IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO 24718/2021

(1)	REPORTABLE:
(2)	OF INTEREST TO OTHER JUDGES:
(3)	REVISED.

13/04/2022 — DATE

SIGNATURE

In the matter between:

QS ONLINE (Pty) Ltd — Applicant

and

THE MINISTER OF PUBLIC WORKS — Respondent

JUDGMENT

MBONGWE J:

INTRODUCTION

[1] This opposed application was initially set down for hearing in the Urgent Court where it was struck from the roll for lack of urgency on the 20 July 2021.

[2] At the heart of the dispute between the parties is the ownership of certain literary work that was created by the Applicant, a company the Respondent had perceived to be Ramabodu and Associates (R & A) whom the Respondent had appointed to the panel of its service providers on 11 February 2008 and 21 February 2011, (Annexures "DPW1.2" and "DPW1.2"), for the construction of an abattoire and a prison. The terms and conditions of the appointment were set out in the letter of appointment which the deponent to the founding affidavit and sole member of (R & A) had agreed to and signed. Amongst the terms and conditions was a clause that upon the completion of the projects, the copyright to the literary work shall vest in the Respondent and may be used by the Respondent in other projects of the Respondent even when the Applicant was not involved therein.

[3] On the 22 February 2013 the Applicant wrote to the Respondent advising that it had changed its name from Ramabodu and Associates ("R & A") to QS Online (Pty)Ltd ("QSO") and that it would thenceforth operate under that name ("Annexure DPW3"). The Respondent took no exception and assumed that by the change of name, the Applicant was assuming the obligations set out in the letter of appointment. No formalities were followed consequent to the change of name. The deponent to the founding affidavit, Mr Ramabodu is a qualified and registered Quantity Surveyor and presently the sole shareholder and director of the Applicant.

[4] During the period February 2017 to October 2019 the Applicant rendered the services referred to in paragraph 2 which required the creation of the literary work in dispute. Mr Ramabodu created the original work and registered a copyright thereon which he subsequently assigned to and in favour of the Applicant, thus the latter became the proprietor of that copyright. The copyright remains extant.

[5] The literary work entailed the;

5.1 preparation of the tender documents for the Grootvlei Abbatoir Chicken project;

5.2 preparation of the Bill of Quantities (for building work, electrical and mechanical work) for stage 3 of the Abbatoir chicken project, and,

5.3 preparation of the elemental estimate for stage 4 of the Kagisanong Police Station project.

[6] R & A was liquidated in 2015, that is, two years after its appointment but before it was assigned to do the work. The liquidation of R & A was conveyed to the Respondent in an email sent by IDT, who had investigated and established that QSO was not in the panel that had been appointed to the Respondent (Annexure "DPW4). The Respondent concluded that the appointment of Ramabodu had terminated upon its liquidation.

[7] The Respondent further alleges that at this stage it had paid for all the services that had been rendered by the Applicant. The Respondent wrote to the Applicant on 28 September 2020, (Annexure "DPW7"), advising it that it was not prepared to continue working with the Applicant as a result of the misrepresentation.

[8] The Applicant's case is that during or about the period between 2017 to 28 October 2019 to the date of the launching of these proceedings, the Respondent may have published and/or used, alternatively, threatened to publish and/or use the original work concerned. The conduct of the Respondent

was never authorised by the Applicant and, as such is and/or will constitute a reproduction, alternatively, adaptation of the original work and an infringement of the Applicant's copyright. The Applicant seeks a final interdictory order against the Respondent as a result.

[9] At paragraph 29 of the founding affidavit the applicant submits that it would be a travesty of justice were an organ of State *''be allowed to execute its latently unlawful conduct''*, that would oblige the applicant to claim monetary compensation – an action that would take time to be finalised.

POINTS IN LIMINE

[10] The Respondent has raised the following points *in limine* against the Applicant: (a) that the Applicant has no *locus standi* to institute these proceedings on behalf of Ramabodu and Associates which has been liquidated; (b) the applicant had misrepresented the name change and, (c) the Applicant does not meet the requirements for the granting of a final interdict.

APPLICANT'S REPLY

[11] A turn in the Applicant's cause of action emerges in its replying affidavit. The Applicant alleges that the Respondent's answering affidavit does not deal with the pertinent issue in the claim, being the Applicant's protection of its copyright. The Applicant concedes that there was never a contract between it and the Respondent and admits that Ramabodu and Associates was liquidated in 2015. The Applicant further states that in rendering the services, the parties operated in a void, meaning that there was no contract between them. This despite the Applicant's misrepresentation that it was R & A, but had merely changed its name.

[12] The Applicant alleges that the Respondent may have published and/or used and/or has threatened to publish and/or use the literary work under the Applicant's copyright without the Applicant's consent. No cogent evidence is given in this regard. The Applicant's attorneys wrote to the Respondent in May

2021 demanding an undertaking that the Respondent will not use and/or publish the Applicant's literary work concerned. The Respondent had failed to give such undertaking, resulting in the launching of this application.

ANALYSIS

[13] The Applicant's claim, the points *in limine* and defences raised by the Respondent are considered in the analysis hereunder.

[14] The first point in limine raised by the Respondent is that the Applicant has no *locus standi* to claim the copyright on behalf of the liquidated R & A. It is noted that the Applicant obviously has altered or rationalised its cause of action giving rise to the Applicant's own complaint that its cause of action is misconstrued. The application may be dismissed on this ground alone. An Applicant in motion proceedings has to make out its case on the founding affidavit. The core of the Applicant's cause of action became identifiable only in the replying affidavit and after the Respondent had file its answering affidavit.

[15] Clearly the Respondent was prejudiced in that it responded to the Applicant's claim with the terms and conditions of the contract with R & A in mind. It is impossible to find fault in the Respondent's approach as there is no clear indication in the founding affidavit what the basis of the Applicant's claim is. More so, the Applicant does not state in the founding affidavit that it had no contract with the Respondent, despite it having rendered services on the misrepresented basis that it was R & A with whom the Respondent had contracted.

[16] The Applicant's failure to disclose the liquidation of R & A and, instead allege a change of name from R &A to QSO was a calculated misrepresentation by Mr Ramabodu to fraudulently render the services to the Respondent on the basis of the contract between R & A and the Respondent. The possibility that R & A was going through liquidation at the time advice of the purported change of name was given cannot be excluded. What the facts clearly establish is that R & A had long been liquidated and, therefore, non – existent when the tenders

for the two projects were awarded. The Applicant /Mr Ramabodu, fraudulently exploited the circumstances to benefit the Applicant and now seek to disavow its misrepresentation by admitting that there was no contract between the Applicant and the Respondent.

[17] The Applicant enjoyed the fruit of its fraudulent misrepresentation of a name change and, therefore, the existence of a contract between it and the Respondent. When the terms of the contract with regard to the vesting of the copyright to the literary work do not favour it, the Applicant seeks to disavow the contract. There is no reason why the Applicant's fraudulent conduct should give it the advantage of claiming propriety of the copyright it had assigned to the Respondent in terms of the contract. The principle of estoppel finds application in favour of the Respondent in this instance.

[18] I cannot agree more with the Respondent's conclusion that the contract it had concluded with the R & A was terminated when the latter was liquidated two years before the awarding of the two tenders. R & A was, for all intent and purposes, no longer existent to carry out its contractual obligations. By fraudulently putting itself in the shoes of the defunct R & A, Applicant had itself assigned the copyright to and in favour of the Respondent in terms of the contract. That the copyright was registered after the contract was concluded is of no moment as a result of the misrepresentation.

[19] While it is not always a bar to introduce new facts in reply, the test whether such facts should be admitted as evidence lies in the absence of prejudice to the other party. In the matter of *BAECK & CO SA (Pty) Ltd v Van Zummerman and Another* 1982 (2) SA 112 (W) the Court laid the principle thus:

> *"In the present case, certainly, it could have been expected from Keller that all the facts should have been stated in the founding affidavit as they were in his knowledge. However, the approach of the court should nevertheless always be to attempt to consider substance rather than form in the absence of prejudice to any party. This approach has become well defined with regard amendments to pleadings and to notices of*

motion. I stress the aspect of prejudice because its existence in any case, if material, will obviously be a bar to an indulgence sought by another party to the proceedings."

[20] Prejudice in this case is glaring in that the misrepresentation by the Applicant has in effect induced the Respondent to unknowingly infringe the provisions of the PFMA. It is fortunate that the relevant services were rendered and seemingly to the satisfaction of the Respondent, gauging by the willingness the Respondent to have continued to work with the Applicant, if the latter could produce proof that it was not liquidated and had merely changed its name. Had the services not been rendered, the expenditure incurred in respect of the two projects would have amounted to wasteful expenditure of public funds in terms of the PFMA. Working with the Applicant would have nevertheless constituted an irregularity.

[21] In addition, the contract between the parties contained a non - variation clause. The purported change of name ought to have been effected in writing and signed for by both parties. This was not done. Again fortunately for the Respondent, the services were rendered, notwithstanding.

[22] I now turn to consider whether the Applicant meets the requirements for the final interdictory relief sought. It is trite that for an Applicant seeking the relief sought, he must establish possession of a clear right it seeks to be protected by the order; the existence of the harm or a reasonable apprehension of an imminent danger of harm to or infringement of that right; that the damage to its right will be irreparable and that Applicant has no alternative, but to approach the court.

[23] The Applicant's denial of the existence of a contract with the Respondent necessarily strips it of *locus standi* in this matter. Locus standi is an elementary requirement for eligibility to institute these proceedings. The fraudulent misrepresentation by which the Applicant unlawfully gained financially cannot lawfully confer a right to a claim on the Applicant. Even if it did, the fact that the Applicant would be entitled to institute action and claim damages,

disenfranchises the Applicant to the final relief sought. This application ought to fail in these circumstances.

CONCLUSION

[24] The efforts of the Applicant, from the inception of these proceedings, were ill-conceived. The Applicant failed from the beginning to establish an extant circumstance that it sought to be interdicted. Its reliance on what the Respondent may have done or may threaten to do is not sufficient to lend the Applicant the right to the final relief sought. The apposite legal principle was enunciated by the Constitutional Court in the matter of *National Coalition For Gay & Lesbian Equity & Other v Min of Home Affairs 2002 (1) SA (CC)* where the court found that "*a case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the court is to avoid giving advisory opinions on abstract propositions of law*"

CONDONATION

[25] It is not unusual for an institution such as the Solicitor General's office that is overwhelmed to delay in its reaction to urgent matters. Obtaining the approval to oppose an urgent matter proves to be a quite a task. Importantly, no palpable prejudice has been suffered by the Applicant resulting from the delay. The application for condonation of the late filing of the Respondent's paper is granted with no order as to costs.

COSTS

[26] The trite principle is that costs follow the outcome of the case. In awarding costs, the fraudulent misrepresentation by the Applicant by which it has benefitted itself, coupled with the desire to continue to benefit by seeking to rely on the contract when that suits it, aggravates the situation. The Applicant approached this Court seeking to perpetuate its ill-gotten gains. I can find no justification for the irresponsible dragging of the Respondent to court. The Applicant deservedly ought to bear the costs of this application.

ORDER

[27] Resulting from the findings in this judgment, the following order is made:

1. The Applicant's application against the Respondent is dismissed.
2. The Applicant is ordered to pay the costs on the opposed scale.

M. MBONGWE J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA.

APPEARANCES

For the Applicant:	Adv C.A.C Korf
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For the Respondent:	Adv N. Matidza
Instructed by:	The State Attorney Salu Building Ground Floor 316 Thabo Sehume Street Pretoria.

Date of hearing: 10 November 2021

JUDGMENT ELECTRONICALLY TRANSMITTED TO THE PARTIES/ LEGAL REPRESENTATIVE ON 13 APRIL 2022.