REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 9258/2021
DOH 9 MARCH 2021

1.	REPORTABLE: **NO**/YES
2.	OF INTEREST TO OTHER JUDGES: **NO**/YES
3.	REVISED.
.... **SIGNATURE**	**28 MAY 2021** **DATE**

In the matter of:

SOUTH AFRICAN MEDICAL ASSOCIATION **APPLICANT**

and

SOUTH AFRICAN MEDICAL ASSOCIATION TRADE UNION **FIRST RESPONDENT**

GERHARD VOSLOO N.O. **SECOND RESPONDENT**

JUDGMENT

THIS JUDGMENT HAS BEEN HANDED DOWN REMOTELY AND SHALL BE CIRCULATED TO THE PARTIES BY WAY OF EMAIL. ITS DATE AND TIME OF HAND DOWN SHALL BE DEEMED TO BE 28 MAY 2021.

Bam AJ

Introduction

1. This is an urgent application for a final interdict by the South African Medical Association NPC (SAMA) to restrain the respondents from publishing injurious falsehoods about SAMA and unlawfully interfering with the SAMA's contractual relationship with its members. Despite two requests for an undertaking that the respondents will desist from their unlawful conduct, they refused to provide same. In the result, SAMA claimed in its papers that it is left with no adequate alternative but to approach this court. As basis for the relief sought, SAMA referred to a notice issued by the South African Medical Association Trade Union, SAMATU, and its administrator on 9 February 2021 (the notice). I shall reproduce the notice shortly. SAMA makes three succinct submissions about the notice. It contends in the first instance that the statements made therein are false and are calculated to cause harm to SAMA and that SAMATU published those falsehoods knowingly. SAMA states that the statements are framed to induce its members to terminate their

membership with SAMA, thus amounting to unlawful interference with the contractual relationship SAMA has with its members. Finally, SAMA submits that in addition to the injury to its reputation and good name, it stands to suffer financial loss should SAMATU persist in its unlawful conduct. As further contention, SAMA states that as a person, (juristic non-profit entity), it has a right to conduct its business without unlawful interference, whether by respondents or any other party.

2. In their response, SAMATU and its administrator, to whom I shall refer to collectively as SAMATU, began their case by asking for condonation for the late filing of their answering affidavit. Given the circumstances of the case and the explanation, I granted condonation. SAMATU denied that there was any urgency in SAMA's case and asked the court to dismiss the application with punitive costs. They denied acting unlawfully or that they were competing with SAMA in any way, let alone unlawfully. They stated that the notice was sent by SAMATU to those of its members who are in its data-base. They add that, unlike SAMA, they are unable to distinguish between an employed and unemployed doctor. They state that with the database of doctors in its hands, SAMA has not only sent renewal notices for SAMA membership but has loaded debit orders of doctors who are not SAMA members. In this regard, they conclude that SAMA, is engaged in the unlawful conduct of poaching SAMATU's members. They referred the court to several pieces of SAMA's communication, about which I shall say more in the course of this judgment, and submit that SAMA has approached this court with unclean hands. In short, SAMATU asserts that its conduct in publishing the notice was only aimed at stemming the tide of losing membership

because of SAMA's conduct of unlawfully interfering in SAMATU's contractual relationship with its members.

3. After carefully considering the parties' submissions and their papers, I was persuaded that SAMA may not obtain substantial redress in due course[1] and that the case made by the applicants was sound in law and granted the relief on 9 March 2021.

4. I consider it necessary to record that sometime late in April, my attention was drawn to an email sent by the respondents to the registrar who was assisting this court during March, seeking reasons for the order I had made. It appears that technical problems with the court e-mail communication system delayed the transmission to the registrar. In that same month of March, the registrar took ill and spent some time away from work convalescing. By the time the communication reached me, my hands were full with the work as per the duty roster hence the reasons are only provided today.

Background

5. Going through the record, it is undeniable that these two entities, which were once joined in the hip, have been involved in a protracted public disagreement, which has seen them in and out of courts. In my assessment of the situation, the present issues can easily be disposed of, keeping a bird's eye view of their history, but without the

[1] *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* (11/33767) [2011] ZAGPJHC 196 (23 September 2011) at paragraph 6

need to immerse oneself into the parties' litigious history. The events leading to the present litigation began with a notice published by SAMATU on 9 February 2021, titled, 'RENEWAL NOTICE FROM THE SAMA NPC'. The notice reads:

> 'We have been notified by some of our members that they have received membership renewal notices from SAMA NPC and hereby wish to clarify that SAMATU will never send a request for members to renew their membership. The motive is to coerce SAMATU members in terminating their SAMATU membership and join SAMA NPC. This is another desperate attempt by SAMA NPC to remain relevant in light of their various unsuccessful legal actions against SAMATU. SAMATU hereby reiterates that only registered and recognised Trade Unions have *locus standi* to represent the rights and interests of the state employed doctors. Members should therefore note that while SAMA NPC is coercing them to terminate their Trade Union membership, SAMA NPC will not be allowed to represent them on any employer employee related matters as it has no legal standing in the Public Service to function as a Trade Union. Members are advised not to cancel membership through panic. You are guaranteed that your rights are protected and shall always be represented with diligence and respect (our current track record speaks for itself). The only change you can expect from SAMATU is a progressive service delivery beyond expectation. You do not have to renew membership and you remain a valued and loyal member of SAMATU. We urge members that may need clarity on this matter to contact us on... Please visit out website... Regards, SAMATU'

6. It is common cause that, after learning of the publication, SAMA dispatched a letter to SAMATU's attorneys, on 16 February 2021, calling for an undertaking that SAMATU will desist from further unlawful conduct. SAMATU responded to the letter but failed to provide the undertaking sought. Instead, it proposed that the parties issue a joint statement to their members to explain the split. SAMA contends that a joint statement is not an appropriate solution to the current issue facing the parties. In any event, states SAMA, the parties have previously issued a joint statement explaining the split to their members. In a further letter issued on 18 February, SAMA again called for the

undertaking. This time, it indicated that, absent the undertaking by 12h00 on the same day, it had intention to approach the court for urgent relief. It is common cause that SAMATU did not provide the undertaking.

SAMA's case

7. Describing itself with reference to its Memorandum of Association, SAMA states that one of its objectives is to represent the medical profession with authority and credibility, collectively and individually, on matters pertinent to the profession and to act as the principal, and the coordinating body for the medical profession. SAMA states that it has a professional image to protect in order to foster not only integrity and accountability but to champion professional ethical standards. It says in its papers that it serves the needs of its members and advocates their autonomy to enable them to function optimally as professionals, which ultimately influences and shapes the healthcare environment in this country.

8. With regard to the notice, SAMA states that membership in its organisation runs for one year, from January to December and must be renewed annually. To encourage its members to renew, SAMA sends renewal notices at the commencement of each year, preferably, by no later than 28 February. SAMA submits that its renewal notice cannot, by any stretch of the imagination, be calculated to amount to coercion of SAMATU members to terminate their membership with SAMATU and join SAMA. In that regard, the notice, submits SAMA, is plainly false and misleading. With regard to the point made in the notice that it will not be allowed to represent doctors in

employer / employee matters, SAMA states these statements are not only false but are harmful to its image. It states that there is nothing in law preventing SAMA from representing its members in employment issues, such as procuring legal assistance. It makes it plain that its services would exclude those preserved for registered trade unions. SAMA further states that the notice attempts to persuade SAMA members not to renew their membership with SAMA. It concludes by stating that SAMATU's conduct is harmful and improperly interferes with SAMA's relationship with its members. It adds that should SAMATU not be stopped in its unlawful conduct, it stands to suffer financial prejudice, in addition to the harm to its name.

SAMATU's case

9. The affidavit filed by SAMATU contains the full exposition of the parties' history from the birth of SAMATU's predecessor, followed by its name change that brought about the current trade union, SAMATU, all the way to the court order appointing the second respondent. It also dealt extensively with previous and current litigation, including its pending application in a bid to wind up SAMA, and the acrimonious relationship the parties have with each other, in particular when it comes to the financial affairs of the two entities that were once held under one roof and SAMATU's access to the data base of members. Ultimately, in an effort to lay foundation for its claim that it issued the notice of 9 February 2021 in order to stem the tide of losing members, SAMATU submitted that its conduct must be assessed in light of SAMA's conduct with reference to various publications, which SAMATU claims amounts to interference with its own contractual relationship with its members. It further referred

the court to communication with some doctors who are members of the first respondent.

10.I record at this early stage that SAMATU's notice or circular of 9 February 2021, which is pellucid from the title of the notice itself, was said to be directed at SAMA's renewal notice. In establishing whether SAMA has met the requirements in order to succeed on a claim for injurious falsehoods, I consider the content of SAMA's renewal notice, SAMATU's notice of 9 February, and its further submissions to this court.

The law

11.It is a long accepted principle in our law that the conduct of spreading disparaging statements and falsehoods about a competitor, its goods or services, in order to gain improper advantage may, where it results in a loss, found a claim in delict[2]. In order to succeed in its claim therefore, SAMA has to prove the following: (i) that SAMATU had spread falsehoods to others about SAMA's name; (ii) that SAMATU did so knowing that the statements or representations were false; (iii) that SAMATU's conduct led to SAMA suffering a loss; and (iv) that the loss or likelihood thereof was a direct result of SAMATU's unlawful conduct[3].

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[2] Nativa (Pty) Limited v Austell Laboratories (Pty) Limited (1298/2018) [2020] ZASCA 11 (19 March 2020), paragraph 1

[3] *Marion Smith v Mountain Oaks Winery (Pty) Ltd & another* (1171/18) [2019] ZASCA 123 (26 September (2019), at paragraph 13

12.As to the requirements for a final interdict, SAMA has to establish (i) a clear right; (ii) an injury actually committed or reasonably apprehended; and (iii) the lack of an adequate and alternative remedy. [See in this regard *Masstores (Pty) Limited v PicknPay Retailers (Pty) Limited*[4].]

Whether SAMATU spread falsehoods about SAMA's renewal notice in its circular of 9 February 2021

13.To properly answer this question, one must refer to the renewal notice issued by SAMA. It is annexed to the founding affidavit[5] under cover of a letter by a Dr MVJ Nhlapho. As the form is a standard form calling for personal detail and various elections as to whether a doctor wants to pay by EFT or by debit order, I only deal with the content of the cover letter. It reads:

> 'Dear Dr…SAMA would like to send this renewal notice electronically and therefore requires your email address. Please make sure you complete/update the email address field on the renewal notice below. Thank you for your continued support. Herewith please find your South African Medical Association Renewal Notice indicating your 2021 subscription fee. Kindly update your details and return the updated information to us…. If no changes are made there is no need to return this form. … If paying SAMA membership through a monthly debit order instruction, the deduction will continue automatically from the end of January 2021…Sincerely.'

14.SAMATU, in the notice of 9 February, contends that SAMA will not be allowed to represent its members on any employer/ employee related matters as it has no legal

[4] [2016] ZACC 42 at paragraph 8

[5] FA 8 Caselines pages 106-109

standing. In its answering affidavit, it contends that SAMA is misleading members when it states that it can offer the services it used to offer its members via the union when it was still in-house. No doubt the statements about what either party is capable of providing its members goes to the heart of competition. However, is the statement as set out in the notice accurate? It has not been disputed by SAMATU that SAMA need not be a trade union to assist its members in some employer / employee matters, but it certainly cannot provide those services that are only meant to be provided by a trade union. In this regard, SAMA states that it does not intend to function as a trade union, but there is nothing in law preventing it from assisting employed doctors in employer/employee issues at no additional cost to its members. One such example is the provision of legal assistance in disciplinary matters. To conclude on this issue, the assertion by SAMATU rings hollow in the face of the myriad of voluntary associations, whether professional or non-professional, that provide assistance to their members on employer and employee matters.

15.Could the content of the renewal notice, as reproduced in paragraph 12 of this judgment, be said to be an act of coercing members of SAMATU to terminate their membership with the latter in desperate attempt to remain relevant on the part of SAMA? Nothing in the content of the cover letter of the renewal notice can, by any stretch of the imagination, be calculated to coerce members to terminate their membership with SAMATU. In support of its claims, SAMATU referred this court to various material annexed to its answering affidavit. For convenience, I divide the material into two. First, I deal with the communication emanating from some doctors and its relevance to the issue/s at hand. I do likewise with the second type of material, namely, the various publications by SAMA.

16.SAMATU referred to a form signed by a Dr EK Gallant on 4 January 2021[6] wherein the doctor terminates his membership with SAMATU. It referred to a similar form signed by a Dr T Qanda dated 6 February 2021[7] to the same effect; next, is a membership subscription form dispatched by SAMA to a Dr Seroto on 8 February 2021[8] with an amount of R4356. I record that there is nothing of significance recorded in the form. There are two further emails dated 1 March 2021 from a Dr Govender[9] and Dr Zaitoon Petersen[10]. Dr Govender states in her email that SAMA deducted an amount from her bank account and that she had not 'committed to continuing her membership with them'. Dr Zaitoon writes that she 'was under the impression that she is a SAMATU member since they have been deducting via Persal. This is the first time SAMA has deducted in months.' She adds she would like to maintain her membership with SAMATU and not SAMA. There is a final email dated 8 May 2020 from a Dr Mahlaela[11] who deposed to a statement under oath that she was called by a lady (unnamed) from SAMA who persuaded her to join SAMA and terminate her membership with SAMATU.

[6] Caselines 004-172

[7] Caselines 004-173

[8] Caselines 004-152

[9] 004-151

[10] 004-153

[11] 004-178

17. The statements by Dr's Govender and Petersen have no relevance to the issues at hand, both from the perspective of their content and dates, nor does the communication from Dr Mahlaela. The problem with SAMATU's justification of its conduct, with reference to this communication, is that the notice of 9 February refers to SAMA's renewal notice. Take for example the forms signed by Drs Gallant and Qanda on 4 January and 8 February 2021. In the absence of evidence to the contrary, it must be accepted that these doctors exercised their prerogative to terminate their membership with SAMATU. Similarly, nowhere is there any hint of coercive conduct on the part of SAMA that can be gathered from the subscription form sent to Dr Seroto. What is plain from the material canvassed in this paragraph is that it stands as no justification for SAMATU's conduct as evidenced in the notice.

18. SAMATU further referred the court to extensive publications issued by SAMA. It states that its issuing of the notice must be seen as a response to curbing its loss of membership at the hands of SAMA's unlawful conduct as evidenced in the publications. The publications are undated but they all appear to relate to events of April, May or June 2020. It is not clear how these publications assist SAMATU's case in so far its publication of the notice complained of in February 2021. SAMATU also fails to explain why it did not take steps then to address what it now contends to be unlawful interference on the part of SAMA, causing it loss. I look at a few examples of the publications:

'The administration order' (No date provided)

The court order imposing the current administration process over the union has a harsh financial and organisational impact on SAMA's strategy with respect to serving state-employed doctors. Their membership fees get directly deducted as union subscription fees from their salaries on the PERSAL system. We wish to enable uninterrupted membership of our colleagues with SAMA, as much as we have ensured the continuity of services throughout all the phases of these challenges. It has therefore become imperative that we embark on the process of migrating subscription membership payment from the Persal system to debit order. This disruption has been long coming, but all attempts to stem it have failed. In light of the above, if you are a state doctor contributing through the Persal deduction system, you are requested to partake in the process of migration by completing the attached debit order form authorising payment through debit order. Kindly find attached to this communication the debit order forms for your completion or click here to submit.....'

19.Further communication issued by SAMA reads:

'In a seperate 'In a separate matter before the Labour Court Judge... handed down judgement on Monday against SAMA. This judgment would effectively divide the Association in two. Those members who have elected to pay subscription fees via Persal were deemed to be members of the trade union by the court. Worryingly, because the court equated Persal payment with union membership, the judge declared that the entire amount deducted via Persal be paid into the administrator's account. Thus, members who have signed up to SAMA will now see their membership fees go to another organisation merely because of the chosen payment method. SAMA continues to hold the view that all members signed up to SAMA and that a divided membership would be in nobody's interest. The dispute over payment method lies at the heart of the dispute between SAMA and the Administrator and once again emphasizes the importance of members migrating from Persal to debit order payment, thereby ensuring that the choice to belong to SAMA, united for health of the nation, remains yours. While SAMA respects the court's ruling, it will be appealing the judgment in a higher court'

19.It is SAMA's case — and SAMATU has not disputed this — that SAMA was founded in 1927, long before there was a SAMATU[12]. Thus, of the 16 000 doctors that both parties agree to be members of SAMA, it makes sense that, for those state employed doctors where SAMA relied on the Persal deductions to account for membership of both the trade union and its own membership, it must inform its own members that membership of SAMA must now be paid directly to it by means of debit order. I am of the view that the publications cited in paragraphs 17 and 18 amount to no more than regular communication wherein SAMA provides its members with the latest developments involving the litigation between itself and SAMATU and pleads for its members' support. Besides, the issue before this court concerns SAMATU's notice, viewed against SAMA's renewal notice, which, as I have already found with respect to the latter, contains nothing amounting to the conduct described in SAMATU's notice. SAMATU's referral to past publications by SAMA does not advance the issues. I conclude that the notice must be read for what it is, falsehood published by SAMATU, and harmful to SAMA's goodwill and reputation, designed to prop up SAMATU at the expense of SAMA.

Whether SAMATU published the notice knowing that it is false

20.In its founding affidavit, SAMA referred to two letters dated 16 and 18 February 2021. In the letter of 16 February, upon learning of the notice issued on 9 February, it drew to SAMATU's attention to the following: The notice:

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[12](birthed in 2002 in the name of its predecessor)

"is without doubt streamlined to cause our client's business, being a non-profit organisation, irreparable economic harm. Your clients simply cannot interfere with our client's contractual relations. As it further appears from Annexure "A' hereto [referring to the notice], the publication under reply is a malicious attempt to defame our client, in that SAMATU published and therefore championed abusive, slanderous and insulting statements at the expense of our client....Your clients are knowingly selling and endorsing a false narrative... This conduct amounts to (1) defamation, (2) unlawful competition and /or infringement of our client's legitimate business operations.'

21.In response to this letter, SAMATU refused to provide the undertaking and merely confirmed that the statements in the notice are accurate and evidence to that effect would be produced in court. The undertaking was not provided, even after the follow up letter. There can be no doubt that the publication of the notice was no error but an intentional act, with SAMATU knowing full well that the statements therein, as demonstrated in this judgement, are false.

The loss

22.SAMA pointed to the tarnishing of its name and the infringement of its good will and reputation, which was not denied by the respondents bar the unsubstantiated claims that with the notice, SAMATU was responding to SAMA's unlawful conduct of interfering with SAMATU's contractual relationships. They referred this court to what one may term 'negative advertisement'. In this regard, SAMA is alleged to have sent notices to SAMATU's members stating that if they do not take active steps, their 'debit orders' will continue as before. In this regard, SAMATU stated that those members had never authorised debit orders in favour of SAMATU. SAMATU, however, did not provide evidence of this allegation. Nevertheless, if SAMATU was aggrieved by SAMA's conduct in this regard, it was always able to approach the courts or the regulatory bodies that are charged with bringing into line organisations whose conduct offends the Consumer Protection Act. As demonstrated in this judgment, SAMATU failed to provide evidence to support its claims. There can be no doubt that SAMA has suffered harm to its name as a result of the disparaging and false statements. For as long as the statements remain in the public space the harm endures. It was further not disputed that in addition to the harm to its name, SAMA stands to suffer financial prejudice as a result of SAMATU's conduct of encouraging SAMA members not to renew their membership.

23. It is not far-fetched to accept that, upon reading SAMATU's notice, doctors who may not be clear about the payment method of their subscriptions since the decision of the Labour Court — regarding ownership of the monies collected through Persal — may not renew their subscriptions, even though they regard themselves as members of SAMA and, for various professional reasons, wish to remain so. No doubt the larger the numbers of those doctors, the more magnified the harm to SAMA who must actively send those renewal subscription forms annually to keep SAMA resourced.

Whether the unlawful conduct of SAMATU is the cause of the loss

24.It must be apparent from the reasoning in this judgement that SAMATU's conduct was calculated to cause harm to SAMA. There is thus no doubt that the resultant harm to SAMA's name is as a direct result of their conduct.

25.As to the requirements for a final interdict, SAMA has a right recognised in law to conduct their business without unlawful interference. The harm complained of has not been denied by the respondents. Based on the respondents' refusal to provide SAMA with an undertaking despite repeated requests, SAMA had no adequate alternative remedy.

Conclusion

26. It is for the reasons set out in this judgment that I granted the order to SAMA.

Order

27.The following order is made:

1. This application is deemed to be an urgent application and the non-compliance with the Rules of Court pertaining to time periods, forms and service is condoned.

2. The First and Second Respondents, and any other member of the First Respondent with its authority or otherwise, are interdicted and restrained from:

2.1 unlawfully or otherwise interfering with the Applicant's business by distributing any communication about the Applicant and its business, either orally or in writing, addressed to the general public, the Applicant's members, including the members of the First Respondent, or the media or any government department and/or government official or otherwise;

2.2 interfering with the rights of the Applicant;

2.3 unlawfully competing with the Applicant; and

2.4 taking any steps whatsoever to encourage members of the Applicant to cancel their existing membership with the Applicant or not to renew their membership.

3. The First and Second Respondents, jointly and severally, the one paying the other to be absolved, be ordered to pay the costs of this application, including the costs consequent upon the employment of two counsel.

NN BAM

ACTING JUDGE OF THE HIGH COURT,

PRETORIA

APPEARANCES:

APPLICANTS' COUNSEL:	Adv Kruger SC with Adv STORM
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RESPONDENTS' COUNSEL:	Adv Fourie SC with Adv Groenewald
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