



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

CASE NO: 21/34177

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

29 May 2023.
DATE

SIGNATURE

In the matter between:

ROXSURE INSURANCE BROKERS (PTY) LTD
(Reg No: 1987/005449/07)

Applicant

and

TRACETEC (PTY) LTD
(Reg No: 2001/021821/07)

Respondent

JUDGMENT

CRUTCHFIELD J:

[1] The applicant, Roxsure Insurance Brokers (Pty) Ltd, launched this application urgently and ex parte against the respondent, Tracetec (Pty) Ltd. The urgent court granted an interim order on 27 July 2021 in the following terms:

1.1 Calling upon the respondent to show cause why the following orders should not be made final:

1.1.1 The respondent is interdicted forthwith from disposing, transferring or in any manner removing data in its possession and/or control, and which relates to the client list of the applicant annexed to the founding affidavit;

1.1.2 The respondent is ordered to provide the complete record of all communications between itself and the applicant's clients with whom it has engaged with a view to attracting those clients within 7 days from the date of the interim order;

1.1.3 The respondent is ordered to provide a full list of the applicant's clients with whom it has contracted within 7 days from the date of the order;

1.1.4 The respondent is ordered to provide a full account in respect of all payments received by it from the applicant's clients from the date of termination of the respondent's services by the applicant to the date of the order within 7 days of the date of the order;

1.1.5 The respondent is ordered to provide the meta data pertaining to each and every Tracetec tag installed in the motor vehicles of the customers of the applicant, evidencing that each tag was fully functional from date of first installation to date of termination of the applicant's agreement with the respondent;

1.1.6 The respondent is ordered to provide the meta data pertaining to the receiver bay stations that it uses to receive signals in respect of the "Trace Tec tags;"

1.1.7 The respondent is ordered to –

1.1.7.1. Immediately desist from contacting the customer base of the applicant;

1.1.7.2. Only communicate with those customers through the applicant;

1.2 Prayers 1.1.1 up to and including 1.1.7.2 shall serve as interim orders pending the return day.

[2] The Rule Nisi was extended on various occasions and allocated to me for hearing as a special motion on 17 and 18 November 2022. The applicant sought confirmation of the Rule together with costs on the attorney and own client scale against the respondent.

[3] The latter claimed the discharge of the Rule and the dismissal of the application with costs.

[4] The parties filed extensive affidavits including the main application, an application by the respondent to file a further set of affidavits in response to the applicant's replying affidavit and an application by the respondent to strike out certain portions of the applicant's replying affidavit. In addition, the respondent raised a point *in limine* that the applicant's founding papers failed to make out a case for the relief sought. Accordingly, I heard the point in *limine* and the main application simultaneously with the two interlocutory applications.

[5] The applicant sought the dismissal with costs of the application to strike out as well as of the application to file a further set of affidavits by the respondent. The applicant also sought an opportunity to deliver a replying affidavit in the interlocutory application.

[6] The applicant contended that the purpose of the main application was to preserve evidence, the respondent's meta data, in order to confirm whether the respondent did indeed provide the tracking services to the applicant's customers in respect of which the respondent contracted and charged the applicant's customers a fee. Furthermore, that the respondent intended causing damage to the applicant's business by hijacking its customer base in a *mala fide* fashion for the respondent's own financial gain and to the detriment of the applicant.

[7] Thus, the applicant argued that the applicant together with its customers and the greater public at large had rights worthy of protection by way of this application.

[8] The applicant, an insurance broker, acts in two capacities in this application: firstly, as the bordereaux in terms of a bordereaux or service level agreement ('SLA'), on behalf of its customers; and, secondly, as the broker for the underwriter, Infiniti Insurance, in terms of which the applicant attends to collections in terms of the 'Binder Agreement.'

[9] As bordereaux under the bordereaux agreement, the applicant collects fees paid by its customers and pays to the respondent that portion of those fees owing to the respondent.

[10] The latter, in addition to concluding the bordereaux agreement with the applicant, concluded subscriber agreements ('the subscriber agreement/s'), with each of the applicant's customers receiving services from the respondent.

[11] The applicant referred to clause 4.1.3 of the subscriber agreement in terms of which the respondent acknowledged the agreement between the applicant and its customers in respect of the applicant fulfilling the role of taking the place of the customer in respect of the customer's rights and obligations.

[12] The applicant alleged that it terminated the bordereaux agreement and that the subscriber agreements terminated automatically, as a result of the termination of the bordereaux agreement, after which the respondent became the applicant's competitor.

[13] As a result, the respondent, according to the applicant, unlawfully poached the applicant's customers away from the applicant by approaching those customers in order to obtain authority to debit them directly for the respondent's tracking services.

[14] Accordingly, the applicant contends that it will suffer substantial harm as a result of the respondent's unlawful conduct, if the Rule is not confirmed by this Court as sought by the applicant. Furthermore, that the applicant is under threat and requires protection in terms of the relief sought herein.

[15] The applicant's clients or customer base relevant to this application, specified in an annexure to the notice of motion and founding affidavit, are regulated by the bordereaux and the subscriber agreements.

[16] The applicant or bordereaux operates as the agent who concludes agreements with its clients or subscribers in terms of which the subscribers pay a consideration to the bordereaux for ensuring that the respondent renders the tracking services to the subscribers. The applicant then pays a portion of the fee received from the subscribers to the respondent as consideration for the respondent's services. The subscribers, in turn, bind themselves to the terms of the agreement, as applicable before the respondent is obliged to render its services to the subscribers.

[17] In terms of the bordereaux agreement, in the event of the applicant or bordereaux wishing to cancel the bordereaux agreement during the initial period, the applicant is obliged to inform the respondent of its intention to do so by giving at least three (3) calendar months' notice in writing of the expiry date.

[18] If no such notice of the applicant's intention to cancel the bordereaux agreement with effect from the expiry date is given, the agreement shall be automatically renewed after the initial period for an indefinite period after the expiry date.

[19] Either party shall be entitled to cancel the bordereaux agreement during the extended period by giving twelve (12) months' notice to the other party subject to the provisions of clause 20 of the bordereaux agreement.

[20] In the event of termination of the bordereaux agreement, the respondent's agreement with the subscribers shall continue to operate between the respondent and the subscribers for the balance of the period thereof.

[21] The respondent shall only be required to terminate a subscriber's service with the respondent within twenty (20) days of receipt of a valid cancellation certificate signed by the subscriber, provided that the tag described in the certificate has been deactivated on the respondent's system.

[22] The bordereaux shall provide the respondent with all cancellation certificates signed by the subscriber in order to enable the respondent to terminate the rendering of the respondent's services to the subscriber within twenty (20) business days after receipt of the signed cancellation certificate.

[23] Testing of the tag in terms of the subscriber agreement is the sole responsibility of the subscriber or owner of the tag once the initial period expires.

[24] The bordereaux indemnifies the respondent against all loss or damage due to:

24.1 Any breach or non-performance of any of the respondent's obligations under the agreement;

24.2 Any negligent act or omission by the respondent, its employees or assignees;

24.3 The respondent's inability to recover an asset after receiving a request to do so due to a personal emergency, in terms of the definition of personal emergency in the bordereaux agreement.

[25] The bordereaux shall not make any false representations about the respondent, its ability to recover lost or stolen assets or the respondent's infrastructure or tags.

[26] In the event of the bordereaux failing to pay any amount due to the respondent in terms of the bordereaux agreement on due date, the respondent is entitled to suspend its obligation to provide its services to the relevant subscriber.

[27] The parties shall always display good faith to each other in all their dealings, in terms of all deals relating to the bordereaux agreement and in any other matters that may affect their rights in terms of the agreement. This implies *inter alia* that they will always act reasonably, honestly and in good faith and perform the obligations arising from the agreement diligently and with reasonable care.

[28] If either party breaches any term/s of the bordereaux agreement, the aggrieved party shall give notice to the defaulting party to rectify the breach within seven (7) days from receipt of the notice.

[29] Upon a failure to rectify the breach within seven (7) business days from receipt of such notice, the aggrieved party shall be entitled, *inter alia*, to cancel the agreement with or without a claim for damages, or, claim specific performance with or without a claim for damages.

[30] The relevant terms of the subscriber agreement/s are the following:

- 30.1 The respondent operates an identification system in order to track, trace and recover lost and stolen assets, including motor vehicles. The subscriber signs a certificate in terms of which it binds itself to the terms and conditions stipulated in the subscriber agreement.
- 30.2 The respondent operates an infrastructure network comprising receiving beacons that communicate signals from units to the respondent. The relevant asset monitored by the respondent is fitted with a "tag" being a recovery device designed by the respondent in order to install in an asset for the purpose of tracking, tracing and recovering the asset in the event that it is lost, stolen or hijacked. The subscriber is the subscriber in respect of the respondent's services.
- 30.3 The subscriber appoints the respondent to render its services to the subscriber subject to the terms and conditions set out in the subscriber agreement.
- 30.4 The subscriber agreement commences on the commencement date and continues indefinitely subject to either party's right to terminate the agreement by allowing twenty (20) business days' written notice to the other party unless otherwise indicated in the certificate under which the agreement is incorporated.
- 30.5 The respondent may enter into the agreement with the subscriber for the sale and purchase, rental and/or installation of its units in exchange for a consideration.
- 30.6 A subscriber may purchase a unit directly from an approved installer.

- 30.7 The subscriber may in certain circumstances be represented by an agent (the bordereaux), with respect to the rights and obligations of the subscriber in which case any notice given:
- 30.7.1 By the respondent to such agent shall be deemed sufficient notice by the respondent to the subscriber; and
- 30.7.2 By the bordereaux or agent to the respondent shall be deemed sufficient notice by the subscriber to the respondent.
- 30.8 The respondent will render its services to the subscriber if a tag is installed in the asset and upon receipt of a valid certificate duly completed and signed by the subscriber, and all amounts due, owing and payable by the subscriber to the respondent are up to date.
- 30.9 In the event that the subscriber wishes to cancel the subscriber agreement with the respondent, it shall give twenty (20) business days' written notice to the respondent to that effect by providing the respondent with a cancellation form, being the respondent's standard cancellation form containing the details of the subscriber and the asset or an email including the subscriber's identity number, tag or billing number and registration number of the vehicle if the asset is a vehicle.
- 30.10 Infrastructure refers to the respondent's network of receiving beacons that communicate signals from units to the respondent;
- 30.11 Tag refers to a recovery device designed for the respondent for the purpose of installation in an asset in order to track, trace and recover

such asset in the event that it is lost, stolen or hijacked (referred to as ('the Tracetec service'));

- 30.12 Unit refers to a tag that is approved by the respondent;
- 30.13 The subscriber appoints the respondent to render its services to the subscriber, which appointment the subscriber accepts subject to the terms and conditions set out in the subscriber agreement;
- 30.14 It is the subscriber's responsibility to ensure that it contacts the respondent within a period of ten (10) business days after sending the cancellation notice to the respondent, in order to ensure that the respondent received such notice. The respondent shall send confirmation of cancellation to the subscriber by email subsequent to cancellation in the event that the subscriber fails to contact the respondent within a period of ten (10) business days after the cancellation notice as aforesaid. The respondent shall not be liable for a refund of monthly subscription fees recovered from the subscriber after the cancellation date;
- 30.15 In the event that the subscriber falls into arrears with any amount including subscription fees, which become due, owing and payable to the respondent, the latter shall be entitled to suspend the services to the subscriber without giving written notice to the subscriber;
- 30.16 In the event that the respondent suspends its services to the subscriber as aforementioned, and the subscriber's asset is lost, stolen or hijacked,

the subscriber shall be required to pay to the respondent various amounts;

30.17 The respondent warrants each tag to the subscriber for a period of three (3) years from first installation in the subscriber's asset;

30.18 The respondent's three-year warranty of each tag shall not apply in the event that the subscriber falls into arrears with any monthly subscription fees which become due, owing and payable to the respondent;

30.19 The subscriber shall be liable to pay to the respondent the monthly subscription fee stipulated in the certificate, and/or other agreement between the respondent and the subscriber, from the commencement date to the cancellation date, in exchange for the respondent rendering services;

30.20 The testing of the unit is the subscriber's responsibility;

30.21 The subscriber is entitled to request the respondent to test the unit in its asset six (6) times per year, effectively once every two (2) months;

30.22 The subscriber is entitled to request the respondent to send an approved installer to test the unit when the subscriber is informed by the respondent that the unit is listed on the respondent's low signal report and that the respondent receives a low signal from the unit;

30.23 The subscriber indemnifies the respondent against any losses or damages which the subscriber may suffer as a result of:

- 30.23.1 Failure of the respondent's infrastructure;
- 30.23.2 A GSM failure or a network failure of the subscriber's internet service provider;
- 30.23.3 Any breach or non-performance of any of the respondent's obligations under the agreement;
- 30.23.4 Any negligent act or omission by the respondent, its employees, contractors or assignees;
- 30.23.5 Any damage caused to an asset as a result of the respondent's tracking, tracing or recovery or attempted tracking, tracing or recovery of an asset;
- 30.23.6 The respondent not being able to recover an asset after having received a call requesting the respondent to recover an asset due to personal emergency.

30.24 The subscriber acknowledges that:

- 30.24.1 The respondent's services are intended to reduce the risk of loss of asset but that the said services do not eliminate such risk;
- 30.24.2 The respondent does not guarantee successful recovery;

- 30.24.3 The respondent's services are only available in the areas in the Republic of South Africa where the respondent has an infrastructure;
- 30.24.4 The respondent shall be relieved of its obligations under the subscriber agreement for the duration of any force majeure and shall not be in breach of the agreement nor otherwise liable to the subscriber as a result of any inability to perform in accordance with the agreement or as a result of any delay or failure in the performance of any of its obligations in terms of the agreement if and to the extent that such inability, delay or failure is caused by a force majeure;
- 30.24.5 In the event that any party to the agreement breaches any of the terms of the agreement, then the other party shall give notice to the defaulting party to rectify the breach within a period of twenty (20) business days from receipt of such notice;
- 30.24.6 Should the defaulting party fail to rectify such breach within a period of twenty (20) business days from receipt of such notice, the aggrieved party shall be entitled to either cancel the agreement with or without a claim for damages, or, claim specific performance with or without a claim for damages.

[31] It is evident from the relief claimed by the applicant that the applicant sought a final interdict together with a claim based on the alleged unfair competition of the respondent although the applicant did not refer to the latter as unfair competition.

[32] The applicant alleged that the launch of the application was the result of the conduct of the respondent's director damaging the applicant's business by hijacking the latter's customer base in a *mala fide* fashion and that the respondent conducted itself dishonestly and *mala fide* with the sole purpose of misusing the applicant's customer base, for the respondent's financial gain to the detriment of the applicant.

[33] The applicant and the respondent commenced business during 2009 or 2010. The applicant alleged that it was satisfied with the respondent's services until during or about 2017. The applicant approached the respondent as its preferred tracking company or service provider pursuant to which the parties concluded the bordereaux agreement or SLA.

[34] The applicant alleged that the relationship with the respondent eroded over time due to the respondent's deteriorating performance and provision of services in respect of the applicant and its customers. The applicant first complained to the respondent during 2017 after which the respondent's percentage of vehicle recoveries allegedly improved. The applicant alleged that the improvement was short-lived. The applicant relies in this application upon two instances of vehicle thefts from customers of the applicant in support of its allegation that the respondent's services deteriorated subsequent to their short-lived improvement during or about 2017.

[35] The first instance referred to by the applicant is the hijacking of a 2016 Toyota Landcruiser or Prado on 21 November 2018, that was not recovered by the respondent. The second incident arose on 12 September 2020, almost 2 years later, when a Ford Ranger motor vehicle was stolen and not recovered by the respondent.

[36] Subsequent thereto, after a plethora of correspondence between the parties that I shall refer to hereunder, the applicant purported to terminate the bordereaux

agreement and alleged that it automatically terminated the subscriber agreement as a result. The respondent denied the termination and alleged that the applicant, in failing to pay over the respondent's portion of the fees paid by the subscribers to the applicant for the respondent's tracking services in October 2020, repudiated the bordereaux agreement, which repudiation the respondent allegedly accepted resulting in the termination of the bordereaux agreement.

[37] The deponent to the applicant's founding affidavit, registered a business known as 'Quick Track', conducting the business of vehicle tracking, tracing and recovery, with effect from 5 November 2020.

[38] The respondent contended that this application was a ruse, aimed at hijacking the respondent's customer base by furnishing the applicant with the respondent's meta data, which would give the applicant access to the respondent's infrastructure, technology and confidential information. The respondent also submitted that the application amounted to a fishing expedition in respect of future litigation that the applicant intended to institute against the respondent.

[39] The applicant referred to the respondent's alleged *mala fide* conduct in which the respondent contacted various of the applicant's clients advising them that the applicant had failed to pay over the monthly subscriptions and informing them that in the event that they required the respondent to continue providing the respondent's services that the respondent required to procure payment for those services from the clients directly.

[40] In respect of the applicant's relief based upon the respondent's alleged failure to provide the tracking and tracing services to the applicant's customers for which the respondent contracted and charged a consideration, the applicant alluded to certain statements by one Mr Robert Austin, a service provider to the respondent's network.

[41] In respect of the evidence of Mr Austin, the applicant states that; "As a result of having been involved in the opening of an improved system for the customers of the applicant, I contacted Robert Austin ...".

[42] Robert Austin ('Mr Austin') alleged provided certain "shocking information regarding the respondent's business practices". Mr Austin allegedly had possession of reports that reflected that less than 60% of the respondent's tags had been seen in the six months prior thereto, being the six months prior to mid-July 2021, being the date on which the founding affidavit and confirmatory affidavits were deposed to, and less than 40% in the months approximately mid-June to mid-July 2021. The '21-day report" alluded to by Mr Austin, was, according to Mr Austin's memory, around 30% of billed Tracetec tags.

[43] The respondent's director allegedly advised Mr Austin that it was the respondent's company decision not to unilaterally replace the respondent's tags but to wait for customers to complain to the respondent.

[44] Mr Austin allegedly advised the deponent to the applicant's affidavit that only 200 out of 1 400 of the respondent's receivers, were fully operational. When asked how many of the receivers were actively detecting the respondent's 24-hours a day, the respondent was unable to answer.

[45] The aforementioned is the sum of Mr Austin's evidence allegedly provided to this Court and relied upon by the applicant. No substantiating facts whatsoever are furnished by the applicant and no basis is set forth to establish Mr Austin's alleged knowledge of the allegations aforementioned.

[46] The reports allegedly referred to by Mr Austin relied upon by the applicant are not attached to the applicant's founding affidavit. No evidence is furnished of the services provided by the company for which Mr Austin works or the position occupied by Utrack It.

[47] It is also wholly unclear from the applicant's founding affidavit how or why the applicant came to request information regarding the respondent from Mr Austin in the circumstances alluded to by the applicant, the deponent to the applicant's affidavit having been involved in the opening of an improved system for the customers of the applicant. There is a disconnect between the applicant's alleged reason for contacting Mr Austin and the ensuing alleged information alluded to by Mr Austin as regards the respondent.

[48] That gives credence to the respondent's averment that the application is nothing other than an attempt to take over the respondent's business. Notwithstanding, I put it no higher than that.

[49] The respondent alleged that Mr Austin is the sole member of Utrack It Manufacturers CC ('Utrack It'), a previous database administrator of and technical advisor to the respondent. Furthermore, Utrack It manufactured the T2 tags and beacons used by the respondent to provide its services to subscribers. The approximate twenty (20) year relationship between Utrack It and the respondent terminated during or about June 2021, shortly prior to Mr Austin signing his confirmatory affidavit to the applicant's funding affidavit on 20 July 2021. Pending litigation between the respondent and Utrack It in which the respondent seeks to recover various significant sums, is pending.

[50] The respondent's answer to the allegations attributed to Mr Austin in the founding affidavit is that they are devoid of all truth. Furthermore, the six-month period referred to by the applicant relates to a period during the covid epidemic when the population of the Republic, whilst no longer under a strict lockdown, remained under ameliorated regulations that served to regulate social distancing amongst the population. As a result of the epidemic, vast swathes of the workforce found comfort in working virtually, which served to reduce the number of vehicles on the roads.

[51] Whilst the applicant does not give a date in respect of its conversation with Mr Austin, that interaction presumably took place post 5 November 2020, upon which date the Quick Track company was registered. The disconnect between the information gleaned from Mr Austin is that the applicant alleges it cancelled the agreement with the respondent during October 2020. Accordingly, as at the presumed date of the interaction with Mr Austin, the bordereaux agreement according to the applicant had already been cancelled. There does not appear to be any reason why the applicant, given that it had already cancelled the bordereaux agreement with the respondent on the applicant's version, should be attempting to glean information about the respondent's business from Mr Austin. In the event that the applicant's meeting with Mr Austin took place immediately prior to the signature by Mr Austin of his confirmatory affidavit on 20 July 2021, then the disconnect between the pursuit of information concerning the respondent against the fact that the applicant allegedly terminated its contract with the respondent during September 2020, is unexplained by the applicant.

[52] This is particularly so considering that the applicant's tracking company was registered on 5 November 2020, the applicant's circular to its customers was sent on 25 January 2021, informing that the tracking services provided by the respondent had

been “moved in-house”. In those circumstances, there was no reason for the applicant to be seeking information on the respondent’s business as at June or July 2021.

[53] The averments attributed to Mr Austin in the founding affidavit are devoid of cogency in that the reports allegedly relied upon by Mr Austin in allegedly making the statements are not provided to the Court, no context is given to the statistics furnished by Mr Austin and no dates or substantiating facts to the statements are provided by Mr Austin. The averment that the respondent had decided to wait for a customer to complain before replacing a tag ran contrary to the subscriber’s agreement. As abovementioned, the respondent warrants in terms of the subscriber agreement, each tag for a period of three years from initial installation and the subscriber agreement provides in terms that the testing of the unit is the responsibility of the subscriber. Furthermore, the subscriber in terms of the subscriber agreement, may request the respondent to test the unit six times per annum.

[54] Additionally, the applicant did not furnish any evidence in respect of the alleged number of ‘fully operational’ receivers as alleged by Mr Austin.

[55] Accordingly, Mr Austin’s allegations relied upon by the applicant are without probative value given that there is no factual premise underlying those allegations. As a result, the applicant’s conclusion drawn from the averments of Mr Austin, to the effect that the respondent was not executing its contractual obligations notwithstanding its charging fees of the applicant in respect thereof, was without any merit whatsoever.

[56] Furthermore, the conclusions drawn by the applicant that the applicant’s customers were entitled to a refund of the fees paid to the respondent, were without any basis. They also ran contrary to the subscriber agreement. The applicant did not allege any facts from which it could justifiably reach the conclusions relied upon by it.

[57] Given that the applicant on its own version, was satisfied with the respondent's services until during 2017, after which it relied upon the two thefts and non-recoveries of the Prado and Ford Ranger in 2018 and 2019 respectively, the applicant, in the light of the absence of any cogency added by the averments attributed to Mr Austin, is not entitled to the meta data in respect of the respondent's tags claimed by it in prayers 2.1, 2.5 and 2.6 of the notice of motion. In short, the applicant did not demonstrate the necessary right for such relief.

[58] Furthermore, the applicant did not make out any basis upon which it litigated on behalf of the entire South African public at large as it purports to do in this application.

[59] Insofar as the applicant alleged that there were "dubious circumstances" surrounding the theft and failure to recover the Prado and Ford Ranger vehicles, those alleged "dubious circumstances" were not specified by the applicant. The respondent detailed the circumstances of the failure to recover the vehicles and there did not appear to be anything dubious about the explanation.

[60] The respondent explained that the Ford Ranger was stolen during the week that the respondent was switching IT suppliers and MTN "went off-line," without warning. The respondent's subscriber agreement as referred to above, serves to exonerate the respondent from liability in such circumstances, in that the respondent is indemnified against such failure by the cell phone networks.

[61] In respect of the Prado, it disappeared into Swaziland allegedly, in which the respondent does not have infrastructure, an aspect specifically covered by the subscriber agreement.

[62] Given the seriousness of the alleged statements of Mr Austin relied upon by the applicant, the respondent attached two substantive confirmatory affidavits in respect of the operational infrastructure and technology of the respondent's business. The details thereof included details of the beacon network and the manner in which it operates together with the transmission of data from a beacon to a computer server. The respondent, notwithstanding that the averments of the applicant did not call for the level of detail provided by the respondent, cannot be penalised for adopting a cautionary approach given the nature of the allegations made by Mr Austin and relied upon by the applicant and the far-reaching relief sought by the applicant in this application.

[63] In considering the respondent's answering affidavit together with the various substantive confirmatory affidavits thereto, I have confined myself to considering the averments that are relevant to the relief sought by the applicant in this application, without venturing into the numerous extraneous issues raised in the respondent's affidavits. I adopted the same approach in respect of the applicant's reply, mindful always of the requirement that the applicant is obliged to make out a case for the relief that it seeks in its notice of motion. Accordingly, I declined to take notice of the new and extraneous averments raised by the applicant in its replying affidavit for purposes of determining this application.

[64] Turning to the applicant's claim arising from the respondent's alleged unfair competition, the applicant alleged that the respondent contacted the applicant's customer base *mala fide* in an attempt to further the respondent's business and prejudice that of the applicant.

[65] The applicant alleged that it terminated the bordereaux agreement with the respondent and accordingly the subscriber agreements. The respondent disputed that the applicant did so in compliance with the relevant provisions of the bordereaux

agreement or the subscriber agreement and, contended that the applicant repudiated the bordereaux agreement, which repudiation the respondent duly accepted, thus giving rise to the termination of the bordereaux agreement.

[66] The bordereaux agreement provides in terms, as stated afore, that in the event of non-compliance, the aggrieved party, being the applicant, will give the non-complier seven business days' written notice to rectify the alleged breach, failing which the aggrieved party may cancel the bordereaux agreement. The applicant alleged that it took "extensive steps to engage with the respondent." Other than various items of correspondence, the specific steps relied upon by the applicant are not referred to and no mention is made of the applicant placing the respondent on terms to rectify the alleged breach within seven business days thereof. Moreover, there is no reference by the applicant of the respondent failing to comply with any demand in writing to rectify the alleged breach.

[67] The applicant alleged that as a result of its cancellation of the bordereaux agreement, the subscription agreement terminated pursuant to clause 4.1.3 of the subscriber agreement to the effect that the bordereaux may represent the subscriber, given that the bordereaux is the agent and the subscriber the principal.

[68] However, clause 6.2 of the subscriber agreement provides specifically, in terms, that a subscriber wishing to cancel the subscriber agreement shall provide twenty business days' written signed notice of cancellation providing certain specified information, including the tag number, vehicle's registration if the asset is a vehicle and the subscriber's ID number. The applicant did not allege that it complied with clause 6.2 on behalf of any of the subscribers.

[69] Furthermore, clause 19 of the subscriber agreement provides for the rectification of the breach of the subscriber agreement upon twenty business days' written notice to the offending party to rectify the breach. In the event of the offending party failing to do so, the aggrieved party may cancel the subscriber agreement. The applicant did not comply with clause 19 and notice in terms thereof was not given to the respondent.

[70] Accordingly, the applicant failed to cancel validly the subscriber agreement, in terms of the provisions particular to the subscriber agreement.

[71] The applicant relied on its email of 17 October 2020 as notice of its cancellation of the bordereaux agreement. The email provides *inter alia* as follows:

"As such we will be sending through notification of cancellation of all Tracetecs in our clients' vehicles during the course of next week for end of October 2020 and I will be moving them into another system altogether."

[72] The applicant however failed to remit the envisaged "notification of cancellation" of all Tracetec tags in the applicant's clients' vehicles.

[73] Cancellation as alleged by the applicant did not comply with the relevant provisions of the bordereaux agreement. As a result, the alleged cancellation was invalid. Repudiation by the applicant, being conduct demonstrating an intention to not be bound by the agreement, arose from the applicant's refusal to pay the respondent's invoices with effect from October 2020. The respondent accepted the repudiation which gave rise to the termination of the bordereaux agreement.

[74] As to the respondent's alleged acceptance of the applicant's cancellation on 19 October 2020, that alleged acceptance is belied by the respondent's outrage at the applicant's failure to pay the respondent's October 2020 invoices. Furthermore, nothing

in the respondent's correspondence of 19 October 2020, indicates that the applicant terminated the bordereaux agreement or that the respondent accepted such alleged termination. In any event, the bordereaux agreement provided that no waiver / relaxation of any of the terms or provisions of the agreement shall operate so as to preclude a party from thereafter exercising its rights strictly in accordance with the agreement.

[75] Moreover, at that stage and in terms of the applicant's email of 17 October 2020, the applicant intended sending notice of cancellation during the course of the following week. Accordingly, the respondent's email cannot be read as anything more than an acknowledgment of the applicant's stated intention at that stage, being to send notice of cancellation of the relevant tags the following week, which notification was not forthcoming.

[76] Accordingly, the applicant's email of 17 October advised of its intention in the future to cancel the agreement but did not itself serve to cancel the agreement.

[77] The deponent to the applicant's founding affidavit, formed a company named Quick Track (Pty) Ltd, registered on 5 November 2020. The sole director thereof is the deponent to the applicant's affidavit and the company's business, according to the applicant, is to meet the tracking needs of the applicant's customers.

[78] As stated afore, the applicant did not cancel validly the bordereaux agreement nor the subscriber agreement.

[79] In respect of the applicant's averment that the applicant's customers who were party to subscriber agreements with the respondent, were customers or clients of the applicant only and not the respondent, the conclusion of the subscriber agreement by

the applicant's customers with the respondent resulted in a direct contractual relationship between the customer and the respondent. Insofar as the applicant may represent its customers as bordereaux under the terms of the subscriber agreement, that does not mean that there is no direct contractual relationship between the respondent and the various subscribers. Furthermore, the subscriber agreement provides that in the event of the cancellation of the bordereaux agreement, the subscriber agreement will continue validly for the balance of that period of the subscriber agreement.

[80] Accordingly, I conclude that customers of the applicant who concluded subscriber agreements with the respondent were clients of the applicant but also clients of the respondent. Furthermore, the termination of the bordereaux agreement, whether it was by the applicant or the respondent, did not result in the termination of the subscriber agreement which functions as a self-standing agreement independent of the bordereaux agreement.

[81] The applicant relied on three instances of the respondent contacting the applicant's customers allegedly *mala fide* and in violation of the applicant's relationship with its customers, and contrary to the respondent's undertaking not to spread a false narrative in respect of the applicant.

[82] The applicant annexed the respondent's email addressed to one Naveen Bulraj, to the founding papers. The email does not mention the applicant at all, and nor does it serve to spread a false narrative in respect of the applicant. The applicant did not furnish any details in respect of the telephone conversation between the respondent's representative and Mr Bulraj that preceded the email.

[83] The respondent referred in the email to the reduction in premiums to be charged from the customer, being from R85 to R50 or R60 per month depending on the option chosen by the customer.

[84] As to the respondent's contacting one Fred van Reenen, and using allegedly private information from 2009, the applicant did not specify what private information it referred to and the respondent's email, likewise, did not refer to the applicant. No details of the preceding telephone conversation between the respondent's representative and Mr Van Reenen were alleged by the applicant.

[85] The applicant complained that the respondent did not inform the customers contacted by the respondent that the applicant had terminated the respondent's services. That was the nub of the applicant's complaint and the reason for the applicant alleging a false narrative.

[86] It is noteworthy that the applicant in advising its customers that it was moving the tracking services in-house, did not advise its customers that it had terminated the respondent's services.

[87] The respondent, in contacting the applicant's three customers referred to by the applicant, made no mention in the email correspondence provided by the applicant, of the applicant itself. All that was stated was that the respondent required to debit the various customers referred to directly in the event that they sought to continue with the respondent's tracking services.

[88] As regards the respondent's contact with Mr Abisai Mbete, the respondent advised him that the applicant had stopped paying the respondent's premiums, a fact that was correct.

[89] The two emails relied upon by the applicant do not refer to the applicant at all. Furthermore, there is no evidence that the applicant's customers contacted by the respondent acceded to paying the respondent directly and that the applicant's business was prejudiced as a result. There is no evidence that the applicant lost customers to the respondent as a result of the respondent contacting the three customers referred to by the applicant. Furthermore, the applicant did not in fact validly cancelled the bordereaux agreement with the respondent and nor did the subscriber agreement terminate as a result of the applicant's purported cancellation or the repudiation thereof by the respondent.

[90] Accordingly, there is nothing on the applicant's founding affidavit before me that the respondent spread a false narrative regarding the applicant to the detriment of the applicant and for the financial benefit of the respondent.

[91] In respect of the respondent allegedly utilising the applicant's pricing in order to undermine the applicant's business, being an aspect of unfair competition, the applicant did not make out a case in respect of the requirements thereof, including showing that it was prejudiced by the respondent's conduct.

[92] Turning to the respondent's two interlocutory applications, I limited my consideration of the parties' respective allegations to those that are relevant to the disputes at hand. In the circumstances, I intend to dismiss both applications. Given, however, that the two interlocutories arise from the applicant's replying affidavit that transgressed the requirements of a replying affidavit in terms of containing extraneous and new matter, the costs of the two interlocutory applications will be costs in the cause of the main application.

[93] As regards the applicant's request for the application to be referred to oral evidence, the alleged disputes of fact relied upon by the applicant in this regard do not merit such a referral. The respondent dealt decisively and substantively with the applicant's allegations, particularly those relating to the allegations of Mr Austin. The result is that the applicant did not substantiate the relief sought by it and there is no basis upon which I can or should grant confirmation of the Rule Nisi.

[94] In respect of the applicant's reliance on the term requiring *bona fides* of both parties in the agreement, reliance on a value such as *bona fides* is not a "free pass." It does not serve to allow an applicant to avoid making out a case for the relevant relief that it seeks. An applicant relying on a value such as *bona fides* remains obliged to set out the relevant factual premise appropriate to its claim. The applicant in this application, as stated by me, did not do so and reliance on *bona fides* does not serve to assist the applicant in this matter.

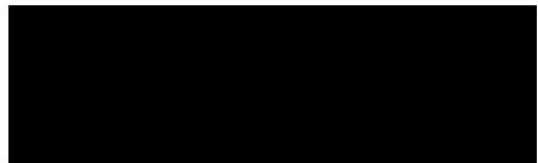
[95] Both parties sought punitive costs against the other. Other than the extreme and abusive length of the papers filed in this matter, there is no basis for punitive costs and notwithstanding the length of the papers, I do not intend to order punitive costs on the attorney and client scale.

[96] By reason of the above, I grant the following order:

1. The Rule Nisi granted ex parte and urgently on 27 July 2021, is discharged.
2. The respondent's application to strike out is dismissed, the costs to be costs in the cause of the main application.

3. The respondent's application for leave to file a further set of affidavits is dismissed, the costs to be costs in the main application.
4. The application is dismissed with costs, including the costs of the two interlocutory applications and all reserved costs orders as may have been granted by this Court prior hereto.

I hand down the judgment.



CRUTCHFIELD J
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 29 May 2023.

COUNSEL FOR THE APPLICANT:

Mr N Jagga.

INSTRUCTED BY:

Jagga and Associates.

COUNSEL FOR THE RESPONDENT:

Mr J Malan.

INSTRUCTED BY:

AGM Attorneys.

DATE OF THE HEARING:

17 and 18 November 2022.

DATE OF JUDGMENT:

29 May 2023.