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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG PROVINCIAL DIVISION, PRETORIA

CASE NO: 12130/2021

REPORTABLE: **NO**

OF INTEREST TO OTHER JUDGES: **NO**

REVISED: N/A

Date of hearing: 23 March 2021

In the matter between:

CLOVER SA (PTY) LTD

(Registration No.: [...])

And

SIQALO FOODS (PTY) LTD

(Registration No.: [...])

APPLICANT

RESPONDENT

JUDGMENT

NYATHI AJ

A. INTRODUCTION

[1] This is an urgent application wherein the Applicant seeks final interdictory relief against the Respondent.

[2] The essence of the Applicant's complaint is that the prominent use of the word "BUTTER" on the Respondent's label for its "STORK BUTTER SPREAD" product misrepresents that it is pure butter and not a modified butter product.'.

[3] The Applicant contends that this contravenes Sections 3 and 6 of the Agricultural Products Standards Act 119 of 1990 (the "Act") and the Regulations Relating to the Classification, Packing and Marking of Dairy Products and Imitation Dairy Products intended for sale in the Republic of South Africa, GN R1510 ("the Regulations"), published under the Act. The Applicant further contends that this conduct constitutes unlawful competition.

[4] There are three questions presented:

4.1 Whether this application is urgent.

4.2 In the event that this application is found to be urgent, whether the Respondent's STORK BUTTER SPREAD is misleading; and

4.3 Whether the Applicant is entitled to final relief.

B. URGENCY

[5] At the inception of the hearing the parties agreed that the aspect of urgency should be argued first.

[6] From submissions made by on behalf of the parties by their counsel the following facts can be distilled:

6.1 On the 1 February 2021, the Applicant addressed a letter of demand to the Respondent in which it complained of the latter's alleged contravention of the Act and Regulations.

6.2 On the 8 February 2021, the Respondent replied to the Applicant's letter of demand rejecting the former's demands.

6.3 6 weeks later, the Applicant launched its application in which the Respondent was given 4 business days to file an answer.

6.4 The Applicant contends that this application is urgent and should be heard as such. The respondent submits a contrary view.

C. SUMMARY OF COMMON CAUSE FACTS

[7] The Applicant seeks to interdict the Respondent who has commenced distributing and selling a medium fat product which has the words "STORK BUTTER SPREAD" boldly imprinted on its product label. The Applicant contends that in so doing, the Respondent is contravening the Act. More importantly that Applicant's commercial interests are negatively affected by the alleged illegality.

[8] The Applicant sets out the details of this infringement very meticulously in its founding affidavit. Its heads of argument are similarly flawless in this regard.

[9] The Respondent opposes this application and sets out its reasoning both in its answering affidavit and in its heads of argument.

[10] As I stated under the sub-heading ‘Urgency’ above, I am called to assess and decide whether the requirements for hearing this matter on an urgent basis have been met or not and proceed to do so hereunder.

D. THE LEGAL REQUIREMENTS FOR URGENCY

[11] Rule 6 (12) of the Uniform rules regulates urgent matters, i.e., matters which need the urgent or immediate attention of the court instead of awaiting their turn to be allocated a date of hearing in the ordinary course of events.¹ This subrule allows applicants to ask the court to “...dispense with the forms and service provided for in these rules.”

[12] In *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite*² and Others Notshe AJ held “... the fact [that] the applicant wants to have the matter resolved urgently does not render the matter urgent.” The court further held that the “procedure set out in Rule 6(12) is not for the taking”.

¹ Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin’s Furniture Manufacturers) 1977 (4) SA 135 (W) at 136H

² 2012 JOL 28244 GSJ at par 6 and 7 / (11/33767) [2011] ZAGPJHC 196 (23 September 2011)

[13] The onus is on the Applicant to persuade the court that the matter is urgent. It must do so in its founding affidavit. The Applicant should set out the circumstances justifying the hearing of its application on an urgent basis and why it would not obtain substantial redress if the matter were to be heard in due course.

[14] "It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course, but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his cases in that regard."³

[15] Commercial interests do in appropriate cases justify the invocation of rule 6(12) of the Uniform rules. Such was the case in *Twentieth Century Fox Film Corporation & Another v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (JV) AT 586 G.

E. SUBMISSIONS BY THE PARTIES

[16] The Applicant lists its contentions on urgency in paragraphs 95 to 102 of its founding affidavit as follows:

16.1 Unless interdicted, there is a reasonable likelihood that consumers and concerns such as the Applicant will suffer serious

³ Notshe AJ in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd* at 7.

and irreparable financial harm should the Respondent be allowed to continue selling its STORK BUTTER SPREAD product.

- 16.2 The alleged contravention of the Act and Regulations constitutes a criminal offence of which the Respondent was made aware by way of the letter of demand which the latter chose to ignore. This renders the matter urgent.
- 16.3 A mere likelihood that consumers would be deceived or confused by such continuing unlawful conduct would constitute sufficient grounds for urgency.
- 16.4 The Applicant and the other competitors of the Respondent are obliged to comply with and adhere to all statutory and regulatory provisions in the production, marketing and sales of their goods, irrespective of the costs of such compliance. They are, therefore, entitled to an enforcement of those same statutory and regulatory provisions against the Respondent so as to level the playing field.
- 16.5 The Respondent should not capitalise on misrepresentation of its modified butter product and charge a “butter” price for it. The considerable financial benefit to the Respondent and the detriment to the Applicant and the other competitors of the Respondent is, with respect, clear and manifest.

16.6 If the Applicant were to approach this Court in the ordinary course, the delay in resolving this dispute would be akin to "closing the gate once the horse has bolted" — the Respondent's product will remain in commerce on sale for the duration and, as a result, the Applicant would continue to suffer financial harm and the general public as consumers would suffer harm as a result of being misled into buying an unlawful product.

16.7 The Applicant has not immediately resorted to litigation, instead it first attempted via its Letter of Demand addressed to the Respondent, to settle the matter outside of court. Only when that was rejected by the Respondent, did the Applicant turn to this Court. This the Applicant did, in spite of the immediacy of the harm that it already suffers as a result of the Respondent's product already being sold.

[17] The Respondent submits that there is no basis to found urgency on the Respondent's alleged contravention of the Act and Regulations. It states in its answering affidavit at paragraphs 138 to 172. As follows:

17.1 The Applicant contends that "consumers and concerns such as the Applicant will suffer serious and irreparable financial harm" should the Respondent continue to sell its STORK BUTTER SPREAD product. It however does not supply any evidence how

the consumers would suffer said irreparable harm. The Respondent submits detailed results of a market research it had conducted on consumer awareness on the differences between “butter” and “modified butter” products. This was not countered in the Applicant’s replying affidavit.

17.2 The Respondent then submits that the remainder of the Applicant’s submissions on urgency pertain to the Respondent’s failure to comply with the Regulations and the alleged misleading of consumers.

17.3 The Respondent sets out the timeframe (paragraph 151 onwards) around the correspondence between the parties’ attorneys leading up to this litigation. An entire month had elapsed since the Applicant’s letter of demand and approximately 3 weeks since the Respondent rejected the Applicant’s demands. The Applicant did not forewarn the Respondent that the application to be launched would be an urgent application.

17.4 The Respondent further takes issue with the fact that the Applicant took 6 weeks to launch its application but afforded Respondent only 4 days to respond thereto and considers this a gross abuse of the urgent court process.

F. ANALYSIS AND CONCLUSION

[18] In the *Luna Meubels (Edms) Bpk v Makin*⁴ matter Coetzee J decried the abuse of the Rule 6 (12) procedure in instances where no urgency existed or was justifiable.

[19] In its submissions above, Applicant makes allegations of “reasonable likelihood of consumers and concerns such as the Applicant” suffering serious irreparable harm. applicant also concerns itself with issues of “a mere likelihood that consumers would be deceived or confused by such continuing unlawful conduct would constitute sufficient grounds for urgency.”

[20] The preceding paragraph reveals the Applicant’s real motive as being a self-serving enforcer of trade and competition laws in the field where it is operative, ostensibly to protect the consumers and other competitors from lawbreakers. This arrogation of enforcement and oversight roles can hardly bestow urgency to the complaints by Applicant in this matter.

[21] Assuming for a moment that this oversight role was indeed the Applicant’s remit, it could have proceeded differently in its crusade, notified the Respond clearly of its intended approach, or took its time and waited its turn for regular enrolment of its matter on the court roll. The urgency is thus contrived and lacks justification.

[22] In the circumstances, I am not persuaded that this matter should be heard as urgent.

G. COSTS

⁴ Footnote 1 supra.

[23] Costs: The Respondent is entitled to an award of its costs in this matter, having been compelled to respond to an unexpected urgent application in an inordinately short time. The cost order should seek to ameliorate the inconvenience and reflect the court's disapproval of the misuse of the Rule 6 (12) procedure.

H. ORDER

I make the following order:

The application is struck from the roll. Applicant to pay the Respondent's costs on an attorney and client scale,⁵ including costs occasioned upon the employment of two counsel.

J.S. NYATHI
Acting Judge of the High Court
Gauteng Division, Pretoria

Date judgment delivered: 17 May 2021.

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⁵ In Re Alluvial Creek, Ltd 1929 CPD 532

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