THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

CASE NO: 594/03
Reportable

In the matter between

MACCSAND CC **Appellant**

and

MACASSAR LAND CLAIMS COMMITTEE **First Respondent**
UNICITY OF CAPE TOWN **Second Respondent**
THE NATIONAL HOUSING BOARD **Third Respondent**
THE DEPARTMENT OF LAND AFFAIRS **Fourth Respondent**
THE COMMISSION ON THE RESTITUTION OF LAND RIGHTS **Fifth Respondent**
THE MINISTER OF ENVIRONMENTAL AFFAIRS AND PLANNING **Sixth Respondent**
DEPARTMENT OF MINERAL & ENERGY AFFAIRS **Seventh Respondent**
REGISTRAR OF DEEDS **Eighth Respondent**
THE SURVEYOR-GENERAL **Ninth Respondent**

CORAM: **Farlam, Cameron, Mthiyane JJA, Jafta, Patel AJJA**

HEARD: **16 November 2004**

DELIVERED: 30 November 2004

Summary: Applicant applied for leave to appeal against an interim interdict- interim interdict appealable – an order is in effect final and appealable if of immediate effect and not to be reconsidered at the trial or on the same facts- applicant found not to be in contempt of interim interdict – interdict varied-costs award at grant of interdict generally not appropriate.

JUDGMENT

PATEL AJA

PATEL AJA

[1] This is an application for leave to appeal in which the parties were directed to argue the merits of the matter. The applicant, Maccsand CC ('Maccsand'), is a close corporation engaged in sand mining on Erf 1197, Macassar, Cape Town. The Respondent, Macassar Lands Claims Committee ('the Committee'), representing certain residents of Macassar, brought a claim in the Land Claims Court ('the LCC') claiming restoration of Erf 1197 on the basis of unregistered commonage rights previously held by the owners of Lots 35 to 63 situate adjacent to Erf 1197.

[2] Pending the finalization of its land rights claim, Moloto J in the LCC granted an interdict to the Committee preventing Maccsand from continuing with its sand mining operation on Erf 1197. Moloto J, after the grant of the interdict, and on further application by the Committee, held Maccsand to be in contempt of the interdict. Maccsand was granted leave to appeal to this court against the contempt finding. The learned judge however refused Maccsand leave to appeal against the interim interdict. A later application brought by Maccsand for the variation of the interdict was also refused. Maccsand thereupon brought an application for leave to appeal to this court against this refusal. The Committee opposed the application for leave to appeal on the essential ground that the interim interdict granted by Moloto J was not appealable. In terms of s 21(3)(c)(ii) of the Supreme Court Act 59 of 1959 the

judges who considered the application for leave to appeal referred the application to the full court for argument and consideration. They also ordered that the merits of the proposed appeal and the appeal against the contempt finding and the application for the variation of the interdict be heard simultaneously.

[3] Moloto J on 28 August 2003 granted the following orders relevant to this appeal:

> '3. Pending the finalisation of the claim for restitution of erf 1197 Macassar to the applicant, that an interim interdict be issued against:
>
> (a) Maccsand, the first applicant (should read first respondent), from continuing to mine sand from erf 1197, Macassar;
>
> (b) That the first and second respondents, be interdicted from attempting to rezone, rezoning or considering any land use change application or development of erf 1197, Macassar, except with the approval and consent of applicant.
>
> 7. Costs of suit against first, third and fourth respondents in respect of the interdict sought.'

[4] Before I proceed to deal with the issues, I will, in brief sketch the background to the dispute. There are several disputes of fact and law on the papers. These need not be resolved at this stage however in order to determine whether the order is appealable and if it is, whether the interdict should be discharged or modified. Nor do I propose to consider whether the mining operations conducted by Maccsand, in the face of the grant to it of a mining

licence, are illegal for non compliance of other statutes. In any event the learned judge in the court *a quo* granted the interdict without considering the legality or not of Maccsand's mining operations.

[5] Maccsand was granted permission to mine Erf 1197 in accordance with a licence issued in terms of s 9(1) read with s 9(3)(e) of the Minerals Act, 50 of 1991. The licence to mine is valid until January 2005. Maccsand has an option to extend the licence for another 6 years. Maccsand purported to exercise the option but the decision has been put in abeyance partly because of this litigation and also because of the apparent conflict that exists in respect of the applicable national and provincial laws.

[6] Erf 1197 is 54,224 hectares in extent and contains substantial deposits of sand. For purposes of mining development it is divided into 13 strips marked A to M as indicated in the general site layout plan. At the time of the grant of the interdict, strip A had been mined to completion and Maccsand was in the process of mining strip B and had already prepared strip C for mining. Maccsand contends that it had already rehabilitated strip A in accordance with the approved 'environmental management programme' (EMP). The very existence of an EMP and the effective rehabilitation of strip A is disputed by the Committee. The failure by Maccsand to annex the EMP to its answering affidavit in the interdict proceedings strengthened the Committee's contention

that Maccsand was mining illegally. This was one of the factors that persuaded the learned judge to grant the interdict.

[7] A subsequent application to vary the interdict on production of the EMP met no success. On the papers I am of the view that an EMP existed at the time the application was brought. The explanation proffered by Maccsand as to why the EMP was not included in the answering affidavit appears to be reasonable.

Is the interim interdict appealable?

[8] Prior to its amendment by s 7 of the Appeals Amendment Act 1982, s 20(2)(b) of the Supreme Court Act 1959 ('the Act') provided that an appeal could be brought against an interlocutory order with leave of the court granting it. A court's decision whether to grant leave or not was premised on the distinction between 'simple' interlocutory orders, which were appealable with leave, and interlocutory orders which had a final and definitive effect on the main action which were appealable without leave (see *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 549 F-H). Section 20(1) of the amended Act creates a right of appeal from a 'judgment or order' only. This court in *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) 531H-536B did a 'brief exposition and a critical review of some of the general propositions commonly (and sometimes loosely) advanced in the

decided cases' relevant to the meaning of the 'judgment or order' before holding that these words meant a judgment or order which was final in effect. It would be jejune to repeat such an analysis. An interim interdict has in general been held not to be appealable because it is not final in effect and is susceptible to alteration by the court of first instance (see *Cronshaw and Another v Coin Security Group (Pty) Ltd* 1996 (3) SA 686 (A)).

[9] In *Metlika Trading Limited and Others v The Commissioner for the South African Revenue Service* (unreported judgment in case number 438/03 delivered on 1 October 2004) this court once again had to pronounce on the appealability of an interim interdict. The Pretoria High Court had, pending the finalisation of claims for unpaid taxes brought by the Commissioner for the South African Revenue, ordered the return of a Falcon aircraft to South Africa. Streicher JA referring to the decisions in *Cronshaw* (*supra*) and *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) noted (paras 19 to 21) that the issues in the interdict proceedings in those cases were the same as the issues that were to be decided at the trial. These matters were accordingly distinguishable because whether or not the aircraft should be returned and whether or not the ancillary orders should be granted were not issues which would arise in the action pending which the interdict was granted (para 22).

[10] The court held (para 22) that the test in *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A) at 870 (which was applied in *Cronshaw* (*supra*) 690F) was wholly inappropriate to determine whether the order granted was final in effect and thus appealable. The court proceeded to hold further (para 24) that:

> 'the order that steps be taken to procure the return of the aircraft to South Africa, as well as the other orders relating to the aircraft, were intended to have immediate effect, they will not be reconsidered at the trial and will not be reconsidered on the same facts by the court *a quo.* For these reasons they are in effect final orders. Some support for this conclusion is to be found in *Phillips and Others v National Director of Public Prosecutions* 2003 (6) SA 447 (SCA) at par (17)-(22) in which it was held that a restraint order in terms of the Prevention of Organised Crime Act 121 of 1998 which was considered to be analogous to an interim interdict for attachment of property pending litigation, was final in the sense required by the case law for appealability'.

[11] Counsel for Maccsand submitted that as in *Metlika* the main proceedings are distinct from the interdict against its mining operations. The main claim for the restitution of the commonage is based on the provisions of s 2 of the Restitution Act. The LCC at the finalisation of the claim could in terms of s 35 of the Restitution Act order the restoration of land or any right in land. In the alternative it could order the State to grant an appropriate right in alternative state-owned land or order the payment of compensation. Thus in bringing the

application for an interim interdict against the mining operations, the Committee was granted relief that was separate from that claimed in the main proceedings. The interdict cannot be regarded as a mere step in the main proceedings.

[12] It is settled law that in determining whether a decision is appealable 'not merely the form of the order must be considered but also, and predominantly, its effect' (*South African Motor Industry Employers' Association v South African Bank of Athens Ltd* 1980 (3) SA 91 (A) at 96H, *Zweni* at 532I and *Metlika* at para 23). Maccsand's right to mine exists for a limited period. The Land Claims Commission, despite the passage of a considerable length of time, has not, because of the complexity of the matter and the expense involved, commenced with the verification of the claim. It was perhaps for this reason that the Committee decided to approach the LCC directly. Counsel for the Committee conceded in argument that to date the necessary research to verify the claim had not even commenced because of a shortage of funds. The conclusion is inevitable in that because of the interdict Maccsand will be unable to invoke its right to mine for a substantial period of time, if at all, since if the delays that have occurred till now are an indicator, its right to mine may be lost forever. Accordingly as far as Maccsand is concerned the interim interdict is final in effect. The interim order granted by the court *a quo* is therefore in my view appealable.

[13] I turn now to the costs order made by the learned judge. Costs orders are, in the absence of exceptional circumstances, not generally made in interlocutory interdict proceedings since the court finally hearing the matter is in a better position, after hearing all the evidence, to determine whether or not the application is well founded (see *EMS Belting Co of SA (Pty) Ltd and Others v Lloyd and Another* 1983 (1) SA 641 (E) 644H, confirmed in *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban, and Others* 1986 (2) SA 663 (A) at 683A).

[14] Moloto J has not placed any exceptional circumstances on record to deviate from the established approach. In my view a costs order would be unjust and without warrant since it may subsequently be shown that the claimants represented by the Committee do not show any entitlement to Erf 1197. The costs order should have been properly reserved for determination at the hearing of the claim.

Did the Committee establish a proper case for the interdict sought?

[15] An interim interdict is a temporary and exceptional remedy which is available before the rights of the parties are fully determined. It should therefore be granted with caution and only if a proper case is made out (see

Memory Institute SA CC t/a SA Memory Institute v Hansen and Others 2004 (2) SA 630 (SCA) at para 10). The court granting this discretionary relief must properly place on the judicial scale all the legal requirements of an interdict. These well known requirements are :

(a) a *prima facie* right though open to doubt;

(b) a well-grounded apprehension of irreparable harm if the relief is not granted;

(c) that the balance of convenience favours the granting of an interim interdict;

(d) that the applicant has no other satisfactory remedy.

[16] The Committee sought interim relief first on the basis of its claim for restitution of Erf 1197 in terms of the Restitution Act and secondly its interest in preventing the environmental degradation caused by the sand mining in terms of s 24(b) of the Constitution. The latter was not properly argued before us and any event its proper ventilation is unnecessary at this stage in light of the conclusion to which I come.

[17] The voluminous papers before us indicate that the commonage right claimed by the Committee is prima facie established though open to doubt. (Perhaps it is for this reason that the Land Claims Commission had to tender out the research on the claimed right. The Committee's counsel also informed the

court that the Legal Aid Board has been approached to fund such research). In any event the strength of the Committee's right is a matter that the LCC will eventually determine. Suffice it to say that Maccsand has succeeded in casting some doubt on the status, the antecedents and the claims of the Committee. It has been established by the Committee that although there appears to be some doubt, at least at this stage, the doubt is not serious. Further it cannot be gainsaid on the papers that if the right to restitution of the commonage rights is established eventually the Committee will suffer irreparable harm unless the LCC grants the Committee a remedy other than restitution.

[18] It is on the fulfilment of the requirement of the balance of convenience that the learned judge misdirected himself. The balance of convenience is often the decisive factor in an application for an interim interdict. The exercise of the discretion vested in the court, where the other requirements for an interdict are fulfilled, must turn on the balance of convenience. Moloto J's finding on the papers that some of the owners of Lots 35 to 63 had a registered right of commonage is legally and factually untenable. If indeed their rights were so registered a restitution claim would be unnecessary. The answering affidavit filed on behalf of Maccsand places in doubt the rights of the claimants represented by the Committee. This doubt appears to be in no small measure. The nature of the balance of convenience required in such a case was well

summed up by Holmes J in *Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 (2) SA 382 (N) at 383F:

> 'In such cases, upon proof of a well grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict - it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience - the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted.'

[19] It is incontestable that the financial consequences for Maccsand are dire if the interdict in its present form is allowed to continue. This aspect has been fully ventilated in the affidavits filed on behalf of Maccsand. The prospect of the restitution claim being resolved in favour of the Committee in the near future is uncertain. The Committee to date has not proceeded with the trial in the LCC.

[20] Maccsand had on obtaining the EMP applied for a limited variation of the interdict to permit it from continuing to mine sand on Erf pending the finalisation of the claim for restitution. The variation sought was in respect of a limited portion of Erf 1197 and was to substitute prayer 3(a) of the order granted

by Moloto J with an order which allowed the applicant to continue mining sand on the area identified as strips B to C on the general site layout plan on condition that the sum of R120 000 be set aside in a trust fund established in terms of the Minerals Act for purposes of rehabilitating strips B and C on completion of mining on each respective strip and on condition that the rehabilitation is in compliance with the approved EMP for Erf 1197 and done to the satisfaction of Department of Mineral and Energy. This variation would in effect permit the applicant to mine approximately 22% of Erf 1197 pending the finalisation of the restitution claim.

[21] In terms of the order granted by this court the variation application was also referred to oral argument. This court has the power to grant such a variation in order to ensure that the interim interdict granted satisfies the requirements of the balance of convenience. I believe that the variation order sought is appropriate in the circumstances. Counsel for Maccsand properly submitted that Maccsand should be given leave to approach the LCC in the event the Committee should adopt a "we do nothing" position. Otherwise Maccsand would be prejudiced if after the mining of strip B and C is complete, the Committee has not proceeded to trial with the restitution claim. I am of the view that this concern must be accommodated and a suitable order made.

Was Maccsand in contempt of the order granted by the LCC?

[22] On the 26 September 2003 the learned judge acting in terms of s 22(2)(a) of the Restitution Act found Maccsand to be in contempt of the interdict granted by him on 28 August 2003. The court further ruled that the notice of appeal filed by Maccsand was null and void *ab initio*. No leave to appeal was sought against this particular ruling in the court *a quo* nor did Maccsand seek leave of this court to appeal against such finding. That ruling of nullity accordingly stands. Although this is so it is necessary to pass judgment on this ruling in order to determine whether the finding of contempt can stand.

[23] Contempt orders are not for the asking. Such an order should only issue after the court is satisfied that there has been a wilful and *mala fide* refusal to comply with an order of the court. Although the procedural requirement of having a notice of motion and a sworn affidavit in support of the application is not a *sine qua non* to the finding of contempt by a court of law, a *viva voce* procedure should be resorted to only in exceptional circumstances where even a short delay would precipitate irreparable harm foreshadowed in the order granted.

[24] There is no record of the contempt hearing since in terms of the LCC rules the learned judge arrived at his conclusion after a telephonic conference between the legal representatives of Maccsand and the Committee. This court is

accordingly at a disadvantage since the learned judge has not set out any basis to support the conclusion that Maccsand was wilful and *mala fide* in its refusal to comply with the order of the court - other than his finding that because the notice of appeal (which would have suspended the interim interdict) was void *ab initio* in that the notice preceded his reasons for the order made. The judge also stated that because in his view the interim order was not appealable, the inference was irresistible that Maccsand was in contempt of the interim order.

[25] It is true that this court in *Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd and Other Related* Cases 1985 (4) SA 809 (A) at 836D-F held:

> 'Once a failure to comply with an order of Court has been established, wilfulness will normally be inferred, and the *onus* will rest upon the person who failed to comply with such order to rebut the inference of wilfulness on a balance of probabilities.'

Counsel for Maccsand submitted in their written heads that the contempt finding was made in the absence of any notice that such finding was ever being contemplated and without affording Maccsand any opportunity of addressing the issue. Thus Maccsand would on this submission have been denied the opportunity to rebut any inference of wilfulness on its part. The absence of papers and a failure by the counsel for the Committee to rebut lends colour to this submission. I am in any event of the view that there is not a scintilla of evidence to justify the conclusion that Maccsand was wilful and *mala fide* in its refusal to obey the interdict.

[26] Maccsand acted on legal advice that the notice of appeal suspended the order and accordingly did not intentionally disobey the interim interdict. The advice was certainly not unreasonable. Rule 65(1)(a) of the rules of the LCC provides that once an application for leave to appeal has been filed, the operation and execution of an order is automatically suspended pending the determination of the application for leave to appeal. Maccsand delivered its application for leave to appeal in terms of Rule 69(1)(b) which provides that notice of application for leave to appeal must be delivered within 15 days after the **order** is made **or** after full **reasons** for the order is given, if the reasons are given on a later date. The rule in pellucid language distinguishes between the making of an order and the furnishing of reasons and provides that notice of application for leave to appeal may be made within fifteen days of either event.

[27] Rule 69(1) of the LCC is couched in terms similar to Rule 49(1) of the Uniform Rules and is consistent with the established approach that an appeal lies against the order and not the reasons (see *Lipschitz NO v Saambou-Nasionale Bouvereniging* 1979 (1) SA 527 (T) at 528H-529H). Counsel for the Committee submitted before us as he did in the court *a quo* that Rule 69(1)(b) must be read with Rule 69(2). So Maccsand had to await the reasons in order to specify in detail in the notice of appeal the grounds of appeal or precise findings appealed against. That may well be but Maccsand was entitled to adopt the attitude that it could amplify its notice of application for leave to appeal when

reasons for the order were handed down. It is therefore impossible to infer that on the legal advice given Maccsand intentionally and wilfully flouted the interim interdict.

[28] I make the following order:

1. The applicant is granted leave to appeal against paragraphs 3 and 7 of the order of Moloto J dated 28 August 2003 granting the interim interdict and order for costs;

2. Paras 3(a) and 7 of the order mentioned in para 1 of this order are set aside and replaced with the following:

> '3(a) Pending the finalisation of the claim for restitution of Erf 1197, Macassar, to the applicant, an interim interdict be issued against Maccsand:
>
> 3(a)(i) Interdicting Maccsand from continuing to mine sand on Erf 1197, Macassar, save for the area identified as Phase 1 demarcated as strips B to C on the General Site Layout Plan dated March 1997, which Maccsand shall be entitled to mine, on condition:
>
> 3(a)(ii) that the sum of R120,000 is set aside in the trust fund established in terms of the Minerals Act, No 50 of 1991, for purposes of

rehabilitating strips B and C on completion of mining on each respective strip; and

3(a)(iii) that such rehabilitation is in compliance with the approved Environmental Management Programme and done to the satisfaction of the Department of Mineral and Energy Affairs.

3(a)(iv) Maccsand is given leave to approach the Land Claims Court for a further variation of this paragraph should the Respondent, the Macassar Land Claims Committee not proceed with the trial for the restitution of Erf 1197 within one year from the grant of this order or as soon as the mining of strip B and C and the rehabilitation thereof is complete, whichever event should occur first.'

'7. The costs occasioned by the application for the interdict are reserved for determination at the hearing of the restitution claim.'

3. The appeal against the whole of the order granted by Moloto J on 26 September 2003 that the resumption of the mining on Erf 1197, Macassar, by Maccsand is in contempt of the interim order granted on 28 August 2003 is upheld with costs and that order is set aside.

4. The respondent, the Macassar Land Claims Committee, is ordered to pay the costs of the appeal, such costs to include the costs of the applications for leave to appeal and the costs of two counsel.

_____

CN PATEL
ACTING JUDGE OF APEAL

CONCUR:

Farlam JA

Cameron JA

Mthiyane JA

Jafta AJA