THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 566/10

In the matter between:

MARK JULIAN ATKIN Appellant

and

PETRUS JACOBUS BOTES Respondent

Neutral citation: *Atkin v Botes* (566/10) [2011] ZASCA 125 (9 September 2011).

Coram: CLOETE, VAN HEERDEN, BOSIELO and SERITI JJA, and MEER AJA

Heard: **17 AUGUST 2011**

Delivered: **9 SEPTEMBER 2011**

Summary: An interdict restraining the respondent from disposing of part of its assets pending an action for damages is not appealable.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Makgoka J sitting as court of first instance):

The appeal is struck off the roll. The appellant is ordered to pay the respondent's costs.

JUDGMENT

CLOETE JA (VAN HEERDEN, BOSIELO and SERITI JJA, and MEER AJA concurring):

[1] This appeal raises the question whether the grant of an interdict, which prevents a respondent from freely dealing with its assets in order to defeat a judgment the applicant believes it will obtain in due course in an action for damages, is appealable.

[2] In May 2009 the respondent, Botes, was shot with a firearm by the appellant, Atkin. On 5 February 2010 Botes instituted an action against Atkin for delictual damages arising from the shooting. On 26 February 2010 and at the suit of Botes, Van der Byl AJ in the North Gauteng High Court granted, ex parte, an urgent interim interdict with immediate effect. The interdict restrained Atkin's attorneys (the second respondent in the court a quo) from paying out the nett proceeds of the sale of Atkin's house, and directed them to invest such proceeds in an interest bearing account 'with an acknowledged bank' pending finalisation of Botes' action for damages. Atkin anticipated the return day. Makgoka J confirmed the interim order on 31 March 2010 and subsequently granted leave to appeal to this court.

[3] The interdict granted by the court a quo is of the type discussed in *Knox D'Arcy Ltd & others v Jamieson & others* 1996 (4) SA 348 (A). Its factual basis was the conclusion by Makgoka J that Botes' apprehension that Atkin was dissipating his assets with the intention of defeating Botes' claim for damages, was well founded. It is this finding which Atkin sought to challenge on appeal.

[4] At the request of the court, counsel filed heads of argument dealing with the appealability of the order. Not surprisingly, counsel for Atkin contended that the order was appealable, whilst counsel for Botes contended to the contrary. As in many cases where this question has been raised, the answer is far from obvious. Schutz JA said in *Cronshaw & another v Coin Security Group (Pty) Ltd*[1] 1996 (3) SA 686 (A) at 690D-E:

'Where to draw the line between decisions which are "interlocutory" and such as have to await their decision on appeal until the proceedings in the court of first instance have been concluded, and those which are "final", deserving to be appealable before the main suit is, is a question that has vexed the minds of eminent lawyers for many centuries, and the answer has not always been the same. The question is intrinsically difficult, and a decision one way or the other may produce some unsatisfactory results.'

[5] In *Knox D'Arcy* it was definitively held,[2] approving previous authority to this effect, that the refusal of an interim interdict is appealable. However, E M Grosskopf JA also discussed, obiter, the position in regard to the grant of an interim interdict, as follows:[3]

'In passing it may be noted that the *grant* of an interim interdict stands, historically, on a different footing. As far back as *Prentice v Smith* (1889) 3 SAR 28 the Court held (at 29) that an order granting an interim interdict "is an interlocutory order, and that consequently there can be no appeal". On the whole this view was followed in the Provincial Divisions (see *Loggenberg v Beare* 1930 TPD 714; *Davis v Press & Co* [1944 CPD 108]; and authorities referred to in those cases) and, ultimately, prevailed in the Appellate Division (*African Wanderers Football Club (Pty) Ltd v Wanderers*

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[1] Incorrectly cited in the law reports and on the internet as '*Cronshaw & another v Fidelity Guards Holdings (Pty) Ltd*'.
[2] At 356H-359E.
[3] At 359F-360C.

Football Club 1977 (2) SA 38 (A) at 46H-47A and *Cronshaw's* case *supra*). Some Judges have questioned the validity of the distinction between the refusal and grant of an interim interdict. This distinction cannot be justified by the nature of the proceedings giving rise to the decision ─ it is the same in both cases (see, for example, *Davis v Press & Co* (*supra* at 118 per Fagan J)). And it may be argued that the prejudice suffered by the unsuccessful party also does not differ in principle. See *Davis'* case *supra* at 112-13 (De Villiers J). However, in *Loggenberg's* case *supra*, Greenberg J expressed the view (at 723) that "there is in fact a real distinction on the question of irreparability between the case of a granting of a temporary interdict and the refusal of a temporary interdict". There may also be a difference in the finality of the decision. Thus, as stated above, the refusal of an interim interdict is final. It cannot be reversed on the same facts (I disregard the possibility, discussed above, of a refusal on some technical ground). The same may not be true of the grant of an interim interdict. It may be open to the unsuccessful respondent to approach the Court for an amelioration or setting aside of an interdict, even if the only new circumstance is the practical experience of its operation. And, apart from the theoretical differences between the grant and the refusal of an interdict, there is also the practical one, discussed in *Cronshaw's* case at 12-15,[4] that an appeal against the grant of a temporary interdict would often be inconsistent with the very purpose of this remedy. See also *Davis v Press & Co* (*supra* at 119 (Fagan J)). It is, however, not necessary to pursue this matter any further. The appealability of the grant of an interim interdict does not arise directly for decision in this matter and is in any event concluded by authority.'

[6] In *Metlika Trading Ltd & others v Commissioner, South African Revenue Service* 2005 (3) SA 1 (SCA) this court held that an interim interdict is appealable if it is final in effect and not susceptible to alteration by the court of first instance. The decision also emphasised[5] that in determining whether an order is final in effect, it is important to bear in mind that 'not merely the form of the order must be considered but also, and predominantly, its effect'.[6] The crucial question in the appeal is therefore whether the granting of the

[4] The reference is to the typed judgment in the archives of this court. The passage in question appears at 691B-G of the reported judgment.
[5] In para 23.
[6] *South African Motor Industry Employers' Association v South African Bank of Athens Ltd* 1980 (3) SA 91 (A) at 96H. See also *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532I and *JR 209 Investments (Pty) Ltd & another v Pine Villa Country Estate (Pty) Ltd; Pine Villa Country Estate (Pty) Ltd v JR 209 Investments (Pty) Ltd* 2009 (4) SA 302 (SCA) para 25.

interim interdict was final in effect. Counsel for Atkin relied on *Metlika* and *JR 209 Investments (Pty) Ltd & another v Pine Villa Country Estate (Pty) Ltd; Pine Villa Country Estate (Pty) Ltd v JR 209 Investments (Pty) Ltd* 2009 (4) SA 302 (SCA) in support of his argument that this was indeed so.

[7] The *JR 209 Investments* case is not of assistance in deciding the present appeal. The order there was clearly final in effect. The same applies to *Maccsand CC v Macassar Land Claims Committee & others* [2005] 2 All SA 469 (SCA), another decision of this court. I shall deal with these two decisions first, and then with *Metlika*.

[8] In the *JR 209 Investments* case there was a dispute between the seller and the purchaser of an erf, Portion 7, in a township being developed by a developer. The seller instituted action for retransfer of the erf. The court a quo granted an interim interdict pending the final adjudication of the action. This court said:[7]

'The order which was sought and granted had as its substrate that the purchaser and the developer were prohibited from proceeding with the establishment of the township as a whole and not only in respect of the development of Portion 7. The order affected the entire development, yet the dispute between the parties related to Portion 7 only. The order was overbroad. The right to develop the township as a whole is not an issue that would be decided by the trial court and it was consequently final in effect even if only for a limited period. In our view the *merx* could have been preserved without the necessity for an order in those terms. It follows therefore that the order of Rabie J was appealable.'

[9] In the *Maccsand* case, the Macassar Land Claims Committee brought a claim in the Land Claims Court for restoration of the erf on which Maccsand conducted its sand mining operations, on the basis of unregistered commonage rights previously held by the owners of certain lots situated adjacent to the erf. This court said:[8]

'It is settled law that in determining whether a decision is appealable "not merely the form of the order must be considered but also, and predominantly, its effect" (*South*

[7] In para 26.
[8] In para 12.

African Motor Industry Employers' Association v South African Bank of Athens Ltd 1980 (3) SA 91 (A) at 96H, *Zweni* (*supra*) at 532I and *Metlika* (*supra*) at paragraph 23). Maccsand's right to mine exists for a limited period. The Land Claims Commission, despite the passage of a considerable length of time, has not, because of the complexity of the matter and the expense involved, commenced with the verification of the claim. It was perhaps for this reason that the Committee decided to approach the LCC directly. Counsel for the Committee conceded in argument that to date the necessary research to verify the claim had not even commenced because of a shortage of funds. The conclusion is inevitable in that because of the interdict Maccsand will be unable to invoke its right to mine for a substantial period of time, if at all, since if the delays that have occurred till now are an indicator, its rights to mine may be lost forever. Accordingly as far as Maccsand is concerned the interim interdict is final in effect. The interim order granted by the court *a quo* is therefore in my view appealable.'

[10] In *Metlika*, interdicts were granted by the court a quo aimed at preserving certain assets (including an interest in an aircraft) pending a claim by the Commissioner of the South African Revenue Service for a declaratory order that the owners of the assets were persons against whom income tax assessments had been raised. Subsequent developments were held by the court a quo to have been designed to undermine the preservation order. That court accordingly made further orders inter alia directing that the aircraft be returned to South Africa. The decisive question on appeal was whether the court a quo had jurisdiction to make this order. Streicher JA first considered whether the order was appealable, and then considered whether the court a quo had jurisdiction to make it. Both questions were answered in the affirmative. In coming to this conclusion on the first question, the learned Judge of Appeal said:[9]

'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.'

[9] In para 24.

[11] It was not, with respect, necessary for the court to have followed the approach which it did. A challenge to a court's jurisdiction, which (as I have said) was the decisive issue in the appeal, is appealable simply because it concerns the competence of the court to grant the relief sought: *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 10E-11B; *Phillips v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) para 19. In any event, the decision in *Metlika* does not provide an answer in the present appeal inasmuch as the order made by the court a quo is, for the reasons which follow, capable of being altered by that court.

[12] Howie P said in *Phillips*,[10] in the course of contrasting provisions of the Prevention of Organised Crime Act 121 of 1998:

'And in the case of a common-law interim interdict or attachment *pendente lite* there is no reason why, for sufficient cause, they would not, generally, be open to variation, if not rescission.'

This is just such a case. To borrow from the passage already quoted from *Knox D'Arcy*, Atkin could approach the court a quo for an amelioration or setting aside of the interdict because of the practical experience of its operation. According to Atkin, he was unemployed at the time the interdict was made final and he had sold his house to tide him and his dependants over until he obtained employment. The trial was due to commence earlier this month, ie some 18 months after the order was made, but we were informed from the bar that it had been postponed sine die. It may well be that Atkin could show that the continued operation of the order would work great hardship on him, his family, and his ex-wife and severely handicapped minor child whom he is obliged to maintain in terms of a court order. If so, he would be entitled to request the court a quo to reconsider the order and that court would be entitled to vary or even rescind it. For that reason the order made in the interdict proceedings cannot be said to have final effect. It is therefore not appealable.

[10] In para 21.

[13] The appeal is struck off the roll. The appellant is ordered to pay the respondent's costs.

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T D CLOETE
JUDGE OF APPEAL

APPEARANCES:

APPELLANTS:	G C Muller SC Instructed by Gerard Stoop Attorney, Pretoria Honey Attorneys Inc, Bloemfontein
RESPONDENTS:	J G W Basson Instructed by Pieterse & Curlewis Inc, Pretoria Martins Attorneys, Bloemfontein