REPORTABLE

Case number 283/95 IN THE

SUPREME COURT OF SOUTH AFRICA (APPELLATE

DIVISION)

In the matter between:

KNOX D'ARCY LIMITED	First Appellant
KNOX D'ARCY OVERSEAS SERVICES LIMITED	Second Appellant
KNOX D'ARCY AG	Third Appellant
KNOX D'ARCY LIMITED	Fourth Appellant
and	
JAMIESON: CHRISTOPER SAMUEL ANDREW	First Respondent
JONES: MALCOLM EDWARD JAMES HOWARD	Second Respondent
KRESTAHAGUE INTERNATIONAL (PTY) LIMITED	Third Respondent
KRESTAHAGUE INTERNATIONAL BV	Fourth Respondent
OTTLEY: STEPHEN ROBERT	Fifth Respondent

CORAM : E M GROSSKOPF, NESTADT, F H GROSSKOPF, HARMS et SCOTT JJA

13/14 MARCH 1996

DATE OF HEARING : 13 MARCH 1996

DATE OF JUDGMENT : 29 MAY 1996

J U D G M E N T

E M GROSSKOPF JA/

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E M GROSSKOPF J A:

INTRODUCTORY

This is a petition for leave to appeal against a judgment delivered by Stegmann J in the Witwatersrand Local Division on 9 December 1994. The judgment is reported as Knox D'Arcy Ltd and Otners v Jamieson and Others 7995 (2) SA 579 (W). The court a quo refused leave to appeal. The resultant petition to the Chief Justice was referred for argument before this court in terms of section 21(3)(c)(ii) of the Supreme Court Act, 59 of 1959. At the same time counsel were directed to present full argument on the merits of the proposed appeal so that, whatever happened, the matter could be finally disposed of.

BACKGROUND

This matter has a long history. The petitioners are companies forming a single group which operates as management consultants, here and overseas. I shall refer to them collectively as Knox D'Arcy. The first respondent

("Jamieson"), the second respondent ("Jones") and the fifth respondent ("Ottley") were employed by Knox D'Arcy (for present purposes it is not necessary to distinguish between the different companies in the group). During 1991 Jamieson and Jones left Knox D'Arcy's employ (on 14 June and 5 July respectively) and floated a group of companies for the purpose of doing business as management consultants in competition with Knox D'Arcy. The third and fourth respondents are the main companies in the group. For convenience I shall refer to them collectively as Krestahague. On 19 July 1991 Ottley left Knox D'Arcy's service and joined Jamieson and Jones.

Knox D'Arcy considered that their former employees were competing with them in an unlawful manner and applied ex parte on 1 9 July 1991 for an urgent interdict to prevent this. A temporary order returnable on 6 August was issued. On 16 August judgment was given (also by Stegmann J) in which certain relief was granted pending "the outcome of an

action for such final relief as the applicants may be advised to seek, or any further order of this court". It should be noted that the nature of the action to be instituted by Knox D'Arcy was not specified. It could accordingly have consisted of, or included, a claim for damages.

The pendente lite relief which is most relevant for present purposes was that the respondents were restrained for four months from soliciting certain named companies for any management consultancy business, and from communicating with any of them with a view to creating opportunities for such business to be offered to the respondents. Among these companies was South African Breweries Limited ("S A Breweries"). Knox D'Arcy was granted leave to deliver further affidavits for the purpose of supplementing the list of companies with the names of any other business entities in respect of which they might consider that they could prove that they had acquired confidential information

(including a confidential customer connection) which was known to the respondents and in respect of which Knox D'Arcy might be able to prove the period it would probably take the respondents to achieve a similar position through their own efforts. Knox D'Arcy was also permitted to adduce further evidence relevant to the question whether the period of four months in respect of the existing list of prohibited companies should be extended. The respondents were further interdicted pendente lite from representing themselves, or the services offered by them, as being connected with the name Knox D'Arcy, and from disseminating injurious falsehoods to the effect that Knox D'Arcy would lose, or had lost, a substantial number of its staff or that it would be unable to perform the services it offered.

Later in the year Knox D'Arcy availed itself of the opportunity to apply, inter alia, for the expansion of the list of prohibited business entities and the extension of

the periods of prohibition. They were partially successful in both respects. One company which they were unable to add to the list of prohibited companies was South African Druggists Limited ("S A Druggists"), a company which figures very prominently in the present proceedings. The relevant judgment, which was delivered on 13 December 1991, is reported at 1992 (3) SA 520 (W).

In accordance with the order of 16 August 1991 Knox D'Arcy instituted an action for a final interdict. No claim for damages was preferred in that action. In January and February 1994, shortly before the trial date, the matter was settled by correspondence between the parties' attorneys. The respondents accepted that the temporary interdicts had been properly granted, and consented to pay Knox D'Arcy's costs of the proceedings, both in respect of the interdicts pendente lite and the trial, on the attorney and client scale. This agreement was incorporated in a court order dated 17 March 1994.

In the meantime Knox D'Arcy had been preparing for the present proceedings. On 10 September 1993 Knox D'Arcy's attorney Mr St J A Bruce-Brand ("Bruce-Brand") consulted with Mr Raymond Bos ("Bos"), a former employee of Krestahague's. Bos provided information which suggested to Bruce-Brand that the respondents had not been open with the court in the 1991 interdict proceedings, and that they were intentionally concealing or dissipating their assets in order to nullify any judgment which Knox D'Arcy might obtain against them. This led to further enquiries which eventually culminated in the present proceedings.

THE COURSE OF THE PRESENT PROCEEDINGS

On 13 April 1994 Knox D'Arcy applied ex parte and in camera for an interdict prohibiting the respondents from freely dealing with their assets. On 18 April Stegmann J granted an order which he himself later (in the judgment under appeal) describes as "draconian". "The judgment of 18 April 1994 is reported: 1994 (3) SA 700 (W). The order is

set out at 714D to 720D. It is not necessary to repeat it in full. It was based on the so-called Mareva injunction which is a feature of modern English legal practice. The main aspects may be summarised as follows. Knox D'Arcy first gave certain undertakings, inter alia that it would issue summons in accordance with a draft particulars of claim attached to the application against the respondents. The claim was, broadly speaking, one for damages for alleged unlawful competition by the respondents. Some aspects of the claim will be considered in more detail later. Moreover Knox D'Arcy undertook to abide by any order which the court might make against it as to damages should the respondents, or any of them, suffer any damages by reason of the order. Subject to these undertakings all the respondents' assets in South Africa (up to a maximum of R15 million) were frozen - the respondents were precluded from dealing with such assets save as permitted by the order. In particular, they were no longer allowed to

operate their existing bank accounts. All the income earned after service of the order as a result of management consultancy services provided by the respondents was to be banked in a new bank account referred to in the order as the "designated account", which was to be controlled by a firm of auditors and, if the respondents so wished, their attorneys. Of the income reaching the designated account, 50 per cent was to be released to allow the respondents to pay their operating costs. This they could do by opening and operating (subject to restrictions contained in the order) another new bank account called a "special account". From the income so released to the respondents, Jamieson, Jones and Ottley were to be allowed R5 000 per week each for living expenses. The respondents were also to be allowed R25 000 for legal expenses. Within three days of service of the order the respondents were to disclose all their assets in this country. Moreover they were to disclose on affidavit, with full details, all income

received by them from their consultancy business from 7 July 1991 to the date of service of the order; and all professional contracts concluded by them during that period. Subsequent changes in any of these matters, and subsequent professional contracts, had to be disclosed as they arose.

Leave was granted to Knox D'Arcy to postpone service of the rule nisi for up to 21 days to enable them to seek similar orders in the United Kingdom and Switzerland, where the respondents, or some of them, had assets. On 27 April 1994 an English court granted a parallel order, and a similar order was obtained in Switzerland. On 9 May 1994 the South African order was served on the respondents.

Pursuant to leave reserved to them the respondents applied on several occasions for the amelioration of the order pending the return date. For present purposes nothing turns on these changes. They are summarised in the judgment a quo at 583E to 585B.

Although the original return date of the rule nisi was 7 June 1994 there were various delays, the nature of which appears from the judgment a quo at pages 5851 to 590D. The hearing of the matter was finally concluded on 5 September 1994. The papers, as embodied in the record on appeal, including the 1991 interdict proceedings, run to 4073 pages. As stated, Stegmann J gave judgment on 9 December 1994. He discharged the interlocutory order (as amended from time to time) with costs, and refused leave to appeal - hence the present petition.

THE ISSUES BEFORE US

The court a quo refused leave to appeal on two grounds: first, that an order refusing an application for an interim interdict (which, in effect, the present order was) is not appealable, and second, that in any event Knox D'Arcy had no reasonable prospects of success on the merits, when this court considers a petition for leave to appeal we are of course not sitting on appeal against the

trial judge's refusal of such leave. We exercise an independent judgment, although we naturally give careful consideration to the views of the trial judge. In the instant case it will nevertheless be convenient to deal with the petition by considering whether we agree with the reasons given by the judge a quo for refusing leave.

IS THE ORDER APPEALABLE?

The question here is whether the decision of the judge a quo was a "judgment or order" within the meaning of sec 20(1) of the Supreme Court Act, 59 of 1959. Relying on Zweni v Minister of Law and Order 1993 (1) SA 523 (A)the court a quo held that it was not. In particular, reference was made to the following passage in Zweni's case (at 532J to 533B):

> "A 'judgment or order' is a decision which, as a general principle, has three attributes, first, the decision must be final in effect and not susceptible of alteration by the Court of first instance; second, it must be definitive of the rights of the parties; and, third, it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings . . . The second is the same as

> the oft-stated requirement that a decision, in order to qualify as a judgment or order, must grant definite and distinct relief ...".

In applying these principles one must first have clarity as to what "the main proceedings" are to which reference is made. If one regards the application for an interim interdict as merely a procedural step in the action for damages, and that the action for damages constitutes the main proceedings, then the grant or refusal of an interdict would clearly not affect the outcome of the main proceedings. On that assumption a decision on such an application would then, applying the passage from Zweni's case, not be appealable. In my view that would, however, be a wrong way of looking at it. Although associated with a main action, the application for an interim interdict seeks to secure relief which is separate from that claimed in the action (See Bekker N O v Total SA (Pty) Ltd 7990 (3) SA 759 (T) at 164 D-G). Its cause of action is different (as will be shown hereafter) and it may introduce

additional parties. In its separateness it is analogous to the review dealt with in Trakman NO v Livshitz and Others 1995 (1)SA 282 (A) at 289G to 290A and the application for recusal considered in Moch v Nedtravel (Pty) Limited t/a American Express Travel Service (AD), unreported, judgment delivered 22 February 1996).

In argument before us Mr Cohen, for the respondents, did not seriously contest that the application for an interim interdict had to be regarded as a separate proceeding. He contended that its refusal was nevertheless not appealable in the circumstances of the present case. It is trite 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 7980 (3) SA 91 (A), a passage approved in, inter alia, Zweni's case (supra) at 532I, Trope and Others v South African Reserve Bank 7993 (3) SA

264 (A) at 277 F-G and Trakman's case (supra) at 289E.) In the present case, it was contended, the application was not refused on its merits. The court a quo refused it in the exercise of a discretion. In doing so the court was strongly influenced by its finding that, when bringing the application ex parte, the petitioners had concealed certain facts from the court. The court's grounds of refusal were thus, the argument proceeded, essentially procedural. The application could accordingly be renewed before the court a quo. If full disclosure were then made, the case could be reconsidered on its merits. This argument seems to accept that, after reconsideration on its merits, a refusal of the application would be final and susceptible to appeal.

In my view this argument cannot be sustained. The grounds for refusing the application were not as limited as suggested by counsel. In the next section of this judgment I discuss the basis upon which interim interdicts are

granted or refused, and the sense in which this exercise may be described as discretionary. For purposes of the present argument it is sufficient to say that the learned judge a quo based his decision on a full conspectus of all the factors which are, or may be, relevant in an application of this kind. He did not confine himself to the point of non-disclosure. His decision was not based on a procedural irregularity which would permit a new application if the procedural defect were remedied.

To sum up: the application for an interim interdict was a procedure separate from the action for damages; the application was refused on its merits and this refusal could not be reconsidered by the court a quo. In my view the refusal amounted to a "judgment or order" within the meaning of the Act.

This conclusion is in accordance with authority in our courts stretching back for almost a century. Admittedly these cases were decided under their own statutes which may

have differed from the present Act. However, the general principles relating to the appealability of decisions were originally derived from Roman-Dutch law and have to a large extent been retained under the different statutes applicable at various times to various courts. In the oft quoted words of Schreiner JA in Pretoria Garrison Institutes v Danish Variety Products (Pty) Limited 1948 (7) 5A 839 (A) at 867

> "... comment has overcome construction and to-day it is no longer possible to interpret the present or any corresponding statutory provision by a straightforward application of the ordinary meaning of the words used."

See Zweni's case (supra) at 531E-G and Cronshawand Another v Coin Security Group (Pty) Ltd (AD), unreported, reasons for judgment delivered on 28 March 1996 at pp 10 to 11. Earlier cases are accordingly often of great assistance in determining whether the nature of a particular decision is such as to endow it with the qualities of a "judgment or order". See, in addition to Zweni's case and Cronshaw's

case, Trope's case (supra) at 270G, Caroluskraal Farms (Edms) Bpk v Eerste Nasionale Bank van Suider-Afrika Bpk 1994 (3) SA 407 (A) at 41 5A to 416E, Trakman's case (supra) at 289G-I and Wellington Court Shareblock v Johannesburg City Council 1995 (3) SA 827 (A) at 832 G-I.

I revert now to interim interdicts. The first case in our law to which we were referred was Donognue and Others v Executor of Van der Merwe (1897) 4 OR 1. In that case the court a quo refused an interdict to restrain the alienation of a certain farm pending action. The Full Bench of the High Court of the South African Republic was called upon to determine whether this decision was appealable. It held that it was. The court reached its conclusion after analysing the relevant legislation as well as Roman-Dutch and other common law authorities. The reasoning of Kotze CJ is in my view particularly apposite. He said (at p 4):

> "An application for an interdict pending action, whereby the opposite party or defendant shall be

> restrained from alienating or mortgaging certain immovable property, the subject of the suit, is not of a purely interlocutory character. If the Judge refuses the application, irremediable injury or loss may indeed be caused to the applicant and plaintiff, for the opposite party would be able, pending the action, to alienate or encumber the property, and in this way frustrate the whole object of the suit. It also seems to me that the Judge of first instance, having once refused to grant the provisional interdict pending action, is not competent to grant the application subsequently on the same facts and vary his order once pronounced after having heard both parties. His duty or office is, so far as concerns the request for an interdict, once for all exercised and determined, and the applicant, who feels himself aggrieved by reason of the refusal of the temporary interdict, has no other means of redress than by way of appeal."

Donoghue's case was followed in the full bench decisions of Ex Parte Lewis & Marks 7904 TS 281 and Carlls v Hertz's Trustee 7904 TS 584. The latter two cases were in turn followed in Donaldson v Foster's Executors 1909 TS 427. In the last mentioned case Innes CJ to stated firmly (at 431):

> "Now the discharge of the rule [i e, a rule nisi in an interim interdict application] must stand in the same position as an original refusal to grant the interdict; and this Court has twice decided [in the

> above mentioned two cases] that such a refusal is a final, and not an interlocutory order. Continuity of practice is very desirable, and we must follow those decisions, and adhere to the rule there laid down ... The refusal of an interdict is always a final refusal to grant that particular form of ancillary relief in the action which is applied for."

It is not necessary to delve further into all the cases. In Davis v Press & Co 7944 CPD 108 at p 113 De Villiers J correctly reflects the previous law by stating "[it] is undisputed law that the refusal of an interdict is always appealable...". The author of Harms on Civil Procedure in the Supreme Court regards this proposition as still constituting good law (see paragraph S20 at p 508. See also LAWSA, Vol 11, para 329.)

In passing it may be noted that the grant of an interim interdict stands, historically, on a different footing. As far back as Prentice v Smith (1889) 3 SAR 28 the court held (at p 29) that an order granting an interim interdict "is an interlocutory order, and that consequently there can be no appeal". On the whole this view was

followed in the provincial divisions (see Loggenbergr v Beare 7930 TPD 774; Davis v Press & Co, supra, and authorities referred to in those cases) and ultimately prevailed in the appellate division (African Wanderers Football Club (Pty) Ltd v Wanderers Football Club 7 977 (2) SA 38 CA) at p 4 6H to 47A and Crenshaw's case (supra) . Some judges have questioned the validity of the distinction between the refusal and grant of an interim interdict. This distinction cannot be justified by the nature of the proceedings giving rise to the decision - it is the same in both cases (see, e g, Davis v Press & Co, supra, at p 118 per Fagan J) . And it may be argued that the prejudice suffered by the unsuccessful party also does not differ in principle. See Davis's case, supra, at p 112 to 113 (De Villiers J). However, in Loggenberg's case, supra, Greenberg J expressed the view (at p 723) that "there is in fact a real distinction on the question of irreparability between the case of a granting of a temporary interdict and

the refusal of a temporary interdict. " There may also be a difference in the finality of the decision. Thus, as stated above, the refusal of an interim interdict is final. It cannot be reversed on the same facts (I disregard the possibility, discussed above, of a refusal on some technical ground). The same may not be true of the grant of an interim interdict. It may be open to the unsuccessful respondent to approach the court for an amelioration or setting aside of an interdict even if the only new circumstance is the practical experience of its operation. And, apart from the theoretical differences between the grant and the refusal of an interdict, there is also the practical one, discussed in Crenshaw's case at pp 12 to 15, that an appeal against the grant of a temporary interdict would often be inconsistent with the very purpose of this remedy. See also Davis v Press & Co, supra, at p 119 (Pagan J). It is, however, not necessary to pursue this matter any further. The appealability of the grant of

an interim interdict does not arise directly for decision in this matter and is in any event concluded by authority.

For the reasons given above I consider that the court a quo was wrong in holding that its judgment was not appealable. This conclusion renders it necessary to consider the second basis for refusing leave to appeal, viz, that the petitioners have no reasonable prospect of success on appeal.

THE NATURE OF AN APPEAL ON THE MERITS

In assessing the petitioners' prospects of success on appeal it is necessary to consider how a court would approach such an appeal. On behalf of the respondents it was argued that a court of first instance always has a discretion to refuse an interim interdict even if the requisites have been established. Consequently, so it was contended, an appeal court would only be entitled to interfere if it came to the conclusion that the lower court had not exercised a judicial discretion. The issue is not,

it was said, whether the lower court had arrived at the correct decision, but whether it had exercised its discretion properly. The appeal court is not entitled to interfere because in its opinion it would have come to a different conclusion. This would be substituting its discretion for that of the court a quo.

This argument was not seriously contested by the petitioners but I do not think it should pass unchallenged.

That a court has a discretion whether or not to grant a temporary interdict has often been said. We were however not referred to any case in which an appeal in respect of an interim interdict was dealt with on the basis that the appeal court could not interfere except on the restricted grounds suggested by the respondents. As far as the Appellate Division is concerned, the authority which I have been able to find goes the other way. Thus in Messina ('Transvaal,) Development Co Ltd v Soutn African Railways and Harbours 7929 AD 7 95 at 215 to 216 Curlewis J A said:

> "In an application for an interim interdict pending action, the Court has a large discretion in granting or withholding an interdict. Where there is merely a possibility, not a practical certainty, of interference or injury, as in the present case, the Court will be reluctant to grant an interdict, especially if the party seeking the interdict will have other means of redress and will not suffer irreparable damage. And the Court is entitled to and must regard the possible consequences, both to the applicant and to the respondent, which will ensue if an interdict be granted or withheld."

It is significant that, despite emphasizing the discretionary nature of the relief claimed, the learned judge did not, in the result, decide the case on the limited basis contended for in the present case. In fact he did not even consider the question whether the trial judge had properly and judicially exercised a discretion. Curlewis J A decided the matter according to his own views of the merits of the application and came to the conclusion that "no sufficient case for an interdict has been made out" (at p 216). Similarly in Goidsmid v The South African Amalgamated Jewish Press Ltd 1929 AD 441 Curlewis JA, on this occasion enjoying the concurrence of three of his

colleagues, went into the merits of an appeal against the refusal of an interim interdict, and concluded that "the lower court acted correctly in dismissing the application." (At p 446).

Much the same happened in Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and Another 7973 (3) SA 685 (A). At p 691C Holmes J A, who delivered the judgment of the court, stated that "[the] granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court". He then (at p 691D-E) set out the requisites for an interim interdict (on the authority of Setlogelo v Setlogelo 7974 AD 227 at p 227) as follows:

> "(a) a right which, 'though prima facie established, is open to some doubt';
> (b) a well grounded apprehension of irreparable injury;
> (c) the absence of ordinary remedy".

At p 691E he reverted to the court's discretion. In exercising its discretion, he said, a court weighs inter alia the prejudice to the applicant, if the interdict is

withheld, against the prejudice to the respondent if it is granted (the balance of convenience). He then continued (p 691F):

> "The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element of 'some doubt', the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and the probabilities..."

Despite the stress placed on the discretionary nature of the court's function, Holmes J A proceeded to deal with the appeal by giving effect to his own view on the merits of the application for an interdict. His final conclusion (at p 696E-F) was that "the affidavits do not warrant the remedy of an interim interdict" and that the judge a quo "was right in discharging the rule nisi".

See also Cassim and Others v Meman Mosgue Trustees 797 7 AD 754.

It would seem to follow from the above cases that the word "discretion" was not used in a strict sense. That this word is capable of different meanings appears from Media Workers Association of South Africa and Others v Press Corporation of South Africa Ltd ('Perskor') 1992 (4) 5A 797 (A) at 796 H-I and 800C-G. In the present context the statement that a court has a wide discretion seems to mean no more than that the court is entitled to have regard to a number of disparate and incommensurable features in coming to a decision. This is also the sense in which, I take it, Schreiner J . used the word "discretion" in the following oft-quoted passage from Transvaal Property & Investment Co Ltd and Reinhold & Co v S A Townships Mining & Finance Corp Ltd and The Administrator 1938 TPD 572 at 521:

> "No doubt the remedy by way of interdict has been said to be unusual; ... it is also described as discretionary ... It seems to me, however, that, apart from cases of interim interdicts, where considerations of prejudice and convenience are of importance, the question of discretion is bound up with the question

> whether the rights of the party complaining can be protected 'by any other ordinary remedy' (Setlogelo's case, 1914 AD 221, at p 227)."

The courts have not defined the considerations which may be taken into account in exercising the so-called discretion save for mentioning the obvious examples such as the strength or weakness of the applicant's right, the balance of convenience, the nature of the prejudice which may be suffered by the applicant and the availability of other remedies. Whilst this list is not exclusive, it does indicate what the relevant features are in an application of this sort. I find it difficult to imagine that considerations which are entirely unrelated to these features could be accorded weight in granting or refusing an application for an interim interdict.

Finally in regard to the so-called discretionary nature of an interdict: if a court hearing an application for an interim interdict had a truly discretionary power it would mean that, on identical facts, it could in principle

choose whether or not to grant the interdict, and that a court of appeal would not be entitled to interfere merely because it disagreed with the lower court's choice (Perskor case at 800D-F). I doubt whether such a conclusion could be supported on the grounds of principle or policy. As I have shown, previous decisions of this court seem to refute it.

In some provincial divisions a different view has been adopted. See, e g, Beecham Group Ltd v B-M Group (Pty) Ltd 1977 (1) SA 50 (T) at 58G-H and 60H-61A.

Since the approach which is to be followed in an appeal against the refusal of an interim interdict was not fully argued before us, it is perhaps best not to express a firm view, particularly since, as will be seen, such a view is not necessary for the determination of this appeal. I shall accordingly assume, in the petitioners' favour, that the respondents' contention is unsound. I propose therefore to follow the course adopted in earlier decisions

of this division and to approach this application as if a court on appeal would have to decide simply whether the application for an interim interdict was correctly refused.

THE CASE FOR AN INTERDICT

Knox D'Arcy's case, as alleged in the papers, may be summarised as follows:

(a) Knox D'Arcy has a well-founded claim against the respondents for damages arising from unlawful competition; and,

(b) with the intent of frustrating this claim the respondents are concealing or dissipating their assets.

I propose dealing with these two contentions in turn, and thereafter to consider other considerations such as the balance of convenience. In dealing with the factual issues between the parties I have regard, of course, to the evidence appearing on the papers. It was suggested during argument that further evidence may be available on some of the issues but I cannot speculate on these matters.

KNOX D'ARCY'S CLAIM FOR DAMAGES

Both Knox D'Arcy and Krestahague provide management consultancy services. Their procedures are much the same. The consultancy company's salesmen approach businessmen and try to persuade them that the consultancy has management skills which will enable it to assist the potential customer to run his business more efficiently and profitably. If a potential customer shows an interest in the proposal, an agreement is arrived at in terms of which the consultancy company first conducts, at its own risk and expense, a preliminary survey aimed at identifying areas in which, and the means by which, the potential customer's business may be more efficiently managed. If the potential customer is impressed by the results of the survey he may conclude an agreement in terms of which the consultancy will provide its skill and service to give practical implementation to the proposed changes. The customer will then pay fees for this project, which are, at least to some

degree, related to the extent to which the consultants succeed in increasing the customer's profitability.

It will be appreciated that the obtaining of customers is a time-consuming and expensive operation. Salesmen are highly qualified and well-paid. Most approaches to potential customers are unsuccessful, and even those that bear fruit normally do so only after many attempts. The preliminary survey requires the services of a number of well-qualified persons and may in the end provide no return. On the other hand, a successful project could be highly profitable.

In this trading milieu business contacts are at a premium. The chief executive officer of a large conglomerate may be the key to a number of lucrative projects. As this case shows, management consultants will, metaphorically speaking, fight to the death to retain or acquire promising business connections.

In argument before us Knox D'Arcy relied on four claims against the respondents. They are, in the order of apparent importance:

1. The S A Druggists claim.

2. The S A Breweries claim.

3. The empty pipeline claim.

4. The restraint of trade claim. THE S A DRUGGISTS CLAIM

This claim forms the most important part of the petitioners' case for various reasons. First, the amount at issue is large and, on the petitioners' case, can be readily proved. Second, the facts alleged in support of it were not known to the petitioners when they brought the 1991 interdict application and action. The novelty of the facts provides an explanation why an action for damages was not instituted earlier. Third, the petitioners contend that the relevant facts were concealed by the respondents in 1991. This, it is contended, demonstrates the

respondents dishonesty, and adds credence to the suggestion that they are likely to attempt to frustrate any order that might be obtained against them.

The basis of the SA Druggists claim according to Knox D'Arcy's heads of argument, is "the wrongful and unlawful diversion and misappropriation by the respondents of a customer connection which existed between the Petitioners and S A Druggists, through its chief executive, Van der Walt". The relief claimed by Knox D'Arcy in its particulars of claim was, first, an account of profits earned by the respondents in respect of SA Druggists projects, and an order to pay such profits to the petitioners on the basis that such profits were earned by the respondents while in a fiduciary position vis-a-vis Knox D'Arcy; and, alternatively, damages in the amount of R4 million on the basis that the projects obtained from SA Druggists would, in the absence of unlawful competition by Krestahague, have accrued to Knox D'Arcy. I need not

discuss two further alternatives. They were based on alleged breaches of restraints in the service contracts of some of the respondents and, as I shall show, this aspect has really fallen away.

The evidence is to the following effect.

Mr J H van der Walt ("Van der Walt") was the managing director of Sentrachem Limited, a company in the Federals group. On 11 July 1989, while still employed by Knox D'Arcy, Jamieson had a meeting with Van der Walt to solicit business. Van der Walt was apparently impressed by Jamieson, and referred him to some of his subordinates, including one Lovell, the managing director of NCP, a subsidiary (or, more accurately, a division) of Sentrachem. In due course Knox D'Arcy contracted to do a project for NCP.

As from 1 May 1991 Van der Walt became managing director of S A Druggists, another company in the same group. That this move was to take place was common

knowledge. Jamieson referred to it on 19 March 1991 in a report of a meeting relating to NCP. On the same day, i e, 19 March 1991, one Collins telephoned S A Druggists. Collins was employed by Knox D'Arcy as a "tele-marketer". He was based in England. His duty was to telephone business executives, including those in South Africa, to persuade them to see Knox D'Arcy salesmen. When he telephoned S A Druggists Collins was attempting to make an appointment for Jamieson. Collins was told that no meeting could be arranged since the managing director was retiring and the new managing director, Van der Walt, would be starting in May.

Up to this stage the facts are undisputed. Further allegations by the petitioners are not. The founding affidavit in the present application for an interim interdict was made by Mr R J G Steele ("Steele") , who controls Knox D'Arcy. He states, on the basis of evidence allegedly gathered subsequent to the 1991 interdict

proceedings, inter alia as follows:

5. "In early May 1991 whilst Jamieson was still in Knox D'Arcy's employ, he had in fact telephonically contacted Van der Walt at S A Druggists;" (emphasis in the original.)

6. "A couple of weeks later he met with Mr van der Walt. The clear purpose of this meeting was to solicit business from S A Druggists. - not for the benefit of his employer Knox D'Arcy but for the advantage of the competing business Krestahague;"

7. "On 4 July 1991 Jamieson had a further meeting with Van der Walt."

8. "In order to make contact with Mr van der Walt he advised Van der Walt's secretary Marianne

> [Shawe] that he was from Knox D'Arcy. This was true as during May 1991 he was still in Knox D'Arcy's employ until 14 June 1991. However when speaking to Van der Walt, he misrepresented to him that he had left Knox D'Arcy and was working for a new company Krestahague. In doing so he breached his fiduciary duty to Knox D'Arcy by disseminating a malicious falsehood."

The essence of Knox D'Arcy's case in respect of the S

A Druggists claim, therefore, was that Jamieson contacted

Van der Walt during May 1991, while Jamieson was still in

Knox D'Arcy's service, for the purpose of soliciting

business for the respondents. This case was based purely

on hearsay evidence, and more particularly evidence given

by Bruce-Brand of what Van der Walt had told him. In the founding affidavit Steele says that Bruce-Brand had spoken to various present and former employees of relevant companies in the S A Druggists Group in an attempt to obtain evidence from them, but that he "was not able to obtain affidavits from any of these persons". In so far as this statement might be taken to refer to Van der Walt and Shawe it was simply not true. Van der Walt and Shawe were always willing to make affidavits. No other explanation is given in the founding papers for the failure to annex affidavits by Van der Walt and Shawe. In an affidavit filed at the reply stage Bruce-Brand states that he did not obtain an affidavit from Van der Walt or Shawe prior to the institution of the proceedings because he was afraid that Van der Walt would alert the respondents to Knox D'Arcy's intention to apply for an interdict.

What then was the information which formed the foundation of Knox D'Arcy's case on this aspect? Bruce-

Brand had a meeting with Van der Walt on 21 October 1993. He testifies that Van der Walt told him inter alia the following:

> "During May 1991 and shortly after his joining SA Druggists, Van der Walt received a telephone call from Jamieson who identified himself as having previously been with Knox D'Arcy and Van der Walt recalled having dealt with him previously. Jamieson had explained that he had left Knox D'Arcy and was now with a new group of companies, on whose behalf he was now offering management consultancy services and requested a meeting for this purpose. Van der Walt had agreed to meet with Jamieson because ... companies in the SA Druggists group had problems requiring management consultancy assistance. A meeting was arranged for a couple of weeks later."

Bruce-Brand made attempts to get greater clarity about the date of the meeting which Van der Walt had with Jamieson, but to no avail. In particular Van der Walt was unable to find his relevant diary.

During early December 1993 Bruce-Brand had various further discussions with Van der Walt. During these discussions, he testifies, Van der Walt confirmed that Jamieson had contacted him shortly after he joined S A

Druggists and that this would have been in May 1991 or at the very latest in early June 1991.

That then was the information regarding Van der Walt. Regarding his then secretary, Shawe, the relevant witness was Collins. He states on affidavit that he telephoned Shawe on 19 July 1991. She told him that Jamieson had been in touch with Van der Walt and had had a meeting with him on 4 July 1991. She said that he had introduced himself by using the name Knox D'Arcy. In January 1994 Bruce-Brand had a discussion with Shawe during which, he says, she recollected having told a representative of Knox D'Arcy (presumably Collins) that Jamieson had mentioned that he was from Knox D'Arcy.

On the basis inter alia of the above hearsay evidence Knox D'Arcy instituted the present proceedings. After the order had been granted but before it was served on 9 May 1994, Bruce-Brand approached Van der Walt for an affidavit. This was on 6 May. He showed Van der Walt his (i e, Bruce-

Brand's) affidavit which formed part of the founding papers. According to Bruce-Brand Van der Walt's comment was that he could not recall the exact dates. Bruce-Brand then handed Van der Walt a short draft affidavit which Bruce-Brand had prepared for signature by Van der Walt. In that draft Van der Walt confirms that he had discussions with Bruce-Brand, and that the contents of Bruce-Brand's affidavit "correctly reflect what I told Bruce-Brand". For the rest the sequence of events is set out as deposed to (on the basis of hearsay) by Bruce-Brand in the passages summarised above.

Van der Walt was not happy with the draft affidavit. He and Bruce-Brand agreed that a further sentence would be added as follows: "However I stress I have no clear recollections of the dates and the meetings with Krestahague may only have taken place as of June 1991 and later." Van der Walt also asked that the word "correctly" be deleted. He was apparently prepared to accept that

Bruce-Brand's affidavit reflected what he had said, but not that it did so correctly.

We were treated to a great deal of exegetic argument to show that Van der Walt's attitude and his affidavit of 6 May are not inconsistent with the petitioners' case, but this was not convincing. The cornerstone of the petitioners' case was that Jamieson contacted Van der Walt prior to 14 June 1991 while he was still in Knox D'Arcy's service. Dates were accordingly all-important. To suggest, as Bruce-Brand has done, that Van der Walt may have been uncertain as to the date of his first meeting with Jamieson but not as to the date when Jamieson first spoke to him is specious - Van der Walt's recollection clearly was that these dates were close together. But there was no need for Bruce-Brand to speculate about these matters. It was easy enough to ask Van der Walt: Are you certain of the approximate date when Jamieson first contacted you? We know, from an affidavit of Van der

Walt's filed with the respondents' answering papers, that the answer would have been no. For some unexplained reason this question was not asked.

Bruce-Brand apparently did not try to get an affidavit from Shawe. It is now clear that she started working for Van der Walt only as from the beginning of June 1991. It would accordingly not have been possible for Jamieson to have telephoned her during May 1991 to make an appointment to see Van der Walt, as the petitioners allege. Indeed, in a letter as far back as 2 February 1994 Bruce-Brand told his London correspondents about an interview he had had with Shawe. In it he says inter alia that Shawe had started working for Van der Walt "from about June 1991". The knowledge of this fact does not seem to have alerted the petitioners to the weakness of their inference that Jamieson had contacted Van der Walt in May.

Incidentally, Shawe also denies on affidavit that Jamieson had told her he was with Knox D'Arcy, or that she

told Steele, Bruce-Brand or Collins that he had.

In his judgment in this matter Stegmann J strongly criticized the petitioners for bringing the application on the basis of hearsay and persisting with it after realising on 6 May 1994 that Van der Walt did not support their case (1995 (2) SA at 640C-H). Similar strictures were passed by the High Court of Justice in England when discharging the Mareva injunction granted against the respondents in that country. I agree with what was said in this connection.

Up to now I have dealt with the petitioners' case on this aspect. In the answering affidavit confirmed by Jamieson the respondents aver that Jamieson approached Van der Walt after Jamieson had left the employ of Knox D'Arcy on 14 June 1991. This led to the meeting between them of 4 July which in turn led to a number of lucrative projects. From what I have said it is clear that the petitioners have no evidence to contradict this sequence of events, and their case based on an alleged approach to Van der Walt

during May or early June 1991 therefore has no prospect of success on these papers, even on the prima facie basis required for an interim interdict.

During argument before us the petitioners shifted their ground somewhat. Even if one accepts the respondents' version of the events, they argued, Jamieson acted improperly. Knowing of Van der Walt's move to S A Druggists, they contended, Jamieson should have approached Van der Walt for Knox D'Arcy's benefit before Jamieson left Knox D'Arcy's employ. To fortify this argument they point to an averment by Collins, denied by Jamieson, that in the course of a meeting on 10 April 1991 Jamieson had said that he knew Van der Walt and that S A Druggists, under Van der Walt's leadership, was a "hot prospect".

The conflict between Jamieson and Collins on this latter point cannot be resolved on these papers, and either witness may prove to be correct. Even on that assumption, however, the petitioners are faced with the problem that

they never specifically taxed Jamieson in their founding papers with the accusation that he had deliberately waited to contact Van der Walt until after he had left Knox D'Arcy's employ. This matter was accordingly not properly ventilated in the papers and it would in my view be impossible and unfair now to find against the respondents on this basis.

Then it was argued that, as at 4 July, Jones's employment with Knox D'Arcy had not come to an end. Jones and Jamieson had agreed to go into business together: they were in effect partners. Consequently, so it was contended (if I understood the argument correctly), Jamieson was not entitled to perform any act which Jones was prohibited from doing. Jones, as an employee of Knox D'Arcy's, was not entitled to see Van der Walt to solicit business for Krestahague. Therefore, it was contended, Jamieson was also disentitled from doing so. I do not think there is any substance in this argument.

The final argument on this aspect is much the same,

except that it relies, not on a colourless partnership, but on an unlawful conspiracy. It was the petitioners' case in the interdict proceedings that Jamieson, Jones and some others had formed an unlawful conspiracy while they were employed by Knox D'Arcy. The purpose of the conspiracy was, in effect, to take over Knox D'Arcy's business. They would encourage as many as possible of Knox D'Arcy's top employees to resign at more or less the same time and would then attempt to take over Knox D'Arcy's business connections in disregard of restraint provisions applying to some of them. In the interdict proceedings the court found that such a conspiracy had been prima facie proved. There was an argument before us whether this finding had any value for present purposes. The judgment on the interdict did not create a res judicata and many of the witnesses who gave affidavits for the purpose of the interdict application did not testify on affidavit before

us. I do not propose resolving the question of the admissibility of the affidavits in the 1991 interdict proceedings. Assuming those affidavits to be admissible and the conspiracy to have been proved I cannot see its relevance to the present point. No doubt Knox D'Arcy can get appropriate relief for acts done in pursuance of an illegal conspiracy. Here, however, the premise on which the present argument rests is that Jamieson's approach to Van der Walt was not unlawful. It is assumed that he approached Van der Walt after he had left Knox D'Arcy. There is accordingly no question that he was soliciting business for himself at a time when he should have solicited it for his employer. And S A Druggists was not a former customer of Knox D'Arcy's. There was in fact nothing in the relationship between Knox D'Arcy and SA Druggists which could preclude Jamieson from doing business with S A Druggists when he was no longer employed by Knox D'Arcy. The petitioners' counsel was consequently

constrained to argue that, because they had conspired to compete unlawfully, the respondents were precluded from competing at all, even by lawful means. This argument cannot be sustained.

To sum up, SA Druggists was not a customer of Knox D'Arcy. Jamieson had met Van der Walt once in 1989 when Van der Walt was in different employment. Van der Walt moved to SA Druggists in May 1991. Jamieson approached him after he (Jamieson) had left Knox D'Arcy. They had a meeting on 4 July which led to lucrative employment for Krestahague. In my view there is, on these facts, no basis upon which Krestahague can be called to account for profits made from this employment, or to be ordered to pay damages for unlawful competition.

In conclusion I should state in passing that I do not agree that, in the 1991 proceedings, the respondents misled the court in relation to S A Druggists. The pertinent point in issue is whether Jamieson testified falsely that

he did not have any meeting with Van der Walt subsequent to 1989. In the context it is clear, however, that he was referring to the period of his employment with Knox D'Arcy. He was not dealing with meetings he might have had after leaving Knox D'Arcy.

THE SA BREWERIES CLAIM

S A Breweries was a customer of Knox D'Arcy's. Ottley was involved in, and responsible for, projects at S A Breweries. The events relative to this claim are best set out in two affidavits by Mr 3 J K Smith ("Smith") who was at the time employed by S A Breweries, Beer Division, as Regional Director for the Northern Transvaal and Orange Free State regions. Prior to July 1991 agreement had been reached between Knox D'Arcy and S A Breweries that a survey would be carried out at three breweries under Smith's control. On 10 July 1991 a colleague of Smith's told him that Jones had resigned from Knox D'Arcy's employ. It will be recalled that Jones's last day with Knox D'Arcy was 5

July. Smith was worried about the effect which Jones's departure might have on Knox D'Arcy, and left a message for Jones to contact him.

On 11 July 1991 Smith met Jones and Jamieson. They told him that approximately twelve of the top people from Knox D'Arcy would be joining them in a new company they were forming in South Africa. Smith added:

> "Jamieson and Jones did, in no way, attempt to solicit the business for their new company, nor did they imply that Knox D'Arcy would not ultimately be able to handle the projects competently. In fact they did agree that Knox D'Arcy could serve the projects with appropriate staff from the United Kingdom."

After this meeting Smith decided to cancel the surveys. His reasons were twofold. The main one was "that Jones was leaving and that possibly top people were leaving Knox D'Arcy". A contributing factor was that the managers of the breweries were lukewarm about the proposal for surveys. Had the surveys been undertaken, Smith considers that in all likelihood projects would have followed. He adds rather cryptically: "Such projects could have been

terminated at short notice."

Apart from Ottley, three other employees of Knox D'Arcy's who had been involved with projects at S A Breweries subsequently resigned.

The petitioners estimate that the lost projects would have earned them revenue of some R3 to R4 million of which at least R1,5 million would have represented profits and they claim this amount as damages.

The court a quo found that the petitioners have shown that they have "a substantially strong prima facie case, even if open to some doubt" in respect of this claim (p 631 J). Two grounds for this view is given. The first is the alleged conspiracy, to which I have already referred. Stegmann J assumed in this respect that the petitioners could make out a sufficient prima facie case with admissible evidence (p 632A). The second was "the injurious falsehood in terms of which [Jamieson] and [Jones] had suggested to Smith that [Knox D'Arcy] would not

have the capacity to carry out the preliminary surveys for the three breweries and the projects which were to follow"(p 632B).

I must admit that here also I have some difficulty with the "conspiracy" theory. In the petitioners' particulars of claim the conspiracy is introduced into this claim by the allegation that Ottley resigned from Knox D'Arcy's employ "with the intention of causing South African Breweries to terminate its relationship with [Knox D'Arcy] and in furtherance of the common purpose and conspiracy aforesaid." Ottley's reasons for changing employers are best known to himself. On general probabilities one would assume that he hoped to better his position. That the reason for his resignation was the intention to induce S A Breweries to terminate its relationship with Knox D'Arcy seems unlikely and would, I imagine, be almost impossible to prove. Such a termination would harm Knox D'Arcy but would provide no direct benefit

for Ottley or Krestahague. Moreover, on Smith's evidence the respondents did not try to solicit work from him, and in fact told him that Knox D'Arcy would be able to comply with its undertakings. I accordingly do not see much prospect of a claim succeeding in respect of the "conspiracy".

That brings me to the alleged injurious falsehood. Smith wanted to see Jones to find out what was happening after his resignation. Smith was entitled to a frank report. The statement by Jones and Jamieson that a number of employees would be leaving Knox D'Arcy was substantially correct. At the very least there is nothing to show that it was not made honestly. Jones and Jamieson did not suggest, as found by the judge a quo, that Knox D'Arcy would not be able to carry out its obligations to S A Breweries - indeed, as noted above, Smith's evidence is to the contrary. Accordingly there is in my view no proof on the papers that Jones and Jamieson were guilty of any

injurious falsehood.

To sum up: I do not think that the petitioners have established a prima facie case against the respondents with reference to S A Breweries. I should add that, in respect to this claim, the petitioners do not rely on any evidence which was not available to them in 1991. It is significant therefore that, when instituting an action in 1991, they did not include any claim for damages in this regard.

THE "EMPTY PIPELINE" CLAIM

The pipeline to which this claim refers is explained as follows. In a business such as that of Knox D'Arcy, business opportunities are constantly generated, nurtured and eventually exploited. Normally, because a number of prospective customers are at different stages of development, prospective customers mature into actual customers at regular intervals. This is the pipeline. As a result of the respondents' unlawful conduct, it is contended, the petitioners' pipeline was empty whereas

otherwise it would have been full. The unlawful conduct complained of is itemised in the petitioners' heads of argument. Six items are mentioned. Among the most important are that the respondents poached the petitioners' employees; diverted business opportunities belonging to the petitioners; unlawfully interfered with the contractual relationship which existed between the petitioners and their employees; stole confidential documents belonging to the petitioners, used such documents and copied such documents; and unlawfully interfered with the contractual relationships existing between the petitioners and their customers.

As a result of this unlawful conduct, it is alleged, the petitioners suffered damages which amounted to at least R1 5 million. This the petitioners seek to prove by showing first that, in the 18 month period after the break between them and Jamieson cum suis, their income suffered a dramatic drop; and second, that Krestahague's income over

the same period corresponded to the loss which the petitioners claim they have suffered.

The empty pipeline claim seems to me to present formidable problems of proof. There is little particularity in the papers and it would be difficult to show a causal relationship between any unlawful act which may be proved and the general loss of income over a period. Indeed, in the founding affidavit in the 1991 application for an interdict the point was made that an interdict was necessary, inter alia, because any claim for damages against the respondents "would be extremely difficult to quantify". The claims in which there may be a prospect of showing that damage was caused by alleged unlawful conduct, namely the S A Druggists and S A Breweries claims, are not included in the empty pipeline claim. Moreover, in 1991 the petitioners obtained an interdict in respect of unlawful competition on the part of the respondents. This does not of course negative the possibility that damage may

have been suffered either before or after the granting of the interdict as a result of the unlawful conduct to which the interdict relates or other conduct, but the existence of the interdict must necessarily have reduced the possibility of damage. It is moreover significant that no claim for damages for an empty pipeline was included in the action instituted in 1991. while I cannot discount the possibility that some damages might be recoverable in respect of the empty pipeline I would, on the papers before me, regard the prospects as rather slim.

THE RESTRAINT OF TRADE CLAIM

In their petition the petitioners state:

> "Your Petitioners contend that they have proved that they had prima facie valid claims against the Respondents arising from the breach of the various restraints of trade undertakings, but for purposes of this petition, Your Petitioners have been advised that it is unnecessary to deal with such claims."

In the result no argument was presented in support of this claim. The facts are that Jamieson and Jones did not sign any restraint of trade agreement. The petitioners rely on

an informal agreement which is denied. Ottley was subject

to a restraint of trade but there seems to be no real evidence that he breached it. In the circumstances I need say no more about this claim.

THE CONDUCT SOUGHT TO BE INTERDICTED

The nature of the interdict sought by the petitioners is to prevent the respondents from concealing their assets. The petitioners do not claim any proprietary or quasi-proprietary right in these assets. It is conceded that the assets are the unencumbered property of the respondents. The interdict sought was therefore of an unusual nature. It is not the usual case where its purpose is to preserve an asset which is in issue between the parties. Here the petitioners lay no claim to the assets in question. They merely allege a general right to damages. Moreover, the conduct on the part of the respondents which is sought to be interdicted is prima facie lawful. It is therefore not surprising that both the name of the interdict and its

essential content have been the subject of some debate.

As far as its name is concerned, the petitioners referred to it as a Mareva-type interdict after the term used in English law. The court a quo did not like this name since the use of the English term might suggest that English principles are automatically applicable (see 1994 (3) SA at 705A to 7063) . I agree with this criticism. The alternatives suggested by Stegmann J were not, however, much more felicitous. Thus he referred to an interdict in securitatem debiti and an anti-dissipation interdict. The former expression may suggest that the purpose of the interdict is to provide security for the applicant's claim. This is not so. The interdict prevents the respondent from dealing freely with his assets but grants the applicant no preferential rights over those assets. And "anti-dissipation" suffers from the defect that in most cases, and certainly in the present case, the interdict is not sought to prevent the respondent from dissipating his

assets, but rather from preserving them so well that the applicant cannot get his hands on them. Having criticized the names used for the interdict I find myself unfortunately unable to suggest a better one. I console myself with the thought that our law has recognized this type of interdict for many years without giving it any specific name.

As to the nature of the interdict, this was dealt with by Stegmann J in 1994 (3) SA at 706B to 707B and in 1995 (2) SA at 591A to 600F. The latter passage was largely devoted to showing that it is not necessary for an applicant to show that the respondent has no bona fide defence to the action. This conclusion was not attacked before us and I agree with it.

What then must an applicant show in this regard? In the passages mentioned above Stegmann J quoted the relevant cases in our law and I do not propose dealing with all of them. For the most part they were decided on their own

facts without providing any theoretical justification for

the interdict. However, in Mcitiki and Another v Maweai

7973 CPD 684 at p 687 Hopley J stated the effect of earlier

cases as follows:

> "... they all proceed upon the wish of the Court that the plaintiff should not have an injustice done to him by reason of leaving his debtor possessed of funds sufficient to satisfy the claim, when circumstances show that such debtor is wasting or getting rid of such funds to defeat his creditors, or is likely to do so."

See also Bricktec (Pty)Ltd v Pantland 7 977 (2) SA 489

(T) at p 493E-G.

The question which arises from this approach is whether an applicant need show a particular state of mind on the part of the respondent, i e, that he is getting rid of the funds, or is likely to do so, with the intention of defeating the claims of creditors. Having regard to the purpose of this type of interdict the answer must be, I consider, yes, except possibly in exceptional cases. As I have said, the effect of the interdict is to prevent the

respondent from freely dealing with his own property to which the applicant lays no claim. Justice may require this restriction in cases where the respondent is shown to be acting mala fide with the intent of preventing execution in respect of the applicant's claim. However, there would not normally be any justification to compel a respondent to regulate his bona fide expenditure so as to retain funds in his patrimony for the payment of claims (particularly disputed ones) against him. I am not, of course, at the moment dealing with special situations which might arise, for instance, by contract or under the law of insolvency. In the judgment a quo Stegmann J dealt with this topic as a part of the enquiry whether the petitioners' claims for damages "will not be a satisfactory remedy in the absence of the interlocutory interdict in securitatem debiti" (1995 (2) SA at 637E-638C) . In my view this is not a correct way of looking at the matter. It is often said that an interdict will not be granted if there is another

satisfactory remedy available to the applicant. In that context a claim for damages is often contrasted with a claim for an interdict. The question is asked: should the respondent be interdicted from committing the unlawful conduct complained of, or should he be permitted to continue with such conduct, leaving the applicant to recover any damages he may suffer?

That is not the question which arises here. In the present circumstances there is no question of a claim for damages being an alternative to an interdict. The only claim which the petitioners have is one for damages. There is no suggestion that it could be replaced by a claim for an interdict. The purpose of the interdict is not to be a substitute for the claim for damages but to reinforce it -to render it more effective. And the question whether the claim is a satisfactory remedy in the absence of an interdict would normally answer itself. Except where the respondent is a Croesus, a claim for damages buttressed by

an interdict of this sort is always more satisfactory for the plaintiff/applicant than one standing on its own feet. The question of an alternative remedy accordingly does not arise in this sort of case. The interdict with which we are dealing is sui generis. It is either available or it is not. No other remedy can really take its place (except, possibly, in certain circumstances, attachments or arrests). The question here is purely whether, in principle and on authority, such an interdict should be granted in cases where the respondent is in good faith disposing of his assets, or threatening to do so, and has no intent to render the applicant's claim nugatory.

In view of the manner in which the present proceedings were brought it is however not necessary to pursue this matter further. The basis of the petitioners' claim as set out in the petition for leave to appeal and their heads of argument is that they have proved prima facie that the respondents had an intention to defeat the petitioners'

claims, or to render them hollow, by secreting their assets. It was common cause that if these facts could be proved, together with the other requirements for an interim interdict, the petitioners would have a good case, and for the reasons given above I agree with this approach. There was some argument on whether the fact that assets were secreted with the intent to thwart the petitioners' claim had to be proved on a balance of probabilities or merely prima facie. However, it seems to me that here also the relative strength or weakness of the petitioners' proof would be a factor to be taken into account and weighed against other features in deciding whether an interim interdict should be granted.

I turn now to the facts. At the outset I should briefly explain Krestahague's corporate structure. The fourth respondent, Krestahague International BV is a company registered in the Netherlands with an office in Switzerland. It operates in South Africa through the third

respondent, Krestahague International (Pty) Ltd. However, contracts with customers and staff are normally concluded with the Netherlands company. Krestahague states that they adopted this structure on the advice of a tax expert, Prof Spitz ("Spitz") because it provides them with certain tax benefits. This is confirmed on affidavit by Spitz. Moreover this structure enables Krestahague to pay its staff, many of whom are expatriates, outside the country. In the papers Knox D'Arcy contends that this structure was adopted for the purpose of spiriting money out of the country so as to defeat its claim. However, in argument before us counsel conceded that the original reason for the creation of this structure was to avoid tax - indeed, Knox D'Arcy has a similar structure. He contended however that the corporate structure facilitated the movement of money out of the country, and that the respondents made use thereof for the purpose of thwarting the petitioners' claim. For this purpose they relied mainly on the evidence

of Bos, to whom reference has already been made. The relevant parts of his evidence were as follows.

Bos is a business analyst. In about August 1991 while he was in France he was telephoned by Jones and offered employment by Krestahague which had started management consulting in South Africa in July 1991. Bos accepted the offer and came to South Africa. He was employed by Krestahague from 12 November 1991 until 10 December 1992 as business analysis manager. Bos was a member of the management committee for Krestahague from January 1992 and attended monthly management meetings which commenced in March 1992. The other members of the committee were Jones, Jamieson and Ottley. Jamieson concentrated mainly on sales whereas Jones was involved in running the business through Ottley.

The court case brought against Jamieson, Jones and Krestahague International (Pty) Ltd by Knox D'Arcy (i e, the 1991 interdict proceedings) was raised and discussed in

depth at the management committee meetings. To the best of Bos's recollection these discussions took place at the March, June and October management meetings. Ottley asked most of the questions with Jones providing the answers with some assistance from Jamieson. Jones stated that they would win the case but nevertheless the question was discussed of whether they should try to settle (obviously he must have been referring to the interdict action, which was then pending). Jones explained the plan was that by the time the matter eventually came to trial all their assets, including those of Krestahague, would be out of South Africa. They were delaying the trial as much as possible particularly until the work being done for SA Druggists had been completed so that this money could be shifted overseas. Once the cash was in their Swiss bank account it would be irrelevant whether or not Knox D'Arcy won.

It was against this background that it was stressed how imperative it was for all contracts to be in the name of Krestahague International BV. If the contracts were in the name of the South African company, Jones was concerned that the money might get stuck in South Africa and then Knox D'Arcy could get hold of it if Knox D'Arcy won the case. Indeed, Bos says, he believed that the contract for a project with Lennons Limited, a subsidiary of SA Druggists Ltd, had been negotiated in the name of the South African company to ensure that there would be money available locally for the operations of Krestahague in South Africa but that the Lennons contract was later changed to be with the Netherlands company to get as many assets as possible out of South Africa and Knox D'Arcy's reach. Thereafter there was a standard contract for all projects to be put into the Netherlands company. For the same reason it was decided that Krestahague would hire rather than purchase assets so as to avoid accumulating

assets in South Africa. Thus if Knox D'Arcy won

Krestahague could simply stop paying the rental and would

be left with no assets here. Bos concludes his evidence on

this aspect by saying:

> "Every time the matter came up it was regarded as a joke and Jamieson and Jones laughed at the fact that Knox D'Arcy would be spending all its money trying to win the case but that afterwards it would be a hollow victory for Knox D'Arcy as there would be no assets left in South Africa."

The respondents denied this evidence and mounted a furious attack on Bos's credibility. In this way a large number of collateral issues were raised with a disastrous effect on the bulk of the record. On the whole it is impossible to reach any conclusion on these issues on the papers before us. Nevertheless I have the gravest reservations about Bos's reliability.

First, his story seems most unlikely. The litigation to which he refers was for an interdict. The only financial liability which could arise from it was in respect of costs. The amount of such costs could not have

been large enough to cripple the respondents financially. They had started a new business in the middle of 1991. At the time of which Bos speaks, the respondents were building up a successful business and, according to the petitioners, were earning large amounts in profits from projects, particularly in the SA Druggists group. Jamieson, Jones and Ottley are able and experienced businessmen who would know that a failure to pay a judgment debt may lead to insolvency. In this case there can be no doubt that Knox D'Arcy would have liquidated or sequestrated the respondents if presented with a nulla bona return. This would have spelt the end of their new venture. Is it conceivable that, in these circumstances, they would have secreted their assets to avoid paying the relatively small amount of costs which may have been awarded against them? It was contended during argument that Krestahague might have been winding down its South African operation and that the respondents would not have minded if it were

liquidated. This contention was sought to be supported by allegations about the places of residence of Jones and jamieson. Again there are factual disputes on this issue, but the objective facts would seem to negative any intention to wind down. Thus the group had only started operations shortly before and was doing very well in 1992 when the alleged discussions took place. This good progress continued. A fact of which Knox D'Arcy made great play in other contexts was that Krestahague had a budget of R22 million in 1994 - hardly a company that was quietly going out of business.

During argument it was also suggested that the respondents' real fear was not the possibility of an award of costs in the interdict proceedings but a judgment for damages against them. There is nothing to support this suggestion. Bos clearly refers to the action already instituted. He does not say that the respondents contemplated the possibility of a further action for

damages. And such possibility must have seemed remote if it was considered at all. Although the petitioners at all times reserved their right to claim damages they had their opportunity to do so when the 1991 interim interdict was granted. At that stage they chose to sue only for an interdict.

It seems clear that Krestahague and Bos are at daggers drawn. After Bos left Krestahague's service he sued it for approximately R500 000 in respect of remuneration. He ultimately accepted R30 000 in settlement of his claim including costs. He has given conflicting reasons for settling at so small an amount.

There are other weaknesses in his evidence. Thus he says that at management committee meetings there were two other particular issues discussed. One was to get round the court order obtained by Knox D'Arcy interdicting Krestahague from dealing with certain companies, especially Makro and AECI. However, as will be recalled, these

interdicts were imposed only for a limited period. In March 1992, when these discussions were alleged to have commenced, the interdict in respect of AECI had already lapsed.

Also in March, when Bos says Krestahague was trying to get as much money as possible out of the country, Krestahague in fact brought in over a million rand from overseas to finance the local operation. Bos's allegation that the contract with Lennons was changed to introduce a new contracting party was denied by the respondents. They aver that the contract was always with the Netherlands company. Although the contract was not attached to the papers the respondents would hardly lie about something like this which is easily verifiable.

In all these circumstances it seems, on the papers, that there must be a grave doubt whether Bos's evidence will be accepted in preference to that of the respondents.

The petitioners have also attempted to show that the financial information supplied by the respondents confirmed their suspicions that money was being secreted. In terms of an amendment effected to the court order on 20 May 1994 the interdict was policed by monitoring auditors. There would accordingly not, on the face of it, have been many opportunities for irregularities. Nevertheless the petitioners were not satisfied with certain aspects. In particular they considered that the cash flow disclosed by the respondents was understated. In addition they were dissatisfied with the information about the funding of Krestahague's operations in the United Kingdom.

It is difficult to draw any inferences purely from the information on the papers. The respondents were not ordered by the interdict to make a full disclosure of their financial affairs to the petitioners or to the court and they have not done so. Without accurate information about their income and expenditure it is impossible to determine

whether their cash flow should have been higher or not. Prima facie the monitoring auditors should have spotted any serious deficiency.

In view of the above circumstances the petitioners' contention that they have proved an intention on the part of the respondents to frustrate any judgment against them by secreting their assets rests on very flimsy grounds.

In argument the petitioners contended in the alternative that they were entitled to the interdict even if the respondents had acted in good faith. The contention is that the respondents' business set-up was such that profits were earned by the Netherlands company. This resulted in money earned in this country being sent overseas, which rendered it likely that there would be no assets to attach in South Africa if a judgment were to be obtained against the respondents. As I stated above, there may be exceptional circumstances in which even a bona fide disposition of assets may be interdicted, but in my view

this is not that sort of case. First, this was not the petitioners' case on the papers. There they pinned their colours to the mast of the intentional secreting of assets. But, in any event, the facts of this case do not require that the respondents should be interdicted from dealing with their own assets. The respondents have a corporate structure which results in money leaving this country. They adopted this structure for good business reasons and, on the assumption underlying this contention, are using it in good faith for that purpose. No authority in our law has been quoted in support of the petitioners' contention that an interdict may be granted in a case like this nor could I find any. In English law, which, it would seem, inspired the application in the present case, a Mareva injunction would not be available in a case like the present. As was stated in Polly Peck International plc v Nadir and Ocners (No 2) [1992] 4 All ER 769 (CA) at p 785g-h:

"It is not the purpose of a Mareva injunction to prevent a defendant acting as he would have acted in the absence of a claim against him."

THE APPLICATION TO LEAD FURTHER EVIDENCE

It will be convenient to deal with this matter now.

At the hearing of this petition the petitioners applied to

' lead further evidence on affidavit. The application was

refused and we intimated that reasons would be given later.

The reasons now follow.

The new evidence sought to be introduced should be

seen against the following background. The fourth

respondent, it will be recalled, is registered in the

Netherlands. It was registered as an external company in

South Africa only in September 1993. Bos says this was

done because of a dispute whether the court had

jurisdiction in a case brought by the Netherlands company

against Bos and others, and that prior to that the

respondents had no intention of registering it in South

Africa. This statement by Bos is not denied. On the

papers there is no suggestion that this registration as an external company ever came to an end.

The new evidence was the following. On 16 March 1994 the directors of the Netherlands company (being Jamieson, Jones and one Pessers) resolved:

> "THAT since the company has not carried on any commercial business since its incorporation and does not intend carrying on business in the future the Registrar of Companies be asked to strike the company from the register in terms of Section 73 (5) of the Companies Act, 1973."

In a statement to the Registrar of Companies in terms of the said sec 73 (5) the same three persons repeated the substance of what was said in the resolution and added that the company had no assets and no liabilities. They consequently asked for the deregulation of the company, which was duly granted.

In Oolman v Dunbar 7933 AD 747 at p 161-3 Wessels CJ dealt with the guiding principles upon which applications to lead further evidence on appeal may be granted. Among them is the following, numbered 3 (at p 162):

> "The evidence tendered must be weighty and material and presumably to be believed, and must be such that if adduced it would be practically conclusive, for if not, it would still leave the issue in doubt and the matter would still lack finality."

See also Simpson v Selfmed Medical Scheme and Another 1995 (3) SA 676 (A) at p 825D.

What is the relevance of the new evidence tendered?

The petitioners conceded that the deregistration of the Netherlands company as an external company in South Africa did not destroy its corporate personality (see Meskin, Henochsberg on the Companies Act, 656). They contended that it was not so much the deregistration that was important, but the statements made by Jamieson and Jones that the company was not carrying on business, and did not have assets and liabilities. Presumably these statements related to the company's situation in South Africa. Even on that basis, the petitioners' counsel contended, the statement contradicted the respondents' case. This may be true, but where does it take us? There was no dispute

between the parties about what precisely the Netherlands company's role was in the respondents' corporate set-up. It was common cause that contracts with customers were concluded in the name of the Netherlands company and that fees were remitted to it. The only issue was what the purpose was in doing so. The respondents said it was for bona fide business reasons. The petitioners said it was for the purpose of secreting the petitioners' assets. How does a statement, even if incorrect, that the company was not carrying on business in South Africa and had no assets or liabilities here, bear upon that issue? The statement seems to be inconsistent with the admitted facts, and therefore of no assistance to either party, except perhaps in respect of credibility. And a court would certainly not allow evidence on appeal which, in motion proceedings, raised a collateral issue which would require further investigation and which could at most have some bearing on the credibility of some of the parties. The application to

lead further evidence was accordingly refused.

The question of costs was reserved for later decision. In my view the ordinary rule should apply, and the petitioners should be ordered to pay the costs of the application to lead further evidence.

OTHER CONSIDERATIONS IN DECIDING ON AN INTERDICT Up to now my conclusion has been that the petitioners' claim for damages is, on the papers, insubstantial, and that they have not shown conduct on the part of the respondents which would warrant the grant of an interdict of the sort with which we are dealing. In these circumstances I need hardly consider any other requirements for an interdict. As I have said, I do not think there is any question in the present case of a possible alternative remedy. If the petitioners had shown a fairly strong case for the payment of damages and for the proposition that the respondents were secreting their assets with the intent to thwart the damages claim, the balance of convenience might

have played a role. On the facts of this case it hardly seems to arise. In the judgment a quo Stegmann J also dealt with certain "equitable considerations" which influenced him in discharging the rule nisi. (See 1995 (2) SA at 639G to 640J). I have already dealt with the "discretion" exercised in interdict matters. The considerations relied upon by the learned judge a quo bear upon matters such as the balance of convenience and the bona fides of the claim for an interdict. To that extent at least I agree that he was entitled to have regard to them.

THE REPLYING AFFIDAVITS

The petitioners were late in filing some of their replying affidavits. Moreover, some of them introduced new matter. The respondents objected to these affidavits. The court a quo allowed some of the contested affidavits and refused others. The respondents were allowed to lead further evidence in some respects. The petitioners argued

before us that the court a quo was wrong in refusing to accept a number of these affidavits. I have considered these affidavits and in my view their introduction would have made no difference to the outcome of this case. I consider therefore that Stegmann J was correct in excluding them.

THE PROCEDURE FOLLOWED IN THIS CASE

The argument before us was confined to the merits of Stegmann J's judgment and did not advert to the procedure adopted when the ex parte application was heard. Nevertheless I believe that some reference should be made to it even if it is not strictly necessary for the purposes of this judgment. In his reasons for granting an interim interdict in the present case Stegmann J said (1994 (3) SA at 707J to 708A):

> "The making of an order which affects an intended defendant's rights, in secret, in haste, and without the intended defendant having had any opportunity of being heard, is grossly undesirable and contrary to fundamental principles of justice. It can lead to serious abuses and oppressive orders which may

> prejudice an intended defendant in various ways, including some ways that may not be foreseeable."

I agree entirely with these comments, and would add that the procedure adopted is even more objectionable if the applicant's case rests largely on untested hearsay. While it is probably not correct to say that an application of this sort should never be heard in camera and without notice to the respondent (cf S-hoba v Officer Commanding, Temporary Police Camp, Magendrift Dam and Another 7995 (4) SA 1 (A)) I consider that this should happen only in very clear cases where justice cannot be served otherwise than by depriving the respondent of his right to be heard. In the nature of things such cases would be exceptional.

Where, exceptionally, the powers to issue an order in this way are exercised, the following warning by Stegmann J is apposite (1994 (3) SA at 708B-D):

> "The exercise of such powers must be attended with due caution; with all practical safeguards against abuse; and with a careful attempt to visualise the ways in which the order may prove to be needlessly oppressive to the intended defendant. Consideration must also be

> given to the manner in which the order may interfere with the rights and obligations of third parties, such as banks or other debtors of the intended defendant, or other custodians of the intended defendant's assets. Both the oppressiveness of the order to the intended defendant and its interference with the rights and obligations of third parties must be kept to the minimum ..."

COSTS IN THE COURT BELOW

When discharging the rule nisi Stegmann ordered the petitioners to pay the respondents' costs. This order was attacked before us. On behalf of the petitioners it was contended that the costs should have stood over for determination at the trial. The same contention was advanced in Goldsmid's case, supra, at p 446. There the court said:

> "When an application for an interim interdict is refused, the general rule is to refuse it with costs. There may, however, be circumstances which would justify a Court in not granting costs against the applicant, but in allowing costs to abide the result of the action if it be instituted within a certain period. But those circumstances are exceptional ...".

The petitioners referred us further to the full bench decision of EMS Belting Co of SA (Pty) Ltd and Others v

Lloyd and Anotner 1983 (1) SA 641 (E).That case dealt with the grant of an interim interdict. In such a case, it was held at p 644H, there are sound reasons for not granting the costs pendente lite to a successful applicant in the absence of exceptional circumstances. The passage continues (p 644H):

> "While it can be said that such an applicant has achieved substantial success, such success is of a limited and temporary nature, often based upon a balance of convenience, and even despite a serious dispute of facts on the papers. It is implicit in an order granting a temporary interdict that such order, and the relief consequent thereon, will fall away should the applicant be unsuccessful in the trial. It would, in such a case, be unjust to compel the defendant in the trial to bear the costs of an interdict to which the plaintiff may subsequently be shown to have been not entitled."

The position of a successful respondent, it seems to me, is essentially different, particularly in a case like the present. The respondents have successfully resisted an application for an interdict. Whatever happens at the trial, this situation will not be reversed. And even though the trial might show that certain aspects of the

petitioners' case was stronger than disclosed by the papers before us, many of the features relied upon by the judge below, and by us, for refusing an interdict will not as such be issues at the trial, and need not be reconsidered. I consider therefore that the order for costs in the court a quo was correct.

CONCLUSION

For the reasons set out above I conclude (a) that the order of the court below was a "judgment or order" in terms of the Supreme Court Act, but (b) that leave to appeal was correctly refused on the ground that the petitioners have no reasonable prospect of success on appeal. This conclusion should normally result in a costs order in favour of the respondents. Mr Cohen argued that such an order should be granted on the attorney and client scale. I do not agree. An order for attorney-client costs might have been appropriate in the court below - the judge a quo refused it, and his decision was not taken on appeal.

There was however nothing in the nature of the appeal or its prosecution which would warrant a departure from the ordinary costs order.

ORDER The petition for leave to appeal is dismissed with costs, including the costs of the application to lead further evidence and the costs pertaining to the appeal itself. The costs of two counsel are to be allowed throughout.

E.M. GROSSKOPF

JUDGE OF APPEAL

NESTADT JA] CONCUR

F H GROSSKOPF JA]

HARMS JA]

SCOTT JA]

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