



**THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

In the matter between

Case No: 14411/2014

INFITECH TECHNOLOGIES (PTY) LTD

APPLICANT

and

**HERBAL ZONE CC
HAKIM HERZALLAH**

**FIRST RESPONDENT
SECOND RESPONDENT**

Coram: ROGERS J

Heard: 25 NOVEMBER 2014

Delivered: 11 DECEMBER 2014

JUDGMENT

Rogers J:

Introduction

[1] The applicant ('Infitech') and the first respondent ('Herbal Zone') concluded a distribution agreement in January 2010 which was to run for five years from 1 February 2010 to 28 February 2015. In terms of the agreement Herbal Zone appointed Infitech as its exclusive South African distributor for a men's health capsule called Phyto Andro. The second respondent ('Herzallah') is Herbal Zone's sole member.

[2] Various disputes have arisen between the parties. These concern, among other things, a price increase notified by Herbal Zone to Infitech on 14 July 2014 and a purported cancellation of the contract by Herbal Zone on 9 October 2014. This has led to applications and counter-applications and several interim orders. Herzallah was joined in these proceedings at a stage when Infitech was seeking contempt relief. All the matters are now before me. Mr Smalberger appeared for Infitech and Mr Goodman leading Mr Acton for Herbal Zone and Herzallah.

The facts

[3] Phyto Andro is a product manufactured by Herbal Zone International, a Malaysian company. The entity I refer to as Herbal Zone is a South African corporation which purchases the product from the Malaysian company.

[4] Herzallah introduced the product into South Africa during 2007. The first South African distributor was an entity trading as KBD. The distribution contract with that company was terminated during August 2009. A former employee of KBD introduced Herzallah to Mr Mosiane. The latter and his wife Sheila are the directors of Infitech. As I have said, the latter concluded a distribution agreement with Herbal Zone in January 2010.

[5] I shall refer later to the relevant provisions of the distribution agreement. For the moment, I note that in terms of clause 15.4 the price per capsule was R20 including VAT. The clause stated that 'the price can be increased depending on the USD rate with a one month's notice letter'. Although the price was expressed per

capsule, Herbal Zone supplied the product to Infitech in a cardboard box containing 50 capsules, each capsule in a separate sachet. The box had a label on the side stating that the product was manufactured by Herbal Zone International (its website details were given), followed by the words: 'Exclusively for: Infitech Technologies'. The latter's telephone number, email address and website particulars were given.

[6] There were uncontentionous price increases during 2011, 2012 and 2013. Pursuant to the last of these price increases, in June 2013, the price per capsule was R25,60 including VAT (ie R22,46 excluding VAT).

[7] What did give rise to friction during 2012 and 2013 were complaints by Infitech that Herbal Zone's capsules or counterfeit capsules were being marketed in South Africa and that Herbal Zone was failing to take action against such marketing. Although these complaints feature in the papers, they are not ultimately germane to anything I need decide. They did, however, result in there being a somewhat fractious relationship by mid-2014.

[8] During the first half of 2014 Herbal Zone decided to change the packaging of the capsules. They were now to be supplied in a sealed jar containing 100 capsules. Herbal Zone communicated this to Infitech in a letter dated 8 April 2014, stating that the change would occur within the next two months. Infitech responded by asking how its customers (re-sellers such as pharmacies) would be able to sell individual capsules if they came in a sealed jar. Herbal Zone replied on 15 April 2014 by stating that the jar would contain the same individual sachets. Mosiane says that he also spoke with Herzallah about the fact that Infitech's customers would not want to buy stock in as large quantities as 100 capsules. He says that Herzallah told him that Infitech would be free to repackage the capsules into boxes of 50.

[9] On 14 July 2014 Herbal Zone notified Infitech of a price increase. The letter stated that the price increase was 9% and that the new price would be R27,90 excluding VAT. While the difference between the old price including VAT and the new price excluding VAT was 9%, the true increase was 24%: from R22,46 excluding VAT to R27,90 excluding VAT. The notice did not explain the increase nor refer to clause 15.4.

[10] On 16 July 2014 Infitech's attorneys, Spamer Triebel Inc ('STI'), wrote to Herbal Zone referring to clause 15.4 and requesting a detailed calculation of how Herbal Zone had arrived at the increase. STI observed that since 2010 Herbal Zone had 'unlawfully' increase the purchase price by 59% (ie from R17,54 excluding VAT to 27,9% excluding VAT).

[11] Herbal Zone's attorneys, AMMM Inc ('AMI'), responded on 30 July 2014. The explanation for the price increase was expressed thus:

'4. Our client manufactures and packages Phyto Andro capsules from overseas. The price of the product at the factory gate and the import parity price which is USD based have recently escalated, over and above such, our client has introduced new failsafe packaging to the product to counter any copying and falsification of the product.

5. The above factors necessitates the nominal price increase which our client considers fair and reasonable under the circumstances.

6. Our client will increase the price with effect from 14th of August 2014.'

AMI requested further correspondence to be addressed to its offices, stating that they were authorised to accept any legal process regarding the matter.

[12] On 12 August 2014 STI responded to AMI, stating that they held instructions to bring an urgent application for interim relief regarding the proposed price increase and that the application would be served on AMI as soon as practically possible. They asked whether, in order to remove the urgency, Herbal Zone would agree not to implement the price increase on 14 August 2014, recording that if such agreement was not received by close of business that same day they would proceed with the urgent application.

[13] Because Herbal Zone seeks a reconsideration, in terms of rule 6(12)(c), of an urgent order granted on 13 August 2014, it is necessary to set out the sequence of events. There having been no response to the letter of 12 August 2014, Infitech issued an urgent application on the morning of 13 August 2014 for hearing at 12h30. (I shall, where necessary, refer to this as 'the price interdict application' to distinguish it from other applications.) At 08h47 STI emailed and faxed the application to AMI for the attention of Mr Malapane. The covering letter simply said:

'Find attached hereto our client's notice of motion and supporting documentation for your records'. STI's Ms Botha phoned Mr Malapane on several occasions but he was not available. She left messages. According to Herbal Zone, Mr Malapane only received the papers at about lunchtime.

[14] A candidate attorney from STI delivered the application to Herbal Zone's Mr Awwad on the morning of 13 August 2014. This was at Herbal Zone's address in the Cape Peninsula. There is a dispute of fact as to when this was. The candidate attorney says in his affidavit that he attended at Herbal Zone's offices at 09h58 and that Awwad refused to acknowledge receipt but confirmed that the application had already been received by AMI. Awwad alleges, by contrast, that he was only handed the application at 11h40 and that he contacted AMI but was told that Mr Malapane was unavailable until 15h00. In the event, Mr Malapane phoned him at lunchtime to say that he too had just received a copy of the application. Herbal Zone says in its answering affidavit that it now appears that by the time Mr Malapane contacted Awwad the urgent order had already been granted.

[15] The time at which the urgent order was granted does not appear on the order itself but I was told by Mr Smalberger that at 12h30 the acting judge before whom the matter served adjourned it down until 14h15 to give Herbal Zone additional time and that the order was then granted at 14h15. Whether anything happened between 12h30 and 14h15 does not appear from the papers. If there was attempted contact, there is nothing to suggest that it succeeded. The order, which was in the form sought by Infitech, reads as follows:

'1. Pending the final determination of an action ("the action") in which the Applicant will seek inter alia an Order:

1.1 Declaring the purported increase in the price of Phyto Andro capsules ("the capsules") supplied by the Respondent to the Applicant, due to come into effect on 14 August 2014 ("the price increase"), to be declared invalid and of no force or effect; and

1.2 Directing the Respondent to comply with its obligations under the distribution agreement concluded between the parties on 20 January 2014 ("the distribution agreement"), in particular its obligations under clause 5 6 thereof,

the Respondent is:

- 1.3 Interdicted and restrained from implementing the price increase; and
- 1.4 Directed to continue to supply capsules to the Applicant at the price at which it supplied the capsules to the Applicant before the price increase, being R25,60 including VAT.
- 2. The relief in paragraph 1.3 and 1.4 above shall operate as an interim order and direction, with immediate effect.
- 3. The action shall be instituted within 30 (30) days of the date of this Order.
- 4. The costs of this application shall be costs in the action.'

[16] At 14h45 AMI sent the following somewhat extraordinary missive to STI: 'Thank you, we shall await to hear of the outcome from you.' As it happens, by this time the urgent order had already been granted. STI emailed a copy to AMI at 16h05.

[17] There was no immediate reaction from Herbal Zone's side. It appears that its attorneys may have been under the impression that the matter would serve again before court, an impression which may have been created by para 2 of the order. AMI was still addressing correspondence to STI on other matters relating to the distribution agreement in the latter part of August 2014. Herbal Zone then changed to their current attorneys ('Hunter') who on 15 September 2014 delivered a notice of opposition. On 2 October 2014 Herbal Zone filed answering papers in the price interdict application. These papers contained a request for a reconsideration of the matter in terms of rule 6(12)(c). At the same time, Hunter delivered a notice setting the matter down for hearing on 8 October 2014. In the meanwhile, Infitech issued summons in the main case.

[18] On 8 October 2014 an order was made by agreement in terms whereof the application was postponed for hearing on the semi-urgent roll on 25 November 2014. Herbal Zone having intimated an intention to bring a counter-application, the order provided that the said counter-application and any further affidavits by Herbal Zone should be delivered by 24 October 2014. A timetable was set out. Costs were to stand over for later determination.

[19] At that stage, therefore, the matters which were to be heard on 25 November 2014 were the price interdict application (and in particular Herbal Zone's request for a reconsideration thereof) and the intimated counter-application.

[20] In order to understand the counter-application, it is necessary to refer to some earlier events. I have already mentioned Herbal Zone's switch in packaging from cardboard boxes containing 50 capsules to sealed plastic jars containing 100 capsules. Herzallah says that following the switch Herbal Zone discovered that Infitech was repackaging the product into cardboard boxes containing 50 capsules. (It will be recalled that Mosiane alleges that Herbal Zone agreed to this.) The cardboard boxes Infitech used for repackaging were in most respects identical to the boxes Herbal Zone had previously supplied. The side of the box still contained the statement that the capsules were manufactured by Herbal Zone International, and its website details were given. Beneath this appeared: 'Exclusively Distributed by: Infitech Technologies', and its telephone number was given. The content and get-up of the front and back of the box were the same as before, including the name Herbal Zone and its logo. A new feature, however, on the front and back of the box was the addition of the name Infitech and its logo.

[21] On 26 August 2014 AMI wrote to STI, responding to a letter which is not part of the record but which, from the tenor of the response, appears to have been a complaint by Infitech about Herbal Zone's change in packaging. AMI in its response called on Infitech to desist from changing or re-filling the original package (ie the jar). Such conduct was said to be in conflict with clause 14.9 of the distribution agreement. The latter clause states that Infitech must not wilfully do any act, matter or thing detrimental to the best interests of Herbal Zone or the product.

[22] It is common cause that Infitech continued to repackage the Phyto Andro capsules.

[23] Herzallah says that during September 2014 he discovered further conduct by Infitech which undermined the distribution agreement. This was the existence of a website in the name of 'Herbs, Oils & Co'. In the counter-application subsequently filed, this was said to be a competing business which Infitech was conducting. It now

appears, though, that there is a company called Herbs Oils and Co (Pty) Ltd ('HOC'). The Mosianes are the directors of this company. It appears to have been acquired by them from STI as a shelf company during the first quarter of 2014. The address and telephone number of HOC as shown on the website are the same as Infitech's. The website stated that HOC retailed and distributed herbal and nutritional supplements and that its products were stocked by leading pharmacies, organic food stores and supermarkets. Among its products was a capsule called Phyto-Form, the composition of which is identical to Herbal Zone's Phyto Andro. Another of its products was a coffee called Cappuccino Zing. Its composition was likewise identical to that of Herbal Zone's Phyto-Andro coffee, a product which Infitech previously distributed for Herbal Zone.

[24] On the day following the agreed order on 8 October 2014, Hunter wrote to STI setting out various respects in which Infitech was alleged to have breached the distribution agreement. Among the clauses allegedly breached was clause 10.1. That clause reads:

'10.1 The Distributor agrees that it will not distribute or represent any Products in the Territory which compete with the Products of Herbal Zone cc during the term of this Agreement or any extensions thereof.'

In terms of clause 10.2, a breach of clause 10.1 entitles Herbal Zone summarily to terminate the agreement. This is by way of contrast to clause 20 which requires, in respect of other breaches, that an aggrieved party give the other party a notice to remedy the breach within three days, failing which certain remedies are specified.

[25] In its letter Hunter said that Infitech had breached clause 10.1 by distributing and representing the competing products reflected on the HOC website. On this basis, Herbal Zone purported summarily to terminate the agreement. The other breaches alleged in the letter concerned Infitech's repackaging of the capsules and the insertion of its name and logo on the front and back of the boxes. In respect of those alleged breaches, Infitech was given three days to remedy the breaches (though this would only be of relevance if the summary termination were ineffective).

[26] Regarding the order of 13 August 2014, Hunter's letter reflects a view that, pending reconsideration of the order on 25 November 2014, Herbal Zone was obliged to continue complying with the order. Hunter said that Herbal Zone thus undertook to continue complying with the order despite its view that the contract had been validly cancelled.

[27] STI responded by way of a letter dated 14 October 2014 in which they denied that Infitech was guilty of any breaches. In regard to HOC, STI said that it was 'an independent legal entity' and that Infitech had not distributed or represented any competing products. (It so happens that shortly after Hunter's letter of 9 October 2014 the HOC website became inaccessible.)

[28] On 16 October 2014 Infitech placed an order for 5000 capsules. Given Herbal Zone's view regarding the continued application of the order of 13 August 2014, it was obliged to supply these capsules and to do so at the old price. On 20 October 2014 STI wrote to Hunter, stating that Herbal Zone had not in accordance with its usual practice issued an invoice for the 5000 capsules and that upon enquiry an employee of Herbal Zone had said that she was under instructions not to process the order. STI said that Herbal Zone was in contempt of the order of 13 August 2014 and required certain undertakings failing which an urgent contempt application would be brought.

[29] Hunter replied on 21 October 2014, stating that because the distribution agreement had been cancelled Herbal Zone was entitled to supply other parties, which it was doing. Although (so Hunter evidently believed) Herbal Zone was also obliged to supply Infitech pursuant to the order of 13 August 2014, it would have to wait its turn. The *bona fides* of the order given the small quantity, was also questioned. Further letters ratcheting up the tension were exchanged on 22 October 2014. Also on that day, Herbal Zone issued an invoice to Infitech for 2000 of the 5000 capsules ordered. Payment was made and they were duly delivered. The other 3000 capsules were invoiced on 29 October 2014 but not before Infitech served the threatened contempt application.

[30] In the meanwhile, on 23 October 2014 Herbal Zone served its counter-application. In this application it sought (i) interdicts preventing Infitech from marketing the capsules in packaging bearing the Infitech logo, manufacturing packaging which was similar to that of Herbal Zone, holding out that it was associated in the production of Phyto Andro capsules or with Herbal Zone's business or products, and the like; (ii) declaring the distribution agreement to have been validly cancelled on 9 October 2014. I shall refer to the interdicts sought in the counter-application as the 'packaging interdicts'.

[31] As I have said, Infitech then served its contempt application on 28 October 2014. Perhaps encouraged by its earlier success, Infitech set down its new application for 31 October 2014. Although I refer to this as a contempt application, the relief sought was not confined to seeking a declaration that Herbal Zone be found to be in contempt and that Herzallah be imprisoned (for which purpose he was joined as the second respondent). In addition, Infitech sought interdicts arising from the disputed cancellation of the distribution agreement (I shall refer to this latter part of the application as 'the termination interdict application'). The interdict sought to restrain Herbal Zone from supplying Phyto Andro capsules to persons other than Infitech and directing it to comply with the agreement and in particular to supply capsules to Infitech in terms thereof. The relief to be sought on 31 October 2014 was in the form of a rule nisi, with the interdict component of such relief to operate as an interim order with immediate effect.

[32] Herbal Zone filed answering papers in the contempt and termination interdict application on 30 October 2014. On the following day Infitech filed its replying papers in the said application. Unsurprisingly the matter was not able to be heard and it was postponed to 5 November 2014. The order is not in the file but I assume costs were to stand over.

[33] The lawyers were now at full throttle. On 3 November 2014 Infitech filed its replying papers in the price interdict/reconsideration application and its answering papers in the counter-application. On 4 November 2014 Infitech filed a supplementary replying affidavit in the price interdict/reconsideration application.

[34] On 5 November 2014 the postponed contempt and termination interdict application served before Riley AJ. He heard argument and made an order on 6 November 2014. During argument Mr Smalberger for Infitech had handed Riley AJ two draft orders. Both drafts assumed success for Infitech on the contempt application and on the termination interdict application. The only difference was in regard to costs – the one draft included the perhaps optimistic request for an immediate costs order against Herbal Zone and Herzallah; the other draft provided for costs to stand over for determination at the hearing on 25 November 2014. Both of Mr Smalberger's drafts followed the notice of motion in requesting a rule nisi, returnable on 25 November 2014 (ie simultaneously with the price interdict/reconsideration application and with the counter-application).

[35] In the event, Riley AJ dismissed the contempt application but granted the termination interdict application. This meant a reformulation of the drafts as submitted by Mr Smalberger. Although I do not think there can be any serious doubt as to what the learned judge intended, the wording of the order gave rise to another application, this time by Herbal Zone for the variation of what was said to be a patent error in the order. The order was as follows (I omit the portion of the order summarising the relief claimed in the action, since that is the same as in the order of 13 August 2014):

'1. The application for contempt of court is dismissed.

2. Pending the final determination of the action issued by the Applicant in this Court under the above case number ("the action") alternatively the termination date of the distribution agreement concluded between the Applicant and the First Respondent on 20 January 2014 ("the distribution agreement"), which ever date is the earlier, in which action the Applicant seeks *inter alia* an order:

2.1 ...;

2.2 ...,

the First Respondent is:

2.3 Interdicted and restrained from selling and supplying the capsules to persons or parties other than the Applicant; and

2.4 Directing [*sic*] to comply with its obligations under the Supply agreement and, in particular, its obligation to supply capsules to the Applicant in terms thereof.

3. The relief sought in paragraphs 1.3 and 1.4 shall operate as an interim order and direction, with immediate effect.
4. The costs of this application shall stand over for determination on Tuesday, 25 November 2014.
5. Written reasons for this order will be furnished on application by any of the parties.'

[36] On 10 November 2014 Herbal Zone requested reasons, which were furnished on 24 November 2014. Also on 10 November 2014, Hunter wrote to STI expressing the view that there was a patent error in the order, in that it was not cast in the form of a rule nisi returnable on 25 November 2014. Hunter requested Infitech's consent to a variation.

[37] On 11 November 2014 Herbal Zone filed its replying papers in the counter-application.

[38] On 13 November 2014 Herbal Zone, having not received the requested consent from STI, delivered an application in terms of rule 42 for the variation of Riley AJ's order. Infitech filed an opposing affidavit on 21 November 2014. As I have said, Riley AJ's reasons became available on 24 November 2014.

[39] This, then, was the tangled web which the parties had succeeded in weaving when the matter came before me on 25 November 2014.

The variation application

[40] It is convenient to deal with the variation application first. Having regard to the procedural history, the form of relief sought in the contempt and termination interdict application and the draft orders handed up by Infitech's counsel at the hearing before Riley AJ, it is perfectly clear that he could not have intended the interim interdict to operate beyond 25 November 2014, on which date Herbal Zone's counter-application for confirmation of the cancellation was to be argued. The learned judge had to reformulate the order because he was dismissing the contempt application. In the process of reformulation he omitted to deal with the interim interdict in the form of a rule nisi returnable on 25 November 2014.

[41] Para 3 of his order reflected that the interim interdict purportedly granted in terms of paras 2.3 and 2.4 would have immediate effect as interim orders. This would have made no sense if paras 2.3 and 2.4 were themselves intended as interim interdicts immediately effective until the earlier of the determination of the action or termination of the distribution agreement. Para 4 recognised that there was still to be a hearing on 25 November 2014, a hearing which would have been rendered academic if interdicts in the apparent form of paras 2.3 and 2.4 were already operative. Those paragraphs must thus have been intended to embody the terms of a rule nisi.

[42] That this is what Riley AJ intended is placed beyond doubt by the reasons he gave on 24 November 2014 (see in particular para 33).

[43] Herbal Zone is thus entitled to have Riley AJ's order varied as prayed pursuant to rule 42(1)(b).

The order of 13 August 2014

[44] Before dealing with the other matters, I must deal with the proper interpretation of the urgent order of 13 August 2014. To the extent that the parties regarded the order as imposing an obligation to supply capsules at a specified price regardless of subsequent events, they erred. The order must be interpreted in the light of the application on which it was based. The application complained that the price increase of 14 July 2014 was invalid. That is the only thing which the order could or did address.

[45] For this reason, Herbal Zone's complaint that the order purported to compel it to supply capsules beyond the distribution agreement's expiry date on 28 February 2015 was misconceived. Also misconceived is the notion that Herbal Zone was obliged to continue supplying capsules after 13 August 2014 if, after that date, it cancelled the agreement. The order of 13 August 2014 could not have been intended to limit the freedom of either side to exercise their rights under the contract after 13 August 2014. Herbal Zone could even have given a fresh notice of a price

increase, this time expressly explaining how the increase was related to the exchange rate.

[46] Accordingly, and even without Herbal Zone's reconsideration application, Herbal Zone could, pursuant to its cancellation of the contract on 9 October 2014, have stopped supplying capsules to Infitech. A refusal to supply on the basis of an alleged cancellation would not have violated the order of 13 August 2014. Of course, if Infitech disputed the cancellation it was at liberty to institute a fresh application for a further interdict, focusing this time on the validity or otherwise of the cancellation. That is indeed what Infitech did in the termination interdict application. If that further interdict succeeded, the order of 13 August 2014 would continue to regulate the price at which capsules would have to be supplied (unless Herbal Zone in the meanwhile gave a fresh notice of a price increase, in which case Infitech, if it disputed the new price increase, would have to obtain relief focusing on the validity of the new notice).

The reconsideration application

[47] Rule 6(12)(c) provides that a person against whom an order was granted 'in his absence in an urgent application' may by notice set down the matter 'for reconsideration of the order'. The word 'absence' does not here bear any technical meaning. The fact that a respondent has received prior notice of an urgent application may be relevant to the exercise of the court's discretion but if such respondent is not as a fact present when the matter is heard and the order granted, he is 'absent' within the meaning of the rule.

[48] Herbal Zone was absent when the price interdict application was heard and the order granted on 13 August 2014. The application was brought as one of urgency. This court thus has jurisdiction to reconsider the order in terms of rule 6(12)(c).

[49] A reconsideration occurs with reference not only to the arguments the respondent may have to offer on the founding papers but also with reference to the facts alleged in any answering and replying papers which may have been filed (see

Industrial Development Corporation of South Africa v Sooliman 2013 (5) SA 603 (GSJ), where the earlier decisions are reviewed). Here there were answering and replying papers.

[50] The court has a wide discretion in its reconsideration of the case. Relevant factors include not only the merits of the order but also the reasons for the respondent's absence, any delay in seeking reconsideration, prejudice suffered and the like.

[51] Apart from the merits of the price interdict application, Mr Smalberger emphasised two aspects militating against acceding to the reconsideration request. The first was the lack of a proper explanation from Herbal Zone for its absence on 13 August 2014. The second was the delay of about seven weeks in Herbal Zone's filing opposing papers and setting down the matter for reconsideration.

[52] The first of these complaints is, in my view, completely overshadowed by the lack of a proper explanation on Infitech's part for having rushed into court on such short notice. Infitech knew on 14 July 2014 that Herbal Zone intended to implement the price increase on 14 August 2014. By 31 July 2014 it had AMI's response to STI's challenge of 16 July 2014. Nearly two weeks passed before the urgent application was issued. When it was issued, it was set down on only a couple of hours' notice.

[53] Even if the matter by 13 August 2014 was extremely urgent, Infitech's own delay had created the extreme urgency. But the matter was not, even on 13 August 2014, extremely urgent. Infitech did not allege that it was on the verge of ordering a substantial further quantity of stock. Nothing was said about its current stock position or its future requirements.

[54] By contrast, the complaint against Herbal Zone is that it failed to appear in court at 12h30 in respect of an application which was at best served on it an hour or two previously. Although STI had foreshadowed an urgent application in its letter to AMI of 12 August 2014, STI did not say in that letter that if they did not receive the requested undertaking the application would be issued for hearing the next day. STI

did not, in its covering letter to AMI at 08h47 on 13 August 2014, highlight that the application was to be heard at 12h30 that same day. In any event, there could be no guarantee that Mr Malapane of AMI would get to see the papers immediately. The fact that he said in his letter of 31 July 2014 that his firm was authorised to accept service of process did not mean that he would be constantly available to consider urgent proceedings on very short notice. There is no acceptable evidence that STI succeeded in making contact with Mr Malapane on the morning of 13 August 2014.

[55] There is a dispute of fact as to when Herbal Zone's Awwad received the papers – 09h58 on STI's version, 11h40 on Awaad's version. Awwad's attempts to contact his attorney are precisely what one would have expected. By the time they communicated between 13h00 and 14h00, they would have expected the matter already to have served before a judge.

[56] In my view, the founding papers came nowhere close to justifying the immediate granting of relief, let alone relief expressed as it was rather than in the form of a rule nisi with a relatively short return day.

[57] The point regarding Herbal Zone's delay in seeking reconsideration has greater force. However, by mid-September 2014 there had been a notice of opposition, indicating that Herbal Zone did not consider Infitech to be entitled to the relief sought in the price interdict application. In support of the delay argument, Mr Smalberger referred me to *ISDN Solutions (Pty) Ltd v CSDN Solutions CC* 1996 (4) SA 484 (W). Other cases can only be of limited assistance in regard to the fact-sensitive exercise of a judicial discretion such as that conferred by rule 6(12)(c). In *ISDN* the court's decision not to take an urgent interim order under reconsideration was influenced by a number of factors. In that case the respondents had received the urgent application on the previous day and had advised the applicant's attorney that they would be opposing the application. Notwithstanding such notice and advice, they failed to appear. Importantly, the main case in *ISDN* was scheduled to be heard and finally determined within about three weeks from the date on which reconsideration was sought. The interim order, which had already been in force for a month, would thus only continue in operation for about three more weeks. The learned judge also pointed out that the interim order merely enjoined the

respondents to refrain from doing that which in law they were in any event prevented from doing or prevented them from using information which they claimed in any event not to have. The continued operation of the interim order thus did not prejudice them.

[58] The present case is obviously distinguishable from *ISDN*. Although the delay was greater in the present case, the interim order of 13 August 2014 would, unless reconsidered, continue to apply until the final determination of an action or (though not so stated in the order) until the distribution agreement terminated on 28 February 2015. The trial action in this division would never have been finally determined prior to 28 February 2015, so the effect of the interim order was to prevent Herbal Zone from acting on its price increase for the remaining term of the contract (a period of about six and a half months reckoned from the date of the order or about four and a half months reckoned from the date of the reconsideration request). The interim order did not prohibit Herbal Zone from doing something which was in any event obviously unlawful; the order prevented it from acting on a price increase, the validity of which would turn on competing views regarding the interpretation of the contract as applied to factual circumstances.

[59] I thus consider that this is a case where the order of 13 August 2014 should be reconsidered. This takes me to the merits of the price interdict application. Infitech sought an interim interdict and that is the form of order granted. Infitech thus needed to establish the well-known requirements for an interim interdict. Its burden in regard to the infringed right was thus lighter than in the case of a final interdict – it was sufficient to establish a *prima facie* right though open to some doubt. On the other hand, Infitech had to establish that without an interim interdict it would suffer irreparable harm and that the balance of convenience was in its favour. These are hurdles which an applicant for a final interdict is not required to cross.

[60] I consider that Infitech met the burden of establishing its *prima facie* right, ie that the price increase of 14 July 2014 was *prima facie* invalid so that Infitech remained entitled to receive capsules at the old price. I have already quoted the relevant part of clause 15.4. Neither side argued that the price clause was void for vagueness by virtue of the power conferred on Herbal Zone to increase the price.

However, the power to increase the price was limited – the price could be increased ‘depending on’ the USD exchange rate. I do not need finally to determine the precise interpretation of this power. It might give Herbal Zone a measure of flexibility, in the sense that Herbal Zone might have regard to the exchange rates on particular dates or to average exchange rates over one or more periods. It might suffice for the price increase to bear a rational relationship to changes in the exchange rate.

[61] On the face of it, however, the clause does not entitle Herbal Zone to have regard to considerations other than the exchange rate. We know in the present case, from AMI’s letter of 31 July 2014, that Herbal Zone had based the price increase on (i) ‘the price of the product at the factory gate’; (ii) an escalation in the ‘import parity price which is USD based; and (iii) the introduction of the new jar package.

[62] I shall assume for present purposes that the second of these considerations is a reference to a weakening in the rand as against the USD, though even this is by no means obvious. An ‘import parity price’ is a price which a domestic producer charges to his domestic customers and which he sets by calculating how much a domestic customer would have to pay if he imported the same product from a foreign manufacturer. An import parity price is affected not only by the exchange rate but by all the circumstances which determine the price at which a foreign manufacturer will sell the product for export to South Africa.

[63] Be that as it may, the first and third considerations previously mentioned seem to me to be unrelated to the exchange rate. The first presumably means that the cost of manufacturing the capsules in the foreign country had increased. The second indicates that the jar packaging is more expensive than the cardboard packaging. Both of these additional considerations are extraneous to the price-increase power conferred by clause 15.4. Herbal Zone’s answering affidavit confirms that these further matters were taken into account.¹ The clause does not say that Herbal Zone may increase the price because the manufacturing costs or

¹ Para 48 at record 86.

packaging costs in the foreign country where they are manufactured and packaged have increased.

[64] Since two of the three reasons given for the price increase were bad, the price notice itself was invalid. Herbal Zone did not, in its notice, specify separately the portion of the increase attributable to the increase in manufacturing cost, the increase in packaging costs and the weakening of the rand against the dollar. From the exchange rate information supplied by Herbal Zone in its answering papers, it appears that the rand weakened from about R7,70 in February 2010 to R10,70 in July 2014, which would suggest that Herbal Zone might have been able to justify an increase of 39% in the starting price of R17,54 excluding VAT, ie a price in July 2014 of R24,38 excluding VAT (in contrast with price increase to R27,90 excluding VAT which Herbal Zone sought to impose). Possibly a somewhat higher increase could have been justified if different pricing points were taken or averages were used but there does not seem to be any rational basis on which one could have arrived at an increase from February 2010 to July 2014 of 59%. (In its answering papers, Herbal Zone tried to do so by comparing the relatively strong rand in December 2010 (R6,70) with the relatively weak rand in February 2014 (R10,95), a depreciation of about 63%. However, and apart from the fact that Herbal Zone did not say in its answering papers that this was in fact how it arrived at the price increase of July 2014, the pricing points chosen for the comparison are irrational. Since the contract was concluded in January 2010 and commenced on 1 February 2010, the starting price specified in clause 15.4 would have been based on the then prevailing exchange rate, rather than the significantly stronger rand in December 2010.

[65] On this basis, the price increase was *prima facie* invalid. It is thus unnecessary to consider Mr Smalberger's submission that the price increase was invalid because the letter of notification did not in terms link the increase to the exchange rate and show how it had been calculated.

[66] Infitech's case on irreparable harm and balance of convenience is much less satisfactory. In regard to the former, Infitech's deponent said in the founding affidavit that its irreparable harm could be 'summed up' as follows: (i) It was required by the

distribution agreement to purchase a substantial number of capsules each month. (ii) The price increase was of such a magnitude – 24% – that, if it took effect, it would be ‘extremely difficult’ for Infitech to sell them and thus sell the number of capsules that it is contractually required to purchase from Herbal Zone. (iii) This ‘may seriously imperil’ Infitech’s business. In regard to the balance of convenience, it was said that Herbal Zone would not suffer ‘substantial financial loss’ because, pending the final determination of the applicant, Infitech would continue buying capsules from Herbal Zone as it was required by the distribution agreement to do. Infitech, by contrast, would, in the light of its allegations on irreparable harm, suffer ‘severe inconvenience and prejudice’.

[67] These allegations appear to me to have been hopelessly deficient to justify interim relief. Infitech stated its prejudice as bald conclusions without substantiation. Harm is irreparable if it cannot be made good by later action. Infitech did not say that it did not have the financial resources to pay the increased price pending a determination of its validity. More importantly, Infitech said nothing about the strength of the market or its current pricing. Depending on its mark-up, Infitech might have been able to absorb a part or the whole of Herbal Zone’s price increase pending a final determination of the action. The only reference to Infitech’s pricing which I can find anywhere in the more than 600 pages making up the record in this case is a letter written by Herbal Zone to Infitech on 20 to March 2013 in which it was said that Infitech was selling capsules to wholesalers at R34,50, a mark-up of 50% on the then prevailing price of R23,10 including VAT.² This letter was attached to Herbal Zone’s answering affidavit in the price interdict. Even if Infitech’s price in August 2014 was still R34,50 (despite the intervening price increase by Herbal Zone in June 2013), that price would have still yielded a gross profit of about 8,5% after the disputed price increase of July 2014.³

[68] Another relevant consideration in this regard is that the contract had only just over six months to run. And even within that period, the fact that the notice of 14 July 2014 was invalid did not mean that Herbal Zone could not validly have given

² See record 136.

³ Following the price increase of July 2014, the VAT-exclusive price was R27,90. On the basis that Infitech’s price of R34,50 was VAT-inclusive, the comparable VAT-exclusive price was R30,26, which is 8,5% higher than R27,90.

notice of a somewhat lesser price increase. The exchange rate appreciation would undoubtedly have justified some increase. Infitech's prejudice could not legitimately be assessed on the basis that it had a right to receive capsules for the remainder of the contract at the existing price of R22,46 excluding VAT.

[69] In regard to balance of convenience, Infitech's even balder assertions contain an obvious *non sequitur*. In the absence of substantiation, it is no more obvious that Infitech would suffer material prejudice than that Herbal Zone would not. If the price increase was, from Herbal Zone's perspective, necessary to cover increased manufacturing and packaging costs and rand depreciation, an interim interdict might have the effect of requiring it to supply capsules at a price below its cost. That would depend on its costs and on rand depreciation. In the same way, material prejudice to Infitech would depend on its operating costs and mark-up.

[70] The replying papers added nothing to Infitech's case on irreparable harm and balance of convenience.

[71] For these reasons, and upon reconsideration, it is my conclusion that the interim order of 13 August 2014 should be set aside.

The counter-application - cancellation

[72] In regard to the counter-application, I shall deal firstly with the order declaring the distribution agreement to have been validly cancelled on 9 October 2014. This is a claim for final relief. The *Plascon-Evans* rule applies to disputes of fact.

[73] The only breach which could have justified a summary termination was the alleged breach of clause 10.1, the terms of which I have previously quoted. Herbal Zone alleged in its attorney's letter of cancellation dated 9 October 2014, and repeated in the counter-application, that HOC's website and the conduct described therein constituted a breach of clause 10.1.

[74] Clause 10.1 on its face applies only to conduct by Infitech. When Herbal Zone gave notice of summary termination and when it launched its counter-

application its contention was that HOC was a business which Infitech was conducting. Subsequent evidence established that HOC is a separate juristic entity. There is no basis for finding that any business which HOC is conducting is in truth the business of Infitech.

[75] The Mosianes obviously provide a link between Infitech and HOC, in that they are the controllers of both. They answered Herbal Zone's allegations regarding the website in an evasive fashion, contenting themselves with the bland assertion that it was 'an entity independent and distinct from' Infitech. In view of the common denominator provided by the Mosianes, it is not true to say that HOC is an 'independent' entity.

[76] It does not follow, however, from the common control of the Mosianes that Infitech has breached clause 10.1. The argument advanced on behalf of Herbal Zone at the hearing went as follows. Clauses 6.2.2 and 9.6 impose on Infitech's 'representatives' the same obligations as are imposed on Infitech itself. The Mosianes are the 'representatives' of Infitech. They are thus bound *inter alia* by clause 10.1. HOC is their *alter ego*. The court should pierce the corporate veil and find that the Mosianes themselves, under the guise of HOC, are distributing or representing the competing products, namely those described on HOC's website.

[77] I regard the first step in this reasoning as unsound. Clause 6.2.2 reads as follows (clause 9.6 is virtually identical):

'[Infitech] shall be accountable for upholding all the terms and conditions contained in this Agreement, and it is further responsible for ensuring that its representatives in the Territory have a full understanding of the terms and conditions contained in this Agreement and that [Infitech] is fully accountable for any breach thereof which may be caused by its appointed Representatives in turn'.

[78] The term 'representatives' is not defined in the contract. On the title page of the contract it is recorded that Infitech was 'represented' by the Mosianes but I do not think the word 'representatives' in clause 6.2.2 refers to the persons who represented Infitech in concluding the contract. It would not make sense to require Infitech to ensure that those who represented it in concluding the contract had a full

understanding of the contract's terms. I think the word 'representative' means, in context, the sales representatives used by Infitech to market the capsules. Infitech was obliged, for example, to ensure that such representatives understood the territorial limits applicable to the product's distribution (clause 6.2.1), that they were aware of and complied with Herbal Zone's policies in regard to discounts, incentives and the like (clause 6.3), that they were aware of and complied with Herbal Zone's instructions to Infitech (clause 8.5), and so forth. If sales representatives marketed the product in breach of these provisions, Infitech would be accountable for the breach.

[79] Herbal Zone's counsel argued that if clause 6.2.2 were interpreted in this way it would add nothing to the liability which Infitech would in any event incur. Infitech, being a juristic person, could only act through human agency. If the 'representatives' were limited to people acting on Infitech's behalf, their conduct would in any event be attributable to Infitech.

[80] Although Infitech can act only through human representatives, it is not necessarily so that it would incur liability for the acts of its purported agents. That would depend on the scope of the representative's authority, a matter between Infitech and the representative in question. Regardless of the precise scope of the agency, clause 6.2.2 makes Infitech liable where a person, appointed by Infitech and marketing the Herbal Zone product, does something in the course of such appointment which would be a breach if committed by Infitech.

[81] The contract cannot sensibly be interpreted, however, as imposing a personal liability on the representatives. They are not parties to the contract. Herbal Zone could no more sue them for breaches of the contract than it could sue them for payment of the purchase price of the capsules.

[82] Assuming, therefore, that one or both of the Mosianes were Infitech's representatives as contemplated in clause 6.2.2 (ie persons engaged by Infitech in selling the Phyto Andro capsules to Infitech's customers), clause 10.1 does not bind them personally. If they are directly or indirectly distributing or representing a competing product, such conduct is not being perpetrated by them in the course of

their appointment as persons engaged by Infitech to market Herbal Zone's Phyto Andro capsules. In that respect, they do not stand in a different position from a third party engaged by Infitech as a sales representative to market the product in a particular part of South Africa or to deal with particular customers. If the third party were to start distributing a competing product, the Mosianes might promptly cause Infitech to terminate the third party's appointment. But on Herbal Zone's argument, the third party's conduct would already constitute grounds for summary termination of the distribution agreement. I do not think that can be correct. Such conduct by a representative is not the sort of conduct which clause 6.2.2 contemplates as being attributed as a breach to Infitech.

[83] It does not follow from this analysis that what has occurred in this case does not implicate Infitech in a breach of the contract. The Mosianes are directors of Infitech and its controlling mind. They have fiduciary duties to advance its best interests and to ensure, among other things, that it complies with its contractual obligations. In terms of clauses 9 and 15.7 Infitech must use its best efforts to develop the largest possible market for Phyto Andro capsules and to promote orders, increase the sales of the product and protect Herbal Zone's interests. Clause 14.8 obliges Infitech 'faithfully and loyally [to] perform, observe and conform to the duties and requests imparted to' it by Herbal Zone. Clause 14.9 stipulates that Infitech must not wilfully do any act or thing detrimental to the best interests of Herbal Zone. Consistently with these duties, Infitech could not allow the Mosianes to remain as its directors while they were undermining the market for Phyto Andro capsules by promoting an identical competing product. The Mosianes' knowledge of HOC's website and activities is attributable to Infitech. The inference is justified that Infitech has stood by while the directors who were meant to be advancing its interests were in fact promoting the interests of a competing company, HOC.

[84] However, the fact that Infitech breached these other clauses of the distribution agreement does not mean that the summary termination of 9 October 2014 was lawful. In respect of breaches other than those contained in clause 10.1, there must be a three-day notice to remedy the breach. Although such a notice was given in the letter of 9 October 2014, it is not altogether clear that a breach of the kind just mentioned was alleged. More importantly, there was not, after 9 October

2014, any further act of cancellation. This is not surprising, because Herbal Zone considered that it had already terminated the contract summarily on 9 October 2014. If it wished to cover the eventuality that a summary termination might not be valid, it should have held its hand until the expiry of the three days and then exercised such rights of cancellation as it considered itself to have. (It was suggested in argument that the counter-application itself could serve as a notice of cancellation. However, the counter-application did not say so and instead sought a declaratory order that the contract had been cancelled on 9 October 2014.)

[85] I should add this in respect of the three-day notice. Herbal Zone says that the HOC website became inaccessible shortly after the sending of its letter of 9 October 2014. This indicates that such representation of competing products as was constituted by the marketing material on the website indeed came to an end after the giving of the notice. There is no evidence that HOC has ever actually sold the competing Phyto-Form capsule. Herbal Zone does not say in its papers that it has found that product on retailers' shelves or seen print advertisements for them. The website referred to prices 'to be announced' ('TBA'), suggesting that the product was not yet available. (HOC does appear to be marketing its coffee product. Herbal Zone attached to its replying papers in the counter-application a newspaper advert dated 4 November 2014 for 'Cappuccino Zing'. However, the distribution agreement does not relate to this product. Whether HOC's marketing of Cappuccino Zing is lawful is not something which arises for decision in this case.)

[86] For these reasons, Herbal Zone's claim for confirmation of cancellation of the contract on 9 December 2014 must be refused.

The counter-application – the packaging interdicts

[87] The interdicts sought in the counter-application are also claimed in the form of final orders. Again, the *Plascon-Evans* rule applies. In the light of my conclusion on the invalidity of the cancellation of the contract, the claim for the interdicts must be assessed on the footing that the distribution agreement remains in place.

[88] I do not intend to quote the precise terms of the nine sub-prayers constituting the interdict. In essence, the interdict complains of two aspects of Infitech's conduct, namely (i) the repackaging of the capsules into cardboard boxes; (ii) the insertion of the Infitech logo on the packaging.

[89] Although reference was made in the counter-application to trade marks, Herbal Zone did not establish that it was the registered owner of any trade marks in South Africa though it has applied to have certain marks registered. (The Malaysian company holds certain trade marks abroad but they are not relevant.)

[90] In regard to the repackaging of the capsules, Herbal Zone relies on the instruction contained in AMI's letter of 26 August 2014 read with clause 8.5, which obliges Infitech 'to comply with any written and oral instructions issued by Herbal Zone' to it. That the instruction was given is clear from the letter. However, the power to give instructions in terms of clause 8.5 must be subject to some limits. Contractual powers imposing an obligation on the counter-party are usually impliedly subject to their being exercised in accordance with the *arbitrium boni viri*, ie honestly and on grounds upon which a reasonable person could act (*Benlou Properties Pty Ltd v Vector Graphics Pty Ltd* 1993 (1) SA 179 (A) at 187J-188C). It has been said that a court may find a power to have been invalidly exercised if it was 'so unreasonable, improper, irregular or incorrect that it would give rise to obvious unfairness' (*Absa Makelaars (Edms) Bpk v De Lange* [2009] ZAWCHC 54 para 20, not disapproved on this point in the appeal reported at [2013] 3 All SA 403 (SCA); see also *Lobro Properties Pty Ltd v Express Lift Co (SA) Pty Ltd* 1961 (1) SA 704 (C) at 708F-H; *NBS Boland Bank v One Berg River Drive & Others, and Other Cases* 1999 (4) SA 928 (A) paras 25-27).

[91] Subject to the logo point to be dealt with hereunder, the packaging which Infitech is using is identical to the packaging in which Herbal Zone initially supplied the capsules to it. According to Infitech, Mosiane discussed the question of repackaging with Herzallah when Herbal Zone changed to the jar packaging. Mosiane claimed in his affidavit that Herzallah agreed that Infitech could repackage the product if it wished to supply its customers in batches of 50 rather than 100. Apart from the fact that Mosiane's version on this aspect cannot be rejected as false

on the papers, it does not strike me as implausible that Herzallah would have agreed to the repackaging. Herbal Zone would have wanted Infitech to maximise its sales in South Africa. It is common cause that for more than four years Herbal Zone had been supplying the product to Infitech, and Infitech had been on-supplying the product to its customers, in packages containing 50 capsules. Mosiane avers, and one would not expect Herbal Zone to be in a position to dispute, that Infitech's customers (the re-sellers), or at least some of them, do not wish to purchase as many as 100 capsules at a time, so that an insistence on supplying the product only in the sealed jars would negatively impact on sales. There is nothing objectionable *per se* in the packaging which Infitech is using. It is, after all, identical to the packaging which Herbal Zone initially used.

[92] I am not persuaded, therefore, on the papers that Herbal Zone's instruction, as contained in AMI's letter of 26 August 2014, was, insofar as it prohibited repackaging altogether, an instruction given in accordance with the judgment of a reasonable person. That letter was written a couple of weeks after the urgent order was granted on 13 August 2014. I cannot help but think that the heightened tension which it caused between the parties led to Herbal Zone instructing AMI to give the instruction contained in the letter.

[93] On the basis, therefore, that Infitech was lawfully entitled to repackage the capsules, the remaining question is whether the insertion of its logo on the packaging is objectionable. There can be no objection to the placing, on the side of the box, of Infitech's particulars as the sole South African distributor of the product. Herbal Zone itself previously supplied packaging with these details. Clause 11 entitles Infitech to 'advertise and hold itself out as' the authorised sole distributor of the products in South Africa.

[94] In my view, the logo which Infitech has caused to be placed on the front and back of the new packaging as well as on the one side stands on a different footing. The front and back of the box advertise the product, proclaiming 'Double strength to give you more power'. The back and front of the box are the largest and most prominent packaging features which a buyer would see. The get-up (the colouring and stripes) is that of Herbal Zone, and only its marks (the Phyto Andro name and

the circular device in combination with the name 'Herbal Zone') appeared on the front and back of the packaging as supplied by Herbal Zone. Infitech has now inserted its own logo on the front and back of the box diagonally opposite that of Herbal Zone. The Infitech logo is at least as prominent as Herbal Zone's and appears immediately above the Halaal and GMP certifications which the product enjoys. The logo on the side of the box, which appears immediately beneath Infitech's details as exclusive distributor, is the only logo appearing on the side of the packaging and thus again attracts the eye.

[95] In my opinion, the insertion of the logo in this way is not a legitimate part of advertising and holding Infitech out as the sole authorised distributor of the product in South Africa. A person viewing the box might not examine the particulars contained on the side and might thus not know that Infitech is merely a distributor. The manner in which the logo has been brought to bear, particularly on the front and back, associates Infitech directly with the product (ie its manufacture or origin) rather than its distribution. This in my view infringes several provisions of the contract. Clause 14.6 prohibits Infitech from taking any action or making any representation which might establish any apparent relationship or association with Herbal Zone (though naturally this must be read subject to Infitech's right to hold itself out as the sole distributor of the product in South Africa). Clause 14.9 prohibits Infitech from wilfully doing anything which is detrimental to the best interests of Herbal Zone and the product. Both these clauses were relied upon in Hunter's letter of 9 October 2014.

[96] In addition to these provisions, clause 11.1 obliges Infitech to submit to Herbal Zone examples of 'all proposed advertisements and other promotional materials' for the capsules and may not use same without Herbal Zone's prior written consent. In similar vein, clause 14.7 provides that Infitech may not publish or display any advertisement or sign referring to the product or to the business of Herbal Zone unless same has been approved by the latter in writing. The front and the back of the packaging can fairly be regarded as advertising or promotional material. Although Hunter's letter of 9 October 2014 did not invoke these clauses directly, reliance was placed on a failure by Infitech to comply with Herbal Zone's instructions, in breach of clause 8.5. The instruction to refrain from using packaging

on which Infitech had brought its own logo to bear was reasonable, having regard to clauses 11.1 and 14.7.

[97] I thus consider that Herbal Zone is entitled to an interdict prohibiting Infitech from selling, advertising, promoting or presenting Phyto Andro capsules in packaging bearing Infitech's logo. Save as aforesaid, the application for an interdict must be refused.

Counter-application – costs

[98] In regard to the costs of the counter-application, Herbal Zone has failed in obtaining confirmation of cancellation and has also failed to obtain some of the interdicts it sought. The balance of success in the counter-application lies with Infitech. I think it would be fair to order Herbal Zone to pay 50% of Infitech's costs in the counter-application.

The termination interdict

[99] What I have styled the termination interdict was claimed by Infitech together with the contempt relief by way of the application it delivered on 28 October 2014 for hearing on 5 November 2014. What Infitech sought was a rule nisi, returnable on 25 November 2014, calling on Herbal Zone to show cause why it should not be ordered, pending the final determination of Infitech's pending action, from supplying capsules to third parties and directed to comply with its obligations under the agreement. In terms of Riley AJ's order as amended pursuant to the variation application, this is the rule nisi that was granted on 6 November 2014, with the rule to operate as an interim interdict (ie over the period 6-25 November 2014).

[100] It seems to me that the termination interdict application was unnecessary, except for the interim period between 6-25 November 2014. As from 9 October 2014 Herbal Zone adopted the position that the distribution agreement had been summarily terminated. That was why Herbal Zone saw itself as being at liberty to supply third parties and as being under no obligations pursuant to the contract (though it erroneously assumed that the urgent order of 13 August 2014 would

continue to apply, despite a valid cancellation of the contract). In order to obtain clarity that it was entitled to act in this way, Herbal Zone sought confirmation of the cancellation of the contract by way of the counter-application. By the time Infitech delivered the contempt and termination interdict application, Infitech knew that the counter-application would be heard on 25 November 2014. There was no reason to think that, if the court ruled against Herbal Zone on the cancellation point, Herbal Zone would then not comply with the contract. The very issue which would determine whether Herbal Zone was or was not bound to comply with the contract was scheduled to be argued and finally determined on 25 November 2014.

[101] In the circumstances, there was no need for Infitech to seek an interdict in the form set out in its application of 28 October 2014, ie an interdict pending the determination of Infitech's action. Infitech's action was not the litigation in which the validity of the cancellation was to be determined; the cancellation was to be determined pursuant to Herbal Zone's counter-application. For this reason, and as I have said, the only interim interdict which Infitech might have required was in respect of the period up to the time when the counter-application was determined. The interim interdict in respect of that limited period was granted by Riley AJ, though Herbal Zone was also called upon to show cause why the interim relief should not be extended until determination of Infitech's action. My decision on the counter-application now determines that the agreement has not been validly cancelled, and Herbal Zone will thus be obliged to continue complying with the agreement. If it does not do so, Infitech may bring further proceedings for relief.

[102] I rather doubt whether Infitech was justified in seeking interim relief in respect of the period from 5 November 2014 to the date on which the counter-application was determined, a period which was unlikely to be longer than three to four weeks. However, since Riley AJ (in the order as varied) granted the interim interdict for that period, and since I have in the event found that the cancellation was invalid, I think the costs of the termination interdict should be granted in favour of Infitech.

The contempt application

[103] Riley AJ dismissed the contempt application on the grounds that wilful non-compliance had not been proved. Mr Smalberger conceded that there was no reason for the costs of the contempt application not to follow the result.

Conclusion

[104] in regard to costs, I should indicate for the guidance of the taxing master that at the hearing on 25 November 2014 not more than 10% of the time was spent on the variation application (order (c) below), 45% on the price interdict/reconsideration application (order (a) below) and 45% on the counter-application (order (b) below). Virtually no time was spent on the contempt and termination interdict applications (order (d) below).

[105] For the reasons set out above, I make the following orders:

(a) In regard to the application launched by the applicant on 13 August 2014 and the reconsideration thereof sought by the first respondent in terms of rule 6(12)(c):

(i) The order of 13 August 2014 is set aside.

(ii) The applicant's application for an interim interdict is dismissed with costs, including those of two counsel where employed.

(b) In regard to the first respondent's counter-application launched on 23 October 2014:

(i) The applicant is interdicted from selling, advertising, promoting or presenting Phyto-Andro capsules in packaging bearing the applicant's logo.

(ii) Save as aforesaid, the counter-application is dismissed.

(iii) The first respondent is to pay 50% of the applicant's costs in opposing the counter-application, including the costs of two counsel where employed.

(c) In regard to the variation application launched by the respondents on 13 November 2014:

(i) The application succeeds with costs, including the costs of two counsel where employed.

(ii) The order granted on 6 November 2014 is varied so as to read in the manner set out in annexure 'X' hereto.

(d) In regard to the applicant's application for contempt and interdictory relief delivered on 28 October 2014:

(i) The application for contempt relief having already been dismissed on 6 November 2014, the applicant is directed to pay the respondents' costs in relation to the contempt relief, such costs to include those of two counsel where employed.

(ii) Save for the interim relief granted on 6 November 2014 (operative until the grant of this order), no further order is made on the application for interdictory relief, save that the first respondent shall pay the applicant's costs thereof, including the costs of two counsel where employed.

ROGERS J

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