

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION: BLOEMFONTEIN

Case No.: 4830/2015

In the matter between:-

NEURO LEARNING LINK

Applicant

and

BIOLINK (PTY) LTD

1st Respondent

(Registration number: 2012/134712/07)

HENDRIK GIDEON VISSER

2nd Respondent

(ID number: [.....])

CORAM:

DAFFUE, J

JUDGMENT BY:

DAFFUE, J

HEARD ON:

28 JANUARY 2016

DELIVERED ON:

11 FEBRUARY 2016

I INTRODUCTION

- [1] Central to the dispute between the parties is a software programme known as BioWiz, developed by Mr Andries Jakobus Mouton (“Mouton”) with the sole purpose to provide neurotherapy to children and adults who suffer from learning and concentration disabilities. Respondents’ right to be in possession of and/or to use a License

File Generator (herein later referred to as a “LFG”), a software utility programme that enables one to install the BioWiz software programme (“BioWiz”) on one’s computer and which has been created with the sole purpose to protect BioWiz against unlawful copying as it is password protected, is seriously contested in the application and needs to be adjudicated by the court.

II THE PARTIES

[2] Applicant is Neuro Learning Link, a sole proprietorship of which Mouton is the sole proprietor. I shall refer to Mouton as applicant in this judgment.

[3] First respondent is Biolink (Pty) Ltd. Second respondent, Mr Hendrik Gideon Visser, an associate professor in chemistry at the University of the Free State, is the sole director of first respondent.

III THE RELIEF CLAIMED

[4] *Ex facie* the notice motion applicant seeks the following relief which is quoted *verbatim*:

- “1. An order compelling the Respondent to destroy the License File Generator from his personal computer or any other copy he might have of the license file generator to the software program BioWiz;
2. That the First and/or Second Respondent be compelled to provide a full detailed list of all of the First and Second Respondent’s agents who was provided with the license filed generator including:
 - 2.1 Their names;

- 2.2 The area that they are operating their business;
- 2.3 A full description of their business addresses;
- 3. Interdicting the Respondent, either personally or through an agent or employee, from installing and distributing any copies of the software program BioWiz;
- 4. An order compelling the Respondent, either personally or through an agent or employee to remove / delete any BioWiz software program(s) which was/were installed on any of his or any of Biolink agents' computer(s) after 21 April 2015.
- 5. An order compelling the Respondent to supply the above honourable court with a sworn affidavit that he complied with prayer 1 herein above;
- 6. That the Respondent pays the costs of this application;"

IV **FINAL INTERDICT**

[5] The nature of the remedy is that of a final and permanent interdict. In prayers 1, 2, 4 and 5 of the notice of motion applicant seeks mandatory relief in terms whereof the performance of certain action is required and in prayer 3 a prohibitory interdict is sought. However it is uncertain against which respondent relief is sought in prayers 1, 3, 4, 5 and 6. 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. It is not a remedy for past invasion of rights, but is concerned with the present or the future. See LAWSA, vol 11, para [390].

[6] The requisites for the grant of a final interdict have been set out a century ago in **Setlogelo v Setlogelo** 1914 AD 221, at 227 a judgment which has been quoted with approval on a regular basis.

The three requisites for a final interdict, all of which must be alleged and proven, are:

- i. a clear right on the part of the applicant;
- ii. an injury actually committed or reasonably apprehended;
- iii. the absence of any other satisfactory remedy available to the applicant.

I shall consider the aforesaid requirements in more detail *infra* when I evaluate the evidence.

V **ADJUDICATION OF OPPOSED MOTIONS**

[7] 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 therefrom. See **Minister of Land Affairs and Agriculture v D & F Wevell Trust** 2008 (2) SA 184 (SCA) at 200D.

[8] It is trite that the applicant in application proceedings must make out his/her case in the founding affidavit. A litigant should not be allowed to try and make out a case in the replying affidavit. The founding affidavit must contain sufficient facts in itself upon which a court may find in the applicant's favour. An applicant must stand or fall by his/her founding affidavit. See **Director of Hospital Services v Mistry** 1979 (1) SA 626 (AD) at 635H – 636D. Fresh allegations cannot be made in the replying affidavit. Allegations in an applicant's replying affidavit which should have appeared in the founding affidavit or which are irrelevant and would gravely prejudice the respondent may be struck out and/or disregarded. It is

not sufficient to prepare a skeleton of a case in the founding affidavit and then to add flesh in the replying affidavit. See **Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage and Others** 1974 (4) SA 362 (TPD) at 369A and further.

- [9] A court should adjudicate factual disputes in application procedure having regard to the well-known **Plascon-Evans Paints dicta** recently approved and considered in more depth in **Wightman t/a JW Construction v Headfour (Pty) Ltd and Another** 2008 (3) SA 371 (SCA). 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: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C. See also the analysis by Davis J in *Ripoll-Dausa v Middleton NO* 2005 (3) SA 141 (C) at 151A-153C with which I respectfully agree.”

VI MATERIAL UNDISPUTED FACTUAL BACKGROUND

- [10] During the course of 2013 and 2014 applicant created BioWiz for the sole purpose to provide neurotherapy to children and adults with learning and concentration disabilities.
- [11] BioWiz was created together with the application specific software utility programme, LFG, to protect BioWiz against unlawful copying,

it being password protected. BioWiz cannot be installed without the LFG and it is impossible to run BioWiz without applying the LFG.

- [12] First respondent is a company that also provides neurotherapy to people to teach them how to learn to concentrate by using computer based programmes. It has agents nationwide and a few internationally who provide these services to the public.
- [13] Applicant saw a mutual beneficial opportunity for BioWiz to compliment the business of first respondent. Thereupon he approached second respondent and this led to a verbal agreement being entered into between applicant and first respondent, represented by second respondent.
- [14] The minutes of the meeting during which the verbal agreement was entered into between the two gentlemen is annexed to the founding affidavit, but the parties agreed that the contents thereof do not encapsulate the full agreement between them. I do not intent to deal extensively with any of the terms and conditions of the agreement; however certain terms will be specifically mentioned when I evaluate the evidence.
- [15] Second respondent was allowed to do the initial installation for first respondent's agents by making use of the LFG which was provided by applicant to second respondent via drop box they both shared. Second respondent received R300,00 for each installation and applicant received R1 700,00 for each copy of the BioWiz installed.
- [16] Since 21 April 2015 no further sales of BioWiz to agents of first

respondent occurred and first respondent did not do any new installations of BioWiz since this date. This last aspect is not common cause, but respondents' version cannot be rejected as false.

- [17] On 23 April 2015 applicant's attorneys wrote a letter to second respondent, terminating the agreement between the applicant and first respondent with immediate effect, but subject to several conditions. The last sentence of the letter reads as follows: "Ons vertrou u vind bogenoemde in orde en ontvang graag u terugvoer hierin." On 30 April 2015 respondents responded through their attorneys, indicating that a formal settlement agreement should be prepared and simultaneously making counter proposals. Finally applicant's attorneys were requested to provide respondents' attorneys with a draft settlement agreement for consideration. Applicant relies on these two letters as proof of consensual cancellation of the agreement and states in paragraph 19.1 of the founding affidavit "... that we agreed to cancellation of the agreement between us ..." and continues in paragraph 19.3 as follows:

"The agreement was then formally terminated on or about 23 April 2015, in that termination of the agreement was offered and accepted by the first respondent."

VII DISPUTED FACTS

- [18] The facts contained under the previous heading are undisputed, save for the one aspect referred to, but the following are in dispute:

1. That the agreement between the parties has been cancelled by agreement as alleged.
2. Whether or not applicant is entitled to rely on cancellation by notice which will be addressed briefly although this is not the case that respondents were called upon to meet.
3. Whether or not respondents have a legal right to possession of the LFG;
4. Whether or not applicant is entitled to the further relief claimed in the notice of motion.

VIII EVALUATION OF THE EVIDENCE IN LIGHT OF THE LEGAL PRINCIPLES AND SUBMISSIONS BY COUNSEL

[19] I regard it convenient to evaluate the evidence based on the requirements for final interdicts and such evidence will be considered under the relevant headings.

Clear right

[20] LAWSA loc cit at para [397] deals with proof of a clear right as follows: "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."

[21] Insofar as applicant seeks a final interdict he 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.

- [22] It is applicant's case that respondents are not entitled to be in possession of the LFG and therefore this court should order them to destroy same. Respondents indicate that first respondent is entitled to be in possession of the LFG even in the event of a finding that the contract between applicant and first respondent has been cancelled, the reason being that it is necessarily required to re-install BioWiz for its agents whose computers might be stolen and/or become defective and who obtained the software before 21 April 2015. Applicant's viewpoint is that such installations could never be regarded as first installations, but second installations and that first respondent was not allowed to do second installations, especially insofar as it might be done without the knowledge of applicant and/or without payment to applicant as agreed upon when the contract was concluded.
- [23] As mentioned it is respondents' case that such re-installations would only be required in respect of first respondent's agents who purchased BioWiz until 21 April 2015, the date when applicant and first respondent ceased to do business with each other.
- [24] I have considered the terms and conditions of the contract entered into between applicant and first respondent, the fact that the minutes attached to the papers do not set out the full terms of the parties' agreement as confirmed by first respondent and also applicant in reply, as well as the background facts. Although I was initially sceptical about first respondent's right to remain in possession of the LFG even in the case of a finding that the contract

between the applicant and first respondent had been cancelled, I have been persuaded, bearing in mind the network of agents which first respondent has established, that it cannot be found that respondents' version is so far-fetched and untenable that it should be rejected on the papers. First respondent needs the LFG to do re-installations to existing agents who purchased BioWiz prior to 21 April 2015 in the circumstances referred to above.

- [25] Applicant does not rely in the founding affidavit on a notice of termination of the contract between the parties and/or that he was entitled to cancel the contract due to first respondent's breach of contract. He clearly tries to make a case that the contract has been cancelled by mutual agreement. However, the two letters relied upon, referred to *supra*, serve as proof to the contrary. When these letters are properly considered, it is apparent that applicant intended to cancel the agreement subject to certain conditions, that first respondent was prepared to terminate the agreement subject to certain proposals and that it invited applicant to prepare a draft settlement agreement for consideration. Respondents responded with a counter offer which has not been accepted.
- [26] Respondents met the case they were called to meet in the founding affidavit and I am satisfied that notwithstanding applicant's viewpoint, no consensual cancellation of the agreement has been effected.
- [27] Strictly speaking that should be the end of the case as to whether the contract between the parties is still in existence or not. I shall however briefly deal with other submissions made on behalf of

applicant in order to convince me that the contract had in fact been terminated. The letter of applicant's attorneys referred to *supra* at first glance gives the impression in paragraph 2 thereof that applicant cancelled the contract with immediate effect. A contract for an unspecified duration may be terminated by one of the parties with reasonable notice. Also, any notice to cancel or the actual notice of termination itself must be clear and unequivocal. See **Kragga Kamma Estates CC and Another v Flanagan** 1995 (2) SA 367 (AD) at 375D. For the reasonableness of a notice of cancellation the reader is referred to **Amalgamated Beverage Industries Ltd v Rond Vista Wholesalers** 2004 (1) SA 538 (SCA) at 545A - E. Reasonableness in this context should be tested at the time when the notice was given and the surrounding circumstances must also be considered. Sufficient time should be allowed to the other party to regulate its own affairs.

- [28] I am satisfied that the contract could not have been terminated in the manner applicant might have intended to do. Firstly, the notice was not clear and unambiguous, but secondly, a reasonable time should have been provided to first respondent to make the necessary arrangements within its business environment, considering the extent of its activities and its agents across the country that relied on it for maintenance and support. Bearing in mind the manner in which applicant approached the litigation, it was not necessary for respondents to put facts before the court as to what should be regarded a reasonable period in the circumstances. However, logic dictates that if the nature of the business is considered, a reasonable notice period would probably be between three and six months. Therefore applicant did not convince me that

it was entitled to cancellation on notice.

- [29] It was furthermore intimated by applicant that a tacit cancellation of the contract occurred based on the facts on record. First respondent decided not to purchase any knew BioWiz from applicant from or about 21 April 2015 and no selling of such software to its agents took place since this date and the same applied to new BioWiz installations. At the present moment respondent sells only PlayAttention systems which are based on EEG technology. It is the sole distributor of this product in South Africa. BioWiz will according to first respondent soon be replaced by the PlayAttention system, but at the present moment the existing BioWiz software programmes are still in use by agents and first respondent is contractually bound to ensure that the necessary maintenance is conducted and support provided. Thus, although no new business is being conducted between the parties since 21 April 2015, I find that existing business as at 21 April 2015 and the contractual rights and obligations flowing therefrom have not been terminated by any tacit agreement. I refer to the following *dictum* of Corbett JA in **Standard Bank of SA Ltd & Others v Ocean Commodities Inc and Others** 1983 (1) SA 276 (AD) at 292B:

“In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact consensus *ad idem*.”

- [30] In any event and even if I am wrong in respect of any of my findings *supra*, I am still satisfied that, bearing in mind the **Plascon-Evans**

principles, the matter must be adjudicated upon the version of respondents together with the version of applicant which has been accepted by respondents. That being the case, applicant has not proven a clear right in terms whereof respondent (it is uncertain which one of the two) shall be ordered to destroy the LFG.

[31] Applicant also seeks mandatory interdicts in prayers 2 and 4 of the notice of motion, requiring the court to compel respondents to provide a list of all agents who had been provided with a LFG and to remove or delete any BioWiz software programmes which were installed on the computers of first respondent's agents after 21 April 2015. Applicant has not proven that anyone of respondents' agents was provided with a LFG, save for Me Du Plessis in Australia to which I shall refer hereinafter and/or that respondents installed BioWiz on its agents' computers after 21 April 2015. In fact this is clearly respondents' case that they never provided the agents with LFG's (save for Me Du Plessis in Australia), and furthermore it is denied that any BioWiz was installed after 21 April 2015. Respondents did not merely deny applicant's entitlement to the relief claimed, but positively stated their reasons for such denial. There is no reason to doubt respondents' sincerity, bearing in mind the utilisation of the PlayAttention system and the circular to agents confirming that first respondent would not supply or market any new BioWiz software.

[32] In prayer 3 of the notice of motion a prohibitory interdict is sought whereby respondent (it is uncertain which of the two) is to be prohibited from installing and distributing any copies of BioWiz. Again, and for the same reasons mentioned above, I am satisfied

that applicant has not proved a clear right in this regard.

- [33] Respondents indicate that it was nowhere agreed that applicant would have sole and exclusive rights of distribution of BioWiz outside the borders of South Africa. It is not necessary to make any finding in this regard in light of the fact that Me Du Plessis to whom BioWiz and a LFG were made available, confirmed under oath that she already destroyed the LFG in 2014. If applicant was of the view that first respondent materially breached the contract with him in this regard, he could and should have pursued his contractual remedies and cancelled the contract forthwith. However he elected not to do so and cannot now be heard to rely on such alleged breach of contract for termination of the agreement. He cannot now change his mind, or put otherwise: “(H)e cannot both approbate and reprobate.” See **Thomas v Henry and Another** 1985 (3) SA 889 (AD) at 895J – 896E. This aspect might have a bearing on the second requirement for final interdicts and I shall deal with that *infra*.

An injury actually committed or reasonably apprehended

- [34] Applicant has produced no evidence to show that respondents distributed or provided BioWiz to any person or entity since 21 April 2015 or that they attempted to do so. There is also no evidence that, save for supply of the LFG to Me Du Plessis, any LFG’s were supplied to other persons or entities or that respondents attempted to do so. There is no real likelihood that respondents will act in such manner. I am prepared to accept respondents’ version set out as long ago as 30 April 2015 in the letter of their attorneys and their undertaking not to distribute BioWiz any further. Applicant has not

proven the second requisite for a final interdict.

The absence of similar protection by any other ordinary remedy

[35] In the light of the conclusions arrived at in respect of the first two requisites for final interdicts, it is unnecessary to consider the third requisite at all.

IX CONCLUSION

[36] Applicant failed to prove the first two requisites for a final interdict and therefore, the application stands to be dismissed. There is no reason why costs should not follow the event.

X ORDER

[37] Therefore the following order is issued:

1. The application is dismissed with costs.

J. P. DAFFUE, J

On behalf of the applicant:

Adv. H. van Zyl
Instructed by:
Hennie Stander Attorneys
BLOEMFONTEIN

On behalf of the respondents: Adv. D. J. van der Walt SC
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