IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 9366/2017

In the matter between:

PUMA SE **PLAINTIFF**

and

HAM TRADING ENTERPRISE CC **FIRST DEFENDANT**
HABTAMU KUME TEGEGN **SECOND DEFENDANT**
THE MINISTER OF POLICE **THIRD DEFENDANT**

J U D G M E N T
Delivered on: Friday, 24 August 2018

OLSEN J

[1] This judgment concerns a narrow issue arising out of the provisions of the Counterfeit Goods Act, No. 37 of 1997 which arose in an application for default judgment made by the plaintiff. This judgment shall be brief, as the occasion demands. I am indebted to counsel for the plaintiff for the heads of argument and oral submissions addressing the one aspect of the plaintiff's case which caused me some concern.

[2] The plaintiff instituted action against the first and second defendants (the "defendants"), citing the Minister of Police as third defendant in the minister's capacity as an interested party. The plaintiff sought a number of orders relying on the provisions of the Trade Marks Act, No.194 of 1993 and the Counterfeit Goods Act No.37 of 1997, amongst which was an order for the delivery up to the plaintiff of certain counterfeit goods which had been "duly" seized, presumably upon a complaint made by the plaintiff, by representatives of the third defendant acting in terms of the Counterfeit Goods Act. The

goods were seized from the possession of the defendants and then lodged in a counterfeit goods depot. It is from there that the plaintiff seeks to have them delivered up to it.

[3] Section 14 of the Constitution deals with privacy rights, and includes amongst them the right not to have one's possessions seized. Presumably with that in mind, and perhaps also with the provisions of s 25 of the Constitution in mind, the Counterfeit Goods Act makes provision *inter alia* for a limitation of the period during which goods might be held after being seized from the possession of someone. These provisions are contained in s 9 of the Act.

[4] Section 9(1) of the Act provides that if criminal charges are contemplated, notice thereof must be given, and if the criminal charge is not laid within a specified time the seized goods must be released to the person referred to as the "suspect", who in terms of s 7(2)(a) is the person from whom the goods were seized. A similar provision is contained in s 9(2) dealing with civil proceedings. Notice of an intention to launch civil proceedings must also be given within a set time. Section 9(2)(b) is to the effect that if the contemplated civil proceedings 'are not instituted within 10 court days' after the date of the notice to the suspect of the intention to institute civil proceedings, the seized goods must be released to the suspect. In this case the plaintiff gave notice of its intention to institute civil proceedings and thereafter had its summons issued out of this court within 10 days of the date of notice. But that summons was only served after the 10 day period.

[5] The questions on which I asked to be addressed are

(a) as to whether the civil proceedings contemplated by the Act are instituted merely by the issue of a summons, or whether the action is only instituted upon service of the summons (which would mean that it was instituted too late in this case); and

(b) if it is found that it was instituted too late, whether the plaintiff should be held to have come to court with unclean hands as it did not notify the third defendant of the fact that the plaintiff had failed to institute its civil

action on time, with the result that the goods which it seeks leave to have delivered up to it are presently detained unlawfully.

In view of the conclusion I have reached on the first of these questions it is unnecessary for me to consider the second. The answer to the first question depends upon a proper construction of the statute, and in particular, on what meaning ought to be ascribed to the word "instituted" where it appears in s 9(2)(b) of the Counterfeit Goods Act.

[6] Counsel for the plaintiff have drawn my attention to the judgment in the matter of *Jazz Cellular CC v Nokia Corporation and others* 2008 BIP 352 (C) where the point which concerns me was taken. As to the argument that service is required, and not merely the issue of the process, the learned Judge stated (at 357A-B) that he agreed with counsel's submission

> 'that this contention has been disposed of by this court in *Commissioner of the South African Revenue Service and others v Shoprite-Checkers* 2006 BIP 243 (C). I agree that there is no requirement of service within 10 court days, only institution of proceedings within that time. Of course, service would have to take place for the action to proceed, but service after the 10 day period would not have the effect of non-suiting a plaintiff.'

The *Shoprite Checkers* case referred to in *Jazz Cellular* dealt with a requirement of confirmation by a court of steps taken by an inspector on application "brought within 10 days of the day on which those steps had been taken". On the question of whether service of the process within the allotted time was required, the learned Judge said the following.

> 'In *Mati v Minister of Justice, Police and Prisons, Ciskei* 1988 (3) SA 750 (C) Claasens J exhaustively considered the authorities dealing with the interpretation of the phrase "proceedings shall be brought". I respectfully concur with his interpretation that proceedings are brought by means of the issue of the summons or application and that service thereof is not a requirement.'

In *Mati's* case, with reference *inter alia* to *Labuschagne v Minister of Justice* 1967 (2) SA 575 (A), the learned Judge held that under both the Ciskei Police Act which contemplated action being "brought", and the South African Police Act which contemplated action being "commenced", what was required to be done within a stipulated period was the issue of summons. The learned

Judge also made the observation (at page 754) that he could see no reason to differentiate between the meaning of the words “commence”, “institute”, or “bring”, when used in such contexts.

[7] The learned judges deciding *Jazz Cellular* and *Shoprite Checkers* adopted the conclusion in *Mati’s* case without discussing the fact that in their respective cases the contexts in which the words concerned were employed were not on all fours with the contexts considered in *Mati*.

[8] It is long established that some words will bear different meanings depending on the context in which and purpose for which they are employed. To my mind the verb “institute”, when used in connection with civil proceedings, may convey merely that the requisite court process is issued; or on the other hand, that the process is not only issued but also served upon the person against whom the proceedings are being instituted. If a fixed time is laid down (statutorily or otherwise) for the institution of proceedings in a context in which a requirement of service is feasible, and the aim of the provision or requirement would be defeated if the process were not to be served within the allotted time, the word “institute” in that context might signify the need to join the defendant or respondent in the litigation by formally notifying the defendant of the claim made on it, thereby setting in motion the defendant’s access to court for the purpose of dealing with the claim. In the case of an action, the issue of a summons is the necessary first step in engaging the court as the arbiter of the proposed claim. In that sense it qualifies as the “institution of action”. But the mere issue of the summons does not “set [proceedings] in motion” (another meaning of the word “institute” given in the second edition of the Oxford South African Concise Dictionary). A consideration of our Rules and practice regulating civil proceedings which involve defendants or respondents illustrates that they are set in motion – the regulation of the adjudicative process starts and then moves ahead – when there is notification to the party against whom the claim is to be made, that being achieved through service. See *Marine and Trade Insurance Co. Ltd v Reddinger* 1966 (2) SA 407 (A) at 413D where Wessels JA put the matter succintly.

> ‘Although an action is commenced when the summons is issued the defendant is not involved in litigation until service has been effected, because it is only at that stage that a formal claim is made upon him.’

[9] The question as to what is required in order to achieve the institution of proceedings in the context of s 9(2)(b) of the Counterfeit Goods Act turns on a construction of the statutory provision. A succinct statement of the proper approach to this task appears in paragraph 26 of the judgment of Schippers AJA in *City SA Property Holdings Limited v Chavonnes Badenhorst St Clair Cooper and Others* 2018 (4) SA 71 SCA at para 26.

> ‘It is settled that words in a statute must be given their ordinary meaning unless to do so with result in an absurdity. Statutory provisions should always be interpreted purposively, in context and consistently with the Constitution. Stated differently, when interpreting legislation what must be considered is the language used; the context in which the relevant provision appears; the apparent purpose to which it is directed; and the material known to those responsible for its production.’

[10] The purpose of the specific provision in this case is the limitation of the period of dispossession of alleged counterfeit goods which is initiated through a process without notice to the possessor of the goods. Consistently with the Constitution, the intention appears to be the prevention of indefinite detention of the goods following seizure from somebody in possession of the goods. The institution of civil proceedings (or the alternative, criminal proceedings) signifies the continued significance of the purpose of the seizure, the legitimacy of which purpose is apparent from the Counterfeit Goods Act itself.

[11] The introduction to the preamble to the Act states the following as the overall purpose of the measures for which it provides.

> ‘To introduce measures aimed against the trade in counterfeit goods so as to further protect owners of trade marks, copyright and certain marks under the Merchandise Marks Act, 1941, against the unlawful application, to goods, of the subject matter of their respective intellectual property rights and against the release of goods of that nature (called “counterfeit goods”) into the channels of commerce.’

In this regard counsel for the plaintiff also referred to *Commissioner for the South African Revenue Services and Others v Moresport (Pty) Ltd and Others* 2009 (6) SA 220 (SCA) para 1 and *Pick 'n Pay Retailers (Pty) Ltd v Commissioner of South African Services and Others* 2008 BIP 187(C), paras 20 and 23.

[12] The intellectual property rights of complainants aside, it is undeniable that measures to prevent the public from becoming victims of fraud perpetrated through trade in counterfeit goods is reasonable and justifiable in an open and democratic society, as contemplated in s 36 of the Constitution.

[13] The rights of any person prejudiced by the seizure of goods are protected not only by provisions of the class to which s 9(2)(b) belongs, but also by s 7(4) of the Counterfeit Goods Act which entitles any person prejudiced by the seizure of goods to apply to the court for relief on notice of motion. Whereas relief in terms of s 7(4) is available to any person prejudiced by the seizure of goods, the civil proceedings contemplated in s 9 of the Counterfeit Goods Act are ones directed at a person from whose possession the goods were seized. Section 9 does not deal with the circumstance that there is no possessor; ie circumstances of the kind considered in paragraph 12 of the judgment in *Minister of Trade and Industry v EL Enterprises* 2011 (1) SA 581 (SCA), where the court was considering another question arising from the Counterfeit Goods Act.

> 'Notice is likely to defeat the purpose of the warrant when a procedure in terms of s 6 is followed and in many cases the identity and whereabouts of potential respondents are not likely to be known by the time a warrant is sought or acts of search and seizure are performed. More often than not counterfeit goods are found in a container or warehouse in the absence of any potential respondents or knowledge of their whereabouts.'

[14] In context, s 9 must be about the institution of criminal or civil proceedings against a person suspected of being guilty of offences set out in s 2 of the Act. The civil remedies and criminal sanctions flowing from those offences are not insubstantial. It is with that in mind that one must consider

the circumstances in which the provisions of s 9(2)(b) of the Act operate. The issue of summons is something firmly within the control and power of the plaintiff. However service of the process is another matter. As counsel for the plaintiff have pointed out, it is not merely a case of service being under the control of the sheriff. When one is dealing with a "suspect" there is every reason to anticipate the suspect evading service. The section cannot be read to allow the employment of that device to generate a right to return of suspected counterfeit goods.

[15] I conclude that the issue of the requisite summons on its own satisfies the requirements of s 9(2)(b) of the Counterfeit Goods Act despite the fact that the "suspect" may remain unaware of the institution of proceedings after the 10 day period referred to in the section, until the summons is served. It is not without significance that the "suspect" is not denied access to the court to vindicate any right that may have been infringed, quite independently of the civil proceedings contemplated by s 9(2)(b) of the Counterfeit Goods Act.

[16] The question as to whether any consequences may flow from an inexcusable delay in the service of the process initiating the civil proceedings contemplated by s 9(2)(b) does not arise for decision in this case, as no such extraordinary delay occurred.

[17] I have accordingly concluded that the Plaintiff is entitled to all the relief sought in these default proceedings. I make the following order.

1. **Judgment is granted by default in favour of the plaintiff against the first and second defendants in the terms set out in paragraphs (a) to (i) of the prayer set out at pages 15 to 17 of the plaintiff's particulars of claim.**

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OLSEN J

Date of Hearing:	WEDNESDAY, 15 AUGUST 2018
Date of Judgment:	FRIDAY, 24 AUGUST 2018
For the Plaintiff:	Ms V Singh with Ms I Joubert
Instructed by:	SPOOR & FISHER PLAINTIFF'S ATTORNEYS 11 BYLS BRIDGE BOULEVARD, BUILDING NO. 14, HIGHVELD EXT 73, CENTURION PRETORIA, GAUTENG (Ref.: LTA3000200/PPR) (Tel.: 012 – 676 1212) **c/o CHAPMAN DYER INCORPORATEDB** 7TH FLOOR 300 ANTON LEMBEDE STREET DURBAN (Ref.: BN/15S5238/17) (Tel.: 031 – 319 7800)