THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA

Reportable

CASE NO: 427/03
438/03

In the matter between :

METLIKA TRADING LIMITED	First Appellant
HAWKER AIR SERVICES (PTY) LIMITED	Second Appellant
HAWKER AVIATION SERVICES PARTNERSHIP	Third Appellant
CARMEL TRADING COMPANY LIMITED	Fourth Appellant

and

THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE	Respondent

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Before:	**STREICHER, CAMERON, CONRADIE JJA, PATEL & PONNAN AJJA**
Heard:	**6 SEPTEMBER 2004**
Delivered:	**1 OCTOBER 2004**
Summary:	**Interim interdict – appealability – an order is in effect final and appealable if of immediate effect and not to be reconsidered at the trial or on the same facts – jurisdiction – if respondent an *incola* the court may assume jurisdiction to grant an interdict (mandatory or prohibitory) no matter if the act in question is to be performed outside the court's jurisdiction.**

J U D G M E N T

STREICHER JA

STREICHER JA:

[1] The Transvaal Provincial Division, ('the court *a quo*'), at the instance of the respondent, ordered the third appellant to take all the necessary steps to procure the return of a Falcon aircraft to South Africa. In addition it granted certain further relief relating to the aircraft. The order was stated to be an interim order pending the finalisation of an action by the respondent against some of the appellants and other parties. The court *a quo* also confirmed the attachment of certain assets of the fourth appellant *ad confirmandam jurisdictionem* alternatively *ad fundandam jurisdictionem*. The appellants appeal against the order that the third appellant should take steps to procure the return of the aircraft to South Africa[1], the fourth appellant appeals against the attachment order and the third and fourth appellants appeal against some of the additional orders as well. It was not contended that the appeal against the additional interim orders should succeed in the event of the appeal against the order that steps be taken to procure the return of the aircraft being successful. The main issues arising for determination are whether the orders are appealable, whether the court *a quo* had jurisdiction to order the third appellant to take steps to procure the return of the aircraft to South Africa and whether the authorised attachments could confirm or found jurisdiction in the court *a quo*.

[1] The first and second appellant did not persist with their appeal against some of the additional orders.

[2] David King, the deponent to the first and second appellants' answering affidavit, describes himself as the South African representative of the first and second appellants. He once told an interviewer that he loved to create new businesses and then exit therefrom. One such a new business created by King was a company by the name of Specialised Outsourcing Limited. Specialised Outsourcing was listed on the Johannesburg Stock Exchange in October 1997. At that time Ben Nevis Holdings Limited ('Ben Nevis'), a company incorporated in the British Virgin Islands, was the registered shareholder of approximately 70% of the shares in Specialised Outsourcing. It sold virtually all these shares over a two year period at a profit in excess of R1 billion whereafter King exited the company.

[3] Ben Nevis acquired various assets in South Africa. One such an asset was the aircraft. During September 2000 it sold the aircraft to a partnership in which the partners were Rand Merchant Bank (a division of FirstRand Bank 'RMB'), Hawker Management (Pty) Ltd ('Manco') and the second appellant Hawker Air Services (Pty) Ltd ('HAS'). At the time Manco and HAS were wholly owned subsidiaries of FirstRand Bank and Ben Nevis respectively. In terms of a loan agreement RMB advanced R171 110 000 to the partnership to purchase the aircraft. The loan was to be repaid in instalments. Ben Nevis deposited approximately R171 million with RMB as security for the loan. The amount so deposited was to be utilised to repay the partnership loan and the repayments so made were to constitute advances by Ben Nevis to HAS and from HAS to the partnership. In

addition the repayment of the loan by RMB to the partnership was guaranteed by Ben Nevis.

[4] In terms of the partnership agreement RMB, Manco and HAS respectively had an interest of 99.8%, 0.1% and 0.1% in the partnership. However, in terms of an option agreement HAS was granted an option to require Manco and RMB to withdraw from the partnership upon all amounts owing under the loan agreement having been paid by the partnership to RMB in full or all of the obligations of the partnership to RMB under the loan agreement having, with the prior written consent of RMB, been delegated to a third party.

[5] The partnership agreement provided that the affairs of the partnership would be conducted by a management committee. In terms of an operations management agreement HAS was appointed as the operations manager in respect of the business of the partnership. The loan agreement provided that certain events would constitute a default which would entitle RMB to declare its obligations under each of the 'transaction documents' cancelled and to declare all amounts payable under the loan agreement immediately due and payable. The transaction documents were defined as the financing documents, the partnership agreement and the operations management agreement.

[6] Ben Nevis had not declared to the respondent its income as a result of the sale of its shares in Specialised Outsourcing. This gave rise to an enquiry, during January 2002, in terms of s 74C of the Income Tax Act 58

of 1962. At the enquiry it came to light that, as a result of enquiries made by an official of the respondent, all the South African assets of Ben Nevis had been transferred to the first appellant, Metlika Trading Limited ('Metlika'), which, like Ben Nevis, is a company registered in the British Virgin Islands. The transfer allegedly took place on 16 January 2001. It could not have been alleged to have taken place earlier as a firm of auditors had advised the respondent, in a letter dated 15 January 2001, that Ben Nevis was the owner of shares in South African companies. Ben Nevis only advised RMB on 21 February 2002 that all assets held to its order should be transferred to Metlika with effect from 28 February 2001.

[7] During February 2002 income tax assessments were raised against Ben Nevis in respect of the 1998, 1999 and 2000 tax years in a total amount of R1 467 844 330. King in his own right was assessed to tax in an amount in excess of R900 million.

[8] As a result, no doubt, of the alleged transfer of all the assets of Ben Nevis to Metlika, the respondent decided to institute an action against Metlika, Ben Nevis and King for an order declaring that various assets previously held in the name of Ben Nevis were in fact owned by King or Ben Nevis and for certain specified alternative relief. The assets included an interest in the aircraft.

[9] Prior to the institution of the action the respondent obtained an order authorising the attachment of certain assets *ad confirmandam jurisdictionem* in the case of Ben Nevis and *ad fundandam jurisdictionem*

in the case of Metlika. In addition interdicts aimed at preserving certain assets were granted pending a return day. The interim orders were subsequently confirmed subject to amendments. In terms of this order ('the preservation order') Hartzenberg J, pending the finalisation of the action, granted an order:

'(a) Interdicting King, Ben Nevis and Metlika from ceding, pledging, alienating, disposing or in any way encumbering any of their assets excluding stock-in-trade of businesses which could be sold in the ordinary course of business.

(b) Interdicting HAS from selling or ceding the aircraft or any rights therein to any person.'

In addition Ben Nevis and Metlika were interdicted from in any way whatsoever disposing of their shareholding and loan accounts in HAS and from in any way whatsoever selling or ceding the Falcon aircraft or any rights therein to any person.

[10] The founding affidavit filed by the respondent in the application for the aforesaid relief made it clear that it was not considered necessary, in order to protect the interests of the respondent, to interfere with the utilisation of the aircraft by the partnership, or the management of the aircraft by HAS.

[11] In a letter dated 27 February 2002 RMB notified the respondent that HAS was the registered owner of the aircraft but not the beneficial owner thereof. RMB stated that the beneficial owner of the aircraft was an *en commandite* partnership in which the disclosed partners were HAS and

Manco, each with a 0,1% interest. The silent partner was FirstRand with a 99,8% interest. Referring to an intimation by the respondent's attorney to the attorney of King, Metlika and Ben Nevis to the effect that the respondent was considering applying for an additional order which would prevent the utilisation of the aircraft, RMB stated:

> 'In the event of your client proceeding with an application for an additional order for relief as intimated by you, FirstRand, as the holder of the majority interest in the partnership, obviously has a material interest in the outcome of such application and would expect . . . to be cited as a respondent.'

[12] The respondent chose not to approach the court for additional relief, at least not until much later when the situation in regard to the aircraft had drastically changed and FirstRand no longer had an interest in the aircraft.

[13] On 12 August 2002 RMB advised the respondent that it had exercised its rights in terms of the various breach clauses in the loan agreement and that it had applied its security to part settle the amount outstanding. Unbeknown to the respondent RMB was in the process of selling its partnership interest for a purchase consideration of R24 550 450 being the liability of the partnership to RMB after the application of RMB's security. Initially the purchaser, or proposed purchaser, was Qwerty Aviation Services Limited ('Qwerty'). The purchase price received from the Bank of Bermuda, was, according to the advice of King to his attorneys, paid by Metlika. Asked why the funds to settle the Qwerty liability were coming from Metlika King replied that it was a convenient

way of facilitating the payment to RMB and that arrangements for reimbursement had been or would be made (the person concerned could not recall which) between Metlika and Qwerty.

[14] However, the identity of the purchaser was subsequently changed to Carmel Trading Company Limited, the fourth appellant ('Carmel'), a company incorporated according to the laws of Mauritius. According to King's attorneys they were informed that the change was necessitated by the fact that the Bermuda authorities would not allow the registration of an aircraft in its jurisdiction unless the aircraft was maintained in Bermuda. As this was not 'the purchaser's' intention 'the purchaser' decided that the aircraft should be based in Mauritius.

[15] The agreement of sale was concluded between FirstRand, Manco, Carmel, HAS and the partnership. In terms thereof FirstRand and Manco sold to Carmel the RMB partnership interest, the Manco partnership interest and all the claims of FirstRand against the partnership under the loan agreement. The purchase price was R24 550 450. RMB delegated to Carmel all of its obligations to HAS and the partnership 'in terms of, or arising out of or in connection with the transaction documents (as defined in the loan agreement) and as a partner in the partnership', Carmel agreed to be bound by the terms and conditions of the partnership agreement and HAS consented to the delegation. It follows that a new partnership between HAS and Carmel came into being ('the new partnership') on the same terms and conditions as the partnership between RMB, Manco and HAS and that

the transaction documents, which included the operations management agreement, were not terminated. This new partnership is the third appellant in this matter.

[16] On 16 August 2002, in response to RMB's letter dated 12 August 2002, the respondent enquired from RMB what clauses of the loan agreement had been breached by the partnership and what the amount owing by the partnership to RMB in terms of the loan agreement was. The respondent, referring to the option agreement, also wanted to know who the present owners of the aircraft were and what rights RMB intended to exercise. Only on 4 September 2002 did RMB furnish the particulars requested. It stated that its outstanding exposure to the partnership, after exercising its contractual rights to the deposit ceded to it as security, was R24 550 450. It stated, furthermore, that it was 'in the process of disposing of its interests in, and its claims against the partnership, to Carmel'. The respondent thereupon attempted to get RMB to delay the transaction so as to enable him to take the necessary steps to protect his interests but was informed that the transaction with Carmel had been finalised on 5 September 2002.

[17] In the meantime the aircraft had been flown out of South African with the intention of not returning it. Enquiries by the respondent revealed that it was in Switzerland.

[18] These developments gave rise to the present application. The respondent alleges that it is highly probable that the partnership's default in

terms of the loan agreement was a designed act to undermine the preservation order. Hartzenberg J agreed. He held that there could not be the slightest doubt that the transaction in terms of which Carmel acquired RMB's interest in the partnership was a contrived transaction, *in fraudem legis*, to by-pass the preservation order. Carmel was a tool of King and under his control. On that basis he granted the following order:

'1. The following interim orders made on 11 September 2002 are confirmed, which orders will serve as interim orders pending the finalisation of the Applicant's action under case number 20827/02:

1.1 The 4th Respondent ("the Partnership") is prohibited from selling the Falcon 900 aircraft, registration number ZS-DAV or any interest therein, without the prior written consent of SARS, which consent may not be unreasonably refused, or the consent of this Honourable Court.

1.2 Hawker Air Services (Pty) Ltd (3rd Respondent)[2] is interdicted from granting consent for the transfer of a partnership interest from the 5th Respondent[3] to any person and/or entity without the prior written consent of SARS, which consent will not be unreasonably refused, or the consent of this Honourable Court.

1.3 The partners to the partnership agreement, the 3rd and the 5th Respondents, are prohibited from amending the partnership agreement without the prior written consent of SARS, which consent shall not be unreasonably withheld, or without the consent of this Honourable Court.

[2] HAS
[3] Carmel

1.4 The 7th Respondent[4] is requested to note this order in its registers pertaining to the Falcon 900 ZS-DAV aircraft.

1.5 The attachment of following assets of the Fifth Respondent, Carmel Trading Company Limited, *ad confirmandam jurisdictionem* alternatively *ad fundandam jurisdictionem*, is confirmed:

1.5.1 Its partnership share in the Hawker Aviation Services Partnership (4th Respondent);

1.5.2 Its loan account in Hawker Aviation Services Partnership (4th Respondent) in an amount of approximately R24.5 million;

1.5.3 Its share in the claim by the partnership against this Sandton branch of First Rand Bank in respect of the credit balance in an amount of approximately R10 797,00 available in the Fourth Respondent's banking account, account number 62011195204;

1.5.4 Authorising and directing the sheriff or his deputy having jurisdiction to attach the assets identified in paragraphs 1.5.1 to 1.5.3 above *ad confirmandam* and *ad fundandam jurisdictionem* respectively.

The following orders are made which orders will serve as interim orders pending the finalisation of the Applicant's action under case number 20827/02:

2.1 That if the R192 300 000,00 loan, or any part thereof, due by the partnership (4th Respondent) to Ben Nevis Holdings Limited (1st Respondent) and/or Metlika Trading Limited (2nd Respondent) and/or Hawker Aviation Services (3rd Respondent), becomes due and payable, the payment thereof will only be made into a trust account in the Republic of South Africa, and nowhere else, and that it

[4] South African Civil Aviation Authority.

be kept therein pending the outcome of the Applicant's action under case number 20827/02.

2.2 That the Falcon 900 aircraft, registration number ZS-DAV, may only be utilised for bona fide commercial charter flights as intended in the partnership agreement and that Hawker Air Services (Pty) Ltd (3rd Respondent) and the partnership (4th Respondent) be prohibited from granting consent for it to be used for any other purpose, without the prior written consent of SARS, which consent shall not be unreasonably be withheld, or the consent of this Honourable Court.

2.3 That in the event of the sale of the Falcon 900 aircraft, registration number ZS-DAV, the purchase price thereof be paid to the Partnership in South Africa, and deposited into and kept in a trust account unless otherwise authorised by an order of this Honourable Court, pending the outcome of the action. This order will be subject to the Applicant launching an application to join the 5th Respondent in the action within 30 days after the grant of this order, with a suitable prayer to the effect that the 5th Respondent's interest in the aircraft should be declared executable for the tax debts of Mr King (6th Respondent) and/or Ben Nevis Holding Limited (1st Respondent).

2.4 That the partnership take all the necessary steps to procure the return of the aircraft to South Africa, and that it may only thereafter leave South Africa temporarily for bona fide charter flights, or for other purposes, only with the prior written consent of the Applicant, which consent will not unreasonably be withheld, or without the consent of this Honourable Court.

2.5 That the Fourth Respondent be directed to furnish to SARS information regarding their monthly income and expenses and proposed flight schedules of the aircraft.'

[19] The first question that arises is whether, in the light of the decision in *Cronshaw and Another v Coin Security Group (Pty) Ltd* 1996 (3) SA 686 (A), the order is appealable. Cronshaw who was employed by Fidelity Guards was formerly employed by Coin Security subject to a restraint of trade. Pending an action for an order restraining him from being so employed an interdict to that effect was granted against him. This court, relying on *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532I-J as to the meaning of 'judgment or order' in s 20(1) of the Supreme Court Act 59 of 1959, held that the order granting an interim interdict was not appealable in that it was not final in effect and was susceptible of alteration by the court of first instance. As to the finality of the order Schutz JA held that the question was decided adversely to the appellant, Cronshaw, in *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) at 690C.

[20] In the *African Wanderers Football Club (Pty) Ltd* case the African Wanderers Football Club (Pty) Ltd contended that the Wanderers Football Club, which used to manage the affairs of a professional football team, had been incorporated as a private company, the African Wanderers Football Club (Pty) Ltd, and had therefore ceased to exist. Pending an action by the club for a declaratory order that that was not the case the club obtained an interim interdict restraining the company from interfering with the management of the professional football team. In the action it was common

cause between the parties that the issues raised by the company's plea were the very issues considered by the judge who granted the interim interdict[6]. The question then arose whether the doctrine of *res judicata* barred reconsideration of the issues in the action. This court held that it had to examine the issues raised in the interdict proceedings and the manner in which they were dealt with in order to determine whether the court meant to express a final decision thereon ie whether it intended to dispose finally of those issues or any part thereof[7]. It held that it did not.[8] In this regard it relied on the fact that the club indicated in its founding affidavit in the interdict proceedings that it was about to institute an action against the company for a declaration of rights concerning the very matter which was in dispute in the interdict proceedings namely the right of the club to manage its own affairs including the management and control of the professional team.[9] It relied, furthermore, on the fact that, from a reading of the judgment of Howard J and having regard to the order made by him, there could be no doubt that he intended that the issues raised before him would be finally resolved in an action to be instituted by the club.[10]

[21] As in *African Wanderers Football Club Ltd* the issues in the interdict proceedings in *Cronshaw* were the same as the issues which were to be decided in a trial. Schutz JA stated that, intrinsically difficult as it was to

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[6] At 45D
[7] At 46C-D
[8] At 47C-D
[9] At 47A-B
[10] At 47H

decide whether a decision was 'interlocutory' or 'final', there had to be a rule and that rule was stated by Schreiner JA in *Pretoria Garrison Institutes v Danish Variety Products (Pty) Ltd* 1948 (1) SA 839 (A) at 870 to be:[11]

'. . . a preparatory or procedural order is a simple interlocutory order and therefore not appealable unless it is such as to "dispose of any issue or any portion of the issue in the main action or suit", or, which amounts, I think, to the same thing, unless it "irreparably anticipates or precludes some of the relief which would or might be given at the hearing".'

[22] The present case is distinguishable from *African Wanderers Football Club Ltd* and *Cronshaw*. Whether or not the aircraft should be returned to South Africa and whether or not the other orders relating to the aircraft should be granted is not an issue in the action pending which the interdict was granted. In these circumstances, coupled with the fact that an application for an interim interdict is a proceeding separate from the main proceedings pending the determination of which it was granted (see *Knox D'Arcy Ltd v Jamieson* 1996 (4) SA 348 (A) at 359H read with 357C) the test in *Pretoria Garrison* is wholly inappropriate to determine whether the present order granted is final in effect and thus appealable.

[23] In determining whether an order is final it is important to bear in mind that 'not merely the form of the order must be considered but also, and predominantly its effect' (*South African Motor Industry Employers'*

[11] 690E-F

Association v South African Bank of Athens Ltd 1980 (3) SA 91 (A) at 96H, and *Zweni* at 532I).

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

[25] The question then arises whether the court *a quo* had jurisdiction to order that steps be taken to procure the return of the aircraft. In this regard it first has to be determined whether the court *a quo* had jurisdiction in respect of the new partnership.

[26] On behalf of Carmel and the new partnership it was submitted that the new partnership carried on business in Mauritius. However, there is no evidence on the basis of which it can be found that the new partnership relocated its place of business to Mauritius. At best for the new partnership and Carmel there is evidence that it is the intention of Carmel that the new

partnership's place of business be relocated to Mauritius, from its present address which is within the area of jurisdiction of the court *a quo*.

[27] Pistorius *Pollak on Jurisdiction* 2 ed at 70 says:

> 'Artificial as it may be to ascribe the term 'residence' to the place where a partnership carries on business, it is submitted that, as in the case of companies, the principal place of business of a partnership constitutes a sufficient connecting factor with the court concerned to permit it to exercise jurisdiction over the partnership.'

[28] A partnership is not a legal entity separate from the individual partners. In terms of rule 14(2) it may, however, be sued or sue in its own name. Rule 14(5)(h) provides that execution in respect of a judgment against a partnership shall first be levied against the assets of the partnership and only after such excussion against the private assets of any person held to be, or held to be estopped from denying his status as, a partner. The estate of a partnership may also be sequestrated as such (s 13 of the Insolvency Act 24 of 1936; see also s 49(1)). In these circumstances the court in whose area of jurisdiction the principal place of business of a partnership is should be the most convenient forum as far as the partnership is concerned and should in general be the court whose judgments against the partnership could most effectively be enforced. For these reasons there is merit in the submission that, as in the case of companies, the location of the principal place of business of a partnership within the area of jurisdiction of a court should be sufficient to confer jurisdiction on that court in respect of the partnership. It is, however, not necessary to decide

the question as to whether the court *a quo* had jurisdiction in respect of the new partnership on this basis, as, for the reasons that follow the court *a quo* had jurisdiction in respect of both the new partnership's partners, HAS and Carmel.

[29] HAS is a South African company with its registered office within the area of jurisdiction of the court *a quo*. The court *a quo,* therefore, had jurisdiction in respect of HAS in terms of the provisions of s 12 of the Companies Act 61 of 1973. Carmel is a company registered in Mauritius. An attachment of its assets was, therefore, required in order to confer jurisdiction on the court *a quo* or to confirm its jurisdiction over the company. Such attachment was performed in terms of a provisional order granted by De Vos J which was confirmed by Hartzenberg J. The assets attached were Carmel's share in the new partnership, its loan account in the new partnership and its share in the claim of the new partnership against FirstRand Bank in respect of the credit balance in the new partnership’s banking account.

[30] The new partnership and Carmel appeal against the whole of the order which confirmed the attachment. It was submitted on their behalf that Carmel’s partnership share was located where the new partnership carried on business, being Mauritius. As stated above there is no evidence on the basis of which it can be found that the new partnership relocated its business to Mauritius.

[31] Counsel for the partnership and Carmel submitted, furthermore, that Carmel had not acquired a loan against the new partnership. However, the agreement in terms of which Carmel acquired RMB's partnership interest specifically recorded that Carmel purchased RMB's loan claims against the partnership. In respect of Carmel's interest in the new partnership's credit in its banking account with FirstRand Bank it was submitted that any credit balance on the account would accrue to the previous partnership. However, Carmel purchased RMB's as well as Manco's interests in the partnership and therefore also their interests in the credit balance. It follows that there is no merit in respect of Carmel's appeal against the orders confirming the attachments and that it should be dismissed.

[32] The next question to be decided in so far as the jurisdiction of the court *a quo* is concerned is whether it had jurisdiction to order that steps be taken to procure the return of the aircraft.

[33] The court *a quo* granted the order on the basis that the preservation order had been breached. In terms of that order HAS, the partner in the partnership, as well as its holding company Metlika had been interdicted from alienating or disposing of any of their assets. On the appellants' own version the partnership, after RMB had terminated the loan agreement and had applied the deposit in respect of the outstanding balance of the loan agreement, was indebted to RMB in an amount of R24 550 450. In terms of the option agreement HAS would against payment of that amount have become entitled to require RMB and Manco to withdraw from the

partnership. Had it done so the partnership would have come to an end and HAS would have become the owner of the aircraft. It is common cause that the value of the aircraft is approximately R190 000 000. It is self evident that on these facts HAS would have had no difficulty in raising the funds to acquire the aircraft for itself. By not doing so it alienated a valuable asset being its right to acquire the aircraft and thereby breached the court order. It did so in collaboration with its holding company Metlika. Metlika provided the necessary funds, R24 550 450, to Carmel to acquire the RMB and Manco interests in the partnership ie a 99,9% interest in an asset worth, once again on the appellants' version, approximately R190 000 000. Metlika and HAS would not have done so had Carmel been anything other than Metlika in another guise.

[34] It does not follow that HAS and Metlika breached the order by removing the aircraft to a foreign country and by failing to return it to South Africa. The movements of the aircraft were never restricted. Faced with this problem counsel for the respondent submitted that the respondent's case was in actual fact never that the respondent was entitled to the return of the aircraft on the basis of a breach of the preservation order. It claimed to be entitled to such an order in order to preserve the assets of Ben Nevis, Metlika and HAS in the light of the fact that they were trying to defeat the right that the respondent would acquire at the successful conclusion of the action to levy execution against the aircraft.

[35] An interdict at the instance of a creditor preventing his debtor, pending an action instituted or to be instituted by the creditor, from getting rid of his assets to defeat his creditors has for many years been recognised in our law (*Knox D'Arcy* at 372C-F). It is similar to the Mareva injunction in English law. The appellants did not contend that the respondent had not established the requisites for such an interdict ie they did not contend that had the aircraft been within the area of jurisdiction of the court *a quo* the respondent would not have been entitled to an interim restraining order preserving the aircraft as an asset in, what the respondent alleges to be, the estate of King or Ben Nevis. They argued that the aircraft was in a foreign country and that the court *a quo* had no jurisdiction to order its return to South Africa because such an order infringed the sovereignty of the foreign country concerned and because the court *a quo* would be unable to give effect to its order. They were unable to find any case in England or in South Africa in which a party had been ordered by way of this type of relief to procure the return of an asset situated in another country to England or South Africa. Counsel for the respondent was similarly unable to find a case in which such an order had been granted. However, counsel did refer us to English authority, to which I shall refer, to the effect that such an order is permissible.

[36] If the court *a quo* was not able to enforce compliance with the order which it granted it had no jurisdiction to grant it.[12] It is, therefore, necessary to determine whether the court *a quo* could enforce compliance with the order. In support of their submission that the court *a quo* could not give effect to its order the respondents relied on *Lenders & Co Ltd v Lourenco Marques Wharf Co Ltd* 1904 TH 176, *Minister of Agriculture v Grobler*1918 TPD 483, *South Atlantic Islands Development Corporation Ltd v Buchan* 1971 (1) SA 234 (C), *Makoti v Brodie* 1988 (2) SA 569 (B) and *Parents' Committee of Namibia and Others v Nujoma and Others* 1990 (1) SA 873 (SWA).

[37] In *Lenders & Co Ltd v Lourenco Marques Wharf Co Ltd* it was held that the Transvaal High Court had no jurisdiction to order the delivery of timber at Delagoa Bay. Direct proceedings to recover the timber had to be brought in the court at Delagoa Bay and the same result could not be obtained indirectly thorough the medium of the Transvaal Court. That was held to be so although the respondent was a company registered in the Transvaal and had its head office within the jurisdiction of the court. In this regard Smith J stated that no authority had been cited showing that the court had jurisdiction, that his attention had not been directed to the work of any writer on the Roman Dutch law and that he had been unable to find

[12] Steytler NO v Fitzgerald 1911 AD 295 at 346; Thermo Radiant Oven Sales Ltd v Nelspruit Bakeries 1969 (2) SA 295 (A) at 307; Ewing McDonald & Co Ltd v M & M Products Co 1991 (1) SA 252 (A) at 259 D-J.

any case in the Courts of Equity in England in which such jurisdiction had been exercised. [13]

[38] The Roman Dutch jurists held conflicting views in this regard. Some were of the view that disputes as to ownership or possession should be aired only at the place where the thing was situated. Others were of the view they could also be dealt with at the place where the defendant was domiciled.[14] Voet says at 5:1:77:[15]

> 'Movables are not tied to any definite place, but allow of restitution at every place, having to be moved from one place to another at the discretion of the judge or even of the unsuccessful defendant. A judge was thus able effectively to give judgment against a defendant subject to him in respect of domicile for the making restitution of something movable in any suitable place, including the very place of domicile. It makes in the same direction that it has been generally laid down by commentators that movables go with the person, and, so far as concerns legal results, are deemed to be at the place where the owner of them cherishes domicile, even though physically they have been stationed elsewhere.'

[39] In *Minister of Agriculture v Grobler* the Transvaal Provincial Division was not prepared to grant an order that the Government should hand over cattle held by it in Botswana to the respondent who was entitled to have the cattle restored to him. It refused to do so because the matter 'had not sufficiently clearly (been) laid before the Court' and the

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[13] At 180
[14] Voet 5:1:77
[15] Gane's translation

authorities were not conclusive.[16] The court had been referred to *Lenders*, Voet 5:1:77 and Voet 2:1:46:47.[17]

[40] In *South Atlantic Islands Development Corporation Ltd v Buchan* the court refused to grant an order against the master of a foreign fishing vessel prohibiting him from fishing in the waters of Tristan da Cunha. The respondent was only temporarily within the area of jurisdiction of the court. The court would therefore have been powerless to enforce its judgment if the respondent chose to ignore the order and started fishing in the waters of Tristan da Cunha.[18]

[41] In *Makoti v Brodie*, relying on *Lenders* and *South Atlantic Islands*, it was held that a court does not have jurisdiction to order *incolae* defendants to deliver movable property situate outside the country because a court could not give an order which would be effective in the sense that the court could ensure its execution in 'the usual direct manner, ie by directing an officer of the Court to take possession' of the movable. [19]

[42] The Supreme Court of South West Africa was, in the *Parents' Committee* case, not persuaded that it could give an effective judgment against *incolae* of the court for the release of detainees unlawfully detained in Angola. From a reading of the judgment it would seem that it had not been submitted that such a judgment could be rendered effective by way of contempt proceedings against the respondents.

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[16] At 488
[17] See 486
[18] See 240G-H
[19] At 576A and E

[43] Pollak[20] accepts that *Lenders* reflects our law as regards foreign jurisdictions ie that the mere fact that a respondent is an *incola* of the court is insufficient to confer jurisdiction on the court to make an order for delivery of movable property situate outside the Republic. Forsyth *Private International Law* 4 ed at 233, on the other hand, is of the view that 'if the respondent is an *incola*, the court may assume jurisdiction to grant an interdict (whether mandatory or prohibitory) no matter if the act in question is to be performed or restrained outside the court's area'. He argues that if 'the respondent is an *incola* . . . the court will have control over him and will be in a position to ensure compliance with its order'.[21]

[44] In *Ashtiani v Kashi* [1986] 2 All ER 970 (CA) at 976 and 979 the Court of Appeal in England, dealing with a pre-judgment Mareva injunction, concluded that Mareva injunctions should be limited to assets located within the jurisdiction. However, that is no longer the position in England. Some 14 years later, in respect of an appeal against an order, made after judgment, precluding the defendants from dealing with any of their assets worldwide without giving five days' notice to the plaintiffs' solicitors in every case, Kerr LJ said in *Babanaft International Co SA v Bassatne* [1989] 1 All ER 433 (CA) at 444b-d:

[20] At 103
[21] At 231-233

'Apart from any EEC[22] or EFTA[23] connection, there is in any event no jurisdictional (as opposed to discretionary) ground which would preclude an English court from granting a pre-judgment Mareva injunction over assets situated anywhere outside the jurisdiction, which are owned or controlled by a defendant who is subject to the jurisdiction of our courts, provided that the order makes it clear that it is not to have any direct effect on the assets or on any third parties outside the jurisdiction save to the extent that the order may be enforced by the local courts. Whether an order which is qualified in this way would be enforced by the courts of states where the defendant's assets are situated would of course depend on the local law . . .'

Lord Donaldson of Lymington MR said in Derby & Co Ltd and others v Weldon and others (No 2) [1989] 1 All ER 1002 at 1007f-g:

'We live in a time of rapidly growing commercial and financial sophistication and it behoves the courts to adapt their practices to meet the current wiles of those defendants who are prepared to devote as much energy to making themselves immune to the courts' orders as to resisting the making of such orders on the merits of their case.'

[45] In *Derby & Co Ltd and others v Weldon and others (No 6)* [1990] 3 All ER 263 (CA) the court was dealing with the question whether the defendants should procure the transfer of certain assets out of Switzerland. Dillon LJ, who had given a judgment in *Ashtiani,* held that more recent developments of the law in relation to Mareva injunctions showed that views expressed by him in that judgment were wrong.[24] He stated that the object of a Mareva injunction was 'that within the limits of its powers no court should permit a defendant to take action designed to ensure that

[22] European Economic Community
[23] European Free Trade Association
[24] At 272a

subsequent orders of the court are rendered less effective than would otherwise be the case'.[25] He quoted a passage from a judgment by Kerr LJ to the effect that the test for a Mareva injunction is 'whether, on the assumption that the plaintiff has shown at least "a good arguable case", the court concludes, on the whole of the evidence then before it, that the refusal of a Mareva injunction would involve a real risk that a judgment or award in favour of the plaintiffs would remain unsatisfied.'[26] He concluded that he could see no objection in principle and in an appropriate case to ordering the transfer of assets to a jurisdiction in which the order of the English court after the trial would be recognised from a jurisdiction in which that order will not be recognised.[27] The other members of the court agreed that the court had the power to make such an order. However, such an order was not made as the judges were agreed that in the particular circumstances of the case the order should not be made in the exercise of the court's discretion.

[46] English principles relating to Mareva injunctions are of course not automatically applicable but serve to show that no reason in principle for not coming to the assistance of the respondent in the present case is to be found in the English law. The problems caused by rapidly growing commercial and financial sophistication are universal and our courts can

[25] At 273d
[26] At 273e
[27] At 273f-g

only benefit from taking note of the way in which the English courts deal with such problems.

[47] In *Hugo v Wessels* 1987 (3) SA 837 (A) at 855J-856A Hoexter JA said in regard to the question whether effect could be given to an order that an immovable property situated outside the jurisdictional area of the court, but within the Republic, be transferred:

> 'Na my oordeel behoort hierdie vraag bevestigend beantwoord te word. `n Belangrike faktor wat ommiddellik na vore tree, is die feit dat `n vonnisskuldenaar wat nie vrywillig aan `n Hofbevel *ad factum praestandum* uitvoering gee nie minagting pleeg en hom aan gevangenisstraf blootstel.'

[48] Counsel for the first and second appellants submitted in their heads of argument that *Hugo v Wessels* did not assist the respondent in that it was distinguishable and in that the order in the present case is an order *ad pecuniam solvendam* and not *ad factum praestandum*. The latter submission was, quite understandably, not advanced in oral argument before us. The order is clearly one *ad factum praestandum*. That *Hugo v Wessels* is distinguishable on the facts is clear but that does not affect the quoted statement at all. It applies with equal force in the present situation.

[49] In the light of the aforegoing I agree with Forsyth's view that if the respondent is an *incola*, the court may assume jurisdiction to grant an interdict (whether mandatory or prohibitory) *in personam* no matter if the act in question is to be performed or restrained outside the court's area of jurisdiction. The authority to the contrary is not persuasive and should, to

the extent not consistent with this judgment, be considered to have been overruled.

[50] The aircraft is registered in South Africa in the name of HAS, a South African company which is a partner in the partnership that owns the aircraft. In terms of an operations management agreement with the partnership, which agreement provided that it could not be terminated on or before 31 August 2004, HAS was, at the time when the order under appeal was granted, the operations manager of the aircraft. As operations manager it was responsible for the management and operation of the aircraft on behalf of the new partnership. In doing so it was obliged to procure that the aircraft at all times complied with all laws and regulations applicable in the Republic with regard to mechanical condition, technical fit-out and general airworthiness and that the aircraft at all times was operated only by qualified and duly registered pilots in compliance with the laws of the Republic. In the case of cross-border flights HAS was obliged to ensure compliance with the immigration and exchange control regulations of the Republic and the health and foreign travel requirements of the country of destination. As consideration for its services HAS was entitled to 80% of the amount by which the difference between the income earned by the business and the expenses incurred by the business exceeded a certain amount.

[51] It is thus clear that the intention was that the aircraft be based in South Africa and that its operation to and from South Africa be managed

by HAS. In these circumstances it was clearly within the power of the new partnership and HAS to procure the return of the aircraft to the Republic. The order could be enforced by contempt of court proceedings against the directors of HAS. The availability of that remedy, in the event of a failure by HAS to comply with the order rendered the order sufficiently effective so as to confer jurisdiction on the court *a quo* to grant the order.

[52] The order does not affect the sovereignty of a foreign court at all. It is an order *in personam* against respondents subject to the court's jurisdiction and not against third parties. It will, if not complied with, be enforced in South Africa against the respondents concerned. For the same reason there is no merit in the argument by the respondents that the order amounts to an impermissible attempt to enforce a South African revenue claim in a foreign state.

[53] For these reasons the appeal is dismissed with costs including the costs of three counsel.

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P E STREICHER
JUDGE OF APPEAL

CAMERON JA)
CONRADIE JA)
PATEL AJA) **CONCUR**
PONNAN AJA)