C of A (CIV) N0.1 of 2006

IN THE COURT OF APPEAL OF LESOTHO

In the matter between:

BP LESOTHO (PTY) LTD APPELLANT

and

STANLEY MAITSE MOLOI FIRST RESPONDENT

STANDARD BANK LESOTHO (PTY) LTD SECOND RESPONDENT

CORAM: STEYN P
GROSSKOPF JA
NOMNGCONGO J

Summary

Interim interdict to freeze bank account – appealability of order – abuse of urgent *ex parte* *application without notice – no need to found jurisdiction – so-called Mareva injunction – requirements for an interim interdict.*

JUDGMENT

GROSSKOPF JA

[1] The first respondent applied ex parte, and on an urgent basis, to the Court a quo on 7 October 2005 for an interim order interdicting the appellant forthwith from operating its current account and call account with the second respondent ("the bank") pending the finalization of the actions in CIV/T/581/04 and CIV/T/582/04. The High Court granted the interim order on 7 October 2005 without hearing the appellant. The appellant's bank accounts holding more than M24 million were thereby frozen. The Court a quo later confirmed the rule on 14 December 2005 but allowed the freezing of the appellant's funds only to the extent of the appellant's alleged indebtedness.

[2] The two actions referred to in the order of the Court a quo had been instituted by the first respondent against the appellant in December 2004 and were still pending when the first respondent brought his urgent application. The first respondent gave no particulars of these actions. We were however told by counsel for the appellant that in case CIV/T/581/04 the first respondent was claiming M 1 500 000.00 in respect of the alleged "wrongful, intentional and malicious civil action" which the appellant had instituted against him, while in case CIV/T/582/04 the first respondent was claiming M75 000,00 from the appellant, being an amount which he allegedly became entitled to when purchases were made from the appellant.

Counsel for the appellant further informed us that the alleged malicious civil action which the appellant had instituted against the first respondent and another in CIV/T/281/01 was in respect of their alleged indebtedness to the appellant. This matter is also still pending.

[3] It is common cause that the appellant had for some years, quite openly, indicated that it intended closing down its business in Lesotho by the end of September 2005. The first respondent maintained in his founding affidavit that in such an event he may eventually find himself with an "empty judgment" against a paper company if he were to succeed in his above mentioned two actions against the appellant.

[4] Five aspects were raised on appeal, viz

1. The appealability of the order of the court a quo.
2. The application for and granting of urgent relief without notice.
3. The need to found jurisdiction
4. The so-called Mareva injunction.
5. The requirements for an interim interdict.

Appealability of the order

[5] Section 16(1) of the Court of Appeal Act 10 of 1978 provides that an appeal shall lie to this Court -

> "(a) from all final judgments of the High Court;
> (b) by leave of the Court from on interlocutory order, an order made ex parte or an order as to costs only."

[6] Counsel for the first respondent submitted that an order is not appealable unless it is such as to "dispose of any issue or any portion of the issue in the main action or suit", as was laid down in Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948 (1) 839 (A) at 870. (And see further African Wanderers Football Club (Pty) Ltd v Wanderers Football Club 1977 (2) SA 38 (A) at 48 E –G; Zweni v Minister of Law and Order 1993 (1) SA 523 (A) at 532 J – 533 A; Cronshaw and Another v Fidelity Guards Holdings (Pty) Ltd 1996 (3) SA 686 (A) at 690 D –G.) Streicher JA however pointed out – correctly in our view – in Metlika Trading Ltd and Others v Commissioner, South African Revenue Service 2005 (3) SA 1 (SCA) that an interim interdict need not necessarily have to have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings before it can be regarded in effect as a final order. The position is set out as follows by the learned Judge at p12 in the Metlika case:

"[21] As in *African Wanderers Football Club Ltd*, the issues in the interdict proceedings in *Cronshaw* were the same as the issues which were to be decided in a trial. Schutz JA stated that, intrinsically difficult as it was to decide whether a decision was 'interlocutory' or 'final', there had to be a rule and that rule was stated by Schreiner JA in *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A) at 870 to be -

> '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" '.

[22] The present case is distinguishable from *African Wanderers Football Club Ltd and Cronshaw.* Whether or not the aircraft should be returned to South Africa and whether or not the other

> orders relating to the aircraft should be granted is not an issue in the action pending [in] which the interdict was granted. In these circumstances, coupled with the fact that an application for an interim interdict is a proceeding separate from the main proceedings pending the determination of which it was granted (see *Knox D'Arcy Ltd and others v Jamieson and Others* 1996 (4) SA 348 (A) at 359H read with 357C), the test in *Pretoria Garrison* is wholly inappropriate to determine whether the present order granted is final in effect and thus appealable.
>
> [23] In determining whether an order is final, it is important to bear in mind that 'not merely the form of the order must be considered but also, and predominantly, its effect' (S*outh African Motor Industry Employers' Association v South African Bank of Athens Ltd* 1980 (3) SA 91 (A) at 96H, and *Zweni* at 5321).
>
> [24] The order that steps be taken to procure the return of the aircraft to South Africa, as well as the other orders relating to the aircraft, were intended to have immediate effect, they will not be reconsidered at the trial and will not be reconsidered on the same facts by the Court *a quo*. For these reasons, they are in effect final orders."

[7] The order of the Court *a quo* pertaining to the freezing of the appellant's accounts had immediate and final effect and will not be reconsidered at the trial of the first respondent's actions. I therefore hold that the order was in effect a final judgment and therefore appealable, despite the fact that it did not have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.

Urgent relief without notice

[8] The application in this matter was brought as an urgent ex parte application in the Court a quo without any notice to the respondents. This Court and the High Court have warned time and again against the launching of such applications and against the granting of orders without notice to respondents.

See in the Court of Appeal: Commander of the Lesotho Defence Force v Attorney General and Another 1999 LLR 13 at 16, Phai Fothoane and Another v President, Christian Democratic Party and Others C of A (CIV) 48 of 2000; Mapuseletso Mahlakeng and Others v Southern Sky (Pty) Ltd and Others C of A (CIV) 16 of 2003; National University of Lesotho and Another v Putsoa C of A (CIV) 28 of 2002. See in the High Court: L.H.D.A. v Phatela and Another CIV/APN 8 of 2002; Highlands Water Venture v DNC Construction (Pty) Ltd CIV/APN 123/1994 Easterbrook Transport (Pty) Ltd v The Commissioner of Police and Another, 1991 – 1996 LLR (1) 141 at 142. See also in South Africa: Knox D'Arcy Ltd and Others v Jamieson and Others 1996 (4) SA 348 (A) at 379 F-I.

[9] It is not clear on what grounds the learned acting judge granted the interim order on 7 October 2005. The first respondent asked that the appellant's bank accounts be frozen so as to found jurisdiction, but it appeared from the first respondent's own founding affidavit that the appellant was an incola. The learned judge nevertheless granted the interim order with its far reaching consequences in the absence of the appellant who had not been given notice. The appellant raised the lack of urgency when the matter came before the Court a quo on the return day but the Court a quo found that the first respondent has shown "reasons for urgency". The first respondent alleged in his founding affidavit that the appellant intended to close down its business operations in Lesotho by the end of September 2005 and that the matter became "very urgent" in the light of the appellant's impending departure. The first respondent however failed to disclose in his founding affidavit when

this first came to his notice. The first respondent later conceded in his replying affidavit that he knew already by 11April 2005 at the latest that the appellant intended to close down its operations in Lesotho by the end of September 2005. Despite this knowledge the appellant waited until 7 October 2005 before he brought his ex parte application as a matter of urgency. Any possible urgency was clearly brought about by the first respondent himself. Had he launched his application in April 2005 there would have been no urgency and no need to bring an ex parte application without giving notice. In my judgment the Court a quo should have discharged the rule and dismissed the application on the return day on this ground alone. The learned judge instead confirmed the rule but allowed the freezing of the appellant's funds at the bank only to the extent of the appellant's alleged indebtedness and costs.

The need to found Jurisdiction

[10] The first respondent alleged in his founding affidavit that it would be in the interest of justice if the appellant's bank accounts were to be frozen so as to found jurisdiction, but he subsequently conceded that the appellant was an incola of Lesotho and that it was therefore not necessary to found jurisdiction. It actually appeared from the first respondent's founding affidavit that the appellant was an incola. It was described as a company duly incorporated in accordance with the laws of Lesotho with its principal place of business in Maseru.

The so-called Mareva Injunction

[11] It was held in the Knox D'Arcy case, supra, that an applicant may in an appropriate case, and pending the outcome of an action for damages, bring an interlocutory interdict to restrain a respondent from concealing or getting rid of his assets with the intention of defeating the applicant's claim. Such an interdict is, however, not available to the first respondent. He has failed at the outset to make out a case that he has well-founded claims for damages against the appellant. But of greater importance is his failure to show that the appellant was getting rid of its funds and assets, or is likely to do so, with the intention of defeating the claims of the first respondent. The first respondent did not even allege that that is what the appellant had in mind. The appellant alleged in its answering affidavit that there is nothing sinister in its attempts to dispose of its business in Lesotho and that it had openly disclosed its intention to do so for a number of years. The first respondent in his replying affidavit conceded that the appellant did not have "any ulterior motive" to dispose of its business operations.

I am therefore of the view that the first respondent has not made out a case for relief in accordance with the requirements of the so-called Mareva injunction.

Requirements for an interim interdict

[12] One of the requirements for an interim interdict is that the applicant must show that it has a prima facie right, even if it is open to some doubt. (See

Setlogelo v Setlogelo 1914 AD 221 at 227, a case consistently followed in Lesotho. See for instance Attorney General & Another v Swissbourgh Diamond Mines (Pty) Ltd and Others (No1) LAC (1995 – 1999) 87 at 99; Lesotho University Teachers' and Researchers' Union v National University of Lesotho LAC (1995 – 1999) 661 at 672). The only particulars which the first respondent disclosed in this regard were the reference numbers of the two actions which he had instituted against the appellant. The pleadings in those two cases were not before the Court a quo and there was no indication on what grounds the first respondent was claiming damages from the appellant. There was no allegation that the first respondent had a prima facie right, and no facts were placed before the Court to substantiate such a right. For this reason too the Court a quo should not have confirmed the rule.

Order

[13] For the reason set out above the appeal is upheld with costs and the order of the Court a quo is set aside and substituted with the following order:

> "The rule is discharged and the application is dismissed with costs."

________________ ________

F. H. GROSSKOPF

JUDGE OF APPEAL

I agree

____

J. H. STEYN
PRESIDENT OF COURT OF APPEAL

I agree

____

T. NOMNGCONGO
EX OFFICIO JUDGE OF APPEAL

For the Appellant: Adv. J.P. Daffue

For the Respondent: Adv. H. Nathane

Delivered at Maseru this 11th day of April 2006.