

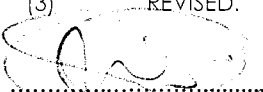
REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

3/11/16

CASE NO: 68286/2015

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED.
 SIGNATURE	
<u>03/11/2016</u> DATE	

REIRITS CC.

APPLICANT

AND

MOHAMED SALIM ABDOOL CARRIM

RESPONDENT

JUDGMENT

THOBANE AJ,

Introduction

[1] On 25 June 2014 the respondent, an accountant, sold his accounting practice that traded as "M S Carrim & Company" to the applicant for the sum of R2.1 million. The agreement the parties concluded for the sale of the business provided that the sale included;

1.1. The trade name "M S Carrim and Company";

1.2. The goodwill of the business;

1.3. Any brand names or patents; and

1.4. The clients of the business.

[2] Initially applicant purchased 65% of the members interest in the entity known as "M S Carrim and Company". The respondent retained 35% of the members interest.

[3] On 7 July 2014 the applicant changed its name to Reirits CC. On 26 September 2014 the parties agreed to go their separate ways. The remaining 35% of members interest held by the respondent was purchased from him for the sum of R1.1 million.

[4] The parties concluded an agreement which incorporated restrain of trade provisions. Clause 10 of the sale agreement stated in relation to the respondent;

".....shall not, for a period of 3 years from the EFFECTIVE DATE be interested or engaged, whether as a proprietor, partner, director, shareholder, employee, member of a

syndicate or otherwise directly or indirectly howsoever in any business which carries on in competition to "THE BUSINESS" hereby sold and within a 50 km radius of the business except as employee and/or member of MS Carrim Secretarial CC. "

[5] In this application the applicant seeks an order in the following terms;

- 5.1. Restraining and interdicting the respondent from utilizing the trading name, "M S Carrim and Company", together with its logo "MSC";
- 5.2. Restraining the respondent from passing off his own business as "M S Carrim and Company";
- 5.3. Restraining the respondent from competing with the applicant;
- 5.4. Directing the respondent to pay the costs of this application.

Applicant's case

[6] The applicant contends that the respondent is continuing to use the trade name M S Carrim and Company, unlawfully, in breach of the agreement the parties concluded.

- 6.1. On 13 July 2015, applicant wrote a letter to the respondent requesting him to stop using the said trading name. In that letter the applicant drew the respondent's attention to a clause in the agreement which was inserted at the respondent's request to the effect that the applicant was to discontinue the use of the trading name. That clause reads as follows;

"SNYMAN may continue to use the trading name of MS Carrim & CO for another six months where after SNYMAN may not use this name directly or indirectly and the reference to MS Carrim & Co must be removed from all stationary and marketing signs. "

- 6.2. Another letter was addressed to the respondent on 17 July 2015. In the letter the respondent was again informed that his continued use of the logo and the name was unlawful. The respondent replied the same day. In his letter, he asserted that he was entitled to the use of the name. In fact, his letter bore the disputed trading name as well as the logo, on its letterhead.
- 6.3. Further correspondence was exchanged between the parties however the respondent failed to give an undertaking that he will not utilize the name "M S Carrim and Company" to conduct business.
- 6.4. In July 2015 the applicant became aware, through one of its clients, that the respondent had approached some clients with the view to solicit business. The respondent contends that the respondent made use of the same name and logo and that such use was not authorized. The applicant contends therefore that the respondent is unlawfully passing off his business as that of the applicant.
- 6.5. The applicant is of the view that there is a protectable interest and that should the respondent not be held to the restraint of trade its client base will be eroded and its name, goodwill and reputation will be harmed.
- 6.6. The applicant is seeking a declarator, an interdict plus a punitive order of costs.

Respondent's case

[7] The respondent contends that three issues are to him critical, namely, invocation of the arbitration clause, ownership of the name as well as the failure by the applicant to make out a case for an order of restraint.

7.1. The respondent correctly abandoned the line of attack that related to arbitration and stated that he was prepared for the matter to be adjudicated upon and finalized by this court;

7.2. The respondent does not challenge the manner in which his accounting practice was purchased. He states further that the purchase of the business included the trade name and any brand or patents.

7.3. That when the parties agreed to part ways, it was agreed that the clause that follows below, be incorporated into the agreement;

"SNYMAN may continue to use the trading name of MS Carrim & CO for another six months where after SNYMAN may not use this name directly or indirectly and the reference to MS Carrim & Co must be removed from all stationary and marketing signs. "

7.4. The respondent is further seeking rectification of the agreement to the extent that the applicant is interpreting it to mean the contract concluded between the parties, prevented the deponent to the affidavit, Gerhard Snyman, personally, from using the disputed name, but did not bind the applicant.

7.5. The respondent denies that it was agreed that he would not be entitled to use the name M S Carrim and Company. He states that the agreement was to the effect that the applicant or Snyman would not use the name. He is of the view that he was not prevented from using the name. He could not use the name only

in the course of business.

- 7.6. That although there is a restraint of trade provision in the agreement, it did not contemplate restraining him from using the name or the logo in a "non-competitive environment". All it did was to restrain him from entering into a competing business.
- 7.7. The respondent further denies that the applicant has made out a case for an order for enforcement of a restraint of trade provision of the agreement between the parties. He alleges that a reach has not been established, that the applicant relies on hearsay evidence and that in any event he is giving an unconditional undertaking to abide by the restraint of trade.

The Law

- [8] The requirements for a final interdict are trite and have been restated in many cases. In **Setlogelo v Setlogelo 1912 AD 221** at 227 Innes JA said:

"The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy."

- [9] The relief cannot be granted if there are disputes of facts (i.e a genuine dispute), whereby the applicable test and the correct approach to be followed will be as set out in **Stellebosch Farmers Ltd v Stellenvale Winery (Pty) Ltd Winery 1957 (4) SA 234 (C)** and well explained in **B H Water Treatment (Pty) Ltd v Leslie and Another 1993 (1) SA 47 (W)** at 55 A-E. In terms of this approach, a final interdict is to be granted

in motion proceedings if the facts stated by the respondent, together with the admitted facts in the applicant's affidavit, justify such an order. The approach now coined the Plascon - Evans approach; ***Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634H- 635B.***

[10] I now turn to consider what each requirement entails;

10.1. CLEAR RIGHT

In order to establish a clear right an applicant has to prove on a balance of probability the right which she seeks to protect. In ***EDREI INVESTMENTS 9 LTD (IN LIQUIDATION) v DIS-CHEM ES (PTY) LTD 2012(2) SA 553 (ECP)*** at 556C-D Eksteen J had this to say:

“The right must of course be a right capable of protection. The party seeking to establish a clear right so as to justify a final interdict is required to establish on the balance of probability, facts and evidence which prove that he has a definite right in terms of the substantive law. It seems to me therefore that where the authorities refer to a clear right, it is reference rather to a right which is clearly established.”

10.2. AN INJURY COMMITTED OR REASONABLY APPREHENDED

Attestation to show some action to exhibit tampering or interference with the applicant's rights or proof of a well-grounded apprehension that acts of the kind will be committed by the respondent is required. A thorough reading of case law shows the use of the word as meaning an act of interference with, or an invasion of the applicant's right and prejudice that follow. The injury must be a continuing one. In reference to a continuing injury Beadle CJ, in ***FRANCIS v ROBERTS 1973(1) SA 507*** at 513 E, had the following to say;

“The injury with which this case is concerned is not the sort of injury which can be described as an injury which has occurred once and for all. It is the type of injury which is capable of repeating itself time and again. The defendant has not, even today, given an unequivocal undertaking that she will refrain from allowing the infringement to occur again. Furthermore from the manner in which the defendant has defied the plaintiff’s rights in the past, it cannot be said with any confidence that the plaintiff’s fears that she will infringe his rights again are groundless. I do not think that this is a case where there is any obligation on the plaintiff to show, on a balance of probabilities that if he is not granted an interdict the defendant will again infringe his rights. I draw attention to the fact that proof by the plaintiff that the injury will again occur if an interdict is not granted, is not one of essential requisites for the granting of an interdict as laid down in Setlogelo’s case, supra..... This case shows that for this type of injury an interdict is certainly, a proper remedy (513H).”

At page 514G-H BEADLE CJ continued;

“Furthermore, it must be borne in mind that this was not a case where the plaintiff rushed into litigation. Had he, without giving the defendant an adequate opportunity of remedying the nuisance, simply gone, to law, then I would have had very little sympathy for him. But I have set out the facts to show that the plaintiff exercised considerable patience before eventually resorting to legal action and right up to the very end the defendant persisted in claiming that the plaintiff had no right to demand that she trim back her trees.”

It is sufficient for an applicant to show that there is a reasonable apprehension of harm. An applicant need not show that such injury will

result. Such apprehension must flow from the conduct of the respondent.

10.3 ABSENCE OF ANY SATISFACTORY REMEDY

The court will not, in general, grant an interdict when the applicant can obtain adequate redress in some other form of ordinary relief. This is because a final interdict is a drastic remedy and is in the court's discretion. An applicant for a final interdict must allege and prove on a balance of probabilities that he has no alternative legal remedy. In ***KEMP, SACS & NELL, REAL ESTATE (EDMS) BPK V SOLL en 'n ANDER 1986(1) SA 673(O)*** at 689F-H the question that arose was whether the court had a discretion to refuse a final interdict where an applicant had succeeded in establishing the legal requirements for the granting of the final interdict. It was held that the discretion of the court where consideration of prejudice and convenience are of importance was bound up with the question whether the rights of the party complaining could be protected by any other ordinary remedy. It would therefore seem that the discretion of the court to refuse a final interdict is indeed limited to the availability of an adequate alternative remedy.

Analysis

[11] If the applicant were to be said to have a clear right, such a right would be derived from the two agreements the parties concluded. The applicant, in terms of the contract concluded on 25 June 2014 purchased the business known as M S Carrim & Company, Professional Accountants, & Tax Consultants, including the following assets;

11.1. The trade name;

11.2. The goodwill attached thereto;

- 11.3. The fixed and movable assets;
- 11.4. Any brand name or patents;
- 11.5. The agreed and listed clients;
- 11.6. The listed staff together with their conditions of employment.

[12] From the simple reading of clause 1(a), it seems to me clear that the applicant acquired the rights to the name of M S Carrim & Company. The applicant in the founding affidavit states that it owns the name, logo and goodwill in terms of the agreement. Not only that, but also that a sum of R2.1 million was paid for same. In responding to this assertion contained in the founding papers the respondent states the following in the opposing affidavit;

"save to admit that the applicability of the restraint of trade, the purchase price of R2.1 m (but not that it was in respect of the name and logo, as per the later agreement) and that applicant might possess the rights it states, but not in relation to the subject matter it raises the remaining content hereof has been addressed above and is denied."

It is difficult to comprehend what the contention of the respondent is. Either the applicant derives its right from the purchase of the business together with what attaches thereto as is contained in clause 1(a) of the agreement or not. Nowhere in the papers does the respondent directly challenge the rights, particularly to ownership, that the applicant acquired when the business was purchased. The emphasis that the respondent seems to be harping on, is the use of the name. Even on this emphasis, the use of the name had clearly established parameters, the existence of which do not support the respondent's case. Moreover, there is a clear difference between ownership and the right to use.

[13] It is my view that the applicant has unequivocally shown that it has a clear right, not only of ownership, but also to the use of the name "M S Carrim & Company." I see no reason why the logo, as well, that attaches to the business can not form part of the right so unequivocally delineated.

[14] The respondent has in correspondence with the applicant, used the name "M S Carrim & Company". He has also used the logo which bears the name any style "MSC". A letter from the respondent dated 17 July 2015 is clear proof of the fact that despite the agreement the parties concluded, the respondent continued to use both the name and the logo. However, a troubling feature of the respondent's intransigence that goes to the core of the respondent's attitude, is his wrong belief to the effect that the name "M S Carrim & Company", belongs to him. In that letter the following is stated;

".....

.....the name M S Carrim & Company belongs to Mohamed Salim Abdool Carrim as per clause 5.6 of the agreement of sale and as a result I may use the name."

As stated above clause 5.6 reads as follows:

"SNYMAN may continue to use the trading name of MS Carrim & CO for another six months where after SNYMAN may not use this name directly or indirectly and the reference to MS Carrim & Co must be removed from all stationary and marketing signs."

Clause 5.6 is not about ownership of the name. It is rather about a

limitation placed on the applicant to use the name as well as an injunction to discontinue with its use after the expiry of six months. To attach a meaning imputing ownership is an epitome of ingenuity.

[15] The use of the name in the letter dated 17 July 2015 is a clear sign that an injury has been committed. Not only that. A false and ill conceived belief of ownership of and the assertion that that the name may be used by the respondent, is a pointer to the apprehension about the use of the name in future. There is therefore not only proof of an injury having been committed but also a reasonable apprehension of its continuation. Such an apprehension, is derived from the past injury, its continuation as well as a well grounded belief that it will materialize in the future, based on the evidence, is reasonable.

[16] The respondent has been given adequate time to remedy the situation. The question therefore, is whether in the present case the court can exercise any discretion other than granting the relief applied for. Put differently, can applicant obtain adequate redress in some other form of ordinary relief? The respondent has, in one of his letters, "threatened" to reduce the period of the restraint of trade. In the opposing affidavit he has stated that such an indication was nothing but a "threat". He states that he has not entered into any business that competes with the applicant and that he does not intend to do so in the future. The respondent's word is worthless, if the provisions of the agreement coupled with recent history is anything to go by. It follows that no alternative relief exits.

- [17] Lastly, the respondent contends that the agreement should be rectified so as to reflect the common intention of the parties. This contention does not even get off the blocks.

Costs

- [18] Both parties are seeking a punitive cost order against each other. The applicant contends that the prayers were couched in such a way that an order of costs would have been sought in the event of opposition. The applicant further argues that after the respondent had been served with the application, there was an approach from the respondent's legal representative, who suggested that an order be obtained on an unopposed basis along the lines of the notice of motion, but that the respondent not be liable for costs. That despite this proposal, the respondent nevertheless proceeded to oppose the application. The opposition, it is argued, is unreasonable, frivolous and vexatious in light of the fact that the respondent has mounted no credible opposition, had been warned that his conduct of using the name and logo was unlawful and has now belatedly made an undertaking to abide by the restraint of trade.
- [19] The general principle underpinning the award of costs is that an unsuccessful litigant should pay the costs of his/her opponent and generally, when a party institutes action but withdraws it, he/she should pay the costs of the Defendant unless good grounds exist. See ***Germishuys v Douglas Besproeiingsraad 1973(3) SA 299 (NK)***. Being a general principle, courts are flexible in their approach and retain a measure of discretion which is judicially exercised when appropriate.

[20] The principles to legal costs were summarized as follows in **Goldfields Ltd and Others v Motley Rice LLC 2015(4) SA 299 (GJ)** at paragraphs [29] and [32] :

"The starting point for an analysis of the South African legal position for legal costs is the general rule that:

- (a) In ordinary cases costs should follow the event - the successful party is ordinarily entitled to costs against the unsuccessful party;*
- (b) Costs are awarded in the discretion of the court which may in appropriate cases not award costs to a successful party or even award costs against such party..... The existence of a discretion of the court in all cases (constitutional and otherwise) ensures that the court is always in a position to balance the interest of the parties and to protect its own process, if necessary through costs orders. In this context there is no party which is a priori immune from the court's power to protect its own process through costs orders." (my emphasis).*

[21] The Constitutional Court has summarized the position pertaining to costs as follows in **Ferreira v Levin NO and Others 1996 (2) SA 621 (CC)** at 3;


"The Supreme Court has, over the years, developed a flexible approach to costs which proceeds from two basic principles, the first being that the award of costs, unless expressly otherwise enacted is in the discretion of the

presiding judicial officer and the second that the successful party should, as a general rule, have his or her costs. Even this second principle is subject to the first. The second principle is subject to a large number of exceptions where the successful party is deprived of his or her costs. Without attempting either comprehensiveness or complete analytic accuracy, depriving successful parties of their costs can depend on circumstances such as, for example, the conduct of the parties, the conduct of their legal representatives, whether a party achieves technical success only, the nature of the litigants and the nature of the proceedings."

- [22] Apart from the fact that the applicant has, in my view made out a case, the court must determine if it must protect its own process through an order of costs. The conduct of the respondent must attract the court's criticism. The respondent in flagrant disregard of the agreement that the parties concluded, proceeded to make use of the name M S Carrim and Company, after it was purchased from him. He was warned about the unlawful use of the name but he offered fanciful explanations and excuses, and did not relent. The respondent offered not to contest the matter on condition each party pays its own costs. When the applicant insisted on costs, the respondent persisted in opposing the merits of the matter. On the facts of this case there appears to be no reason why the respondent opposed the application. The conduct of the respondent is the one which calls upon the court to take a robust view and show its disapproval and displeasure by awarding a punitive cost order.

[19] I therefore make the following order;

1. The respondent is restrained and interdicted from utilizing the trading name, "M S Carrim and Company", together with its logo "MSC";
2. The respondent is restrained from passing off his own business as "M S Carrim and Company";
3. The respondent is restrained from competing with the applicant;
4. The respondent is directed to pay the costs on a scale as between attorney and client



SA THOBANE

ACTING JUDGE OF THE HIGH COURT

Date of hearing : 22nd August 2016

Date of judgment : 3rd November 2016

Applicant's Counsel : Adv.

First respondent's Counsel : Adv.