THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 4928/2015

Before the Hon. Mr Justice Bozalek

Hearing: 15 & 16 August 2016
Judgment Delivered: 18 August 2016

In the matter between:

CARNILINX (PTY) LTD	**Applicant**
and	
THE TOBACCO INSTITUTE OF SOUTHERN AFRICA	**1st Respondent**
FORENSIC SECURITY SERVICES (PTY) LTD	**2nd Respondent**
STEPHANUS JOHANNES HOFMEYER BOTHA	**3rd Respondent**

JUDGMENT

BOZALEK J

[1] The applicant in this matter is a manufacturer and distributor of cigarettes and a member of the Fairtrade Independent Tobacco Association ('FITA'). In March 2015 its instituted motion proceedings against the respondents seeking a final interdict in relation to a wide range of activities relating to the allegedly unlawful surveillance by the respondents of its manufacturing facilities, suppliers, directors, employees, distributors, sellers, retailers, agents; surveillance of or interference with its vehicles or those of its

suppliers and distributors or soliciting law enforcement agencies or SARS to conduct such activities; the interception and/or monitoring of its communications with all the above named parties with whom it conducts trade; the searching, seizing or detaining its stock through its manufacturing and distribution cycle; the interference in its trade or business through law enforcement officers of SARS, the providing of false information and tip-offs to such parties, the provision of false and misleading information through pamphlets and material to such bodies; the offering of free assistance to such bodies in fighting *'illicit'* tobacco products in South Africa, the false holding out of the respondents to be experts in the checking and verifying of tobacco products and in impersonating SAPS and SARS officials.

[2] First to third respondents are respectively the Tobacco Institute of South Africa ('TISA'), an industry organisation and a non-profit organisation, representing part of the tobacco industry sector in South Africa, Forensic Security Services (Pty) Ltd, a company which was alleged to provide security services to first respondent and its director and shareholder one Stephanus Botha.

[3] All the respondents opposed the application, the second respondent stating almost from the inception that it was wrongly cited because it was a dormant company.

[4] Over a period of some 18 months the papers grew until they numbered some 1200 pages involving numerous affidavits of persons on one side or the other of what appears to be a long running partly public, partly subterranean struggle between on the one hand commercial interests who consider themselves as forming the established tobacco/cigarette manufacturing industry in South Africa and another group which, broadly speaking, constitutes manufacturers who produce what are termed, *'value'* products or cigarettes i.e. cigarettes which appear to sell for considerably less than the established brands. Again broadly speaking, the former grouping are members of TISA

and its principal member is British American Tobacco of South Africa ('BATSA'), a large listed public company in South Africa with its parent overseas whilst the latter grouping are members of and represented in this struggle or propaganda battle by FITA.

[5] First respondent is much concerned about the trade in so-called illicit products i.e. cigarettes not properly packaged, labelled or compliant with local laws relating to such products or in respect of which the various duties or taxes have not been paid. To this end first respondent directs much of its efforts to combat such activities and in so doing works with law enforcement agencies, SARS and private security services providers in which the third respondent appears to play a prominent role. FITA and its members, amongst them the applicant, appears to view first respondent's mission as little more than an attempt to drive them and other *'value'* manufacturers from the market place through fair means or foul and thereby eliminate them as competition and a threat to the monopoly said to be held by first respondent's members and in particular BATSA.

[6] The broad thrust of the applicant's case is that first respondent's and its alleged security arm 'FSS' have engaged in wide ranging, unlawful conduct involving the surveillance and the tracking of its vehicles with electronic devices in an apparent attempt, as I have said, to protect TISA and its members against competition from the applicant in the tobacco products (cigarette) market. It seeks to rely on *'incidents and information'* which allegedly illustrates this conduct. However, many of the allegations are vague, amount to or contain hearsay or are of doubtful relevance and many were the subject of separate striking applications brought by both first and third respondents. Most of these incidents were either denied by the respondents or only partly admitted and, save for one or two rare instances, all allegations or illegality i.e. unlawful conduct were likewise denied.

[7] By the time the matter was set down for hearing the parties were in agreement that the matter could not be determined on paper by reason of the numerous disputes of fact. The applicant sought the referral of the matter to trial but this was opposed by the respondents who contended that the application should be dismissed out of hand. This question, as well as the two striking out applications, are thus the issues which fall to be determined by the Court.

[8] Prior to argument the order sought by the applicant in this regard was simply that the matter be referred to trial, that the applicant file its declaration within a certain period and that thereafter the rules of Court would apply to the further conduct of the litigation between the parties. In his argument on behalf of the applicant, Mr Vermeulen sought a much more detailed order including provisions that the notice of motion would stand as a summons, that the trial would proceed on the basis that the pleadings were closed and that the trial court would deal with certain defined issues, namely, whether the first respondent's conduct *'vis-a-vis'* the applicant over the relevant period involved:

1. reporting the cigarette products manufactured by the applicant as illicit or probably illicit to SARS or SAPS;

2. disseminating information to SARS or SAPS identifying the applicant's products as illicit or probably illicit;

3. procuring the covert electric surveillance of the applicant's business premises, delivery vehicles and distributors;

4. procuring the interception, detention and/or seizure of the applicant's products.

[9] A further issue was whether such conduct, if proved, was activated by a lawful motive or the motive of breaching the applicant's right to goodwill in its business. The role of the third respondent was also defined as an issue, namely, whether the first respondent acted through him in any of its alleged conduct, whether third respondent

either directly or through any corporate entity acted in the manner ascribed to the first respondent, whether such conduct was lawful, whether the first respondent was vicariously liable therefor and, ultimately, whether the applicant was entitled to the protection of an interdict.

[10] It will be noted that no mention at all is made in this defining of the issues of the second respondent and it would appear that to all intents and purposes the applicant has abandoned its case against the second respondent.

[11] Provision is made of the request for trial particulars, a pre-trial conference and for the joinder of Forensic Security Services (Kwa-Zulu Natal) CC, ('FSS(KZN)CC'), the corporate entity which third respondent stated in his affidavit was the vehicle largely through which he provided services to first respondent. Finally, the order provided that the third respondent should procure the joinder of such other corporate entities as are under his direction and/or control as may have an interest in the proceedings.

[12] Rule 6(5)(g) of the Uniform Rules of Court provides as follows:

> *'Where an application cannot properly be decided on affidavit the Court may dismiss the application or make such order as it deems fit with a view to ensuring a just and expeditious decision. In particular but without the effecting the generality of the aforegoing it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for such deponent or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise'.*

[13] A litigant who proceeds on notice of motion where a material dispute of fact is foreseeable or who should have realised when launching the application that a serious dispute of fact was bound to develop, does so at his peril because a Court may, in the exercise of its discretion, decide to dismiss the application in its entirety. As stated in

Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at page 1162:

> ***'***It is certainly not proper that an applicant should commence proceedings by motion with knowledge of the probability of a protracted enquiry into disputed facts not capable of easy ascertainment, but in the hope of inducing the Court to apply (what is now Rule 6) to what is essentially the subject of an ordinary trial action'.

[14] In *Standard Bank of South Africa Limited v Neugarten* 1987 (3) SA 695 (WLD) the Court held that when in motion proceedings an order is granted referring the matter for the hearing of oral evidence it should not be formulated in such a fashion that a hearing as on trial is authorised. It is the more desirable method, also in the interest of certainty, that the order state which issues will be determined by the hearing of oral evidence and defines who may or must be called as a witness or as witnesses. At page 699 Fleming J stated:

> *'But the hearing of oral evidence remains generally appropriate only to cases where it is found 'convenient', where the issues are 'clearly defined', the dispute is 'comparatively simple' and a 'speedy determination' of the dispute is 'desirable'.*

[15] As is noted in Erasmus' Superior Court Practice Vol 2 D1-79 178, a referral of a matter to trial is appropriate if the dispute of fact is incapable of resolution on the papers and too wide ranging for resolution by way of a referral to oral evidence. It is an alternative procedure to dismissal of the application in such circumstances, and is appropriate where the applicant when launching his application could not reasonably have foreseen that a serious dispute of fact, incapable of resolution on the papers was bound to develop.

[16] In arguing for a referral to trial the applicant contended that it could not reasonably have foreseen that the factual disputes which have emerged in this matter relating to first respondent's business relationship with second respondent, to the relationship between the respondents, FSS(KZN)CC and alleged *'sub-contractors'* and

to the various incidents of unlawful conduct on which incidents it seeks to rely but which the respondents deny.

[17] For its part first respondent opposed the referral application on five grounds – firstly, that the main application was bad in law and on the facts; secondly, that the disputes of facts which were raised were reasonably foreseeable and the motion proceedings were therefore misplaced; that the applicant had failed to properly identify the issues to be referred to trial, fourthly, that the applicant had not joined FSS(KZN)CC and other entities as respondents. Second and third respondents likewise submitted that applicant should have realised that material disputes of fact were bound to arise. It was also contended on their behalf that since the applicant effectively abandoned its case against the second respondent, on a proper analysis the case as alleged against third respondent should also fail.

[18] I shall proceed to deal with these grounds in evaluating whether they support a referral to trial or not.

NO CASE MADE OUT IN THE APPLICATION

[19] I do not agree with the submission made on behalf of the first respondent that no case is made out against it in the application. The legal underpinnings of the case are certainly not made explicit in the applicant's papers and it was only during argument that counsel for the applicant set out his client's reliance on breaches of its right to privacy and to be protected from injurious falsehood as a species of unlawful competition which interfered with the goodwill in its business. Nonetheless, given the lack of any clear delineation in its papers a concise setting out of its case as would be required by a declaration or particulars of claim would greatly facilitate the just and expeditious resolution of any litigation. There is perhaps more to be said for the second and third respondents' argument that given the manner in which applicant set out its case in its

founding papers coupled with its virtual abandonment of its case against the second respondent, its case against the third respondent is at the very least considerably weakened. It is clear, however, that the applicant has proceeded against the third respondent as the controlling mind behind the various FSS entities of which there are a good number and which it alleges committed the various dealings against it at the behest of TISA.

[20] It is clearly in the interest of the efficient and orderly litigation of this matter that all interested parties be cited, most notably, FSS(KZN)CC. In this regard the provisions in the draft order sought by the applicant that FSS(KZN)CC is forthwith joined to the proceedings and that the third respondent should procure the joinder of any such other corporate entities that are under his direction and/or control as may have an interest in the proceedings, strike me as prima facie undesirable. The applicant must join those parties it considers may have an interest in the matter and not leave this to the third respondent. Similarly, should FSS(KZN)CC be joined this should be done at the behest of the applicant either by direct citation or following the joinder process.

THE FORESEEABILITY OF THE DISPUTES OF FACT

[21] In my view the applicant must have foreseen the disputes of fact or, at the very least, should have foreseen the many disputes of fact. These disputes are too numerous to mention but many of them involve covert and allegedly unlawful conduct on the part of the respondents either independently or acting on the instructions of first respondent. It would have been well known to the applicant that first respondent's stated position is that it is a body which operates within the confines of the law in its proclaimed goal of combatting the illicit trade in cigarettes and in so doing sometimes acts through contractors.

[22] It was utterly unrealistic of the applicant to have expected that the respondents would have admitted to unlawful activity or to have been activated by the motive of eliminating the applicant as a competitor, for example, giving false tip-offs and impersonating SARS or SAPS officials.

[23] One major area of dispute is the nature of the relationship between the first and second respondent. In this regard the applicant initially alleged that the second respondent was a company owned and run by the third respondent but at the same time acknowledging that there were several entities registered in this name or deratives thereof affiliated with the second and third respondent. It stated that it was citing second respondent since that entity appeared to be the umbrella entity of the conduct complained of. Without going into detail I consider that the applicant's grounds for making this assumption were not well founded even on its own limited knowledge. Even when the dormant nature of the second respondent was pointed out the applicant appeared to disregard this until the eleventh hour.

[24] The second major area of dispute is the relationship between first respondent, second respondent/FSS, and its sub-contractors. In its application the applicant alleges that FSS is the *'security arm'* of the first respondent and that the unlawful activities of which applicant complains are undertaken by first respondent and/or FSS which acts under the instruction and mandate of first respondent and/or its members. These allegations are denied by the respondents which, in broad terms, allege that second respondent (or related corporate entities) assists first respondent in gathering information regarding unlawful activities in relation to cigarettes and in doing so works with the law enforcement authorities in any subsequent action but only when requested to do so. Furthermore, third respondent's case is that use is made of sub-contractors who are properly trained and who are not permitted to act unlawfully.

[25] The applicant must have foreseen that the first respondent would dispute that in effect all activities undertaken pursuant to these relationships in allegedly combating the illicit cigarette trade could not simply be ascribed to it regardless of contractual arrangements and the nature of the relationship between it and the person or parties effecting such action. This much is evident alone from applicant's disparate descriptions of various persons as *'FSS/TISA employees'* or *'FSS persons'*.

[26] It is clear from the affidavits as a whole that, as I have observed earlier, the two groupings which are represented in these proceedings have been at loggerheads with each other directly or indirectly over a considerable period of time. This impression is reinforced by a reading of the affidavit of the applicant of one Ms Belinda Walters who occupied a leading position in FITA but who was at the receiving end of litigation from the applicant in 2014 in which she filed an affidavit accusing the applicant of dishonesty, perjury and launching a malicious and vexatious and defamatory application against her. Therein she accused the applicant of spying on and *'ratting out'* its competitors and fellow FITA members, obtaining information illegally and generally made her opinion clear that the *'value'* cigarette industry can best be described as murky.

THE ISSUES FOR TRIAL ARE NOT PROPERLY DEFINED

[27] The applicant's initial draft order did not specify any issues for trial although its subsequent draft does so. I am by no means persuaded, judging by the papers in the application, that the issues between the parties are defined with the necessary clarity and comprehensiveness which the ordinary process of pleading would bring. They are defined in relation to unspecified *'conduct'* which a process of pleading would properly bring to the fore. Other criticisms are that other issue relates to the ill-defined or elusive concepts of the *'motive'* which actuated the first respondent as well as vicarious liability. Although provision is made for requests for trial particulars in the draft order, in my view

a clear and precise delineation of the issues between the parties is far more likely to be produced by a process of pleading for which the draft order makes no provision.

[28] I asked Mr Vermeulen what the status of the voluminous affidavits and annexures would be on trial and he confirmed that they would not stand as either evidence or pleadings. The question inevitably arises, in the event of the Court granting a full referral to trial, as to what was the purpose of exchanging these affidavits over a period of 18 months if they are simply to be discarded or merely used for the purposes of cross-examination in a full-fledged trial. Will the trial judge have to read the voluminous papers again in order to understand the defined issues but on the other hand give that material no evidentiary weight?

[29] Granting an order for referral in these circumstances could have the indirect effect of encouraging parties to engage in drawn out motion proceedings without properly considering whether this is appropriate only to abandon them at the eleventh hour and ask for a referral to trial without any proper pleading process being conducted. The application proceedings, notwithstanding that numerous persons have deposed to affidavits, has not even served the purpose of limiting the persons who will testify in any forthcoming trial.

NON-JOINDER OF FSS(KZN)CC AND OTHER ENTITIES

[30] As I have already indicated, the citation or joinder of parties remains the primary responsibility of the applicant which also has the advantage of all the information which it had gleaned in these proceedings as to which parties may be responsible for the conduct which it complains of. The proposed arrangements for the citation of parties in the draft order do not in my view deal adequately with this question whereas were the matter to start afresh through action proceedings instituted by the applicant it will have to make the usual choice which a plaintiff has to make as to which parties to cite or join.

CONCLUSION

[31] For all these reasons I consider that there is little value, if any, to be gained by referring this matter to trial as opposed to requiring the applicant to start afresh with action proceedings. Furthermore, in my view this course of action should have been adopted by the applicant from the very outset since it must have foreseen or at the very least should have foreseen the numerous disputes of facts which have arisen and which could never have been resolved by way of motion proceedings.

[32] On behalf of the applicant, Mr Vermeulen, urged me to consider the necessity for a just and expeditious resolution of the matter and emphasised that I enjoyed a discretion, should I refer the matter to trial, to make a cost order which would act as salve for the respondents in respect of the applicant's misguided decision to initially proceed by way of application. In this regard, however, I note that several of the more serious incidents upon which the applicant relied happened several years before these proceedings were even instituted which, even then, were not pursued by the applicant with any sense of expeditiousness or urgency. The time lost by the applicant having to commence afresh with an action is not material in these circumstances and, as I have indicated, the benefits and advantages both to the parties and to the Court in resolving the disputes in this litigation between the parties through action proceedings far outweigh any such prejudice caused by a delay.

[33] Ultimately, however, the principal reason for not ordering a referral to trial is that this matter presents itself as a prime example of a cause of action which should have been pursued by way of action proceedings given the inevitable disputes of fact which lay ahead.

[34] I should make it clear that this order should not be understood as suggesting that there is no merit in the applicant's case. The main application falls to be dismissed

without dealing with its intrinsic merits but rather on the procedural grounds that it should never have been brought by way of motion proceedings.

THE STRIKING OUT APPLICATIONS

[35] The applicant conceded that various passages which the respondents sought to strike out were inadmissible for one or other reason. In view of the conclusion which I have reached I do not find it necessary to deal with the balance of the striking out application. The papers have now become largely irrelevant and would be so even on the applicant's formulation of the order of referral for trial. Suffice to say that I would reach the same conclusion as I have done in regard to the application for referral to trial even if none of the allegedly offending passages were struck out.

[36] In the result for these reasons the application for a referral to trial cannot succeed and must be dismissed with costs. As a result the main application is also dismissed with costs, in the case of the first respondent with such costs to include the costs of two counsel. Such costs are to include the costs of the striking out applications.

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BOZALEK J

APPEARANCES

For the Applicant:	Mr W Vermeulen (SC) Ms L Ferreira Instructed by: Tanya Nöckler Attorneys
For the 1st Respondent:	Mr L Rose-Innes (SC) Ms C De Villiers Instructed by: Webber-Wentzel
For the 2nd & 3rd Respondent:	Mr F Van Zyl (SC) Instructed by: