IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

Date: 17 0ctober 2005 Case number: 18386/2003

NOT REPORTABLE Delivered: 10/1/2006

In the matter between:

INDUSTRO-CLEAN (PTY) LTD FIRST APPLICANT

INDUSTRO CLEAN (NORTH WEST) PTY LTD SECOND APPLICANT

AND

IVAN SAINCIC FIRST RESPONDENT

SHARON JEAN SAINCIC SECOND RESPONDENT

CRISM WATER SYSTEMS CC THIRD RESPONDENT

Van Rooyen AJ

[1] This is an application for leave to appeal against my judgment in favour of the First Respondent, whereby the execution of a writ against him was stayed pending the outcome of an action for a declaratory order concerning the debt on which the writ was based. The matter was brought before me on the urgent roll in June 2005. The application for leave to appeal was heard on the 17th October 2005. Since I decided to read the record of the original trial before Basson J, I

took longer to come to a conclusion on this application for leave to appeal than I would have wished to have taken.

[2]The Applicants issued summons against the Respondents for *inter alia* damages. As part of a wider order First Respondent was ordered in paragraph D of the said order to pay the Second Applicant R148 655.2 plus interest and costs. The claim for damages became liquidated on the 12th August 2004 and the Second Applicant proceeded to enforce the judgment debt by having a writ issued. Before the writ could be executed, the First Respondent brought the said urgent application for the setting aside, alternatively, the staying of the said writ.

[3] I should mention that the First Respondent is married in community of property to the Second Respondent and she was, accordingly, also involved in this part of the order. Since paragraph D of the 2004 Court Order only refers to Second Applicant (as second plaintiff) and First Respondent (as second defendant), I shall only refer to them in this judgment. In the application which was brought before me in June, Crism Water Systems CC was cited as "First Applicant" in the Notice of Motion but it should, more correctly, have remained in its position as "Third Applicant" since it was the Third Defendant in the action. First Respondent was the First Defendant in the action and he was ordered, in terms of paragraph D of the order, to pay Second Applicant the said amount. The citation by the Applicants in the present application for leave to appeal is the correct one and is cited in the heading to this judgment. The founding affidavit in

the June application also cited the parties in the correct order. As a result of the incorrect order of the applicants in the Notice of Motion, that citation was also used by the Registrar when my order was issued. In any case, the (active) parties in the present matter are the Second Applicant and the First Respondent.

[4] The First Respondent alleged in the urgent application that he had a liquidated claim against the Second Applicant for unpaid salaries/remuneration exceeding the judgment debt and that by the operation of set-off the judgment debt had become extinguished on the date when it was granted and thus the writ of execution should never have been issued because of the absence of a judgment debt. The First Respondent had, however, never instituted a counterclaim against the Second Applicant in the aforesaid action. Accordingly, it was argued that the First Respondent could not, only at that stage, have attacked the writ.

[5] I granted an interim interdict by staying the writ pending an action to be instituted within 21 days for a declaratory order as to whether set-off in fact occurred or not. I was informed from the Bar that such an action has been instituted.

[6] Hereafter the Applicants applied for leave to appeal against the said interim interdict. It was argued by Mr *Rossouw,* for the First Respondent, that the interim order that was granted was not appealable. The test to be adopted in deciding

whether a decision is appealable or not is stated in *Zweni v Minister* of *Law and Order* 1993 (1) SA 523 (A).at 531 to 533. For the Applicant, Mr *Cochrane,* however, relied on the decision in *Metlika Trading Ltd and Others v Commissioner, South African Revenue Services* 2005(3) SA 1 (SCA).

[7] The latter case is distinguishable from the present in that the interim order that was made in *Metlika* in respect of the aircraft was final in effect. Streicher JA says the following: "Whether or not the aircraft should be returned to South Africa ... is not an issue in the action pending."[1] As already stated, the issue in the urgent application, i.e. whether set-off occurred or not, is the issue in the

[1] Streicher JA states as follows in *Metlika:*
"[21] As in *African Wanderers Football Club Ltd,* the issues in the interdict proceedings in *Cronshaw* were the same as the issues which were to be decided in a trial. Schutz JA stated that, intrinsically difficult as it was to decide whether a decision was 'interlocutory' or 'final', there had to be a rule and that rule was stated by Schreiner JA in *Pretoria Garrison Institutes* v *Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A) at 870 to be
'a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to "dispose of any issue or any portion of the issue in the main action or suit" or, which amounts, I think, to the same thing, unless it "irreparably anticipates or precludes some of the relief which would or might be given at the hearing" '.
[22] The present case is distinguishable from *African Wanderers Football Club Ltd and Cronshaw. Whether* or *not the aircraft should be returned to South Africa and whether* or *not the other orders relating to the aircraft should be granted is not an issue in the action pending* which the interdict was granted. In these circumstances, coupled with the fact that an application for an interim interdict is a proceeding separate from the main proceedings pending the determination
of which it was granted (see *Knox D'Arcy Ltd and Others* v *Jamieson and Others* 1996 (4) SA 348 (A) at 359H read with 357C), the test in *Pretoria Garrison* is wholly inappropriate to determine whether the present order granted is final in effect and thus appealable.
[23] In determining whether an order is final, it is important to bear in mind that 'not merely the form of the order must be considered but also, and predominantly, its effect' *(South African Motor Industry Employers' Association* v *South African Bank of Athens Ltd* 1980 (3) SA 91 (A) at 96H, and *Zweni* at 532I).
[24] The order that steps be taken to procure the return of the aircraft to South Africa, as well as the other orders relating to the aircraft, were intended *to have immediate effect, they will not be reconsidered at the trial and will not be reconsidered on the same facts by the Court* a *quo. For these reasons, they are in effect final orders.* Some support for this conclusion is to be found in *Phillips and Others* v *National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) in paras [17] - [22] in which it was held that a restraint order in terms of the Prevention of Organised Crime Act 121 of 1998 which was considered to be analogous to an interim interdict for attachment of property pending litigation, was final in the sense required by the case law for appealability." (emphasis added)

pending action. My view is that the interim interdict is not open to appeal. However, if I am wrong in this respect, the merits of the application for leave to appeal are, in any case, considered.

[8] *Compensatio* is a method by which contractual and other debts may be extinguished. It comes into effect when two parties are reciprocally indebted to each other: if the debts are equal, both are discharged; if they are unequal, the smaller is discharged and the larger is reduced by the amount of the smaller. Set-off may be regarded as a form of payment and even as the equivalent of payment in cash. Set-off operates automatically. A defendant is not obliged to raise every available defence to a claim, and if he does not plead set-off and judgment is given against him, he may rely on the set-off against the judgment debt and, if necessary, apply to stay execution on it. Although a piecemeal approach to a matter should be avoided, it would be unfair to categorically not allow a defendant to raise such a defense at the stage of the execution of a writ. A cost order against a defendant who raises this claim later, would usually address the equities.

[9] By necessary implication I only decided that the First Respondent had made out a *prima facie* case, although open to some doubt, that set-off occurred and consequently that there was, on the same standard, no judgment debt upon which the writ could have been issued. It was obviously not intended to dispose finally of this issue, otherwise I would not have ordered the First Respondent to

institute an action for a declaratory order within 21 days. It was argued that the First Respondent was simply into delay tactics. I agree that the First Respondent was not very clear about how this debt had come about, but essentially there was a reference to a contract, when the business was taken over, to pay him his remuneration. On a *prima facie* basis this would not seem to be something which was pulled out of a hat by the First Respondent. In fact, it would seem quite natural that some or other arrangement would have been made. I regarded this as sufficient to entitle the First Respondent to obtain the interim interdict. It is true that this would take further time to adjudicate, but on a *prima facie* basis (though open to some doubt) I was of the opinion that it was not without some merit to have this matter investigated properly. I have reconsidered this point and have also read the record in the original action to form a proper view of the whole matter. I have come to the conclusion that there are no reasonable prospects of success on appeal.

[10] I am, accordingly, firstly of the view that my decision is not appealable. However, if I am wrong in this respect, I also do not believe that there are reasonable prospects of success on appeal.

The application for leave to appeal is dismissed with costs.

10 January 2006

JCW VAN ROOYEN, ACTING JUDGE