IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 20454/2008

DATE: 11 DECEMBER 2008

In the matter between:

JUSTIN RORY McKENZIE LEWIS N.O.	1st Applicant
JUSTIN RORY McKENZIE LEWIS	2nd Applicant
ROBERT WILLIAM SEMPLE	3rd Applicant
CORNELIA LEWIS	4th Applicant

and

PETER COOPER	1st Respondent
THE TRUSTEES FOR THE TIME BEING OF THE HELDERFONTEIN FARMING TRUST	2nd Respondent

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JUDGMENT

GAUNTLETT, AJ:

This is an urgent application brought on less than one court day's notice seeking the 'suspension' of 'proceedings flowing out of judgments in case no 11292/2008 and 14889/2008'.

/ds

The first applicant in this matter appears in person. He is a farmer, a trustee of a trust, and the recent applicant in an urgent application to interdict the respondents from placing a certain shareholding or property on the market for sale. This application was brought on 17 July 2008 (under case number 11292/2008), and was heard on 13 November 2008 by Fourie, J.

It appears from the founding affidavit in the application before me that Fourie, J refused an *in limine* application for postponement and also refused related relief dealing with the manner in which the matters were to be heard.

The gravamen of the application this morning is as follows:

> "I am advised that I [had] a right in the event of the request for postponement in both matters being denied, and my request that the matters be argued separately being denied, to request that this decision be taken on review. Justice Fourie did not inform me of that right at that time, before the proceedings began. Had I been informed of this right timeously I would have requested that the learned judge's decision be taken on review."

/ds

On the basis of this alleged denial of the contended right – to the judicial review of an interlocutory ruling by a superior court regulating the conduct of proceedings before it - the applicant now asks "that the judgments be set aside as submitted in this application", and that while that application "is underway that the judgments be suspended until such time as the application for the setting aside of the judgments referred to is heard".

Mr Lewis clarified in oral argument that what he seeks at this time in the present application is the suspension of the "judgments" pending the hearing of a further application, not yet instituted, for the setting aside of these judgments.

As I have put to Mr Lewis, the difficulty which presents itself in this matter is of the following nature. In the first place what he seeks evidently at this stage - some form of suspension of judgments (quite what it is, is confused) pending an application to set aside the dismissal of the postponement applications by Fourie, J – is incompetent because his putative main relief is incompetent. Fourie, J's rulings were of an interlocutory nature, did not purport to be final, and have not been shown on these papers to be final in effect.If they are not appealable, then the temporary order sought now is for that reason alone also not competent.

/ds

The second difficulty which I pointed out to Mr Lewis is that the decision of a superior court judge is in our law not susceptible itself to judicial review. Thus on this basis too a suspension or interference with the postponement decision pending the main application contemplated must fail, because there is no such right underlying the main matter.

Thirdly, there is the further difficulty that no proper grounds at all are set out in the founding affidavit to interfere with court orders which do have final effect. This is by virtue of the well established authority in Schierhout v Union Government to the effect that judgments on substantive matters are final in effect, and may only be set aside on very strict grounds such as fraud. (See further Firestone South Africa (Pty) Limited v Gentircuoag 1977(4) SA 298 (A), at 206 F-G). Thus even were the applicant be able to show that the rulings by Fourie J were final in effect, it has not established a proper basis to assail these.

Fourthly, there is equally no prospect of success in the putative main matter on the basis that Fourie J failed in a contended duty to advise a civil litigant of a non-existent procedural right (to review a judge, and this in relation to a purely procedural ruling).

/ds

In the circumstances it is unnecessary to deal in any detail with other defects which present themselves in the matter. The lack of a proper notice of motion, the lack of a proper case being made out in the founding affidavit, and a recourse to urgency which in the circumstances seems to me not to be not far short of an abuse of court, given the fact that the ruling made by Fourie was handed down on 13 November 2008, and this application was only launched and served less than 24 hours ago – on the reasoning, as it was disclosed to me in argument by Mr Lewis that today is the last day of the court term. Having regard to the manner in which this application has been presented and its timing, I believe that it has crossed the line from a mere deficiency as regards meeting urgency (such as would warrant it merely being struck from the roll) to amounting to an abuse of proceedings. There is no indication to me on the papers as to why this should be sufficiently excused by the fact that the litigant appears in person (he discloses in argument that he has been assisted by a 'reired judge').Whetherr or not that is so, the papers speak of a regrettably extensive lack of judgment in the institution of the application and the seeking of the relief.

Be that as it may, as I have indicated, these are secondary factor to the principal reasons why I find that the application is incompetent. As I have indicated it is that the application is

based on four entirely faulty premises. An interlocutory decision given just weeks ago by Fourie, J declining postponements may not be revisited at will by a litigant such as the applicant on the basis that he may be proceed from court to court seeking a different view in relation to the correctness of a refusal of a postponement, pending a legally untenable main application.

In the circumstances, the APPLICATION IS DISMISSED with costs.

GAUNTLETT, AJ

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