

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 25718/2012

(1)	<u>REPORTABLE: NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES</u>
(3)	<u>REVISED: YES.</u>
23 July 2013	
DATE	SIGNATURE

In the matter between :-

UNIPLATE GROUP (PTY) LTD

Applicant

and

NEW NUMBER PLATE REQUISITES CC

Respondent

In re the application for leave to appeal between :-

NEW NUMBER PLATE REQUISITES CC

Applicant

and

UNIPLATE GROUP (PTY) LTD

Respondent

JUDGEMENT : APPLICATION FOR LEAVE TO APPEAL

Coram : BESTER, AJ:

1. The main and counter applications in this matter served before me on 15 October 2012, in the last week of my acting appointment.

2. A written judgement signed by me on 28 October 2012, was handed down on 5 November 2013.
3. Before I deal with the application itself, an apology is necessary :-
 - 3.1. On a re-reading of my written judgment in preparation for this hearing, it was apparent that between the settling of the first draft of the judgment and its retyping, a number of inconsequential typographical and grammatical errors had escaped my attention – for those errors I apologise.
 - 3.2. On 12 February 2013, I received a telephone call from Mr P Bester (no relation), attorney for New Number Plate Requisites CC (“NNP”), who informed me that NNP had lodged an application for leave to appeal my judgement was filed as far back as 21 Nov 2012. He enquired when the application would be heard. That telephone call was my first notification that an application for leave to appeal had been lodged. At my request, attorney Bester e-mailed to me a copy of the application.
 - 3.3. After that telephone call, I immediately e-mailed senior counsel who had argued the application for NNP and Uniplate Group (Pty) Ltd. (“Uniplate”) and informed them that, although I was recuperating from surgery and booked off until 9 April 2013, I would hear the application on any date in February or March. I requested of them to let me have about four dates on which all parties would be available for the hearing so as to enable me to arrange an enrolment of the application through the office of the Deputy Judge President.
 - 3.4. Senior counsel for NNP confirmed by e-mail on 13 February 2013, that he would discuss dates with his counterpart and would revert with proposed dates as soon as possible. I heard nothing further from counsel and assumed that the application had been withdrawn or that the matter had settled.

- 3.5. My assumption was incorrect, as on 15 May 2013, I received another call from attorney Bester again enquiring when the application would be heard. I informed him that I had requested dates from counsel as far back as February 2013, but had heard nothing further from them and had therefore assumed that the application had been withdrawn or settled. Attorney Bester undertook to take the matter up with his counsel and revert.
- 3.6. By 31 May 2013, I had again heard nothing further. Therefore, on 31 May 2013, I telefaxed the Honourable Deputy Judge President, informed him of these delays and asked that the application be set down for hearing at 9:30 AM on Monday, 10 June 2013, and that the parties be notified of the set-down. Receipt of the telefax was not acknowledged.
- 3.7. On 7 June 2013, I sought confirmation from the office of the Deputy Judge President that the application had indeed been enrolled for hearing and again e-mailed senior counsel to notify them that I was seeking such confirmation.
- 3.8. The application was, however, not enrolled as requested.
- 3.9. Thereafter, Advocate Botha for NNP arranged a date for the hearing with all parties and succeeded in achieving an enrolment for 23 July 2013.
- 3.10. The failure to resolve the application for leave to appeal is undoubtedly lamentable and ought to have been avoidable. However, because acting judges do not, after completion of their acting stints, have the benefit of direct and ongoing communication with the court and registrars about matters heard by them, failures such as that sketched above, occur. The procedures relating to the administration of applications for leave to appeal the judgements of acting judges may therefore require a re-visitation to ensure that

litigants receive their deserved expeditious hearing of disputes and particularly of their applications for leave to appeal.

3.11. In as much as I had unwittingly contributed to the delay in the hearing of this application by not myself immediately setting in motion the wheels for the enrolment and hearing of this application in February 2013, and by assuming, erroneously, that the matter had resolved itself, I also apologise.

4. To return to the application for leave to appeal, the obvious question is whether the interim order granted by me is appealable. First, however, some background :-

4.1. Uniplate, the applicant in the main application and the respondent in this application sought, in its Notice of Motion, final or interim interdict relief against NNP, the respondent in the main application and the applicant in this application. The alternative interim relief was sought pending the finalisation of an action to be instituted by Uniplate against NNP within 30 days of the granting of this Order.

4.2. The relief sought was founded in an alleged unlawful competition and more specifically, the alleged unlawful and intentional interference with contractual, vertical tie-in relationships created between Uniplate and its customers by Uniplate's standard customer rental agreement. That agreement precluded certain trade between Uniplate's customers and third parties such as NNP. NNP, therefore, so the complaint went, sought to precipitate a breach by these customers of their agreements so as to free them up to trade with NNP. Uniplate therefore sought interdict relief against NNP to restrain such conduct.

4.3. In its opposing papers in the main application, NNP attacked the validity of the agreements on two grounds. These grounds are conveniently summarised in NNP's notice of application for leave to appeal :-

- 4.3.1. The agreements are contrary to public policy. Therefore, to prevent NNP from interfering with them would be contrary to public policy (referred to in the notice as "*the public policy issue*"). (Stated differently, what NNP contends in its notice is that it is not unlawful for a *third party* to interfere with, and to encourage the breach of contract between two other contracting parties where that contract is alleged, not by a contracting party, but by that third party to be unenforceable on public policy grounds - an extraordinary notion indeed, but more on that below);
- 4.3.2. The agreements are anti-competitive under the Competition Act, 89 of 1998, ("the Act") in that certain exclusivity provisions in them are prohibited and/or liable to be declared void, having regard to sections 5(1) and 8(1)(a), (c) and (d) of the Act (referred to in the notice as "*the competition law issue*").
- 4.4. In a counter application, NNP therefore sought a stay of the relief sought by Uniplate in the main application pending a referral of the competition law issue to the Competition Tribunal in terms of section 65(2)(b) of the Act.
- 4.5. At commencement of argument on the day of the hearing of the main and counter applications, I was informed by Uniplate's counsel that Uniplate accepts that the competition issue must be referred to the Tribunal and that it would therefore seek only interim interdict relief pending that referral.
- 4.6. On behalf of NNP it was there contended that a crucial issue in the determination of the application and counter-application is the enforceability of the agreements and, in particular, the exclusivity provisions in them. The agreements, it was further contended, not only contravene the mentioned sections of the Act; they are also

contra bonos mores under the common law and therefore unenforceable.

- 4.7. During debate at the hearing of the main and counter applications it became apparent that counsel for the parties were in agreement that there is a substantial confluence between the principles underlying the mentioned sections of the Act and those of the common law relating to unlawful competition. Therefore, for the purposes of the interim interdict relief sought, much of the argument at the hearing of the application was focussed on the judgment of Spilg J in **Erf 179 Bedfordview (Pty) Ltd v Bedford Square Properties (Pty) Ltd** 2011 JOL 27160 (GSJ) and whether, in view of section 65(2)(b) of the Act, an enquiry into conduct allegedly prohibited under the Act is at all permissible and whether the interim relief sought, is available to Uniplat in this court.
5. In my judgement I held that, if the judgment in **Erf 179 Bedfordview** is taken to its logical conclusion, then a High Court may, for the purposes of establishing a *prima facie* right for the purposes of interim relief, consider whether or not a provision in an agreement is *prima facie* valid or not. But it can do no more, for then it would infringe on the exclusive jurisdiction of the Competition Tribunal or the Competition Appeal Court. In my judgment I also held that, on my reading of Spilg J's reasoning, his judgment is authority for the proposition that, irrespective of section 65(2) and having found *prima facie* that a contract was valid, a High Court may grant interim relief (pending a referral to the Competition Tribunal) in order to maintain a status quo. I further held that, contrary to the position in the case heard by Spilg J where the right was *res iudicata*, that *prima facie* right must in this case be shown before I could issue an interim interdict.
6. These findings are not attacked in NNP's application for leave to appeal and were not criticised at the hearing of this application; on the

contrary, counsel for NNP, in an eloquently delivered address, submitted that they were correct. NNP therefore, it seems to me, is in agreement with my finding that interim interdict relief in this court, pending the referral and final resolution of the competition issue, is not precluded under the Act.

7. The immediate question is therefore whether or not the interim interdict handed down order in paragraph (b)(i) of my order is appealable.
8. NNP contends in paragraphs 1.4 and 1.5 of its notice of application for leave to appeal that I had erred by “*not referring the matter to trial as prayed by Uniplate*” but by simply postponing the main application for final relief *sine die* pending the final determination of the Competition issue. In the premises, NNP contends further in that notice that I had erred in “*finally determining the public policy issue since the final relief sought (sic) is not subject to a trial or any other procedure relating to the public policy issue but only the competition law issue*”. (I accept that what NNP here meant to contend, was that “the interim relief handed down is not subject to the final resolution of a trial or any other procedure relating to the public policy issue but only subject to the final resolution of the competition law issue”.)
9. NNP then contends in its notice that my order is final in effect since it :-
 - 9.1. disposes of at least a substantial portion of the relief claimed in the main proceedings;
 - 9.2. is intended to and does have an immediate effect and is not susceptible to be reconsidered on the same facts in the main proceedings;
 - 9.3. effectively usurps the role of the court granting the final order in the application by making it dependent only on the finding of the Competition Tribunal.

10. Finally, NNP contends that is in the interests of justice that it should be granted leave to appeal against part (b) of my order (sic, I assume that NNP meant to refer to part (b)(i) of my order).
11. In my judgment, I made the following order:-
 - “(a) The issue as to whether Uniplate’s standard agreement concluded with its customers, an example of which is attached to Uniplate’s founding affidavit as Annexure "NPC–2", alternatively the issue as to whether the exclusivity provisions in that agreement is to be prohibited or declared void in terms of the Competition Act, 1998 (“the Act”) is referred to the Competition Tribunal to be considered on the merits in terms of section 65 of the Act;
 - (b) Pending the final determination of the issue so referred :-
 - (i) NNP is interdicted and restrained from unlawfully and intentionally interfering with Uniplate’s contractual relationship with its customers by soliciting, inducing and persuading and by attempting to solicit, induce or persuade any of such customers to sever and/or in any manner whatsoever to breach their agreements with Uniplate;
 - (ii) Uniplate’s main application for final interdict relief under case number 25718/2012 is postponed sine die;
 - (c) The costs of this application will stand over for final determination when Uniplate’s main application for final relief is heard.”
12. As pointed out above, the alternative interim interdict relief was sought pending the finalisation of an action to be instituted by Uniplate against NNP within 30 days of the granting of this Order.
13. However, after preparation of my judgment and when considering the form of the order, it appeared to me that, if the referred competition issue, after wending its laborious way through the competition law

processes to finality, succeeds, the operative or crucial parts of the agreement relied upon by Uniplate to maintain its control over its contracting partners would be struck down, thus effectively rendering moot whatever dispute Uniplate might have with NNP about its attempts to precipitate a breach of those agreements in order to leave Uniplate's contracting partners free to do business with NNP instead. However, if I directed Uniplate to institute action for final relief within 30 days of my order, NNP would no doubt again have had to plead a stay of the action on the same grounds raised in the main application. It would of course also have had to plead over on the merits. If NNP did not plead a stay of that action pending the final resolution of the competition issue, the action might inexorably have progressed to the allocation of a trial date and a hearing of the action well before the competition issue had achieved to finality. Despite the fact, therefore, that Uniplate had in its Notice of Motion sought interim relief pending the institution of an action for final relief it would in my view have been, if not absurd, then certainly extremely wasteful from a costs and court resources perspective to do so.

14. On the flip-side of the coin, if the competition issue ultimately fails, then the final relief sought in the main application and NNP's opposition thereto would be squarely back in play - *sans* NNP's competition law points raised in opposition, of course.
15. Hence, in terms of paragraph (b)(ii) of my order, I postponed Uniplate's main application for final interdict relief *sine die*. If the competition issue fails, then, no doubt, the main application may and will be re-enrolled for the hearing of Uniplate's application for final relief on the same facts that served before me. When that application is heard, NNP will be at large to oppose the final relief on the basis of its public policy issue grounds. Even Uniplate's *prima facie* right could be reargued: see **Airoadexpress (Pty) Ltd v Chairman, Local Road**

Transportation Board, Durban 1986 (2) SA 663 (A). As quite correctly also pointed out at the hearing of this application by counsel for Uniplate, who vigorously opposed leave to appeal, the parties may even seek leave of the court to supplement their evidence or to file further affidavit evidence in the main application. Such further evidence could conceivably be new evidence that became available to the parties during the course of the Competition Tribunal exercise. Nothing in my order precludes them from doing so and nothing in my order precludes another court from discharging, varying or even extending the interim relief pending the institution of an action for final interdict relief.

16. My finding that Uniplate had established a *prima facie* right to the relief granted in paragraph (b)(i) of my order is therefore self-evidently not a definitive finding on the existence of that right. Accordingly, when NNP contends in its notice of application for leave to appeal, and contended at this hearing, that the public policy issue was finally decided because the interim relief handed down was subject only to the final resolution of the competition law issue (in another forum), it clearly misinterprets my judgement and order. I therefore have great difficulty in following NNP's argument that my order is final in effect or that any part of my (judgment and/or) order dispose/s of at least a substantial portion of the relief claimed in the main application.
17. During the course of argument on behalf of NNP in this application, counsel for Uniplate also referred me to **Intl Trade Administration Commission v SCAWSA (Pty) Ltd** 2012 (4) SA 618 (CC). With reference to that case, it was submitted that the prohibition on the granting of leave to appeal in respect of orders which are not final in effect had of late been adapted and that regard must now be had to the interests of justice and, in particular, the effect of the order rather than simply to the form of the order. The effect of paragraph (b)(i) of the order made by me in this case, contended counsel, occasioned and will

occasion irreparable harm to NNP which, contrary to what I had found, outweighs the harm that would be suffered by Uniplate if the order had not been granted. Whatever harm suffered by Uniplate, counsel contended further, would, also contrary to what I had found, be easy to compute whereas the harm that NNP will suffer if the order remains in place, is virtually impossible to quantify. Leave to appeal part (b)(i) of my order ought therefore to be allowed in the interests of justice.

18. At the hearing of this application my recollection of **SCAWSA** was that it was decided in a completely different factual context and that the tenor of the judgement in respect of the appealability of interim interdicts was overly generalised in counsel's submission. Unfortunately, I was not before the hearing of this application alerted to the fact that counsel would rely on that case in support of the mentioned submission and I therefore could not review the judgment in preparation for the hearing. At conclusion of all argument, I therefore indicated to counsel that I would reserve the judgement that I was then about to hand down in this application in order first to review **SCAWSA**.
19. In **SCAWSA** an application for leave to appeal and an appeal against an interim order handed down in the North Gauteng High Court served before the Constitutional Court. The court held that the question whether the Constitutional Court should grant leave to appeal depends on two considerations, namely whether a constitutional issue has arisen and if it has, whether it is in the interests of justice to grant leave to appeal. The mere fact that the order in respect of which leave to appeal is sought in that court is in the form of an interim order, the court held, is relevant and important but not a determinative consideration in ascertaining where the interests of justice reside, and whether it is in the interests of justice to grant leave to appeal, hinges on a cluster of interactive considerations (**SCAWSA**, paragraphs 41 and 46).

20. However, the court further held that it would often not be in the interests of justice to entertain appeals against interlocutory rulings which do not have a final effect on the dispute between the parties (**SCAWSA**, paragraph 47).
21. In the context of interim orders of execution, **Machele and Others v Mailula and Others** 2010 (2) SA 257 (CC) at 264, citing **Minister of Health and Others v Treatment Action Campaign and Others (No 1)** 2002 (5) SA 703 (CC), held that the "*primary consideration*" in determining whether or not it is in the interests of justice for a litigant to be granted leave to appeal against an interim order of execution is whether irreparable harm would result if leave to appeal is not granted. It also held that a court should have regard to the possibility of irreparable harm and the balance of convenience.
22. Contrary to **Machele**, **SCAWSA**, however, does not pitch the irreparable harm requirement as high as a "*primary consideration*"; it merely holds that irreparable harm is "*an important, but not the sole requirement for granting leave to appeal*". "*The test of irreparable harm*", the court held, "*must take its place alongside other important and relevant considerations that speak to what is in the interests of justice*". These other relevant considerations are the prospects of success; whether the order, although interlocutory, is final in effect; and the kind and importance of the constitutional issue raised. These considerations are, however, not exhaustive; as pointed out by the court; what is in the interests of justice will depend on a careful evaluation of all the relevant considerations in a particular case.
23. It is these "*important and relevant considerations*" and the peculiar facts of this case that NNP overlooks entirely in focusing on irreparable harm and balance of convenience. I dealt extensively with these considerations in my judgement, for example, from paragraph 59 to paragraph 68, and I do not consider it necessary to repeat myself here.

24. However, what needs specific emphasis is the fact that NNP, an outsider, seeks to impugn agreements concluded between Uniplate and its customers in the face of a complete absence of any evidence whatsoever that these customers themselves consider the agreements to be invalid on any basis. And NNP seeks to impugn those agreements for no reason other than to secure the release those customers from their contractual obligations so that it can trade with them in direct competition with Uniplate. Moreover, what NNP apparently pointedly ignores, is the fact that, in terms of paragraph (b)(i) of my order, it is interdicted and restrained, temporarily, only from unlawfully and intentionally interfering with Uniplate's contractual relationships by soliciting, inducing, etc., those customers to sever or breach their agreements with Uniplate. Nothing in that temporary interdict prevents NNP from trading lawfully - as I held in paragraph 69, all that NNP needs to do in its competitive struggle with Uniplate for a greater market share is to keep its marketing activities within lawful bounds. The latter it can do without calculatingly precipitating breaches of *prima facie* valid contracts. (As I pointed out in my judgment, section 65(1) of the Act preserves the validity of an agreement until it is declared void or prohibited by the Tribunal or Competition Appeal Court.) The effect, therefore, of *not* granting the interim interdict would have been to clothe NNP's calculated endeavours with judicial endorsement and to afford it a virtual free licence to induce the breach of *prima facie* valid agreements, the unlawfulness of which conduct was *prima facie* established on the papers before me. That, I was not prepared to do.
25. In this context NNP's contention at paragraph 15.2.1 of its notice of application for leave to appeal, namely that I had erred in failing to find that Uniplate "*could mitigate its damage by seeking to enforce its agreements directly with its own customers*" is an odd contention and rather cheeky proposition. Why should Uniplate be put to the

considerable aggravation, trouble and expense to litigate with its own customers to force specific performance of its agreements in order to mitigate the effect of NNP's *prima facie* unlawful attempts to precipitate those breaches? It is in my view in the interests of justice that *prima facie valid* agreements be safeguarded against such *prima facie* unlawful conduct by interim interdict relief.

26. Such interim relief does indeed have an immediate effect but, if the referred competition issue is decided against NNP, it is susceptible to reconsideration, discharge, extension or finalisation on the same facts in the postponed main application.
27. In the above premises, I am of the view that another court would not have come to a different conclusion.
28. Whereas in my judgement I reserved the costs of the main and counter applications for final determination when the main application for final relief the relief is heard, I see no reason to do so in the case of this application.

I accordingly make the following order :-

"The application for leave to appeal is dismissed with costs"

A J BESTER

ACTING JUDGE OF THE SOUTH GAUTENG HIGH COURT,

JOHANNESBURG

COUNSEL FOR THE PLAINTIFF :	ADV A C BOTHA
INSTRUCTED BY:	BLAKE BESTER ATTORNEYS
COUNSEL FOR THE DEFENDANT:	ADV F SAINT
INSTRUCTED BY:	MAHMOOD MIA ATTORNEYS
DATE OF HEARING:	23 JULY 2013
DATE OF JUDGMENT:	26 JULY 2013