



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not reportable

Case no: 145/2021

In the matter between:

RTS INDUSTRIES

CGC INDUSTRIES (PTY) LTD

CHRISTIAAN ARNOLDUS KURTZ

CARL WILLIAM RICHTER

C-QUIPTECH (PTY) LTD

FIRST APPELLANT

SECOND APPELLANT

THIRD APPELLANT

FOURTH APPELLANT

FIFTH APPELLANT

and

TECHNICAL SYSTEMS (PTY) LTD

LAVIRCO BELEGGINGS (PTY) LTD

FIRST RESPONDENT

SECOND RESPONDENT

Neutral citation: *RTS Industries and Others v Technical Systems (Pty) Ltd and Another* (Case No. 145/2021) [2022] ZASCA 64 (5 May 2022)

Coram: PETSE DP and ZONDI, DLODLO and GORVEN JJA and MOLEFE AJA

Heard: 4 March 2022

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 5 May 2022.

Summary: Interim interdict – appealability of interim interdictory relief and refusal of counter-application – interests of justice do not require that appeal be entertained.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Mangcu-Lockwood AJ sitting as court of first instance):

- 1 The appeal is struck from the roll.
- 2 The appellants shall jointly and severally bear the respondents' costs, the one paying the others to be absolved, including the costs of two counsel.

JUDGMENT

Molefe AJA: (Petse DP and Zondi, Gorven and Dlodlo JJA concurring):

[1] This appeal turns on the appealability of the order made by the Western Cape Division of the High Court, Cape Town (the high court) on 9 March 2020 (the 2020 order), enforcing the terms of the order – granted by agreement between the parties – on 2 June 2015 (the 2015 order). The 2020 order (per Mangcu-Lockwood AJ) in essence, confirmed the 2015 order and ordered compliance therewith. It is against this 2020 order that this appeal is directed and is before us with the leave of this Court.

[2] The 2015 order was granted pursuant to proceedings instituted by the respondents for relief arising from the appellants' alleged misappropriation of the confidential information relating to the auger manufacturing process and machinery of the first respondent, as well as the unlawful use of such information, thereby unlawfully competing with the first respondent.

[3] The relevant background of the 2015 order is briefly as follows. The third appellant, Mr Christiaan Arnoldus Kurtz (Mr Kurtz), was previously employed by the first respondent as a plant engineer and, in the course of his employment, gained intimate knowledge of the manufacturing processes of the first respondent. He had unfettered access to the first respondent's technical drawings and technical data relating to the manufacturing processes. As part of Mr Kurtz's conditions of employment with the first respondent, he was obliged to enter into a confidentiality undertaking and restraint of trade agreement in favour of the first respondent.

[4] During 2009, Mr Kurtz left the employ of the first respondent. Shortly thereafter, rumours emerged of a competitor in the market selling a product similar to that of the first respondent. The competitor's product was offered for sale at a lower price than that of the first respondent. The competing entity appeared to be RTS Industries, the first appellant, but the first respondent was not able to ascertain the identity of the individual who was the first appellant's controlling mind for some time. It was only in July 2014 that the first respondent was able to confirm the involvement of Mr Kurtz with RTS Industries and, as a result, the 2014 application, which culminated in the 2015 order, was launched.

[5] Following the launch of the 2014 application, the first respondent came into possession of technical drawings prepared by the appellants. It was then discovered that these drawings infringed the copyright of the first respondent in 1179 of its technical drawings. The appellants had made reproductions and adaptations of the copyrighted work. Subsequently, the notice of motion of the 2014 application was amended to include a prayer for relief based on the copyright infringement of the first respondent's technical drawings relating to its auger machinery and equipment. It became clear from the discovery process that the second appellant, CGC Industries (Pty) Ltd, and Mr Kurtz had unlawfully competed with the first respondent between 2009 and June 2015. Thereupon, they had no choice but to capitulate and accede to the 2015 order.

[6] In terms of the 2015 consent order, the appellants recognised the confidentiality of the first respondent's production process for the production of auger. The order interdicted

the respondents from using this information for as long as it retained its confidentiality. They were also interdicted from infringing the copyright of the first respondent in its artistic works comprising its 1179 technical drawings for a period of three years from the date of the granting of the order. The 2015 order obliged the appellants to deliver up to the first respondent all works infringing the latter's copyright for destruction. In addition, the appellants were restrained from competing in the field of manufacturing, marketing and sale of flat wire, auger and auger coiling machinery.

[7] The scheme of the 2015 order regulated the manner in which the appellants would be free to resume competition with the respondents. Paragraph 23 of that order in clear terms provided that upon the expiry of three years, and in the event of the appellants manufacturing flat wire or auger or equipment for the manufacture of flat wire or auger, such manufacture would not infringe the confidential information or copyright of the respondents. Paragraph 24 of the order prescribes a procedure to be followed for the determination of compliance by the appellants with paragraph 23. Experts for the parties would independently be appointed to inspect the proposed production facility and thereupon compile a joint report in respect of the extent to which the production facility complies with paragraph 23 of the 2015 order. The experts would record their agreements and disagreements, after which each party would have the opportunity of commenting on the report, whereupon the experts would submit their final report.

[8] The 2015 order also prescribes a procedure designed to resolve disagreements between the parties in respect of the final report. An application would be made to court, and the court would be entitled to determine the procedures necessary to determine the disputes. Until such time that a court had made a determination, the appellants would not be entitled to commission the production facility.¹ Evidently, and until such time that the process had been completed, the appellants' proposed production facility would not be put into service for the commercial production of auger. On 22 August 2019, the

¹ The meaning of 'commission' is: 'order or authorize the production of [something, such as a building, piece of equipment etc]; order or authorise (someone) to do r produce something.' (Concise Oxford English Dictionary 12^{ed} (2011))

respondents discovered that the first appellant had allegedly sold auger to an Egyptian company, Techno Max, which is one of the respondents' existing clients. The shipment was destined to depart on 30 September 2019. The appellants admitted to issuing a quote (pro-forma invoice) to Techno Max, but denied issuing a stamped invoice or that a sale was made and claimed that the invoice relied upon by the respondents was 'a fake [document] generated solely for the purpose of this litigation'.

[9] The respondents then launched the 2019 proceedings seeking a rule *nisi* interdicting and restraining the appellants from manufacturing, processing, marketing for sale or selling flat wire and auger, pending the completion of the process stipulated in the 2015 order. They also sought an order declaring the appellants to be in contempt of the 2015 court order and their committal to prison, alternatively payment of a fine.

[10] The appellants submitted that the lawfulness of the agreement, which culminated in the 2015 order, was the subject of an investigation by the Competition Commission. Further, the appellants contended that the respondents had deliberately delayed and frustrated the appellants' efforts to give effect to the terms of the 2015 order to prevent the appellants from competing with them. It was the appellants' contention that no part of the respondents' manufacturing process was in fact confidential, and that the prohibitions contained in the 2015 order had ceased to be of any force and effect.

[11] On 9 March 2020, Mangcu-Lockwood AJ delivered her judgment and granted the following order:

'1) That an interim interdict is granted in the following terms:

1.1 Pending the finalisation of the process provided for in paragraphs 23 to 25 of the order granted by this Court under case number 17470/14 on 2 June 2015 (the Court Order), the respondents are interdicted and restrained from –

1.1.1 manufacturing and/or producing flat wire for purposes of manufacturing auger;

1.1.2 manufacturing and/or producing auger;

1.1.3 marketing for sale and/or selling any flat wire and/or auger produced by any of the respondents;

1.2 The respondents are restrained and interdicted from removing, causing or permitting the removal of any of the unlawfully produced products from the premises situated at 6 Distillery Way, BAT Building, Paarl, Western Cape, or from any other premises where same may be located.

1.3 Within 5 court days of the issue of this Order, the respondents are directed to furnish the applicants with the addresses of all premises where the respondents are storing the unlawfully produced products.

2) That the respondents are in contempt of the Court Order of 2 June 2015.

3) That the respondents are directed to pay to the applicants a fine of R450 000.00 (four hundred and fifty thousand rand) jointly and severally, the one paying the other to be absolved, by no later than 30 April 2020.

4) The respondents are to pay the costs of all the proceedings to date, including costs of two counsel, save for costs relating to the respondents' application to strike out portions of the applicants' founding affidavit.'

Following the notice of the current appellants' intention to apply for leave to appeal against the 2020 judgment, the respondents abandoned all the relief granted to them save for the interim interdicts and the costs order.

Leave to adduce new evidence

[12] On the date of the hearing of this appeal, the respondents made an application in terms of s 19(b) of the Superior Courts Act 10 of 2013 (the Act). The application was for leave to adduce further evidence contained in the founding affidavit of their expert, Mr Mattheus Willem Johannes Kühn (Mr Kühn) dated 25 January 2022, and ancillary relief. The appellants opposed the application.

[13] Counsel for the respondents submitted that this application was necessitated by the narrative advanced by the appellants in the appeal that the respondents had frustrated the execution of paragraphs 24 and 25 of the 2015 order, alternatively that paragraphs 24 and 25 are not capable of execution. Mr Broekhuizen, the respondent's expert, had prior to the appellants launching their application for leave to appeal, produced his report and the appellants' expert, Mr Bowles had responded to the report. It was further

submitted that when the application for leave to appeal served before this Court, Mr Broekhuizen was in the process of considering and responding to Mr Bowles' inputs.

[14] The respondents argued that the process contemplated in paragraphs 24 and 25 of the 2015 order had been implemented and completed as the experts' report was finalised. The parties had, on 16 November 2021, delivered their respective commentary on the report. The opinions, findings and conclusions of the respective experts are not uniform but are widely divergent. Following the delivery of the experts' final report, the respondents launched the application under case number 17470/2014 on 30 November 2021 for the court a quo to determine the process to be followed in terms of paragraph 24 for the determination of the disputes between the parties. It is the respondents' contention that the determination of the disputes identified in the report now fall to be determined by the court a quo, which therefore renders the relief to set aside the provisions of paragraphs 24 and 25 of the 2015 order moot.

[15] The respondents further submitted that it is in the interests of justice and fairness that they be allowed to adduce further evidence and that the evidence is dispositive of substantial issues that the appellants require this Court to determine. It was argued that the respondents will be severely prejudiced if the false narrative of the frustration of the implementation of the order and the purported non-executability of the 2015 order is not addressed.

[16] Section 19 of the Act provides:

'The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may specifically be provided for in any other law –

(a) dispose of an appeal without the hearing of oral argument;

(b) receive further evidence;

(c) remit the case to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence or otherwise as the Supreme Court of Appeal or the Division deems necessary; or

(d) confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require.'

[17] Our Courts have laid down basic requirements to emphasise the court's reluctance to reopen the trial. They may be summarised as follows:²

- (a) There should be a reasonably sufficient explanation, based on true allegations, why the evidence sought was not led at the trial;
- (b) There should be a prima facie likelihood of the truthfulness of the evidence;
- (c) The evidence should be materially relevant to the outcome of the trial.³

[18] A court of appeal will exercise its discretion to receive further evidence on the hearing of an appeal only if the circumstances are exceptional.⁴ A court of appeal should, in the normal course, decide whether the judgment appealed from is right or wrong according to the existing facts and not according to new circumstances. Therefore, as a general rule, evidence of events subsequent to the judgment under appeal should not be admitted in deciding the appeal.⁵ In general, a court of appeal should exercise the power conferred by s 19(b) of the Act sparingly.⁶

[19] In the case of *In re Certain Amici Curiae: Minister of Health and Others v Treatment Action Campaign and Others*,⁷ the Constitutional Court, in the context of an application to introduce further evidence said:

‘. . . However, this is subject to the condition that such facts “are common cause or otherwise incontrovertible” or “are of an official, scientific, technical or statistical nature, capable of easy verification”. This rule has no application where the facts sought to be canvased are disputed.’

² See *Pepkor Holdings Ltd and Others v AJVH Holdings (Pty) Ltd and Others; Steinhoff International Holdings NV and Another v AJVH Holdings (Pty) Ltd and Others* [2020] ZASCA 134; [2021] 1 All SA 42 (SCA); 2021 (5) SA 115 (SCA) para 49

³ *Johannesburg Society of Advocates and Another v Nthai and Others* [2020] ZASCA 171; 2021 (2) SA 343 (SCA); [2021] 2 All SA 37 (SCA), the Supreme Court of Appeal refused to receive further evidence which amounted to mere surplusage para 115.

⁴ *Goudini Chrome (Pty) Ltd v MCC Contracts (Pty) Ltd* [1993] 1 All SA 259 (A); 1993 (1) SA 77 (A).

⁵ *Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd and Others* [1992] 4 All SA 453 (A); 1992 (2) SA 489 (A) at 507D.

⁶ *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) at 388F-389A.

⁷ *In Re Certain Amicus Curiae Applications: Minister of Health and Others v Treatment Action Campaign and Others* 2002 (10) BCLR 1023 (CC); 2002 (5) SA 713 (CC) para 8.

[20] The evidence in Mr Kühn's founding affidavit that the applicants seek to introduce on appeal is clearly controversial. It is not only disputed by the respondents but is also not germane to the issues raised in this appeal. Accordingly, there is no basis for its admissibility. Therefore, the application to adduce such evidence falls to be dismissed.

Appealability of the March 2020 order

[21] I now turn to the question whether the 2020 order is appealable. On this score it bears mentioning that I am alive to the fact that this Court is under no obligation to entertain an appeal against an unappealable order merely because the appellants were granted leave to appeal by this Court. If we find that the 2020 order is not appealable, then it will not be necessary to deal with the merits of the appeal.

[22] As already indicated above, what gave rise to this appeal was the 2015 order granted by agreement between the parties. The respondents sought to ensure compliance with the 2015 order. It was not in dispute that the appellants were in breach of that order in that they were manufacturing and selling flat wire and auger before completion of the process envisaged in paragraph 24 of the 2015 order. The March 2020 order is manifestly an interim interdict pending the finalisation of the process provided for in paragraphs 23 to 25 of the 2015 order.

[23] The crux of the matter is firstly, whether this order was 'final in effect' and was therefore appealable even if its stated character was interim. Secondly, whether the interests of justice warrant that an appeal against the order in issue should be entertained. Our courts have established that an interim order may, if the interests of justice in a particular case so dictate, be appealable.⁸ The constitutional standard for appealing an interim order when it best serves the interests of justice was reiterated by the Constitutional Court in *City of Tshwane Metropolitan Municipality v Afriforum and Another*. There the Constitutional Court emphasised that '[i]f appealability or the grant of leave to

⁸ *Philani-Ma-Afrika and Others v Mailula and Others* [2009] ZASCA 115; 2010 (2) SA 573 (SCA) para 20.

appeal would best serve the interest of justice, then the appeal should be proceeded with no matter what the pre-Constitution common law impediments may suggest'.⁹

[24] Whether or not an interim order is appealable is fact-specific. This was affirmed in *South African Informal Traders Forum v City of Johannesburg*,¹⁰ where the Constitutional Court held that when determining whether it is in the best interests of justice to appeal an interim order, the court must have regard to and weigh carefully all relevant circumstances. The factors that are relevant or decisive in a particular instance, will vary from case to case.

[25] The appellants' complaint is that the high court failed to issue a rule *nisi* (operating in part as an interim interdict) in circumstances where this was the only relief which the respondents had sought at the hearing of this matter. In support of the complaint, the appellants submitted that the relief granted in paragraphs 1.3 and 2 of the 2020 order was final in effect. It is common cause that the respondents had abandoned the relief in paragraph 2.¹¹ Different considerations apply in respect of paragraph 1.3.

[26] The appellants' argument, in essence, is that had the 2020 order taken the form of a rule *nisi*, returnable on a specified date, such an order would have afforded the appellants the opportunity to deliver such further affidavits as they considered appropriate. And to the extent that the court was minded to grant relief as it did, it was obliged to apply the Plascon-Evans¹² rule in assessing the evidence. Had the court done so, it was argued, all factual disputes would be determined on the basis of the appellants'

⁹ *City of Tshwane Metropolitan Municipality v Afriforum and Another* [2016] ZACC 19; 2016 (9) BCRL 1133 (CC); 2016 (6) SA 279 (CC) para 41.

¹⁰ *South African Informal Traders Forum and Others v City of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others* [2014] ZACC 8; 2014 (6) BCLR 726 (CC); 2014 (4) SA 371 (CC) para 20.

¹¹ Paragraph 2 stipulates '[t]hat the respondents are in contempt of the Court Order of 2 June 2015'.

¹² *Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A); 1984 (3) SA 623 (A); 1984 (3) SA 620.

(the respondents in the high court) version, and the appellants would have succeeded in their opposition.

[27] The appellants' argument is, in my view, without any merit. On a proper interpretation of paragraph 1.3 of the 2020 order, it is ancillary to that granted in paragraph 1.1 and the remainder of the relief is evidently interim. The order stands, pending the finalisation of the process provided for in paragraphs 23 and 25 of the 2015 order. Where both parties are before the court; the issues raised have been fully ventilated; and an order granted, which clearly endures only until paragraphs 23 and 25 of the 2015 order have been complied with, there is no point in issuing a rule *nisi*.¹³

[28] In *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*,¹⁴ the Constitutional Court, in the course of addressing the controversy about whether the order under consideration was appealable, remarked:

'In this sense, the jurisprudence of the Supreme Court of Appeal on whether a "judgment or order" is appealable remains an important consideration in assessing where the interests of justice lie. An authoritative restatement of the jurisprudence is to be found in *Zweni v Minister of Law and Order* which has laid down that the decision must be final in effect and not open to alteration by the court of first instance; it must be definitive of the rights of the parties; and lastly, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings. On these general principles the Supreme Court of Appeal has often held that the grant of an interim interdict is not susceptible to an appeal.

The "policy considerations" that underlie these principles are self-evident. Courts are loath to encourage wasteful use of judicial resources and of legal costs by allowing appeals against interim orders that have no final effect and that are susceptible to reconsideration by a court *a quo* when final relief is determined. Also allowing appeals at an interlocutory stage would lead to piecemeal adjudication and delay the final determination of disputes.'¹⁵

¹³ *Bosman NO v Tworeck en Adere* 2000 (3) SA 590 (C); See also *Turquoise River Incorporated v McMenamin and Others* 1992 (3) SA 653 (D) at 658A.

¹⁴ *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2010 (5) BCLR 457 (CC); 2012 (4) SA 618 (CC) paras 49 & 50.

[29] The question before Mangcu-Lockwood AJ was simply whether the appellants complied with the 2015 order. Evidently, until the process ordained in paragraph 24 is completed, the proposed production facility of the appellants will be out of service for the commercial production of auger. Considering the evidence relating to background facts and 'surrounding circumstances', it is clear that the 2020 order was not final in effect and was thus open to alteration by the court of first instance. All of this means that, in my view, the order of the high court is not appealable. In such an instance, the appropriate order is that this application be struck from the roll. As for the question of costs, the failure of the appellants to have the appeal heard requires that they bear the costs jointly and severally.

[30] In the circumstances, I make the following order:

- 1 The appeal is struck from the roll.
- 2 The appellants shall jointly and severally bear the respondents' costs, the one paying the others to be absolved, including the costs of two counsel.

DS MOLEFE
ACTING JUDGE OF APPEAL

Appearances

For the appellants:

Instructed by:

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For the first respondent:

Instructed by:

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