

INTERIM INTERDICTS, A GROWING TREND – John Carr-Hartley (Managing Partner)

There is a growing trend on the part of lawyers and members of the public alike to seek an interdict when the rights of party have been, or are thought to have been, infringed. Whilst there is no doubt that in the correct circumstances an interdict is a very powerful remedy, it is useful to know when and in what circumstances an interdict should be sought.

Interdicts can be classified into two broad categories. An **interim interdict** generally seeks to prevent an infringement of a right, or to stop the infringement of a right from continuing, pending the final determination of the rights of the parties. A **final interdict** is generally used to permanently prevent or stop the infringement of a party's clear right. Although there are differences in the requirements which must be met in order for a person to qualify for an interim interdict or a final interdict, there is a substantial overlap in the requirements. This article will only deal with the requirements of an interim interdict, which is the type of interdict most commonly sought.

At the outset, it is to be noted that interdicts are regarded as “*an unusual, extraordinary and discretionary remedy.*” Per Tebbutt JP in the case of **Spectra Botswana (Pty) Ltd v First National Bank & Ano 1995 BLR 210 CA**. The requirements which must be met by a person seeking an interim interdict are:

- that the right which is the subject matter of the main action and which he seeks to protect by means of an interim interdict is clear or if not clear, is *prima facie* established though open to some doubt;
- that if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the Applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
- that the balance of convenience favours the granting of the interim interdict; and
- the Applicant has no other satisfactory remedy. (per Tebbutt JP in Spectra *supra*)

Although the requirements which must be met in order for an interim interdict to be granted are not considered in isolation, each of the requirements must be met. That is, a party seeking an interim interdict must demonstrate in the part founding affidavit that he has a legal right which is being infringed, that if the interdict is not granted he will suffer irreparable harm, that the balance of convenience is in his favour and that he has no other satisfactory remedy which would protect his right or compensate him for the infringement of the right.

Most often applications for interim interdicts fail because the applicant is unable to show irreparable harm or the applicant does not have an adequate alternative remedy.

The issue of irreparable harm and the “balance of convenience” are often considered together. As a result, the applicant does not always have to demonstrate that the harm that he will suffer (if the interdict is not granted) is absolutely irreparable, but he must demonstrate with a high degree of probability that he will suffer significant harm and that this harm outweighs maintaining the status quo.

Where most applications for interim interdicts fail is because the applicant is found by the Court to have an adequate alternative remedy. In many instances an applicant seeking an interim interdict could be adequately compensated by an award of damages if it is later found that his rights had been infringed.

The above two requirements are best demonstrated by briefly narrating the facts of a matter recently decided by the High Court in the case of **Zac Construction v Elsamex International**. In that matter, Zac Construction was a sub-contractor on the rehabilitation of a road. Zac Construction claimed that various amounts were owed to it for work done. Elsamex disputed the claim. Zac Construction suspended work and in turn Elsamex cancelled the sub-contract and started work on the road itself. Zac Construction sought an interdict, interdicting Elsamex (or anyone else) from executing the works pending the outcome of an arbitration which it intended to institute against Elsamex. The Court found that if Zac Construction was correct and Elsamex had unlawfully terminated the sub-contract, Zac Construction could be adequately compensated by an award of damages in the arbitration proceedings. In addition, the Court found that delaying the rehabilitation of a major public road until the outcome of the arbitration would have catastrophic consequences and therefore the balance of convenience did not favour the granting of the interdict. As a result, the Court dismissed the application for the interdict.

An interim interdict is a powerful, but also an unusual and extraordinary remedy and should only be sought when the Applicant can satisfy each of the requirements.