

ECJ no: 40

AND

REFERENCE NUMBERS -

- DATE DELIVERED: **4 SEPTEMBER 2006**

JUDGE(S): **C. PLASKET**

LEGAL REPRESENTATIVES -

Appearances

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- for the State/Applicant(s)/Appellant(s): **ADV. P. R. JAMMY**
- for the accused/respondent(s): **ADV. T.J. M. PATERSON**

Instructing attorneys:

- Applicant(s)/Appellant(s): **MLONYENI & LESELE INC.**
- Respondent(s): **WHEELDON, RUSHMERE & COLE**

CASE INFORMATION -

- *Nature of proceedings* : **INTERDICT**

- *Topic:*
- *Keywords:*

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION)**

CASE NO: 2295/2006

DATE HEARD:24/8/06

DATE DELIVERED:4/9/06

NOT REPORTABLE

STURU PASIYA

APPLICANT

and

ANDREW STUART PATERSON NO

FIRST RESPONDENT

GARTH MERRICK VOIGT NO

SECOND RESPONDENT

NKOSINATHI NEO SOBELO NO

THIRD RESPONDENT

NATIONAL SOCCER LEAGUE

FOURTH RESPONDENT

SOUTH AFRICA FOOTBALL

ASSOCIATION

FIFTH RESPONDENT

THE MASTER OF THE HIGH COURT,

EASTERN CAPE DIVISION

SIXTH RESPONDENT

JUDGMENT

PLASKET, J

[A] INTRODUCTION

[1] This is an urgent application in which the applicant, Mr Sturu Pasiya, has applied for an interim interdict to prevent the sale by tender of Bush Bucks

Football Club (the club) by the liquidators of Trendmania 4 (Pty) Ltd (Trendmania) pending the resolution, by an arbitrator, of the issue of who owns the club. (This is the form of relief sought by Mr Jammy, who appeared for the applicant, from the bar. The original notice of motion and the amended notice of motion are in somewhat different form.) Pasiya contends that he is the owner of the club, while the first, second and third respondents (the liquidators) contend that Trendmania is the owner of the club.

[2] Three other respondents are parties to these proceedings. They are: the National Soccer League (the NSL), which is responsible for the organisation of professional football in South Africa; the South African Football Association (SAFA), which is the governing body for all football in South Africa; and the Master of the High Court, who gave consent for the sale of the club and who otherwise has an obvious interest in this matter.

[3] The NSL and SAFA were represented by Mr Beasly who informed me that his clients did not oppose the relief sought and did not ask for cost in their favour. They saw their role as being akin to that of an *amicus curiae*. The Master has taken the position that he abides the court's decision. The real dispute, therefore, is between Pasiya and the liquidators and it is focused on whether Pasiya or Trendmania own the club: if Pasiya owns the club the liquidators may not sell it, but if Trendmania owns the club the liquidators may sell it.

[4] All of the parties agree that the matter is urgent, although they differ to an extent as to why it is urgent. I am satisfied that is, indeed, urgent. At the commencement of the proceedings before me I made two orders. First, I granted the liquidators leave to oppose the application, this being necessary because, on their appointment, they were not granted the power to bring and defend legal proceedings in the name and on behalf of the company. Secondly, I made an order joining the Master as a respondent.

[B] BACKGROUND

[5] The club has, for a number of years, been the most prominent professional football side in the Eastern Cape. It was formed nearly 50 years ago and for most of that time was based in Mthatha. In 2003, an entity known as Bucks (Pty) Ltd, which owned the club, was liquidated.

[6] Pasiya purchased what he termed the rump of the club from the liquidators. He purchased, he said, 'a few contracts with players who wished to remain, the name of the club and various registered intellectual properties such as trademarks and logos'. The club moved from Mthatha to East London.

[7] Trendmania was incorporated at much the same time as Pasiya bought the club. It was formed, Pasiya says, 'to assist in the better management of Bush Bucks and in particular to assist in securing sponsorship and other funding'. He alleges that it was involved in the 'day to day affairs of the club and contributed in a range of ways to the development of Bush Bucks brand'.

[8] While Pasiya intended to sell the club to Trendmania – inter alia, to reduce the business risk to himself – this, according to him, never happened.

[9] Within Trendmania problems began to be experienced. This led to an application being brought by one of the directors, Mr Bongani Nkola, to have Trendmania placed under judicial management. That matter was argued before me and I dismissed the application.¹

[10] Nkola then applied for the liquidation of Trendmania. A provisional order was granted on 15 June 2006 and a final order was granted on 26 July 2006.

¹ See *Nkola v Trendmania 4 (Pty) Ltd* ECD 2 February 2006 (case no: 2955/05) unreported.

The liquidators were appointed by the Master as provisional liquidators on 23 June 2006.

[11] A short while thereafter the liquidators placed a notice in various newspapers in which they offered for sale, by way of tender, the 'franchise in the Mvela League of the PSL' of an entity they described as 'Trendmania 4 (Pty) Ltd (in liquidation) formerly trading as Bush Bucks Football Club, East London'.

[12] Pasiya, through his attorneys, asserted his claim to ownership of the club on 7 August 2006 – the day before the planned sale -- when he sought an undertaking from the liquidators that they would not proceed with the sale. The liquidators did not give the undertaking and these proceedings were launched on 8 August 2006. On that day the matter was postponed to enable the applicant to join the Master as a respondent. Costs of that day were reserved and will be determined by me later in this judgment.

[C] THE INTERIM INTERDICT

[13] The elements of an interim interdict are well-known. They are that the applicant must establish a *prima facie* right, although it may be open to some doubt, a well-grounded apprehension of harm, the balance of convenience and the absence of any other satisfactory remedy.² The only element in dispute in this matter is the first element -- whether the applicant has established a *prima facie* right, even if it is open to some doubt. I did not understand counsel to contend otherwise.

[14] In *Webster v Mitchell*³ Clayden J said the following of the requirements of proof of this element of an interim interdict:

² Erasmus *Superior Court Practice* Cape Town, Juta and Co: 1994, E8-8 to E8-9; Van Winsen, Cilliers and Loots *The Civil Practice of the Supreme Court* (4 ed) Cape Town, Juta and Co: 1997, 1065.

³ 1948 (1) SA 1186 (W), 1189.

‘The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, *prima facie* established, may only be open to “some doubt”. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief.’

[15] This test has, subject to an occasional gloss, stood the test of time.⁴ It has, more recently, been restated by Selikowitz J in *Spur Steak Ranches Ltd and others v Saddles Streak Ranch, Claremont and another*,⁵ as follows:

‘The proper approach is to take the facts set out by the applicants together with any facts set out by the respondents, which the applicants cannot dispute, and to consider whether having regard to the inherent probabilities the applicants should, not could, on those facts obtain final relief at the trial.

It is also necessary to repeat that although normally stated as a single requirement, the requirement for a right *prima facie* established, though open to some doubt, involves two stages. Once the *prima facie* right has been assessed, that part of the requirement which refers to the doubt involves a further enquiry in terms whereof the Court looks at the facts set up by the respondent in contradiction of the applicant's case in order to see whether serious doubt is thrown on the applicant's case and if there is a mere contradiction or unconvincing explanation, then

⁴ See, for instance, *Gool v Minister of Justice* 1955 (2) SA 682 (C), 688E.

⁵ 1996 (3) SA 706 (C), 714E-G.

the right will be protected. Where, however, there is serious doubt then the applicant cannot succeed.'

[16] I shall now turn to the evidence adduced by the Pasiya and the liquidators before determining whether Pasiya has established a *prima facie* right, albeit open to some doubt, and thus whether he has crossed the threshold for the grant of an interim interdict.

[D] THE FACTUAL ALLEGATIONS

[17] The essence of Pasiya's case is this. It is common cause that he bought the club from the liquidators of Bucks (Pty) Ltd in 2003. He still owns it, he says, and this assertion is based on the fact that the liquidators cannot point to an agreement that transferred ownership from him to Trendmania. He conceded, however, that while he and the other directors of Trendmania had planned for him to transfer the club to Trendmania this never occurred.

[18] He also points to the fact that Trendmania's financial statements do not reflect the players' contracts and intellectual property as assets of the company, that there has been no application to the NSL, as required by its constitution, for its consent to the transfer of the club to Trendmania and that the liquidators themselves had told players that they did not have contracts with Trendmania. These factors are, he says, further indications that he was still the owner of the club.

[19] Two of the directors of Trendmania and one Leister Phiti have made affidavits in support of Pasiya's contentions. Those directors, Mr N. Mngandi and Mr P. Balfour, deposed to affidavits in almost identical terms. In the affidavit of Balfour, he stated:

'I have read the founding affidavit of Sturu Pasiya in the main application and in the application to join the Master and I confirm the

correctness thereof insofar as it relates to me and to the relationship between Trendmania and Bush Bucks Football Club. Much as I would like to have become a joint owner or shareholder of Bush Bucks I did not. For the liquidators of Trendmania to contend otherwise is ridiculous and I challenge them to produce evidence of a transfer from Pasiya to Trendmania or of an application for consent to the NSL for approval of such a transfer. They cannot do so because it never happened as no agreement was reached as to a mode of transfer or a purchase price.'

[20] Phiti, in his affidavit, described himself as 'the General Manager of Bush Bucks Football Club'. He confirmed the correctness of Pasiya's affidavit 'insofar as it relates to me and to the relationship between Trendmania and Bush Bucks Football Club as far as I am concerned'. He proceeded to state:

'As General Manager of Bush Bucks I dealt with players of the club on a day to day basis and reported directly to the owner Mr Pasiya. It came as a total surprise to me to learn that it was being contended that Trendmania or rather the liquidators of that entity contended they owned the club.'

[21] The liquidators have answered these allegations in great detail and have also, in so doing, incorporated by reference the papers in the judicial management application.

[22] The answering affidavit was deposed to by Mr Andrew Paterson, the first respondent. He denied that Pasiya was the owner of the club and stated that '[f]rom the documents and records within my and the other liquidators' possession, it is apparent that Bush Bucks is owned by Trendmania' and that, as a result he and his fellow liquidators were entitled to sell the club in the liquidation process.

[23] Paterson referred to the following in support of his assertion that Trendmania owned the club: statements made under oath in the judicial management application by Pasiya, Mnqandi and Balfour; the financial statements of Trendmania for the year ended 30 June 2004; the sponsorship agreement entered into between Trendmania and Daimler Chrysler South Africa (Pty) Ltd; Trendmania's tax assessment dated 17 May 2005; invoices of Trendmania; and details of its bank account.

[24] An affidavit deposed to by Mr Bongani Nkola, the applicant in both the judicial management application and the liquidation application, supports the conclusions drawn from these documents by Paterson. Nkola stated that he was a shareholder and director of Trendmania 'from the time of its inception up to the time of the granting of the final liquidation order' and that, as a result, he has intimate knowledge of Trendmania and its management.

[25] He stated that the first time that he heard that Trendmania and Bush Bucks Football Club were separate entities was when an application was brought by Pasiya for a postponement of the granting of the final liquidation order. He stated too that the allegation by Pasiya that Bush Bucks Football Club was never transferred to Trendmania, and so never became the property of Trendmania, was 'entirely incorrect and false'. He continued to say that when his involvement in the club commenced, it was decided 'that a shelf company be bought and that the company would assume ownership of Bush Bucks Football Club. This was duly done and Trendmania 4 (Pty) Ltd has ever since traded as Bush Bucks Football Club'.

[26] He pointed to certain confirmatory indications. The first is a letterhead of the club which bears the registration number of Trendmania. I note that at the foot of the letter (which is dated 8 June 2005) directors are listed. They are MDS Pasiya, who is cited as Executive Chairman, PN Mnqandi, BS Nkola and PP Balfour. It is common cause that they were the directors of Trendmania.

The appearance on the letter of these names is certainly inconsistent with Pasiya being the sole owner of Bush Bucks Football Club.

[27] He also attached a series of tax invoices that had been submitted to the NSL invoicing it for the club's monthly grant. They reflect both Bush Bucks Football Club and Trendmania, the registration number of Trendmania and, in most, the bank account provided is described as the account of 'Trendmania 4 (Pty) Ltd t/a Bush Bucks Football Club'. In one invoice the account is described as 'Trendmania 4 (Pty) Ltd' and in one, no bank account is given.

[28] I return now to the affidavit of Paterson. In respect of the judicial management application, he stated that Nkola, in his founding affidavit, had said that Trendmania did business as Bush Bucks Football Club, and that Pasiya in his answering affidavit admitted this. Furthermore, Nkola also stated in the judicial management application that Trendmania 'trades as a professional football club'. In answering this allegation and the allegation that Trendmania did business as Bush Bucks Football Club, Pasiya stated that he 'confirmed' these averments.

[29] In addition, in paragraph 21 of his answering affidavit, Pasiya said the following:

'At the time that the respondent was incorporated, no formal advice was sought as to the financial and legal systems that would be required to transfer the assets of the club into the respondent. At the time I introduced into the respondent certain furniture and equipment, a bus, a vehicle and approximately 28 contracted players'.

He also stated that Trendmania 'presently has 29 players on contract' and that 15 of them could be transferred if need be 'at an average fee of R500 000.00 each.

[30] This is all at odds with what Pasiya has stated under oath in this matter but is consistent with what Nkola said in his affidavit referred to above. In the light of the above statement by Pasiya in the judicial management application, it is not strictly speaking necessary to deal any further with the discrepancies between what Pasiya said in that case and in this. I shall instead focus now on his fellow directors, Mnqandi and Balfour, and on Phiti. (Note that Pasiya stated that two more directors were appointed in 2004 but that they were not reflected in the secretarial documentation of Trendmania. They were Ms Prim Pasiya, his sister, and Mr Eric Mqgibelo, who was nominated by Daimler Chrysler in terms of the sponsorship agreement.)

[31] Mnqandi – who identified himself as an attorney and hence an officer of this court – stated in his affidavit in the judicial management application that his portfolio as a member of the board of Trendmania was security and the ‘development of the club Bush Bucks’. In this capacity he was, he said, responsible ‘for all aspects relating to the printing of tickets, the distribution and sale of tickets, access control, payment of expenses and disbursements relating to games *of the respondent*⁶ and the final reconciliation and banking of the proceeds of matches’. It is clear from this statement that Mnqandi considered Trendmania and the club to be the same thing.

[32] Balfour stated in his affidavit in the judicial management application that he was the director in charge of Trendmania’s finances. Two aspects of his affidavit are noteworthy. First, he ‘reminded’ the court that ‘the respondent is managed by four administrative employees only, these being Mr Lester Phiti, who is the Secretary and General Manager’, and a further three employees whose identities and functions are not relevant for present purposes.⁷ Secondly, Balfour confirmed in the clearest of terms that the club’s players were contracted to Trendmania. He stated:

⁶ Emphasis added.

⁷ In this matter, as already indicated, Phiti has described himself as the general manager of the club and its owner as Pasiya. He expressed his surprise that anyone could suggest that Trendmania owned the club.

'6.4 A crucial part of the financial status of the respondent is the issue relating to the value of the club and the players contracted by it. I understand the point made by Mrs Hanner in this regard to be that in terms of accounting principles the value of players that the company did not purchase cannot be capitalised in the balance sheet. The respondent presently has 29 players on contract, and various of the players referred to are in demand by other clubs. I submit that communications have been received from various clubs in the PSL in terms of the rules and guide lines for the transfer of players, for the purchase of certain individual players in the club for a total value in excess of R4 000 000.00 (four million rand).

6.5 The respondent therefore finds itself in a position that it has assets of considerable value that are incapable of being reflected on the financial statements. The fact is, however, that a very simple procedure could be followed to dispose of or transfer certain players on very short notice and at considerable profit.

6.6 I therefore submit that although the draft financial statements reflect the respondent to be in insolvent circumstances, it is able to meet its commitments.'

[33] What Balfour stated in these paragraphs was confirmed by Ms Lana Hanner, the auditor responsible for auditing Trendmania. She said that, in terms of generally accepted accounting practice in South Africa 'neither the market value of the club attributable to its membership of the PSL nor the market value of individual contracted payers can be shown as assets in the balance sheet'. The context makes it clear that she considered the club to belong to Trendmania and the players' contracts to be with Trendmania. Indeed, this was never disputed by anyone who deposed to an affidavit in the judicial management application.

[34] It is not only the evidence under oath of Pasiya, Balfour and Mnqandi in the judicial management application that point towards Trendmania being the owner of the club. A number of other documents point in the same direction.

[35] First, Paterson refers to the financial statements of Trendmania for the year ended 30 June 2004. This document bears the signature of Pasiya and Balfour and, under the heading 'Directors' Report' and the sub-heading 'Business Activities' it is stated that Trendmania was incorporated on 11 July 2003 and that it 'operates as Bush Bucks Football Club'.

[36] Secondly, Trendmania entered into a sponsorship agreement with Daimler Chrysler (which was of central significance in the judicial management application). The agreement describes Trendmania as 'Trendmania 4 (Proprietary) Limited t/a Bush Bucks Football Club'. It is then provided (below its registration number) that, for purposes of the agreement, Trendmania will be referred to as Bush Bucks. To reinforce this, the first definition in the agreement is of the term Bush Bucks. It is defined in clause 2.1.1 as meaning 'Trendmania 4 (Proprietary) Limited (Registration No. 2003/06260/07) of 7 Military Road, Gately, Industrial, East London, 5201'. Clause 7.7 provides that Daimler Chrysler 'will assign a senior manager to Bush Bucks who will serve as a member of the Bush Bucks Board of Directors for the duration of the agreement for the purposes of strengthening the Bush Bucks Management Team.' That person, according to Pasiya's affidavit in the judicial management application, was Mr Eric Mgqibelo.

[37] Thirdly, three sets of documents are to the same effect: a tax assessment of Trendmania, dated 17 May 2005 reflects the company as 'Trendmania 4 (Pty) Ltd t/a Bush Bucks', three invoices dated 26 September 2005, 16 September 2005 and 12 September 2005 are all headed Bush Bucks Football Club but reflect the registration number of Trendmania and in providing bank details refer to a bank account (4059372490) at Meeg Bank in the name of

'Trendmania 4 (Pty) Ltd t/a Bush Bucks Football Club'; a bank statement for the period 1 July 2005 to 30 September 2005 reflects that Trendmania's bank is Meegbank, its account number is 4059372490 and it is described as 'Trendmania 4 (Pty) Ltd c/o Bush Bucks Football Club'; and Trendmania's payroll shows that the club's players and Phiti (who was so surprised that anyone could suggest that Trendmania owned the club) are employees of Trendmania.

[38] Finally, a number of annual registration forms for the club submitted to the NSL require analysis. Paterson attached one such form dated 30 July 2004 which reflects that the 'registered name' of Bush Bucks Football Club was Trendmania 4 (Pty) Ltd. The form is signed by five directors, namely Pasiya, Nkola, Balfour, Ms P. Pasiya and Mnqandi. Other similar forms are part of the papers. For instance, three forms were attached to the affidavit of Mr Trevor Phillips, the Chief Executive Officer of the NSL. One was a copy of the registration form mentioned above. The other two relate to the 2001/2002 and 2002/2003 seasons and reflect that the club was then owned by a private company of which the directors included Pasiya and his father. These registration forms pre-date the liquidation of Bucks (Pty) Ltd and Pasiya's subsequent purchase of the club.

[39] The final registration form is attached to the replying affidavit of Pasiya. It is dated 22 June 2005. It states that the registration name of the club is 'Bush Bucks Football Club', which is described as a private company and, on the last page of the form, it describes the registration name of the club as Bush Bucks Football Club (Pty) Ltd. The second page of the document is signed by the directors. They are: Pasiya, Mnqandi, Balfour, Mgqibelo (who is described as 'sponsor rep'), Nkola, Ms P Pasiya and Phiti (who is described as 'general manager').

[40] Despite the club not being referred to as Trendmania, this form nonetheless fails to support Pasiya's version. First, it does not indicate that the club is a sole proprietorship. Secondly, it stated that it is a private company. Thirdly, if Pasiya was the owner, only he would have signed the second page. Fourthly, on his version, the additional signatories would have had no business signing the document (and make something of a mockery of the statements of both Mnqandi and Balfour that much as they would have liked to have become owners of and shareholders in the club, they did not). Fifthly, it is noteworthy that all of the signatories, except Phiti, were the directors of Trendmania at the time, and Phiti if the papers in the judicial management application and the payroll mentioned above are considered, was the general manager of Trendmania.

[41] I turn now to the explanations that were tendered in reply to explain these indications that Trendmania owned the club. As will be shown by the examples cited below, Pasiya's reply to the detailed allegations made by Paterson is obfuscatory, disingenuous, bellicose and, in some instances, simply dishonest. It appears to be based too upon a misunderstanding of the import of the evidence adduced by Paterson and is premised on the idea that because Paterson cannot point to a document embodying the transfer of the club from Pasiya to Trendmania, or to the precise time, place and terms of that agreement, its existence cannot be accepted as proved.

[42] In answer to Paterson's general averment that the liquidators were entitled to do what they had done because the documents and records in their possession made it apparent that Trendmania owned the club, Pasiya said the following:

'I think it is important to stress, again, that the liquidators' disregard for the legal position continues. It would be a simple matter for the liquidators to say to me and the Court that on a particular day, and at a particular place, a transaction was concluded where Bush Bucks was

transferred from me to Trendmania. Voigt certainly is well aware of the fact that I purchased Bush Bucks myself in terms of a written agreement, that I then sought and obtained the consent of the NSL, and in the circumstances that I owned Bush Bucks. One would have expected, at the very least, that the liquidators would have realised that no transaction such as that has taken place since then. They have admitted to refer to affidavits filed in applications in which Nkola and others (myself included) were litigating does not take the matter any further (sic). For the liquidators to continue to make this allegation without any facts whatsoever to support it, is an abuse of their responsibility in my respectful submission.'

[43] Paterson stated that in the judicial management application, Nkola made the allegation that Trendmania did business as Bush Bucks Football Club and that Pasiya admitted this. Pasiya's reply to this is that the 'judicial management application related specifically to Trendmania and Nkola's attempt to have the company placed under judicial management' and that he, Pasiya, 'never denied, and would not deny, that Trendmania was involved in the affairs of Bush Bucks'. This reply loses sight of the fact that Pasiya had confirmed – and I quote from paragraph 6 of Nkola's founding affidavit – that Trendmania 'trades as a professional football club'. Pasiya's reply also flies in the face of his own statement in the judicial management application that, at the time of the respondent's incorporation, 'no formal advice was sought as to the financial and legal systems that would be required to transfer the assets of the club into the respondent' but that he introduced into Trendmania 'certain furniture and equipment, a bus, a vehicle and approximately 28 contracted players'.

[44] Pasiya also stated in his reply that when Nkola had said specifically, at paragraph 12 of the founding affidavit, that after Pasiya bought the club, Trendmania was formed and 'assumed ownership of the football club', he had

denied this. He relied on a paragraph that is common in affidavits – and meaningless too – that ‘to the extent that I do not specifically address any allegation in the founding papers, same should be understood to be denied by the respondent’. It is true that he confirmed paragraphs 8, 9 10, 11, 13 and 14 subject to a qualification in respect of paragraph 13, but to suggest that he denied by default, as it were, that Trendmania was the owner of the club is simply dishonest: as I have indicated above, he had already said himself that he ‘introduced’ into Trendmania the assets of Bucks (Pty) Ltd that he had purchased from the liquidators of that company. In all likelihood therefore, the omission of paragraph 12 from the set of paragraphs that he admitted was nothing more than a typographical error that he now seeks to take advantage of. Such a denial would, in any event, be entirely inconsistent with what was said by him in the judicial management application because, as Paterson has said, ‘during the entire said application it was nowhere suggested that the respondent was not the owner of Bush Bucks Football Club’ and the judgment ‘is premised on the acceptance of Trendmania being the owner of Bush Bucks Football Club’.

[45] It is possible to go further and to state that the respondent’s case in the judicial management application – as set out in the answering affidavit of Pasiya -- was premised on it being the owner of the club: it withstood the allegation that it was hopelessly insolvent by saying that the value of the club and the players’ contracts were not reflected as assets and that, if it had to, it could sell players to pay its debts. I have referred above to the affidavits of Balfour and Hanner in this respect. Despite that, however, Pasiya stated in his reply in this application that, in dealing with the financial statements for the period ended 30 June 2004, the liquidators ignored the contents of the financial statements and that the ‘court will note that under the heading “Current Assets” all that is reflected is cash and cash equivalents’, there being no provision made ‘for the value of the contracts of professional footballers,

for the value of players' image rights, or of anything at all which would be normal in the context of a professional football club'.

[46] The way in which Pasiya deals with the sponsorship agreement between Trendmania and Daimler Chrysler is best described as bizarre. (It must be noted that the sponsorship agreement and its terms were of great significance in the judicial management application.) Pasiya stated in his reply that he had been advised that 'the way in which Bush Bucks is described in the sponsorship agreement is not correct. This is regretted but it certainly was not done with any bad intention nor did it cause Bush Bucks to be transferred to Trendmania'.

[47] I do not think it is necessary to deal in any more detail with the remainder of the reply. It is cut of much the same cloth as that which I have discussed and much of it – for instance factually erroneous allegations that the liquidators do not have the Master's consent for the proposed sale and that they misrepresented the true position to the Master – is ill-considered, intemperate and unjustified.

[48] Two final matters require comment for the sake of completeness. They relate to the players' contracts and to the registration of Bush Bucks with the NSL. I have indicated that the documents of Trendmania and the affidavits of Pasiya and Balfour point to the contracts of the club's players being with Trendmania. Despite this, Pasiya has attempted to persuade the court that the players' contracts are with him. In support of this he stated that the liquidators had told two of the players that they were not contracted to Trendmania. This has been explained by Paterson. He stated that when he was appointed as provisional liquidator, he investigated the position of employees of Trendmania, including the players. He was provided with a list of its employees, which included players, by its accountant. On this basis, he assumed that the players were contracted to Trendmania.

[49] When certain of the players requested that they be released, he informed them that he could not consent to this without them first demanding payment of their salaries. When they made a demand and he informed them that the company was unable to pay them, they cancelled their contracts and were released. He then met with Pasiya and his attorney who threatened to sue him if he released any more players. He continued as follows:

‘I then found myself between the devil and the deep blue sea. If I did not release the player concerned his representative threatened to sue me. If I did release him then the applicant threatened to sue me. When one of the player’s representatives contacted me about his client’s release and furnished me with a copy of the player’s contract, the document revealed that the contract was between the player concerned and, as it now appears, a non-existent company called Bush Bucks Football Club (Pty) Ltd. I erroneously believed that Bush Bucks Football Club (Pty) Ltd was the company that had previously been liquidated. In fact the company which was previously liquidated was called Bucks Football Club (Pty) Ltd. As a result of this I advised the player’s representative concerned that his client’s contract was not with Trendmania 4 (Pty) Ltd, but with Bucks Football Club (Pty) Ltd. I therefore declined to release the player concerned.

However, I have subsequently found out that some of the players contracts are simply with “Bush Bucks Football Club”. Notwithstanding all this, I verily believe that the wording “(Pty) Ltd” was erroneously placed on the contract and that the contract was entered into by and between Trendmania 4 (Pty) Ltd trading as Bush Bucks Football Club. I deny that the incorrect wording of the contracts in any way signifies that the players were contracted to the applicant and not Trendmania. In any event the players listed in annexure “ASP 10a” [the payroll] were paid by Trendmania and not by the applicant.’

What Paterson discovered about the description of the employer in the contracts is consistent with the slap-dash way in which Trendmania described itself more generally. This is particularly evident in the registration forms that I have discussed above. It does not establish, and neither does the conduct of Paterson, especially since it has now been explained, that the players' contracts are with Pasiya and not with Trendmania.

[50] The second issue relates to whether Trendmania was registered as the owner of the club with the NSL. Two points must be made at the outset: first, whatever the NSL knew of the ownership of the club, it cannot be disputed that it paid the grant to which clubs are entitled to Trendmania. This payment is reflected in the financial statements of Trendmania that I have already referred to: and secondly, despite the lack of uniformity in Trendmania's documents and the documents that it supplied to the NSL, nowhere is it reflected that the club is a sole proprietorship or that Pasiya is its owner. The affidavit of Phillips completes the picture. He states that there is no record that the NSL was ever informed of the winding up of Bucks (Pty) Ltd – the Mthatha company – and the first he knew of this was when the present dispute arose. He also states that there is likewise no record that the NSL was ever informed of the sale of the club to Pasiya. He points out, however, that in the 2004/2005 season, in the club's registration form, the trade name of the club is given as Bush Bucks Football Club and the registration name is given as Trendmania 4 (Pty) Ltd. Finally, he says that at no stage was the NSL informed that Pasiya was the sole proprietor of the club and that it assumed 'that since the same directors were involved, that Trendmania was simply the successor-in-title to the old company'. Nothing in the affidavit of Phillips concerning the registration of the club with the NSL supports Pasiya and the most up-to-date documents support the liquidators on the ownership of the club by Trendmania.

[E] CONCLUSION: COSTS AND THE ORDER

[51] From a consideration of the allegations that I have set out, it is now necessary to decide whether it can be said that Pasiya has established a *prima facie* right. Even if it should be accepted that the allegations made by Pasiya, taken with those allegations of the respondent that he cannot deny, establish a *prima facie* right, the second stage of the enquiry, a consideration of the facts set out by the liquidators in contradiction of Pasiya's case, raises doubt of so serious a degree that it cannot be concluded that Pasiya has made out a case for an interim interdict. In assessing that evidence, I take into account that Pasiya, Mnqandi and Balfour made statements under oath in the judicial management application that were consistent with the fact that, and amounted to admissions that, Trendmania was the owner of the club, that much of the evidence of this fact that was adduced by the liquidators was documentary evidence which emanated from Trendmania itself, and the wholly unconvincing attempts to explain away these documents by Pasiya.

[52] What I have set out above concerning the contradictory factual allegations made by Pasiya, Mnqandi, Balfour and Phiti in the judicial management application and in this case is cause for grave concern. Some or all of these deponents appear to have perjured themselves. One of the deponents is an attorney, and hence an officer of this court, which makes matters even more serious. Furthermore, Pasiya's attorney, Mr Nompozolo, has been involved in this matter from an early stage: he met with Paterson about the players' contracts and threatened to sue Paterson if he released players, he wrote letters of demand, signed the certificate of urgency (which was defective for want of proper compliance with the practice rules of this court) and appeared on the occasions when the matter was postponed. In these circumstances, it is unthinkable that he would not have had regard to the papers in the judicial management application, given their central importance to this matter. (It is certainly evident from the replying affidavit that he had a working knowledge of those papers.) If my assumption is correct, his

conduct in being party to different and contradictory versions being put up under oath by his client falls well short of the ethical standards expected of an officer of this court. I intend referring the papers in the judicial management application and in this application to the Director of Public Prosecutions and to the Law Society of the Cape of Good Hope for appropriate action to be considered by those bodies.

[53] I turn now to the question of costs. It has been argued that costs on the scale of attorney and client should be awarded against Pasiya on account of the bad faith disclosed by him in the presentation of his case. In my view, there is merit in this submission: the factors that I have listed in paragraph [52] above are equally applicable to the question of whether a punitive costs award should be made against the applicant. Such serious issues cannot be ignored and the due and proper administration of justice requires that a punitive costs order be made against Pasiya to mark my disapproval of his unethical and unacceptable conduct in this matter.

[54] The question of costs for 8 August 2006 must also be determined by me. On that day, the matter was postponed when the liquidators took the point that the Master had not been joined as a respondent. There is no doubt that he should have been joined: he had given his consent to the sale of the club and apart from that he has an obvious interest in the liquidation of companies within his jurisdiction and the oversight of liquidators. Consequently, the applicant must bear the costs of 8 August 2006, also on an attorney and client scale. The matter was postponed again on 17 August 2006. It was postponed by agreement and the costs occasioned by the postponement were reserved. Although neither Pasiya nor the liquidators chose to address me on these costs, it appears to me that they must be costs in the cause.

[55] The following order is made.

(a) The application is dismissed with costs, such costs to be on the scale of attorney and client, and to include the costs of 8 August 2006 and 17 August 2006.

(b) The Registrar is directed to furnish copies of the papers in this matter and in the matter of *Nkola v Trendmania 4 (Pty) Ltd* (case no. 2955/05) to the Director of Public Prosecutions, Eastern Cape, and to the Law Society of the Cape of Good Hope.

C. PLASKET

JUDGE OF THE HIGH COURT