IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 215/2013

In the matter between: 24/3/2014

OPTICO (PTY) LIMITED Applicant

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO

19/03/14
DATE

SIGNATURE

and

MARTHINUS JOHANNES TE GROEN First Respondent

CITY OF TSHWANE Second Respondent

JUDGMENT

Tuchten J:

1 Mrs van der Merwe, the owner of the applicant and the wife of the first respondent are competitors in the baby creche industry. The parties and their some of their family members attend the same church. The applicant moved into premises in Tweefontein, Pretoria and towards the end of January 2013, employees of the second respondent ("the City") connected these premises to a water supply pipe running past them. But the water supply pipe was not under the control of the City.

It belongs to or is under the control of a company called Shere Waterwerke. Shere supplies water to persons to whom it is contractually obliged to do so. The procedure is that a prospective consumer applies to Shere for permission to connect and if the application is approved, Shere provides the consumer with water.

2 The first respondent was a director of Shere. On 11 February 2013, the first respondent was travelling past the premises. He saw the connection. He made enquiries and came to the conclusion, correctly, that the connection had been effected without the necessary permission from Shere. He then proceeded to instruct an employee of Shere to remove the connection by closing the valve and physically removing the connection, after which he and one of his co-directors laid a charge with the police. Throughout, the first respondent intended to protect the interests of Shere.

3 Indeed, his allegation that he in fact acted on behalf of Shere was not challenged or disputed by the applicant. Nor is the allegation that he consulted with and reported to his co-directors on what he had done. There is no suggestion that at that time Shere repudiated the actions of the first respondent.

4 It seems that the first respondent left one or more workers to remove the connection because members of the management of the creche saw the a worker digging in the vicinity of the connection and found out that he had removed the connection on the instructions of the first respondent. But for reasons which were not explained, nobody on behalf of the applicant contacted the second respondent either to protest or discuss the matter. Instead the applicant simply got a plumber to restore the water supply to Shere's pipeline.

5 During the early evening of the same day, the second respondent was once again travelling past the premises. He noticed that connection to Shere's pipe had once again been effected. But this time the connection had been concreted in. Mindful that the concrete would harden, he and Shere's employees immediately opened up the connection and once again disconnected the water supply to the applicant's premises.

6 Early the next morning, the second respondent once again drove past the premises. There he found some workmen digging around the site of the connection he had caused to be removed. He told them to stop and they obeyed. The second respondent then went to the premises to find out who was responsible for what he regarded as the violation of Shere's rights and property. He encountered a Mrs Andrejevic. A

heated argument ensued. Mrs van der Merwe, followed by Mrs Koster, another employee of the applicant arrived on the scene. I have little doubt that voices were raised, in my view by all concerned. The argument was not restricted to the legitimacy of the connection to and the disconnection from the water supply but became personal.

7 An unidentified passing motorist was so concerned by the ferocity of the argument that he stopped. Assuming that the three ladies might be in some danger, he gallantly asked them if they needed his help. They said they did not. It is relevant to what followed that no charge was laid with the police against the second respondent.

8 Instead, by notice of motion dated 15 February 2013, and on very short notice to the respondents, the applicant went to court for an order interdicting the first respondent from coming within 100 metres of the premises, contacting intimidating or threatening any employee of the applicant, interfering or involving himself with the business of the applicant, ordering the first respondent to restore the water supply to the premises and prohibiting the first respondent from interfering with that water supply.

9 The matter came before Pretorius J. The second respondent was represented by counsel. The learned judge granted interim relief in all the respects I have mentioned in the form of a rule *nisi* to operate immediately. This is the extended return day of that rule. The second respondent abides but the first respondent opposes confirmation of the rule.

10 As a result of the present case, Shere disassociated itself from the first respondent. He resigned as a director of Shere. I have pointed out that subjectively the first respondent acted as he did to advance the interests of Shere. I find it surprising that the first respondent did not before he summarily disconnected the water supply, make enquiries. There was a meter within the connection. There would not have been a meter unless the consumer of the water wished her consumption to be measured, obviously for payment in due course. The first respondent ought to have realised that there had been a misunderstanding. I find equally surprising that Mrs van der Merwe did not, once she heard that the water supply had been disconnected at the instance of the second respondent, did not contact him to discuss the matter and find out why he was acting as he did.

11 The relief sought before me falls essentially into two categories: firstly, to prevent violation of the rights of personality of the applicant's employees;[1] secondly to prevent a further spoliation of the applicant's water supply.

12 As to the first category of relief: I think that the case for the applicants, that the three ladies were terrified by the violent shouting of the first respondent, is overstated. The applicant seeks final relief in this regard. The *Plascon-Evans* rule applies. The First respondent denies violent behaviour. As I have said, I am sure that the participants in the argument shouted at each other. But they did not try to run away from the first respondent or call the police or even report the matter to the police. And most telling in this regard, the employees of the applicant did not tell the kindly motorist who stopped to provide assistance that they feared for their bodily or emotional integrity. I conclude that in the shouting match, the applicant's employees probably gave as good as they got. I think it likely that friction between the various parties arising from their competing commercial interests played a part in the applicant's decision to seek personality relief.

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[1] It was not argued that the applicant did not have standing to protect these rights of its employees.

13 It follows from this conclusion that none of the relief which falls into the first category should be granted.

14 Counsel for the first respondent presented a well-constructed argument in answer to the spoliation claim. The contention is that the acts of connection to Shere's pipeline spoliated Shere of its water. While counsel recognised that the disconnections were acts of spoliation by the first respondent, the submission was that the first respondent had, acting in his capacity as a director of Shere, engaged in acts of counter-spoliation consequent upon the spoliation constituted by the connections. That the self-help complained of constituted an act of counter-spoliation carried out swiftly after an earlier act of spoliation can constitute a defence to a claim for spoliatory relief The problem is that this defence was never raised by the first respondent in his papers.

15 In *Mthimkulu and Another v Mahomed and Others,*[2] a full bench of this Division considered whether it had been appropriate for a single judge to reach a conclusion on the case by invoking the principle of counter-spoliation where this question had not been raised or addressed by the parties and where the trial judge had not put the proposition to

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[2] 2011 6 SA 147 GSJ para 6

counsel for the parties for consideration. The full bench came to the conclusion that it was not.

16 In the present case, counsel for the applicant submitted that if the defence of counter-spoliation had been raised, as it should have been, on the first respondent's papers, the applicant might well have investigated the first respondent's allegations that he had acted on behalf of Shere particularly in the light of the fact that Shere had apparently repudiated the first respondent's actions. I find merit in this submission. I am fortified by the reasoning in *Mthimkulu, supra*.

17 In *Bosman NO v Tworeck en Andere*,[3] the court considered the case of a respondent, whose right of way over a road had been spoliated by the locking of a gate over the road, who had used self-help to restore his right of way by removing the entire gate rather than merely removing the locking mechanism. In those circumstances, the court found, the respondent had exceeded the permissible bounds of counter-spoliation. I think that if proper notice of the defence had been given, the applicant and its lawyers might well have given consideration to the question whether the first respondent should not, if he were engaged in an act of counter-spoliation, have confined

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3 2000 3 SA 590 C

himself to closing the valve that controlled the water supply rather than remove the entire connection.

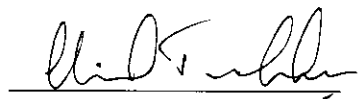
18 I conclude, therefore, that the defence of counter-spoliation should not on these papers be sustained. The question remains whether any final relief at all should be granted. In my view, while the applicant was fully justified in approaching the court urgently to protect its water supply, there is not the slightest risk that the first respondent will ever again spoliate the applicant's water supply. He did so because of his association with Shere. That association has been terminated. I see no need to confirm the rule in this regard.

19 The question of costs remains for decision. Both parties have enjoyed a measure of success, the first respondent in relation to the personality relief and the applicant in relation to the spoliatory relief. I think that each party should pay their own costs.

20 I make the following order:

1 The rule is discharged;

2 There will be no order as to costs.



NB Tuchten
Judge of the High Court
19 March 2014

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