

**IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA**

**REPORTABLE
CASE NO 392/2004**

In the matter between

<u>V & A WATERFRONT PROPERTIES (PTY) LTD</u>	First Appellant
<u>VICTORIA AND ALFRED WATERFRONT (PTY) (LTD)</u>	Second Appellant

and

<u>HELICOPTER & MARINE SERVICES (PTY) LTD</u>	First Respondent
<u>THE HUEY EXTREME CLUB</u>	Second Respondent
<u>THE SOUTH AFRICAN CIVIL AVIATION AUTHORITY</u>	Third Respondent

CORAM:	HOWIE P, ZULMAN, NUGENT	JJA, COMBRINCK	ET
	CACHALIAAJJA		

Date Heard: 15 August 2005

Delivered: 26 September 2005

Summary: Requirements for final interdict – meaning of ‘injury’ in phrase ‘injury ... committed or reasonably apprehended’ – includes invasion of contractual right.

J U D G M E N T

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[1] The issue in this case is whether all the well-known requirements for final interdict relief were met.

[2] The first appellant company, through its managing agent, the second appellant company, lets various commercial properties at the Cape Town harbour waterfront. One of them is a helicopter landing site ('the premises'). The other party to the lease of the premises is the first respondent company. It owns and operates helicopters, including one originally used in the Vietnam war and known in the relevant flying fraternity as a 'Huey' ('the helicopter'). The first respondent's sole director is also chairman of the second respondent, The Huey Extreme Club, a juristic person, to which the helicopter is made available and whose members fly it recreationally. The first and second respondents' respective activities in operating the helicopter are conducted at and from the premises.

[3] In January 2004 The South African Civil Aviation Authority, the third respondent, issued and served an order, in terms of the Civil Aviation Regulations promulgated under the Aviation Act 74 of 1962, grounding the helicopter until the airworthiness of the aircraft could properly be assessed by its officers.

[4] When it was intimated on behalf of the first and second respondents that the grounding order would be ignored the appellants applied in the High Court at Cape Town for an order that the respondents

‘Be interdicted and restrained from operating the helicopter ... from the (premises) pending the upliftment of (the) grounding order ...’.

The matter came before Comrie J who dismissed the application and refused leave to appeal. The appellants appeal with the leave of this Court. The third respondent has taken no part in the appeal and abides the court’s decision. For convenience I shall refer to the first and second respondents as ‘the respondents’ and to the third respondent as ‘the Authority’

[5] The Court below considered that the grounding order had, for present purposes, to be regarded as valid and that the first appellant had a clear right to insist that the respondents complied with it for as long as it stood. The court nevertheless found that, relief having been sought in final form, and in the face of a deposition on behalf of the respondents that the helicopter was, and remained, at all relevant times, airworthy, the appellants had failed to establish that they had a reasonable apprehension of harm.

[6] The lease contains two provisions which are material now. In the first the lessee undertook to comply strictly with the regulations and rules of, *inter alia*, the third respondent.¹ The second forbade contravention by the lessee of any statutory

¹ Clause 6.3.5.1 reads: The Lessee shall be obliged to obtain and maintain for the duration of this lease including any renewal thereof, the requisite licences and all the necessary approvals from inter alia the Department of Transport, The South African Civil Aviation Authority, The Port Captain and any other Authority who may require approval for the operation of a helicopter landing site. The Lessee undertakes to strictly comply with the regulations and rules of such authorities.

regulations relating to or affecting the carrying on of the lessee's business in the premises.²

[7] Operation of the helicopter would necessarily involve taking off and landing at the premises and constitute an activity within the course of first respondent's business. Such operation would conflict with the grounding order. That order was empowered by, or itself constituted, 'regulations and rules' of the third respondent. Furthermore, the order was founded on statutory regulations which bore on the operation of the helicopter. Consequently the regulations, through the order, affected the carrying on of the business at the premises in so far as operation of the helicopter was concerned.

[8] Therefore, if the grounding order has, for present purposes, to be regarded as valid, the respondents' threatened operation of the helicopter entailed a threat to infringe the appellants' rights under the lease provisions referred to.

[9] For the respondents it was alleged in the opposing affidavit, and urged before us, that the grounding order was the product of reviewably irregular and thus unlawful administrative action. It was therefore argued that the order was invalid and that disregard of it would not be unlawful and could not constitute breach of the lease.

²Clause 6.8 contains the following: 'The Lessee shall not contravene (or permit the contravention of) any law, bye-law, statutory regulations or the conditions of any licence relating to or affecting the occupation of the Premises or the carrying on of the Lessee's business in the Premises, ...'

[10] The defence which the respondents sought to raise in this respect has sometimes been called ‘collateral challenge’. Its applicability was examined and explained by this court in *Oudekraal Estates Pty Ltd v City of Cape Town and Others*.³ In brief, it is applicable in proceedings where a public authority seeks to coerce a subject into compliance with an unlawful administrative act.⁴ If these proceedings are not of that nature then the grounding order will have legal effect until set aside by a reviewing court.

[11] The argument for the respondents was that the application in this case was really brought by the appellants on the Authority’s behalf and that the latter sought to coerce the respondents to comply with the allegedly invalid grounding order. I disagree. The third respondent was joined at its own request in the court below and an answering affidavit was deposed to on its behalf by its Senior Manager: Airworthiness. The affidavit did not canvass the procedural and unfairness issues encompassed by respondents’ review grounds but focused on the merits of the grounding order. In addition, the deponent declared that the third respondent abided the High Court’s decision and offered its testimony to assist the court in determining the issue between the appellants and the respondents.

[12] In support of the respondents’ argument reliance was placed on a letter from the Authority to the second appellants Property Area Manager. It was written two

³2004 (6) SA 222 (SCA)

⁴At 244 C-D

days after the grounding order. Having referred to the order, the writer requested that the second appellant refuse access for the helicopter's operation from the premises. The submission for the respondents was that this indicated that the Authority was in truth the applicant.

[13] While it is understandable that the Authority would want to invoke the appellants' assistance in combating what it regarded as unlawful operation of the aircraft, neither the Authority's joinder nor its letter just referred to advance the respondents' case. Quite without the need for any reliance on the reasons for the grounding order, or the Authority's joinder for that matter, the appellants were entitled entirely on their own account to take legal action against the respondents. They could do so not to enforce the grounding order but to enforce the lease. It is not adverse to them that the terms of the interdict sought were aimed at compliance with the grounding order with no mention of the lease. Had the interdict merely demanded compliance with the relevant lease provisions it would not have been specific enough. Moreover compliance with the grounding order was necessary to achieve compliance with the lease.

[14] In addition nothing justifies the conclusion that the proceedings amounted in reality to an attempted enforcement by the Authority against the respondents or an endeavour by them to review the Authority. Neither in form nor substance was the

case geared to address those questions which needed to be resolved if the central issue for decision was the validity of the grounding order.

[15] In the circumstances the proceedings *a quo* were not such that the defence of collateral challenge was available. The grounding order therefore had to be regarded as valid. The consequence is that its infringement by the respondents would have brought about a breach of the lease if indeed the first respondent bore the obligations of lessee.

[16] The respondents sought to argue that the first respondent had the rights of lessee but none of the obligations. Reliance was placed in this regard on the relevant contractual documentation which, it was contended, supported this submission.

[17] What the papers reveal is that initially the premises were leased by the first appellant to CHC Helicopters (Africa) Proprietary limited. Later, that lessee's rights and obligations were assigned to Wealth International Network Proprietary Limited. Later still, the current lease documentation was signed. The signatory parties were the first appellant as lessor and the first respondent, the latter being specifically referred to throughout the signed document as 'the tenant'. In badly drawn but nonetheless understandable preambles to the signed document it was recorded that the first appellant and Wealth International Network had entered into a new lease 'on the same terms and conditions' as before and that Wealth

International Network had ‘ceded and assigned its rights under the lease’ to the first respondent. It was this last reference to rights but not obligations which prompted the argument.

[18] The contention overlooks that in legal parlance ‘assignment’ normally means the transfer of both rights and obligations but that its interpretation is in any event dependent on context.⁵ If use of ‘assigned’ in addition to ‘ceded’ is not enough to indicate the transfer of more than rights, the context makes it unarguably clear that the first respondent assumed not only the rights of lessee but the obligations as well.

[19] It follows that the respondents’ threat to ignore the grounding order amounted at the same time to a threat to breach the lease.

[20] The respondents contended nevertheless that breach did not constitute ‘injury’ for purposes of the second essential requirement for final interdict relief which was expressed in the classic formulation as ‘injury actually committed or reasonably apprehended’.⁶ The argument was that ‘injury’ in that phrase had necessarily to entail physical harm or pecuniary loss. The appellants had consequently to show, so the contention proceeded, that the helicopter was unairworthy and that its operation involved risk to life and property.

⁵ *Simon NO v Air Operation of Europe AB and others* 1999 (1) SA 217 (SCA) 228I

⁶ *Setlogelo v Setlogelo* 1914 AD 221, 227.

[21] The argument is founded on neither authority nor principle. The leading common law writer on the subject of interdict relief⁷ used the words ‘eene gepleegde feitelijkheid’ to designate what is now in the present context, loosely referred to as ‘injury’. The Dutch expression has been construed as something actually done which is prejudicial to or interferes with, the applicant’s right.⁸ Subsequent judicial pronouncements have variously used ‘infringement’ of right⁹ and ‘invasion of right’.¹⁰ Indeed, the leading case *Setlogelo*¹¹ was itself one involving the invasion of the right of possession. Of course it is hard to imagine that a rights invasion will not be effected most often by way of physical conduct but to prove the necessary injury or harm it is enough to show that a right has been invaded. The fact that physical means were employed or physical consequences sustained is incidental.

[22] In the present case therefore the threatened invasion of the first appellant’s rights under the lease constituted proof of reasonably apprehended injury. It was not necessary for the appellants’ success to show that the helicopter was unairworthy or what the chances were of a fatal or destructive crash.

[23] Coming to the third and final requirement, the respondents submitted that an interdict was not the only appropriate remedy. It was said that the first appellant

⁷Van der Linden, *Judicieele Practijc* 2 19 1; *Koopmans Handboek* 3 1 4 7.

⁸*Blackburn v Krohn* (1855) 2 Searle 209, 211; *Bok v The Transvaal Gold Exploration and Land Co* (1883) 1 SAR 75, 76.

⁹*Rossouw v Minister of Mines and Minister of Justice* 1928 TPD 741, 745.

¹⁰*Von Molkte v Costa Areosa (Pty) Ltd* 1975 (1) SA 255 (C), 258D

¹¹1914 AD 221.

could sue for damages or cancel the lease. This argument cannot prevail. The first appellant is entitled to enforce its bargain: to obtain the lessee's promised rental while preventing the latter from conducting itself in a manner that involves breaking the law. The only ordinary remedy which provides it with the necessary protection is an interdict. Cancellation would be quite the opposite of that to which the first appellant is entitled. And damages would be difficult to prove if possible to prove at all. Lessors of commercial complexes stipulate for provisions like those in issue because they want, understandably, to maintain the standing or repute or safety or appeal of their properties. However, whether a particular lessee's contraventions of the law, and consequent breaches of its lease, have led to financial loss because aspirant or even existing tenants do not want, in view of the contraventions, to be involved in the complex, could be exceedingly problematic to prove.

[24] For these reasons the application in the court below should have succeeded and the appeal must succeed.

[25] It remains to mention that a good deal of time was devoted in the appeal to the question whether the appellants were, by interdict proceedings, really seeking contractual relief in the form of specific performance and, if so, whether they needed to fulfil the requirements for a final interdict. In reliance on the views of Professor RH Christie *The Law of Contract*, 4th ed, 618-9, they argued that there

was no such need. One may indeed say that had the prayer expressly been for specific performance many of the same issues may have arisen as have arisen. However, an interdict having been sought, and the requirements for it having been met, it is unnecessary to decide whether the appellants' argument was right.

[26] The following order is made:

1. The appeal is allowed, with costs, including the costs of two counsel.
2. The order of the court a quo is set aside and substituted for it is the

following order:

- '(1) That the first and second respondents be interdicted and restrained from operating the Bell helicopter, registered as ZU-CVC-B205 UH 1 H, from the helipad situated at Building 200, Breakwater East Pier, V&A Waterfront, Cape Town pending the upliftment of a grounding order issued by the South African Civil Aviation Authority on 7 January 2004;
- (2) The first and second respondents are ordered, jointly and severally, to pay the first and second applicants' costs, such costs to include the costs of engaging two counsel.'

CONCURRED:

ZULMAN JA

NUGENT JA

COMBRINCK AJA

CACHALIA AJA