

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 2907/2006

In the matter between:-

SCHOEMANPARK GOLF EN ONTSPANNINGSKLUB Applicant

versus

JABULANE KHETHELO Respondent

HEARD ON: 26 OCTOBER 2006

JUDGMENT BY: H.M. MUSI J

DELIVERED ON: 2 NOVEMBER 2006

[1] This is an application for a final interdict. The applicant is a golf and entertainment club registered as a section 21 company. It has by a resolution of its board of directors passed on 2 June 2006, authorised its manager, Mr. Jacobus Cornelius Louw (Louw), to launch the instant application and to attest to the necessary affidavit and to do the necessary to prosecute the application. The applicant

seeks the following orders against the respondent:

- “1. Prohibiting the Respondent to be on the premises of the Applicant (the golf course, restaurant, club house, rugby, bowls, tennis, jukskei and archery) situated at the Schoemanpark Golf Club, Maselspoort Road, Bloemfontein) save with permission of the Club Manager (presently JACOBUS CORNELIUS LOUW);
2. Prohibiting the Respondent to play golf on the golf course of the Applicant, namely Schoemanpark Golf Club, without permission of the Club Manager (presently JACOBUS CORNELIUS LOUW);
3. Costs of the Application;”

[2] In the course of argument, Mr. Reinders, who appeared for the applicant, indicated that the applicant would abandon prayer 1 and contend only with prayers 2 and 3. Counsel explained that prayer 1 is rather sweeping and it was not the applicant’s intention to prohibit the respondent from being on its premises as such. The aim of the application was to stop the respondent from using the applicant’s grounds to play golf, without complying with the applicant’s rules.

[3] The applicant’s case, as made out in its founding affidavit, is briefly as follows:

The right to be on its premises and to use its facilities

especially playing golf, is restricted to members. However, even such members must, when wishing to play golf, report to the club house and pay the stipulated fee for the day before they can play. It is a condition of membership that they must pay before they can play on any particular day. To become a member, a person must apply and comply with all the requirements for membership before being accepted. However, visitors are accommodated and would be allowed to play provided they make prior arrangements and pay the fees prescribed for visitors, which are substantially more than that paid by members.

- [4] The founding affidavit goes on to aver that the respondent is not a member and has never applied for membership. Neither does he comply with the rules applicable to visitors, in that he does not make prior arrangements with the manager to obtain permission to play and does not pay the prescribed fees, but that he simply comes on to the premises and insists on playing without following the standard procedure. As a result, numerous confrontations have ensued in the past, resulting in the police being called and

the respondent being removed by the latter. Charges of trespass have been laid and the respondent duly charged, but that on each occasion he would be discharged by the magistrates court on the basis that the matter was a civil dispute and not criminal in nature.

- [5] In his opposing affidavit, the respondent does not deny the existence of the rules and requirements for playing golf on the applicant's premises. In fact, in argument, his counsel conceded that the applicant has, on the papers, established two of the three requirements for the grant of a final interdict, namely, a clear right and the absence of an alternative satisfactory remedy. The respondent's case is centred on the requirement of an injury actually committed or reasonably apprehended. He denies that he infringes on the applicant's rights or causes it any injury. He says that he is a professional golfer and a member of the Professional Golfers Association of South Africa (the PGA) and is an accredited member of its Senior Tour and that members of the PGA are exempted from complying with the domestic rules and

requirements of golf clubs countrywide. In particular, they do not need permission to play and are exempted from paying any fees in order to play. As such, he can simply report to any golf club, make a courtesy call on the resident professional golfer or the club manager and as long as the ground is available he can play, subject only that he must behave professionally. He alleges that the privilege and respect accorded to professional golfers had always been given to him by the applicant and that the picture only changed after Louw was appointed manager. The latter, he alleges, has a personal grudge against him and refuses to accord him the necessary privileges and respect that he had always enjoyed purely because of such grudge. The respondent also alleges that Louw is motivated by racial prejudice and discriminates against him because he is black.

- [6] Now the applicant vehemently disputes these allegations made by the respondent and has filed a voluminous replying affidavit by Louw with annexures and supporting affidavits by other people. The affidavits and annexures are all meant to

disprove the core of the respondent's case, namely, that he is exempted from complying with the domestic rules of the applicant and that Louw is victimising him.

[7] Now there are many other allegations in the affidavits filed by both parties over which there are disputes of fact. However, these do not go to the core of the dispute herein. The real dispute relates to the defence raised by the respondent in his answering affidavit, namely, that by virtue of being a professional golfer he is exempted from seeking permission and paying fees in order to play golf on the applicant's course.

[8] In argument, Mr. Reinders contended that this averment by the respondent was so untenable as to entitle this court to reject it on the papers and to grant the relief sought. Mr. Williams, for the respondent, argued on the other hand, that this is a real dispute of fact which cannot be resolved on the papers. Nor can it be resolved on the basis of the approach enunciated in **PLASCON-EVANS PAINTS LTD v VAN**

RIEBEECK PAINTS (PTY) LTD 1984 (3) SA 623 (A). He

said that although the respondent admits the applicant's affidavit evidence, he has nonetheless alleged other facts which the applicant disputes and in this regard he referred to

ROOM HIRE CO (PTY) LTD v JEPPE STREET MANSIONS

(PTY) LTD 1949 (3) SA 1155 (T) at 1163. Mr. Williams

further submits that the applicant should have foreseen that the respondent would raise such a defence and that the application should be dismissed.

- [9] Now there is authority for the view that disputes of fact arising in motion proceedings should not be accepted at face value. The court is entitled to scrutinise the issues to determine whether the alleged dispute cannot satisfactorily be resolved without the aid of oral evidence. In that context, the court would be entitled to look at the probabilities and if these overwhelmingly favour a specific factual finding, the court should adopt a robust approach and make such finding. See **SOUTH PENINSULA MUNICIPALITY v EVANS AND OTHERS** 2001 (1) SA 271 (CPD) at 283 B – I

and the authorities cited therein. I should mention that this approach was also adopted in **MAHALA v NKOMBOMBINI & ANOTHER** 2006 (5) SA 524 (SECLD) but this was only because the matter was urgent. But then again, the authorities caution that this approach should not be adopted without circumspection.

[10] I have scrutinised the papers filed of record and it is my view that this matter does not lend itself to the robust approach referred to above. In my view, this matter can best be resolved by referring the specific issue in dispute to oral evidence. I canvassed this possible route with counsel for both parties during argument and they both indicated that they have no problem with such approach. It is also my view, that *prima facie* the applicant is entitled to some form protection pending the hearing of oral evidence. This is because the only dispute really is the validity of the respondent's defence. An interim order is also necessary in order to avoid further confrontations between the parties pending the determination of the dispute.

[11] In the premises I make the following order:

1. The following specific issue is referred to oral evidence:

Whether the respondent is entitled, by virtue of being a professional golfer and/or member of the South African PGA Senior Tour, to play golf on the greens and courses of the applicant without having to obtain permission from the applicant to do so and without having to pay the requisite fees.

2. Pending the determination of the above issue, the respondent is prohibited from playing golf on the applicant's course and grounds unless he shall have obtained prior permission to do so and having paid the prescribed or agreed fees.

3. The costs hereof shall be costs in the cause.

H.M. MUSI, J

On behalf on the applicant:

Adv. S J Reinders
Instructed by:
Van Wyk & Preller Attorneys
BLOEMFONTEIN

On behalf of respondent:

Adv. A. Williams
Instructed by:
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