



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 752/2011

In the matter between:

FOIZE AFRICA (PTY) LTD

Appellant

v

FOIZE BEHEER BV

First Respondent

ALGEMEEN BEHEER NEDERLAND BV

Second Respondent

FOIZE SALES BV

Third Respondent

PAUL VAN OOSTVEEN

Fourth Respondent

LEONARDUS MARIA WINDER

Fifth Respondent

NORBERT WILMERING

Sixth Respondent

MERTECH TELECOMMUNICATIONS (PTY) LTD

Seventh Respondent

FOIZE EUROPE BV (FORMERLY FOIZE TRADING BV)

Eighth Respondent

NEW GENERATIONS SMS (PTY) LTD

Ninth Respondent

Neutral citation: *Foize Africa v Foize Beheer* (752/2011) [2012] ZASCA 123 (20 September 2012)

Coram: Mthiyane DP, Cloete, Heher, Shongwe and Leach JJA

Heard: 23 August 2012

Delivered: 20 September 2012

Summary: Interdict against *peregrini* — effectiveness thereof — effect of a contractual provision that parties to a dispute would proceed to arbitration in Holland and that Dutch law would apply to their dispute — such clauses not ousting the jurisdiction of a South African court — discretion whether to stay South African litigation by reason of such a clause — factors to be taken into account.

O R D E R

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

- (a) The appeal succeeds, with costs.
- (b) The order of the high court of 13 September 2011 is set aside and is substituted with the following:

‘1. That pending the final determination of an action to be instituted by the applicant against the respondents for a final interdict and ancillary relief, an interim order is issued in the following terms:

a. Interdicting and restraining the first to sixth and eighth respondents from being involved whether directly or indirectly in granting a licence to the seventh or eighth respondents or any third party from selling, marketing or distributing the product commonly known as the Foize on Mobile software, more fully described in annexure MV 3 to the founding affidavit, in South Africa from the date of this order to 6 December 2014.

b. Interdicting and restraining the first to the sixth and eighth respondents from marketing, selling or distributing the said product in South Africa from the date of this order up to and until 6 December 2014.

c. Interdicting and restraining the seventh and ninth respondents from entering into a licensing agreement with the first to sixth and/or eighth respondents which purports to grant any rights to the seventh or ninth respondents to market, distribute or sell the said product in South Africa for any period prior to 7 December 2014.

d. Costs of the application against the first to the sixth and eight respondents are to be costs in the cause of the action to be instituted.

2. The applicant is to institute an action against the respondents by 31 October 2012 seeking an order that the interim relief be made final.

3. In the event that the applicant fails to bring an action against the respondents as envisaged in paragraph 2 above, then, unless this court grants an extension of time on good cause shown, the interim relief will lapse.'

J U D G M E N T

LEACH JA (MTHIYANE DP, CLOETE, HEHER AND SHONGWE JJA CONCURRING):

[1] The appellant is a South African company incorporated with the specific purpose of proceeding with a business venture arising from a written contract ('the licensing agreement') concluded in Johannesburg in December 2009. The first, second, third and eighth respondents are companies incorporated in the Netherlands while the fourth, fifth and sixth respondents are Dutch businessmen. The relationship between the respondents and the roles they are reputed to have played in the events giving rise to these proceedings will become apparent in due course.

[2] The appellant concluded the licensing agreement with the third respondent, represented at the time by the fourth and fifth respondents. It related to the sale and distribution of the 'Foize on Mobile platform' ('the product') which consisted of certain software and customised hardware, designed for use in the telecommunications industry. The agreement also included the following terms relevant to the present dispute:

(a) The appellant was extended the exclusive right to sell, market and distribute the product in certain specified geographical areas (referred to as the 'Territory'), including South Africa, for a period of five years until 6 December 2014.

(b) The third respondent warranted that the use of the product would not infringe on the intellectual property rights of any third parties and that it was fully authorised to appoint the appellant as its exclusive licensee for the 'Territory'.¹

¹ Clause 6.1.

(c) In clause 9 the third respondent undertook to ensure that the first respondent (described as being the holder of all intellectual property rights relating to the product) was fully aware and consented to the terms of the licensing agreement, and that:

'If, for any reason, the agreement between [the first respondent] and [the third respondent] is terminated the [third respondent] shall procure that its license agreement with [first respondent] contains a provision that [first respondent] will honour the terms of this license agreement and all the rights and obligations of the [third respondent] in terms of this agreement shall then vest in [first respondent].'

[3] The first respondent was a further signatory to the licensing agreement. Also represented at the time by the fourth and fifth respondents who signed on its behalf, it agreed to be bound by the terms and conditions therein contained, particularly those in clause 9 of the agreement (quoted in para 2(c) above).

[4] Unfortunately, business relations between the parties soon soured. The second respondent subsequently announced that it, and not the first respondent, in fact held both the intellectual property rights and the marketing and distribution rights to the product, and that it was going to market the product in South Africa through two South African companies owned by a businessman, Mr Stephen van der Merwe (these latter companies were cited as the seventh and ninth respondents in the court a quo).

[5] This led to the appellant instituting proceedings in the North Gauteng High Court in April 2011, seeking interim relief pending the final determination of an action which it intended to institute against the respondents for a final interdict that would, in effect, compel the respondents to honour the terms of the licensing agreement. Essentially the appellant sought (a) an order piercing the corporate veil of the first respondent and declaring that its sole director, the second respondent, was bound, together with the first and third respondents, by the licensing agreement, and (b) interdictory relief designed to protect its rights under the licensing agreement. In regard to the latter, the appellant cited not only the present respondents but also, as seventh and ninth respondents, Van der Merwe's two South African companies, alleging that the second respondent had purported to grant them the exclusive right

to market and distribute the product in South Africa. The precise relief relevant to the present dispute was set out in the notice of motion in the following terms:

‘2. That pending the final determination of an action to be instituted by the applicant against the respondents for a final interdict and ancillary relief an interim order be granted as follows:

- a. Declaring the first to third respondents as parties, in their capacities as licensors, to the licensing agreement
- b. Interdicting and restraining the first to sixth and eight respondents from being involved whether directly or indirectly in granting a licence to the seventh or eighth respondents or any third party from selling, marketing or distributing the product . . . in South Africa from the date of this order to the 6 December 2014.
- c. Interdicting and restraining the first to the sixth and eighth respondents from marketing, selling or distributing the product . . . in South Africa from the date of this order up to and until the 6 December 2014.
- d. Interdicting and restraining the seventh and ninth respondents from entering into a licensing agreement with the first to sixth and/or eighth respondents which purports to grant any rights to the seventh or ninth respondents to market, distribute or sell the product . . . in South Africa for any period prior to the 7 December 2014.
- e. Costs of the application against the first to the sixth and eighth respondents to be costs in the cause of the action to be instituted.
- f.

3. The applicant is to institute an action against the respondents within a period of 30 days from the date of this order seeking an order that the interim relief be final.

4. In the event that the applicant fails to bring an action against the respondents as envisaged in paragraph 3 supra the interim relief will lapse.’

[6] Neither the seventh nor the ninth respondent (Van der Merwe’s two companies) sought to oppose the application and, when the matter came before it on 24 May 2011, the high court granted an interim interdict against them in terms of prayer 2d of the notice of motion. The matter was then postponed and the remaining respondents (ie the respondents in this appeal) were put on terms to file their answering affidavits by 27 May 2011.

[7] This they failed to do. Instead, when the application was subsequently set down, they sought to resist it by raising an objection *in limine* to the appellant's case.

We were informed from the bar that the respondents had in fact prepared an opposing affidavit in which they outlined their objection *in limine*, but that it had not been timeously filed. As the respondents were out of time, they did not seek condonation and leave to file the affidavit; instead, they merely raised their objection in argument.

[8] Although in the judgment of the court a quo it is stated that there were three points *in limine*, the terms thereof were unfortunately not specifically recorded. But however the points may have been framed, they were based squarely upon the three parts of clause 10 of the licensing agreement which reads as follows:

'10.1 This agreement shall, for all intents and purposes, be governed by and executed according to Dutch Law.

10.2 The parties irrevocably consent to the jurisdiction of the Courts of Holland for any matter arising out of or in connection with this agreement.

10.3 Should any dispute arise out of or in connection with this agreement, that dispute shall be referred to and finally decided by arbitration in accordance with the rules of the International Chamber of Commerce on arbitration with the seat of the arbitration being Amsterdam and the language of such arbitration shall be English.'

[9] The essence of the objection was, first, that the appellant, by submitting to the courts of Holland, had waived its right to seek relief in the courts of this country in respect of any matter arising out of or in connection with the licensing agreement and, second, that the appellant was bound to proceed to arbitration in Holland in respect of any such matter. Both these points were upheld and the appellant's application for interim relief was dismissed. With leave of the court a quo, the appellant now appeals to this court.

[10] The decision to refuse the interim interdict, as I understand the judgment of the court a quo, was based on a finding that by agreeing to the provisions of clause 10, the appellant had precluded the high court from exercising jurisdiction over the respondents in the action the appellant intended to bring against them. In order to consider the correctness of this conclusion, it is necessary to outline briefly the background to the dispute and the relationship between the respondents.

[11] At all material times the fourth respondent was the sole director of the second respondent which, in turn, was the sole director of the first respondent (presumably, contrary to the position in this country,² under the laws of Holland a company may be a director of another company). The first respondent, in turn, held 80% of the shares in the eighth respondent, which was the controlling body of the third respondent. The appellant therefore alleged that the second respondent in fact controlled the first, third and eighth respondents at the time the licensing agreement was concluded – and that, as the fourth respondent was the sole director of the second respondent, he, together with the fifth respondent (who held a third of the shares in the second respondent and 25% of the shares in the first respondent) and sixth respondent (who held 20% of the eighth respondent's shares and who was a director of the third respondent) were the controlling minds behind the first, third and eighth respondents at that time.

[12] The appellant alleged that the licensing agreement had been signed pursuant to a representation that the first respondent owned the intellectual property rights to the product, had given the third respondent the right to market and distribute it, and had authorised the third respondent to enter into the licensing agreement. It alleged further that if in fact the distribution and marketing rights to the product were vested in the second respondent, the first, second and third respondents must have known at the time the licensing agreement was concluded that this representation was false and were therefore parties to a fraud against it. The appellant therefore expressed its intention to seek to pierce the corporate veil of the first respondent so as to hold the second respondent, together with the first and third respondents, bound by the licensing agreement; and to obtain an interdict restraining all three from acting in breach of their contractual obligations. Moreover, as the appellant alleged that the fourth, fifth, sixth and eighth respondents controlled the first, second and third respondents, it contended that they were also parties to the fraud and should be interdicted to prevent them from relying on their fraud to circumvent the licensing agreement.

[13] For convenience I intend first to consider the position of the fourth, fifth, sixth and eighth respondents. Relying on the decision in *Atlas Organic Fertilizers (Pty Ltd*

² See s 69(7)(a) of the Companies Act 71 of 2008.

v Pikkewyn Ghwano (Pty) Ltd 1981 (2) SA 173 (T) and the authorities referred to in that judgment, the appellant based its claim for relief against them on the allegation that they were wrongfully interfering with the contractual obligations of the first and third respondents arising from the licensing agreement. The claim to an interdict against them arises from conduct of a delictual nature, brought against persons who are not parties to the licensing agreement. As the appellant does not (and cannot) seek to enforce that contract in their case, they cannot seek to invoke the protection of clause 10, to which they were not parties, to seek to avoid the high court exercising jurisdiction over them, nor was it suggested otherwise in argument. This the court *a quo* appears not to have appreciated, its judgment having been based solely upon the effect of the provisions of clause 10. Although this was specifically raised in the application for leave to appeal, it was not dealt with in the judgment on that application. The inference is irresistible that the learned judge overlooked the fact that not all the respondents had been parties to the licensing agreement, and clause 10 in particular, and exercised his discretion on an incorrect factual basis.

[14] Counsel for the respondents however sought to defend the court *a quo*'s decision in regard to the fourth, fifth, sixth and eighth respondents by raising two general contentions, of equal application to the remaining respondents, to justify the decision not to grant an interim interdict. I shall deal with each *seriatim*.

[15] The first was that as the respondents are *peregrini* who have no presence in this country, it would be futile to grant an interdict against them. The basis of this argument was that, as the respondents are in Holland, it would not be possible to ensure that they complied with an interdict granted by a court in this country as contempt of court proceedings could not be brought against them. This is a somewhat surprising argument as, historically, the courts of this country have as a matter of course granted interdictory relief against *peregrini*³ and, presumably for this reason, the argument was somewhat tentatively advanced. Such diffidence was well founded. The issue is really one of effectiveness, and while I accept that a court of this country should not grant an interdict against a *peregrinus* where the act

³ Some of the authorities are usefully collected in *Zokufa v Compuscan (Credit Bureau)* 2011 (1) SA 272 (ECM) — see also *Lawsa* (first re-issue) vol 11 para 305.

sought to be interdicted would take place outside its area of jurisdiction,⁴ this is not such a case. This is a matter involving a contract concluded in this country, which is to be performed in this country, which the respondents threaten to breach in this country, and which the appellant, an *incola*, seeks to enforce in this country. In these circumstances a court of this country will be able to enforce an interdict if granted, even if contempt proceedings are not available (about which I express no opinion).

[16] The respondents' second general objection to the issue of an interim interdict against them was based on the interdict already granted against the seventh and ninth respondents on 24 May 2011. In the light of that order, so it was argued, there was no longer any threat of the licensing agreement being breached and thus an interim interdict against them was not required. But the mere fact that an interdict has been granted against certain persons does not mean that similar relief need not be granted against others who have conducted themselves in a manner justifying the grant of an interdict against them. Moreover, the grant of an interdict against the seventh and ninth respondents would not operate to restrain the remaining respondents from conducting themselves in such a way so as to frustrate the appellant's rights under the licensing agreement.

[17] There was therefore no reason for the high court not to have entertained the appellant's envisaged action against the fourth to ninth respondents, and the court *a quo* erred in failing to appreciate that to be the case.

[18] That brings me to the position of the second respondent. As already mentioned, the appellant's papers foreshadow an argument that the corporate veil of the first respondent should be pierced in order to hold its sole director, the second respondent, bound by the licensing agreement. It is unnecessary to consider whether the suggested piercing of the veil would be appropriate as, at the very least, the second respondent, as sole director of the first respondent, would be responsible for the first respondent's decision not to honour the terms of the licensing agreement. In these circumstances the appellant's allegations concerning the second respondent are equally capable of founding a claim for an interdict based on

⁴ Compare *Ex parte Hay Management Consultants (Pty) Ltd* 2000 (3) SA 501 (W) at 507H, [2000] 2 All SA 592 (W) at 599f-g and *South Atlantic Islands Development Corporation Ltd v Buchan* 1971 (1) SA 234 (C).

its wrongful and intentional interference with the first respondent's contractual obligations under the licensing agreement, and in that regard it is in the same position as the fourth to sixth and eighth respondents.⁵ That being so, on a parity of reasoning with that already expressed in regard to those respondents, the high court can exercise jurisdiction over the second respondent irrespective of the provisions of clause 10. This the court a quo does not appear to have appreciated, and it erred in reaching the contrary conclusion that the high court could not interdict the second respondent.

[19] I turn to consider the position of the first and third respondents who successfully relied upon clause 10 to persuade the court a quo that it should not entertain the matter against them. In their case it is necessary to consider the effect of a foreign jurisdiction and arbitration clause upon the jurisdiction of a court which would otherwise be able to deal with a dispute.

[20] It is clear from its judgment that the court a quo regarded the respondents' objection *in limine* as relating to the high court's jurisdiction to entertain the dispute between the parties. In upholding that objection it found that by reason of clause 10.2 of the licensing agreement 'the only courts being possessed of jurisdiction are the courts in the country of Holland' and that under clause 10.3 the appellant was bound by its agreement to proceed to arbitration. It therefore held that the high court in fact had no jurisdiction in respect of the parties' dispute.

[21] In doing so, the court quo erred. It can now be regarded as well settled that a foreign jurisdiction or arbitration clause does not exclude the court's jurisdiction. Parties to a contract cannot exclude the jurisdiction of a court by their own agreement, and where a party wishes to invoke the protection of a foreign jurisdiction or arbitration clause, it should do so by way of a special or dilatory plea seeking a stay of the proceedings.⁶ That having been done, the court will then be called on to exercise its discretion whether or not to enforce the clause in question — see eg *Commissioner for Inland Revenue and another v Isaacs* NO 1960 (1) SA 126 (A) at 134B-H, *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 682 (C), *Butler v Banimar Shipping Co* SA 1978 (4) SA 753 (SE) and

⁵ Cf *Genwest Batteries (Pty) Ltd v Van der Heyden & others* 1991 (1) SA 727 (T) at 728G-729B.

⁶ *Yorigami Maritime Construction Co Ltd v Nissho-Iwai Co Ltd* 1977 (4) SA 682 (C) at 692H.

Universiteit van Stellenbosch v J A Louw (Edms) Bpk 1983 (4) SA 321 (A) at 333G-H.⁷

[22] The court a quo should therefore have approached the objection *in limine* on the basis that it enjoyed a discretion whether or not to enforce the clause, taking into account all the relevant facts and circumstances. In concluding that clause 10 excluded the jurisdiction of the high court to adjudicate upon the parties' dispute, it clearly misunderstood the position.

[23] In seeking to meet this, counsel for the respondents drew attention to the fact that the court a quo, after reaching the conclusion already mentioned, had gone on to refer to the decision in *Butler* and had then purported to exercise its discretion adverse to the appellant. A number of issues arise from this.

[24] First, in purporting to exercise its discretion, the court a quo did so by holding 'that this court has no jurisdiction to hear this matter'. This, too, constituted a misdirection on its part. It had no discretion to hold that the high court lacked jurisdiction. Its discretion lay in deciding whether or not the exercise of that jurisdiction should be stayed pending the outcome of foreign proceedings or arbitration – something it had not been called upon to do.

[25] Secondly, it is necessary to consider whether it was appropriate for the court quo to have purported to exercise its discretion at a time when all that was before it was a preliminary application for an interim interdict pending a decision on an action still to be instituted. In *Butler*, where the court was asked to authorise an attachment to found jurisdiction for a claim for damages which the respondent contended had to be pursued in Greece by reason of a foreign jurisdiction clause, the court concluded that it would be for the trial court to decide whether to enforce that clause.⁸ On the other hand, in similar circumstances in *Yorigami*, the court held, albeit obiter, that despite the existence of a clause in a charter requiring the dispute to be decided by arbitration in Japan, the proceedings should not be stayed but determined by a Cape

⁷ See further Forsyth *Private International Law* 5 ed (2012) at 218.

⁸ I should remark that the court misdirected itself in incorrectly finding at 761H that it had been held in *Yorigami* that it was not for the court hearing the attachment application to decide whether the trial ought to be stayed and referred to arbitration under the arbitration clause.

Town court.⁹ Similarly in *Polysius (Pty) Ltd v Transvaal Alloys (Pty) Ltd & another* 1983 (2) SA 630 (T), in an application brought after the issue of summons but before the trial, the court held that the hearing should be stayed by reason of the term in the parties' contract providing for the submission of their dispute to arbitration in Europe.

[26] The cases mentioned above show that no hard and fast rule can be laid down as to the stage when a court should exercise its discretion to enforce a foreign jurisdiction or arbitration clause. In each given case much will depend upon its own particular facts and circumstances as well as the stage at which and the manner in which the issue of enforcement of the clause in question is raised. Certainly the mere fact that the respondents raised the issue when the appellant sought interim relief as a precursor to the trial did not, in itself, preclude the court a quo from exercising its discretion at that stage. But whether it was appropriate for it to exercise its discretion in the light of the circumstances of the case and the way in which the issue was raised, is another matter to which I now turn.

[27] Of course the factors relevant to the discretion a court is called on to exercise are of importance. In the light of my view on the outcome of this appeal, it is unnecessary to deal in detail with what factors appear at this stage to be relevant. Indeed it would be premature and improper to do so without the parties having had the opportunity to properly canvass the facts. Nevertheless it is of assistance to consider in broad terms the factors which may be relevant. In *The Eleftheria* [1969] 2 All ER 641 (PDA), when considering whether an action should be stayed by reason of a foreign jurisdiction clause, Brandon J stated:¹⁰

'In particular . . . the following matters, where they arise, may properly be regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the (local) and foreign courts; (b) Whether the law of the foreign court applies and, if so, whether it differs from (local) law in any material respects; (c) With what country either party is connected, and how closely; (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would — (i) be deprived of security for that claim, (ii) be unable to enforce any judgment obtained, (iii) be faced with a time-bar not

⁹ At 693F-694B.

¹⁰ At 645C-E.

applicable (locally), or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.’

[28] These are not the only factors to which regard may be had. Others which may be relevant include the following:

(a) Flowing from the sanctity of contracts, it has often been said that a decision not to enforce either an arbitration or foreign jurisdiction clause should only be made where there is a very strong case made out for the parties not to be bound by their agreement.¹¹

(b) It is desirable if at all possible to avoid a multiplicity of actions in different courts with the associated potential complication of conflicting decisions.¹² In the present case this may well be a weighty factor bearing in mind that there is no reason why the appellant’s claims in respect of all but the first and third respondents cannot be determined in the high court and only those two respondents may seek to invoke clause 10 to have their dispute with the appellant determined elsewhere.

(c) Moreover, a single action has the undoubted advantage of saving time, expense and costs when compared to a multiplicity of actions. This too may be a weighty factor as the appellant’s claims that are capable of being determined in the high court against most of the respondents will involve the same factual matrix and the same witnesses as in the foreign proceedings against the first and third respondents.

(d) When considering the issue of costs, it should also be remembered, certainly if the cost of litigation in England is any barometer,¹³ that the cost of litigation in Europe may well be astronomical when compared to the cost of litigation in this country. Sight must also not be lost of the likely fees and charges of the arbitrators should an arbitration take place.

(e) If the dispute involves questions of law rather than of fact, arbitration may well prove to be both inconvenient and impractical. Consequently regard should be had to whether the dispute is readily capable of being dealt with by way of arbitration. If not, it would count heavily against the enforcement of an arbitration clause.

¹¹ *Polysius* at 656D-E and *Universiteit van Stellenbosch v J A Louw (Edms) Bpk* at 333H-334A.

¹² See for example *Halifax Overseas Freighters Ltd v Rasno Export; Techno-Prominport; and Polskie Minie Oceaniczne PPW (the ‘Pine Hill’)* [1958] 2 Lloyd’s Law Reports 146 (QB) at 152 and *El Amrid* [1981] 2 Lloyd’s Law Reports 119 (AC) AT 128.

¹³ See for comparison *Motto & others v Trafigura Ltd & another* [2011] EWCA Civ 1150; [2012] WLR 657 (CA); [2012] 2 ALL ER 181 (CA) and *AB v Ministry of Defence* [2012] 3 ALL ER 673 (SC): [2012] UKSC 9.

[29] These are some of the relevant factors which spring readily to mind. The list is certainly not intended to be exhaustive. Of course the discretion to be exercised is fact specific in the sense that each case must be considered in the light of its own discrete facts, with the various relevant factors being afforded whatever weight in the scales is appropriate in the circumstances. Certainly no hard and fast rules can be prescribed.

[30] The court a quo, in purporting to exercise its discretion, stated that it did so in the light of 'the attendant circumstances' without in any way identifying what circumstances it took into account. But as the respondents' objection was merely raised from the bar without any supporting affidavits, the only relevant circumstance then known appears to have been the existence of the foreign jurisdiction and arbitration clauses as most of the facts and circumstances as outlined above which would have been relevant to the exercise of the court's discretion had not been canvassed in the papers. As already mentioned, a party wishing to raise an arbitration or foreign jurisdiction clause as a reason to stay a court from exercising jurisdiction, should do so by way of a dilatory plea. As in motion proceedings the affidavits serve as both pleadings and evidence,¹⁴ in a case such as this it would be necessary to place the relevant facts upon which reliance is placed before court by way of affidavit. This the respondents failed to do. By the same token, the appellant was not obliged to deal with a dilatory plea based on clause 10 until it had been properly raised. In the light of this the court a quo was left in a position where, apart from a few basic facts, it was not in a position to take an informed decision in exercising its discretion.

[31] That being so, this was clearly a matter in which the court a quo ought not to have taken a final decision at that stage on whether a South African court should exercise jurisdiction in respect of appellant's proposed action. It was a matter which cried out for that issue to stand over for decision by the trial court. On the bare facts then available it was, in truth, impossible to do justice to either side in regard to the disputed questions flowing from clause 10 and the court a quo clearly erred on

¹⁴ *Absa Bank Ltd v Kernsig 17 (Pty) Ltd* 2011 (4) SA 492 (SCA) para 23.

deciding on the papers, as they were then, that the dispute was one in which the arbitration and foreign jurisdiction clauses should be upheld against the appellant.

[32] On the other hand the appellant, whose factual allegations had not been challenged, had clearly shown that its rights were being infringed. However, the respondents submitted that the appellant had failed to establish that it was likely to suffer irreparable harm or that it harboured a fear of such harm should the order it sought not be granted. The simple answer to this latter contention is that by seeking an interdict in this manner the appellant, in reality, was asking for an order of specific performance of the licensing agreement. That being the case, the appellant was not required to prove it would suffer harm if the interdict was not granted. All it had to show was that the respondents were either breaching or threatening to breach the licensing agreement, or were intentionally assisting or encouraging another to breach such agreement.¹⁵ For the reasons already given, this the appellant established.

[33] In these circumstances the court a quo erred in not granting the interim relief and leaving it to the trial court, once the material facts and circumstances were available, to determine whether the provisions of clause 10 should be enforced and the action stayed.

[34] The appeal must therefore succeed and an interim interdict against the first to sixth and eighth respondents granted. While I see no reason to include the declarator in 2(a) of the notice of motion quoted in para 5 above as part of the interim order, it was not suggested on behalf of the respondents that an interdict in the terms sought would not be appropriate. However it is necessary to alter those terms somewhat to reflect that the interdict relates only to the first to sixth and eighth respondents (the seventh and ninth respondents already having been interdicted) and to put the appellant on terms to institute its proposed action. As its notice of motion envisaged the institution of such action within a month of the order granting interim relief, and given the delays that have already occurred, it would in my view be appropriate to direct that the anticipated action be instituted by the end of

¹⁵ *Genwest Batteries* (referred to in footnote 5) and Christie *The Law of Contract in South Africa* (6 ed) at 555.

October 2012. To allow for the possibility that the appellant may justifiably be unable to meet that deadline, I intend to authorise it to seek an extension on good cause shown. That will be reflected in the order below.

[35] The following order will therefore issue:

- (a) The appeal succeeds, with costs.
- (b) The order of the high court of 13 September 2011 is set aside and is substituted with the following:

‘1. That pending the final determination of an action to be instituted by the applicant against the respondents for a final interdict and ancillary relief, an interim order is issued in the following terms:

a. Interdicting and restraining the first to sixth and eighth respondents from being involved whether directly or indirectly in granting a licence to the seventh or eighth respondents or any third party from selling, marketing or distributing the product commonly known as the Foize on Mobile software, more fully described in annexure MV 3 to the founding affidavit, in South Africa from the date of this order to 6 December 2014.

b. Interdicting and restraining the first to the sixth and eighth respondents from marketing, selling or distributing the said product in South Africa from the date of this order up to and until 6 December 2014.

c. Interdicting and restraining the seventh and ninth respondents from entering into a licensing agreement with the first to sixth and/or eighth respondents which purports to grant any rights to the seventh or ninth respondents to market, distribute or sell the said product in South Africa for any period prior to 7 December 2014.

d. Costs of the application against the first to the sixth and eight respondents are to be costs in the cause of the action to be instituted.

2. The applicant is to institute an action against the respondents by 31 October 2012 seeking an order that the interim relief be made final.

3. In the event that the applicant fails to bring an action against the respondents as envisaged in paragraph 2 above, then, unless this Court grants an extension of time on good cause shown, the interim relief will lapse.’

L E Leach
Judge of Appeal

APPEARANCES:

For Appellant:

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For Respondent:

M C Erasmus SC

Instructed by:

On behalf of 1st to 6th & 8th:

Geyser Attorneys, Pretoria

On behalf of 7th & 9th:

Kerron Edmunson Attorney, Johannesburg

The main application was not opposed on behalf of 7th & 8th respondents and they did not take part in the appeal.

Honey Attorneys, Bloemfontein