



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 No.: **4425/2018**

In the matter between:

WEALTH 4 ALL SOLUTIONS

APPLICANT

and

NTAOLENG MARIA HANONG

RESPONDENT

CORAM: I VAN RHYN, A J

JUDGMENT BY: I VAN RHYN, AJ

HEARD ON: 29 NOVEMBER 2018

DELIVERED ON: 30 NOVEMBER 2018

BACKGROUND

- [1] On 23rd May 2018, under case number 2554/2018, a rule nisi was issued in terms whereof, inter alia the Respondent in the present application, was called up to show cause why a final order

interdicting and prohibiting her from making any unlawful and defamatory statements regarding the business and business affairs of the Applicant should not be made final. The application was not opposed by the Respondent and the rule nisi was confirmed on 12th July 2018.

[2] *Ex facie* the notice of motion the Applicant now seeks the following relief which is quoted *verbatim*:

- “1. That the Respondent is restrained, interdict and prohibited from making unlawful and defamatory statements to the public regarding the business affairs of the Applicant.
2. That the Respondent is prohibited and interdicted from dissuading members of the public both current and potential customers from investing and continuing to invest in the Applicant’s trading business.
3. That the Respondent is hereby ordered to return and hand over the Applicant FNB Card and all Business Financial Books of the Applicant currently in her possession.
4. The Respondent is restrained and interdicted from taunting her own business pamphlets within the business area of the Applicant’s business.
5. Cost of suit.”

[3] What gave rise to the application is a failed business venture between the directors of Applicant, a forex trading investment company situated at the Setsing Shopping Complex in Phuthaditjhaba and the Respondent, a former director of the Applicant.

[4] The Respondent opposed the application on the following bases: the Respondent denies having any intention of defaming the

Applicant; that she has not made any unlawful and defamatory statements regarding the business of the Applicant in the past, or since the order granted in the previous application under Case No: 2445/2018 in May 2018. The Respondent denies that she has ever dissuaded members of the public from investing with the Applicant and contends that she has destroyed the FNB bank card provided to her when she was a director of the Applicant.

- [5] The Applicant has never, prior to this application requested the Respondent to hand back the financial books of the Applicant and the Respondent tenders to hand back the financial documents and books as well as the remains of the bank card before the hearing of this application. She furthermore denies that she went to the premises of the Applicant where she distributed pamphlets to promote her business or to inform the Applicant's clients to invest with her business.

FINAL RELIEF

- [6] The nature of the remedy is that of a final and permanent interdict. In prayer 3 of the notice of motion the Applicant seeks mandatory relief in terms whereof the performance of certain action is required and in prayers 1, 2, and 4, prohibitory interdicts are sought. Interdict procedure is a remedy of a summary and extra-ordinary nature, allowed in cases where a person requires protection against an unlawful interference or threatened interference with his or her rights.

[7] The requirements for a final interdict are well established. They are firstly, a clear right; secondly, that such clear right has been infringed by the Respondent to the prejudice of the Applicant or that there is a reasonable apprehension that such right will be infringed, causing resultant injury and harm and thirdly, the absence of any other satisfactory remedy¹.

[8] It is a trite principle of our law that in the case of a final interdict, any disputes of fact must be resolved on the basis of the test set out in *Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*², recently approved and considered in more depth in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*³. I quote from para [12]:

“[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter’s allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers”

[9] The difference between an interim and final interdict is well known. The test for the grant of the one is quite different to the test for the grant of the other. Since the balance of convenience plays no role in the grant of a permanent interdict, such an interdict is not usually sought on notice of motion, although of

¹ *Setlogelo v Setlogelo* 1914AD 221 at 227

² 1984 (3) SA 623 (A) at 634E-G

³ 2008 (3) SA 371 (SCA)

course it might be if no dispute of fact is anticipated.⁴ A final interdict is a final determination of the rights of the parties to the litigation.

[10] The Applicant's founding affidavit is deposed to by Portia Tshangela, an adult female director of the Applicant. A company, as an artificial person can act only through its agents and any person who acts on behalf of a company must allege that he or she is authorized by the company to bring the proceedings. The deponent to the founding affidavit does not state that she has been authorized to bring the application on behalf of the Applicant. The Respondent questions the deponent's authorization and states that prior to her resignation as a director of the Applicant there were two other directors, namely Mr Monwabisi Bebeza and Mr Thabo Peter Mathunjwa. Once authorization has been placed in issue, the onus to establish upon a balance of probabilities that the application was duly authorized by the Applicant's board of directors rest upon the Applicant.⁵

[11] Appended to the Applicant's replying affidavit, again deposed to by the said Portia Tshangela, is a copy of the registration certificate of the Applicant. Apart from the two directors mentioned by the Respondent, the third director is Kobane, Portia Mamapele. Save for the name "Portia" the other name and surname do not resemble the name and surname of the deponent to the Applicant's affidavits. The best evidence that an application

⁴ Hall and Another v Heyns and Others 1991 (1) SA 381 (CPD) 395 D-E.

⁵ Griffiths & Inglis (Pty) Ltd v Southern Cape Blasters (Pty) Ltd 1972 (4) SA 249 (C)

has been properly authorized would be provided by an affidavit made by an official of the company annexing a copy of a directors' resolution.⁶ No resolution was attached to the replying affidavit and I am not convinced that the deponent to the founding and replying affidavits has been properly authorized to launch the present application.

DISPUTED FACTS

- [12] Since defamation is a wrong done to the reputation of a person, every person who is recognised by law as having a reputation and whose reputation is unlawfully injured, will have a cause of action. A trading corporation may also sue for defamation if the defamatory statements was calculated to injure its business reputation or to affect the trade of the business which it was formed to carry on.⁷
- [13] The Applicant must set out the words alleged to have been used by the Respondent and must prove them. It is not necessary to state the exact words used by the Respondent, but it is of utmost importance to state more or less the statements or words used by the Respondent '*of and concerning*' the Applicant in order for the court to decide on the effect and meaning of the words. The Applicant does not disclose the nature of the statements allegedly made by the Respondent. Although the Applicant alleges that the statements made by the Respondent were defamatory, it is a question of law whether the words complained of are reasonably

⁶ Mall (Cape) (Pty) Ltd v Merino Ko Operasie Bpk. 1957 (2) SA 347 (C) at 352A

⁷ Dhlomo NO v Natal Newspaper (PTY) Ltd and another 1989 (1) SA 945 (A)

capable of conveying to the reasonable person or reader a meaning which defames the Applicant⁸.

- [14] The Respondent appended as “Annexure J” to the opposing papers, an original handwritten note she received subsequent to handing out pamphlets to advertise her business. A copy of the pamphlet was appended to the founding affidavit marked “Annexure E1”. From “Annexure J” I quote the following paragraph:

“I’m warning you because your people dish out the pamphlets of Matsebetsebe on the que of the FNB at the expense of my name as well as the name of my company...”

- [15] The content of the pamphlet, “Annexure E1” does not refer to the business of the Applicant or its directors and/or employees. In fact no mention is made of the Applicant. This has been conceded by Mr Ponoane appearing on behalf of the Applicant. The author of the note however threatens the Respondent in the following way:

“...Just a reminder that the court said you should not (refrain) from talking bad about Wealth 4 all. You should not open a business similar to it altogether.”

And further:

“I will go back to High Court so that it closes Matsebetsebe. Also you should incur the costs. I am advising you I am not playing.”

- [16] The Applicant must allege and prove that the statement complained of refers to the reputation, moral character,

⁸ Le Roux v Dey 2010 (4) SA 210 (SCA) para 15

imputing for example dishonesty or unethical or unprincipled behaviour by the employees or directors of the Applicant. The Respondent denies spreading lies, badmouthing or defaming the Applicant. On behalf of the Respondent it was argued that the application was brought to intimidate and to prevent the Respondent from conducting a business in direct competition with the Applicant. I tend to agree with this observation.

Clear right

- [17] In LAWSA⁹ the first requisite to be established for the granting of a final interdict is proof of a clear right.

“Whether an applicant has a right is a matter of substantive law. Whether that right is clear is a matter of evidence. In order therefore to establish a clear right the applicant has to prove on a balance of probabilities facts which in terms of substantive law establish the right relied upon.”

- [18] Insofar as Applicant seeks a final interdict it has to prove an unlawful state of affairs and the right to secure a permanent cessation thereof. In saying this, an interdict is not a remedy for the past invasion of rights, but is concerned with present or future infringements. By failing to state the alleged defamatory statements made by the Respondent and in light of the Respondent’s version that she, being aware of the order granted by this court, severed all ties with the Applicant and has not made any unlawful and defamatory statements to the public regarding the business affairs of the Applicant, the Applicant has not made out a case for the relief claimed in prayer 1 of the notice of

⁹ Second Edition VOL 11 para[397]

motion.

[19] The Applicant contends that the Respondent is not entitled to be in possession of the FNB bank card and the financial books of the Applicant and therefore this court should order the Respondent to hand same back to the Applicant. Respondent indicated that the FNB bank card is useless as her access to the Applicant's account has been blocked on her request. The order obtained in under case number 4425/2018 directed FNB bank to cancel any authorization whereby the Respondent is allowed to deal with the account of the Applicant. On behalf of the Applicant it was argued that the FNB bank card is used by the Respondent as a "marketing tool" and to indicate to members of the public that the business of the Applicant has been closed down. How a cancelled bank card can be used to obtain these results are beyond me and I fail to understand the reasoning. It was not necessary to obtain an order against the Respondent to return the FNB card to the Applicant.

[20] The Respondent tendered the return of the financial books of the Applicant and contends that if the return of the said books were requested earlier, she would have handed the books back to the Applicant. Mr Ponoane did not understand the Respondent to have tendered the return of the financial books of the Applicant and has not made contact with the attorney acting on behalf of the Respondent to obtain the books. Therefore it was unnecessary to obtain a court order in this regard.

Whether a clear right has been infringed by the Respondent

- [21] In the absence of special legal restrictions a person may freely exercise his or her trade profession or calling and this right has been enshrined in Section 22 of the Constitution¹⁰ of our country, unless the person has bound him or herself to the contrary. In the business world competitors is of course subject to fair and honest competition and such competitive conduct will often in one way or another lead to interference by rivals about which he or she cannot legitimately complain. The competition, as with all activities, must itself remain within lawful bounds¹¹.
- [22] The Applicant avers that the Respondent is dissuading members of the public from investing and continuing to invest in the Applicant's trading business. The Applicant furthermore contends that the Respondent, while within the premises of the Applicant's business tried to persuade potential customers to invest in her business as the Applicant's business has been closed down. This statement does not make sense. The Respondent denies the allegation.
- [23] In motion proceedings the affidavits constitute both the pleadings and the evidence and the issues and averments in support of the parties' cases should appear clearly therefrom¹². The Applicant did not provide any further information regarding the conduct of the Respondent or whether the Applicant lost any potential investment business due to the Respondent's conduct. Contained in Annexure J, referred to above is an allegation that the

¹⁰ Constitution of the Republic of South Africa 108 of 1996

¹¹ Bress Designs (Pty) Ltd v GY Lounge Suite Manufacturers (Pty) Ltd 1991 (2) SA 455 (W) 475

¹² Minister of Land Affairs and Agriculture v D & F Wevell Trust 2008 (2) SA 184 (SCA) at 200 D

Respondent distributed pamphlets advertising her investment business to members of the public who waited in the queue at the FNB Bank. There is nothing unlawful in distributing pamphlets to advertise a business. The evidence before court is not clear and comprehensive regarding the unlawful conduct of the Respondent. The Applicant failed to place any evidence before this court to substantiate the granting of prayers 2, 4 and 5 of the notice of motion.

[24] These are disputes of fact, which Applicant should have foreseen. The authorities are to the effect that an application may be dismissed where a dispute of fact which cannot be resolved on paper should have been anticipated by an Applicant. In the present case the Applicant could have brought an application for an interim interdict pending an action for a permanent interdict but he chose not to do so.¹³

[25] The Applicant obtained a previous court order in similar terms to prayer 1 of the notice of motion during July 2018. The Applicant however, even though it is argued that the Respondent is in contempt of court specifically in relation to this aspect, fails to bring a contempt of court application, but launched a further application to obtain a similar order.

[26] Even if I am wrong in those conclusions, I am of the view that the Applicant has failed to satisfy the third requirement of an interdict, namely, that it does not have a satisfactory alternative remedy.

¹³ Hall and Another at 397.

[27] **Order**

In the result the application is dismissed with costs.

I VAN RHYN, AJ

On behalf of the Applicant: Mr. M. J. PONOANE
Instructed by: PONOANE ATTORNEYS

On behalf of the Respondent: ADV.G S J VAN RENSBURG
Instructed by: HILL McHARDY & HERBST INC
(Mr J M M Verwey)