THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 324/2013

In the matter between:

ADAMS & ADAMS ATTORNEYS **First Appellant**

DELUXE HOLDINGS AG **Second Appellant**

and

POINTER FASHION INTERNATIONAL CC **First Respondent**

COMMISSIONER OF COMPANIES AND INTELLECTUAL PROPERTY **Second Respondent**

SHERIFF OF THE MAGISTRATES' COURT, PRETORIA SOUTH EAST **Third Respondent**

Neutral citation: *Adams & Adams v Pointer Fashion International (324/2013) [2014] ZASCA 11 (19 March 2014)*

Coram: MTHIYANE DP, MHLANTLA and WALLIS JJA, VAN ZYL and MOCUMIE AJJA.

Heard: **13 March 2014**

Delivered: **19 March 2014**

Summary: Application for leave to deliver a further affidavit – application granted – order not appealable.

ORDER

On appeal from: North Gauteng High Court, Pretoria (Prinsloo J sitting as court of first instance) it is ordered that:

The appeal is struck off the roll with costs, such costs to include those consequent upon the employment of two counsel.

JUDGMENT

Wallis JA (**Mthiyane DP, Mhlantla JA and Van Zyl and Mocumie AJJA concurring**)

[1] The underlying dispute between the parties relates to five trade marks that are at present registered in the name of the second appellant, Deluxe Holdings AG (Deluxe), a Swiss company. These trade marks were formerly owned by and registered in the name of the first respondent, Pointer Fashion International CC (Pointer). They were purchased by Deluxe at a sale in execution held on 8 September 2011 at the instance of the first appellant, Adams & Adams Attorneys (Adams & Adams). The latter had obtained two judgments against Pointer, the one dated 15 July 2005 in respect of the costs of the adjournment of an action it had instituted against Pointer in the Magistrates' Court, Pretoria, and the other a default judgment for outstanding fees dated 16 October 2006 in the same court.

[2] On 27 February 2012 Pointer instituted application proceedings in the North Gauteng High Court, Pretoria, to set aside the sale in execution;

cancel the registration of the trade marks in the name of Deluxe and have its name restored to the register as the owner of the marks. It framed the relief that it was seeking in its notice of motion in two parts. Part A was interim relief aimed at preventing Deluxe from dealing with or disposing of the marks pending the final outcome of the application. Part B was the claim for final relief. The application for interim relief was set down for hearing on 6 March 2012. In heads of argument furnished on that day Pointer indicated that, over and above the grounds set out in its founding affidavit, it intended to argue that the two judgments obtained by Adams & Adams had become superannuated in terms of s 63 of the Magistrates' Courts Act 32 of 1944. It intended, on this ground also, to contend that the sale in execution fell to be set aside. The present appellants objected to the point being raised in this fashion and the application was then adjourned sine die in terms of an interim arrangement incorporated in a court order.

[3] Thereafter Pointer launched an application purporting to be in terms of rule 6(5)*(e)* of the High Court Rules, but in fact in terms of rule 6(11),[1] seeking leave to deliver a supplementary affidavit raising the new point 'as evidence in the main application'. That application was opposed by Adams & Adams and Deluxe, although their reasons for doing so are obscure. Courts are reluctant to prevent parties from raising fresh legal issues provided that does not cause irreparable prejudice to the other litigants. And so it proved, because, when the application came before Prinsloo J in the North Gauteng High Court, leave was granted to deliver the further affidavit. Ancillary orders were granted to permit further answering and replying affidavits to be delivered in relation to the issues

[1] Rule 6(5)*(e)* deals with the delivery of replying affidavits in conventional application proceedings whereas the application was an interlocutory application incidental to pending proceedings.

arising from the admission of further evidence. Thereafter leave to appeal to this Court was sought and granted by Prinsloo J.

[4] That recitation of the history of the litigation, and the description of what was before Prinsloo J and the orders that he made, makes it clear that he was dealing with an interlocutory matter, namely, whether to permit the new legal point to be raised by Pointer. The order was purely procedural in nature and disposed of no issue in the litigation between the parties. In the circumstances on well-established authority the order was not appealable.[2]

[5] The reason the appellants thought otherwise lies in the course that the argument before Prinsloo J took. Although no such point was taken in the answering affidavit in the application before him, in the answering affidavit in the main application, Deluxe submitted that the court had no jurisdiction over it because it was and is a *peregrinus* and could not be made subject to the court's jurisdiction in the absence of an attachment *ad confirmandam jurisdictionem* of property owned by it and situated within the area of the court's jurisdiction. At the commencement of the proceedings before Prinsloo J counsel representing Adams & Adams and Deluxe submitted that the court should first decide this point of jurisdiction. The learned judge went on to do so and held that he had jurisdiction. This ruling was not embodied in the order, but it was argued

[2] The line of cases starts with *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 531B-D and runs through *Jacobs and Others v Baumann NO and Others* 2009 (5) SA 432 (SCA) para 9; *Health Professions Council of South Africa and Another v Emergency Medical Supplies and Training CC t/a EMS* 2010 (6) SA 469 (SCA) para 15. The topic is fully discussed in D E van Loggerenberg (General editor) *Erasmus Superior Court Practice* (looseleaf) A1-42 to A1-46 (as at service 41, 2013). There is no need to add further to the burden of annotations.

in this court[3] that it formed the necessary underpinning for the order to permit the additional affidavit to be delivered.

[6] That approach was fundamentally misconceived. The court did not have before it the application in respect of which the new evidence was being tendered, whether that was at that stage in two parts, seeking both an interim interdict and final relief, or was confined to the latter.[4] It was only seized of the interlocutory application to admit the further affidavit. In regard to that application it clearly had jurisdiction over Deluxe. After all Deluxe had entered appearance and caused an answering affidavit to be delivered in the main application in which the point of jurisdiction had been taken. Deluxe had joined with Adams & Adams in objecting to the new legal point being raised informally and thereby compelled Pointer, if it wished to pursue the point, to bring the application that it had. Deluxe then opposed that application. For the purposes of the interlocutory application it had clearly submitted to the jurisdiction of the court and the court therefore had personal jurisdiction over it for the purposes of deciding whether to admit the additional affidavit.

[7] I do not mean by this to say that Deluxe has submitted to the jurisdiction of the high court for the purposes of the main application. That is a matter to be debated when the merits are adjudicated upon in due course, in accordance with the law as laid down in several decisions of this Court.[5] All that I am saying, and that ought to be obvious, is that in regard to the interlocutory proceedings Deluxe had joined issue and submitted itself to the jurisdiction of the court.

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[3] By leading counsel who did not appear in the court below.
[4] In this court counsel confirmed that Pointer is only pursuing the main relief and not the application for an interdict.
[5] *Hay Management Consultants (Pty) Ltd v P3 Management Consultants (Pty) Ltd* 2005 (2) SA 522 (SCA); *MV Alina II (no 2): Transnet Ltd v Owner of MV Alina II* 2011 (6) SA 206 (SCA) para 14.

[8] The result of this misconception as to what matters were before the court below was that argument was addressed and a judgment delivered on some difficult issues dealing with the nature of a registered trade mark and whether it is for the purposes of jurisdiction to be treated as an immovable or, to adopt the expression used in one case,[6] akin to an immovable. If it is, then it was argued (and accepted in this court) that an attachment *ad confirmandam jurisdictionem* of property of the registered user of the trade mark is unnecessary in order for the court to exercise personal jurisdiction over the registered user.[7] But all this is by the by. That issue was not before the court below and in relation to the only issue that it had to decide it plainly had jurisdiction over Deluxe.

[9] In those circumstances what is before us is an appeal against a purely interlocutory order. That is not appealable. For the sake of clarity this judgement neither endorses nor dissents from the views expressed by the court below on the topic of jurisdiction and the need for an attachment of Deluxe's property. They do not in any way bind the court that will in due course, if this litigation continues, be seized of the main application.

[10] The appeal is struck off the roll with costs, such costs to include those consequent upon the employment of two counsel.

M J D WALLIS
JUDGE OF APPEAL

[6] *Oilwell (Pty) Ltd v Protec International Ltd & others* 2011 (4) SA 394 (SCA) para 13.
[7] *Jackaman and Others v Arkell* 1953 (3) SA 31 (T) at 34*; Manna v Lotter and Another* 2007 (4) SA 315 (C) paras 7-10.

Appearances

For appellant:	C E Puckrin SC (with him L G Kilmartin) Instructed by: Adams & Adams Attorneys, Pretoria; Honey Attorneys, Bloemfontein
For respondent:	C A Da Silva SC (with him D W Gess) Instructed by: Springer-Nel Attorneys, Cape Town; Van der Merwe & Sorour, Bloemfontein.