

**IN THE HIGH COURT OF SOUTH AFRICA**  
**(WESTERN CAPE HIGH COURT, CAPE TOWN)**

**CASE NO:** 18171/2011

**DATE:** 12 OCTOBER 2011

5 In the matter between:

**FPT GROUP (PTY) LTD** Applicant

and

**BOTTOM LINE SOLUTIONS (PTY) LTD** Respondent

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**J U D G M E N T**

**(Application for leave to appeal)**

**GAMBLE, J:**

15 [1] This is an application for leave to appeal against an  
interim interdict which I granted in favour of the erstwhile  
applicant on 16 September 2011. In argument, Mr Fagan who  
now appears for the erstwhile respondent, addressed the  
issues of mootness and finality of that order.

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[2] In regard to mootness he pointed out correctly, in my  
view, that if an appeal in this matter were to be heard early in  
2012, when the next round of Full Bench appeals is due to be  
heard, it was unlikely that the dispute referred to arbitration

will have been finally determined by then. In such circumstances an appeal would not be moot.

[3] On the issue of whether the order is appealable or not, it is for the respondent to show that, while the order is interim in form, it is final in effect. On this score, Mr Fagan argued just one point. He said that with regard to the future conduct of the arbitration, (that is a hearing in November or December 2011, an appeal by April or May 2012 and a review possibly only in 2013), the effect of my order is to enforce the contract between the parties for anything up to two years. That, he said, made the order final in effect.

[4] Mr McClarty SC with Mr Melunsky for the respondent, referred to a recent decision of the Supreme Court of Appeal in Atkin v Botes [2011] ZASCA 125 (9 September 2011). In that matter Cloete, JA found on the strength of a number of earlier decisions of the Supreme Court of Appeal that an interim order did not have final effect if it was open to the party affected thereby to approach the court for a reconsideration of the order in the light of the onerous nature of the order at a later stage. Mr Fagan accepted that proposition as a matter of law and said only that his client would have to show a change of circumstances to succeed.

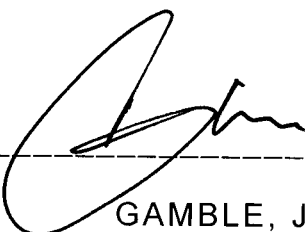
[5] Both parties accepted that the effect of my judgment was that no finding had been made, one way or the other, on the right in issue in the arbitration.

5 [6] I am of the view that Mr McClarty is correct in his interpretation of the Atkins case and its applicability to the present set of facts. I agree that the fact that the respondent would be entitled, sometime in the future, to approach the court again for an amelioration of my order renders the effect  
10 of the order interim in substance, rather than final.

[7] In the circumstances I am of the view that the order is not appealable and that the application for leave to appeal must consequently fail. As to costs, I consider that the  
15 application for leave to appeal did not merit the engagement of two counsel on the part of the applicant.

[8] Accordingly, I make the following order:

20 THE APPLICATION FOR LEAVE TO APPEAL IS  
DISMISSED WITH COSTS.

  
GAMBLE, J