REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NUMBER : 3212/2019

DELETE WHICHEVER IS NOT APPLICABLE

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

7/8/2024
DATE

[redacted]
SIGNATURE

In the matter between:

GENESIS ONE LIGHTING (PTY) LTD	**Applicant**
and	
JAMIESON, BRADLEY LLOYD N.O.	**1st Respondent**
RODNEY GERSON FITTINGHOFF N.O.	**2nd Respondent**
BRAD ANTHONY KALISH N.O.	**3rd Respondent**
ROBERT LARRY KALISH N.O.	**4th Respondent**
JASON RIVKIND N.O.	**5th Respondent**

IRON ICE (PTY) LTD **6th Respondent**

STEAMLIGHT FX (PTY) LTD **7th Respondent**

JUDGMENT

VAN DER BERG AJ

[1] On 18 March 2019 Justice Mahalelo granted an interim interdict pending the finalisation of an action to be instituted in an urgent unlawful competition application brought by the applicant.

[2] Arising from that order there are two applications. The applicant has brought a contempt of court application, alleging that the respondents are in breach of the order. The respondents in turn have launched a counter-application, seeking variation of the interim interdict by the deletion of certain paragraphs thereof. Both the application and the counter-application are opposed.

THE INTERIM INTERDICT ORDER AND SUBSEQUENT LITIGATION

[3] On 30 January 2019 the applicant issued an urgent application out of the above court broadly seeking the following relief:

[3.1] Interdicting the respondents from unlawfully competing with the applicant;

[3.2] Interdicting the respondents from utilising the applicant's

confidential information;

[3.3] The return of confidential information;

[3.4] Termination of the first respondent's employment;

[3.5] Providing source documents and reports regarding the respondents' unlawful import and retail activities.

[4] The application was opposed.

[5] On 18 March 2019 Justice Mahalelo granted the following order ("the Court Order"):

"1. The court dispenses with the forms and service prescribed by the Rules of Court and disposes of this matter as once of urgency in terms of Rule 6(12).

2. Pending the final determination of an action to be instituted in this court by the applicant against the respondents for relief substantially as set out in the notice of motion, the respondents are interdicted and restraint from:

(2.1) using the applicant's confidential information relating to the applicant's clients and/or suppliers as listed in annexure "A", in any manner, whether directly or indirectly for the

purposes of soliciting the business of the applicant its clients and suppliers, competing with the business of the applicant;

(2.2) *contacting, canvassing, dealing, soliciting or diverting, securing or attempting so to do any existing client or supplier of the applicant and as more specifically listed in annexure "A".*

(2.3) *any conduct which will have the effect of damaging the client or business relationships of the applicant;*

(2.4) *copying, transmitting or transcribing, or rendering in usable form, any existing client and supplier data relating to the applicant and as more specifically listed in annexure "A";*

(2.5) *making available to any other party or entity, whether in digital form or otherwise, any client data or contact information relating to any existing client and supplier of the applicant and as more specifically listed in annexure "A";*

3. *The first respondent is interdicted and directed forthwith to deliver up to the applicant all documents whether in digital form or otherwise in his possession or control relating to the applicant's business, clients and/or suppliers, representing and/or containing any documents, reports and/or specifications relating to the know-how and/or unique selling points ("USP") of the applicant's*

products, and/or from further disseminating and/or making available to any person including specifically the second, third, fourth, fifth, sixth and seventh respondents same.

4. *The second, third, fourth, fifth, sixth and seventh respondents are interdicted and directed forthwith to deliver up to the applicant all documents whether in digital form or otherwise in their possession or control relating to the applicant's business, clients and/or suppliers, representing and/or containing any documents, reports and/or specifications relating to the know-how and/or unique selling points ("USP") of the applicant's products, and/or from further disseminating and/or making available to them by the first respondent whether directly and/or indirectly.*

5. *The first, second, third, fourth, fifth, sixth and seventh respondents are interdicted from using any of the applicant's confidential information and/or trade secrets and/or pricing structure including client and/or supplier lists, USP and know-how to unlawfully compete with the applicant whether as a springboard or otherwise to advance the business of the second and/or third respondents or any interest either directly or indirectly of the first, second, fourth, fifth, sixth and seventh respondents in the second and third respondents.*

6. *The second and third respondents* [the seventh and sixth

respondents respectively in this application] *are interdicted from employing the first respondent in any capacity whatsoever whether directly or indirectly in the carrying on of the business of the second and third respondents.*

7. *The second and third respondents are to deliver to the applicant:*

   7.1 *forthwith all documents relating to the ordering, quotation and invoicing by them or received from the applicant's supplier of lighting products ZHEJIANG SHENGHUI LIGHTING CO, LTD t/a Sengled;*

   7.2 *a report to the applicant upon receipt of the lighting product ordered by them from Sengled reflecting the quantity of product received together with product specifications and description supported by all documents exchanged by them with Sengled and in particular bill of lading and/or way bills, or the like;*

   7.3 *an accurate report each month from 31 March 2019 and the end of each succeeding month accounting for all sales, duly supported by purchase orders, invoices and delivery notes, for the lighting product ordered and received from Sengled.*

8. *The applicants are to institute the action referred to in para 2 hereof within 30 days from the date of this order, failing which the interdicts*

in para 2 to 7 hereof will automatically lapse.

9. *The costs of this application are reserved for decision by the court trying the said action."*

[6] Annexure A to the order listed clients and suppliers of the applicant. One of the suppliers listed is Sengled which is also referred to in paragraph 7 of the Court Order.

[7] The action envisaged in paragraph 8 of the Court Order was duly and timeously instituted and is pending.

[8] The sixth and seventh respondents are companies and were cited as third second and second respondents respectively in the urgent application ("*the company respondents*"). The first to fifth respondents ("*the individual respondents*") are joined (according to the notice of motion) "in their capacities" as directors of the sixth respondent, and the second respondent also as a director of the seventh respondent.

[9] It appears from the judgment of Mahalelo J that the first respondent was employed by the applicant and concluded a confidentiality agreement. Thereafter he joined the company respondents and divulged confidential information to them, *inter alia* in respect of the applicant's supplier, Sengled.

[10] On 31 May 2019 Mahalelo J granted the respondents leave to appeal against his judgment. However, on 26 July 2021 Gilbert AJ in an application brought

by the applicant held that the appeal had lapsed. He later refused leave to appeal against his order.

[11] On 15 September 2022 the applicant issued the contempt of court application (the application is dated 12 September 2022).

[12] On 6 December 2022 the contempt application was postponed on application by the respondents. On 17 February 2023 the respondents filed the counter-application referred to above together with their answering affidavit in the contempt application. Thereafter further affidavits were exchanged.

NOTICE OF MOTION

[13] The applicant's notice of motion in its contempt of court application reads as follows in relevant part:

> *"1. The first, second third, fourth and fifth respondents are declared to be in breach of the court order granted by the Honourable Justice Mahalelo on 18 March 2019 in the Gauteng Local Division of the High Court, Johannesburg, case number: 3212/2019. ('the order').*
>
> 2. *The first, second third, fourth and fifth respondents in their* nomino officio *capacities as directors of the sixth respondent and the second respondent as a director of the sixth and seventh respondent are declared to be in contempt of the order and are*

hereby afforded (7) seven days from date of this order to deliver to the applicant or applicant's attorney and in full compliance with the order the following:

2.1 *all documents relating to the ordering, quotation and invoicing by them or received from the applicant's supplier of lighting products ZHEJIANG SHENGHUI LIGHTING CO, LTD t/a Sengled ('Sengled');*

2.2 *a report to the applicant upon receipt of the lighting product ordered by them from Sengled reflecting the quantity of product received together with product specifications and description supported by all documents exchanged by them with Sengled and in particular all bills of lading and/or waybills, or the like;*

2.3 *an accurate report each month from 31 March 2019 and the end of each succeeding month accounting for all sales, duly supported by purchase orders, invoicing and delivering notes, for the lighting product ordered and received from Sengled.*

2.4 *Written confirmation from the Companies and Intellectual Property Commission that Form CoR39 (previous CM29) and Annexure A, (being the resolution by the directors or extract of minutes) noting the resignation as director of the sixth respondent as director of the second and third respondents,*

has been received.

3. *In the event that the first, second, third, fourth and fifth respondents fail to comply with (2) two above the applicant is entitled to:*

   3.1 *Approach the above Honourable Court on an urgent basis, on the same papers, duly supplemented (if necessary) for an order holding the first, second third, fourth and fifth respondents in contempt of the order.*

   3.2 *Seek an order in terms of which the first, second, third, fourth and fifth respondents be set to goal for a period of six (6) months, alternatively; to a period of incarceration, to be determined in the discretion of by the above Honourable Court, further alternatively; a penalty be imposed as deemed appropriate by the above Honourable Court."* (Sic)

[14] The remainder of the prayers contains directives to the sheriff and the SAPS for the incarceration of the individual respondents if required. The applicant also seeks cost against these respondents on a scale as between attorney and client.

[15] Paragraph 2 of the notice of motion in fact contains two separate prayers: the first is for a declaration that the individual respondents are in contempt of the Court Order, and the second is for an order that the individual respondents must deliver the documents specified in paragraphs 2.1 to 2.4

of the notice of motion to the applicant. Should they fail to do so, the applicant seeks (in prayer 3) leave to approach the court to hold these the respondents in contempt and for an order of incarceration or a penalty. It is clear from the applicant's heads of argument and oral argument at the hearing that the contempt order sought in paragraph 2 relates to the individual respondents' failure to have furnished the documents listed in paragraphs 2.1 to 2.4.

[16] Prayer 1 is more problematic. It merely seeks a declaratory order that the individual respondents are in "breach" of the court order. It is framed in the present tense. It makes no mention of "contempt". It also does not set out the respects in which the Court Order was allegedly breached. During oral argument it was submitted on behalf of the applicant that:

[16.1] the court should find that the breach referred to in prayer 1 includes the respondents' breach in trading with clients and customers listed in Annexure "A" to the Court Order;

[16.2] an order should be made that the individual respondents are in contempt (as opposed to merely be in breach) of the Court Order by trading with these clients and suppliers;

[16.3] an order should be made substituting the words "to be in breach" in the prayer 1 with the words "have breached" (i.e. in the past tense).

[16.4] these orders can be made under "further and/or alternative relief" in the notice of motion.

[17] Such orders cannot be granted. A court is not permitted to grant relief not sought in the notice of motion. Relief may sometimes be granted under the head of "*further and/or alternative relief*" but only if "*...the party against whom such relief is to be granted has been fully apprised that the relief in this particular form is being sought and has had the fullest opportunity of dealing with the claim for relief been pressed under the head of 'further and/or alternative relief'.*"[1]

[17.1] The respondents admitted in the answering affidavit that they traded with the suppliers and clients listed on annexure "A" but averred that it was not prohibited by the Court Order.

[17.2] The Court Order itself may be ambiguous. Paragraph 2.2 of the Court Order can be construed as interdicting the respondents from trading with the clients or suppliers listed on annexure "A". However, paragraph 7 of the Court Order requires documents and reports pertaining to trading with Sengled (which is listed on annexure "A") to be furnished, which suggests that the respondents were entitled to continue trading with the listed entities.

[17.3] None of the parties addressed argument on this possible contradiction or ambiguity in the Court Order in their heads of

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1 *Port Nolloth Municipality v Xhalisa and Others; Luwalala and Others v Port Nolloth Municipality* 1991 (3) SA 98 (C) at 112 D – F. This principle has been followed subsequently: *Combustion Technology (Pty) Ltd v Technoburn (Pty) Ltd* 2003 (1) SA 265 (C) at paragraph [11], p 268; *Mgoqi v City of Cape Town and Another; City of Cape town v Mgoqi and Another* 2006 (4) SA 355 (C) at paragraphs [10] – [13], p 362 – 363; *Hirschowitz v Hirschowitz* 1965 (3) SA 407 (W) at 409

argument. In my view it was not done as they did not think it was an issue on the papers.

[17.4] Accordingly, the *respondents did not have "the fullest opportunity of dealing with the claim for relief*" which is now sought. They would be even more prejudiced if a contempt finding against them in respect of trading with the listed entities is now to be considered.

[18] It is also not clear how prayer 1 takes the matter any further, as no consequential relief is sought pursuant to the declaratory order in prayer 1. This issue will in any event become moot in future in light of my finding on the counter-application.

[19] Accordingly, the only issue in the application in convention is whether the applicant has made out a case for relief in terms of paragraph 2 of the notice of motion.

CONTEMPT OF COURT APPLICATION

[20] Extensive correspondence was exchanged between the parties' respective attorneys during the period 25 March 2019 to 8 June 2022. Between 18 August 2021 and 4 May 2022, Chad Jacobs Attorneys (*"CJA"*), the respondents' erstwhile attorneys, delivered certain documents to the applicant. In the correspondence the applicant's attorneys Otto Krause Inc ("*OKI*") repeatedly stated that the documents supplied on behalf of the respondents did not comply with the Court Order.

[21] The deponent to the founding affidavit, Michelle Anne Bothma ("*Bothma*") is a chartered accountant and the financial director of the applicant. She made a detailed analysis of all the documents which have been received from CJA. It is clear from this affidavit that a substantial number of documents required in terms of the Court Order had not been furnished to the applicant at the time when Bothma deposed to the founding affidavit. This is not in dispute.

[22] On 24 November 2022 (i.e. after the postponement of the contempt application) Hadar Incorporated (*"Hadar*), the respondents' new attorneys, delivered a discovery affidavit in the pending action discovering 4 140 documents.

[23] On 19 January 2023 OKI made payment for the copying of the discovered documents, and the documents were duly provided to the applicant. The respondents filed their answering affidavit in the contempt application on 31 January 2023. Additional documents were provided by the respondents to the applicant on 23 February 2023.

[24] The applicant's replying affidavit was deposed to by Bothma on 9 March 2023. In this affidavit she analysed the further documents which Hadar had furnished since she had deposed to the founding affidavit. She concluded that documents relating to ten transactions and reports relating to lighting product received from Sengled were still outstanding. The respondents' response to this affidavit is dealt with below.

Contempt of Court: legal principles

[25] In *Fakie*[2] Cameron JA confirmed that in a contempt of court application an applicant must prove the requisites of contempt, namely: the order; service or notice or knowledge of the order; non-compliance with the order; and wilfulness and *mala fides*.[3]

[26] Cameron JA held that once the applicant has proved the order, service or notice, and non-compliance, "*...the respondent bears an evidential burden in relation to wilfulness and mala fides.*" (Own emphasis, as is the case throughout the judgment.)

[27] The learned judge also held:[4]

> *"The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith)."* (Footnotes omitted.)

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2 *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA)

3 *Fakie,* paragraph [42](c), p 344 H – J

4 Para [9]

[28] This principle is demonstrated by the facts and litigation in *Ndabeni*.

[28.1] A municipality and its municipal manager breached a court order. An application to hold them in contempt of court was dismissed in the High Court. On appeal to the SCA, the majority reversed the decision and declared that they were in contempt of court.[5]

[28.2] Dambuza JA on behalf of the minority (relying on *Fakie)* came to a different conclusion[6] and said:

> *"The non-compliance in this case was not driven by a deliberate and intentional violation of the court's dignity, repute or authority."*

[28.3] On further appeal the Constitutional Court held: [7]

> *"[21] The secondary issue is whether the Municipal Parties are in contempt of the Mjali J order and whether they should be required to purge such contempt. This issue can be determined without much ado…Griffiths J's finding, that the Municipal Parties' non-compliance was neither wilful nor mala fide, dispensed with this factual requirement to prove contempt. In addition to the*

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5 *Ndabeni v Municipal Manager: OR Tambo District Municipality* [2021] ZASCA 82021; JDR 0066 (SCA)

6 Para's 36-39

7 *Municipal Manager, or Tambo Municipality and Another v Ndabeni* 2023 (4) SA 421 (CC)

Municipal Parties' claim that they were acting on legal advice, Griffiths J and two judges of the Supreme Court of Appeal agreed with them. Hence the Municipal Parties' version was not so far-fetched or untenable that it could be rejected on the papers. As the Supreme Court of Appeal could not refute Griffiths J's factual finding, it could not declare the Municipal Parties to be in contempt."

[29] Regardless of where the onus lies in civil contempt cases, the *Plascon-Evans* rule still applies as these are motion proceedings (see *NDPP v Zuma*[8] and in restraint cases, *Reddy v Siemens*.[9]) The *dictum* in the Constitutional Court in *Ndabeni (supra)* is consistent with this principle.

Contempt application: discussion

[30] The respondents in a subsequent affidavit filed in response to Bothma's replying affidavit state that:

[30.1] they did not know what the alleged outstanding documents constituting the *"10 transactions"* are but tendered to provide any documents that the applicants complained have not been provided.

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8 *National Director of Public Prosecutions v Zuma* 2009 (2) SA 227 (SCA) at para's 26-27 ("*In motion proceedings the question of onus does not arise.*")

9 *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA), para 14.

[30.2] they have not compiled any reports other than those they had provided but in any event the applicant had compiled the reports itself, rendering the relief in this regard moot.

[30.3] but for the documentation relating to the alleged *"10 transactions"* (which are not identified or identifiable, and the respondents say they have no knowledge of), every document contemplated by the court order has been provided.

[31] No objection was taken to this affidavit. The applicant has not filed a response to this affidavit. In fact, it is clear from Bothma's replying affidavit that the10 transactions have not been identified, and that the applicant itself compiled the alleged outstanding reports. The respondents' evidence must therefore be accepted.

[32] It is therefore found that any contempt or breach that may have existed was purged by the individual respondents.

[33] Written confirmation that the first respondent had resigned as director of the company respondents was provided to the applicant and there is thus no remaining breach of the Court Order in that respect.[10]

[34] The applicant has also not made out a case for contempt based on the respondents' historic breaches of the agreement by not furnishing the

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10 In prayer 2.4 of the notice of motion reference is made to the incorrect respondents.

documentation required in terms of the Court Order before 22 November 2022.

[35] The respondents aver that they were informed by their erstwhile attorney that they had already complied with the Court Order. They say that they verily believed that they have complied with the Court Order in providing the documents which CJA forwarded to OKI.

[36] In light of the *Plascon-Evans* rule, this version must be accepted. It also appears from *Ndabeni (supra)* that relying on legal advice can constitute a defence in contempt of court applications.

[37] The applicant contends that the *mala fides* of the respondents is *inter alia* shown by the extensive correspondence and demands for documentation, and the unnecessary delay in complying with the Court Order. This submission is not without merit, but in my view it is not possible to reject the respondents' version on this basis alone. The fact of the matter is that the documents were made available as soon as there was a substitution of attorneys.

[38] The applicant also wants the court to draw an inference of *mala fides* from the fact that the applicant appealed the Court Order and then allowed the appeal to lapse. The appeal lapsed because the respondents did not follow the rules of court. It clearly was not deliberate.

[39] The respondents lodged an unsuccessful application with the Competition

Commission *inter alia* asking that the Court Order be suspended. The applicant avers that Competition Commission application was a stratagem to delay the Court dealing with the contempt application. I do not see how the Competition Commission application could delay this application, or how it can have any bearing on the respondents' *mens rea* in breaching the Court Order. (The Competition Commission ruling has no other relevance to this application.)

[40] There is a more compelling reason why a contempt order for historic breaches should not be made in this case. In this leg of the application the applicant merely seeks an order compelling the respondents to deliver certain documentation, failing which, that the individual respondents be committed to imprisonment or that a penalty be imposed. The applicant thus seeks a "coercive order" as opposed to a "punitive order". A coercive order gives the respondent the opportunity to avoid imprisonment by complying with the original order and desisting from the offensive conduct.[11] In that the respondents have no further documents to deliver the purpose of any coercive order falls away.

[41] For reasons set out below, the applicant's conduct before 22 November 2022 does remain relevant to the issue of costs.

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11 *Secretary State Capture Commission v Zuma* 2021 (5) SA 327 (CC), para 47

COUNTER-APPLICATION FOR VARIATION OF INTERIM INTERDICT

Variation of interim order: legal principles

[42] At common law any interlocutory order made any time before final judgment in the suit can be varied or set aside by the judge who made it or by any other judge sitting in the same court and exercising the same jurisdiction.[12] A temporary interdict may be varied or discharged where altered circumstances since it was ordered makes it no longer necessary.[13]

[43] In *Lagoon Beach*[14] the SCA referred to *Knox D'Arcy*[15] and held:

> *"Moreover, as has been pointed out inter alia by this court* in Knox D'Arcy, *whilst the refusal of an interim interdict may be final in that it cannot be reversed on the same facts, it may be open to an unsuccessful respondent against whom it is passed to approach the court for its amelioration or to have it set aside 'even if the only new circumstance is the practical rule experience of its operation'. Certainly, in the present case, should the Irish proceedings be unduly delayed or should there arise some other material change in circumstances likely to have a bearing on its continued enforcement, the appellant can apply to have*

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12 Erasmus, Superior Court Practice, Vol 1, E142-15; *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (8) and 550H

13 *Meyer v Meyer* 1948 (1) SA 484 (T)

14 *Lagoon Beach Hotel (Pty) Ltd v Lehane NO and Others* 2016 (3) SA 143 (SCA), para 10

15 *Knox D'Arcy Ltd and Others v Jamieson and Others* 1996 (4) SA 348 (A) at 360A

the interim interdict either varied or even set aside."

Duration of unlawful competition interdict: legal principles

[44] In the case of unlawful competition, an applicant is entitled to an interdict protecting its confidential information in circumstances where the respondent is using the confidential information as a *"springboard"*. Springboarding entails not starting at the beginning in developing a technique, process, piece of equipment or product but using as the starting point the fruits of someone else's labour.

[45] An interdict granted to prevent springboarding may, however, be limited by the duration of the advantage obtained, or the time saved, by reason of having had access to the confidential information.[16]

[46] Stegmann J held:

> *"A temporary interdict (and also a final interdict) which aims to deprive the respondents of that unfair and unlawful advantage, must be appropriately limited in time. Its object is to provide fair protection to the rights of the applicants for the period for which the unfair advantage may reasonable be expected to continue. The object is not to punish the respondents nor to prevent them from competing unlawfully with the*

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16 *Waste Products Utilisation (Pty) Ltd v Wilkes and Another* 2003 (2) SA 515 (W) at 583F

applicants."[17]

[47] Customer or supplier relationships, and customer or supplier lists, constitute the type of confidential information that an ex-employee can *"carry away in his head"* when he/she leaves an employer and the period for which the "unfair advantage may reasonable be expected to continue" would by its nature be limited.

[48] Similarly, any confidentiality in and to a pricing structure or marketing strategy is of a limited nature and duration, and any interdictory relief to protect such pricing structure or strategy must be limited in nature.[18]

[49] Ultimately, there must come a time when the confidential information in question is no longer secret and an interdict is not warranted.[19]

Variation application: discussion

[50] The respondents state the following in support of the counter-application:

[50.1] Sengled is one of the largest manufacturers of LED lighting products in the world, and any person can purchase Sengled products online, and the respondents cannot exert any influence or

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17 *Knox D'Arcy Ltd and Others v Jamieson and Others* 1992 (3) SA 520 (W) at 527F-528I

18 See *Traka Africa (Pty) Ltd v Amaya Industries* 2016 JDR 0310 (GJ) at para's 70-73, and para's 79-83

19 *Multi Tube systems (Pty) Ltd v Ponting and Others* 1984 (3) SA 182 (D) at 189H. See also *Van Castricum v Theunissen and Another* 1993 (2) SA 726 (T) at 736D

control over Sengled;

[50.2] The first respondent is no longer employed by the respondents, and the respondents cannot exert any control over the applicant's alleged customers;

[50.3] Four years have passed (as at the date of the answering affidavit) and many events have occurred which would necessitate a change in the pricing structure of the products;

[50.4] Marketing plans and test results have also become obsolete in the past four years because the market has changed and so have any and all marketing plans;

[50.5] Due to the period that passed since the order was granted, any confidentiality and information in their possession has long since disappeared;

[50.6] The respondents have developed their own pricing structures and know-how.

[51] The applicant has not in its answering affidavit to the counter-application meaningfully disputed any of these contentions.

[52] The applicant in response states that the respondents are attempting to revisit the arguments advanced during the urgent application. This is clearly not the case – the respondents base their counter-application on changed

circumstances since the Court Order.

[53] The applicant further – in response to the respondents' above averments – repeats that the respondents are in breach of the Court Order. This does not constitute a defence to the counter-application.

[54] The Court Order was made more than five years ago. In my view the time lapse since the Court Order (as illustrated by the reported cases referred to above) is in itself grounds for a variation of the Court Order. I have not been referred to any case where an interim interdict of this nature has been granted for a period of five years. Coupled with respondents' evidence referred to above which is for all intents and purposes undisputed, I am satisfied that the respondents have made out a case for a variation of the Court Order.

COSTS AND CONCLUSION

[55] The contempt of court application therefore stands to be dismissed and the counter-application is to be granted.

[56] In the Court Order Justice Mahalelo reserved costs for the trial court. The counter-application is a variation of that order and remains an interim order. In my view the costs of the counter-application should also be reserved for the trial court. Ultimately the trial court will have to make a final decision as to the issues raised in the urgent application and in the counter-application.

[57] The contempt application stands on a different footing, as this court is in a better position than the trial court would be to deal with the costs of the contempt application.

[58] The respondents' breach of the Court Order extended over a long period of time. Although the respondents may not have had the required *mens rea* as a result of the advice their attorney gave them, a party cannot hide behind its attorneys' advice in order to excuse non-compliance with court orders or rules of court. The applicant was within its rights to have launched the contempt application and would ordinarily have been entitled to its costs up the date the respondents purged their breach or contempt on 24 November 2022. The respondents would in the ordinary course have been entitled to costs of the contempt application incurred after 24 November 2024.

[59] In my view it would fair under the circumstances if each party should bear its own costs in respect of the application in convention.

ORDER

[60] The following order is made:

[60.1] The application in convention dated 12 September 2022 is dismissed with no order as to costs.

[60.2] The order made by Justice Mahalelo on 18 March 2019 under case number 3212/2019 is varied with effect of the date of this order by

the deletion of paragraphs 2, 5, 6 and 7.3 thereof.

[60.3] The costs of the counter-application are reserved.

VAN DER BERG AJ

APPEARANCES

For the applicant:

Adv CB Garvey
Instructed by:
Otto Krause Inc

First respondent: No appearance

For the second to seventh respondents:

Adv I Miltz SC with
Adv J M Hoffman
Instructed by:
Hadar Inc

Date of hearing: 31 July 2024

Date of judgment: 7 August 2024