Onlangse regspraak/Recent case law

Makulu Plastics & Packaging CC v Born Free Investments 128 (Pty) Ltd and Others
2013 1 SA 377 (GSJ)

Interference with contractual relationship – extension of existing categories for purposes of granting relief – requirements for granting of interdict to prevent interference – obligations of landlord in terms of contract of lease as alternative basis for relief

1 Introduction

The delict of interference with a contractual relationship as a species of *damnum iniuria datum*, warranting the institution of an Aquilian claim to enable a party suffering harm in consequence of such interference, has received but scant attention in South African law in recent times. For this reason alone the handing down of a judgment on the basis of this specific form of delict is noteworthy.

The rules of English law pertaining to the tort of "interference with contractual relations" or "inducing breach of contract" have exerted a strong influence on the rules of the South African law of delict in this respect (see eg Van der Merwe *Die Beskerming van Vorderingsregte uit Kontrak teen Aantasting deur Derdes* (1959) 119 sqq, demonstrating a reliance on English precedent in early South African case law; on this action in general, see McKerron *The Law of Delict* (1971) 270-275; Van der Merwe & Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1989) 370-382; Neethling & Potgieter *Neethling-Potgieter-Visser Law of Delict* (2010) 306-309; Loubser, Midgley *et al The Law of Delict in South Africa* (2010) 230-233). However, in *Lanco Engineering CC v Aris Box Manufacturers (Pty) Ltd* (1993 4 SA 378 (D) 380D) it was pointed out that "the later cases have sought to bring the claims more strictly under the *actio legis Aquiliae*, broadening its ambit where necessary ...".

In this note an evaluation of the judgement of a full bench of the Gauteng South High Court (Johannesburg) will be given, with specific reference to its value in respect of the development of the delictual claim for redressing harm flowing from an interference with a contractual relationship.

2 Facts and Judgment

The appellant (applicant in the court *a quo*), a tenant of the premises of the first respondent, had, pending the finalisation of an action to be instituted by it, urgently – but unsuccessfully – applied for orders designed to prevent the appellant from: (i) entering into an agreement

with the third respondent (the Ekurhuleni Metropolitan Municipality) in terms of which the third respondent would provide various municipal services to the leased premises; or (ii) requesting, instructing or encouraging the third respondent to terminate the supply of any such services; and (iii) hindering or obstructing the appellant or its employees and invitees in respect of access to and use or enjoyment of the leased property (378J-379B).

The first respondent was the owner of property originally leased to the second respondent who was subsequently placed in liquidation (and although formally a party to the proceedings, played no role in the present application, due to its liquidation). Prior to such liquidation, the appellant was able to render *prima facie* proof of the fact that it had, however, taken occupation of the premises and commenced trading from it with the owner's (appellant's) consent and had even entered into a contract of lease with the owner in terms of an agreement which it had drafted (379E-F, 384D), but remained unsigned. The court held that the signing of the lease agreement remained a mere formality and that it would merely reflect the terms of the oral contract entered into between the appellant and the first respondent (379G). More than a year later the first respondent formally requested the municipality in question (the third respondent) to terminate the electricity supply to the premises occupied by the appellant, stating as reason that its tenant (referring to the previous tenant, the second respondent) had been liquidated (380B). In addition to failing to mention the fact that the appellant was occupying the premises, the first respondent threatened to take legal steps against the municipality and even to claim damages from it if it were to "connect the electricity to any illegal applicant after today ...", prompting the court to conclude: "It is apparent that the first respondent took steps to cause the third respondent to cease supplying electricity to the premises" (380C-D).

As the appellant throughout its occupation of the premises maintained sufficient payments to the municipality (on behalf of the second respondent who had previously entered into a service agreement with the municipality in its capacity as tenant of the premises) to ensure the municipality's continuation of a supply of services, the court concluded as follows (380F):

> The reason why the third respondent terminated the services was not on account of non-payment but on account of the fact that the person with whom it had contracted (the second respondent) had been liquidated. It requested a new user agreement to be concluded and if such agreement were concluded it would continue to supply electricity.

It transpired that the first respondent's attitude in this regard depended on its opinion that the only tenancy that the appellant had had of the premises was on a monthly basis and that such lease had expired pursuant to notice given by the first respondent (381I). Notwithstanding the court's recognition of the dispute between the parties as to the existence or not of a longer lease between the appellant and the first

respondent, it ultimately favoured – for purposes of granting of a temporary interdict – the appellant in deciding that it had provided *prima facie* proof of an existing contract of lease, as mentioned earlier (381B, 384D).

The court's findings in respect of the *prima facie* existence of a lease between the appellant and the first respondent lay the foundation of its decision as to whether the first respondent's behaviour regarding its failure to communicate anything about the existence of a lease between itself and the appellant constituted an actionable wrong. Lamont J (with whom Tsoka J and Francis J concurred), came to the following conclusion (381G-I):

> The acts of the first respondent in notifying the third respondent [the municipality] of the fact that the property was occupied by a person with whom it had no contractual relationship, if the contractual relationship existed, would constitute an interference by the first respondent in the contractual relationship between the appellant and the third respondent. The fact that the contractual relationship had not been concluded, in my view, does not affect the position. It inevitably would have been concluded but for the interference. In terms of the lease agreement the first respondent was by necessary implication, at the very least, to have co-operated with the appellant when the appellant sought to conclude the services agreement with the municipality. It is apparent that the third respondent, in consequence of the interference by the first respondent, declined to conclude a contract with the appellant.
>
> ... In my view, the conduct of the first respondent in performing acts designed to frustrate the free commercial activity of the appellant constitutes a wrongful act.

After referring to case law relevant to the delict of interfering with contractual relationships (382A-384D), the court tested the third respondent's conduct against the established requirements for the issue of an interim interdict (384A-C, which requirements were established in *Setlogelo v Setlogelo* 1914 AD 221, again confirmed in *Hix Networking Technologies v System Publishers (Pty) Ltd* 1997 1 SA 391 (A) and neatly paraphrased by Harms "Interdict" *LAWSA* vol 11 (2nd ed) 419-424) and found it to conform to such requirements (384D-F), indicating that: (a) a clear right on the part of the applicant (appellant) had existed (rights in terms of a lease); (b) the applicant would suffer irreparable harm if the order were not issued (if services were withheld, its occupation of the premises would not be possible); (c) no other form of relief was available; and (d) the balance of convenience favoured continued occupation by the applicant (who had been paying the rent regularly, thereby not causing any harm to the municipality, instead of denying the applicant occupation, involving obviously harmful consequences to the applicant). The court concluded its *ratio decidendi* by emphasising that no risk attached to the position of the first respondent if the municipality were to conclude a services contract with the appellant, because its bylaws made specific provision that the person concluding such contract with

the municipality, and that person alone, shall be liable for any payments in terms of it (384H).

The court finally handed down judgment in favour of the appellant and interdicted the first respondent to prevent the appellant from entering into a services agreement with the municipality, or to request or encourage the municipality to terminate such agreement with the appellant, or to hinder or obstruct the applicant to have access to and enjoyment of the premises. The municipality, as third respondent, was ordered to enter into a services contract with the appellant and to maintain its supply of services in terms thereof. The entire order was made subject to the appellant's instituting an action to ascertain the existence or not of the contract of lease on which it had based its present application, within a month of the date of the present court order (385A-H).

3 Critical Evaluation

3 1 Introduction

In view of the basis on which the court decided to grant the appellant an order as applied for in this case, *viz* the first respondent's infringement of its (potential) contractual relationship with the municipality (the third respondent), regard should at the outset be had to the different situations under which South African law has in the past granted relief to someone who has suffered harm in consequence of a third party's interference with such harmed party's contractual relationship(s). Neethling and Potgieter (306-307) neatly summarise the following instances that have crystallised in our case law:

(i) Where the defendant's or respondent's intentional interference caused one of the contracting parties to commit a breach of contract (a classic formulation of which appears in *Atlas Organic Fertilisers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 2 SA 173 (T) 202), such as enticing an employee to commit a breach of his or her employment contract (*Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 1 SA 209 (C) 215G-H; see also case law cited by Neethling & Potgieter 306 nn 261-262; see further Van der Merwe 119-126; Van der Merwe & Olivier 371-373; Neethling *Van Heerden-Neethling Unlawful Competition* 246-247).

(ii) Where, due to the defendant's or respondent's conduct, a contracting party fails to obtain the performance to which he or she is entitled in terms of a contract, although no breach of contract occurs, nor did the defendant's or respondent's conduct amount to an inducement to breach of contract. (This instance is clearly set out in *Lanco Engineering CC v Aris Box Manufacturers (Pty) Ltd* 1993 4 SA 378 (D) 383 G-I, 384E; see further case law quoted by Neethling & Potgieter 307 n 263.)

(iii) Where an act of inducement has occurred, causing no actual breach of contract, but lawful termination thereof. In *Lanco Engineering CC v Aris Box Manufacturers (Pty) Ltd* (383B-E) Galgut J referred to the judgment of Van Dijkhorst J in *Atlas Organic Fertilisers (Pty) Ltd v Pikkewyn Ghwano*

(Pty) Ltd (200D-G) in this regard, where he mentioned the example of a businessman who systematically induces his competitor's employees to leave under circumstances where public policy dictates that if such businessman's aim was not to benefit from those employees' services, but merely to cripple or eliminate the business competitor, such action could well be branded as wrongful (see also Neethling *Unlawful Competition* 247-249).

(iv) Finally, where a contracting party's obligations in terms of his or her contract are increased due to the interference by the defendant or respondent. In this instance it would probably be more accurate to describe the delictual act of the defendant or respondent as merely an "interference with a contractual relationship" and not an "inducement to breach of contract" (see Van der Merwe & Olivier 381 n 6, referring to cases such as *Nieuwenhuizen NO v Union and National Insurance Co Ltd* 1962 1 SA 760 (W); *Saitowitz v Provincial Insurance Co Ltd* 1962 3 SA 443 (W); and *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 1 SA 769 (A); Neethling 1981 *THRHR* 78 79).

Neethling and Potgieter (307 *sqq*) correctly place emphasis on the state of modern South African law in this context in terms of which only an intentional inducement to breach of contract or interference with a contractual relationship is actionable. This position was established in the leading judgment of *Union Government v Ocean Accident and Guarantee Corporation Ltd* (1956 1 SA 577 (A), the *ratio decidendi* of which has since been strictly observed in South African case law.

An author such as McKerron (270 *sqq*) treats the case law concerning interference with a contractual relationship in the context of competition law ("interference with trade, business or employment") and relies so heavily on English precedent, that it is virtually impossible to draw a distinction between the rules of English and South African law in this regard. However, as previously mentioned, this part of our law of delict has certainly been heavily influenced by English case law. Although McKerron (272) does not specifically refer to the wrongfulness element in his exposition of the rules pertaining to this delict, he does mention an approach followed in English law that would appear to be pertinent to the establishment of wrongfulness, even in a South African context, namely that courts should not be concerned with the propriety or ethical or social grounds of what parties have done, but should be concerned only with whether the defendant or respondent acted wrongfully (referring to the leading English cases of *Allen v Flood* ([1898] AC 1 142 and *Hodges v Webb* ([1920] 2 CH 70 80). Whether the interference by a defendant or respondent with a contractual relation between two other parties is wrongful, or not, has been held to be determined by means of the general *boni mores* or public policy test (see *Lanco Engineering CC v Aris Box Manufacturers (Pty) Ltd* 380G-H, relying on a range of cases dating from the leading case of *Minister van Polisie v Ewels* 1975 3 SA 590 (A)).

3 2 The Court's Interpretation of the Facts and Application of the Law

3 2 1 Extension of Categories of Interference with a Contractual Relationship

It is evident that Lamont J viewed the facts of the instant case as falling within the confines of the first of the four categories of cases systematised by Neethling and Potgieter (306-307), earlier alluded to (see 3 1 above), *viz* where a defendant or respondent caused one of the contracting parties to commit a breach of contract. This is evident from his general reference to relevant parts of *Lanco Engineering CC v Aris Box Manufacturers (Pty) Ltd* (*supra*) (382A-383A) and more specific reference to *Atlas Organic Fertilisers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* (*supra*) 9383A-384C). It is further clear that the fact that no such contractual relationship, relating to the supply of services, between the appellant and the municipality existed at the relevant time, did not in the least stand in the way of the court's approach on this basis. As pointed out earlier (see 2 above), the court was of the opinion that such contract would inevitably have been concluded, but for the *interference* by the first respondent (381H).

This finding warrants some comment. In this regard it is important to observe that Lamont J referred approvingly (382A-383A) to a long passage from the *Lanco Engineering* case (380B-381B) as authority, *inter alia*, for the broad requirements for a delictual claim based on interference with a contractual relationship, namely "that there must be (a) an unlawful and (b) a culpable (in the broad sense) (c) interference". First, a reference to "interference" seems out of place here.

In the first place, commencing with the last requirement, an interference implies the existence of a relationship, which in the instant case has not yet materialised. Logically there can thus be no interference at all. It is suggested that the word "conduct" would convey the factual situation more accurately. Furthermore, the fact cannot be ignored that, at the time of the conduct of the first respondent, no contractual relation existed between the appellant and the municipality. The bland statement by the court that such a state of affairs does not affect the position, fails to address the legal basis on which such view rests. It is suggested that the mere fact that the first respondent's omission to communicate the "true state of affairs" (according to the appellant, but not necessarily according to the first respondent) to the municipality, should, in itself, be irrelevant in this regard. The legal position regarding omissions is well known in our law: a mere omission attracts no legal consequences, whereas an omission in breach of a legal duty is the only type of omission bringing about legal consequences. The court should at least have explained its finding on the basis of the existence of a legal duty to communicate.

The position taken by the court, in which it regards a potential (future) contractual relationship as having the same standing as an existing legal relationship, resembles the approach of our law of contract regarding the so-called fictitious fulfilment of a condition, *viz* where the law regards a condition as having been fulfilled if one of the parties involved deliberately frustrates the fulfilment of such condition in order to gain a benefit from such negative conduct. However, no such construct exists in our law of delict. Creating further confusion in this regard, is the court's obvious uncertainty with its own finding, reflected in phrases such as " ... if the contractual relationship existed, [it] would constitute an interference..." (381G) and "... assuming the existence of the lease, the appellant would be entitled to obtain relief ..." (381J). The only conclusion to which one must come in evaluating this approach, is that the court in fact extended the categories of instances where the law will grant redress in consequence of an interference with contractual relations, namely where a *potential* or *future* contractual relationship would have come into being, but for the conduct of the defendant or respondent. Should such a notion be tenable at all, it would in any event have to be linked to a further requirement, namely that the defendant's or respondent's conduct in question should have breached a legal duty either to have refrained from acting in such a way that the potential contract did not come into being, or to have taken active steps to promote the conclusion of such a contract.

It is suggested that neither our common law, nor our case law provides any authority for the extension effected in this judgment by the court to the existing law on interference with contractual relationships. The only analogous extension in modern times, relevant for South Africa in view of the history of this type of liability – an extension not even alluded to by counsel or the court – actually took place in England, in the judgment handed down by Lord Denning MR in the case of *Torquay Hotel v Cousins* [1969] 1 All ER 522 (CA) 529 *sqq* where that famous jurist extended the action for inducing breach of contract to a situation where a trade union targeted a hotel by means of industrial action, in the process inducing a supplier who had been contractually bound to deliver furnace oil to it, *as well as a supplier who had not yet entered into a contract for the supply of furnace oil*, to desist from dealing with the hotel in question. However, the general principle enunciated by Lord Denning was criticised as erroneous in the later judgment of *Cheall v APEX* [1983] 2 AC 180. In the case of *Middlebrook Mushrooms Ltd v TGWU* [1993] 1CR 612 620 Neill LJ opined that the liability for inducing breach of contract must not be expanded outside its proper limits, which point of view was finally reiterated in the recent judgment of Lord Nicholls in *OBG Ltd v Allan* [2008] 1 AC 1 [185], in which judgment Lord Denning's view "is exploded", to use the words of Rogers *Winfield and Jolowicz on Tort* (2010) 865. In that judgment (n 32) the court held that one "cannot be liable for inducing a breach unless there has been a breach. No secondary liability without primary liability" (see also Rogers 864). It would thus seem that the present English position is that this form of tortuous

liability is even more restricted than its South African counterpart. Dugdale, Jones *et al Clerk and Lindsell on Torts* (2006) 1496, with reference to *F v Wirral MBC* [1991] Fam 69 115, remark that there are at present four "necessary ingredients" for the tort of inducing breach of contract, *viz* existence of the legal right of a contracting party *vis-à-vis* the other contracting party, knowledge on the part of the tortfeasor of such right and an intention to interfere with it, direct and unjustifiable interference with the right and, finally, damage. This brief comparative review of English sources makes it abundantly clear that the court's approach cannot even be justified by referring to that legal system.

As will be demonstrated later (3 3 below), the only sound legal basis for the finding in favour of the appellant would be an infringement of the rights flowing from the contract of lease concluded between itself and the first respondent.

3 2 2 The Wrongfulness Element

However, even if one were, for argument's sake, to accept the extended basis for granting redress in the case at hand, it is to be doubted whether the appellant should have been successful at all, in light of the two other requirements posed in the *Lanco Engineering* case. In the first instance, one may question whether the element of wrongfulness had in fact been established on the part of the first respondent. From the outset it is quite clear that no illegal means – *viz* the commission of a criminal act or civil wrong – had been employed by it in failing to communicate the position of the appellant to the municipality (*cf* the *Atlas Organic Fertilizers* case 179H, referring to McKerron 270). In view of the general principles pertaining to wrongfulness, this element will in the case of positive conduct only be present where the defendant or respondent infringed the plaintiff's interest in a legally reprehensible way or, in the event of an omission, failed in terms of a legal duty owed to the plaintiff, to prevent the plaintiff from suffering harm (see in general Neethling & Potgieter 33-49; Van der Walt & Midgley *Principles of Delict* (2005) 67-84). In each of these cases the *boni mores* criterion is employed to ascertain whether a factual infringement of an interest, or breach of a legal duty is in fact in a legal sense to be regarded as reasonable and therefore lawful, or unreasonable and therefore wrongful. It is suggested that the application of this criterion – which, as has been demonstrated earlier (see 3 1 above) only comes into being once a factual indication of possible wrongfulness exists, otherwise one would have to do with what is termed "wrongfulness in the air". In this regard Lewis JA uttered the following warning in *Premier, Western Cape v Faircape Property Developers (Pty) Ltd* 003 6 SA 13 (SCA) 31-32: "For an act or omission to be actionable, it must constitute an infringement of a legal interest. Just as there cannot be negligence in the air, so too there cannot be wrongfulness ... in the air ..."; see further sources quoted by Neethling & potgieter 33 n 6.) The only substantiation offered by Lamont J in this case of his finding of wrongful conduct on the part of the first respondent, appears as follows (381I): In my view, the conduct of the first respondent in performing acts designed

to frustrate the free commercial activity of the appellant constitutes a wrongful act.

It is suggested that this is a prime example of an approach to establishing wrongfulness on the basis of "wrongfulness in the air" and that the implications of such an approach is so far reaching, that it could in fact frustrate normal transactions in a society where free trade is the order of the day. In this respect it is well worth to note the warning sounded by McKerron in the context of competition law, where he refers to the approach taken by English judges that courts should not concern themselves with the propriety on ethical or social grounds of what litigating parties have done, but should only be concerned with the question whether the plaintiff could prove such unlawful act on the defendant's part as would entitle him to relief (270 *sqq*, referring to the leading English cases of *Hodgson v Webb supra* and *Allen v Flood supra*; see 3 1 above).

3 2 3 Excursus on Fault in Cases of Interference with a Contractual Relationship

It would appear that, from an academic point of view at least, some measure of doubt exists as to what the fault requirement in this regard entails. Although the present appeal deals with the application for an interdict, for which fault need not be proved by the applicant, the court's extension of the field of application of the remedy for interference with a contractual relation justifies a brief discussion of the present South African position in this regard.

Obviously influenced by the application of the term "malice" in some of the English cases, McKerron (274; quoted *in extenso* in the *Atlas Organic Fertilisers* case 180A-C) is the only South African author who is not averse to an interpretation of this term as being tantamount to "spite", "ill-will" or "improper motive" which, in addition to *dolus*, has to be present on the part of the defendant or respondent and which would then explain that in the case of interference with business relations a person's *motive* has a part to play. In this context McKerron concludes (274):

> [C]ourts of law should not attempt to distinguish between acts of interference which are unfair and unreasonable. But a line can and should be drawn between acts of interference whose object is the defence or advancement of a person's own interests, and acts of interference whose sole or dominant purpose is the infliction of harm for harm's sake.

It is suggested that if this line of reasoning is followed, the facts of the present case do not warrant a finding of malice on the first respondent's part. The sole fact that a measure of doubt existed as to the existence of a contract of lease between the appellant and the first respondent (that it "is apparent that there is a dispute between the first respondent and the applicant as to the existence of the lease") and that the court at most found that there was *prima facie* evidence of the appellant's occupation

of the premises in terms of a lease (384D), to my mind definitely does not justify a finding of malice on the part of the first respondent. If the court's reference to the first respondent's conduct as "designed to frustrate the free commercial activity of the appellant" (381I, quoted above) was meant as a positive finding as to malice, it is clearly wrong. (For stringent criticism of an interpretation of malice as representing an improper motive, see Van der Merwe 13 *sqq*.)

There seems to be a greater measure of unanimity in respect of the requirement of fault: intent (*dolus*) at least is required, with specific emphasis on the element of consciousness of wrongfulness (see the *Lanco Engineering* case 380J, merely endorsing the earlier leading judgment of *Union Government v Ocean Accident and Guarantee Corporation Ltd* (*supra*); Neethling & Potgieter 308-309 who, in principle, favour negligence as a sufficient form of fault). It is suggested that if the facts of this case are kept in mind, it is doubtful whether any action on the first respondent's part giving rise to the appellant's dilemma had been done with full consciousness of wrongfulness, considering the great measure of uncertainty regarding the existence or a lease between the appellant and the first respondent. It could well be argued that the first respondent's conduct had simply been consistent with an opinion that no lease agreement had been concluded and that it simply acted to its own advantage in wishing to see the appellant leaving the premises.

3 2 4 Compliance with Requirements for Granting of an Interim Interdict

Finally, something falls to be observed on the way in which the court applied the requirements for the granting of an interim interdict to the appellant. Courts confronted with instances of interference with a contractual relationship usually have to decide a claim for damages instituted by the aggrieved party. However, Van der Merwe (195) points out in this respect that "die krag van 'n interdik ook nie uit die oog verloor [moet] word nie". This is indeed the only reported case of this kind which I could find and in which the remedy of an interdict featured. The first, second and fourth requirements regularly posed for the granting of a temporary interdict (see 384A-C; see further *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 2 SA 256 (C) 267; Neethling & Potgieter 255; Van der Merwe & Olivier 257) call for some comment.

The first requirement is that the applicant should prove a *prima facie* right (which is being infringed or imminently threatened by the respondent). If the typical position in cases of this kind is taken into account – where A and B are in a contractual situation on which C infringes – it will be evident that the court did not pay careful attention to this. In this case one could imagine A being the appellant (tenant), B being the municipality and C being the first respondent (landlord). In the typical case the *prima facie* right would be that of A, flowing from his contractual relationship with B, under threat by C. The court's positive finding in respect of the existence of the required *prima facie* right,

appears as follows: "The appellant [A] has established prima facie that it occupies the property pursuant to a lease [with landlord C]" (384D). It is obvious from the information supplied in square brackets, that the required *prima facie* right as explained above – *viz* between A and B – is totally lacking! The only right which the court alluded to here, was B's right *vis-à-vis* C in terms of the purported contract of lease. This is a far cry from the required right of A *vis-á-vis* B, on which C's conduct could constitute an infringement. The unavoidable conclusion from this is that there had been no compliance in this case with the first requirement for granting an interim interdict.

As Harms (*LAWSA* vol 11 422) points out, the second requirement for obtaining an interim interdict, *viz* that irreparable harm would follow if such interdict were not granted, need not *eo nomine* be adhered to where the applicant has already established a clear right; and that it is furthermore closely related to the last requirement posed for the granting of an interim interdict, such being a consideration of the balance of convenience, which should favour the granting of the interdict. It is trite that this means that such interdict should be granted if this would not entail serious detriment to the respondent, while a refusal of the order would give rise to the applicants suffering substantial harm (*Olympic Passenger Service (Pty) Ltd v Ramlagan* 1957 2 SA 382 (D) 383F; see further Harms *LAWSA* vol 11 422, in particular authorities quoted in nn 1-4). It should be kept in mind that an interim interdict, when granted, only applies pending the outcome of a trial action based on the same facts (see Neethling & Potgieter 255). From the order granted by the court it appears that it was expressly made subject to such action being instituted within a month of the granting thereof. One could thus safely predict that the dispensation brought about by the granting of the order in favour of the appellant would be of relatively short duration. Was that the main reason for the court's lenient attitude towards the appellant? One can only speculate on this, as the judgment itself sheds no further light on the matter.

Furthermore, it is not clear on what basis the order against the municipality (the third respondent) to conclude a contract for the provision of services with the appellant rests, having regard to the above-mentioned requirements. In the first place, from the facts it is patently clear that a contractual relationship had not yet come into existence between the appellant and the municipality; in fact, the entire object of the legal proceedings had been to effect such a relationship. Any *prima facie* right of the appellant required *vis-à-vis* the municipality on the basis of a services contract had thus been totally absent. Although it might be argued that, in the event of the existence of a lease between the appellant and the first respondent (as *prima facie* decided by the court), the municipality would have been obliged to conclude a contract for the provision of services with the appellant (on the basis of a consumer's right based on the relevant bylaws), there is no indication in the facts set out in the judgment that the municipality would not have concluded such a service agreement if it had been informed by the first respondent of the

appellant's tenancy of the premises in terms of a lease. As a necessary corollary to the existence of a clear or *prima facie* right on the part of an applicant, our law requires an act or omission on the part of the respondent indicating that a breach of the right would occur in the absence of an interdict (see eg *Conde Nast Publications v Jaffe* 1951 1 SA 81 (C); Van der Merwe & Olivie 252). It is therefore suggested that this fundamental requirement for granting the order against the municipality was lacking. One can justifiably argue that the appellant could have proceeded against the municipality with an urgent application for a temporary interdict aimed at the conclusion of a services contract, only after the municipality would have failed to conclude the contract for the provision of services with the appellant after having been informed of the court order against the first respondent.

3 3 An Alternative Basis for Granting of the Interdict

Accepting the correctness of the court's granting the appellant an interim interdict against the first respondent, one is forced to consider the correct basis on which such relief was granted. It is suggested that this basis emerges clearly from the court's own finding in respect of the presence of the first requirement for the granting of an interim interdict, *viz* that "the appellant has established *prima facie* that it occupies the property pursuant to a lease" (384D). In terms of the legal rules governing leases, it is well established that the landlord is under a legal obligation to grant the tenant occupation of the leased premises, together with all accessories that are essential for its proper use and enjoyment (*McNeil v Eaton* (1903) 20 SC 507 512; *Pistorius v Abrahamson* 1904 TS 643 648; see further Du Bois *et al Wille's Principles of South African Law* (2007) 911; Kerr & Lotz "Lease" *LAWSA* vol 14 (First Reissue) 169 sqq). This entails a performance by the landlord of all actions necessary to enable the tenant to occupy the premises in terms of the contract.

It is suggested that such performance of the first respondent *in casu*, on the basis of the *prima facie* contract of lease with the appellant, was to inform the municipality of the lease, to enable it to supply services to enable the appellant (tenant) to occupy the premises as contemplated in the lease contract. The flipside of this obligation is of course the tenant's right to such performance against the landlord. It is suggested that it is in fact this right that formed the *prima facie* right required for the granting of the interdict by the court.

4 Conclusion

As pointed out previously (1 above) this is the first judgment on interference with a contractual relationship to have appeared for a long time and, in addition, it is a judgment of a full bench, which has implications in terms of the doctrine of precedent. This entails that at least the South Gauteng High Court (Johannesburg) will in future be bound to recognise a considerable extension to the instances where certain conduct is to be considered to constitute such an interference, *viz*

that a mere potential (future) contractual relationship will have the same standing as an existing legal relationship.

As pointed out, serious doubt can be expressed on the correctness of the court's reasoning in this regard on both logical and legal grounds. It is suggested that the applicant (appellant) should have been granted relief against the first respondent, but then on the simple basis of the contract of lease that was found to exist between them. It is to my mind understandable that the court *a quo* refused the application on the basis of interference with contractual relations.

It would appear that the case was wrongly argued but that the full bench notwithstanding wished to grant temporary relief to the applicant, which would seem equitable under the circumstances (especially in view of the temporariness thereof, and in light of the importance attached to the balance of convenience). If I am correct in my assessment of this aspect of the case, this is a prime example of the old adage that hard cases make bad law.

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