Court File

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 20827/2008

DATE: 24 DECEMBER 2008

In the matter between:

VENDOMATIC (PTY) LTD Applicant

And

JT INTERNATIONAL SOUTH AFRICA Respondent

J U D G M E N T

DAVIS, J:

[1] Applicant has approached this Court on an urgent basis for final interdictory relief against respondent from unlawfully interfering with applicant's contractual relationships and rights. The matter was heard on an urgent basis before me on Monday 22 December, 2008, and given the urgency of the application I have prepared under some considerable pressure a judgment which I shall now read into the record.

[2] Applicant's business is described by Mr Zelezniak who deposed to the founding affidavit as follows:

"Agreements are entered into between Vendomatic (the applicant) and the owners or operators (the venue owners) of restaurants, clubs, pubs and the like entitling Vendomatic to install the cigarette vending machines (machines) or similar devices at the premises in question. These agreements (the venue agreements) give Vendomatic the sole and exclusive right to sell cigarettes on the premises. The venue agreements are typically for a three year term subject to a further period of three years in the absence of the venue owner giving Vendomatic written notifications described. The venue owner receives a payment styled the commission calculated either on the basis of a flat monthly rate or (more commonly) on the basis of the volume of cigarettes sold from the machine(s) in a month...

Vendomatic derives income from cigarettes sold from the machines and from what it refers to as a distribution fee payable by British American Tobacco SA (Pty) Ltd (BATSA). BATSA is the most prominent producer and distributor of cigarettes in South Africa, its brands including names such as Peter Stuyvesant, Dunhill, Kent and Rothmans. BATSA is Vendomatic's principal supplier, in terms of Vendomatic's contractual relationship with

BATSA various BATSA cigarette brands are prominently displayed on machines which in turn house for the most part BATSA products. The distribution fee is paid by BATSA to Vendomatic for having BATSA products identified and displayed on the machines.

Formally Vendomatic likewise have an agreement(s) in place with the respondent whereby the respondent similarly paid Vendomatic a distribution fee in respect of the respondent's products housed and sold from the machines. The distribution agreement with the respondent terminated at the end of May 2007 at the instance of the respondent notwithstanding my attempts to continue such mutually beneficial agreement.

Until relatively recently the Vendomatic business was operated countrywide. I decided in 2007 however to scale the business down, this was done by selling off Vendomatic operations outside of the Western and Eastern Cape. The Vendomatic business in the Western and Eastern Cape is in (indistinct) and consists of some thousand machines in the Western Cape and some 400 machines in the Eastern Cape. The business remains substantial and continues to derive a

distribution income from BATSA in addition to its income from the sale/vending of cigarettes".

[3] It appears that respondent lodged a complaint against BATSA with the Competition Commission, the complaint being based on BATSA's alleged abuse of dominance. This complaint and the proceedings pursuant thereto are then set out in the founding affidavit. Thereafter, Zelezniak continues as follows:

> "Recent developments have shown that the respondent has now taken aggressive action to expand its market share. To this end the respondent has been approaching Vendomatic's venue owners who are contractually bound to Vendomatic in terms of the venue agreements and has been inducing and persuading such venue owners to stock and sell the respondent's product on their premises in contravention of the venue agreements. Inducements include providing free product to the venue owners and making cash payments to them. In making these approaches, the respondent would necessarily have known whether from the extensive information obtained by it in the course of the Competition Tribunal proceedings or simply by the obvious presence of

the Vendomatic machines on such premises (they are clearly identified as Vendomatic machines) that the venue owners in question were contractually bound to the applicant.

Furthermore, the respondent has various representatives attending on the various venues to ensure that the Vendomatic machines stock (and that such stock is regularly replenished) with the respondent's products – Camel filter, Camel Light, Winston, Davidoff and/or 20.

The respondent would in particular have been aware of the material terms of the venue agreements, including the provisions that Vendomatic was to have the sole and exclusive right to sell cigarettes on the premises. For the duration of the venue agreement the venue owner was not to allow or cause to be allowed any person other than Vendomatic to place or install on or at the premises a machine or other similar device which would in any way have the effect of competing for the customers of the machines".

[4] Zelezniak then sets out in his founding affidavit various examples of what he avers is respondent's unlawful interference by way of approaches to venue owners who

have entered into a standard agreement. I should add that attached to the founding affidavit is such an agreement.

[5] From the founding affidavit it is therefore alleged that the applicant has concluded venue agreements with some 1 400 venue owners along the lines of the standard agreement attached to the founding affidavit. Applicant's case further is that respondent has approached a number of applicant's venue owners and has secured their apparent agreement to the installation of the respondent's OTC unit in contravention of the standard exclusivity provision contained in all of the venue agreements to which I have already made reference.

[6] Applicant provides evidence of such approaches and this applicant contends is in material respects corroborated by the evidence put up on behalf of the respondent in the answering affidavit. Applicant avers further that respondent's Mr Roesstorff approached Mitchell's Ale House, African Shebeen Pub and Forest Lodge Pub, all of whom it is averred are venue owners. By virtue of Roesstorff's employment with respondent, applicant infers that he would have known or necessarily foreseen by the mere presence of Vendomatic machines that these

were applicant's venues and therefore that contracts of a standard nature had been entered into between these establishments and applicant. Accordingly, applicant submits that Roesstorff would have been alive to the nature of their contractual relationship with the applicant.

[7] Similarly, the respondent would have been aware from the evidence placed before the Competition Tribunal in the matter to which I have made reference, that the applicant had venue agreements with the Stone's venues nationwide. Until the termination of their marketing arrangement at the end of May 2007, respondent readily received a schedule of applicant's venues when the respondent was billed with an applicable marketing fee.

[8] Mr Rosenberg, who appeared on behalf of the applicant, submitted that this evidence merely provided a context in support of the need for the relief which had been claimed. The need for that relief, in his view, became apparent in the wake of respondent's refusal to provide an undertaking sought by applicant's attorney in a letter of 28 November 2008. In that letter applicant's attorney pointed out to respondent that the applicant's installation of cigarette vending machines was pursuant to a standard contract with venue owners in terms whereof

applicant enjoyed a sole and exclusive right to sell cigarettes on these premises. Respondent was well aware of the terms of the applicant's standard contract, not least of all because of the evidence which had been placed before the Competition Tribunal pursuant to the complaint.

[9] Given that the applicant had recently become aware of respondent's approaches and inducements to the applicant's venue owners, respondent had been called upon to give an unequivocal undertaking to cease what applicant considered to be intentional interference with its contractual arrangements.

[10] Mr Rosenberg submitted that the respondent's answering letter of 5 December 2008 was in itself illuminating. In that letter respondent declined to furnish an undertaking on the ground that its conduct in approaching the venue owners was not unlawful. Mr Rosenberg viewed it significant that it did not indicate that its problem in furnishing an undertaking lay in the fact that in approaching venue owners it was not sure whether or not they were applicant's venue owners and, further, that it was unaware of the material terms of the venue agreements.

[11] Mr Rosenberg therefore submitted that in the circumstances there was little doubt that the respondent considered itself to be at large to continue approaching these venue owners and that indeed it would do so. From its answering papers that this particular intention had become clear. From the evidence provided by the respondent it was clear in the applicant's view that respondent was intent on approaching the 1 000 venue owners in the Western Cape.

[12] Mr MacWilliam, who appeared on behalf of the respondent, complained about the very nature in which this application had been launched. He first observed that applicant had applied for relief on an extremely urgent basis, as he said three days before Christmas in the middle of a court vacation. It had given the respondent three days' notice of the application, served its replying affidavit at approximately 10:30 on the morning of the hearing and in that replying affidavit indicated that it was intent on moving two further amendments to its notice of motion. In Mr MacWilliam's view the application was patently not urgent, alternatively it was never sufficiently urgent to justify the procedure which applicant had adopted.

[13] In the preliminary answering affidavit filed by the respondent, respondent takes up this particular theme as follows:

> "Respondent's first over-the-counter dispensing solution (called the MAC) unit was installed by the applicant at Stone's Night Club in Durbanville in May 2008, this is the club referred to in paragraph 15.6 of the founding affidavit. At the time Stones had a Vendomatic vending machine installed. Not only that but Stones also had a digital distribution machine...which is the OTC solution used by the British American Tobacco South Africa...to sell cigarettes".

In short, the point being made by the respondent was that the apprehension of any interference with applicant's venue owners had taken place so long ago, namely in May 2008, that in itself this indicated that the frenetic launching of an application three days before Christmas was itself evidence that the urgency had been self-induced rather than having had the application launched shortly after the apprehension of harm.

[14] Mr MacWilliam also submitted that the applicant seeks to appropriate to itself anyone who it regards as a venue

owner. In his view it seeks to do this in circumstances which has never informed a single venue owner that it intends to bring the present application, notwithstanding that it is these venue owners' rights as much as anyone else's, which will be prejudiced by the application should it be successful.

[15] Mr MacWilliam further noted that not only has a single affidavit been put up by a venue owner, nor has a venue owner been cited as a respondent but when the respondent sought to approach the venue owners referred to by applicant, the applicant warned the respondent to cease behaving in this fashion applicant's attorneys claiming "it would be appreciated if you would request Orin and any other employees not to attend on the venues referred to in the court papers until such time as the matter has been resolved".

[16] Mr MacWilliam also referred to the seven venue owners who are described in the founding affidavit. Of these, one did not have a contract with the applicant, a fact that has been admitted, another contract which has been properly attached in reply may well have expired. In relation to a third contract, applicant did not contest that the person who signed the contract was not so authorised to do so.

In the circumstances Mr MacWilliam submitted that in no less than three of the seven contracts referred to which were put up, as he said, at mildest(?) suspect, applicant now seeks final relief in relation to every other possible venue owner without even informing, let alone joining, these venue owners to the application.

[17] In any event, in the circumstances Mr MacWilliam submitted, it was clear that before the applicant could obtain any relief which affects any venue owner, the venue owner must have been joined to the proceedings.

[18] So much therefore for the disputes between the parties as they flowed from the papers.

The requisites for a final interdict

[19] The three requisites for a final interdict are trite. They are briefly:

1. A clear right on the part of the applicant
2. An injury actually committed or reasonable apprehended
3. The absence of any other satisfactory remedy

(See Setlogelo v Setlogelo 1914 AD 221)

[20] Turning to the question of a clear right, Mr Rosenberg referred to McKerrin and The Law of Delict (7th ed.) where the learned author writes that in South African law, as in English law "intentionally and without lawful justification to induce or procure anyone to break a contract made by him with another is a wrong action and pursuit of that other if damage results". McKerrin writes that the rule is merely a branch of a much wider proposition, namely that he who wilfully induces another to do an unlawful act which, but for his persuasion would or might never have been committed, is answerable for the wrong which he has procured.

[21] More recently Van Heerden-Neethling:Unlawful Competition (2nd ed.) state that interference with the contractual relationship is present where a third party's conduct is such that the contracting party does not obtain the performance to which he is entitled from the other party or where the contracting party's contractual obligations are increased by a third party. They state that this type of conduct may naturally also occur in the context of commercial competition.

[22] At page 245 of their work, the learned authors state:

"In South African law the general rule is that the intentional interference by a third party with the contractual relationship of another in principle constitutes an independent delictual cause of action. Much of the decisions deal with intentional interference in circumstances where a third party induces, entices or instigates one of the contracting parties to commit breach of contract".

In Atlas Organic Fertilisers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd 1981(2) SA 173 (T) at 202, Van Dijkhorst, J stated:

"A delictual remedy is available to a party to a contract who complains that a third party has intentionally and without lawful justification induced another party to a contract to commit a breach thereof".

Van Heerden and Neethling submit that this principle also applies to the conduct of competitors. Accordingly, A acts unlawfully towards B, a rival, if he entices away B's customers, supplies, credit granters etcetera by inducing them to commit breach of contract.

[23] At 252 of their work, the authors then continue:

"It is nevertheless important to note that in particular circumstances breach of contract by an

> entrepreneur they also constitute unlawful competition against his rivals with whom he does not stand in a contractual relationship and whose goodwill is or will be infringed as a result of the conduct complained of".

Such a case apparently came before the Court in 20th Century Fox Films Corp v Anti (indistinct) Films (Pty) Ltd. The applicants, rivals of the respondent in the field of video cassettes, applied for an interdict restraining respondent with whom they had no privety of contract from competing with them in breach of his contractual obligations towards a third party. The second applicant's case was based on the fact that respondent has breached the terms of the contract subject to which it had purchased the cassettes in the United Kingdom. Those terms were imposed to protect it (the second applicant's) own interests and those of the first applicant. That such breach is prejudicial and damaging to it, the second applicant intends to trade in video cassettes in South Africa and that therefore the respondent has acted unlawfully in competition with the second applicant. Goldstone, J decided that:

> "On the assumption that the applicant's allegations of fact are true and correct, I cannot find at this stage of the proceedings that the applicant does not

have a *prima facie* cause of action for an interdict and damages".

[24] This excursus into the law very briefly reveals that an intentional interference in circumstances where a third party induces one of the contracting parties to commit a breach of contract is a delict and, accordingly, our law protects therefore the rights-holder, that is the rights-holder who can source its rights in a contract which a third party is seeking to render redundant. In my view, therefore, in South African law there is a right on the part of a party such as applicant to approach this Court to protect their contractual relationships.

[25] Turning to the question of an injury actually committed or reasonably apprehended, in V&A Waterfront Properties v Helicopter Marine Services 2006(1) SA 252 (SCA) at 257, Howie, P confirmed that what is comprehended by an injury is essentially an infringement or an invasion of right. In that case the threatened invasion of the first appellant's rights under the lease agreement constituted proof of reasonably apprehended injury.

[26] Turning to the question of the absence of any other satisfactory remedy, Howie, P stated that the appellant in

that matter was entitled to enforce its bargain, that being so a prohibitory interdict was the only satisfactory way to ensure that enforcement of the bargain.

[27] Respondent appears to take the view that it has a defence based on justification that is legitimate competition. There is no question that our law seeks to promote legitimate competition and that is why in all forms of restraints an exercise of proportionality between legitimate rights of competition and the protection of contractual arrangements which have been voluntarily entered into needs to be exercised. However, competition which involves the intentional interference with a competitor's contractual rights by inducing, in this case venue owners to breach a material term of their venue agreement with applicant, does not amount to lawful conduct, that must be clear from the jurisprudence already analysed in this case. There would have to be some compelling reasons of social and economic policy to trump the generally applicable principle that intentional interference with contractual rights of another, particularly in the form of an inducement to breach the contract, is unlawful. There is nothing in the papers which suggests the case put up by the respondent as to

what the social or policy considerations might be in these circumstances.

[28] The threatened invasion or infringement of the applicant's rights not to have its contractual arrangements unlawfully interfered with is therefore clearly an injury for the purposes of the interdictory requirements. It is also clear that an interdict is the appropriate remedy. It is here where it appears to me that Mr MacWilliam's analysis of the dispute is palpably incorrect. The relief sought is not to recover damages from the seven venue owners who were cited in the founding affidavit, it is of an anticipatory nature that is to prevent further inroads into its venue owner base to protect rights which it had entered into with venue owners and which it anticipates may be destroyed by virtue of conduct which has been commenced by respondent and which it has every reason to believe will continue. (See in this particular case respondent's own answering affidavit and its response to applicant's attorney's letter to which I have already made reference).

[29] In response to respondent's case about non-joinder of the venue owners, Mr Rosenberg submitted that the relief which is sought in respect of the venue owners is sought

by reference to them as a group or body. Venue owners are those who have concluded, whether now or in the future, a venue agreement with the applicant containing standard terms in a typical form as is clearly attached to the founding affidavit. As much advantage as Mr MacWilliam would seek to squeeze from the fact that the Court was not given all 1 400 agreements, it is clear from the agreement attached to the founding affidavit and further agreements in replying affidavits that a standard form contract has been employed. Given that the venue owners' body changes over time with fresh venue agreements being concluded and existed venue agreements being terminated on occasion, it was neither necessary nor appropriate that the relief granted should go further than referring to the applicant's venue owners as the group or body which symbolises effectively the contractual relationships entered into by applicant and which are now under threat given the conduct or threatened conduct of the respondent.

[30] Given the respondent's contention that it was unaware of those venues which have contracted with the applicant, Mr Rosenberg submitted that this could be addressed by making an operational(?) interdict framed in the notice of motion in respect of any of the applicant's venue owners,

subject to the applicant having given the respondent written notification that the venue or venue owner in question is bound by the applicant's standard venue agreement.

[31] The critical response to respondent's case is that there is no reason in law or logic why the venue owner should thus be joined. The relief sought is to prevent the commission of an apprehended wrong, rights of the venue owners are not affected. Certainly such venue owners do not have a right or entitlement to be approached by the respondent with a view to inducing them to breach their venue agreements or obligations to the applicant. So much is clear from the law which I set out and to which Mr MacWilliam took no issue in argument.

[32] Turning to the question therefore of urgency, respondent's complaint was not so much that the matter is not otherwise sufficiently urgent to justify the procedure adopted, it appeared from what I have already stated that the urgency was somewhat self-created. As stated by Mr Zelezniak, respondent's approaches to the applicant's venue owners only came to the attention of applicant during the course of November 2008. The

matter was then investigated, legal action was taken and the letter to which I have made reference was then generated on 28 November 2008. Respondent then declined to furnish an undertaking on 5 December 2008. Accordingly, it does appear that on the case made out there is no basis for concluding that this was simply a matter of self-created urgency.

[33] To summarise therefore, I am satisfied that our law does provide applicant with a right to seek the relief sought. I am satisfied further that when the papers are taken as a whole, that is applicant's and respondent's versions, there is a reasonable apprehension that the respondent will continue to seek to induce venue owners to become part of its custom and therefore by virtue of the contracts entered into between applicant and the venue owners, breach the contracts so entered into.

[34] I am further satisfied that the basis of the remedy is anticipatory in nature, that is not to seek damages in cases here the breach has already occurred (that is not before me), but rather to prevent the very business which applicant conducts to be eroded to such an extent that it would be rendered nugatory by the time any further action can be taken by way of damages.

[35] The only issue that then remains is the following; having established the requirements should final relief be granted. Respondent complains of being compelled to answer within three days and there is a case in point. The scope of the relief may therefore be difficult to determine with the precision required to grant final relief given the papers which have been presented to the Court. There are allegations of the lack of knowledge of the existence of venue owners and therefore the scope of permissible marketing by respondent into these areas. In my view, therefore, final relief may well be premature on the papers entered into. Manifestly, it is within the power of this Court to refuse final relief but to grant interim relief by way of a temporary interdict, this notwithstanding that applicant asked for final relief.

[36] In relation to the question of costs, given that a tender was made in open court by the applicant that this case could be resolved by way of a temporary interdict pending further papers being generated by the parties so that the issue of a final interdict could be argued at a later stage rather than placing this Court under undue pressure in the circumstances of this case and that that

tender was refused, it does appear to me that an adverse costs order against respondent is therefore appropriate.

[37] For these reasons therefor the following order will be granted:

A rule *nisi* is issued calling upon the respondent to show cause as to why an order should not be made on 9 February 2009 as follows:

1. Interdicting and restraining the respondent from approaching, inducing or persuading the applicant's venue owners in order to secure the installation at the venues in question of the respondent's over-the-counter units or with a view to securing any right or arrangement for the distribution of the respondent's products at the venues in question.

2. Interdicting respondent from interfering in any way with the applicant's contractual arrangements with its venue owners.

3. Paragraphs 1 and 2 shall operate as interim orders pending the return date of the rule.

4. Respondent is to pay applicant's costs.

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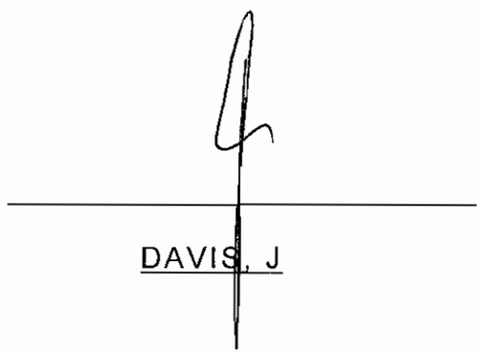

DAVIS, J