REPUBLIC OF SOUTH AFRICA

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

CASE NUMBER: 2015/26094

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

02/09/2016

SIGNATURE DATE

In the matter between:

RICOH SOUTH AFRICA (PTY) LTD	**FIRST APPLICANT**
NASHUA LTD	**SECOND APPLICANT**

AND

FIRST GOLDEN STATIONERS CC	**FIRST RESPONDENT**
KAMANGA, FUNANI MAVIS	**SECOND RESPONDENT**
SMIT, CHARMAIN	**THIRD RESPONDENT**
DAVE MARTINS	**FOURTH RESPONDENT**
HERISTOVA, JESSICA	**FIFTH RESPONDENT**

J U D G M E N T

WINDELL J:

INTRODUCTION

[1] This is an application for interdictory relief against the first to fifth respondents.

[2] The application is only opposed by the first and second respondents. There is no indication that the third, fourth and fifth respondents are aware of the proceedings.

[3] In essence the applicants seek an order prohibiting the respondents to make false representations to the applicants' clients and prohibiting the respondents from selling or attempting to sell any products to the applicants' clients. The applicants allege that all five respondents engaged in fraudulent conduct by making false representations to the applicants' clients, and by using confidential information of the applicants to unlawfully compete with the applicants.

[4] The first and second respondents contend that the application is an abuse, is based entirely on hearsay evidence, and is an attempt to stifle lawful competition.

[5] Prior to the hearing of this application, the first and second respondents brought an application in terms of Uniform Rule 6 (15) to strike out certain portions and annexures relating to the founding affidavit and replying affidavit, which they averred constituted hearsay evidence.

[6] It was clear that the offending paragraphs were hearsay as the applicants relied on "information" given to them by "certain clients". This information is in essence the emails and documents attached to the founding affidavit. Some of the emails were referring to second hand information conveyed to the authors of the emails by other persons. The emails came from unknown parties, none of whom signed confirmatory affidavits as to the truth or correctness of the emails or the context in which it was sent or received.

[7] The court granted the application and large portions of the founding and replying affidavit were struck out.

THE PARTIES

[8] The first applicant is Ricoh South Africa (Pty) Ltd ("Ricoh"), a company with limited liability duly incorporated, with its principal business at Bedfordview, Johannesburg. The second applicant is Nashua Ltd ("Nashua") a company with limited liability duly incorporated, with its principal business at Woodmead, Sandton.

[9] The applicants are suppliers and service providers of office automation equipment. This includes amongst others, the supply of office machines to do printing, copying, scanning and faxing of documents. Apart from selling and renting machines to clients, the applicants also conduct

maintenance and servicing of the machines in accordance with the maintenance and service agreements with the clients. Part of the applicants service to their clients, is to provide their clients, free of charge, the required toner for their machines. The applicants have their respective networks of dealerships and authorized representatives through which the toners are distributed to its clients nationally and internationally.

[10] The first respondent is First Golden Stationers CC ("First Golden"), a close corporation, with its principal place of business at Leondale, Germiston. First Golden has only one member namely the second respondent, Funani Mavis Kamanga ("Kamanga"). First Golden conducts business from Kamanga's residential address.

[11] First Golden's business is supplying toner and other items of stationery to businesses and to the public. First Golden do not run a warehouse or retail outlet and do not hold any stock. In all instances orders are taken telephonically or via email or fax, and First Golden then "buy-to-order". Invoices are dispatched and delivery is only made once payment is done. The toner is ordered from suppliers.

[12] The fourth respondent is Dave Martins, and the fifth respondent is Jessica Heristova. The applicants allege that the fourth and fifth respondents are employed by First Golden. Kamanga stated, under oath, that she has no knowledge of who the fourth and fifth respondent are;

has never employed them in any capacity, nor had she done any business with them, and neither she or First Golden can be held accountable for any representations or alleged misrepresentations made them.

[13] The third respondent is Charmain Smit. Kamanga confirmed that the third respondent was employed with First Golden for a period. She took orders, created invoices and ensured that payments were received. She was not on the telesales side of the business and her function was that of an administrator and secretary. She left her employment at First Golden in December 2014.

BACKGROUND FACTS

[14] The applicants allege in their founding affidavit that during 2012 some of Ricoh's clients complained that "another company" contacts them on a regular basis and attempts to sell them toner for use in their office machines. This "other company" will in some instances also tell the clients that Ricoh is unable to supply toner, or that Ricoh has sub-contracted them to supply toner at a charge. The applicants aver that in some instances the respondents used the name of the applicants in the first person ("*we at Ricoh; we at Nashua*") in its email messages to create the impression to clients that the message that the clients receive actually emanates from the applicants' offices.

[15] Ricoh investigated the complaints and concluded that First Golden was the "other company".

[16] The applicants aver that the respondents have intricate knowledge of what machines the applicants' clients use and that they also have intricate knowledge of the persons in the client's organisations. It therefore appears that the respondents possess confidential information of the applicants which they obtained in some way or another.

[17] The allegations of fraud and a scam are denied and First Golden avers that the real intention of the applicants is to close down a competitor under the vague and misleading guise of some sort of unlawful activity.

[18] It is common cause that Ricoh's attorney of record sent a written demand to First Golden's attorneys on 9 November 2012, wherein it was demanded that First Golden give a written undertaking to refrain from contacting or soliciting their customers, and to refrain from representing that they are associated with or contacting the clients on behalf of Ricoh. Kamanga replied with a letter through her attorneys, and stated that First Golden gets its clients from the telephone directory and that they do not know who Ricoh's customers are. In this letter Kamanga also denied making any false presentations to any customers.

THE EVIDENCE

[19] As indicated earlier, large portions of the applicant's founding and replying affidavit were struck out as it amounted to hearsay. The only allegations in the founding affidavit that remain in support of the relief sought are the following paragraphs:

34.

BME Omnia

"During or about October 2012 the third respondent, representing the First Respondent, conducted unlawful and fraudulent behavior towards BME Omnia Group (Pty) Ltd, a client of the first applicant.

35.

In this regard I attach hereto a tax invoice issued by the first respondent dated 19 October 2012 in the amount of some R 51 290.00 for toner. From this invoice it is clear that the first respondent has the specific particulars of what machine it is for and also the contact details of the person in employ of the client. Also to this client the first applicant normally provides toner free of charge and they should never have purchased or paid for any from the first respondent. I attach a copy of this invoice with number # 021221 hereto marked "FA5".

36.

In order to conduct trade with Omnia, Omnia requested the first respondent to apply to become a supplier of Omnia and in this regard the first respondent had to *complete an application form, a copy of which I obtained from Omnia attached hereto marked "FA6".*

37.

From this document the particulars and addresses of the first respondent appears as well as that of the first respondent's member, the second respondent. Also on the document appear the particulars of the third respondent and her identity number.

38.

I state from this that it is accordingly clear who acts through and on behalf of the first respondent and as a result I state that the second and third respondents on this basis have to also be subjected to the order as prayed for in the notice of motion in their personal capacities as in addition to only the first respondent "

54.

AON SA

On or about 20 December 2012 the first defendant supplied toner to AON South Africa (Pty) Ltd, a client of the first applicant, in respect of toner for a Gestetner MPC5501 machine. I attach hereto marked "FA11" a copy of the invoice with number #078321 in the amount of R 31 720.00 as well as proof of payment by the client attached hereto marked " FA12" .

55.

Thereafter and or about 7 January 2013 the respondents attempted to again supply AON with toner on the same unlawful and fraudulent basis and issued a tax invoice with number #078356 to AON in the amount of R 95 160.00 a copy of which I attach hereto marked "FA13"

71.

Total SA

During January 2015, clients of the first applicant again complained to the first applicant about the unlawful conduct of the first respondent.

72.

In this regard I attach hereto marked FA16 a copy of an email message dated 16 January 2015 at 01h00 pm sent from Jessica Heristova the fifth respondent to Sphesile Sithole from Total SA.

73.

From this message it appears that the fifth respondent fraudulently impersonates as being contacting the client from the first applicant where she states "We at Ricoh have a shortage on these toners and we are only getting our next shipment in October 2015. First Golden is reliable supplier of these toners and has enough in stock".

74.

The fifth respondent's email signature then implies that she is a "secretary from Head Office, Rich Machines, South Africa". This is a fraudulent misrepresentation as there is no person by that name employed by the first applicant"

75.

An invoice was then issued dated 15 January 2015 to Total Ladysmith (Pty) Ltd from the first respondent a copy of which is attached hereto marked "FA17"

76.

Santam

The first respondent also fraudulently targets the first applicant's clients in Namibia. In this regard I attaché hereto marked "FA18" a copy of an email message from the fifth respondent to Madrigale Cloete from Santam Namibia dated 19 January 2015 at 4h42 pm.

78.

Public Service Union

On 6 February 2015 at 10h04 am the fifth respondent sent an email message to Ms. Saara Halweendo from the Public Service Union of Namibia. A copy of this email is attached marked "FA19".

79.

Important to note in that in this instance the fifth respondent impersonates to be from "Ricoh Machines Windhoek, Namibia". Again in the same fraudulent misrepresentations are made to these clients.

80.

In this instance Ms Halweedo fell for the respondent's fraud and the third respondent sent an invoice to the first applicant's client. I attach hereto marked FA 20 a copy of the invoice #008949 dated 9 February 2015 as well as marked FA21 a copy of the email message from the third respondent dated 9 February 2015 at 2h45 pm to which the invoice was attached."

90.

Department Arts and Culture

I attach hereto marked FA28 a copy of an email message dated 7 may 2015 under the hand of the fifth respondent addressed to Nomsa Rabotapi from the Department of Arts and Culture.

91.

In this message the fifth respondent again fraudulently representing to be acting on behalf of the second applicant makes the false statement similar to the instances above.

[20] The answering affidavit of Kamanga on her behalf, and on behalf of First Golden revealed the following:

- *First Golden "cold calls" all companies in South Africa to sell them goods, and does not have a list of the applicants' clients. Having regard to the fact that the two applicants are the largest suppliers of toner in the country, it is inevitable that, from time to time, clients will be contacted who are already clients of the applicants and who do not wish to do business with First Golden.*

- *It is impossible for First Golden to know who the applicants' clients are, and Kamanga is not privy to any confidential information other than information which is conveyed to First Golden and its employees by the clients who call them or to whom they speak to on the phone.*

- *Many of the applicants' alleged clients contact her as they are disgruntled with the level of service and the turnaround times in delivering toner. These clients buy toner from First Golden notwithstanding and despite the fact that they have might have service level agreements in place with the applicants.*

- *First Golden also sources business from various agents dealing in toner and some of these agents arrange deals directly with the clients. Kamanga then sent details of where invoices must be sent and sends the invoices, receives payment and arranges for delivery of the goods. These agents are independent and do not act for and on behalf of the First Golden. How they source their business and what representations are made by them is unknown to her, and she cannot be held liable for their actions.*

- *In many cases the orders are placed directly or through agents who are ex-employees of the applicants themselves, and therefore are privy to information in relation to who the correct people are to deal with at the so-called clients' offices alternatively are ex-employees who wish to divert business to First Golden and away from the applicants as the result of the fact that they have grudges with the applicants.*

- *First Golden's invoices are specific, they deal with the information as to the nature of the ink for which toners are being supplied as this is critical in order to ensure that the correct toner is supplied, and this information is gathered from the persons who they deal with when the deal is being done. The person being dealt with from the customer side is always reflected on the invoice and one would assume that, if any of these so-called persons were disgruntled, or felt that they were being misrepresented, a confirmatory affidavit by them would have been annexed to the founding affidavit instead of simply a series of e-mails conveying second hand and third hand information.*

[21] In their replying affidavit the applicants attempted to change the cause of action to allege that First Golden overcharged the customers for such orders and in the circumstances somehow acted unlawfully. This cause of action is made out in reply, and is in any event not a basis for an interdict as sought.

EVALUATION

[22] The remaining paragraphs in the founding affidavit, after the hearsay evidence was struck out, deal with six instances where it is alleged that the respondents acted in a fraudulent manner. In two of the instances the third respondent ("Smit") is implicated, and in the remaining four instances the fifth respondent ("Heristova") is implicated. The fourth respondent, Dave Martins is not implicated at all. I will deal with each of the six instances separately.

[23] In the first two incidents regarding Omnia and AON, it is alleged by the applicants that First Golden supplied toner to Omnia and AON whom they allege are the applicant's clients. It is alleged that Smit represented First Golden and that Smit engaged in "unlawful and fraudulent behavior" towards the applicant's clients.

[24] Kamanga stated that Smit was employed by First Golden during this period and that she was responsible for taking orders and creating invoices. First Golden also admitted that it must have done some business with the Omnia Group in October 2012 and with AON during December 2012; but how such business was secured and on what basis the orders were placed for toner is unknown to them.

[25] No confirmatory affidavits from Omnia or AON had been obtained supporting the alleged impropriety and no particulars of Smit's alleged unlawful and fraudulent behavior were given. The applicants only attached

invoices that showed that First Golden supplied toner to Omnia and AON during October and December 2012, and that First Golden applied to get onto the vendor roll of the BME Omnia Group. The correspondence emanating from Smit simply indicates that she processed the invoices. There is nothing unlawful or fraudulent therein and no inference of unlawful activity can be made under these circumstances.

[26] In the four remaining incidents involving Total SA, Santam, Public Service Union and Department of Arts and Culture, the applicants alleged that First Golden, through the actions of the fifth respondent, Heristova, made fraudulent representations to these clients by stating that she is from Ricoh and that *"Ricoh has a shortage on toners and that First Golden is a reliable supplier of these toners and has enough in stock".*

[27] The representations in Heristova's email are clearly false and constitute a misrepresentation.

[28] In the instance of Total SA, an email containing the above misrepresentations was sent by Heristova to Sphesile Sithole at Total SA on 16 January 2015. In the instance of Public Service Union a similar email was sent by Heristova to Saara Halweendo at Public Service Union on 6 February 2015. In both instances First Golden issued invoices to Total and Public Service Union with an order after the emails from Heristova were sent. The invoices were attached to the founding affidavit and First Golden admitted that the invoices belonged to them. No confirmatory affidavits

from Sithole at Total or from Halweendo at Public Service Union were however obtained.

[29] The applicants conducted investigations into the alleged unlawful conduct of, *inter alia,* First Golden and Kamanga. The outcome of this investigation was not made available to the court. It seems as if the extent of the investigation was a gathering of emails, which were attached to the founding papers. The emails are unsubstantiated by any proper information under oath, and none of the emails are supported by any independent evidence to indicate that First Golden or Kamanga engaged in any fraudulent or unlawful conduct.

[30] In relation to the annexures which constitute invoices from First Golden, there is a factual dispute as to why those invoices were disseminated. First Golden stated that they source work from various agents and persons who often obtain work on their own behalf, and who then ask First Golden to supply a quote to the client concerned. Kamanga contended that this does not necessarily imply that she and First Golden are involved in any impropriety, as they simply supply a quote and thereafter the quote is dispatched. It is common cause that on every quote where a payment was made, the goods were delivered.

[31] I am satisfied that no case based on unlawful or fraudulent conduct has been made out against First Golden and Kamanga.

[32] In addition the applicants' aim is to demonstrate that there was an employee/employer relationship between First Golden and Heristova. If such a relationship is established, so they argue, the fraudulent misrepresentation made by Heristova can be attributed to First Golden and Kamanga. The only attempt to link Heristova and First Golden is the fact that after the misrepresentation was made by Heristova, orders were placed by Total SA and Public Service Union, and quotations were dispatched from First Golden's office to Total SA and Public Service Union. The court is asked to infer that the invoices were dispatched as a result of the fraudulent misrepresentations made by Heristova as a representative of First Golden.

[33] Kamanga denied that Heristova was ever employed by First Golden and stated that she has no knowledge of who she is. Kamanga further stated that she had never done any business with her, and that First Golden cannot be held accountable for any representations or alleged misrepresentations made by Heristova.

[34] The applicants did not verify whether Heristova was actually in the employ of First Golden and have simply made the assumption based on their investigation and collection of documentation which is over three years old. There were not sufficient facts set out by the applicants to establish that Heristova was employed by First Golden and /or Kamanga. There is however a link between First Golden and Heristova as the

invoices and emails showed that after Heristova send an email an invoice was dispatched from First Golden. The question is whether First Golden has a duty of care or is vicariously liable in relation to the conduct of Heristova in circumstances where her relationship with First Golden is not clear, and where First Golden denied that she was under their control or in its employ.

Duty of care and vicarious liability

[35] The general principle of vicarious liability holds an employer responsible for the wrongs committed by an employee during the course of employment. The courts have held that as long as the employee is acting "within the course and scope of his/her duties" or is "engage with the affairs of his master", that the employer will be liable[1].

[36] The court stated that the rational of vicarious liability is to be found in a range of underlined principles[2].

> "An important one is the desirability of affording claimants efficient remedies for harm suffered. Another is the need to use legal remedies to incite employers to take active steps to prevent the employees from harming members of the broader community. There is a counter availing principle to which is that damages should not be borne by employers in all

[1] [1] *NK v Minister of Safety and Security*

[2] Ad par [21]

circumstances, but only in those circumstances in which it is fair to require them to do so".

[37] In *Absa Bank Limited v Bond Equipment Pretoria (Pty) Ltd* [3], the court held the following:

> "The master is not responsible for the private and personal acts of his servant, unconnected with the latter's employment, even if done during the time of his employment and with the permission of the employer. The act causing damage must have been done by the servant in his capacity as servant and not as an independent individual."

[38] There is no evidence that Heristova has ever been employed by First Golden. Kamanga gave a detailed explanation in her answering affidavit in regards to agents and there was no basis laid down by the applicants to find that First Golden had any control over the actions and conduct of Heristova. Applying the well-known principles set down in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [4], and in the absence of any contradictory evidence, the only reasonable conclusion is that Heristova might have made the misrepresentations in the furtherance of her own economic benefits, namely the earning of potential commissions if deals were done. There is no evidence that she acted on the authority or under the supervision of First Golden or Kamanga. Kamanga in fact stated that

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[3]

[4] *1984(3) SA 623 (A)*

the conduct and behavior of Heristova may have been intended to defraud herself and her business, as on at least one occasion the invoice rendered was fictitious and did not emanate from her office. I am satisfied that First Golden cannot be expected to control the utterances and representations of persons who firstly they do not know, over whom they have no control, and whom they do not employ in any capacity. This would be untenable and unfair. Whilst First Golden may have benefited from the said representations to some extent, this fact alone cannot lead to the automatic inference that First Golden is vicariously liable.

NOTICE OF MOTION

[39] The relief sought by the applicants is set out in prayers 1 to 7 of the Notice of Motion. The relief in prayers 3,4 and 5 were abandoned on the day of the hearing. The interdictory relief can be described as follows:

1. Interdicting the respondents from making false representations to clients of the applicants.
2. Restraining the respondents from contacting any of the applicants' clients for the purpose of making an attempt to sale or supply printer toners to such clients.
3. Costs of this application.

Prayer 1: The interdict

[40] The applicants seek an order interdicting the respondents from making false representations to clients of the applicants.

[41] The requirements for a final interdict are trite. The applicants must show: 1) A clear right; 2) An injury actually committed or reasonably apprehended; and 3) The absence of any other satisfactorily remedy available to the applicant.

[42] As previously indicated there is no evidence implicating First Golden and Kamanga. There is also no evidence that Heristova was in First Golden or Kamanga's employment or under their control, and First Golden and Kamanga cannot be held responsible for representations made by her or any other independent agent. It is accordingly impossible for First Golden and Kamanga to be interdicted from making such representations in circumstances where they have no control, authority or influence over Heristova or any other agent.

[43] In the case of *Masstores (Pty) Ltd v Pick 'n Pay Retailers*[5], the Supreme Court of Appeal considered the burden of proof when considering whether there has been an unlawful interference in an

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contractual relationship, and expressly stated that the following must be evident:

1. That there is an unlawful act.
2. That the unlawful act constitutes an interference in the contractual relationship.
3. The unlawful act was committed with some sort of *dolus*.

[44] No details of the applicants' customers were provided. It is therefore impossible to ascertain whether such clients have in fact been interfered with, and whether in fact the applicants have any proprietary interest which is capable or deserving of protection. The applicants have not made available their contracts with their clients. The court can therefore not ascertain if the clients are prohibited from buying from First Golden. The applicants simply made vague and sweeping statements in regard to some sort of right in relation to these clients. There is therefore no evidence of an interference with a contractual relationship between the applicants and their customers.

[45] There is also no evidence in support of the applicant's allegation that First Golden and Kamanga conducted any unlawful act. Accordingly, there is also no evidence of dolus. There is no reason in law or in fact why First Golden and Kamanga would be prohibited from doing business with any of the applicants' alleged clients.

[46] I agree with the attorney of the respondents that the nature of the relief being sought is similar to that of a party trying to enforce a restraint of trade against another party. Whilst in the present application there is no contractual obligation for First Golden and Kamanga not to deal with the so-called clients of the Applicants, it helpful to observe the comments of the Appellate division in relation to the caution which must be exercised when a restraint prohibits another party from conducting its business or earning a living.

[47] In *Reddy v Siemens Telecommunication*[6] the Supreme Court of Appeal dealt with a restraint of trade and the following principles were set out:

> [15] *"The court must make a value judgment with two principle policy considerations in mind in determining the reasonableness of a restraint. The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim pacta servanda sunt. The second is that all persons should in the interest of society be productive and be permitted to engage in trade and commerce or profession. Both considerations reflect not only common law but also constitutional values.....*
>
> [16] *In applying these two principle considerations, a particular interest must be examined. A restraint would be enforceable if it prevents a*

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[6] [2006] SCA 164

> *party after determination of his/her employment from partaking in trade or commerce without a corresponding interest of the other party deserving of protection."*

[48] The interest between the parties must be balanced. I agree with the attorney of the respondents that the interests of First Golden and Kamanga would be severely prejudiced if the interdict is granted.

Prayer 2: The restraint order

[49] The applicants seek an order restraining the respondents from contacting any of the applicants' clients for the purpose of selling, or attempting to sell or to supply printer toners.

[50] Kamanga stated in her answering affidavit that First Golden makes use of "cold calling", and from time to time they will "cold call" clients of the applicants. The applicants failed to make a list of their clients available. The order sought is too wide and will make it impossible for First Golden to run its business. There is in any event no contractual basis made out in the founding affidavit upon which the applicants' clients cannot do business with the First Golden. An order to this effect would interfere with Kamanga's constitutional right to earn an income and to conduct her own business, and would be contrary to public policy.

[51] An order on these terms would also be impractical and open to abuse by the applicants who could at any stage contend or allege that one of

their clients had been contacted for purpose of doing a sale and therefore hold the respondents in contempt.

[52] The applicants had failed to meet the requirements of a final interdict and that there are no factual or legal basis to grant such an order.

[53] In the result the following order is made.

1. The application is dismissed with costs.

L WINDELL

JUDGE OF THE HIGH COURT

Counsel for applicants:	***Adv. J H De V Botha***
Instructed by:	***Jordaan Attorneys***
Attorney for 1st and 2nd respondent:	***Mr Rael Zimerman***
Instructed by:	***Taitz & Skikne Attorneys***
Date of hearing:	***2 June 2016***
Date of judgment:	***2 September 2016***