REPUBLIC OF SOUTH AFRICA

GAUTENG DIVISION

PRETORIA

(REPUBLIC OF SOUTH AFRICA)

Appeal no:A1012/2013

31/10/2014

In the matter between:

SVK HOLDINGS (PTY) LTD **APPLICANT**

AND

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

31/10/2014

BRIAN STEPHEN CROOCK **FIRST RESPONDENT**

SHERRIF OF THE HIGH COURT(LEPHALALE) **SECOND RESPONDENT**

Coram: Potterill J; Baqwa J; Bam J

Date: 25 September 2014

Delivered: 31 October 2014

JUDGMENT

BAQWA J

Summary

Interim Interdict- Preventing execution and enforcement of default judgment- Pending application for rescission- rule nisi discharged-appealability of order.

The main issue which the court ***a quo*** *had to decide was entitlement or otherwise of the respondent to keep both the* ***merx*** *and the purchase price upon cancellation of the agreement of sale in respect of the 220 Crane when appellant had already paid a significant portion of the purchase price. In deciding the said issue the court* ***a quo*** *had also to decide whether a proper basis had been laid for the relief sought, namely the interdicting of the execution and/or enforcement of the default judgment granted on 10 June 2013 and return of the 220 Crane.*

Appeal dismissed.

Held*: As the* ***merx*** *was sold prior to the hearing of the appeal, the appeal had become academic in terms of section 16(2)(a)(i) of the Superior Courts Act.*

Held*: The Court* ***a quo*** *erred in granting leave to appeal against an interlocutory order.*

Held*: The appellant had failed to prove a* ***prima facie*** *right and was accordingly not entitled to confirmation of the* ***rule nisi****.*

Annotations

Case law

Saloojee v Minister of Community Development 1965 (2) SA 135 (A) at 141 C-E

Hepworths Ltd v Thornloe and Clarkson Ltd 1922 TPD 336

Kingsborough Town Council v Thirlwell and Another 1957 (4) S.A 533 (N)

Radio Pretoria v Chairman, Independent Communications Authority of South Africa and Another 2005 (1) SA 47 (SCA)

Rand Water Board v Rotek Industries (Pty) Ltd 2003 (4) SA 58 (SCA)

Cronshaw v Coin Security Group (Pty) Ltd 1996 (3) SA 686 (A)

Grancy Property Ltd and Another v Seena Marena Investment (Pty) Ltd and Others July (2) 2014 All SA 123 SCA

Constantinides v Jockey Club of South Africa 1954 (3) SA 35 (Z)

Kelly Group Ltd v Solly Tshiki and Associates SA (Pty) Ltd 2010 (5) SA 224 (GSJ)

[1] This is an appeal against a judgment granted on 20 September 2013 in which the appellant sought an order compelling the first respondent to return a 220 Faun-Tadano Crane (the crane) to the appellant.

[2] On 27 August 2013 this Court (per Ranchod J) issued a **rule nisi** returnable on 3 September 2013 in the following terms:

"1.1. First and/or second respondents are interdicted and prohibited from further executing and/or enforcing the default judgment granted on 10 June 2013 under case number 24847/2013...;

1.2. First and/or second respondents are ordered to forthwith restore the applicant's undisturbed possession of the 220 ton Faun-Tadano Mobile Crane with serial number 326269 and with chasis number WFN5RUGRIA2036269 together with C/W71 ton counterweights and a 22 metres Jib (hereafter 'the 220 Crane').

1.3. ...

1.4. Cost of the application will stand over for adjudication on the return day."

[3] On the return day the matter came before Mashile J and on 20 September 2013 he delivered a judgment discharging the **rule nisi** and ordering the appellant to forthwith give the first respondent undisturbed possession of the 220 Crane. He further ordered the appellant to pay the costs of the application including the costs of the first respondent's counter application such costs to include the costs of two counsel.

[4] The main issue which the court **a quo** had to decide was the entitlement or otherwise of the respondent to keep both the **merx** and the purchase price upon cancellation of the agreement of sale in respect of the 220 Crane when appellant had already paid a significant portion of the purchase price. In deciding the said issue the court **a quo** had also to decide whether a proper basis had been laid for the relief sought, namely the interdicting of the execution and/or enforcement of the default judgment granted on 10 June 2013 and return of the 220 Crane.

Background

[5] On 4 June 2012 and at Benoni, the appellant and first respondent concluded an oral agreement in terms of which the first respondent purchased a 220 Ton Crane from one Terry at a purchase price of R15,960,000-00 and thereafter

sold it to the appellant at the same price (inclusive of VAT). The purchase price was payable in the following instalments:

4.1. R6,000,000.00 on or before delivery of the 220 Crane to the appellant;

4.2. R3,200,000.00 together with interest in the amount of R141,000.00 on or before 10 August 2012;

4.3. R3,320,00.00 together with interest in the amount of R94,000.00 on or before 10 August 2012;

4.4. R3,320,000.00 together with interest in the amount of R47,000.00 on or before 10 September 2012.

[6] First respondent would retain ownership of the 220 Crane until payment of the purchase price had been paid in full.

[7] The first respondent delivered the 220 Crane to the appellant and that the appellant paid the first instalment in two tranches, R2,999,999.00 on 14 June 2013 and R3,000,001.00 on 15 June 2013.

[8] The first respondent after delivery, and payment of the first instalment, presented the appellant with a draft written agreement which the appellant refused to sign because the terms thereof were at odds with those of the oral agreement. Amongst others, the written agreement contained a forfeiture clause which the appellant never agreed to.

[9] Before the second instalment fell due, on 10 July 2012, the appellant and the first respondent concluded a second oral instalment sale agreement on substantially the same terms as before.

[10] In terms of the second agreement the first respondent sold to the appellant a 110 ton Faun-Tadano mobile Crane with registration number HZZ898W (the110 Crane) at a purchase price of R6,270,000.00.

[11] The parties further agreed that the appellant would pay the first respondent R1,000,000.00 upon delivery of the 110 Crane and that the appellant would thereafter pay the balance outstanding on both cranes in equal monthly instalment of R2,000,000.00 each, together with interest on the outstanding capital amount calculated at 17 percent per annum.

[12] According to the appellant all payments would first have gone towards extinguishing its indebtedness in respect of the 220 Crane.

[13] The first respondent denies the terms of the oral agreement contended for by the appellant and alleges the parties concluded a single oral agreement in terms whereof the appellant purchased both cranes for the respective amounts referred to hereinbefore. The first respondent further alleged that the parties agreed:

12.1. That interest was payable on the outstanding balance at the rate of 17 percent per annum calculated daily and compounded monthly in arrears; and

12.2. That in the event that the appellant defaulted and the first respondent cancelled the sale agreement, the appellant would forfeit all payments already made in lieu of the appellants' use of the cranes and the first respondent would be entitled to recover the cranes.

[14] The appellant paid the amount of R1,000,00.00 and after delivery of the 110 Crane, made the following further payments to the first respondents:

13.1. On 17 July 2012 an amount of R2,400,000.00;

13.2. On 17 July 2012 and amount of R1,061,000.00;

13.3. On 3 September 2012 an amount of R2,000,000.00;

13.4. On 1 October 2012 an amount of R2,000,000.00;

13.5. On 5 November 2012 an amount of R2,000,000.00.

[15] The payment of 3 September 2012 and 1 October 2012 were made into the banking accounts of Marshall Eagle Aviation (Pty) Ltd and investment Aircraft (Pty) Ltd respectively. Those payments were done on the instruction of the first respondent. This is however now denied by the first respondent who alleges that he only received R1,700,000.00 on 2 October 2012.

[16] During November 2012 and mainly owing to labour unrest at the Medupi Power Station, the appellant found it difficult to keep up the agreed monthly instalments but managed to pay R1,000,000.00 to the first respondent on 19 December 2012.

[17] The first respondent on 20 March 2013 demanded payment of the balance purchase price together with interest at 17 percent per annum, failing which he threatened to cancel the agreement of sale and reclaim the cranes.

[18] No payment was made and the first respondent on 15 April 2013 gave notice of cancellation of the sale agreement and claimed return of the two cranes. Upon the appellant's failure to comply with the demand, the first respondent caused summons to be issued out of this Court under case number 24847/2013.

[19] Summons was served at the appellants' former registered address and the contents thereof (like the demand) did not come to the appellant's attention and default judgment was granted on 10 June 2013. The appellant only became aware of the default judgment when the first respondent's attorney informed it thereof by letter dated 24 June 2014.

[20] The first respondent thereafter attached both cranes whereafter negotiations ensued culminating in two agreements, firstly, that the first respondent was entitled to remove the 110 Crane, and later an oral Settlement Agreement concluded on 27 June 2013 (which was confirmed in a letter by the appellant's attorney) the salient terms whereof were as follows:

20.1. Appellant would pay the first respondent an amount of R2,200,000.00 on or before Saturday 29 June 2013;

20.2. Appellant would refund the first respondent an amount of R932,000.00 (this amount to be confirmed, verified and substantiated by CSS Tacticals Auditors in writing) in respect of a VAT liability allegedly incurred by the first respondent;

20.3. Appellant would pay the first respondent the balance of the purchase price due, as and when confirmed in a certificate signed by the first respondent on or before 31 July 2013.

[21] The first respondent has filed papers in opposition not only to the appeal but also in opposition to the granting of condonation for the late filing of the Notice Of Appeal by the appellant.

[22] In first respondent's affidavit opposing condonation he has also raised several points **in limine** regarding the merits of the appeal.

[23] For this reason, when the matter was heard, counsel for the appellant Mr De Koning SC, was granted leave not only to address the Court on the preliminary issue of condonation only but also on several points raised **in limine** and on the merits of the appeal. This would serve to avoid addressing the various issues on a piecemeal basis and curtail the proceedings. The same would apply to counsel for the first respondent, Mr Subel S.C.

[24] Having read the papers and having heard counsel and having considered the matter, I have come to the conclusion that it is not necessary to deal with the other issues raised by first respondent, namely, the abandonment of the appeal and special plea of **res judicata**.

Condonation

[25] The appellant's application for condonation mainly rests on an affidavit filed by its erstwhile attorney, Van Dyk who seeks to explain why the Notice of Appeal was only filed 52 days after the granting of leave to appeal, thus becoming 32 days out of time.

[26] A synopsis of Van Dyk's affidavit is that due to a bona fide oversight on his part, he was under the impression that the application for leave to appeal also served as a Notice of Appeal. Van Dyk only realised his error on 10 December 2013 when the firm tasked with compiling the record requested him to provide them with a copy of the Notice of Appeal. The Notice of Appeal was subsequently filed on 12 December.

[27] Appellant's submission is that its failure to file the Notice of Appeal within the time period stipulated in the Uniform Rules of Court was not an intentional or reckless disregard of the Rules of Court.

[28] First respondent on the other hand submits that condonation ought not be granted as the appeal, in his words, is 'still born'. The basis **inter alia** for this submission is that the **merx** which is the subject of appeal, the 220 crane, has since been sold and that for that reason, the appeal even if it were successful, the outcome thereof cannot be enforced. He submits that the appeal has become academic.

[29] It is an established principle of law that there is a limit beyond which a litigant is not entitled to rely upon the failings of its legal representative.

In the case of **Saloojee v Minister of Community Development 1965(2) SA 135(A) at 141 C-E** Steyn CJ stated as follows:

"There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered. To hold otherwise might have a disastrous effect upon the observance of the Rules of the Appellate Division. Considerations ***ad misericordiam*** *should not be allowed to become an invitation to laxity. In fact this Court has lately been burdened with an undue and increasing number of applications for condonation in which the failure to comply with the Rules of this Court was due to the neglect on the part of the attorney. The attorney, after all, is the representative whom the litigant has chosen for himself, and there is little reason why, in regard to condonation of a failure to comply with a Rule of Court, the litigant should be absolved from the normal consequences of such a relationship, no matter what the circumstances of the failure are. (****Cf Hepworths Ltd v Thornloe and Clarkson Ltd 1922 T.P.D 336; Kingsborough Town Council v Thirlwell and Another 1957(4) S.A 533(N)).*"

[30] In **Silben v Ozen Wholesalers (Pty) Ltd 1954(2) SA 345(A) at 352H-353A** it was found that an applicant applying for condonation has to show good cause and this entails that the applicant *"must at least furnish an explanation of his default sufficiently full to enable the Court to understand how it really came about, and to assess his conduct and motives."*

This principle was once again approved in **Minister of Agriculture and Land Affairs v CJ Rance 2010 (4) SA 109 (SCA)** on 117 par [36].

In casu, Van Dyk fails to elaborate on what led him to make the mistake or omission which he refers to in his affidavit. It bears mentioning that Van Dyk, as an admitted attorney ought to have known the difference between an application for leave to appeal and a Notice of Appeal. Conflation of the two is unthinkable given his expertise and knowledge as an attorney. It was thus incumbent on him to fully inform this Court how he came to commit this glaring omission. He did not do so. This is yet another glaring omission which does not lay sufficient ground for this Court to grant condonation for the late filing of the Notice of Appeal. In the circumstances the application for condonation ought not to succeed.

Even though the period of delay is not that long the reasons and merits for the delay does not set out good cause. The prospects of success on the appeal also do not favour the appellant. Accordingly the application for condonation must be dismissed.

However in the event that we err in the refusal of the condonation application we address the merits of the appeal.

Appeal academic

[31] The question arose whether the discharge of the interim order is appealable. On behalf of the respondents it was argued that the discharge of the order is not appealable. It was a refusal of an interim order which did not finally dispose of the determination of rights; the interim order only related to possession. The order did not affect Part A of the notice of motion and they could still apply to have the default judgment rescinded. The appellants were further not barred from issuing a summons for damages or obtaining relief for monies to be repaid to the appellant in terms of the Conventional Penalties Act 15 of 1962.

[32] On behalf of the appellant it was argued that the refusal of the interim relief equated to final relief. This was especially so as the court hearing the rescission application would be bound by the judgment made by Mashile J. The biggest issue between the parties was whether the appellant agreed to a forfeiture clause. The appellant argued that at the heart of the appeal laid the First Respondent's attempt at keeping both the money and the proverbial box upon the cancellation of the agreements between the parties. The appellant disputed that the first respondent is entitled to forfeiture of the R20 061 000.00 already paid by the appellant as part of the total amount of the purchase price of R22 230 000.00.

[33] First respondent states under oath that the 220 Crane has been sold and that he is no longer in possession thereof. He further submits that it would serve no purpose for the Court to grant an order compelling him to return the 220 Crane to the appellant in circumstances where he cannot comply with. Appellant was notified of the sale of the 220 Crane prior to hearing of this appeal.

[34] It is an established principle that an appeal Court does not determine issues that are academic.

See **Radio Pretoria v Chairman, Independent Communications Authority of South Africa and Another 2005(1) SA 47 (SCA).**

Rand Water Board v Rotek Industries (Pty) Ltd 2003(4) SA 58 (SCA) at paragraph 26.

[35] The Supreme Court Act 59 of 1959 ("the earlier Act") was repealed by the Superior Courts Act 10 of 2013 ("the Superior Courts Act") with effect from 12 August 2013. Both the earlier Act and the Superior Courts Act, however, contain virtually identical provisions in relation to appeals of an academic nature.

[36] Section 21A(1) of the earlier Act states as follows: *"When at the hearing of any civil appeal to the Appellate Division or any Provincial or Local Division of the Supreme Court the issues are of such a nature that the judgment or order sought will have no practical effect or result, the appeal may be dismissed on that ground alone."*

[37] Section 16(2)(a)(i) of the Superior Court Act reads as follows: *"Where at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on that ground alone."*

[38] Section 16(2)(a)(ii) of the Superior Courts Act provides as follows:

"Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs."

[39] **In casu**, the subject matter of this appeal, the 220 crane has been disposed of by way of sale. The first respondent would in the circumstances not be in a position to comply with the order sought by the appellant. Any order made, in the event that appellant is successful would have no practical effect or result. In those circumstances the appeal ought not to succeed.

Appealability of Interlocutory Interdicts

[40] In **Cronshaw v Coin Security Group (Pty) Ltd 1996(3) SA 686(A) at 690 E-F** the Supreme Court of Appeal held that an interlocutory interdict was appealable if it was final in effect and not susceptible to alteration by the Court of the first instance. In determining whether an order is final, it must be borne in mind that *"not only the form of the order must be considered but also, and predominantly its effect."*

[41] The Supreme Court of Appeal also enunciated the law further in this regard in **Grancy Property Ltd and Another v Seena Marena Investment (Pty) Ltd and Others July(2) 2014 All SA 123 SCA** in that it quoted the following from **Zweni v Minister of Law and Order 1993 (1) SA 523 (A)** at 532J-533A:

"On the preliminary issue of whether the High Court order was appealable, the Court was guided by the principles established in case law. A judgment or order is a decision which, as a general principle has three attributes. First, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second it must be definitive of the rights of the parties; and third it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings."

[42] In the **Grancy** matter **supra** the court at paragraph [14] referred to Maya JA in **Jacobs v Baumann NO**, where it found:

"..[A] court determining whether or not an order is final considers not only its form but also, and predominantly, its effect. An order may not possess all three tributes, but will nonetheless be appealable if it has final jurisdictional effect or is 'such as to "dispose of any issue or any portion of the issue in the main action or suit" or...irreparably anticipates or precludes some of the relief which would or might be given at the hearing."

[43] In **NDPP v King** Harms DP held:

"...[T]he focused issue is whether the 'order' was in substance and not in form final in effect. In other words, was it capable of being amended by the trial court?...if a party has been prejudiced by the order his prejudice is irremediable."

[44] The court in the **Grancy** matter **supra** decided whether an interim order was appealable guided by the principles laid out in a line of cases. The court did however not refer to **Knox D'Arcy and Another v Jamieson and Others** 1996 (4) SA 348 (A) where the court after referring to **Cronshaw** and **Zweni's** cases **supra** endorsed the finding in **Davis v Press & Co 1944 CPD 108** at 113 *"... it is undisputed law that the refusal of an interdict is always appealable ...".* On p359 I-J the court found that *"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)."*

[45] If regard is had to the judgment of Mashile J then not only does the court find that there was a forfeiture clause but also found that:

"In my view the position is that when the First Respondent cancelled the instalment sale agreement on 15 April 2013 as a result of the Applicant's breach the Applicant forfeited whatever it had paid to the First Respondent and had no right to keep the cranes." [p14 lines 6-9]. The court also found that there are no prospects of success in rescinding the judgment, not only in terms of Rule 42 but also in terms of the common law.

Although Mashile J referred to the order as an interim order the court did not confine its decision to that relating to the interim order. I thus understand the problem the appellant is faced with in that in the interim order final pronouncements were made on the merits which were only to be addressed in the rescission application. The judgment of the court **a quo** thus rendered a clearly interim order final with the reasons for judgment. This would hinder the appellant as the reasons pronounced finality on the merits. However as the court **a quo** was clearly incorrect in reaching these findings on the merits of the rescission application or action, the findings are thus **obiter dictum** and would not bind another court deciding the rescission application or action. The interim order thus remains interlocutory and not appealable. **In casu** the return or not, but more importantly the forfeiture, can be addressed on the same facts in the action; contra distinct to the finding in **Knox D'Arcy supra**.

[46] The application **in casu**, was brought before the urgent Court and it was couched as follows:

"Part B

Take notice that applicant intends making application to the above Honourable Court for an order in the following terms;

1. *The default judgment granted on 10 June 2013 under case number 24847/2013 against the applicant (a copy of the default judgment is attached as annexure "A" to the Notice of Motion) is set aside and applicant is granted leave to file its plea within 15 days from date hereof;*
2. *Costs (including costs relating to the order granted in terms of PART A hereof) are cost in the course save in the event of opposition hereto;*
3. *Further or alternative relief."*

[47] Mr Subel S.C submits and I accept that the discharge of the rule nisi (which related only to Part A) by the court **a quo** had the effect of restoring the **status quo ante** to the default judgment status. In other words Part A of the application was granted pending the appellant prosecuting the application for rescission in Part B of the application. It is therefor, patently clear that the order of the Court **a quo** could not be interpreted as final in the sense referred to in the **Grancy Property Ltd** decision **(supra)**.

The logical conclusion is therefore that the Court a quo was wrong to grant the appellant leave to appeal against what was clearly an interlocutory interdict.

Prima facie right

[48] One of the requirements that the appellant had to prove in order to be granted an interdict was to prove that he had a **prima facie** right to possess the 220 crane.

[49] In the appellant's founding affidavit supporting the application for an interdict the appellant admits its indebtedness to the first respondent in the sum of R3,555,567.57. This admission in my view confirms appellant's failure, in its

own affidavit, to demonstrate that it had the **prima facie** right to possess the 220 crane. The Court **a quo** also found in its judgment that the appellant had failed to prove a **prima facie** right.

[50] In summary, it would seem to me that this appeal ought to be dismissed mainly for four reasons. Firstly the application for condonation is dismissed, secondly, the appeal has become academic by reason of sale of the 220 crane which is the subject matter of the appeal. Thirdly, the granting of leave to appeal by the Court a quo was an incorrect decision. This view is affirmed by **Erasmus, Superior Court Practice E8-15** where it is stated: "If, however, an application for an interdict is refused on the basis that no **prima facie** right has been established, a Court is not entitled to grant an interlocutory interdict pending an appeal against such decision."

See also **Constantinides v Jockey Club of South Africa 1954 (3) SA 35 (Z) at 53 H and 54E-55A.**

Kelly Group Ltd v Solly Tshiki and Associates SA (Pty) Ltd 2010 (5) SA 224 (GSJ) at 231G.

Fourthly, the appellant had failed to prove a **prima facie** right before the Court **a quo** and was therefore not entitled to confirmation of the rule nisi.

Costs

[51] The Court has to make a costs order not only with regard to today's hearing but also on 20 August 2014 when the case was postponed to today. Even though the case was postponed at the request of first respondent, it is common cause that first respondent had brought it to appellant's notice that the 220 crane had already been sold prior to this appeal being heard.

The appellant decided to continue with the prosecution of the appeal despite that knowledge. Having pursued the appeal and having lost the appeal the order for costs must follow the result. The appellant must bear the costs.

[52] In the result, I propose that the following order be made:

52.1. The application for condonation of the late filing of the Notice of Appeal is dismissed.

52.2. The appeal is dismissed with costs which shall include the costs incurred on 20 August 2014.

52.3. Costs shall be calculated on an attorney and client scale and include the costs of employing two counsel.

S.A.M BAQWA

(JUDGE OF THE HIGH COURT)

I agree.

pp. A.Bam.

A.J BAM

(JUDGE OF THE HIGH COURT)

I agree and it is so ordered.

S POTTERILL

(JUDGE OF THE HIGH COURT)

Counsel for the appellant:	Adv L.W De Koning S.C
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