IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case number: 16151/2021

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

SIGNATURE 20/04/2020 DATE

In the matter between:

ZINATHI INTERNATIONAL (PTY) LTD	**Applicant**
V	
GLUTATHIONE SOUTH AFRICA (PTY) LTD	**First Respondent**
ASHLEY HARPERSAD	**Second Respondent**

JUDGEMENT

MOSOPA, J

1. The applicant in this matter brought an application against the respondents in terms of Rule 6(12) of the Uniform Rules of Court, to order the respondent to remove any and all posts from all social media platforms which state: *"Do not*

accept any requests from Zinathi International", and further to remove the posts from social media which read:

> *"Do not accept any request from this business we do not supply them no more, they do not sell glutathione products. #theywontbeme #saynotocheapproducts #saynotobackstabbers" (sic).*

pending the institution of a civil claim by the applicant against the respondents.

URGENCY

2. The respondents admitted that there was a post, created by them, on their Instagram account, about the applicant's business, but that this post has since been removed from the first respondent's Instagram account. The applicant's contended that there exists a similar post on the second respondent's Facebook page and that it is prejudicing the business of the applicant.

3. It is on the basis of this averment, even though it was disputed by the respondents, that I considered the matter urgent, as I was of the view that if I do not hear the matter now, the applicant will not be afforded substantial redress in the future. *(see Rule 6(12)(b) of the Uniform Rules of Court and* ***Luna Meubel Vervaardigers (Edms) Bpk v Makin t/a Makin Furnitures Manufacturers 1977 (4) SA 135 (W)****)*.

BACKGROUND

4. The core business of the applicant is to distribute, market and sell skincare and related beauty products. The first respondent is the supplier of a variety of skincare products in South Africa, which includes creams, body gels, capsules, oils, serums, powders and IV vials.

5. The nature of the business relationship between the applicant and respondents is in dispute, but it is apparent that the applicant ordered

skincare products from the first respondent, which will then be delivered to applicant at the expense of the first respondent.

6. Matters came to a head on 16 March 2021, when the applicant returned its consignment stock to the first respondent. The applicant further informed its existing clients that it has terminated its agreement with the first respondent. The applicant then received telephone calls from its existing clients about the post shared by the first respondent on its Instagram account.

7. The exact words posted by the first respondent on its Instagram account read as follows:

   "do not accept any requests from Zinathi International."

   In the comments section, the following was shared;

   "#theywontbeme #saynotocheapproducts #saynotobackstabbers"

8. The first respondent removed its post about the applicant from its Instagram account on 16 March 2021.

9. On 22 March 2021, the applicant's legal representatives addressed a letter to the first respondent, instructing the first respondent to, amongst other things, make an unreserved apology to their client's customers in respect of a post on the first respondent's Instagram account, which makes defamatory statements about the applicant and, withdraw the statement unconditionally.

10. The applicant's legal representatives addressed another letter to the respondents, dated 25 March 2021, instructing the respondents to remove the post on their Instagram account referred to in the letter dated 22 March 2021. In the event that they fail to do so, the applicant will approach the court to interdict the respondents from persisting with the posts.

DISCUSSION

11. The issue for determination is twofold;

11.1. Whether there exists a defamatory post on either of the respondents' social media platforms, regarding the applicant; and

11.2. In the event that such a post exists, whether or not the respondents should be ordered to remove such a post.

12. The existence of the post shared on 16 March 2021 by the first respondent about the applicant has been confirmed. This fact is acknowledged by the respondents. It is common cause at this stage that the post was eventually removed by the first respondent from its Instagram account.

13. The applicant contends that, after the removal of the first respondent's Instagram post, the second respondent shared the same post on his personal Facebook page.

14. The existence of this defamatory post about the applicant on the second respondent's Facebook page was confirmed by Mr Markus Swart. I must at this stage pause to mention that no such allegations were levelled against the second respondent in the applicant's founding affidavit, but were only raised in the replying affidavit. Also, in the letters of demand sent to the respondents, there is also no mention of the removal of the post from the second respondent's Facebook page.

15. The general rule, which is well established in our law, is that in motion proceedings, the applicant is required to make his or her case in the founding affidavit and not in the replying affidavit. (*see* ***Kleynhans v van der Westhuizen NO 1970 (1) SA 565 (O)***). This rule is based on the principle that the applicant stands or falls by his or her founding affidavit. (*see* ***Director of Hospital Services v Mistry 1979 (1) SA 626 (A) at 645H***). This rule is also based on the procedural requirement of motion proceedings which requires the applicant to set out the cause of action in both the notice of motion and the supporting affidavit. The notice of motion and the founding affidavit form part of both the pleadings and evidence. The basic requirement is also that the relief sought has to be found in the evidence supported by the facts set out in the founding affidavit (*see* ***Kleynhans*** *(supra)*).

16. I must say that annexure "RA1", which is the alleged Facebook page of the second respondent, is not clear and it is difficult to make head or tail of this page. One cannot even read what is written on this page and counsel, in argument, directed the court to what was written on the Facebook page. However, the words which the applicant alleges to be defamatory, as stated in the notice of motion and the founding affidavit do not appear on this page.

17. Mr Markus Swart deposed to the confirmatory affidavit only to the extent of confirming the allegations made against him in the replying affidavit. He did not confirm the existence of the defamatory words as expressed by the applicant in its notice of motion.

18. In any event, the applicant does not explain when this new issue, which was only canvassed in the replying affidavit, came to its attention. It is not clear whether, at the time of deposing to the founding affidavit, the applicant had knowledge of this issue, as this is not dealt with in the applicant's replying affidavit. This is important in the sense that the applicant seeks an order to interdict the first and second respondents to remove defamatory posts on their social media platforms and further contends that the second respondent still kept the defamatory post on his Facebook page. The only inference I can draw, is that the applicant had knowledge of the existence of the post (if it really existed) on the second respondent's Facebook page but failed to deal with this allegation in its founding affidavit. That fact alone is fatal.

19. What is common knowledge is the fact that the first respondent removed the alleged defamatory post on its Instagram page on 16 March 2021, a fact accepted by the applicant in its replying affidavit. This application against the first respondent then becomes academic.

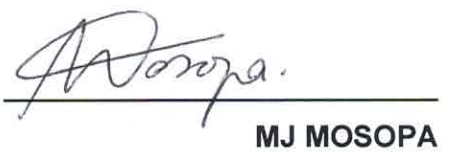
20. The applicant, in its letter of demand to the first respondent, never mentioned the existence of a defamatory post on the second respondent's Facebook page and the second respondent was never instructed to remove any defamatory post from his Facebook page. This issue only arose in this application. However, I am not satisfied that the applicant has made out a

proper case against the second respondent from what I said elsewhere in my judgment. In my view, the application against the respondent ought to fail.

ORDER

21. I therefore make the following order:

1. The application is dismissed with costs.



MJ MOSOPA
JUDGE OF THE HIGH
COURT, PRETORIA

Appearances:

For the applicant:	Adv C Britz
Instructed by:	Friedrich Inc Attorneys
For the respondent:	Adv BC Bester
Instructed by:	AH Stander Attorneys
Date of hearing:	7 April 2021
Date of judgment:	Electronically transmitted