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

CASE NO: 2022/23988

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED. ~~YES~~/NO

In the contempt application between:

A&D SPITZ (PTY) LTD

Applicant

and

BLESSED MIRACLE WHOLESALERS AND RETAILERS CC First Respondent

SAMUEL MEKONEN HAMZA

Second Respondent

COURT ORDER

A. The matter is referred for the hearing of oral evidence in terms of Rule 6(5)(g) on a date to be fixed by the Registrar of the above Honourable Court on the issue whether the information and/or documentation referred to in paragraphs 2-2.1.3 of the order granted by this court (per Mahon AJ) on 4 August 2023 is within the second respondent's personal knowledge or under his control.

B. The parties shall make the following persons available for cross-examination:

B1. The applicant shall make Irvin Hleza and Jabulani Oliphant Mtsweni available; and

B2. The respondents shall make the second respondent, Azarias Hamza and Zachaues Moyo available.

C. Either party may lead the evidence of additional witnesses, provided that a summary of the witnesses' evidence is furnished to the other party no later than 1 month prior to the hearing, or otherwise with the leave of the Court;

D. Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not;

E. The provisions of Rules 35, 36, 37, 38, 39 and 41 of the Uniform Rules of Court shall apply to the hearing of the oral evidence, along with the provisions of the above Honourable Court's Practice Manual pertaining to trials; and

F. The costs of the application for referral of this matter to oral evidence will be reserved for determination by the Court deciding the contempt application.

JUDGEMENT

INTRODUCTION

(1) This is an application to declare the first and second respondents (together referred to as "the respondents") to be in contempt of an order granted by Mahon AJ on 4 August 2023 and that the second respondent is committed to prison for a period of 90 days for contempt of court, alternatively, for such period and on such terms as the court

deems just. In the further alternative, the applicant sought a declarator that the respondents have not complied with the said court order and are directed to do so within 10 days of an order by this court being granted. Punitive costs are also sought against the respondents.¹

(2) This application followed upon an order made by consent, save in respect of costs, on 4 August 2023, against the respondents.

(3) The exact terms of the order by Mahon AJ will be referred to hereunder, but the consent order contained, apart from several prohibitory interdicts, a direction, based on section 10(1)(d) of the Counterfeit Goods Act 37 of 1997 (the Counterfeit Goods Act), to the opposing respondents to provide certain information to the applicant insofar as it is within their personal knowledge or under their control.²

COURT ORDER OF 4 AUGUST 2023

(4) The full order³ made by Mahon AJ on 4 August 2023, reads as follows:

“1. The first and second respondents (“the opposing respondents”) are interdicted and restrained from, directly or indirectly as partner, representative, shareholder, director, employee, consultant, adviser, financier or agent (or any other like or similar manner or capacity) of or associated with any corporate entity or other association of persons, engaging in:

1.1 the importation, manufacture, production, distribution or sale of counterfeits of “the Carvela branded products” (described and defined in paragraph 20 to 22, as well as annexure FA7, of the founding affidavit of Vivien Crystal (“the founding affidavit”));

1.2 the use of a mark identical to “the Carvela trade marks” (described and defined in paragraph 18 to 19 of the founding affidavit), or a mark so nearly resembling the Carvela trade marks as to be likely to deceive or cause confusion,

¹ Caselines, AA1-AA2.

² Own emphasis.

³ Caselines 00-5 to 00-8.

in relation to goods in “class 25” (described more fully in paragraphs 18.1 to 18.6, and annexures FA1 to FA6, of the founding affidavit);

1.3 the use of a mark identical to the Carvela trade marks, or a mark similar to the Carvela trade marks, in the course of trade in relation to goods which are so similar to the goods in class 25, that in such use there exists the likelihood of deception or confusion;

1.4 the use of a mark identical to the Carvela trade marks, or a mark similar to the Carvela trade marks, in the course of trade in relation to any goods or services, where such use would be likely to take unfair advantage of, or be detrimental to, the distinctive character or repute of the Carvela trade marks,

2 The opposing respondents are directed, in terms of section 10(1)(d) of the Counterfeit Goods Act no. 37 of 1997 (“the Counterfeit Goods Act”), to provide the following information to the applicant in so far as it is within their personal knowledge or under their control:

2.1 full and accurate details of all sources or suppliers from which the counterfeit Carvela branded products emanate or where purchased, including:

2.1.1 the name and registration number of the manufacturer and/or source and/or supplier of the counterfeit Carvela branded products;

2.1.2 the names and contact numbers (telephone numbers and email addresses) of the employees, representatives, brokers or agents of the manufacturer and/or source and/or supplier of the counterfeit Carvela branded products with whom the Respondents have dealt with at any stage in the course of dealing in the counterfeit CARVELA branded products;

2.1.3 any transaction documentation of any kind relating to the purchase or procurement or otherwise dealing in the counterfeit Carvela branded products.

3 Should the opposing respondents fail to disclose within 10 days of service of this order the information detailed in paragraphs 2 to 2.1.3 above, the applicant may apply to court, based on the contents of this affidavit, supplemented to the extent it deems necessary, for an order declaring the

opposing respondents to be in contempt of court and for further relief in the form of a penalty and/or imprisonment.

4 In terms of section 10(1)(a) of the Counterfeit Goods Act:

4.1 The opposing respondents are directed to deliver-up at the premises of the applicant or its legal representatives, Adams & Adams, any counterfeit CARVELA branded products which are currently in their possession or under their control;

4.2 The applicant is authorised to take into its possession the counterfeit Carvela branded products seized by the SAPS on the 8th of June 2022 at the opposing respondents' business premises situated at no. 8[...] D[...] Street, Corner J[...] Street, Johannesburg.

5 The opposing respondents are ordered to pay the costs of this application, which costs shall include the costs of two counsel where so employed."

EVENTS AFTER 4 AUGUST 2023

(5) On 7 August 2023 the applicant's attorneys served a copy of the court order on the respondents' then attorney of record, Mr Hugh Rachlin, ("HR Attorneys") and demanded compliance with paragraph 2 to 2.1.3 of the order.⁴

(6) On 16 August 2023, HR Attorneys sent an email⁵ to the applicant's attorneys, therein inviting the applicant's attorneys, in respect of paragraph 2 of the court order, to attend at the respondents' premises in order to inspect its books and records of the business and its stock insofar as the information sought in paragraphs 2.1 to 2.1.3 of the order are concerned. It was further indicated that such inspection and examination should take place after 5:30pm on weekdays or on Sundays from 9h00. It was indicated that the second respondent Mr Samuel Hamza would be present.

⁴ Caselines, para 51, AA 25.

⁵ Caselines, para 52, AA 25; Annexure "CFA3",

(7) The applicant took the view that the said offer did not comply with the terms of the order which required the production of the requisite information. The order placed the responsibility solely on the respondents to identify and produce the information stipulated in the court order, to the applicant. The deponent to the founding affidavit submitted that the respondents' proposal shows contempt for the order and is also disingenuous, because on the respondents' own version, Mr Hamza Jr., the brother of the second respondent, allegedly kept separate books and records from those of the first respondent.⁶

(8) On the same day, the applicant's attorneys rejected the respondents' proposal and demanded proper compliance with the court order by 21 August 2023.⁷

(9) On 17 August 2023 HR Attorneys wrote to the applicant's attorneys and reiterated the respondents' version that they had no knowledge that Hamza Jr. dealt in counterfeit Carvela branded goods from the first respondent's premises, that the information sought in terms of the court order is not within the respondents' knowledge and is not under their control and referred to the invitation to the applicant to inspect their books and records and that they could not have done more to comply with paragraph 2 of the court order.⁸

RELEVANT FACTUAL BACKGROUND

(10) The applicant is the registered proprietor of various trademarks consisting of or incorporating the word "Carvela". This trade mark is applied to, among others, handcrafted Italian footwear. The Carvela products constitute protected goods under the Counterfeit Goods Act 37 of 1997 ("the CGA").

⁶ Caselines, paras 53 and 54, AA 26.

⁷ Caselines, para 55, AA26.

⁸ Caselines, para 56-57, AA26 to AA27.

(11) The first respondent is a retailer or wholesaler of formal men's apparel, including men's shoes. The second respondent is the sole member and owner of the first respondent.

(12) The applicant relied during argument in this matter on extensive investigations conducted by the applicant into the affairs of the respondents. The investigation proved conclusively, according to the applicant, that the respondents were involved in the procurement and sale of Carvela products. The applicant referred to the extensive evidence set out, without being challenged, in the main application. The SAPS applied for and obtained a warrant in respect of the first respondent's premises.⁹ The SAPS executed the warrant in June 2023, during which they found and seized large quantities of counterfeit Carvela products.

(13) The execution of the warrant followed an investigation by Mr Mtoweni and Mr Hleza of Ifalethu Business Consulting who investigated whether the first respondent was involved in the trade of counterfeit Carvela products. Mr Hleza confirmed under oath in the main application that he attended the first respondent's premises on 8 and 15 September 2021. On both occasions he purchased a pair of counterfeit Carvela shoes. On 25 January 2022 Mr Hleza visited the first applicant's premises again where he noted 150 pairs of suspected counterfeit Carvela branded shoes.

(14) On 9 February 2022 Mr Hleza attended at the first respondent's premises for a fourth time and arranged to communicate with the second respondent. On 24 February 2022, the second respondent telephonically contacted Mr Hleza on the phone number left at the premises. The second respondent enquired with Mr Hleza about the quantities of Carvela products Mr Hleza was interested in purchasing. As Mr Hleza indicated that he would like to make a large purchase of Carvela products. The second respondent indicated that he would revert regarding the request by Mr Hleza. On 1 March 2022 the second respondent contacted Mr Hleza and advised that he had received new stock of Carvela branded products.

⁹ See references in Applicant's Heads of Argument, footnote 7, at para 6-7, Caselines EE3.

(15) On 4 March 2022 Mr Mtsweni visited the first respondent's premises and purchased one pair of Carvela branded shoes.

(16) The applicant relies on this investigation for its submission that the first respondent was involved, with the second respondent, in the sale of counterfeit Carvela branded goods.

(17) Thereafter followed the execution of a warrant by Sergeant Hlongwane of the SAPS on 8 June 2022, assisted by Messrs Potter. On arrival at the first respondent's premises, Hlongwane engaged in conversation with an adult male who indicated that he was the manager of the first respondent and he identified himself as Mr Moyo. Hlongwane requested Moyo to contact the owner of the store, which Mr Moyo proceeded to do.

(18) Whilst waiting for the owner to arrive, the search of the first respondent's premises proceeded. Substantial quantities of counterfeit Carvela products were found being stored behind a trap door inside the store. These counterfeit Carvela products were seized and transported to a counterfeit goods depot.

(19) Hlongwane provided Moyo with a notice in terms of section 7(1)(b) of the CGA as well as an inventory detailing the quantity of seized goods. Moyo signed both documents on behalf of the first respondent.

(20) In July 2022 the applicant launched the main application which ended in the order issued by Mahon AJ in August 2023. The events that transpired after the court order granted by Mahon AJ has been referred to above.

PRINCIPLES OF CIVIL CONTEMPT

(21) The relief sought in this application has become known as committal for civil contempt. Civil contempt is the wilful and *mala fide* refusal or failure to comply with an order of court other than a money judgement.¹⁰

(22) In the pre-constitutional dispensation the standard of proof in civil contempt matters was a balance of probabilities.¹¹ Accordingly, the applicant had to establish the following elements on a balance of probabilities: (a) the existence of a court order, (b) service or notice of the order, (c) non-compliance with the order and (d) wilfulness and *mala fide*.

(23) In **Fakie v CCII Systems (Pty) Ltd**¹² the SCA held that the pre-constitutional standard of proof for a finding of contempt where committal is the sanction, is not in keeping with constitutional values and that the standard should rather be beyond a reasonable doubt. The court held that once the applicant has proved the order, service or notice, and non-compliance, the respondent bears an evidential burden in relation to the wilfulness and *mala fides*: should the respondent fail to advance evidence that establishes a reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt will have been established beyond a reasonable doubt.¹³

(24) Cameron JA (as he then was) added that in contempt proceedings a declaratory and other appropriate remedies remain available to a civil applicant on proof of a balance of probabilities.¹⁴

(25) The applicant submitted that it had complied with the first two requirements, being an order and service or notice.

¹⁰ **Consolidated Fish Distributors (Pty) Ltd v Zive** 1968 (1) All SA 64 (C).

¹¹ **Uncedo Taxi Service Association v Maninjwa** 1998 (3) SA 417 (E) 425G- 426C.

¹² **Fakie v CCII Systems (Pty) Ltd** 2006 (4) SA 326 (SCA) at 42.

¹³ At para 42.

¹⁴ **Fakie**, *supra*, para 42(e). This was confirmed in **Matjabeng Local Municipality v Eskom Holdings Limited and Others** 2018 (1) SA 1 (CC) at para [67].

(26) The third requirement of non-compliance enjoyed most of the attention and time during argument.

(27) The main argument of the respondents was that they have not failed or neglected to comply with Mahon AJ's order as the information is not within their personal knowledge.

(28) In the main application and in the contempt application the respondents contend that they are not involved in the procurement and sale of counterfeit Carvela products. They contend that the Carvela products purchased by the Ifalethu investigators were procured and sold by the second respondent's younger brother, Azarias Hamza ("Hamza Jr.") from a part of the first respondent's premises that he rented and that the respondents were not involved in any way in Hamza Jr.'s business.

(29) Mr Allison, who appeared for the respondents, made much of the fact that Mr Hamza Jr. and his employee, Mr Moyo were arrested, detained and charged in terms of section 3(1) read with section 9(1)(a) of the CGA, for offences committed under the CGA in selling counterfeit Carvela leather products. Mr Hamza Jr. and Mr Moyo entered into a plea agreement and pleaded no contest to criminal charges brought against them. Consequently, no trial was held in which evidence was led. Mr Hamza Jr. was given a fine of R100 000-00 alternatively, three years imprisonment. Mr Moyo received a sentence of 18 months imprisonment, alternatively, a R50 000-00 fine, which was suspended.

(30) Mr Allison submitted that it was crucially important that the second respondent was not criminally charged or arrested or treated as a suspect in the criminal proceedings involving the sale of counterfeit Carvela shoes from the first respondent's premises. This was the main thrust of his opposition to the committal for contempt relief sought against the second respondent.

(31) It was on the said basis argued that the applicant did not prove beyond a reasonable doubt that the second respondent was in possession of information about the sale of the counterfeit goods and therefore he did not have a deliberate intent to disobey the court order.

(32) The evidence presented by the applicant and the respondents will have to be considered to determine whether the applicant acquitted itself of the *onus* in this matter in respect of the committal relief.

DISCUSSION

(33) The applicant has applied for committal of the second respondent for contempt and failure to comply with paragraphs 2 to 2.1.3 of Mahon AJ's order. This order is competent if the applicant persuaded the court that it has overcome the legal threshold of beyond a reasonable doubt. If not, the question is whether the applicant has persuaded the court on a balance of probabilities that the respondents have failed to comply with Mahon AJ's order for the purposes of the alternative relief in prayer 2, which is declaratory relief.

(34) In view of the first defendant's approach of denying any knowledge of the procurement and sale of counterfeit Carvela products, it is in any event questionable whether the alternative relief, if granted, would provide an effective remedy to the applicant in view of the stance taken by the respondents that they have no information.

(35) The applicant had, in the main application, provided direct evidence under oath of the respondents' involvement in the sale of counterfeit products. The investigations by Ifalethu and the products seized by the SAPS provide direct evidence of the respondents' involvement. The second respondent's version is that he was not involved and that the counterfeit goods were procured and sold by Hamza Jr. This version was persevered in by the second respondent who avoided responding to the detailed allegations and by not opposing certain of the relief sought in the main application.

(36) When the second respondent was taken to task in the applicant's replying affidavit for relying on uncorroborated evidence, the respondents filed two "confirmatory affidavits" some ten months later by Moyo¹⁵ and Hamza Jr.¹⁶ These affidavits both merely contained a third paragraph which read:

"I have read the affidavit of Samuel Mekonen Hamza dated 23rd of September 2022 and confirm the contents thereof insofar as it relates to me."

(37) This kind of "corroboration" was held to be not cogent by the Supreme Court of Appeal where the main deponent has no personal knowledge of facts he deposed to. Counsel for the applicant referred in argument to **Drift Supersand (Pty) Ltd v Mogale City Local Municipality**.¹⁷ This lack of proper corroboration renders the second respondent's "evidence" regarding Hamza Jr. and Moyo's involvement to be hearsay evidence. This raises the serious question where the second respondent obtained such evidence.

(38) In the same vein, the respondents rely on an unsigned Statement in terms of Section 112(2) of the Criminal Procedure Act 51 of 1977.¹⁸ In the said statement Hamza Jr. refers to the first respondent's shop as his "workplace" and to Mr Moyo as the supervisor of the "shop" and these statements are not qualified by reference to only the limited space inside the shop which the second respondent alleged was rented in terms of an oral lease by the first respondent to Hamza Jr.

(39) It is evident that the second respondent on the probabilities must have more information than he admitted to. The respondents' attorney wrote to the applicant's attorneys on 29 July 2022, when the respondents indicated that they would not oppose certain of the relief in the main application, that their instructions were "...that the

¹⁵ Caselines, 009-23 to 24.

¹⁶ Caselines, 009-29 to 30.

¹⁷ 2017 JDR 1611 (SCA) at [31].

¹⁸ Caselines, Annexure "**SH1**", 009-15 to 16.

Chinese suppliers would contact Azarias Hamza telephonically from a 'private number' ...". Those instructions could only have come from the second respondent, who was the instructing client in the matter.

(40) In the answering affidavit of the second respondent in this contempt application the second respondent stated under oath as follows:

"54.2 I have had no dealings with the alleged Chinese supplier and counterfeiter as reference (sic) by A Hamza and in this respect, I disassociate myself from the unlawful conduct of A Hamza."

(41) There was no confirmatory affidavit filed in respect of this answering affidavit, notwithstanding that the respondents delivered confirmatory affidavits in the main application. There is no explanation for this situation.

(42) During the hearing Mr Allison's main argument in resisting the relief of committal was based on the fact that the respondents were never prosecuted by the NPA and this should provide sufficient doubt to counter any finding of beyond a reasonable doubt. It was stressed that the second respondent had no control over his brother Hamza Jr.

(43) Mr Allison also submitted that there is no reference to Hamza Jr. in the order of Mahon AJ. He submitted that Hamza Jr. was the person from whom information should be obtained and this matter should be referred to oral evidence pursuant to Rule 6(5)(g) and that Hamza Jr. should be subpoenaed to testify under oath.¹⁹

(44) The applicant submitted in response that it is the NPA who was *dominus litis* in the criminal proceedings and the applicant, despite having laid criminal charges against the respondents, had no say or influence over the NPA's decision who to prosecute. In these proceedings the applicant is *dominus litis*.

¹⁹ Caselines, Respondents' Heads of argument, para 66, EE4.

(45) Ms Kilmartin, at the end of argument in court, presented four different draft orders to the court to consider. The fourth draft order entails a reference of this matter to evidence.

(46) It is found that it has not been proven beyond a reasonable doubt that the committal relief sought by the applicant has been proven, and should be granted.

(47) There is, however, sufficient evidence to indicate that the respondents could on a balance of probabilities provide more information as is required by Mahon AJ's order in paragraphs 2 to 2.1.3.

(48) The intellectual property of the applicant should be protected and it is of national importance that the importing of counterfeit products into the country constitutes a serious crime which should be stopped as far as possible.

(49) The court therefore exercises its discretion to refer the matter to oral evidence. The purpose of the order that will be made is to obtain all relevant evidence, tested by cross-examination of witnesses. A trial court will also be in a position to make credibility findings, if necessary, which the opposed motion court is not in a position to make.

CONCLUSION

(50) Consequently, I make the order set out above.

LM du Plessis

Acting Judge of the High Court

Gauteng Division

Johannesburg

REPRESENTATION

For the applicants

Counsel: **Adv LG Kilmartin SC**
Mr CW Pretorious
Attorneys: **Adams & Adams**

Respondent

Counsel: **Adv AP Allison**
Attorneys: **Tshepo Mohapi Attorneys**
Date of Hearing: 20 January 2025
Date of Judgement: 28 August 2025