REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

APPEAL CASE NO: A5017/12
SGJ CASE NO: 12664/2011

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

11.9.2012
DATE

SIGNATURE

In the matter between:

MAKULU PLASTICS & PACKAGING CC
t/a G P PACKAGING — Appellant (Applicant *a quo*)

and

BORN FREE INVESTMENTS 128 (PTY) LTD — First Respondent (First Respondent *a quo*)

G P PACKAGING SA (PTY) LTD — Second Respondent (Second Respondent *a quo*)

EKURHULENI METROPOLITAN MUNICIPALITY — Third Respondent (Third Respondent *a quo*)

JUDGMENT

LAMONT, J:

[1] During March 2011 the appellant launched an urgent application against the respondents. In the application the appellant sought relief pending the finalisation of an action to be instituted. That relief included orders designed to interdict and restrain the first respondent from preventing the appellant from: entering into an agreement with the third respondent in terms whereof the third respondent would provide various services to a certain property; requesting, instructing or encouraging the third respondent to terminate the supply of any services; hindering or obstructing the appellant or its employees and invitees in respect of access to and use or enjoyment of the property. In the same application the appellant sought relief against the third respondent in the form of an order directing the third respondent to continue supplying services to the property subject to the appellant making the appropriate payments. The appellant also sought the costs of the application.

[2] The second respondent was in liquidation and played no role in the application. The third respondent similarly did not participate in the litigation. The relief sought against the third respondent is dependent upon the success of the relief sought against the first respondent. The Court *a quo* found that the relief sought was incompetent as there was nothing a landlord could do to

prevent a municipality from entering into a consumer agreement if it chose to do so. The application was accordingly dismissed with costs.

[3] The first respondent is the owner of a property which originally was leased to the second respondent. The second respondent was placed in liquidation. At a time prior to the liquidation of the second respondent the appellant took occupation of the premises and commenced trading from it. The trade which it undertook was identical to the trade formerly undertaken by the second respondent. The appellant's evidence was that the occupation of the property by the appellant was with the consent of the first respondent and pursuant to a lease. The appellant set out how the first respondent and the appellant had concluded a contract the terms of which were contained in a lease agreement which the first respondent had had drafted. This took place during the period October/November 2009. The signing of the lease agreement was a formality and it would reflect the terms of the oral contract which had been concluded.

[4] Pursuant to the lease the appellant remained in occupation of the property from the period 1 October 2009 and was still in occupation of the property as at the date the application commenced. Invoices had been rendered by the first respondent to the appellant in the name of the appellant for the period. During May 2010 the first respondent's representatives and the appellant's representatives met to discuss certain other outstanding issues between the parties. At the meeting the writing reflecting the oral agreement was tabled but not signed; various other matters were resolved.

The second respondent in due course was liquidated on 22 September 2010. During March 2011 commercial issues existing in respect of other matters between the appellant and first respondent again came under discussion and the parties were unable to resolve their differences. The first respondent indicated that the third respondent would have no option but to disconnect services to the property and furnished a letter dated 9 March 2011 addressed to the second respondent advising that the electricity supply would be discontinued on 16 March 2011. This letter is a reaction of the municipality to correspondence addressed to it by the first respondent.

[5] On 8 March 2011 the first respondent addressed a letter to the third respondent setting out that it was the owner of the property and that its tenant the second respondent had been liquidated. In that letter the first respondent sought as follows:

> "*We, the legal owners of the property, request that the electricity supply to this property be terminated on a permanent basis for the reasons set out below:*"

The reason furnished was that the second respondent had been liquidated and did not occupy the premises. No mention was made of the occupation by the appellant. The letter concluded with the following:

> "*In the event that the Ekurhuleni Metropolitan Municipality connects the electricity to any illegal applicant after today, we shall take the necessary legal steps to apply for an urgent Court interdict and claim damages from Ekurhuleni Metropolitan Municipality ...*"

[6] It is apparent that the first respondent took steps to cause the third respondent to cease supplying electricity to the premises.

[7] At that time the appellant had not been paying the charges levied by the municipality continuously as and when they fell due since 1 October 2009 but was maintaining sufficient payments to ensure the municipality maintained the supply of services. The municipality was billing the second respondent which had concluded the services contract with it. The bills were however being paid by the appellant notwithstanding the fact that they were being sent to the second respondent. The reason why the third respondent terminated the services was not on account of non-payment but on account of the fact that the person with whom it had contracted (the second respondent) had been liquidated. It required a new user agreement to be concluded and if such agreement was concluded it would continue to supply electricity.

[8] The appellant's representatives called upon the third respondent's offices in order to conclude a contract for services to be supplied to the property. The third respondent adopted the attitude that it was not in a position to enter into such a contract with the appellant since the first respondent had denied having any relationship with the appellant. In consequence the third respondent would not conclude any contract with the appellant neither would it supply services to the property. But for this fact the municipality would contract with the appellant.

[9] The first respondent's evidence was that no contract of lease had been concluded and that the contract of lease which had been in existence between itself and the second respondent had come to an end. The first

respondent claimed that there had been a monthly tenancy between the first respondent and the appellant and that that monthly tenancy had terminated pursuant to notice which it had given.

[10] The first respondent's evidence was that the appellant had been in occupation of the premises in terms of a sub-lease between the second respondent and itself.

[11] The letter pursuant to which notice was given is dated 24 January 2011, is addressed to the appellant and gives one month's notice. In the letter dated 22 February 2011 the first respondent sought to make arrangements to re-take possession of the property.

[12] It is apparent that there is a dispute between the first respondent and the appellant as to the existence of the lease. There are some indications that the lease as claimed by the appellant was concluded on the basis claimed by the appellant in that there are accounts sent to the appellant and notice was given to the appellant.

[13] While the appellant's right is disputed there is some substance to the right. On the basis of the lease claimed to be in existence by the appellant, there was in force a lease which had several years left to run at the time of the events in question. Under and in terms of that lease the appellant was entitled to occupation of the property.

[14] Under and in terms of that lease it was the obligation of the appellant to secure the rendering of services by the third respondent. In paragraph 4 the following is said:

> "*4.1 The tenant shall pay on demand to the local authority, the costs of all electricity and water consumed on the premises, as well as all basic sanitary and refuse removal fees levied in respect of the premises by the local authority.*
>
> *4.2 The tenant shall be obliged to make all necessary arrangements to ensure that the relevant accounts, invoices and notices are delivered to an address which the tenant has selected for this purpose.*
>
> *4.3 The tenant shall pay such charges as and when they fall due.*
>
> *4.4 ...*
>
> *4.5 The tenant shall be responsible to conclude consumer arrangements in its own name and to make its own arrangements for the supply of basic services to the premises with the appropriate local authority and/or supplier and the landlord shall be fully absolved from any liability in regard thereto ...*"

[15] The acts of the first respondent in notifying the third respondent of the fact that the property was occupied by a person with whom it had no contractual relationship if the contractual relationship existed would constitute an interference by the first respondent in the contractual relationship between the appellant and third respondent. The fact that the contractual relationship had not been concluded in my view does not affect the position. It inevitably would have been concluded but for the interference. In terms of the lease agreement the first respondent was by necessary implication to, at the very least, have co-operated with the appellant when the appellant sought to conclude the services agreement with the municipality. It is apparent that the

third respondent in consequence of the interference by the first respondent declined to conclude a contract with the appellant.

[16] In my view the conduct of the first respondent in performing acts designed to frustrate the free commercial activity of the appellant constitute a wrongful act.

[17] In my view, assuming the existence of the lease the appellant would be entitled to obtain relief against the unlawful interference in its contracts and its dealings with others with whom it proposes contracting. This action was recognised in *Lanco Engineering CC v Aris Box Manufacturers (Pty) Ltd* 1993 (4) SA 378 (D) which held:

> "The progress of our law in regard to an action under the lex Aquilia whereby a party to a contract sues a third party for interference in his contractual relationship has not been free from difficulty. The reported cases which have dealt with it are collected and some of them discussed in works such as Van der Merwe and Olivier Die Onregmatige Daad in die Suid-Afrikaanse Reg 6th ed at 370-82; Van Heerden and Neethling Onregmatige Mededinging (1983 ed) at 149-52 (supplemented by an article by Neethling in (1991) 54 THRHR at 566-7, which dealt with developments since D 1983); McKerron The Law of Delict 7th ed at 268-9; Lee and Honoré The South African Law of Obligations 2nd ed at 306-7.

The earlier cases reflect a leaning toward the English law and, while the later cases have sought to bring the claims more strictly under the actio legis Aquiliae, broadening its ambit where necessary, it is clear that the last word has not been spoken by our Courts on the subject.

The wrongful interference by a third party in another's contractual relationship is closely allied to and, depending on the facts of a given case, is sometimes part of what is commonly called unlawful competition. One way or the other, however, the legal principles ought to be the same. In this regard a reference to the works which I have mentioned and to the more recent cases referred to in them reflects that there are at least three requirements to a successful claim based upon interference in a contractual relationship. These are that there must be (a) an unlawful and (b) a culpable (in the broad sense) (c) interference.

The question of unlawfulness, and in particular by what yardstick such unlawfulness is to be determined, is a matter which, until the last decade at any rate, provided our Courts with some difficulty. As I understand the cases it is, however, by now well settled that what determines whether any particular conduct is unlawful or not is the general criterion of reasonableness or the bony mores as perceived by the public. See *Minister van Policies v Eels* 1975 (3) SA 590 (A); Administrator, *Natal v Trust Bank van Africa BP* 1979 (3) SA 824 (A); *Marais v Richard en 'n Ander* 1981 (1) SA 1157 (A) at 1168C; and *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 498H. In regard to these cases it was said in

Coronation Brick (Pty) Ltd v Strachan Construction Co (Pty) Ltd 1982 (4) SA 371 (D) at 384D that conduct will be regarded as unlawful.

> '... when the circumstances of the case are of such a nature that it not only incites moral indignation but also that the legal convictions of the community demand that it ought to be regarded as unlawful and that the damage suffered by the plaintiff ought to be made good by the defendant'.

As far as the question of culpability is concerned, it is clear that dolus at least is necessary. Whether culpa will also suffice is a question that has thus far not been settled by our Courts. It was left open by the Appellate Division in *Dantex Investment Holdings (Pty) Ltd v Brenner and Others NNO* 1989 (1) SA 390 (A) at 395G. In the case before me there is no need to go into this question, firstly, because counsel for the plaintiff accepts that dolus is necessary and, secondly, because, as I will show, dolus has in any event been proved. I will therefore assume that dolus is the necessary ingredient to found a successful claim".

[18] The action was also recognised in *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others* 1981 (2) SA 173 (T) where it was held:

> "McKerron The Law of Delict 7th ed at 270 and following states that in the absence of proof of malice our law does not recognise a wrong of

unfair distinguished from illegal competition. He states that interference with the trade or calling of another is not unlawful and is therefore not actionable unless the defendant either used illegal means or was actuated by malice. By illegal means is meant means which involve the commission or threatened commission of a criminal or a civil wrong, for example, assaulting or intimidating the customers of the other trader, threatening to take fictitious legal proceedings or inducing others to break their contracts with him. As regards the element of malice which in the alternative would create liability the learned author states that in his submission interference with business relations constitutes one of the few exceptions to the general rule that, apart from the doctrine of abuse of rights, motive is not a material element of civil liability. He states: "The desirability of admitting an exception to the rule in this class of case is obvious. No doubt, as we have seen, Courts of law should not attempt to distinguish between acts of interference which are fair and reasonable and acts of interference which are unfair and unreasonable. But a line can and should be drawn between acts of interference whose object is the defence or advancement of a person's own interests, and acts of interference whose sole or dominant purpose is the infliction of harm for harm's sake. The burden of proving that the defendant was actuated by malice rests, of course, on the plaintiff. To discharge the burden he must show not merely that the defendant intended to damage him in his business or means of livelihood, but also that he had no legitimate interest in doing so. The burden is not an easy one to discharge. Interferences with business

relations are ordinarily prompted by economic self-interest, and, whatever the position may be in ethics, in law the advancement of one's own economic interests is always a legitimate motive for action."

On the other hand Van der Merwe and Olivier in Die Onregmatige Daad in die SA Reg 3rd ed at 363 recognise the existence of an Aquilian action where in the competitive field damage has been sustained by one competitor through the actions of his rival. The learned authors state that this form of delict has received scant scientific analysis in South African Law.

In *Cape of Good Hope Bank v Fischer* 4 SC 368 at 376 the Court referred to the extension by analogy the Aquilian law had undergone in the Netherlands to a degree never permitted under the Roman law. It was no longer confined to cases of damage done to corporeal property, but was extended to any kind of loss sustained by a person in consequence of the wrongful acts of another."

[19] The appellant sought an interim interdict. "The legal principles governing interim interdicts in this country are well known. They can be briefly restated. The requisites are:

(a) a prima facie right;

(b) a well-grounded apprehension of irreparable harm if the relief is not granted;

(c) that the balance of convenience favours the granting of an interim interdict; and

(d) that the applicant has no other satisfactory remedy.

To these must be added the fact that the remedy is a discretionary remedy and that the Court has a wide discretion (a matter to which I shall return). This is of course the classic formulation of the principles as laid down by this Court in *Setlogelo v Setlogelo* (supra).

See: Joubert (ed) The Law of South Africa vol 11 paras 322-7 and the cases there cited."

See: *Hix Networking Technologies v System Publishers (Pty) Ltd and Another* 1997 (1) SA 391 (A)

[20] The appellant has established prima facie that it occupies the property pursuant to a lease; that its occupation is untenable unless it has access to services hence that the harm is irreparable; there is no other form of appropriate relief available to the appellant (it either can negotiate freely with the third respondent or it cannot); the balance of convenience favours continued occupation of the property by a party who on the evidence is paying the rent rather than that that party be frustrated in its occupation. The state of affairs has arisen in direct consequence of the correspondence addressed by the first to the third respondent. There is also some evidence that the first respondent is attempting to manipulate a state of affairs to put it in a stronger position to eject the appellant and or force appellant to give in to its other demands.

[21] The first respondent is not at risk of being compelled to pay any amount due by the appellant to the third respondent by reason of the provisions of the third respondent by-laws which provide that if there is a contract pursuant to which the consumer consumes electricity that, that person alone and not the owner of the property (the person in the position of the first respondent) is liable to make payment (clause 34.1 and 34.2 read with the definition of consumer). I suggested that the first respondent could obtain comfort if in addition to the orders sought by the appellant an order was made directing the appellant to each month deliver the invoice from the third respondent together with proof of payment. Counsel for first respondent submitted that such an order did not meet the problem but agreed that at the very least if the appellant succeeded such an order should be made. The appellant agreed to such an order. As there is agreement to this order it can be made.

[22] In these circumstances it appears to me that the relief claimed by the appellant should have been granted.

[23] I make the following orders:

1. The appeal is upheld.
2. The first respondent is to pay the costs.
3. The order made by the court a quo is set aside and the following substituted therefore:-

"1 Pending the finalization of the action to be instituted by the applicant within 1 month of date hereof the first respondent is interdicted and restrained from:-

1.1. Preventing the applicant from entering into a Consumer Agreement with the third respondent pertaining to the provision of water, electricity, sanitary and refuse removals services to the premises situated at 23 Derick Road Spartan, Kempton Park (hereinafter referred to as "the premises").

1.2. Requesting, instructing or encouraging the third respondent to terminate the supply of any of the aforesaid services to the premises for any reason whatsoever, other than for non-payment of the charges pertaining to the provision of those services.

1.3. Hindering or obstructing the applicant its employees and invitees access to and the use or enjoyment of the premises.

2. The third respondent is directed to conclude a contract for the provision of services to 23 Derick Road Sparton Kempton Park on its standard terms and conditions as against performance by the appellant of such payment and other obligations as the third respondent may require including without limiting the

generality of the aforegoing payment of a deposit of R220 000-00 or such greater deposit as the third respondent may require.

4. The third respondent is directed to maintain supply of services to the said property subject to compliance by the applicant with all its payment obligations to the third respondent and such other obligations as the third respondent imposes on all its customers.

5. The applicant shall deliver the monthly services accounts of the third respondent in respect of the property together with proof of its payment by the 15th day of each month.

6. In the event the action is not instituted timeously this order shall lapse and the applicant shall pay the costs of the application

7. The first respondent is to pay the costs of the application."

LAMONT J
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree:

TSOKA J
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

I agree:

FRANCIS J
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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DATE OF HEARING	:	28 August 2012
DATE OF JUDGMENT	:	13 September 2012