

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO:2022-032863

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

Date: 21 October 2022

E Van der Schyff

In the matter between:

VON THUNDERBOLT BREEDERS (PTY) LTD

APPLICANT

and

IBIDA SOUTH AFRICA (PTY) LTD

FIRST RESPONDENT

PHOEBE KOKETSO LINA MOOKA

SECOND RESPONDENT

JUDGMENT

Van der Schyff J

Introduction

- [1] The applicant issued an urgent application on the basis of extreme urgency. The application s dated 10 October 2022. It was emailed to the respondents' attorney of record on the same day. The respondents were required to notify the applicant's attorney of their intention to oppose by 12 October 2022 and file their answering affidavit on the same day. The matter was set down for hearing on 18 October 2022.
- [2] The applicant seeks the following relief:
- i. That the application be heard as an urgent application;
 - ii. That the first and second respondents immediately provide details of the whereabouts of four specific dogs¹ and allow the applicant to remove the dogs from the facilities where they are kept;
 - iii. That the respondents hand over the dogs' vaccination charts and micro-chip barcodes to the applicant;
 - iv. That the Sheriff of the Court be authorised to remove the dogs from the facility where they are kept if the respondents fail to adhere to the order;
 - v. That the applicant retains possession and ownership of the dogs for at least a period of one month from the date of the order, during which period the respondents may issue and/or take any action should they elect to claim any right to the dogs;
 - vi. That should the respondents fail to institute such legal proceedings within the stated period, the applicant may deal with the dogs as it elects, without prejudice to any of the rights of the respondents to institute any further legal process within any normal prescription periods;
 - vii. That the respondents pay the costs of the application.

The facts

- (i) The applicant's facts

- [3] The applicant is in the business of breeding dogs. She specialised in breeding Belgian Malinois and Dutch Sheppards for personal protection, further breeding, tracking-, detection- and K9 units.

¹ The dogs are properly described in the notice of motion.

- [4] The second respondent approached the applicant and informed her that she had a contract with the South African Police Services Dog and K9 unit (SAPS) in terms whereof she could procure dogs and sell them to the SAPS. The parties agreed that the applicant would from time to time provide dogs to be tested by the SAPS.

- [5] The applicant always took the dogs to the SAPS to be tested on behalf of the respondents and afterward took them home again. During August 2022 the second respondent requested that four dogs be delivered for testing by the SAPS. The parties agreed that the dogs would be tested whereafter the second respondent would make arrangements to re-deliver the dogs should the SAPS not be interested in them. On this occasion, the second respondent met the applicant halfway and took the dogs. The agreement was that the second respondent would have the dogs tested and keep them safe pending the outcome of the tests. The parties concluded a written agreement wherein the second respondent undertook to ensure the health and safety of the dogs, and to reimburse the applicant should anything happen to the dogs. The applicant left the dogs with the second respondent based on their trust relationship. She handed over the dogs' vaccination cards and microchip details.

- [6] The applicant contends that it never was the intention to sell the dogs to the respondent. The sale would only be to the SAPS if they were interested. The applicant frequently enquired about the dogs. She was informed that the SAPS was interested in one dog, Bon-Bon, a female Dutch Sheppard. At some stage, she was also informed that one dog was taken to the vet because he was sick. On further enquiry she was informed that the dog "maybe missed" her.

- [7] Despite the applicant enquiring numerous times as to the return of the dogs, the second respondent merely indicated that the SAPS is still interested and busy with the procurement process for the dogs.

- [8] On Sunday 2 October 2022, an article was published in the Rapport newspaper wherein it was contended that the respondents were involved in an elaborate scheme with the SAPS whereby they posed to be dog breeders and as such able to sell dogs to the SAPS.

- [9] It is apposite to pause at this juncture and to reflect on the content of the article as it was attached to the founding papers. The heading of the article “Seep-smous kry Polisie kontrak” refers, amongst others, to the fact that the respondents were awarded a contract of millions of rands to provide the SAPS with trained dogs. It mentions that the respondents do not have any proven record of experience or history in the breeding business and that the first respondent was awarded a tender to the value of R27 million rand to provide cleaning-and pest control services to the state in 2021. The article informed readers that the SAPS had to give more than 200 specially bred dogs to the Society for the Prevention of Cruelty to Animals (SPCA) because they had become untrainable due to neglect a few weeks ago.
- [10] After reading the newspaper article, the applicant contacted the second respondent and explained that her dogs could not be involved in a scandal as their breed was excellent. It would have a negative effect on their bloodline as well as on the applicant’s business to be associated with the “scandal” referred to in the newspaper article. The applicant also sent a letter to the respondents indicating that it decided not to go ahead with any sales until further notice. The applicant asked to be provided with the address where the dogs were kept in order for them to be collected.
- [11] On 4 October 2022, the applicant received a letter from the respondents. The respondents offered to expedite the sale of the dogs and to pay the full purchase price to the applicant. However, if this offer was not accepted, then the applicant could get the dogs back after it settled all the costs and expenses incurred by the respondents. The respondents stated that the Rapport article was fake news and assured the applicant’s member that her reputation would be protected and that the parties could still enjoy a fruitful and profitable relationship. The applicant came to Pretoria on 9 October 2022 in an attempt to ascertain the whereabouts of the dogs, but the second respondent refused to entertain her.
- [12] On 10 October 2022, the applicant’s legal team contacted the second respondent, who refused to speak to them and referred them to her attorney, Mr. Mothle. The applicant’s legal team discussed the matter with Mr. Mothle and indicated that their first priority was to know where the dogs are kept to ensure that they are safe. They

were informed that the dogs “may be” at the SAPS facility but that Mr. Mothle would revert. Upon receiving this information, the applicant contacted Brigadier Dreyer at the Roodeplaat SAPS Dog Unit. He indicated that the SAPS are not allowed to keep the dogs at their facilities until an invoice has been issued after the procurement process was finalised. He stated that although the SAPS was interested in one of the dogs, Bon-Bon, they canceled the procurement process when they realised that the applicant was the owner, and the applicant was not an approved sub-contractor. He explained to the applicant how SAPS’s procurement system functions. This issue will be revisited when the bidding document, that was attached to the respondents’ answering affidavit is considered. The most relevant of what he conveyed to the applicant was that the SAPS would not accept animals unless the sub-contractor is approved by SAPS.

- [13] The applicant was not able to obtain a confirmatory affidavit from Brigadier Dreyer. The application was, however, served to him by email. The respondents objected to the court taking cognisance of what Brigadier Dreyer allegedly informed the applicant’s member. They contended that it was inadmissible hearsay evidence. I disagree. The evidence was not presented to prove the truth of the matter stated, but it was relayed to the court as to what the applicant was informed of by the Brigadier. Because it is not presented to prove any fact other than what the applicant was told, the probative value thereof does not depend on the credibility of the Brigadier.
- [14] Based on what she was informed of by the Brigadier, the applicant concluded that the respondents could only provide dogs to SAPS if they were bred by a SAPS-approved sub-contractor. This position is supported by the bid document referred to herein below. As a result, SAPS would and could not procure the applicant’s dogs.
- [15] When Mr. Mothle reverted, he indicated that his instructions were that the dogs were safe and that his client would affect payment of the purchase price. The applicant informed Mr. Mothle that they were no longer interested in selling the dogs because the dogs would not be bought by the SAPS in light of the recent events, and it does not “sell dogs to anyone. Despite again requesting to be informed of the dogs’ whereabouts to inspect their health and see the conditions in which they were kept,

no information was provided. This was of great concern to the applicant because the dogs are specially bred dogs that not only have to follow a specialized diet, but need care and attention, including medical attention.

- [16] The applicant contends that it is entitled to the interim interdict it seeks. As the dogs' owner, who never intended to sell the dogs to anyone but SAPS, it has a *prima facie* right to reclaim possession of the dogs. Due to the dogs' unique needs, and the respondents' persistent refusal to inform the applicant of the dogs' whereabouts and to provide access to the dogs, the applicant submits that there is a real and imminent danger that the dogs may suffer harm, or is suffering harm. Due to the terms of the proposed order through which the respondents' claim, if any, to the dogs is safeguarded, whilst the dogs will be cared for at the applicant's premises and facilities, the balance of convenience favours the applicant. There is no other remedy available to the applicant. It attempted to mediate the situation through Mr. Mothle but was unsuccessful due to the respondents' steadfast refusal to provide it access to the animals.

(ii) The respondent's facts

- [17] The second respondent is the Chief Executive Officer of the first respondent. They will collectively be referred to as 'the respondent'. The respondent states that she has a contract with SAPS for the provision of trainable and breeding dogs. The respondent attaches the bid specifications to her answering affidavit. A sub-contract was entered into with an accredited breeder, but she later entered into different contracts with different companies who breed dogs. She claims to have informed SAPS of the further breeders, and that SAPS conducted due diligence on the new suppliers and accepted two of the three. It should be noted at this point that the respondent fails, however, to provide any documentary proof that the applicant, or any other company, was approved as a supplier.
- [18] She confirms that she concluded an agreement with the applicant in terms whereof the applicant would provide her with dogs. The dogs would be trained and if they passed the SAPS's training- and medical assessment they would be sold to SAPS. SAPS would pay the first respondent and the first respondent would, in turn, pay the

applicant. She also confirms that she collected the specific dogs that constitute the subject of this application and took them for assessment. The respondent states later that the parties agreed that the dogs could also be sold to “whatever third party who needs a dog [and] confirms the dog’s suitability”.

- [19] The respondent takes issue with the applicant’s statement that it is not a sub-contractor of the contract between the first respondent and SAPS, and had no knowledge of the process followed by SAPS for buying dogs. This, the respondent contends, is farfetched since the applicant knew the dogs would be assessed by SAPS.

- [20] The respondent contends that the applicant’s statement that she was informed by Brigadier Dreyer of Roodeplaat that SAPS cancelled the procurement is inadmissible hearsay evidence since it is not supported by a confirmatory affidavit. As stated above, the evidence by the applicant was not presented to prove, as a fact, that SAPS cancelled the procurement contract with the respondent. It was presented to convey to the court what she heard, first hand, from the Brigadier. The respondent avers that the allegation regarding the cancellation of the contract is ‘untrue’. She states that she has been given a purchase order for Bon-Bon, the dog that passed the assessment. She fails, however, to attach a copy of the purchase order.

- [21] The respondent claims that the application is not urgent, because she offered the dogs’ full purchase price to the applicant, and the applicant failed to adhere to comply with the Practice Directives in that all the papers were not filed by the Thursday preceding the date of hearing, the following Tuesday. The respondent contends that the dogs are undergoing training and are safely being taken care of in a rented kennel. The respondent also contends that the applicant failed to meet the requirements for an interim interdict.

Urgency

[22] I found that the application is urgent because of the fact that the subject-matter of the application is living animals, to which the applicant was refused access. In light of the thrust of the newspaper article, the applicant cannot be blamed for being concerned about the welfare of the animals, particularly since the respondent steadfastly refused to disclose the dogs' whereabouts. Even after I indicated on the 18th of October 2022 that the matter would stand down to the 19th and that I regard the applicant's concern for the dogs' safety and well-being linked with her right to see the dogs, as the factor that renders the application extremely urgent, the applicant eventually had to leave Pretoria on the 18th to tend to her children elsewhere without been granted access to the dogs. The affidavit of the trainer with whom the dogs allegedly are kept, which was belatedly filed by the respondent, did not diminish the urgency.

The interim interdict

[23] The respondent states that the applicant failed to make out a case that it fulfilled the requirements of an interim interdict.

(i) Prima facie right

[24] The respondent acknowledges that the applicant is the owner of the dogs, but contends that the parties entered into an agreement in terms whereof the applicant would provide dogs to the respondent to have them assessed by SAPS, and if they passed, to be sold to SAPS whereafter the applicant would be paid by the respondent. The applicant chose to limit her rights to the dogs, be it for a particular period until the dogs have been assessed, and the process is still in play.

(ii) Irreparable harm

[25] The respondent contends that the applicant failed to show irreparable harm if the order is not granted. The applicant's contention that her harm emanates from the fact that she does not know where the dogs are and her fear that the dogs are neglected, at best establishes an apprehension of harm that is speculative. The

applicant's past dealings with the respondent should be sufficient to belie the fear that the dogs are not safe. The respondent contends that the applicant knows where the dogs are, and refers the court to a WhatsApp conversation:

A: "Thank you where are my dogs at the moment?"

R: "Where I am training the dogs We have rented a place"

(iii) *Balance of convenience*

- [26] The balance of convenience favours the respondent in that it has an agreement with the applicant to provide the dogs for assessment, and that if the dogs fail the assessment, to be retrained so that they can pass the test. This is what is currently happening. The respondents have invested substantial amounts of money into the training, keeping and medicine of the dogs.

(iv) *No other remedy*

- [27] The respondent claims that she offered the full purchase price to the applicant. The applicant's remedy is to accept the full purchase price. She also offered to hand the dogs back if the applicant was willing to reimburse her expenses.

Discussion

- [28] The applicant's version that it agreed to provide the respondent with dogs to be assessed by SAPS, and to be sold to the SAPS, is supported by the respondent's initial outline of the terms of the agreement. The respondent's averment that the agreement was that the dogs could be sold to any interested third party comes as an afterthought. The applicant's contention that it was informed by Brigadier Dreyer that SAPS would not purchase any dog provided by it because it is not an approved sub-contractor, finds support in the terms of the bidding document annexed to the respondent's answering affidavit. In the absence of any substantiation that a purchase order was issued by SAPS for Bon-Bon, or that SAPS indeed approved the applicant as a sub-contractor, the applicant's claim that the SAPS will not buy her dogs is not disputed. In this context, the possibility of the dogs being sold to

SAPS, the reason why these dogs were handed over to the respondent, is negligible. I therefore find that the applicant established that she, as the owner, has a *prima facie* right to the dogs in question.

- [29] The well-grounded apprehension of irreparable harm is substantiated by the respondent's steadfast denial to grant the applicant access to the dogs. The applicant agreed to hand the dogs over to the respondent before the newspaper article gave rise to concern over the dogs' well-being. Had the respondent granted the applicant access to the dogs when she first requested it, the situation might have been different. However, in the context where doubt is cast on the respondent's continued involvement with SAPS, the applicant not being an approved sub-contractor, and the respondent's belated averment that the dogs can be sold to any interested person, the question as to the dogs' fate, if they remain in possession of the respondent, is uncertain. The applicant's interest in the dogs extends beyond their mere monetary value. The applicant is also the custodian of the dog's bloodline in South Africa. If the dogs are sold to third parties without the applicant's knowledge, and consent, the applicant may well suffer irreparable harm. In these circumstances, she succeeded in proving a well-grounded apprehension of irreparable harm
- [30] The balance of convenience favours the applicant. The respondent did not substantiate her averments that SAPS is in the process of procuring any of the applicant's dogs. The relief sought provides for a safeguard of any claims that the respondent can prove to the animals. The respondent will also be able to institute a damages claim for the expenses to date and whatever damages she can prove. The applicant, on the other hand, is the owner of the dogs and her loss will be significant if the dogs are not cared for as they should be, or sold to third parties without her knowledge.
- [31] There is no other satisfactory remedy available to the applicant. As stated, the applicant's interests in the dogs surpass their monetary value. In these circumstances, the interim relief sought is the only remedy available.

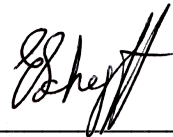
ORDER

In the result, the following order is granted:

- 1.** This application is found to be urgent in terms of the provisions of Rule 6(12) of the Uniform Rules of Court and any non-compliance is condoned;
- 2.** The first respondent and second respondent are ordered to provide details of the whereabouts of the dogs listed below in [3], and allow the applicant's representatives access to the dogs from Saturday 22 October 2022 at 07h00;
- 3.** When the applicant provides proof that security in the amount of R32 820.00 has been paid into the trust account of Hamann & Botha Attorneys, the applicant's representatives may remove the following dogs from such facility:
 - 3.1.** One dark black mask, black chest with white spot, mahogany brown male Belgian Malinois dog called T-Bone born on 12 November 2021, with micro-chip number 941000026799944;
 - 3.2.** One brindled colour female Dutch Sheppard dog called Bon-Bon born on 7 November 2021, with micro-chip number 941000026799963;
 - 3.3.** One brindled colour female Dutch Sheppard dog called Bo born on 7 November 2021, with micro-chip number 941000026799964;
 - 3.4.** One brindled colour female Dutch Sheppard dog called Becca born on 7 November 2021, with micro-chip number 941000026799962.
- 4.** The respondents are ordered to hand over the vaccination charts and micro-chip barcodes of the said dogs;
- 5.** Should the respondent, or any third party, fail to adhere to this order, the Sheriff of the Court is ordered to accompany the applicant's representatives to any facility where the dogs may be found and allow the applicant to take possession of the dogs and remove them from the facility, subject to [3] above;
- 6.** Should the respondents fail to adhere to this order, the applicant may approach the court on the same papers as amplified, for appropriate relief;
- 7.** The applicant shall retain possession and ownership of the dogs for one month from the date of this order, during which period the respondent may issue or take any action should they elect to claim any right to the dogs. If such legal proceedings are instituted

the applicants may not sell or otherwise dispose of the dogs until the respondent's claim is finalised;

8. Should the respondent fail to institute any such legal process within such period, the applicant may deal with the dogs as it elects, and the amount paid in as security with Hamann & Botha Attorneys may be repaid to the applicant, without any prejudice to any of the rights of the respondent to institute any further legal process within any normal prescription period;
9. The respondents are ordered to pay the costs of this application, jointly and severally, the one to pay the other to be absolved.



E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

For the applicant:	Adv. E Janse van Rensburg
Instructed by:	Hamann & Botha Attorneys
For the respondents:	Adv. M S Manganye
Instructed by:	Mothle Jooma Sabdia Inc.
Date of the hearing:	19 October 2021
Date of judgment:	21 October 2021