IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 7348/2021

TAKEALOT ONLINE (RF) (PTY) LTD Applicant

and

DRIVECONSORTIUM HATFIELD (PTY) LTD Respondent

Date of hearing: 17 August 2021 and 6 October 2021
Date of Judgment: 11 October 2021 (to be delivered via email to the parties' legal representatives)

JUDGMENT: 11 OCTOBER 2021

HENNEY, J

Introduction:

[1] This is an application for leave to appeal against the whole of the judgment of this court, delivered on 26 May 2021, in which it granted an interdict in favour of the respondent with costs, including the cost of two counsel.

[2] At the outset, it needs to be said that some of the issues raised in this application for leave to appeal were not addressed or fully ventilated in the main application. The court was also not asked to address it in the manner it is now being asked to. What is further unusual is that this application for leave to appeal was argued over almost a full day.

[3] Mr Dickerson appears for the applicant in these proceedings, although he did not appear in the proceedings in which an interdict was sought. He is assisted by Mr. Vaughn, who had been counsel for the applicant in the interdict proceedings. Mr. La Grange, assisted by Mr. Quixley, appears for the respondent in this matter.

Grounds of appeal:

[4] Mr. Dickerson submitted that the most important grounds of the appeal are the following:

1) that the court erred in granting an amendment to the notice of motion which substantially altered or changed the case the respondent originally made out in the founding papers;
2) that the court erred in finding that the respondent had shown that it had a *prima facie* right where there were no dispute of fact on the papers, and failed to appreciate the approach in determining whether an applicant has a *prima facie* right to an interim interdict, as laid out in Gool v Minister of Justice and Another[1];
3) that Part 2 of the order, which was in essence a spoliation order, amounted to final relief;

[1] 1955 (2) SA 682 (C) at 688 D-E

4) that the court failed to apply the provisions of section 69 (d) of the Consumer Protection Act ("the CPA") 68 of 2008, which states that a party who seeks to enforce any right in terms of the act or in terms of a transaction or agreement, or otherwise resolve a dispute with a supplier, may only approach the court with jurisdiction over the matter if all other remedies available to that person, in terms of national legislation, have been exhausted;
5) that the court erred in impermissibly applying the provisions of section 114 of the CPA, dealing with interim relief, in circumstances where the respondent has not applied for relief to a court before such interim relief was applied for in terms of this provision.

Discussion:

[5] Regarding the first ground of appeal, which is that the court granted the respondent leave which substantially amended its notice of motion, in circumstances in which its case had been brought on a different basis, thereby permitting the respondent to substantially alter its original relief it sought in its notice of motion. In my view, there is no substance to this complaint, because from a reading of the initial notice of motion, as contained on page 1 of the record, the amendments applied for and granted did not substantially change the case which the appellant had to meet.

[6] In respect of the first amendment, regarding prayer 2, the court was asked to permit an amendment in order to add, after the words "National Consumer Commission", the words alternatively "in the Western Cape Division of the High Court". This amendment was sought by the respondent, after it realised that the relief sought in terms of section 48 of the CPA, regarding the unfairness, unreasonableness and unjust contract terms as they have referred to in paragraphs

59 to 70 of the founding affidavit, could only be granted, in terms of section 52 of the CPA, by a court and not the National Consumer Commission. This the applicant was also aware of. In its answering affidavit it stated the following:[2]

'5.1.1 In terms of pray 4 of the notice of motion, the Applicant seeks an interim interdict pending the institution of "proceedings against the respondents at the National Consumer Commission" within 10 days of the grant of the order. Nowhere in the founding affidavit does Applicant clearly and categorically set out the supposed "relief" it will seek from the National Consumer Commission ("the Commission") but merely makes generalized broad allegations of contraventions of the various provisions of the Consumer Protection Act 68 of 2008 ("the Act") which bear no relation to any of the relief which it may claim from the Commission.

5.1.2 The Applicant's fundamental complaint, once distilled from the various allegations makes in relation to the Respondent's conduct in terms of clause 5.2.1 of the Franchise Agreement ("the Agreement") ... is essentially that that clause is an unreasonable, unfair or unjust contract term.

5.1.3 However, those sections of the Act which deals with unfair, unreasonable or unjust contract terms (in particular sections 48 of the Act read with section 52 thereof) make it clear that only a court has jurisdiction to make findings in relation to such terms or conduct. Indeed, I am advised and respectfully say that neither the Commission nor the National Consumer tribunal "(the Tribunal") have the powers under section 52 of the Act. The Tribunal has held that only the ordinary courts have the power to apply section 48 of the Act.

5.1.4 in the circumstances, the Applicant's fundamental complaint is simply not one which can be determined by the Commission and/or the Tribunal, which the Applicant itself concedes is a time-consuming process which may follow various routes, depending on the nature of investigations, findings and other factors.

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[2] Page 159-160 of the record

5.1.5 The effect of the Applicant's relief is that it will secure for itself and alleged "interim position" in relation to main proceedings (before the Commission) which cannot achieve the purported intended result and have no prospects of success. In those circumstances I am advised and respectfully submit that "interim" interdict can be granted . . . '

This was stated by the applicant in its answering affidavit, in answer to what the respondent stated in its founding affidavit about its reliance on section 48 of the CPA.

[7] The amendment to the notice of motion was clearly within the bounds and parameters of the case it set out in its founding affidavit, to which the applicant had ample opportunity to answer, to as can be seen from its answering affidavit. The other amendments, in my view, were clearly of a cosmetic nature and did not affect or substantially change the case as pleaded in the founding affidavit. In my view, there was in any event no prejudice to the applicant when the court granted the amendment. Clearly if the amendment would have caused prejudice to the applicant, it could have requested an indulgence from the court in order to deal with the amendment. It chose not to do so, which, in my view, was a correct decision, because in its answering affidavit it clearly dealt with the issues which the amendment sought to address. In my view, regarding this ground of appeal, there are no reasonable prospects that another court would come to a different conclusion.

[8] Regarding the second ground of appeal, which is that the respondent had not established a *prima facie* right and that the court failed to appreciate that this could only be adopted in proceedings for an interdict *pendente lite*, if there should be a dispute of fact, the applicant contends that there is no dispute of fact, and the only dispute is one of law, which is whether the respondent's common cause conduct

amounted to a breach, and/or whether clause 35.3.2 of the agreement is unjust or unfair.

[9] I agree that the conduct of the respondent with regards to the correspondence it made to the various entities about the applicant was not disputed; the question remains whether it amounted to a breach of the agreement. This is clearly a legal question, but that is not the end of the matter. It would also seem that the other question that needs to be considered in this matter is whether some of the terms of the agreement and the conduct of the applicant amounted to unfair, unreasonable or unjust contract terms. The finding of the court was that a court may very well come to the conclusion that the provisions of clause 5.2 are unfair and overbroad, as it gives a franchisor the power to seize and reduce the areas of operation and the volume and size of a business operation of the franchisee, for any reason, or at the very least for reasons that cannot be properly justified.

[10] The court also concluded that the conduct of the applicant, in the manner in which it exercised its contractual rights, was unjust and unfair and a *prima facie* contravention of section 51 (1) (i) (i) of the CPA, which the applicant denies, contending that it was at all times entitled to do so in terms of the agreement. The court then concluded that a court hearing the matter in terms of section 52, needs to determine whether the conduct of the applicant in exercising its rights in terms of the agreement, as well as the contract terms, can be regarded as fair, reasonable and just in terms of the provisions of section 48 of the CPA.

[11] The applicant vehemently opposed and denied that any of the terms of the agreement are in contravention of the provisions of the CPA, and that its conduct, based on the agreement, was in contravention of the provisions of the CPA. There

seems to be very difficult legal questions that need to be addressed and which seem to be in dispute. Is it the place of a court in an urgent application for interim interdictory relief to make such a decision? In this regard, the applicant in its heads of argument[3] in the initial application before the court, said the following: '. . .The applicant's prima facie right can derive solely from its allegation that the respondent's conduct is prohibited by the Consumer Protection Act as being unfair, unjust or unreasonable in the particular circumstances. This court must be satisfied that it should be successful in proving this in due course in order for an interim interdict to be granted." (Own emphasis added.)

[12] There was therefore clearly a realisation that the respondent's *prima facie* right can derive only from its allegation that the applicant's conduct is prohibited by the CPA as being unfair, unjust or reasonable in the particular circumstances, for the court to conclude that it has established a *prima* facie right, and that the right can only fully be established in proceedings that will follow thereafter. This was exactly the court's finding in the initial application, which formed the basis upon which the court found that a *prima facie* right existed. This is clearly a legal question, that could not have been determined in urgent interlocutory proceedings of this nature.

[13] Our courts are called upon to make difficult decisions regarding novel legal issues and have to interpret legislation such as the CPA on an urgent basis in applications like this. It is difficult to deal with such issues during an application for an interim interdict, and our courts have in the past concluded that in such cases where a legal issue is in dispute, it need not be dealt with finally during an application for an interim interdict. In this regard, this court in *Ward v Cape Peninsula Ice Skating Club*

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[3] Page 20 para 53

1998 (2) SA 487 (C), after discussing the requisites of an interim interdict, had the following to say at 497-498:

'The question of the proper approach to be followed in applying the first requirement to a legal issue, is, however, not that clear. This topic is discussed by C B Prest in *The Law and Practice of Interdicts* at 59 - 60. After referring to the apparently conflicting decisions in *Mariam v Minister of the Interior and Another* 1959 (1) SA 213 (T) at 218B - E (where the *prima facie* right test was applied to a disputed point of law) and *Fourie v Olivier en 'n Ander* 1971 (3) SA 274 (T) at 285 B - E (where Viljoen J held that the *prima facie* right test did not apply to a legal issue) Prest says the following:

> "The fact that a Court is called upon to decide a point of law in circumstances of urgency does not necessarily make the task any easier than being called upon to decide a dispute of fact. This was made clear by Franklin J in *Beecham Group Ltd v B-M Group (Pty) Ltd* where, in the papers before the Commissioner, there were no substantial disputes of fact but the Court had to deal with difficult questions of law, in respect whereof detailed and thorough argument had been presented to the Court.
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> When regard is had to the wider context of the application for urgent relief in circumstances where detailed argument and mature reflection are not possible, then the approach taken by Franklin J and the view expressed by Roper AJ in *Mariam v Minister of the Interior and Another* must be preferred."

In *Beecham Group Ltd v B-M Group (Pty) Ltd* 1977 (1) SA 50 (T) at 55H, Franklin J, delivering the judgment of the Full Bench, referred to the following approach of the Commissioner of Patents (Nicholas J) whose decision was being taken on appeal:

> "Although there are in the present papers no substantial disputes of fact, these grounds of objection raise difficult questions of law, to which detailed and thorough argument was devoted by both sides. These are, however, matters to be dealt with at the trial, and it is both unnecessary and undesirable that I should give my views on them at this stage. It is

sufficient for me to say for present purposes that I have carefully considered all the arguments which have been advanced, but that I do not think that on the respondent's side they are such as to disturb my strong *prima facie* view that the patent is valid."

In my view it is clear from the judgment of Franklin J that he approved of the approach adopted by the Commissioner (Nicholas J). At 58H-59A he said the following:

"I have, after careful consideration, come to the conclusion that there are no adequate grounds for holding that the Commissioner erred in law or that he did not exercise a proper judicial discretion in dismissing the application on the grounds stated in his judgment. He took into account all the main factors bearing upon the establishment of a *prima facie* right, upon the adequacy or otherwise of an award of damages, and upon the balance of convenience; and I am not persuaded that his conclusions in regard to any of those issues were wrong in law or based on any material misdirections."

In English law, I may point out, the test for the first requirement for an interim interdict is formulated differently. Instead of a *prima facie* right, as in our law, reference is made to a "serious question to be tried". (See *American Cyanamid Co v Ethicon Ltd* [1975] 1 All ER 504 (HL).) It is significant, however, that precisely the same approach is followed with respect to disputed issues of fact and difficult questions of law. See the *dicta* at 510c-e:

"The use of such expressions as a probability, "a *prima facie* case", or "a strong *prima facie* case" in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief. The Court no doubt must be satisfied that the claim is not frivolous or vexatious; in other words, that there is a serious question to be tried.

It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavits as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial."

It seems to me, however, that the approach of Viljoen J in *Fourie v Olivier en 'n Ander* (*supra*) can be reconciled with that of Nicholas J (approved in the *Beecham* case *supra*), if due regard be had to the expression "*difficult* questions of law". This reference to "difficult" appears to imply that ordinary questions of law could be decided at the interlocutory stage of the proceedings.

How are ordinary questions of law to be distinguished from "difficult questions of law"? I would venture to suggest that a basis for such a distinction can be found in the remarks made in the *American Cyanamid* case *supra* (quoted above) to the effect that difficult questions of law are those which require "detailed argument and mature considerations". Whether or not a question of law is to be described as difficult for purposes of this test would obviously depend on the nature of the question concerned and the circumstances in which it is required to be decided at the interlocutory stage.'

[14] In my view, it was therefore perfectly permissible for this court, even though there was no dispute of fact, to find that, there being a number of legal disputes and difficult questions of law between the two parties, a *prima facie* right had been established. In my view therefore, there is no merit in this ground of appeal.

[15] The next ground of appeal is that the court erred in granting the respondent the relief, when in terms of the agreement provision had been made for any disputes between the two parties to be dealt with by means of arbitration. The court dealt with this issue in the judgment. The argument raised, for the very first time during these proceedings, was that this court had no jurisdiction to deal with the application, because the respondent, in terms of section 69 (d) of the CPA, had not exhausted all other remedies available to it in terms of national legislation. This issue was not raised during the original hearing of the matter. In any event this argument, in my

view, is misplaced, because in terms of the provisions of section 52 of the CPA, which was conceded by the applicant in its answering affidavit as was referred to earlier, only a court of law can deal with the issues raised regarding unfair, unreasonable or unjust contract terms in terms of section 48 of the CPA. An arbitrator, the Commission or Tribunal, is not empowered in terms of the act to deal with these kinds of matters. This ground of appeal, in my view, is also without merit.

[16] The last issue that was raised as a ground of appeal was the fact that the court impermissibly applied the provisions of section 114 of the CPA, dealing with interim relief, without the respondent first having applied in separate proceedings for relief to a court. The argument of the applicant in this regard is that the party first had to institute proceedings before the court, before it can apply for interim relief pending the finalisation of the proceedings. This is essentially a matter of the interpretation of the specific section.

[17] The applicant's interpretation envisages a duplication of proceedings and a cumbersome approach to the section. Such an interpretation seeks to circumvent the provisions of the act, more especially in a case like this where a party seeks urgent relief from the court. What it then means is that a party like the respondent is prohibited from applying for interim relief unless it has first instituted proceedings, either in a court or before a Tribunal. That, in my view, is not a sensible and businesslike interpretation of the provision. Subsection 3 of that section states that when an interim order has been granted and a hearing into that matter has not been concluded within six months of that order, the court or Tribunal, on good cause shown, may extend the interim order for a further period of six months. This clearly envisages a situation where the hearing into that matter can be instituted after the

interim order had been granted. The purpose of this subsection is to prevent abuse, in circumstances where an interdict had been applied for and the person in whose favour the interdict had been granted failed to proceed with a hearing within the period of six months after the date of the order.

[18] In any event, the provisions of section 114, and the manner it was applied in this case, were clearly aimed at supplementing the interdictory relief the respondent would ordinarily have been entitled to under the common law. Any interpretation of section 114 that stifles or undermines such relief would in my view be contrary to the provisions of section 34 of the Constitution, which guarantees a person's right of access to courts. In my view therefore, there is also no merit in this ground of appeal.

[19] The next question to consider is whether it would be in the interest of justice to grant leave to appeal. This argument was raised given the nature of the legal questions applicable in this matter, and furthermore, given the extended criteria with regards to whether leave to appeal should be granted in matters where an interim interlocutory interdict had been granted, as laid down in *Tshwane City v Afriforum and Another*[4], where it was held that the common law test for appealability has since been denuded of its somewhat inflexible nature. The court held that, unlike before, appealability no longer depends largely on whether the interim order appealed against has final effect or is dispositive of a substantial portion of the relief claimed in the main application, and that all of this has been subsumed under the constitutional interests of justice standard.

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[4] 2016 (6) SA 279 (CC)

[20] In my view, having regard to the interests of justice, the whole purpose of granting the interim relief would be defeated if leave to appeal is to be granted. This is in circumstances where the respondent has already issued summons before this court in the main action under case number 9547/2021, and the applicant has already filed an appearance defend, a special plea and an exception to the particulars of claim. The interim interdict will only prevail until the action proceedings have been finalised; the granting of leave to appeal in this application will bring the proceedings in the main action to a halt and the purpose of the interdict will have been defeated.

[21] In my view therefore, it would also not be in the interests of justice that leave to appeal be granted in this matter. In the result therefore, I make the following order:

a) that the application for leave to appeal is dismissed;

b) that the applicant pay the costs, including the cost of two counsel.

R.C.A. HENNEY

Judge of the High Court