



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 3974/2019

In the matter between:

VERMEULEN VERF CC
(Reg. No. 1996/016122/23)

1st Applicant

LAMININ COATINGS (PTY) LTD
(Reg. No. 2012/103111/07)

2nd Applicant

and

DIY SUPERSTORES (PTY) LTD
(Reg. No. 1998/015794/07)

1st Respondent

MARIUS EKSTEEN JNR.

2nd Respondent

MANGAUNG METROPOLITAN MUNICIPALITY

3rd Respondent

SNYMAN SIGNS

4th Respondent

HEARD ON: 07 NOVEMBER 2019

JUDGMENT BY: MATHEBULA, J

DELIVERED ON: 13 DECEMBER 2019

Final interdict – Requirements met – Mootness of a matter does not constitute an absolute bar – Discretion lies with the court whether or not to consider it.

Introduction

- [1] This is an application in which the applicants claims an interdictory relief against the first and second respondent. The order sought is to interdict the aforementioned respondents from displaying and/or erecting any signs which replicates road traffic signs without the appropriate authority to do so. The first prayer compelling the respondents to remove the offending road signs was complied with after receipt of the application.

Parties

- [2] The application is supported by a founding and replying affidavit deposed to by a member of the first applicant namely Jan Gabriel Vermeulen. He is also mandated by directors of the second applicant to institute this application on their behalf. There are two confirmatory affidavits deposed to by Hendrikus Johannes Stander (attorney of record) and Willie Loftus who is employed by the third respondent as the Manager: Transport Planning.
- [3] The opposing affidavit was deposed to by Marius Eksteen in his personal capacity and also as a director of the first respondent. There are two confirmatory affidavits, one by an independent contractor Johan Pienaar and the other by the owner of the fourth respondent.

Factual background

- [4] The facts, as I glean them from the affidavits, are as follows.
- [5] The applicants and first respondent conduct business from adjacent premises along Monument Road, Bloemfontein. The applicants are selling paint and paint related products. Although the first respondent is also selling paint, it sells a wide range of products used in the construction and building industry.
- [6] Monument Road pass in front of the premises of the applicants and first respondent and provide access to those premises. This road has two traffic lanes on each side from East to West and vice versa separated by a concrete traffic median. It is important to note that at the portion in front of the premises of the applicants, it is a one-way preventing customers to turn to the right. This is so for those traveling from East to West. They will have to pass the applicant's premises and make a U-turn manoeuvre in order to enter the premises. The premises of the first respondent are easily accessible at that point.
- [7] A "No U-turn" traffic sign was erected and displayed at the end of the traffic medium in front of the premises of the applicants. This was amplified with a rectangular sign clearly specifying that transgressors will be fined the sum of R1000,00. The practical effect of these signs is that it created a hassle for the customers of the applicants to drive approximately 1 kilometre westwards and then make a U-turn to their destination. This was not the case for the customers of the first respondent. It is unknown as to who

erected it, when and why. Vermeulen took it upon himself to spoil it with spray paint.

- [8] It is common cause that Eksteen instructed one Tiaan Snyman attached to the fourth respondent to take down the vandalized signs and replace them with the new ones. It is also common cause that the traffic signs were not erected by the competent authority in this case the third respondent. These traffic signs were also not conforming with the standards and regulations pertaining to traffic management. The usurping of the function to erect the traffic sign(s) by any unauthorized person is a criminal offense.¹ In a nutshell this is what led to the application before me.

Submissions on behalf of the applicants

- [9] In the heads of argument and in oral argument, counsel for the applicants submitted that if a person contravenes the provisions of the National Road Traffic Act, then the public at large may apply to court for an appropriate relief. The decided cases of *Patz v Greene* and *Laskey v Showzone* were referred to in amplification of his submission. I shall return to this aspect at a later stage. He further submitted that the applicants have a real right to apply to court for the relief. Inter alia that they have the right to conduct their business in a lawful environment freely and without any illegal infringement. Therefore as members of the public with a protectable interest they may enforce prohibitions of the display of illegal signs.

¹ National Road Traffic Act 93 of 1996

- [10] The cornerstone of his submission based on the two cases quoted above that the applicants need not prove harm or prejudice where the conduct complained of constitutes the breach of a statute. The illegal traffic sign was a hassle in that it prevented or discouraged patrons from easy access to the business premises of the applicants. The reasonable apprehension is that they would lose customers because of the illegal conduct of the second respondent.
- [11] It is important to note that the respondents complied with the prayer that the offending traffic sign must be removed. The argument is that the remedy must still be granted because the attitude adopted by the second respondent is that it is still dangerous for road users in the absence of the traffic sign. Therefore the second respondent will still erect one in future.

Submissions on behalf of the respondents

- [12] Counsel for the first and second respondent submitted in reply that the applicants have not demonstrated a single thread of evidence from any of their customers that the traffic sign caused them any discomfort or nuisance and let them to not enter the premises of the applicant. Equally that there was no morsel of evidence that the first respondent gained an unfair advantage because of this discomfort or nuisance. The essence of his submission is that the applicants do not have the locus standi to seek interdictory relief for its customers who are not party to the litigation. In any event there is no evidence that any nuisance or discomfort did occur. As a result the applicants have not proved a clear right.

[13] On whether injury was actually committed or reasonably apprehended, the reasoning is that the discomfort or nuisance of the third parties ie customers can never be equated to injury or prejudice of the applicants. The argument is that the applicants have not produced any evidence pointing towards commercial damage or prejudice, unfair advantage gained by the first respondent or obstruction to access its premises. Accordingly, the interdict should be refused on this ground.

[14] It was submitted that despite second respondent complying with prayer one of the notice of motion by taking down the offending traffic signs, the applicants persisted with the application. The applicants are seeking an order to interdict the second respondent for future conduct. The applicants, so the argument goes, have not discharged the onus to show that they will suffer a continuing violation of their rights in the future. Prior to launching the application, the applicants did not request or demand the second respondent to remove the offending traffic signs. On this ground, the interdict should be refused. Finally he submitted in the event that the applicants are successful in this application, the respondents must be ordered to pay the costs only up to the filing of the answering affidavit. The applicants should be liable to pay the costs of the application.

Discussions

[15] As the applicants are seeking final relief in motion proceedings, the correct approach to resolve the dispute is the application of the

well-trodden Plascon-Evans rule.² These principles were restated in **National Director of Public Prosecutions v Zuma** in the following terms:

“Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the *Plascon-Evans* rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's (Mr Zuma's) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, farfetched or so clearly untenable that the court is justified in rejecting them merely on the papers. The court below did not have regard to these propositions and instead decided the case on probabilities without rejecting the NDPP's version.”³

I do not understand this rule to mean that the court must adjudicate the matter on the basis of the version advanced by the respondent(s).

- [16] There is an unequivocal admission by the second respondent that he instructed or employed the third respondent to erect a road sign. This was in blatant contravention of section 57 (10) of Act 93 of 1996 which specifically prohibits any person to display any road traffic sign on public road unless authorized to do so. The first respondent was not authorized by the competent authority in this case the third respondent. According to the expert commissioned by the second respondent, the plate underneath the road traffic sign could have been put by someone with ulterior motives. In this case that points in the direction of the second respondent.

² *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634 E – 635C

³ 2009 (2) SA 277 (SCA) para 26

[17] The court in Patz supra expressly stated the principle that

“where the act prohibited is obviously prohibited for the protection of a particular party, then it is not necessary to allege special damage.”⁴

This was refined by the then Appellate Division when the following was said:-

“Where it appears either from reading of the enactment itself or from that plus a regard to surrounding circumstances that the Legislature has prohibit the doing of an act in the interest of any person or a class of persons, the intervention of the Court can be sought by any such person to enforce the prohibition without proof of special damage.”⁵

[18] The conclusion is that the applicants have a real right to apply to court for the relief. Acts and regulations enacted to ensure road safety by inter alia prohibiting an authorized display or erection of illegal road traffic signs applied to them as members of the public. I do not agree with counsel for the respondents that the applicants are seeking an interdictory relief on behalf of parties who are not litigants in this matter. In **Giant Concerts CC v Rinaldo investments (Pty) Ltd**⁶ the court stated the following:-

“The separation of the merits from the question of standing has two implications for the own-interest litigant. First, it signals that the nature of the interest that confers standing on the own-interest litigant is insulated from the merits of the challenge he or she seeks

⁴ 1907 TS 427 at 433

⁵ Roodepoort-Maraisburg Town Council v Eastern Properties (Prop.) Ltd 1933 AD 87 at page 96

⁶ 2013 (3) BCLR 251 (CC) at para 33

to bring. An own-interest litigant does not acquire standing from the invalidity of the challenged decision or law, but from the effect it will have on his or her interests or potential interests. He or she has standing to bring the challenge even if the decision or law is in fact valid. But the interests that confer standing to bring the challenge, and the impact the decision or law has on them, must be demonstrated.”

[19] The passage above nullifies the contention by counsel for the respondents and I agree with it. In line with the dicta in **Patz v Greene** and **Laskey v Showzone**⁷ that the applicants being members of the public for shown the traffic legislation was enacted need not necessarily prove harm or prejudice where the conduct complained of constitutes the breach of statute. There is no doubt that the illegal road traffic sign prevented the customers of the applicants to enter their business premises at the end of the concrete traffic median. The incidental result of this illegal act perpetrated with ulterior motive meant that customers of the applicants had to travel extra kilometre(s) without any cogent reason(s). Clearly such conduct had the effect of prejudicing the applicants and they reasonably apprehended harm in the circumstances that their enterprise will be placed at risk. On this ground the interdict ought to succeed.

[20] It was contended by counsel for the respondents that the granting of the relief has become moot. The reasoning is that the second applicant has complied with prayer 1 of the notice of motion by removing the offending traffic sign. The alternative argument is that at no stage did the applicants demand from the second respondent that he remove the traffic sign that he has only re-

⁷ 2007 (2) SA 48 (C)

erected after it was spoiled. I do not find any merit in this argument. I was not referred to any authority that it was a requirement that they have to request him or demand that he removes the traffic sign. He was not supposed to erect or re-erect it in the first place.

- [21] The Constitutional Court has confirmed that the mootness of the matter does not necessarily constitute an absolute bar to its justiciability. The discretion lies with the Court whether or not to consider it.⁸ Such discretion the learned judges held that it must be exercised according to what the interest of justice require. I hold a firm view that in this matter I am enjoined to consider the matter.
- [22] It will appear that the second respondent does not appreciate the illegality of his actions because of a perceived civil duty he is performing on behalf of the ineffective or non-functional third respondent. While it is commendable that he is acting as a good citizen, his actions remain illegal. In fact he still considers absence of the traffic sign to be dangerous for other road users. The certainty that must be emphasised is that it is against the law to act in the manner that he did.
- [23] The rationale for the granting of the interdict was sufficiently espoused in **Independent Outdoor Media (Pty) Ltd v City of Cape Town** in para 36 as follows:-

“In my view there is no reason why an interdict should not be granted to stop unlawful signs being displayed in breach of the

⁸ *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA CC 925 ad par 9

Bylaw, and while a criminal prosecution may well follow upon an offender making itself guilty of unlawful conduct, it would be a sad day if the criminal courts were to be clogged by a vast number of cases of such a nature. The court a quo was quite correct to have granted the interdict that it did.”

- [24] This brings me to the conclusion that prayers 3 and 4 of the notice of motion should be granted. However, there must be some amendment particularly on the issue of costs. The principle is that the costs must follow the result. That far I am in agreement with counsel for the applicants. We part ways on the aspect that punitive costs on an attorney and client scale should be granted. Such costs are only awarded in situations where the court demonstrate its displeasure against a litigant. The Court must exercise its judicial discretion in a just and fair manner. In my view there are no cogent reasons to make such an order. The costs for employment are warranted.

Order

- [25] In the result the following order is made:-

- 25.1. The First and Second Respondent are interdicted from displaying and, or erecting any signs which replicates road traffic signs without the necessary authority to do so;
- 25.2. The First and Second Respondent are ordered to pay the costs, the one paying the other to be absolved, including the costs of two (2) counsel.

M. A. MATHEBULA, J

On behalf of applicant:

Adv. P. Zietsman SC

Assisted by:

Adv. S. Rautenbach

Instructed by:

Stander & Green Attorneys
BLOEMFONTEIN

On behalf of 1st & 2nd respondent:

Adv. P.J.J. Zietsman

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