THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 49/10

In the matter between:

Saidex (Pty) Ltd	First Appellant
Frits Stephanus Visser	Second Appellant
Este Minerals CC	Third Appellant
D & R Diamonds CC	Fourth Appellant
CS Diamonds CC	Fifth Appellant
Platinum Shadow Trade 101 (Pty) Ltd	Sixth Appellant
and	
The Minister of Minerals and Energy NO	First Respondent
The Department of Minerals and Energy	Second Respondent
SA Diamond & Precious Metal Regulator	Third Respondent
Martinus Mamphenyane Mononela NO	Fourth Respondent

Neutral citation:	*Saidex v The Minister of Minerals and Energy* (49/10) [2011] ZASCA 102 (1 June 2011)
Coram:	LEWIS, SNYDERS, SHONGWE, THERON AND MAJIEDT JJA
Heard:	19 May 2011
Delivered:	1 June 2011
Summary:	Interim interdict – requirements – nature of business permitted by Diamonds Act 56 of 1986.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Sapire AJ sitting as court of first instance).

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

SNYDERS JA (Lewis, Shongwe, Theron, Majiedt JJA concurring)

[1] The appellants were refused an interim interdict in the North Gauteng High Court, Pretoria (Sapire AJ) and are before this court with the leave of the court below.

[2] The appellants conduct business in the diamond industry subject to and in terms of the provisions of the Diamonds Act 56 of 1986 (the Act). During 2005 the Act was amended twice and the amendments came into effect on 1 July 2008 (the amended Act).[1] The appellants allege that, save in so far as the transitional provisions protect their rights, the amended Act has deprived them of the business which they have been conducting in terms of the Act. They seek to preserve their rights under the Act pending an application by the South African Diamond Producers Organisation ('SADPO'), of whom they are all members, aimed at obtaining an order declaring certain provisions of the amended Act to be unconstitutional.

[3] The respondents are, respectively, the Minister, the department, the SA Diamond & Precious Metal Regulator established in terms of the Act and the official in the employ of the third respondent, tasked with the implementation of the Act and the amended Act. Only the second and third respondents opposed both the application and this appeal and I will refer to them, for the sake of convenience, as the respondents.

[4] At the outset the respondents contested the appealability of the order of the court below. The refusal of an interim interdict is, in principle, appealable.[2] The question of

1 The amendments were introduced by the Diamonds Amendment Act 29 of 2005 and the Diamonds Second Amendment Act 30 of 2005.

2 *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) at 47C-48H; *Cronshaw & another v Coin Security Group (Pty) Ltd* 1996 (3) SA 686 (A) at 690B-691G; *Knox D'Arcy Ltd & others v Jamieson & others* 1996 (4) SA 348 (A) at 356H-360D.

appealability is, however, by no means a simplistic one.[3] The facts of this case suggest that the relief sought in the court below was aimed at preserving the status quo of the vested business interests of the appellants, pending the determination of the main application that would definitively decide the rights of the parties. The effect of the refusal of the interim interdict is, therefore, final in declining to preserve the status quo. A consideration of this issue on appeal does not constitute an undesirable piecemeal approach to the matter. Without delving too deeply into the issue I accept in favour of the appellants that the order by the court below is appealable.

[5] The respondents also submitted that the appellants' notice of appeal is defective because it does not 'state in what manner the variation of the order of the Court a quo is sought'.[4] The appellants' notice of appeal may strictly fall short of the rule, but as the relief sought in the court below was refused and the appeal is noted against 'the whole of the judgment and costs order', it is obvious that the appellants seek the reversal of the refusal and the granting of the relief contained in the notice of motion. Although sloppiness and a lack of discipline is by no means encouraged, the notice of appeal has not caused prejudice and the matter should be decided on its merits.

[6] To have achieved success the appellants would have had to persuade the court below that if their factual allegations were accepted, together with the respondents' allegations that could not be disputed by the appellants, and if regard was had to the inherent probabilities, they could have obtained final relief in the main application. Once that exercise produced an answer in the appellants' favour, only serious doubt cast on the appellants' case by the respondents' allegations could have prevented the granting of interim relief.[5] In addition the appellants had to have persuaded the court below that they had a well grounded apprehension of irreparable harm if interim protection was not afforded, that the balance of convenience favoured them and that they had no other

---

3 *Health Professions Council of South Africa v Emergency Medical Supplies and Training CC t/a EMS* 2010 (6) SA 469 (SCA) paras 14-19.

4 SCA rule 7(3)(b) requires an appellant to 'state the particular respect in which the variation of the judgment or order is sought'.

5 *Webster v Mitchell* 1948 (1) SA 1186 (A) at 1189; *Gool v Minister of Justice* 1955 (2) SA 682 (C) at 688E. This case having originated as an urgent application, I will accept in favour of the appellants, the lesser test stated in *Webster* on the strength of *Sing & Co (Pty) Ltd v Pietermaritzburg Local Road Transportation Board* 1959 (3) SA 822 (N) at 824C.

adequate remedy.[6]

[7] Integral to an interim interdict is the need to show that proceedings which address the principal dispute between the parties are intended or pending. In the founding affidavit this aspect is addressed as follows:

'On 20 December 2007 SADPO issued an application out of the above Honourable Court under case number 98085/07 against the first and second respondents herein ("the main application") to –

24.1 set aside the coming into operation by proclamation published on 12 July 2007 in Government Gazette No. 30071, Volume 505, No. R17 of 2007 of the First and Second Amendment Acts respectively;

24.2 declare as unconstitutional

24.2.1 certain sections of the Acts;

24.2.2 the arbitrary deprivation of the rights accrued to tender houses in consequence of certain sections of the Second Amendment Act; and

24.2.3 set aside the Regulations made under that Act.'

The appellants do not refer to the specific provisions of the amended Act that are being attacked in the main application. That failing is repeated in the present proceedings.

[8] The first appellant is the holder of a valid certificate issued by the South African Diamond Board (SADB) in terms of s 26 of the Act which entitles it to operate a diamond exchange at designated premises. The second appellant is a shareholder and director of the first appellant and the holder of a licence as a diamond dealer in respect of the same premises. The third to fifth appellants are all diamond dealers on the strength of similarly issued diamond dealers' licences. The sixth appellant is a newly formed company and has applied for a licence as a diamond dealer in terms of the amended Act, which has not yet been issued. The sixth appellant therefore has no rights that require protection and can, for that reason, be ignored for purposes of this

6 *Setlogelo v Setlogelo* 1914 AD 221.

judgment.

[9] The appellants place much reliance in their founding affidavit on a judgment granting an interim interdict in the same division of the high court, by the same judge and, seemingly, on the same issue and against the same respondents in favour of one *Meyer Diamonds CC* which held a diamond exchange certificate. The only value of the judgment in the *Meyer* matter is that it may have constituted a precedent for the court below. However, it was distinguished by the court below and not followed. (Whether the distinction was justified is not something I need decide.) In fact the only significance of *Meyer* for this court is that a large portion of the founding affidavit incorporates allegations made in the *Meyer* papers. The incorporated allegations describe the details of what is called 'the tender business' and in the present application all the applicants align themselves with the *Meyer* matter in this regard.

[10] The appellants allege that they have established, in terms of the Act prior to the amendments, a business described by them as a 'tender business' which is made unlawful by the amendments. The explanation in the founding affidavit of the tender business is given by quoting several paragraphs from the *Meyer* matter. In summary, local licensed diamond dealers are assisted by unlicensed foreigners in the purchase of unpolished diamonds from other local licensed dealers like themselves. This practice, so they allege, ensures that they come into contact with international traders and obtain the best possible price commensurate with international, as opposed to local, markets. It also ensures a commission for the local licensed dealers involved that are not the sellers in the transaction. Significantly, the appellants refer to this as a 'de facto' practice and distinguish it from the 'de jure' position. This distinction illustrates the fundamental flaw in the appellants' case.

[11] The appellants do not refer to a single provision in the Act that suggests that a practice such as their tender business is or ever has been legitimate. On the contrary the Act is aimed at the prevention of all dealing in, possession of and the purchase and sale of unpolished diamonds at premises not licensed and by persons not licensed to do

so.[7] The tender business described involves the dealing in unpolished diamonds by unlicensed foreigners. To refer to assistance by unlicensed foreigners distorts the truth in that it identifies the unlicensed foreigner as the one who 'assists' the licensed dealers whereas it is the licensed dealers who assist the unlicensed foreigner and earn commission by doing so.

[12] The appellants rely solely on a letter from the SADB for the legitimacy of the tender business. They do not attach the letter to their papers, but allege that it is dated 21 March 1993, was written by the SADB, and was addressed and sent to every licensed rough diamond dealer and cutter in South Africa. Reliance on the letter is explained as follows in the founding affidavit:

'7.2 According to this letter, licensees were no longer permitted to be assisted, when viewing and purchasing diamonds, by anyone who was not a licensee or the Authorised Representative of a licensee.

7.3 The letter made it very clear that this condition applied to **selling offices** (section 48(1)(d)) and **buying offices** (section 48(2)(d)) exclusively.

7.4 The letter went on to state categorically and unequivocally that (and I quote for convenience of the court from the letter as follows):

> "Please note, however, that the Board's decision **does not apply** to the viewing or purchasing of diamonds on any of the following premises:
>
> 7.4.1 the premises of the Diamond Bourse of S A;
>
> 7.4.2 **the business premises of a licensed cutter or dealer (the particulars of such a premises are reflected on a cutter or dealer's license)**; and
>
> 7.4.3 the premises of Trans Hex in Parow."' (Their emphasis)

[13] These allegations contain an apparent conflict between para 7.4.2 of the quoted letter and para 7.2 of the excerpt from the founding affidavit that purports to contain a summary of part of the letter. It is extraordinary that the appellants seek to establish a prima facie right on the contents of a letter which is not placed before the court. The

7 Sections 18, 19, 20, 21, 31 and 48 of the Act.

court is not put in a position to interpret the letter for itself and assess the cogency of the allegation that it gave rise to a legitimate practice. The respondents also do not deal conclusively with this letter. They do not deny the letter or the rendition of its contents by the appellants but allege that the letter has been superseded by the licence conditions of each of the appellants. I will return to this aspect.

[14] The exclusion in para 7.4.2 of the letter relied upon by the appellants is contrary to the provisions of the Act even before the amendments were passed. Although the applicants do not allege that the letter had been written in terms of the provisions of s 30 of the Act, which gives the SADB the power to determine, cancel, vary or impose conditions in respect of licenses issued, this is the only provision that they could possibly rely on for the legitimacy of the exclusion.[8] However, it goes without saying that the SADB could not possibly allow exemptions contrary to the Act. But even if that is ignored, s 30(3), in peremptory terms, obliges the executive officer of the SADB to endorse 'on the licence any cancellation, variation or condition referred to' in s 30(2). Section 30(4) gives the executive officer the necessary powers to require that a licensee submits a licence to be endorsed. The appellants are silent as to whether this was done or had to be done in consequence of the letter. Their case does not contain the necessary averments required to establish the alleged exclusion in the letter that legally entitled them to develop the 'de facto' tender business that they rely on. A fortiori, they have not established even a prima facie right.

[15] I return to the respondents' answer to the letter. All the dealers' licences, except that of the fourth appellant, attached to the founding affidavit are dated after 21 March 1993. It is inconceivable that the licences would not have been endorsed with the exemption relied on by the appellants, if it legitimately existed. Section 29 of the Act

8 Section 30 reads: '(1) A licence shall be subject to such conditions as the Board may determine at the time of the granting of the application in question.
(2) The Board may at any time-(a) cancel or vary any condition to which a licence is subject; or (b) impose any condition or any further condition in respect of a licence.
(3) The executive officer shall endorse on the licence any cancellation, variation or condition referred to in subsection (2).
(4) In order to give effect to subsection (3), the executive officer may request a licensee in writing to submit his licence to the executive officer within the period specified in the request.'

compels the endorsement of any licence with the conditions determined by the SADB.[9] When the licences were issued without this all important exemption the appellants were within their rights to seek endorsement in terms of s 30. They make no allegations to this effect nor do they make out a case that their licences were issued reflecting the incorrect conditions. The conditions reflected on all licences attached to the papers are in direct conflict with the exemption relied upon by the applicants. Each one includes the following condition:

'The licensee's authorised representative(s) may when viewing or purchasing unpolished diamonds on a premises approved in terms of Section 48(1)(d) (selling office) or a premises approved in terms of section 48(2)(d) (buying office), only be assisted by another licensee or a natural person registered as an authorised representative in terms of section 54 of the Diamonds Act, 1986'.

[16] The fourth appellant is affected in precisely the same manner as all the others despite the fact that its licence was issued in 1988, because there is no endorsement on the licence consistent with the alleged exemption and no attempt to explain why the provisions of s 30(3) and (4) were not employed to have it endorsed to reflect the alleged true conditions of its licence.

[17] The respondents' answer to the appellants' allegations is a persistent and unequivocal denial that the tender business described and relied upon by the appellants is legal in terms of the Act. They contend that the amended Act does not bring about anything new in this regard. This view accords with the provisions of the Act. The allegations by the appellants provide a context to the amended Act which reveals that the amended Act seeks to root out, in express terms, an illegal practice that has developed contrary to the provisions of the Act.

[18] The second to fifth appellants have not established a case in respect of the first requirement of an interim interdict and rightly failed to obtain relief in the court below.

---

9 Section 29 reads: '(1) If the Board grants an application for a licence, the executive officer shall against payment of the prescribed fee issue to the applicant the licence on the prescribed form.
(2) The executive officer shall endorse on such licence – (a) any condition determined by the Board under section 30(1); and (b) particulars of the location of the premises approved by the Board under section 31(1).'

[19] The second appellant, as the shareholder and director of the first appellant, deposed to the founding affidavit. As already mentioned the founding affidavit contains an extensive quotation from the founding affidavit in the *Meyer* matter. The applicant in *Meyer* was the holder of a diamond exchange certificate, like the first appellant. At first blush it seems strange that the holder of a diamond exchange certificate would place so much emphasis in its founding affidavit on the case for the holder of a diamond dealer's licence. A closer look reveals that the first appellant has an interest that is closely linked to and dependent upon the second appellant's diamond dealer's licence. It is that close link which puts another perspective on the first appellant's case as a diamond exchange: it is not a mere complaint that the amended Act does not provide for a certificate to operate as a diamond exchange. If the first appellant's case was as simple as that, there was no need for it to pay any attention to the tender business of the diamond dealers in its founding affidavit and likewise in the *Meyer* matter. The identity of interest is, however, clear if the case of the diamond dealers and the diamond exchange is read together, as it is presented in this matter. It is the access to and contact with unlicensed persons, primarily foreigners, that creates the first appellant's export market.

[20] The explanation in the founding affidavit as to how a diamond exchange operates confirms this conclusion:

'Anyone wishing to export a rough diamond (eg the South African Licensee in consortium with the foreigner who had won a parcel on a "tender") may place it on a Diamond Exchange duly registered as such in terms of section 47 of the Act.'

The export business of the first appellant stems from dealing with unlicensed foreigners, an illegal practice in terms of the Act that the amended Act seeks expressly to forbid.

[21] Although it is technically correct that there no longer exists a diamond exchange certificate in terms of the amended Act, the implication argued for by the first appellant – that it would no longer be able to export diamonds - is not correct. The certification of premises as a diamond exchange in terms of the Act has been replaced by the certification of premises as a diamond trading house. The first appellant has already

applied in terms of the amended Act for its premises to be certified as a diamond trading house and that application is pending. The procedures for the export of diamonds in terms of the Act as amended are similar to those in place previously, with two important differences. First, diamond trading houses would not be entitled to make contact and enter into transactions with unlicensed foreigners that would lead to the export of unpolished diamonds to them; and second, export duty exemption has been abolished by s 115 of the Taxation Amendment Laws Act 8 of 2007. The abolition of the export duty exemption is not attacked by the appellants. In so far as the first difference is concerned, contact with unlicensed foreigners in terms of the express terms of the amended Act has to take place at prescribed premises and export of unpolished diamonds to them occurs in terms of the same procedure as operated in terms of the Act and as described in the founding affidavit.[10]

[22] In the appellants' eagerness to align themselves with *Meyer* as a consequence of the success obtained in that matter, they have not made allegations pertinent to any imminent threat which they are facing or the extent of the harm they may suffer if an interim interdict was not granted. The extensive quote from *Meyer* in the founding affidavit contains allegations of threats leveled by the respondents to close down *Meyer Diamonds'* business. It also contains details of the income that could be earned as a tender business and a diamond exchange. In this matter the appellants have made only vague allegations of threats resulting from a refusal by the respondents to agree to extend to them the same protection obtained in *Meyer*. No allegations are made of the extent of income that would be lost, relative to their total income, as a result of the implementation of the amended Act.

[23] The second amendment to the Act introduced transitional provisions to the effect that if application is made for a licence or certificate in terms of the amended Act within one year of the coming into operation of the amended Act, the licence or certificate in existence in terms of the Act remains operative until the applications in terms of the

10 Sections 60-69

amended Act are decided.[11] It is common cause that all the appellants had applied within the required one year period for the comparable licences and certificates in terms of the amended Act and that no decision has yet been made on those applications. They can therefore continue their legitimate trade in terms of the provisions of the Act.

[24] Assuming, however, in favour of the appellants, that the appropriate official could at any stage, without notice, take a decision on the new applications and that a threat is constituted in that way, the appellants face the difficulty that they have not disclosed what harm such a decision would cause them, if any.

[25] The appellants submitted in their founding affidavit, and persisted with that stance during the hearing, that s 31(9) is 'void for uncertainty' because it refers to a date before 'section 4 of this Act takes effect' and that this reference is incomprehensible as s 4 deals with the 'objects of the Regulator'. The date referred to is 1 July 2008, the date the amended Act came into operation, because the reference to s 4 in s 31(9) seeks to inform licensees that licences in terms of the Act would continue in operation for a limited period, namely, one year after the coming into operation of the amended Act. This is clearly how s 31(9) has been understood by all parties in this matter and reflects the obvious intention of the legislator.

[26] For the reasons stated the appeal is dismissed with costs, including the costs of two counsel.

_____

S SNYDERS

JUDGE OF APPEAL

APPEARANCES:

For appellants: J J Gauntlett SC (with him N Jagga)

Instructed by David Kotzen Attorneys, Edenvale

11 Sections 31(9), (10) and (11) of the Diamonds Amendment Act 29 of 2005.

Lovius- Block, Bloemfontein.

For respondents: I Semenya SC (with him T Machaba)
Instructed by The State Attorney, Pretoria,
The State Attorney, Bloemfontein.
(On behalf of the 1st & 2nd Respondents)