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In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Provincial Division)
(APPELLATE Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

WANDERERS FOOTBALL CLUB *Appellant,*

versus

AFRICAN WANDERERS FOOTBALL CLUB (PTY) LTD. *Respondent*

Appellant's Attorney Lovius, B.M. & S. *Respondent's Attorney* Cooper & San
Prokureur vir Appellant *Prokureur vir Respondent*

Appellant's Advocate A. Findlay *Respondent's Advocate* A. Wilson W. Daley
Advokaat vir Appellant *Advokaat vir Respondent*

Set down for hearing on 25-11-1976
Op die rol geplaas vir verhoor op

T: 2571011

Coram: Holmes, Trollip, Muller, Katzé et Miller JJA

Findlay - 9.45 - 10.40; 11.26 - 11.32;

(D.C.L.D.) Wilson - 10.40 - 11.00. 11.15 - 11.26;

C.A.V.

The Court allows the said appeal with costs. The order of the Court a quo is set aside and the matter is referred to the Court a quo for trial and for the said Court to make an

Security fixed

P.T.O.

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Bills taxed—Kosterekenings getakseer

Date Datum	Amount Bedrag	Initials Paraaf

IN THE SUPREME COURT OF SOUTH AFRICA.

APPELLATE DIVISION.

In the matter between:

AFRICAN WANDERERS FOOTBALL CLUB (PROPRIETARY) LIMITED ..... APPELLANT

and

WANDERERS FOOTBALL CLUB ..... RESPONDENT

Coram: HOLMES, TROLLIP, MULLER, KOTZé et MILLER, JJA.

Heard: 25 November 1976.

Delivered: 21 December 1976

J U D G M E N T.

MULLER, JA.

The respondent is referred to in the record of proceedings in the Court a quo as the Wanderers Football Club, also known as the African Wanderers Football Club.

I ...../2

I shall refer to it as the club. As will appear from what is stated hereinafter, the present existence of the club is a matter in dispute in these proceedings. But it is common cause that the club, if it still exists, is a voluntary association with a constitution, and is a universitas, capable of suing and being sued; and is administered by an executive committee.

The club was formed in Durban in or about 1921 with the object of promoting "football amongst the African people". Over the years its membership grew to more than 1 000 members. It controlled amateur football teams since its foundation and as from 1973 it also entered a team in the National Professional Soccer League, the team playing under the name of African Wanderers. It is the existence of this professional team that eventually led to the present litigation.

The appellant was registered as a company on 26 June 1974. According to its Memorandum of Association, the main object of the company was

"to...../3

"To acquire and conduct a football club known as African Wanderers Football Club."

The principal place of business of the appellant, to whom I shall hereinafter refer as the company, is in Durban.

It appears from the papers before us that by the end of 1973 certain members of the club had become dissatisfied with the manner in which the affairs of the professional team were being managed. Some of the members advocated the formation of a limited liability company as they considered that, for financial and other reasons, the professional team could best be administered by a company. And that is how the company came to be registered.

After its incorporation the company claimed that it had the exclusive right to control and manage the professional football team and to receive the "gate money" paid by spectators attending football matches played by the professional team. The club denied that the company had any such right.

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The aforesaid dispute between the parties led to an application being made on notice of motion by the club to the Durban and Coast Local Division for an interdict pendente lite. The interdict sought was one restraining the company from interfering with the management and control of the club's professional soccer team and authorising the club to manage and control all the affairs of the club, including the professional team, pending the final determination of an action to be instituted by the club against the company for a declaration of rights.

The company opposed the application and, in an opposing affidavit filed on its behalf, it was contended, inter alia, as follows:

> "It was constitutionally agreed to incorporate the Club as a private company without objection by the members (of the club) at the said General Meeting on 4th November 1973.....Subsequently on 9th December 1973 at a Special General Meeting the incorporation of the Club as a private company with [redacted] shareholders was again accepted by the members (of the club) present without objection."

By...../5

By reason thereof it was submitted that the club was no longer in existence and, in the alternative, that, if the club was still in existence, it was no longer vested with the management and control of the professional team, such management and control having been transferred to the company.

On 11 December 1974 HOWARD,J., granted an order which was to operate as an interdict pending the final determination of an action to be instituted by the club against the company for a declaration of rights. The order was to the following effect:

(a) The company was interdicted and restrained from:

(i) interfering with the management and control of the professional soccer team which plays under the name of AFRICAN WANDERERS;

(ii) representing itself to the National Professional Soccer League as the body which has the right to manage and control the professional team;

(b) The club was authorised to manage and control all the affairs of the WANDERERS FOOTBALL CLUB, including the professional team;

(c)...../6

(c) The club was directed:

(i) to deposit into a bank account in the name of WANDERERS FOOTBALL CLUB ~~including~~ the nett proceeds of all gate money received by it from matches played by the said professional team after deduction therefrom of the expenses of the match including the remuneration payable to members of the team, such proceeds to be held in the said account pending the final determination of the action;

(ii) to furnish the company, within one week after receipt of any such gate money, with an account showing the amount so received, the payments made therewith, and the amount of the balance paid into the said bank account;

(d) The action was to be instituted within one month from the date of the order, failing which the foregoing interim interdicts and orders would lapse.

With regard to costs, it was ordered that the company pay the costs occasioned by its opposition to the application, and that the remaining costs be reserved for decision at the trial.

The action contemplated in the aforementioned order was duly instituted by the club in the Durban and Coast Local Division. In its Particulars of Claim the

club.../7

club again set out the facts which led to the dispute between the parties and prayed for an order :

(a) declaring that the control and management of the professional football team known as African Wanderers is vested in the club and that the company has no rights in regard to such team; and

(b) that the company pay the costs of the action, such costs to include those reserved in the interdict proceedings.

In its plea the company challenged the locus standi of the club to institute the action. It averred that a resolution was taken by the members of the club, at a meeting held on 4 November 1973, that a company should be formed to take over the control and management of the club, which would include the control and management of the professional team, and that the said resolution was duly ratified by the members of the club at a meeting held on

9 December..../8

9 December 1973. This was the basis for a contention that the club's existence did not continue after the date of incorporation of the company on 26 June 1974, and the plea that the club has no locus standi in these proceedings was founded thereon.

From what is stated above, it is clear that in the action the company, in its plea, raised the same issues that had unsuccesfully been raised in the interdict proceedings before HOWARD, J.

After the company had filed its plea, the parties came to an agreement which was recorded as follows (the club is referred to therein as the plaintiff and the company as the defendant) :

> "By agreement between the parties and subject to the consent of the Presiding Judge, it has been agreed that the Presiding Judge be asked to give judgment on the questions set out hereunder before the trial of this action commences.
>
> 1. Whether on a consideration of the papers before HOWARD, J. in Case No. M. 696/74 and in the light of his judgment delivered in that matter:

(a)...../9

(a) It is now open to the Defendant to challenge the locus standi and the authority of the Plaintiff in these proceedings;

(b) It is now open to the Defendant to raise the issue:

(i) that a formal resolution was taken by the members of the Plaintiff at the Annual General Meeting on the 4th November 1973 as alleged in paragraph 3 of the Defendant's Plea;

(ii) that such resolution was duly ratified as alleged in paragraph 4 of the Defendant's Plea;

(iii) that by virtue of the said resolution and its ratification, the control and management of the Plaintiff and of its professional football team was taken over by the Defendant upon its incorporation.

2. It is agreed between the parties that in the event of the learned Judge holding that the answer to the query set out in sub-paragraph 1 (a) is in the negative and the answer to any one of the queries set out in sub-paragraph (b) is in the negative, then and in that event, judgment shall be entered for the Plaintiff together with costs.

3. It...../10

3. It is further agreed between the parties that in the event of the learned Judge coming to any other conclusion, then the matter shall proceed to trial."

The issues, as formulated in the said agreement, came before SHEARER, J. It was not suggested that any evidential material, other than the affidavits and annexures filed in the interdict proceedings, would be available at the trial. The learned Judge, after hearing argument, decided the issues in favour of the club, and, pursuant to the aforementioned agreement, entered judgment for the club as prayed.

The company now comes on appeal to this Court.

At the commencement of the arguments on appeal the attention of counsel for the appellant (the company) was drawn to the fact that in the company's plea reference is made, in paragraph 3 thereof, to a "formal" resolution of members of the club at a meeting held on 4 November 1973 and that, in the agreement between the parties mentioned above, there is also a reference, in paragraph 1 (b) (i),

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to a "formal" resolution of 4 November 1973, whereas it is clear, from the documents filed in the interdict proceedings, that there was indeed no formal resolution taken on that date and that the company did not in the interdict proceedings rely on a formal resolution. Counsel for the company (he did not represent the company in the interdict proceedings, but did appear at the trial) explained that the use of the word formal was a mistake; that it was common cause between the parties in arguing the agreed issues before SHEARER, J., that the company was not relying on a formal resolution but on what is recorded in the minutes of the meeting of that date, and that it was common cause that the issues raised by the company's plea were the very issues considered by HOWARD, J., in the interdict proceedings. Counsel for the club agreed that that was so.

Because.../12

Because SHEARER, J., found in favour of the club by applying the doctrine of res judicata, it is necessary to restate briefly the requirements for the application of that doctrine. Voet 44.2.3. (Gane's translation, Volume 6 at page 554) states as follows:

> "There is nevertheless no room for this exception unless a suit which had been brought to an end is set in motion afresh between the same persons about the same matter and on the same cause for claiming, so that the exception falls away if one of these three things is lacking."

And in Custom Credit Corporation (Pty.) Ltd. v. Shembe, 1972 (3) S.A. 462 (A.D.), VAN WINSEN, A.J.A., stated, at p. 472 A:

> "The law requires a party with a single cause of action to claim in one and the same action whatever remedies the law accords him upon such cause. This is the ratio underlying the rule that, if a cause of action has previously been finally litigated between the parties, then a subsequent attempt by one to proceed against the other on the same cause for the same relief can be met by an exceptio rei judicatae vel litis finitae".

Counsel for the company contended before us that SHEARER, J., erred in applying the res judicata rule

in.../13

in the instant case. In this regard he made two main submissions, one of which was that the learned Judge erred in finding that the judgment of HOWARD, J., in the interdict proceedings, was a final and definitive judgment which disposed of the issues raised in those proceedings concerning the club's locus standi.

Counsel for the club conceded that, if the judgment of HOWARD, J., was not a final and definitive judgment which disposed of the said issues, then SHEARER, J., must be held to have erred in applying the res judicata rule, in which case the appeal should succeed. Counsel, however, argued in support of the finding that the judgment of HOWARD, J., was a final and definitive judgment.

With regard to the test to be applied in determining whether a judgment on a particular issue must be regarded as a final and definitive judgment, we were referred by both counsel to a number of decisions dealing

with.../14

with the test for determining whether or not an order is a simple interlocutory order and therefore not appealable, save with the necessary leave. One of these decisions was Pretoria Garrison Institutes v. Danish Variety Products (Pty.) Limited, 1948(1) S.A. 839 (A.D.), in which SCHREINER, J.A., stated, at p. 870:

> "But since the decision of this Court in Globe and Phoenix G.M. Company v. Rhodesian Corporation (1932, A.D. 146) the test to be applied has appeared with some certainty, whatever difficulty must inevitably remain in regard to its application. From the judgments of WESSELS and CURLEWIS, JJ.A., the principle emerges that 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'."

The test in that form was restated by BOTHA, J.A. in Charugo Development Co. (Pty.) Ltd. v. Maree N.O., 1973 (3) S.A. 759 (A.D.), at p. 763. One must therefore examine the issues raised before HOWARD, J., in the interdict proceedings, and the

manner..../15

manner in which he dealt therewith in order to determine whether he meant to express a final decision thereon, i.e., whether he intended to dispose finally of those issues or any part thereof. But before doing so I wish to say something with regard to the decision in Trustee Insolvent Estate Kuhn v. Kuhn and Kuhn, 1915 N.P.D. 79, a decision of the Full Bench of the Natal Provincial Division, which SHEARER, J., considered himself bound to follow. In that case the trustee in an insolvent estate applied for the extension of an interdict restraining the respondents from disposing of certain movable assets which he claimed to be assets in the estate. The Court extended the existing interdict but its order also provided for the trustee to institute an action against the respondents for recovery of the property in question. The trustee appealed, inter alia, "on the ground that the respondents should have been put on terms to bring the action and that the onus for such action should not be put upon him". In the course

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of his judgment in the said case DOVE WILSON,J.P., stated

> "Now, in the present case the order of the learned Judge is made in respect of two points: It grants the interdict which was asked for, but to a limited extent; and it decides that action as to the disputed ownership shall be at the instance of the trustee, whose position however, in asking for the interdict was that he as trustee was entitled to the property and that no action on his part was necessary, it being for the respondents to take action to establish any claim they might have. Now, in my opinion, upon these points, the order is final."

BROOME,J., however, stated his views in the matter as follows:

> "The question we have to decide is by no means an easy one because there can be no doubt that these interdict proceedings are in themselves of an interlocutory character, and any remedy in respect of the order made as regards the right to the property in question, could no doubt have been obtained in the final proceedings. But by the order as of record the appellant is put in the position of a plaintiff in the action to determine these rights, and in that respect I agree in thinking that the order is final and definitive, and that the last word, so far as it is concerned, has been spoken."

In so far as the order in the interdict proceedings in

that..../17

that case provided for the trustee to institute an action, despite the contention of the trustee that it was not for him to institute an action, it was clearly, as BROOME, J., saw the matter, a final order and, as such, appealable. In so far, however, as DOVE WILSON, J.P., might also have considered that the grant of an interim interdict was in itself a final order, I cannot agree with the decision. See in this regard Loggenberg v. Beare, 1930 T.P.D. 714, at p. 719 et seq. Davis v. Press & Co., 1944 C.P.D. 108 at p. 113 et seq, and Pretoria Garrison Institutes v. Danish Variety Products (Pty.) Limited, (supra).

Turning now to the interdict proceedings before HOWARD, J., it is clear that the club sought, as a matter of urgency, nothing more than an interdict pendente lite, indicating in its notice of motion and its founding affidavit that it was about to institute an action against the company for a declaration of rights concerning the very matter which was in dispute in the interdict proceedings,

namely, the right of the club to manage its own affairs, including the management and control of the professional team. Indeed, the club foresaw the possibility that, in considering the application the Court could find that the right sought to be protected was not clearly established, and, for that reason, it contended in the founding affidavit that the balance of convenience favoured the granting of the interim relief sought. (see Eriksen Motors Ltd. v. Protea Motors and Another, 1973 (3) S.A. 685,(A.D.) at p. 691).

When one looks at the written judgment of HOWARD, J., in the interdict proceedings, it is clear that he did not intend finally to dispose of the issues raised in the papers before him. He quotes, in his judgment, various passages from the opposing affidavit filed on behalf of the company and states

> "I find myself quite unable to decide, on the basis of these confused and contradictory averments, whether the Club members

> . allegedly agreed: (a) to change the Club's identity by incorporating it as a private company, or (b) to dispose of the Club's interest in the professional team to a company to be formed. A perusal of the minutes put up by the respondent in support of its averments hardly assists me in deciding what agreement or decision, if any, was arrived at in connection with the formation of the company."

He refers to the minutes of certain meetings of members of the club, including the meetings of 4 November 1973 and 9 December 1973, and states

> "It is difficult to determine from the minutes whether any decision was taken with regard to the formation of a company, and quite impossible to ascertain the precise terms of any such decision or resolution."

And his conclusion is expressed as follows:

> "In my view nothing which has been placed before the Court on behalf of the respondent shows that the Club has ceased to exist, or that there has been a change in its status, or that the respondent has legally acquired its interest in the professional team. The Club's right to manage and control the professional team and to receive and use its share of the 'gate money' is clearly established, in my opinion, and it is equally

clear..../20

> clear that the respondent is unlawfully infringing that right. It does not appear that the applicant's right can be adequately protected by any ordinary remedy other than an interdict, and I am unable to hold that the balance of convenience so favours the respondent that the applicant ought to be denied the protection which it seeks."

From a reading of the judgment of HOWARD,J., and having regard to the terms of the order made by him, the provisions of which have been stated above, I have no doubt but that the learned Judge intended that the issues raised before him would be finally resolved in an action to be instituted by the club and that all that he was called upon to do was to make an order which would operate pendente lite. The order made by him was therefore not a final and definitive order.

Counsel for the club (the respondent) submitted that the order granted by HOWARD,J., was prejudicial to the company and could cause irreparable harm to the company. For that reason he contended that the order did not merely preserve the status quo, and was therefore not an order ad servandam causam, but one having the force

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of a definitive sentence and was accordingly a final judgment. In support of this contention counsel referred, inter alia, to the following passage in Bell v. Bell, 1908 T.S. 887, at p.891 :

> "When an order incidentally given during the progress of the litigation has a direct effect upon the final issue, when its execution causes prejudice which cannot be repaired at a later stage, when it disposes of a definite portion of that suit, then in essence it is final, though in form it may be interlocutary."
>
> (my underlining)

See in this regard also Steytler N.O. v. Fitzgerald, 1911 A.D. 295, at p. 313. The test as formulated in Bell's case is, however, no longer considered to be a proper and acceptable test. In Pretoria Garrison Institutes v. Danish Variety Products (supra) SCHREINER,J.A., referred, at p. 870, to the case of Globe and Phoenix Gold Mining Co. Ltd. v. Rhodesian Corporation Limited, 1932 A.D. 146, (in which case reference was made to Bell's case) and said

> "The earlier judgments were interpreted in that case and a clear indication was given that regard should be had, not to whether the one party or the other has by

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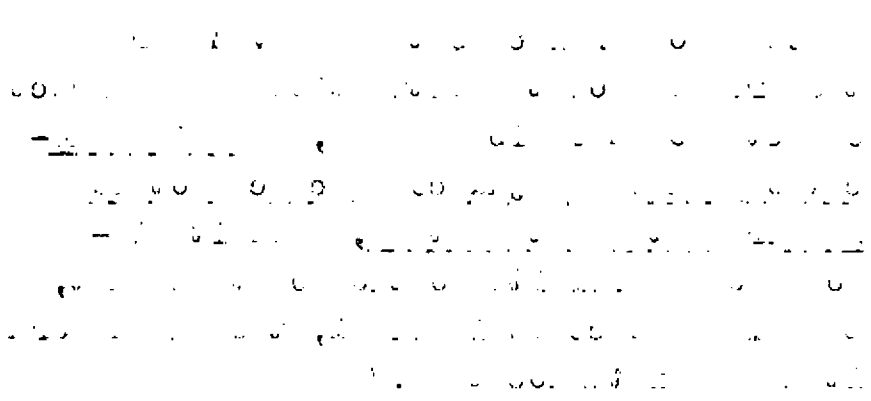
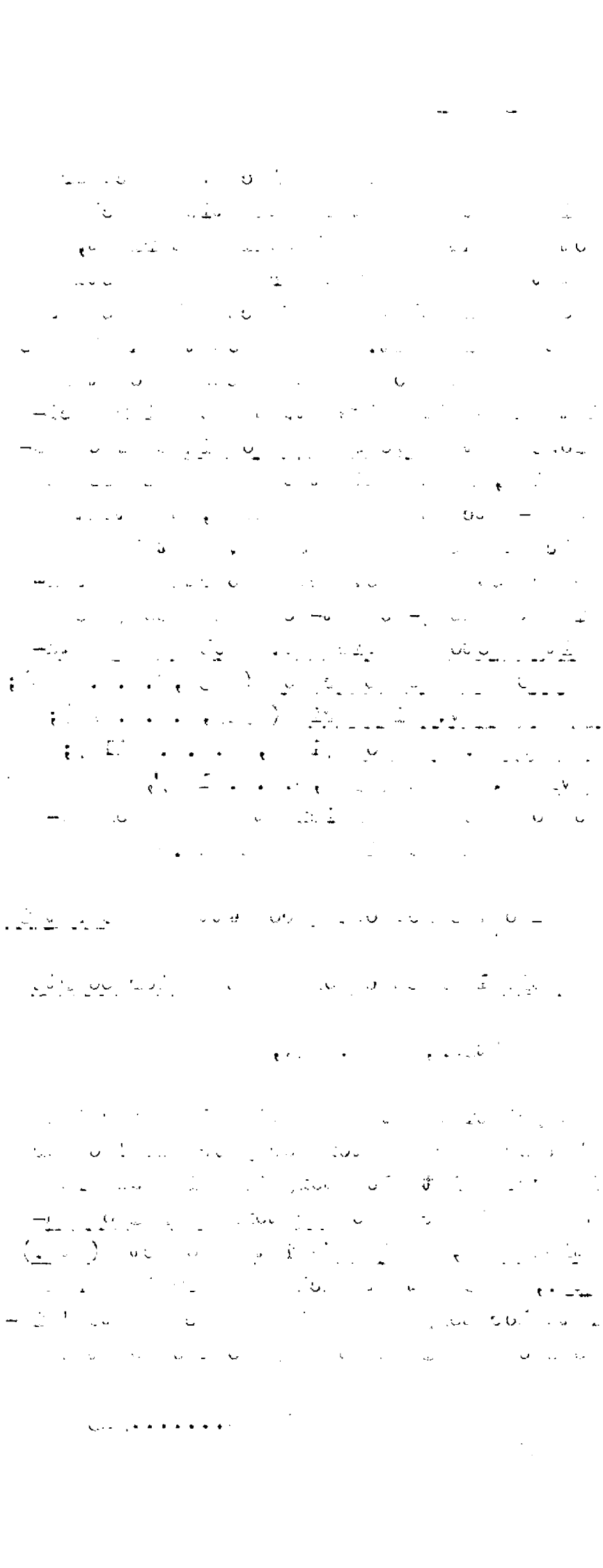


> the order suffered an inconvenience or disadvantage in the litigation which nothing but an appeal could put right, but to whether the order bears directly upon and in that way affects the decision in the main suit. I do not think that we should pass upon the correctness of the interpretation given to the earlier decisions in the Globe and Phoenix case or re-examine, in the light of the practice in Roman-Dutch times or earlier, the test which the case has adopted. It has been understood in Provincial Courts as providing the long-sought-for guidance (see United Motor Services v. Globe Manufacturing Company of Chicago (1937,C.P.D. 284); Agambaram v. Nimdhari (1939,N.P.D. 28); Ranchod v. Lalloo (1942, T.P.D. 211); Davis v. Press (1944,C.P.D. 108), and I do not see any sufficient reason for depriving them of its assistance."

See in this regard also the following comments in Herbstein and van Winsen: The Civil Practice of the Superior Courts in South Africa, 2nd Edition, at p. 631,

> "The principle to be applied in determining whether a preparatory or procedural order is purely interlocutory is laid down in the leading case of Pretoria Garrison Institutes v. Danish Variety Products (Pty.) Ltd., namely that such an order is purely interlocutory unless it is such as to 'dispose of any issue or any portion of the

issue...../23



> issue in the main action or suit' or unless it 'irreparably anticipates or precludes some of the relief which would or might have been given at the hearing.' Earlier judgments which laid down a further test, namely whether the order causes irreparable prejudice, are overruled by the majority judgment in the Pretoria Garrison Institutes case, in so far as they purport to take into account prejudice - such as the loss and inconvenience caused by an interim interdict - which does not directly affect the issue of the suit."

The fact that the order made by HOWARD,J., could well prove to be prejudicial to the company does therefore not justify a contention that the order was a final and definitive order and not merely an order ad servandam causam. Indeed, it very often happens that, when a court is asked to grant a temporary interdict, and the right which it is sought to protect is not clear, the court weighs, inter alia, the prejudice to the applicant, if the interdict is refused, against the prejudice to the respondent if it is granted (Eriksen Motors Ltd. v. Protea Motors and Another, supra, at p. 691.)

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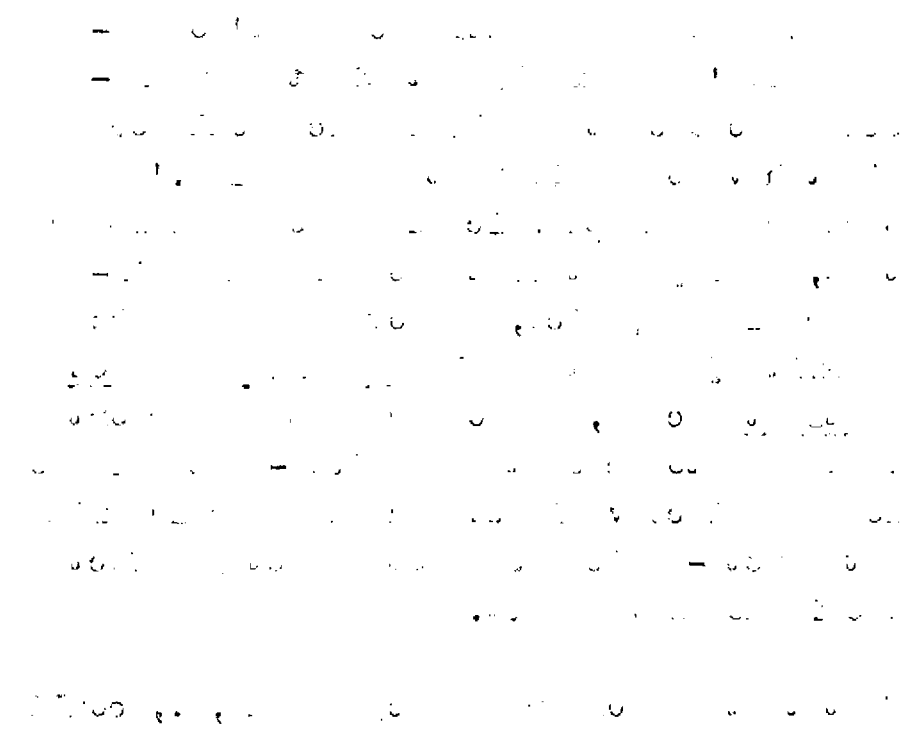

For the above reasons I agree with counsel for the appellant (the company) that SHEARER,J., erred in holding that a final and definitive judgment was given by HOWARD,J., in the interdict proceedings, and in holding that, on that basis, the doctrine of res judicata was applicable. In the premises there is no need to consider any of the other contentions advanced before us by counsel for the company. The appeal must succeed and, in pursuance of the agreement arrived at between the parties, it must be ordered that the matter proceed to trial.

There remains the question of costs. The company as the successful party on appeal is entitled to the costs of appeal. Ordinarily such costs are awarded on a party and party basis. Counsel for the company however, contended before us that this Court should order that, with regard to certain of the costs of appeal, the club should be liable on an attorney and client basis. The costs to which this argument related were those occasioned in preparing certain parts of the record. In this regard counsel

drew...../25

drew our attention to a letter dated 26 March 1976 addressed by the company's attorneys to the club's attorneys before the record of appeal was prepared. In this letter the company's attorneys contended that the issues in the interdict proceedings were the same as the issues raised in the action and they stated that, in their opinion, it was unnecessary to include in the appeal record the whole of the record in the interdict proceedings as well as the whole of the record in the action. In the premises they made the following suggestion:

> "We accordingly suggest that a record be prepared in terms of the provisions of proviso (i) of Rule 5 (4) (c) on the basis that the question is one of law namely whether or not
>
> (a) the Roman Dutch Law principles of res judicata apply;
>
> and
>
> (b) the judgment on the interdict was a final judgment giving rise to a res judicata.
>
> If you are in agreement with this view it seems to us that all that will be required will be a formal document recording our agreement and stating the question of law together with a

copy.../26

copy of the judgment of HOWARD, J., and the judgment of SHEARER, J.

It seems to us that it would be unnecessary in the circumstances to include copies of the pleadings or the interdict proceedings.

If your client is not prepared to indicate agreement to this proposal within 10 days of the date of this letter, in view of the shortage of time, we will proceed to prepare copies of the full record and if necessary will make an application to you for your consent to an extension of time in terms of Rule 5 (4 bis) (b).

If you do not agree, and if you accordingly require us to prepare a full record, we propose to put this letter before the Appeal Court in the event of it being relevant to the question of costs of preparation of the full record since the Appeal Court may well wish to deprive us of costs for preparing the full record unnecessarily."

The attitude of the club was that a "full record of the case" should be prepared, i.e. that the appeal record should include the whole of the record in the interdict proceedings as well as the complete record in the

action...../27

action.

It was submitted by counsel for the company that, as a result of the attitude adopted by the club, unnecessary expense was incurred in preparing the appeal record. And, said counsel, this Court should, for that reason, order that, in respect of part of the record, the club should pay costs on an attorney and client basis.

Counsel for the club, on the other hand, explained that, as his client saw the matter, it would be for this Court to decide, in its determination of the appeal, whether all the requirements of res judicata had been met and, in particular, to determine whether the issues in the interdict proceedings were the same as the issues raised at the trial and whether the judgment in the interdict proceedings was intended to be a final and definitive judgment. And, said counsel, it was thought that, for that purpose, this Court would require to have before it the complete records both of the interdict proceedings and of the trial.

I do not think that the club can be faulted in the

view.../28

view which it took of the questions to be decided on appeal and in its refusal to agree to the company's proposal, namely, that a question of law be stated for the decision of this Court. Indeed, the agreement between the parties as to the issues to be decided by SHEARER, J., in the action, the terms of which have been set forth above, provided that the learned Judge, in deciding the issues agreed upon, should do so

> "on a consideration of the papers before HOWARD, J., (in the interdict proceedings) and in the light of his judgment delivered in the matter:....".

In the circumstances I do not think that there is any justification for an order that any part of the costs awarded to the company should be paid on an attorney and client basis.

The appeal is allowed with costs. The order of the Court a quo is set aside and the matter is referred to

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the Court a quo for trial and for the said Court to make an appropriate order as to costs, including any wasted costs.

G.V.R. MULLER.
JUDGE OF APPEAL.

HOLMES,
TROLLIP,
KOTZÉ,
MILLER. } Concur.