



IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case No: 36830/2014

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

22 May 2015

EJ FRANCIS

In the matter between:

FIREWORK 1475 (PTY) LTD

Applicant

And

BECKER, CLYDE JOHNATHAN

First Respondent

ROUX, RIAAN JOHANNES

Second Respondent

FIRE BRAND SOLUTIONS (PTY) LTD

Third Respondent

JUDGMENT

FRANCIS J

1. The applicant had previously brought an application (the main application) against its former employees - the first and second respondents - to interdict and restrain them from disclosing confidential information to any person including the third respondent (their new employer); and from contacting the applicant's existing clients or past clients for any business, regardless of whether such business is directly in competition with the applicant until 1 September 2015; and being engaged with the third respondent as shareholders,

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employees or in any other capacity until 1 September 2015.

2. The main application was opposed by the respondents. The matter was heard by Semenya AJ who handed a written judgment on 12 December 2014 in terms of which he found that it was not necessary to deal with the merits of the matter and referred it to oral evidence for determination on whether the first and second respondents were employed by the applicant; whether their contracts of employment stood to be rectified as prayed for by the applicant; whether they breached their employment agreements; whether the third respondent is in unlawful competition with the applicant and whether the applicant has made out a case for any of the relief that it is seeking in the proceedings. Costs were costs in the cause.
3. On 2 March 2015 the applicant filed the current application stating that at the hearing of the main application it would be seeking an order for the following relief:
 - 3.1 Granting the applicant leave to file a supplementary affidavit deposed to by Wayne Lawrence Hardie, which was attached as annexure “A”;
 - 3.2 Recalling the ruling made by Semenya AJ in terms of paragraph 18 of the judgement handed down on 12 December 2014 in the main application, in terms of which the matter was referred to oral evidence, and directing that the matter may be heard afresh on the papers presently before the court.
 - 3.3 Ordering the first, second and the third respondent to pay costs of this

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application on an attorney and client scale, jointly and severally, the one paying the other to be absolved;

3.4 Granting the applicant further and/or alternative relief.

4. The basis for the aforesaid application was that the first and second respondents had filed supporting affidavits in an application that was brought in the Randburg Magistrate's court by the deponent's wife, one Therese Hardie in terms of the Protection from Harassment Act 17 of 2011 against their brother, Claude Peter Becker. Claude Peter Becker had filed an answering affidavit wherein he stated *inter alia* that the first and second respondents were employed by the applicant and had resigned. He also referred to the main application.
5. An issue that was referred to oral evidence by Semenya AJ was about who the first and second respondents' employer was. In the answering affidavit filed in the Randburg Magistrate's Court the first and second respondents seem to have answered that question namely that they were employed by the applicant. Their admission, subject to any explanation to the contrary, appear to contradict what they had stated in the main application about who their true employer was. This was one of the reasons why the matter was referred to oral evidence. The referral to oral evidence was correctly made since there was a genuine dispute of fact on the papers before Semenya AJ about who had employed the first and second respondents.

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6. At the hearing of this application counsel for the respondents sought for the matter to be postponed to afford the first and second respondents an opportunity to file an affidavit in response to what is contained in the supplementary affidavit. This application was served on the respondents on 19 February 2015. No reason was proffered why no application was made for leave to file a response to the supplementary affidavit. However I am of the view that it will be in the interest of justice that they should be granted an opportunity to file such affidavits.

7. The applicant in seeking to recall the order made by Semenya AJ relied on the Constitutional Court judgment in the matter of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC). It is trite that a referral to oral evidence constitutes a ruling and not an order by a Judge. As such, it is open to the court to withdraw that ruling and order that it is unnecessary to hear oral evidence. If a party wants to recall that order, an application will have to be made for such an order to be recalled. Ideally such applications should be made to the judge who had referred the matter to oral evidence. The reasons for doing so are obvious. A referral to evidence is specific. It deals with the evidence that must be heard by the judge who had referred it to evidence. This is different to the case where a matter has been referred to trial. There is a distinct difference between a referral to trial and a referral to evidence. If the judge is no longer available to hear such evidence, the application to recall may be heard by another judge. The judge hearing that application is not bound by the

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ruling made by an earlier judge referring the matter to oral evidence.

8. It is not clear on the papers before me why this application was not brought to the attention of Semanya AJ when full arguments were heard by him in the main application. It is a waste of resources for both parties that another judge should hear full arguments that were already heard by another judge.
9. It is clear from the current application that the applicant wishes to place new facts before a judge for the order to be recalled. I do not believe that it is appropriate for me to deal with the application for a recall at this stage since I have given the first and second respondents leave to file supplementary affidavits. In my view, such an application will have to be made after they have filed their supplementary affidavits. This would also be in line with the relief that the applicant is seeking in prayer 2 of its notice of motion where it is stated *inter alia* that the matter is to be heard on the papers presently before court. The respondents' supplementary affidavits are presently not before court and it will be inappropriate for me to deal with the recall application.
10. Part of the application stands to be granted. An appropriate order as far as costs are concerned is to reserve the questions of costs to be determined when the matter is re-enrolled for a hearing to recall the order made by Semanya AJ.
11. In the circumstances I make the following order:

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- 11.1 The application for leave to file a supplementary affidavit by Wayne Lawrence Hardie is granted.
- 11.2 The first and second respondents are granted leave to file their supplementary affidavits within five days of date of this order in response to Hardie's supplementary affidavit.
- 11.3 The application to recall the order made by Semenya AJ and for it to be heard afresh on the papers presently before court is postponed *sine die* to be heard with the main application.
- 11.4 Costs of this application are reserved to be determined at the main application.

FRANCIS J

JUDGE OF THE HIGH COURT

FOR APPLICANT	:	H P WEST INSTRUCTED BY MALHERBE RIGG & RANWELL INC
FOR RESPONDENTS	:	G V MEIJERS INSTRUCTED BY WRIGHT ROSE-INNES INC
DATE OF HEARING	:	11 MAY 2015
DATE OF JUDGMENT	:	22 MAY 2015