

IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION: MTHATHA

CASE NO. 1496/2016

ARISTOLINX INVESTMENTS CC

t/a ECDC SASOL GARAGE

Applicant

and

MZUKISI VICTOR SIYONGWANA

Respondent

JUDGMENT

BROOKS J

[1] This is an application in which the applicant obtained, as a matter of urgency, an interim interdict against the respondents. The interim interdict, embodied in a rule *nisi*, was obtained on 28 April 2016. The return day was initially 26 May 2016. For reasons not disclosed in the application papers, the rule *nisi* was extended until 31 May 2016, but then lapsed when the matter was simply removed from the roll on that date.

[2] On 30 May 2016 the matter became opposed by the respondent. There appears to have been a delay in the preparation of the answering affidavit, which is unexplained, that affidavit being deposed to on 30 June 2016. In the interim, as it was entitled to do in the absence of an answering affidavit, on 22 June 2016 the applicant had applied for the allocation of a date when the matter might be heard on the uncontested opposed motion court roll. On the same date, the registrar allocated the matter to the uncontested opposed motion court roll of 5 July 2016. Thereafter, on 30 June 2016 the respondent filed his answering affidavit. Inevitably, the matter was then removed from the uncontested opposed motion court roll on 5 July 2016 with a further order reserving the wasted costs.

[3] Thereafter the matter appeared on the roll on a number of occasions and appears to have been removed by agreement. On those occasions, costs orders were made.

[4] Although the terms in which the rule *nisi* was issued differed substantially from the notice of motion, no amendment to the notice of motion has been sought. The rule *nisi* having lapsed, the relief sought by the applicant now is a final order in terms of the original notice of motion. If granted, the order would be in the following terms:

- “1. That the respondent be and is hereby interdicted from holding a media conference at or near ECDC SASOL garage, Sutherland Street, Mthatha, or anywhere, in which conference the respondent will call upon customers or members of the public to boycott or not to go to the applicant’s business;

2. That the respondent be and is hereby interdicted from making defamatory and false statements that the applicant is deliberately damaging customers' motor vehicles;
3. That the respondent be and is hereby interdicted from calling upon customers to boycott the ECDC SASOL garage situated at Sutherland Street, Mthatha, or organising customers to the public to stage protest actions at the applicant's premises or near them;
4. That the respondent be and is hereby directed to pay the costs of this application.”(sic)

[5] It is trite that the court is enjoined to consider the grant of final relief only if the facts alleged on behalf of the applicant which are admitted by the respondent in the answering affidavit, together with the facts expressed by the respondent therein, justify such relief.¹ The position may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.²

[6] Unlike an interim interdict, which does not involve a final determination of rights, a final interdict effects such a final determination of rights.³

¹ PLASCON EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD 1984 (3) SA 623 (A) 634 – 635.

² NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS v ZUMA 2009 (2) SA 277 (SCA) par [26].

³ FOURIE v OLIVIER EN 'N ANDER 1971 (3) SA 274 (T).

[7] Upon the consideration of the allegations of fact contained in the affidavits filed of record in accordance with the preceding paragraph, the applicant would be entitled to relief if it is able to establish the following:

[7.1] that there is a clear right on the part of the applicant;

[7.2] an injury actually committed or reasonably apprehended;

[7.3] the absence of any other satisfactory remedy available to the applicant.⁴

[8] It is apparent from the application papers that on 19 March 2016 the respondent bought fuel from the applicant's premises in Mthatha. Instead of diesel, the vehicle was filled with petrol. The respondent was obliged to take remedial action and a number of exchanges occurred between the parties. There are disputes on the papers pertaining to the true cause of the need for the remedial action and the timing thereof. For present purposes, it is not necessary to go into any detail on these aspects. In seeking the interim interdict originally, the deponent on behalf of the applicant expressed fears that the respondent was on the point of organising a press conference outside the applicant's premises at which defamatory statements would be made and at which potential customers would be asked to boycott the applicant's business. The impression was that this press conference would be held on 28 April 2016, the day upon which the interim order was sought and obtained *ex parte* as a matter of urgency.

⁴ SETLEGO v SETLEGO 1914 AD 221 at 227.

[9] Whilst in the answering affidavit the respondent admits to exchanges occurring between the parties, the essential allegations pertaining to the imminent threat perceived by the applicant are denied. Attention is drawn in the answering affidavit to the insufficiency of the material placed before the court by the applicant as evidence of the threat alleged.

[10] It is apposite to record that nowhere in the founding affidavit does the applicant allege a well grounded apprehension that any threats of action against the applicant's business are likely to occur in the future. It is plain that disputes between the parties remain, but they are not the true subject of the present proceedings. Indeed, nothing prevents the respondent from instituting an action against the applicant for the recovery of any damages which he believes he has suffered as a result of the incident at the applicant's premises on 19 March 2016. The same right accrues to the applicant.

[11] It is noteworthy that the application papers and the interim order were only served at 12h00 on 28 April 2016 and that the service was not personal. In the answering affidavit filed later, the respondent states that he has no knowledge of the person upon whom service occurred. The return of service shows simply that occurred at "Gxulu A/A Mthatha", referring to an administrative area, and upon a named person thereafter described as a "cousin sister". The respondent only came to know of the application and the interim order much later, and quite by chance when his attorneys caught sight of the name of the matter when perusing the motion court roll for 31 May 2016.

[12] It is trite that a court will not grant an interdict restraining an act which has already been committed. An interdict is not a remedy for a past invasion of rights.⁵ The high water mark for the applicant's case (which in any event is disputed by the respondent) is an event which the applicant believed was scheduled for 28 April 2016 and which may or may not have occurred. Any invasion of rights which may have been threatened has come and gone.

[13] In all the circumstances, I am of the view that the applicant's pursuit of this application for a final interdict is ill-advised. The application cannot succeed.

[14] On 5 July 2016 the matter was removed from the roll, apparently by agreement between the parties. By that date, all the affidavits had been exchanged and, by all appearances, the matter could have been argued. By then the *rule nisi* had lapsed. The wasted costs occasioned by the removal of the matter from the roll were reserved. In the absence of any reliable indication of the dynamics at play on 5 July 2016, in my view an appropriate order would be simply to make no order as to those wasted costs.

[15] The following order will issue:

1. The application is dismissed with costs.
2. No order is made in respect of the reserved costs of 5 July 2016.

⁵ PHILIP MORRIS INC AND ANOTHER v MARLBORO SHIRT CO. LTD AND ANOTHER 1991 (2) SA 720 (A) 735 B.

RWN BROOKS

JUDGE OF THE HIGH COURT

Appearances:

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For the respondent: Adv MN HINANA
Instructed by
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Date heard: 03 November 2016

Date delivered: 10 November 2016