



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: **2024-048486**

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED: YES/NO
<u>21.06.24</u>	
DATE	SIGNATURE

In the matter between:

FINE AND COUNTRY SOUTH AFRICA (PTY) LTD

Plaintiff

and

TRADELINK PROPERTIES (PTY) LTD

Defendant

Urgent application - Final interdict sought - Lack of urgency - Founding papers not making out case - Dispute of facts - Dismissal of the urgent application.

JUDGMENT

NHARMURAVATE, AJ:

Introduction

- [1] This is an urgent application wherein Fine and Country South Africa (Pty) Ltd ("Applicant") seeks to interdict Tradelink Properties (Pty) Ltd ("Respondent") from trading and using all its business activities under its brand and intellectual property including: -
- a. Holding itself to the public and the real estate sector as the applicant's license.
 - b. The use of the applicant's brand on its office, office building, business assets and/or equipment of any nature.
 - c. The use of the Applicant's brand on its stationery including offers to purchase, rental agreements, sole mandate documents, letterheads, email signature and business cards.
 - d. Trading, operating and listing properties under the Applicant's branding and intellectual property and related media including Websites; Social Media Platform including WhatsApp, Facebook and Instagram; Third party syndicated portals, including Property24 and Private Property and ImmoAfrica.
- [2] Lastly, that the Respondent be ordered to pay the costs of this application on party and party scale including costs of two Counsel. The Respondent is opposing the matter as in its view the matter is not urgent, urgency is self-created by the Applicant. The Respondent also raise a few points *limine* that is the existence of a dispute of fact, *lis pendense*, *non-joined* amongst others.
- [3] Subsequent to that, the points in *limine* of *lis pendense* and *non-joinder* were abandoned by the Respondent.

Background Facts

- [4] The Applicant entered into the written agreement in terms of the license agreement which granted the Respondent a license to trade under the Applicant's brand. Around 12 April 2024 the Applicant terminated their agreement with the Respondent citing various breaches that had been

committed by the Respondent. This is after the Applicant had called upon the Respondent in writing to rectify the breaches committed in terms of the agreement. The termination of contract between the parties resulted in the Respondent losing the right to use the Applicant's trademark (rights to market and sell the properties using their brand).

- [5] In urgent court the Applicant has to satisfy the requirements for urgency before merits can be dealt with. However during the argument of the matter both parties argued the issue of urgency inclusive of the merits of the matter.

Urgency: Is the Matter Urgent

- [6] The test for urgency has been repeated in plethora cases that a party must show a lack of a substantial remedy in due course. A litigant that approaches the court for relief on an urgent basis must comply with Uniform rule 6(12)(b).¹ The rule reads as follows: -

“In every affidavit filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course.”

- [7] The rule consists of two legs to be present before urgency can properly be founded, namely: first, the urgency should not be self-created,² and secondly, it must provide reasons why substantial relief cannot be achieved in due course. Rule 6(12)'s procedure is not available for the mere taking, and the rule is so significant.

- [8] In *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd*,³ Notshe AJ stated as follows:

“The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers

¹ Uniform Rules of the High Court.

² *Nelson Mandela Metropolitan Municipality v Greyvenouw CC* [2003] ZAECHC 5; 2004 (2) SA 81 (SE) paras 23, 33-34, and *Rokwil Civils (Pty) Ltd and others v Le Sueur N.O and others* [2020] ZAKZDHC 61 paras 16-19.

³ [2011] ZAGPJHC 196 para 6.

render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course.”

[9] In *MM v N M and Others*,⁴ the Court stated that:

“The import of this is that the test for urgency begins and ends with whether the applicant can obtain substantial redress in due course. It means that a matter will be urgent if the applicant can demonstrate, with facts, that the applicant requires immediate assistance from the court, and that if his application is not heard on an urgent basis that any order that he might later be granted will by then no longer be capable of providing him with the legal protection he requires.”

[10] In the case of *In re Several Matters on the Urgent Court Roll*,⁵ Wepener J took the opportunity to reiterate certain well-accepted principles on the question of urgency:

- a. He reiterated what was said about the requirements of rule 6(12)(b).⁶
- b. He pointed out that the Uniform Rules are delegated legislation, have statutory force and are binding on the Court.⁷
- c. He held that the procedure envisaged by rule 6(12)(b) is not there for the taking. It is for the applicant to show that he or she will not obtain substantial redress at a hearing in due course.⁸

[11] The circumstances which have led to this matter being heard on an urgent basis are that:

- a. On 19 March 2024 the Applicant communicated the breaches committed by the Respondent.

⁴ [2023] ZAKZPHC 122.

⁵ 2013 (1) SA 549 (GSJ).

⁶ 2013 (1) SA 549 (GSJ) at para 6.

⁷ 2013 (1) SA 549 (GSJ) at para 6.

⁸ 2013 (1) SA 549 (GSJ) at para 6.

- b. On 28 March 2024 the Respondent denied the breaches alleged and they pointed out a breach committed by the Applicant in that they sold their franchise to a third party and allowed it to operate in Helderfontein which encroaches upon their area of operation. They further suggested a private arbitration be held with the assistance of a retired judge on an expedited basis.
- c. On 5 April 2024, the Applicant rejected the suggestion of arbitrating the matter and they denied having any agreement with any third party which infringes upon their agreement. Thereafter, gave the Respondent 7 days' notice that they were cancelling their agreement with them. In this correspondence they also set out terms and conditions of the cancellation.
- d. On 9 April 2024, the Respondent responded by reiterating their point that they have not committed any breach in terms of the agreement, and they further substantiated that they have the required evidence to prove that indeed they were not in breach with the agreement. They communicated that the purported cancellation of the contract in the absence of a judicial determination of the dispute demonstrated their desire to terminate the license agreement at all costs. The Respondent informed the Applicant that the purported cancellation was unlawful. An undertaking was sought from the Applicant that the contract will not be cancelled, and should they not receive such agreements they will launch an urgent court application.
- e. On 22 April 2024 the Applicant sent a letter to the Respondent requesting them to cease using their brand. On 23 April 2024 the Respondent advised that they will be instituting a legal action to challenge the cancellation of the trademark agreement.
- f. Subsequent to the letter sent to the Respondent to cease and desist the Respondent replied through a correspondence dated 30 April 2024 made it explicitly clear that they would continue trading and concluding their

business activities under the Applicant's brand and intellectual property as in their view the contract had been cancelled unlawfully.

- [12] Mr. Hollander for the Applicant argued that the correspondence of 30 April 2024 was the only time that the Respondent made their intention known that they would continue trading and concluding their business activities under the Applicants brand and intellectual property.
- [13] In rebuttal, Mr. Cassim for the Respondent argued that this matter was not urgent as it is a commercial dispute which cannot be resolved by way of an urgent application. Mr. Cassim argued that urgency was self-created in that the applicant has always known that the Respondent disputes the breaches which they are alleged to have committed. This was demonstrated through a correspondence, as early as the 28 March 2024 that had suggested that the parties go through the arbitration process in line with *clause 9.11* of the agreement.
- [14] Mr. Hollander for the Applicant in reply argued that the matter was urgent as they had failed to address the breaches committed. All that the Respondent did was to give a blanket denial of the breaches committed. The Applicant also argued that it has no obligation to go through the process of an arbitration as some of these breaches were admitted by the Respondent. The Applicant argued that the reason why they were before urgent court was because there was no substantial remedy which was available to them in due course as the harm was continuing which was causing the Applicant unquantifiable damage.
- [15] The test for urgency is a lack of a substantial remedy in due course. In my view the argument made by the Respondent has merit in that the urgency of this matter is self-created by the Applicant. This is simply because the applicant invoked *clause 9.11* of the agreement which was a suggestion to arbitrate the matter through their letter dated 28 March 2024. This clause was invoked before the purported cancellation was done.
- [16] The Applicant rejected the proposal to settle this dispute through the arbitration process which would be conducted by a retired Judge. The Applicant did not give

or detail any probable reason why they did not want to arbitrate the matter in line with their agreement which stipulates that:

“9.11 Suggestions, complaints and disputes may be set before the steering committee who will arbitrate and give guidance and suggestions towards the direction of the company.”

[17] In my view, clause suggests that the parties' complaints, suggestions including disputes may be set before the Steering Committee. The Applicant did not even demonstrate that it made any attempts to table the complaints it had to the Steering Committee. It is not clear why this route was not preferred by the Applicant as both parties are bound by it. The argument raised by the Applicant in this regard is flawed. The request made by the Respondent was made as far back as 28 March 2024. It is not a requirement of the contract for a party to refuse arbitration on the basis of a failure to address the complaint (which is in this instance was the breach). Complaints and disputes may be set for guidance and suggestions to move the company forward. One has to wonder why this was not preferred as a mechanism to move both companies forward since they have been in this licence agreement since 2016. My prima facie view is that there may be merit in the Respondent's argument that the Applicant wishes to make them sign the new sub-licence agreement under duress.

[18] The Respondent suggested that the arbitration be heard on an urgent basis to try and resolve the disputes which the parties had amongst each other. In my view, arbitration amounts to a substantial remedy available to the parties. In fact, had the option of arbitrating the matter been accepted then by the Applicant perhaps the issues would have been resolved before the hearing of this urgent application.

[19] In my opinion, urgency is self-created as rightfully argued by Mr. Cassim for the Respondent *clause 9.11* was invoked earlier (more than 40 days) before the hearing of this matter. The Applicant was aware that the Respondent does not accept the cancellation of the agreement or the purported breaches. This point was reiterated by the Respondent in several correspondences to the Applicant.

The correspondence between the parties demonstrates the need for the parties to arbitrate their matter, which is a fast and effective process.

- [20] Mr. Cassim for the Respondent argued that even though they are of the view that the matter is not urgent perhaps the court needs to look at the matter as if it urgent to address the other two points of law to deal with the matter in its entirety. It is also my view and for the convenience of both parties that this court also considers the rest of the arguments raised as it would be in the interest of justice.
- [21] The second point *in limine* for consideration is that the Applicant has made out a new case on the reply.

The Applicant's Founding Papers

- [22] The Applicant's founding affidavit under paragraph 19 alleges that the Respondent committed a number of breaches of the Tradelink agreement and are detailed in a correspondence dated 19 March 2024. The Respondent contends that all the necessary allegations the Applicant relies on must appear in the founding papers as it is generally not allowed to supplement the facts on the replying papers. Mr. Cassim for the Respondent further argued that two additional breaches were raised that is the Betterbonds issue and the *clause 6.19* of the license agreements which is related to technology to maintain the high standards of current property and client information.
- [23] In rebuttal the Applicant argued that there was no new case made out on the replying affidavit. It was merely an explanation, or a further expatiation of the issues already dealt with in the founding papers. Mr. Hollander pointed to the breach correspondence dated 19 March 2024 without directing this court to the sufficient facts which need to appear on the founding papers. It is trite that an applicant must make out its case in its founding affidavit. In *Transnet Ltd v Rubenstein*,⁹ the Supreme Court of Appeal held that due to the nature of applications, the affidavit plays a dual role in the application in that they form both pleadings and the evidence upon which the applicant relies.¹⁰ An applicant's

⁹ [2005] 3 All SA 425 (SCA).

¹⁰ *Kham and Others v Electoral Commission and Another* 2016 (2) SA 338 (CC) par [46]

pleadings contain the legal basis of the claim under which an applicant has chosen to invoke the court's competence. In other words, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits must be interpreted to establish what the legal basis of the applicant's claim is.¹¹

[24] In *Airports Company of South Africa (SOC) Ltd v Tswelokgotso Trading Enterprise CC*,¹² the court held that:-

“Consequently, the applicant must set out sufficient facts in the founding affidavit to disclose a cause of action, that is, the founding affidavit must be self-contained. The replying affidavit (and in this instance the supplementary affidavit) cannot be used to augment the applicant's case.”

[25] This application is premised upon the cancellation of a contract due to the breaches which were committed by the Respondent. It is a foundation of our law specifically in motion proceedings that the Applicant must make out its case in the founding papers not in the replying papers. As stated in *Business Partners Ltd v World Focus 754 CC*,¹³ that in application proceedings the affidavits constitute not only the pleadings but also the evidence and that an applicant must therefore make out his case in his founding affidavit and that he must stand or fall by the allegations contained therein. This is simply because permitting such will mean that the Respondent would not have had the opportunity to address those issues sufficiently and this amounts to gross prejudice to the Respondent who would have filed the answer. This will also transgress in the respondent constitutional rights.

[26] The rule against allowing new matter or new grounds in reply was held in *Bayat and Others v Hansa and Another*,¹⁴ to be capable of being departed from only in exceptional circumstances. The principle nonetheless remains that a case must be made out in the founding papers. Its rationale promotes legal certainty. This is evident from the contemporary approach adopted by the Constitutional Court

¹¹ *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC).

¹² [2022] ZAGPJHC 410 at para 9.

¹³ 2015 (5) SA 525 (KZD)

¹⁴ 1955 (3) SA 547 (N) at 553D.

in *South African Transport and Allied Workers Union and another v Garvas and others*,¹⁵ where it held as follows:

"Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty, which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet."

[27] In *Elegant Line Trading 257 CC v MEC for Transport, Eastern Cape*,¹⁶ Rugunanan J, held stated that:-

"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. It is trite that an applicant must make out its case in the founding affidavit which must contain sufficient facts in itself upon which a court may find in the applicant's favour."

[28] In fact, in *Bowman NO v De Souza Roldao*,¹⁷ Cohen, J concluded:

"But none of these cases goes to the length of permitting an applicant to make a case in reply where no case at all was made out in the original application. None is authority for the proposition that a totally defective application can be rectified in reply. In my view, it is essential for applicant to make out a prima facie case in its founding affidavit."

[29] In my view the Applicant's founding papers need to demonstrate and address the contract, the breach of contract and the cancellation of the contract. In my opinion these need to be pleaded with sufficient particularity on the founding affidavit not elsewhere. The contract and the breaches are not dealt with in detail by the Applicant if at all. The alleged breaches committed by the Respondent are an integral part of this application in my opinion. All that the Applicant merely deposes under paragraph 19 in relation to the breach are as follows:

¹⁵ 2013 (1) SA 83 (CC) para 114.

¹⁶ [2022] ZAECHC 45 at para 2.

¹⁷ 1988 (4) SA 326 (T) at 336B.

“Tradelink committed a number of breaches of the trade link agreement. These breaches we detailed in a letter addressed to Tradelink....”

The entire founding papers thereafter do not address or detail the breaches which were committed by the Respondent, at the very least this would have given the Respondent an opportunity to answer these allegations. Pleading with precision on the founding papers is a requirement in our law. In my opinion, the respondents cannot be expected to fully ventilate these issues as they are not appropriately pleaded by the Applicant.

[30] Annexure **FACC3** purportedly deals with the breaches “*in detail*” as per the founding papers filed by the Applicant. This annexure supports the vague allegation made under paragraph 19 of the Applicants founding papers. This correspondence in my opinion does not amount to facts pleaded on the face of the founding papers but rather serves as proof of a fact pleaded. The Respondent cannot therefore be expected to plead in detail to facts which are not in existence. There is no expectation for the Respondent to plead to a letter attached, in motion proceeding, as a party stands and falls by its papers.

[31] It is not open to the parties to merely annexes to their affidavit documentation and to request the court to have regard to it without laying a proper basis for it on the face of the affidavit. What is required is the identification of the portions relevant which reliance is placed and an indication of the case which is sought to be made out of the strength thereof must appear on the affidavit. It cannot be expected of a party to trawl through lengthy and anxious to the opponent's affidavit to speculate on the relevance of the facts contained in such annexures since trial by ambush is not permitted within our courts. Alternatively, it is not for the Respondent to establish through such annexure(s) if there is material that adds substance to lose averments in an affidavit.¹⁸

[32] The rule still stands that all the necessary allegations upon which the applicant relies must appear in their affidavit as they will not generally be allowed to supplement the affidavit by adducing supporting facts in a replying affidavit. In

¹⁸ Van Loggerenberg, Erasmus Superior Court Practice, 2nd ed Vol 2 [Service 5, 2027] at D1-58D – D1-59; *Swissborough Diamond Mines (Pty) Ltd & Others v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 324F-G.

my opinion, the Applicant's case is that the Respondent committed breaches which were subsequently not remedied, it thereafter cancelled the contract in line with the breaches. At the very least these breaches should have been outlined in the applicant's founding papers, which is not the case herein. All the Applicant simply did was to make a very vague statement and thereafter attached a correspondence. The correspondence does not amount to an averment which the Respondent must answer accordingly. Under these circumstances it amounts to evidence which supports the averment made which does not compel the Respondent to answer in detail.

[33] 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.¹⁹ A founding affidavit must contain sufficient facts in itself upon which a court may find in the applicant's favour. it is not permissible to make out new grounds for the application in the replying affidavit.²⁰

[34] It is to the founding affidavit that a court will turn to determine what the complaint is. In *Director of Hospital Services v Mistry*,²¹ the court held that: -

"When, as in this case, the proceedings are launched by way of notice of motion, it is to the founding affidavit which a Judge will look to determine what the complaint is ... and as been said in many other cases: "... an applicant must stand or fall by his petition and the facts alleged therein and that, although sometimes it is permissible to supplement the allegations contained in the petition, still the main foundation of the application is the allegation of facts stated therein, because those are the facts which the respondent is called upon either to affirm or deny".

[35] Mr Cassim for the Respondent is correct in his argument when he argues that the Applicant have made an attempt to make out their case in their replying affidavit which is against the rules. The rule does not permit a case being made out or a new matter alternatively new grounds being made on the replying

¹⁹ *Minister of Land Affairs and Agriculture v D & F Wevell Trust* 2008 (2) SA 184 (SCA) at 200D.

²⁰ *SA Railways Recreation Club and Another v Gordonias Liquor Licensing Board* 1953 (3) SA 256 (C) at 260A-D

²¹ 1979 (1) SA 626 (A) at 635H

affidavit. At times this is permitted within exception where there are exceptional circumstances, which was not a case in this matter.

[36] In my opinion the Applicant has failed to make out its case in the founding papers the founding papers are very vague.²² They only detail the occurrences which led to the urgent application they do not address the pertinent issues between the parties' regard being had to the contract and the breach alleged.

[37] I have given the breach correspondence a benefit of a doubt and attempted to see if indeed it would have been clear or made any sense to the Respondent to enable them to plead or answer with particularity. After closely examining the correspondence from the Applicant to the Respondent regarding the breaches, I have included my analysis and a detailed description of each breach as follows:

*"You failed and or refused to diligently protect and promote interest of F and CSA and fail to act in a manner that is beneficial to F&C SA". **There is no detail as to how and when the Respondents committed such.***

*"2.1.1 We have an engaged with you on a number of occasions to explain that the commercial terms contained in the agreement which was concluded many years ago, are no longer suitable for fine and country in light of the market practices and norms. The new sub licensing agreement incorporates commercial terms that align with F and CSA and fine and country group and market norms, however despite our efforts you have failed and/ or refused to conclude such an agreement with us". **When, with whom and why does the Applicant want to change from the agreement concluded years ago which is still binding on the parties and why does that amount to a breach. Otherwise, this statement gives an impression of a party which seeks to renege from the old agreement unilaterally and without any probable reason.***

²²(1) Every application must be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief.

"2.1.2 Your communication and engagement with us and other Fine and Country licenses is rude and unprofessional"; This is not specific to the where, when how and to whom and by whom such engagements were done.

"2. 1.3 You failed in or you refused to support our values and strategies and you further undermine and disrespect the leadership structures in F and C SA;" This in my opinion is another bold and bare statement as it has no details how the respondent has refused to support the values and strategies by the Applicant and how did the Respondent undermine and disrespect the leadership of the applicant.

"2 .1.4 You failed and or refused to migrate to our online business platform;" This is also another bold statement which is not specific when did this take place and by whom and when was the migration supposed to take place.

"2.2.2 you have failed and or refused to adhere to terms and conditions prescribed by us in relation to our agreement with better bonds a division of better life originators origination services proprietors limited, and or have failed and or refused to sign a lead generation or similar agreement and better bonds and with better bonds and instead signed up with avoid direct competitor;" This is vague what were those terms and conditions which were prescribed by the Applicant at the time? These are not addressed.

"2.3 You have failed to achieve the acceptable market value;" This is also another bold statement the court has no idea what were the acceptable market values which the Respondent failed to achieve as this is not detailed in the papers.

"2.4 You have engaged with you have engaged directly with F&C(UK);" This is another bold statement the how and when is not provided.

"2.5 your actions and omissions above heaven not only constrain the relationship between the parties but have but I prejudicial to FNC SA and the fine and country brand."

- [38] The exercise I engaged in above was to try and give the benefit of a doubt to the Applicant regard being heard to the urgency of the matter. The breaches correspondence contains a lot of bold statements which the Applicant should have foreseen when they were filing their papers. This is why it is of outmost importance to plead with precision and sufficient particularity to enable another party to respond thereto. In my opinion expecting the Respondent to respond to these correspondence as if there were pleaded, creates problems as highlighted.
- [39] A competent Applicant would have pleaded in detail the breaches committed by the Respondent to enable the Respondent to answer appropriately. This would have also allowed the court to examine if indeed the orders sought are competent on the face of the founding papers filed. The way the breach is pleaded made it very difficult for this court to even examine if there are material facts in dispute.²³
- [40] Litigation cannot be done in a piecemeal manner this court is surely not expected to only look at the cancellation letter and move forward from there and examine only the requirements of the interdict as pleaded by the Applicant. The application is based on a contract therefore the salient facts thereof need to be demonstrated specially the ones which the Respondent is alleged to have breached. Additionally, what are those breaches? This court has not been taken into confidence with the details of these breaches committed by the Respondent.
- [41] The breach in terms of *clause 6.19* is not in the correspondence dated 19 March 2023. The Respondent argument that a new case is made out on the replying affidavit is therefore correct in that the replying affidavit is in more detail regard being heard to the breaches alleged which is not permitted in our law as it transgresses on their right to litigation being conducted fairly.
- [42] The last point argued by the Respondent was that of an existence of a dispute of facts.

²³ *South African Transport and Allied Workers Union and another v Garvas and others* 2013 (1) SA 83 (CC) para 114 "Holding parties to pleadings is not pedantry. It is an integral part of the principle of legal certainty, which is an element of the rule of law, one of the values on which our Constitution is founded. Every party contemplating a constitutional challenge should know the requirements it needs to satisfy and every other party likely to be affected by the relief sought must know precisely the case it is expected to meet."

Dispute of Facts

[43] Mr. Cassim for the Respondent argued that this application contains clear disputes of facts and that the matter needs to be heard by way of an arbitration or rather by leading evidence in a trial. In rebuttal, the argument raised by the Mr. Hollander for the Applicant is that there are no genuine disputes of facts. In arguing this point Mr. Hollander highlighted paragraph 88 of the Respondent's papers which formed part of the annexures to the answering affidavit of what was to be an urgent application by the Respondent on 12 April 2024.

[44] Paragraphs 88.16 to 88.19 was highlighted by the Applicant wherein the Respondent do not deny that they had an agreement with Evo specifically the Midrand branch was being incentivized by Evo who is Betterbonds competitor which is in breach of clause 6.19 of the license agreement. This was highlighted to be a clear indication by the Respondent that it did not consider the license agreement to be binding on it. This is not the case made out on paper by the Applicant rather this is a case made out on the replying affidavit. The Applicant could not direct this court to the averments made by it on paper which were admitted by the Respondent except to highlight the Respondent's annexure. The breach was not admitted.

[45] The general rule was initially formulated in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*,²⁴ where the court held that: -

"Where there is a dispute as to the facts, a final interdict should be granted in motion proceedings only if the facts as stated by the respondents, together with the admitted facts in the applicant's affidavit, justify such an order, or where it is clear that the facts, although not formally admitted, cannot be denied and be regarded as admitted."

[46] In *Plascon – Evans Paint Ltd v Van Riebeck Paints (Pty) Ltd*,²⁵ the then Appellate Division (now known as the Supreme Court of Appeal) found that the rule as formulated in *Stellenbosch Farmers' Winery Ltd* required clarification and

²⁴ [1957] 4 SA 234 (C).

²⁵ 1984 (3) SA 623 (A) at 634-635

qualification where final relief was sought in motion proceedings. The rule was then established that in motion proceedings when disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in Applicant's affidavits, which have been admitted by the Respondent, 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 all so clearly untenable that the Court is justified in rejecting them merely on the papers.²⁶

[47] The general rule in *Plascon – Evans* is that final relief may only be granted if the facts as stated by the Respondents, together with the admitted facts in the Applicant's affidavit, justify the granting of such relief.²⁷

[48] More recently, in *Wightman t/a JW Construction v Headfour (Pty) Ltd*,²⁸ Heher JA made its findings as follows:

"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party to and nothing more can therefore be expected of him."

[49] Accordingly, the Applicant firstly must aver facts in their affidavit. In line with the breach the only allegation made by the Applicant is that: -

"Trade link committed a number of breaches of the trade link agreement. These breaches we detailed in a letter addressed to trade link..."

[50] In answer to this allegation the Respondent averred as follows:

"AD PARAGRAPH 19 TO 20

Save to admit receipt of the breach letter I deny that the respondent committed any of the alleged breaches detailed in **FCSA3**".

²⁶ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 279 SCA (26).

²⁷ *Nampesca (SA) Products (Pty) Ltd v Zaderer* 1999 1 SA 886 (C) at 892H-J; *Townsend Production (Pty) Ltd v Leech* 2001 4 SA 33 (C) at 40E-H.

²⁸ [2008] 2 All SA 512 (SCA) at para 13.

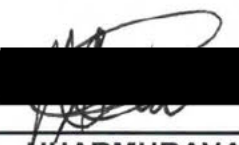
- [51] The Applicant pleaded the breach very vaguely which indeed deserved the answer which the respondent answered. In light of the answer above can this court even make a fair determination if indeed there is a genuine dispute of fact or this has been raised by the Respondent to delay the matter further. In my opinion, based on the papers before me I cannot make a probable determination if indeed there is a genuine dispute of fact. The lack of pleading in detail the breach by the Applicant is the cause of this difficulty.
- [52] The court is somewhat expected to look at the correspondence which was sent by the Applicant on 19 March 2024 versus the answer received from the Respondent on 20 March 2024 to reach a decision. A court in an application proceeding only concerns itself with the factual basis related on the face of the affidavits filed.
- [53] This point of law is not appropriately addressed by the Respondent in their answer. In the main, the Respondent deals with this point *in limine* based on the allegations that they have served and filed a combined summons with the Applicant which were issued on 19 April 2024. When the matter was argued the Applicant had not received the summons and the Respondent had no explanation of the delay of service of the summons on the Applicant. I am therefore constrained in considering this point *in limine* based on summons which is yet to be served as that is information not before this court.
- [54] It should be emphasized that whilst generally it is undesirable to attempt to decide an application on affidavit where there are material facts in dispute, it is equally undesirable for a court to take all disputes of facts on the face value which would enable a Respondent to raise fictitious issues of fact in avoidance. It is necessary then to examine the alleged disputes and determine whether they are real or can be satisfactorily resolved without the aid of oral evidence.

Conclusion

[55] I am not satisfied that a proper case has been made out by the Applicant on their papers based on the arguments raised by the Respondent.

[56] I therefore make the following order:

- a. The Applicant's application is dismissed with costs inclusive of costs of employing two Counsel on scale "C".



NHARMURAVATE, AJ
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

For the Applicant: Adv. L Hollander

Instructed by: Stuart Hodgkinson Attorneys Inc

For the Defendant: Adv. N Cassim SC

Instructed by: Dev Maharaj and Associates Inc

Date of judgment: 21 June 2024