IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

CASE NO. 41094

WILLIAM GRAHAM CRONSHAW FIRST APPELLANT

FIDELITY GUARDS HOLDINGS

(PTY) LTD SECOND

APPELLANT

VERSUS

COIN SECURITY GROUP (PTY) LTD

RESPONDENT

CORAM: E M GROSSKOPF, F H GROSSKOPF, HARMS,

SCHUTZ JJA et PLEWMAN AJA

DATE HEARD: 19 MARCH 1996

DATE FILED 28 MARCH 1996

R E A S O N S F O R J U D G M E N T

SCHUTZ JA:

After conclusion of argument this Court ordered that the appeal be struck from the roll with costs. These are the reasons which were to follow.

The first appellant ("Cronshaw") was formerly employed by the respondent ("Coin") subject to a restraint of trade. He is now employed by the second appellant ("Fidelity"). Coin and Fidelity are competitors. The former obtained interim interdicts against Cronshaw and Fidelity, i.a.

forbidding the continued employment of Cronshaw in breach of the restraint, pending the determination of the trial. Leave to appeal against these interdicts was refused by the Court a quo, Barkhuizen AJ, on the ground that the grant of the interim orders was not appealable. Leave to appeal was granted pursuant to a petition addressed to the Chief Justice. Prior to the hearing of the appeal counsel were requested to consider the relevance of the decision in African Wanderers Football Club (Pty) Ltd v Wanderes Football Club 1977(2) SA 38(A) on the question of the appealability of an order granting an interim interdict. In argument Mr Mendelow, for the appellant, did not contend that this case was wrongly, even less, clearly wrongly, decided. He confined himself to the submission that it is distinguishable, on the ground that whereas

leave to appeal was granted in the case before us, in that case there had been no leave (the reason being that at the relevant time there was a right of appeal in trial cases emanating from the supreme court). The questions before us are, accordingly, whether the two cases may be distinguished, and if not, whether the ratio in African Wanderers is decisive in this appeal.

Whether leave to appeal is required, and if yes, in which cases, are questions that have been answered differently by a variety of statutes over the years. No end would be served by reviewing the history. The purpose of leave is to limit appeals to those that have reasonable prospects of success: Westinghouse Brake & Equipment (Pty) Lty v Bilger Engineering(Pty)Ltd 1986(2) SA 555(A) at 561 D-E. In itself

the grant of leave does not prejudge the appeal. Where appealability is the issue on appeal (as it was in this case) the same applies. Therefore, to say what is trite, the fact that leave has been granted on a question of appealability (even by this Court) does not mean that the decision in respect of which leave is given is indeed appealable. Leave is entirely extraneous to the enquiry now before us, which is whether the grant of an interim interdict is appealable. I fail to see how a case dealing with that question is rendered unworthy of consideration, or incapable of binding operation, merely because before it was decided the procedural sifting process depending upon prospects did not have to take place. All that matters is the ultimate ratio of the earlier appeal. I therefore reject the attempt to distinguish African Wanderers.

Does African Wanderers dispose of this case? The appeal was from a judgment of Shearer J in a trial. The trial had been preceded by the grant of an interdict by Howard J pending the final determination of an action for a declaration of rights by the plaintiff club. Two points that had been decided by Howard J in the plaintiffs favour were again raised before Shearer J, namely whether the plaintiff had ceased to exist, so that it did not have locus satndi, and whether resolutions had been passed by its members transferring its control and management to the defendant. Shearer J found that these decision were re judicat and binding on him. This could be correct only if Howard J's judgment was a final and definitive one. On appeal the defendant attacked Shearer J's further finding that it was. In delivering the judgment of the Court Muller JA

relied upon decisions dealing with the test for determining whether an order is a simple interlocutory order (as opposed to a final and definitive order) and therefore not appealable (as the legislation then stood) save with leave. One of those decisions was Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd 1948(1) SA 839(A). The enquiry then was whether Howard J had intended to express a final opinion upon these two points.

Before entering upon that enquiry Muller JA said, with regard to the judgment of Dove Wilson JP in Trustees,Insolvent Estate Kuhn v Kuhn and Kuhn 1915 NPD 79:

> "In so far, however, as Dove Wilson, JP, 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 Baere 1930 TPD 714 at 719 et seq

Davis v Press and Co 1944 CPD 108 at pp 113 et seq PretoriaGarrison Insitutes v Danish Variety Products (Pty)

The form of the proceedings before Howard J was that of an interdict pendente lite in which lis the very matters on which the interdict was sought would be in issue; and the balance of convenience was considered in respect of the interim period. This Court held that Howard J had no intention of making a final and definitive order, with the result that the order pendente lite could not support a finding of res judicata.

The plaintiff sought to avoid this conclusion by arguing that because the interim orders were prejudicial and could cause irreparable harm to it, they were not orders ad servandam causam, merely to preserve the position until trial, but ones having the force of a definitive

sentence. This argument also was rejected, it being held on the authorities that it is not every kind of prejudice that is relevant, only that which directly affects the issue of the ultimate suit.

The result is that African Wanderers does decide the question in this appeal, whether the grant (but not the refusal) of an interdict pendente lite is appealable, adversely to the appellant.

Where to draw the line between decisions which are "interlocutory" and such as have to await their decision on appeal until the proceedings in the court of first instance have been concluded, and those which are "final", deserving to be appealable before the main suit is, is a question that has vexed the minds of eminent lawyers for many centuries, and the answer has not always been the same. The question is intrinsically

difficult, and a decision one way or the other may produce some unsatisfactory results. There has to be a rule, however, and that rule was laid down by not later than the Pretoria Garrison case. It is, as stated by Schreiner JA (at 870) 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'."

I have used the expressions "interlocutory" and "final" as familiar labels only. They do not appear in the amended s 20(1) of the Supreme Court Act 59 of 1959. Notwithstanding, the ancient distinction lives on, because it is one of the attributes of a "judgment or order" (the

expression that is used in that subsection) that it be final in effect and not susceptible of alteration by the court of first instance: Zweni v Minister of Law and Order 1993(1) SA 523(A) at 532 I - J.

We were addressed, as have been many courts before, on the prejudice that is suffered by the subject of an interim interdict, which prejudice is argued to render the working of such an interdict final, in the sense that time run cannot be recalled, and that the harm done cannot be retrieved. That such prejudice is often suffered is not in issue. That the harm caused is irretrievable is by no means true in all cases. A court granting an interim interdict is entitled, in the exercise of its discretion, to impose reasonable conditions, one of them being that it be a condition of the grant that the applicant undertakes to be liable in such damages as

the respondent may prove he has suffered as a result of the interdict, if at the trial it emerges that the interdict should not have been granted: Hillman Bros (West Rand) (Pty) Ltd v van den Heuwel 1937 WLD 41 at 46. In many instances justice dictates that the judge should require the giving of such an undertaking before there can be any question of the grant of an interim order. Of course, even where this is done, it may be small solace to a respondent having difficulty in proving or recovering damages. But it is a remedy sometimes of worth. And the prospect of the imposition of such a condition may act as a deterrent to an applicant ready to deal out but not take hurt.

There is a further explanation of a rule that allows such prejudice without prompt appeal. It is that the prospective harm is one of the

factors that must be judged by the court of first instance in weighing the balance of convenience: see African Wanderers supra at 48 H. This is a responsible and often difficult balancing, premised as it is on the distinct possibility that the order be wrongly granted, because of the incomplete information available to the judge, and sometimes the haste with which such matters have to be dealt with. If the grant of an interim interdict were appealable and leave were to be granted (the test being reasonable prospects of success) the interim order would be stayed. Such a stay would be destructive of the main object of an interim interdict -to maintain the status quo pending the final determination of the main case.

The stay may in its turn lead to what is called an application for

leave to execute (to put the order into operation again) where considerations similar to those already weighed under the balance of convenience would have to be re-assessed. The court of first instance would then be required to reach a decision, on imperfect information, a second time, all with regard to the interim situation. If it be postulated that leave to appeal can and has been granted, the appeal court would have to reconsider that situation without being in a position to reach a final decision. From a practical point of view it seems preferable that the merits of the interdict be left for final determination at the trial, and that the interim relief, to which the balance of convenience is relevant, be considered once only.

The net effect of a contrary rule, allowing an appeal against the

grant of interim orders, could be the undermining of a necessarily imperfect procedure, which is nonetheless usually best designed to achieve justice.

It is for these reasons that the appeal was struck from the roll with costs.

W.P. SCHUTZ JUDGE OF APPEAL

EM GROSSKOPF JA)
FH GROSSKOPF JA)
HARMS JA) CONCUR
PLEWMAN AJA)