by one or both of the Applicants, within 30 days of this order, that an order be issued with immediate force and effect that:

4.1 the Respondent are interdicted and ordered not to defame or spread injurious falsehoods in respect of the Applicants;

4.2 the Respondents be interdicted and ordered not to publish any statement or claim that the First Applicant has been debarred in terms of the provisions of the Financial Advisory and Intermediary Services Act 37 of 2002 or any other Law, that she lacks character qualities of honesty and integrity; or

4.3 the First Applicant has transgressed any Law or that she has acted dishonestly.

[5] That the Respondents ordered, jointly and severally, the one paying the other to be absolved, to pay the cost of this application as between attorney and client

[2] At the close of argument counsel for the applicant, handed up a draft order which read as follows:

1. That the respondents be interdicted and ordered:

1.1 not to defame or spread injurious falsehoods about the Applicants;

1.2 not to publish any statement or claims by email, verbally or otherwise, that the First Applicant:

1.2.1 lacks the character qualities of honesty and integrity; and

1.2.2 acted illegally or unlawfully or that she has transgressed any law.

2. That Respondents be ordered, jointly and severally, the one paying the other to be absolved, to pay the cost of this application as between attorney and client.

Urgency

- [3] The law on urgency is trite. Urgent applications are brought within the purview of Rule 6(12) of the Uniform Rules of Court, taking due cognizance of the Practice Directives of the Division. The seminal authorities on urgency are *Die Republikeinse Publikasies (Edms) Bpk 1972(1) SA 773 (A)* at paragraphs 782 A –G, and *Luna Meubelvervaardigers (Edms) Bpk v Makin and Another 1977(4) SA 135 (W)*.
- [4] In *East Rock Trading 7 (Pty) Limited v Eagle Valley Granite (Pty) Limited and Others (2012) JOL 28244 (GSJ)* the following was enunciated regarding urgency:
- [6] The import thereof is that the procedure set out in Rule 6(12) is not there for the taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain redress.
- [7] It is important to note that the rules require absence of substantial redress. This is not equivalent to irreparable harm that is required before the granting of interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able to obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his case in that regard”.
- [5] An examination of the conspectus and substance of the application led to the ineluctable conclusion that it was urgent. Pursuant, to a positive finding of urgency in favour of the applicant’s, the issue of urgency does not warrant further elucidation.

Background facts

- [6] The main performer is the first applicant. A crisp backdrop of her vocational ascend gives context to the proposed relief. The first applicant commenced her career as an admissions clerk at Vryburg Private Hospital whereat the first applicant focused on dealing with the admissions of patients, medical aid authorizations, causality admissions, filing and general administration including the charging of hospital doctors claims. In December 2012, the first applicant was duly recognized with a promotion to a debtor’s clerk and assistant case manager. It appears that the first applicant acted in the capacity as assistant case manager from 3 December 2012 to 30 April 2016.

- [7] Operating within this environment, the first applicant accumulated a wealth of experience in respect of medical aid claims, and the essential mechanics of the medical aid schemes. From 2 May 2016 to 14 July 2018, the first applicant had secured employment at Robert Twigge Financial Services dealing with medical aid and related issues. The professional relationship ceased on the passing of Mr. Robert Twigge.
- [8] In July 2018 the first applicant entered into supervision or an employment agreement (the “SA”) with the first respondent. The SA was not provided to the first applicant, notwithstanding proper demand for it. Whilst in the employ of the first respondent, the second and third respondents often commended and complimented the first applicant on her work efforts.
- [9] On being offered better conditions of employment, the offer was discussed with third respondent who was unable to equal it. The first applicant decided to tender her resignation on 18 July 2022. This resignation letter provided for two weeks’ notice, now by the first applicant’s own calculation her final day in the employ of the first respondent would have been 29 July 2022. At the time of discussing the offer tendered to the first applicant as well as the expiration of the resignation period, in the view of the first applicant, no disciplinary proceedings had been instituted against her.
- [10] On 29 July 2022, the final date at the employ of the first respondent, the third respondent via what’s app, conveyed inter alia her gratitude for the standard of work that was rendered, by the first applicant and wished the first applicant well on the journey ahead. The first applicant took up employment at Tokkie Ferreira Brokers (Pty) Ltd, the second applicant.
- [11] The employ at the second applicant was under supervision. The second applicant laid out considerable capital to vigorously advertise the provision of medical aid and related broker services. The upside of this marketing strategy seems to have borne immediate fruits. To borrow from the words of the first applicant “this has resulted therein that the movement of clients and the obtaining of new clients is driven by service delivery rather than financial benefits.” Three salient factors underscored the exponential growth of the client base of the second applicant, firstly the marketing campaigns that were conducted, secondly the well-established good reputation of the second applicant and thirdly the first applicant’s specialized knowledge in dealing with medical aid and related claims.
- [12] A passage of four months had elapsed after what the first applicant suggested was her last day (29 July 2022) at the employ of the first respondent, the first applicant received a Notice of Disciplinary Hearing, couched in terms of section 14(1) (2) or (3) of the Financial Advisory and Intermediary Services Act 37 of 2002 (“the FAIS”) In the view of the first applicant, the letter of the law concerning this notice had not been complied with. Notwithstanding, the glaring defects in the view of the applicants in the Notice of Disciplinary Hearing, attorneys for the first applicant responded that any attempt to conduct any disciplinary hearing against the first applicant would be unlawful, given that the first applicant had left the employ of the first respondent. No procedural shortcomings were objected to.

- [13] The letter encouraging the first respondent to desist from having the proposed disciplinary hearing did not have the desired effect. On 14 December 2022 the first applicant elected not to attend the disciplinary hearing. The finding of the disciplinary hearing in the absence of the first applicant was in broad that the first applicant had failed to adhere to the terms of her employment agreement. Resultantly, the first applicant was barred and the Financial Sector Conduct Authorities (“the FSCA”) had been notified of the first applicant’s barring. The actions of the first applicant were listed on the FSCA as being barred as the first applicant “Does not comply with personal character qualities of honesty and integrity.” This website, if accessed, is open to the public at large.
- [14] On 14 December 2022, an employee of the first respondent disseminated electronic mails to innumerable third parties, previous clientele of the first applicant and apparently all of the respondent’s clientele informing all recipients of the debarring of the first applicant.
- [15] An exchange of correspondence between the respective attorneys for the litigating parties ensured commencing on 14 December 2022, which progressed during the month of December 2022 and spilled over into January 2023. The parties were unable to find each other in terms of a remedy which would resolve the issue.
- [16] Regarding the second applicant, the launching of this application had been authorized by the sole director, Mr Danie Burger, (Tokkie) Ferreira. The second applicant is Tokkie Ferreira (Pty) Ltd, a private company registered and incorporated in terms of the relevant company laws, of the Republic of South Africa with its main place of business at 38 McKenzie Street, Vryburg, North-West Province. The second applicant is a duly registered financial service provider, established in 2002, which renders financial and insurance related services. The first applicant is an employee of the second applicant.
- [17] The first applicant features prominently on the website and the marketing campaign that the second applicant embarked upon. In terms of financial exposé for the purposes of marketing the second applicant, an estimated amount of approximately between R500-000-00 and R750-000-00 is spread out per annum, on marketing with the sole aim of building the second applicant’s reputation and brand. As such, the second applicant has a legitimate legal protectable interest; inherent therein is the protection of the second applicant’s name and reputation.
- [18] The applicants contend that respondents should have been interdicted from damaging the reputations of the applicants and spreading injurious falsehoods about the applicants. These falsehoods are in the form of emails that have been distributed in the public domain. An interpretation of the email implies that the first applicant was correctly barred in terms of proper procedure and legal protocol. The barring denotes that the first applicant is prohibited from rendering financial services.
- [19] The applicants submitted that a proper case had been made out for an interdict in that the applicants have established that they have a clear right to the protection of their reputations and to circumvent unlawful competition in the form of the dissemination of falsehoods. In

respect of irreparable harm, the applicants opined that there was a well-grounded apprehension of irreparable harm if the relief was not granted. This was as a result of the reputational damage that was suffered by the applicants. The consequences of the emails transmitted and the listing of the first applicant on the FSCA website, indicating that the first applicant was barred due to dishonesty and lack of integrity is damaging beyond any proper qualification or quantification.

- [20] Regarding the balance of convenience (in so far as interim relief is to be granted in the alternative), it would be best to borrow from the applicants where the following is stated:

“119. The balance of convenience clearly favours the granting of the final relief or interim relief pending the finalisation of either the damages claim or the proceedings pending before the Tribunal. If the Respondents believe that their debarment of the First Applicant is proper, then they can try and prove that in the reconsideration application.

“120. It is inherently unfair to allow the Respondents to continue with their defamation and attack upon the First applicants prior to the true issues between the parties having been resolved through litigation. If the Respondents believe that the Applicants have acted unlawfully then they can use means available in Court process to prove that. The Respondents know that they will not succeed and have therefore opted for the smear campaign against the First respondent (should have read first applicant)”

- [21] There is no other satisfactory remedy as contended by the applicants, as the initiating of the criminal charges would not be of any assistance as this process is slow and ineffective.

The respondent's case

- [22] The respondents raised a number of legal points, in view of the ultimate finding made, these legal points are not deserving of further attention.
- [23] The case for the respondents run parallel to that of the applicant. It is undeniably that the first applicant was previously in the employ of the first respondent. The respondents deny that the first applicant whilst in their employ, disclosed that a better career opportunity had presented itself. The first applicant indicated to the third respondent that she wanted an increase of R10-000-00 per month and that there were potentially two other offers, presumably in the environment peculiar to which the first applicant practiced her skills.
- [24] The third respondent specifically requested of the first applicant that a list be provided of all the clientele that the first applicant had serviced whilst in the employ of the first respondent. The first applicant declined. This request was made on the basis that first applicant had no clients and that at all time she acted in a representative capacity of the first respondent. Therefore the client relationship that existed was between the first respondent and the clients. The first applicant refused to provide the thirty-day notice.
- [25] The complimentary overtures of the third respondent, directed at the first applicant on her departure from the employ of the first respondent are incontestable. The respondents raised no issues with the first applicant proposed new venture.

- [26] As a result of the first applicant securing information unlawfully from the data base of the first respondents, the respondents proceeded to institute a disciplinary hearing against the first applicant, by providing a notice of the commencement of the disciplinary hearing and a notice of the said hearing. The first applicant elected not to attend the disciplinary hearing. The disciplinary process guided by direction of the FSCA culminated in the barring of the first applicant. The barring of the first applicant imposed certain obligatory actions on the respondents.
- [27] In corroborating the unlawful actions of the first applicant, a confirmatory affidavit deposed to by Mrs Van Vuuren that the first applicant took files of the first respondent home with her. Well knowing that the first applicant clandestinely removed her service agreement, she calls for its production fully alive to the impossibility of this specific performance by the respondents. The first applicant attempted to persuade clientele of the first respondent to move their respective portfolios with her. The first applicant was barred after a disciplinary hearing of which the first applicant was duly informed of. The debarment of the first applicant was forwarded to FSCA.
- [28] This debarment remains undisturbed until the debarment is reconsidered by The Financial Services Tribunal. It is a lawful debarment until pronounced otherwise. It is unquestionably that an email emanating from an individual in the employ of the first respondent was disseminated. The email was directed to every person that was part of the first respondent's data base and an obligatory duty rested on the respondents to act so. The respondents contend that the email circulated was the truth and it was peremptory of the first respondent to have done so. The effect of the debarring, did not debar the second applicant from continuing to operate as a business concern.

The law on interdicts

- [29] In terms of the relief proposed, the applicants founding affidavit speaks to the following prerequisites for the interdictory relief:

- (i) Clear right
- (ii) Irreparable harm
- (iii) Balance of convenience (in so far as interim relief is granted in the alternative)
- (iv) No other satisfactory remedy.

Discussion

The requirements for an interim interdict and a final interdict

- [30] The requirements for the granting of an interim interdict are settled. The seminal authority *Setlogelo v Setlogelo* 1914 AD at 227 notwithstanding that the case dealt with a final interdict, has served the purpose of determining the threshold for the grant of interim interdicts for more than a hundred years (100). It is still good law. The test formulated in *Setlogelo* is such that, an applicant has to establish:
- (i) a prima facie right, though open to some doubt;
 - (ii) a reasonable apprehension of irreparable and imminent harm to the right;
 - (iii) the balance of convenience; and
 - (iv) the applicant must have no other satisfactory remedy.
- [31] The rudiments for the granting of a final interdict are equally settled. The requirements for a final interdict differ in two material respects from the requirements for an interim interdict. The test, for the granting of a final interdict, requires of an applicant to establish:
- (i) a clear right;
 - (ii) a reasonable apprehension of irreparable harm and imminent harm to the right;
 - (iii) no other satisfactory remedy available to the applicant.
- [32] The first difference between an interim and final interdict lies in the nature of the right to be asserted. Whereas an applicant need only prove a prima facie right (though open to some doubt) in the case of an interim interdict, the requirement for the granting of a final interdict is much more stringent in that a clear right must be proven. The second difference is that in an application for an interim interdict, an applicant must show that the balance of convenience justifies the granting of the interim interdict. No such requirement exists for the granting of a final interdict.
- [33] In view of the final draft order that was presented to me and the applicant's assertion of the existence of a clear right, the relief sought could have only been for a final interdict.
- [34] The legality of the debarment process is not before this Court for reconsideration. I am unpersuaded in this view that I hold. It was rather disingenuous of the applicants to devote a large portion of the founding papers on the shortcomings of the disciplinary process relating to the first applicant. This was misplaced whilst being fully alive to the fact that the reconsideration of the first applicant's debarring was before The Financial Services Tribunal.

[35] It inevitably led to a prolixity of the papers. An attempt to cloud facts was ill-contrived. I was not enjoined with the powers in an urgent application to review the disciplinary process. The application that was before me was that of an interim or a final interdict. The applicants seem to blow hot and cold on this. The reconsideration application falling within the purview of section 230 of the Financial Sector Regulation Act 9 of 2017, which was to be considered in due course by The Financial Services Tribunal.

[36] This much was apparent to the applicants by annexing the reconsideration application as “FA11”. In any event, in answering affidavit the respondents submit at paragraph 194:

“In addition, on their own version although they do not disclose the full background to this, the debarment has been suspended provisionally

pending finalisation of the application to suspend the debarment which in turn was pending the finalisation of the reconsideration

application.”

[37] In the same tenor, it was futile of the respondents to attach confirmatory affidavits confirming conduct alleged by the first applicant to bolster the finding of the disciplinary process, which by the respondents own concession was before The Financial Services Tribunal.

[38] Without trivialising the relief sought, the heart of the application can be gleamed from the commonalties. I enumerate these as follows:

(i) The citation of the various litigants.

(ii) The first applicant was a former employee of the first respondent.

(iii) The first applicant resigned as an employee of the first respondent and was now an employee of the second applicant.

(iv) Notice of a disciplinary process was delivered to the first applicant. The applicant elected not to attend same.

(v) On 14 December 2022, the first applicant was debarred.

(vi) The debarring was distributed through email. The contents of the email are accurate in that the respondents do not dispute that indeed it originated with the respondents

(vii) The first applicant has filed a reconsideration application which is pending before The Financial Services Tribunal. The respondents are to oppose the same and opposing papers are to be delivered.

(viii) The debarment has been provisionally suspended pending the hearing of the suspension application.

The credibility of the first applicant

- [39] It is apparent that on the papers, the first applicant has not been candid in her affidavits. There is a distinct probability that the first applicant may not have been truthful with the second applicant.
- [40] The first applicant's credibility was severely tainted by innumerable improbabilities in her evidence. I expand on a few. The first applicant attempted unsuccessfully assert a standpoint of a victim and that she has been indispensable to the peculiar field of employment that she operated in.
- [41] In July 2018, the first applicant asserted that a "supervision agreement" was entered into with the first respondent. The first applicant was not furnished with a copy of this agreement notwithstanding a demand. The precise detail of this demand was not aerated in the founding affidavit. In reply, the first applicant contends that in September 2021, a copy of her supervision agreement was requested after a dispute arose with another colleague. One wonders why the supervision agreement would suddenly have become important, when it is unchallenged that the first applicant commenced employment with the first respondent in July 2018.
- [42] I am perplexed by the disappearance of the supervision agreement and the complained reluctance of the respondents not to discover same. The first applicant would have the court believe that irrespective of the congenial relationship that she had enjoined during her employment with the respondents from 15 July 2018 until 29 July 2022, the respondents had not furnished her with this supervision agreement is simply disingenuous.
- [43] The tone of what's app departing messages which the first applicant so heavily emphasises belie the existence of a strained professional relationship between the first applicant and the respondents. The first applicant was considered as a team member during her employment with the first respondent. That being found, it would have been unnecessary for her to demand the supervision agreement. A simple request in so an affable environment would have probably led to its production. To have averred that the respondents have resisted the production of the supervision agreement is simply opportunistic.
- [44] Then again, this is not the only document that the respondents are professed to have retained. The first applicant declares that on 18 July 2022, a resignation letter was handed over to third respondent. In the same tenor as the supervision agreement, the only copy of the resignation letter is in possession of the respondents and the respondents "are called upon to provide the same in their answering papers". This contention is simply astounding on two levels. Firstly, the first applicant speaks of a copy, the existence of the original or its whereabouts are simply side- stepped. The second level exposes the lack of frankness of the first applicant. The first applicant, as was her right, tendered a written resignation. Incongruously, the first applicant does not tender the original or a copy of this resignation letter to the second applicant, more so in the actual diction of the first applicant that the "integrity and trustworthiness of employees of an employer is of central importance. If the employee is seen as dishonest and lacking integrity that implies that the employer employs

untrustworthy persons and in turn cannot be trusted and relied on.” There is no affidavit evidence to challenge these business values that the second applicant coheres to. This makes it highly improbable that the second applicant would not have required a letter of resignation from the first applicant, before an informed decision was made whether the first applicant had in fact resigned and could be employed by him.

- [45] In June 2020, the first applicant concedes that she had requested Mrs. Van Vuuren to accompany her while she made copies of her qualifications as she “was afraid that Topkin would fire me if they knew that I was in the market and the lookout for a better position. The documents were not confidential or privileged, did not relate to any client and only to me personally. ...I made copies of my matric

certificate, my RE examination, and all my courses whilst I was employed at Topfin.” These averments are plainly ill-contrived. It was far-fetched that the first applicant did not have copies of her matric certificate or the original. It is further unlikely that the first applicant’s supervision contract was not amongst the documents that were being copied.

- [46] The first applicant’s proclivity for being contradictory is further borne out by the facts. The first applicant attached what’s app messages to reinforce the cordial and congenial relationship that she enjoyed with the respondents. The first applicant’s averments that her employment would be terminated had the first respondent discovered that the first applicant was in search of better employment prospects are simply mendacious. This is self-corroborated by the first applicant in reply wherein the following was stated:

“111. Tokkie started making me offers as far back as 2018. Mrs Reinecke was made aware of this to which she said she cannot offer me the package that Tokkie is willing to provide.”

- [47] In terms of the first applicant’s employment agreement, it was required of her to treat information of the first respondent’s client data base as confidential, and the data base of information would be the property of the first respondent. In terms of the employment contract for representatives under supervision, the first applicant had to adhere to inter alia clauses 16 and 17. In terms of clause 16, the first applicant acknowledged that all notes, memoranda, records lists of clients/providers and or employees, correspondence documents, computer and other material, whether created by the first applicant or not, which belongs to the employer will remain the property of the employer and upon termination of the first applicant’s employment had to be returned to the employer. In terms of clause 17, the first applicant agreed and acknowledged that after termination of her employment, the first applicant may not use for the first applicant’s benefit or any other person any confidential information.
- [48] In raising the procedural and substantive irregularities in the debarment process, which I emphasize is *lis pendens*, the notice of the Disciplinary Hearing, delineated in broad the charges:

- (i) Performed, caused, permitted, or assisted in any act which is/was prejudicial to the administration, discipline or efficiency of the business
- (ii) Gross dishonesty
- (iii) Failure to comply with the internal safekeeping measures to protect personal information, as defined in POPIA from the business premises without prior consent from the Employer.
- (v) Gross dishonesty which is/was of such a nature that it has/had an impact on the employment relationship between Employer and the Employee.
- (vi) Wilfully and knowingly committing acts of such a nature which is in contradiction with good faith and/or relevant South African legislation.

[49] The response to the receipt of this notice, is beyond question. The nucleus of the charges would have been glaringly obvious to the first applicant, in conjunction with her accumulated experience disclosed in her founding affidavit. What was expected of the first applicant was to make a full disclosure as to her dealings with the data base information of the first respondent, in her founding affidavit. The first applicant chose not to. In the founding affidavit, the first applicant makes no mention of a USB- stick containing information of the first respondent's clients which was raised in August 2022, which was confirmed would be returned. The first applicant chose not to disclose her sojourn to the offices of the respondents with Mrs Van Vurren when this was highly relevant.

The waffle of the first applicant was endless.

The relief sought

[50] The applicants contended the existence of a clear right. The averment of the existence of a clear right falls for consideration within the purview of a final interdict. This was the relief sought in terms of the draft order that was handed up for consideration. Under the caption of the elements for an interdict the applicant proffered:

"107. The applicants contend that they have made out a case for the relief being sought:

Clear right

"108. The applicants have a clear right to protect their reputations and to stop unlawful competition in the form of spreading injurious

falsehoods by the respondents...."

[51] From a reading of the proposed draft order, I was fortified in my view that final relief was being sought. The heart of interdictory

relief is to prevent or prohibit unlawful conduct. In *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* [2008] ZASCA 78; 2008 (5) SA 339(SCA) 346H at paragraph [20] the SCA stated as follows:

“An interdict is not a remedy for past invasion of rights but is concerned with the present or future infringements. It is appropriate

only where future injury is feared. When a wrongful act giving rise to the injury has already occurred, it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated.”

[52] The applicants submitted that they are enjoined with a clear right to protect their reputations and to stop the unlawful competition in the form of the spreading of injurious falsehoods by the respondents. It is incontestable that the first applicant was subject to a disciplinary hearing (albeit in her absence as elected), after she had resigned. It was further irrefutable that the first applicant was debarred. The respondents admit to the transmission of the email which was peremptory in terms of protocol. In the email there was no injurious falsehoods, there exists no defamatory claims. The contents of the email embraced the truth at the time of its publication. In making this finding I must categorically and unequivocally reiterate, in the determination of urgent relief in the form of a final interdictory, I am not enjoined with a discretion to reconsider the debarment process. This much was conceded to by the applicants. The applicants had not made out a cause of action in terms of a clear right.

Irreparable harm

[53] In attempting to deal with this prerequisite of the final interdict the applicants use the phrase “rumour- mongering.” The averment defied logic. It was not idle talk within the environment that the applicants and respondents co-exist that the first applicant had been debarred. The courts have no control over rumours, which are generally salacious having its genesis from unidentified sources. Court orders are not founded on rumours. The emails have been distributed to persons that the respondents were obliged to. On the presumption that the applicants had made out a cause of action for the granting of a final interdict, it would not have circumvented the existence of this email, which is within the knowledge of the recipients. To suggest that the conduct of the respondents was devious is a misnomer. At the date of transmission, the contents of the email were the truth, the first applicant was debarred afore a disciplinary process. The effect of the debarment was that the first applicant was listed on the Financial Sector Conduct Authority’s website as having been debarred, as such not being entitled to provide financial services.

Balance of convenience (in so far as interim relief is granted in the alternative) as cited by the applicants

[54] The applicants conflated interim with final relief. The suffixing of “in so far as interim relief is to be granted in the alternative” to the balance of convenience prerequisite whilst asserting a claim of a clear right is legally untenable. The balance of convenience is used within the parameters of an interim interdict. Afore, a consideration of the balance of convenience, it falls to be determined whether an applicant has established a prima facie right though opened to some doubt. Put differently, the applicant premised the relief on a

clear right, which pinned their colours to the mask of seeking final relief. The applicants' case hinged solely on publications in the form of emails made on 14 December

2022. There is no rational or evidential basis provided that the applicants have a legitimate fear that further publications would be made. In short, the applicants have not presented evidence of a reasonable apprehension of future harm. This is the basis for the invasive relief, to interdict future harm.

No other satisfactory remedy

- [55] In reply the first applicant states as follows:

"52. The relief is not invasive and not unreasonable. It simply seeks to stop the unlawful defamation which may continue to occur in the future. It does not stop the Respondents from acting lawfully and it will simply serve to ensure that the disputes are properly ventilated in a court of law rather than by abuse of process facilitated through the distribution of "bulk E-mails." (My underling)

- [56] The applicants contend that all reasonable steps have been taken to address the unlawful and improper debarment of the first applicant. This did not halt the continued unlawful conduct of the respondents. Due consideration was given to instituting a criminal process, but it was deemed to be a slow and ineffective process. What the applicants seem to shy away from was that there was no perpetual transmission of the email addressing the debarment of the first applicant, after the provisionally suspension of the first applicant's debarment, pending the finalization of the reconsideration application by the Financial Services Tribunal. There was no evidence that apart from the admitted emails that were transmitted by respondents, the respondents had perpetuated the transmission of further emails regarding the first applicant's debarment after the debarment of the first applicant was provisionally suspended. The applicant's submission that the respondents are intent upon proceeding to do so, and that the applicants have good reason to fear further harm which may arise, is misplaced. It was apparent that the applicants were clutching at straws, without the provision of necessary evidence. The applicants had not made out a case for the relief sought. In any event the first applicant, has the pending hearing before the Financial Services Tribunal, which is not finalized, as interim remedy.

- [57] The applicants may find solace in what the Supreme Court of Appeal stated in *Midi Television (Pty) Ltd v Director of Public Prosecutions (WC)* [2007] ZASCA 56; 2007 (5) SA 540 SCA at paragraph [20] the following was stated:

"Where it is alleged, for example, that a publication is defamatory, but it has yet to be established that the defamation is unlawful, an award of damages is usually capable of vindicating the right to reputation if it is later found to have been infringed, and an anticipatory ban on the publication will seldom be necessary for that purpose."

Costs

- [58] There is no basis to deviate from the usual order as far as costs are concerned.

Order

[59] Resultantly, the following order is made;

The application is dismissed with costs.

A REDDY

ACTING JUDGE OF THE HIGH COURT,

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

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