IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE, HIGH COURT, PORT ELIZABETH)

CASE NO: 1662/2013
Date heard: 26 September 2013
Date delivered: 15 October 2013

In the matter between:

RGT SMART OPERATIONS (PTY) LTD Applicant

and

JUSTIN STUART SWANEPOEL First Respondent

AVARTO SOUTH AFRICA Second Respondent

JUDGMENT

LOWE, J:

Introduction:

[1] On 11 June 2013 applicant ("RGT"), which provides customer satisfaction services within the motor industry, specifically in respect of motor body repairs, launched an urgent

application against first respondent ("Swanepoel"), a former employee, and against second respondent ("ASA").

[2] The application for some reason not explained in the founding affidavit, was launched by short form Notice of Motion affording respondent no opportunity of answering along the usual long form accepted process. The Notice of Motion issued on 11 June 2013 sought that the matter be heard as one of urgency seeking a Rule Nisi on the 14th June 2013, calling upon Swanepoel and ASA to show cause on 2 July 2013 as to why extensive interdictory leave should not be granted, seeking that paragraphs 2.1, 2.2, 2.3 and 2.4 of the Rule Nisi operate with immediate effect, and calling upon Swanepoel and ASA to give notice of intention to oppose, should they wish to do so, by 28 June 2013.

[3] Although clearly urgent (at least against Swanepoel) there was no attempt to follow the normally applicable Form 2 (a) procedure which could (and should) have been utilised albeit with truncated time periods.

[4] The relief sought was substantive and far ranging, interdicting both Swanepoel and ASA from approaching motor body repairers or motor manufacturers listed in the application and

from marketing the so called aCE System operated by ASA, together with various other ancillary relief.

[5] I should make it clear that the relief sought initially was immediate interim relief, the Notice of Motion made it clear, on a proper reading thereof, that on the return day of the rule, final relief would be sought against both Swanepoel and ASA. The only aspect of the Notice of Motion which was not intended to operate with interim immediate effect, was paragraph 2.5 thereof which sought that "…Costs of this Application be reserved for decision in an action to be instituted by the Applicant against the Respondents, for an interdict and other relief, within 60 court days of 7 June 2013."

[6] There was no other indication that the remainder of the Notice of Motion would remain as interim relief pending the determination of an action.

[7] In my view the Notice of Motion clearly, save in respect of costs, was worded such as to lead the respondents to believe that on the return day final relief would be sought, save for costs.

[8] It should perhaps be mentioned that in the founding affidavit and in reply, there was certainly reference to interim relief, and it is now common cause that an action has been instituted against ASA, claiming interdictory and other relief including damages.

[9] The background to the application was simply that Swanepoel, formerly employed by RGT, had been responsible for administering and marketing a customer satisfaction product approved by certain motor manufacturers for use by motor body repairers. Swanepoel's contract of employment with RGT contained provisions protecting RGT's customer connections and its confidential information and prohibited Swanepoel from dealing with RGT's customers and from marketing competing products to RGT's customers.

[10] Swanepoel who had worked for RGT for some time, resigned his employment with RGT on January 2013, immediately thereafter taking up employment with ASA. It is alleged by RGT that ASA did not compete with applicant at that time, for the custom of RGT's customers in relation to the particular product concerned.

[11] RGT states that in June 2013 it came to its notice that ASA, with the aid of Swanepoel, was launching a wide ranging and

concerted attack upon the RGT customer base by means of a product which RGT contends is substantially a copy of its own product.

[12] Much of the above is contested by ASA, but as will appear hereafter, it is unnecessary to determine the various disputes of fact which arise (were I able to do so), on the papers in any event.

[13] On 4 June 2013 under case number: 1560/2013, RGT obtained an Anton Pillar type order authorising it to search and attach evidence relevant to the above, and Swanepoel's activities since leaving RGT, as well as an iPad, cellphone and a laptop computer, the property of RGT, which Swanepoel had reported stolen shortly before resigning his employment with RGT.

[14] A search was conducted of Swanepoel's residence and the business premises of ASA, and a cellur telephone and the iPad were recovered and certain computer information downloaded to be preserved as evidence.

[15] This having been done, this application was launched.

[16] In this application Swanepoel and ASA were represented by attorneys and counsel separately.

[17] When the matter was argued, Swanepoel did not appear nor was he represented, the matter having resolved itself into a continuing opposed application between RGT and ASA.

[18] It was alleged by RGT that at the time of the launch of the interim interdict application (11 June 2013), a number of RGT's customers had switched their custom to ASA it being alleged that this was mainly as a result of Swanepoel's influence, these being customers with whom Swanepoel had dealt on a daily basis when employed by RGT.

[19] There were, so it is alleged, threats by a number of customers to switch their custom to ASA and it was anticipated that this would impact severely on RGT. (I should comment, again, that much of this is disputed by ASA).

[20] Faced with the application, Swanepoel represented by his legal team, and without the concurrence of ASA concluded what has been termed a "comprehensive settlement", consenting to the return of RGT's property, recovered in the Anton Pillar proceedings, and further to a final interdict enforcing RGT's contractual rights against Swanepoel.

[21] The “Settlement Agreement” addresses both the Anton Pillar application and the present application.

[22] To be more precise the Anton Pillar application was dealt with by Swanepoel agreeing to return the cellphone and iPad, and further agreeing that RGT would be entitled to inspect the “mirror copy” of the personal laptop computer in the possession of the Sheriff. In respect of this application the first respondent agreed to applicant taking an order in terms of the draft order, annexed to the agreement, as permanent interdictory relief, and recorded that applicant would not take any further legal action against Swanepoel, criminally or otherwise, and that it would not claim costs against Swanepoel.

[23] This “settlement agreement” was signed by or on behalf of RGT and Swanepoel and dated 13 June 2013. The “Draft Order” referred to reads as follows:

> “1.1 The First Respondent is interdicted and restrained from directly or indirectly approaching any of the motor body repairers and motor manufactures listed on Annexures PDV17 and PDV18 annexed hereto, with a view to securing approval of the aCE system, or with a view to

securing the custom of any of the MBR's so listed, or persuading any of the entities listed to terminate their contractual arrangements with the Applicant, or their approvals of the Applicant's SQS system;

1.2 The First Respondent is interdicted and restrained from marketing the aCE system of the Second Respondent, or any system similar to the Applicant's SQS system, to any of the entities referred to on Annexures PDV17 and PDV18 hereto;

1.3 The First Respondent is interdicted and restrained from persuading or attempting to persuade, any employees of the Applicant to leave the Applicant's employment and from offering employment to any of the Applicant's employees.

1.4 The First Respondent is interdicted and restrained from copying, retaining, developing or using the Applicant's SQS or SQS Lite systems."

[24] This settlement and draft order impacted on the relationship between Swanepoel and ASA (for whom Swanepoel now works), and particularly in respect of the marketing of the aCE System, was invasive of ASA's product marketing at the very least.

[25] Having regard to the settlement Swanepoel filed no papers in this application and did not further oppose the proceedings brought by RGT.

[26] ASA, filed lengthy papers opposing the interdict sought against it.

[27] In reply RGT failed to deal with the disputed issues between the parties, and referred mainly to the settlement concluded with Swanepoel. It was alleged that at the time the original interdictory application was launched, Swanepoel was the "key man" in the ASA onslaught against applicant's customer base, and that following the settlement with Swanepoel "…it had become clear that the loss of the Applicant's customers had been effectively stopped by neutralising the First Respondent."

[28] The reply stated that in the circumstances proceeding with the application for an interdict against ASA would amount to an academic exercise "…as the likelihood of harm has disappeared." The reply went on to contend that to the extent that RGT might have been harmed this would be dealt with in an action against ASA for a permanent interdict and damages.

[29] RGT stated further that it had been advised not to take up the time of the court in pursuing the interdict application. It was said that this would have "…no practical effect".

[30] RGT informed ASA in the final paragraph of the replying affidavit that an order would be sought in terms of Rule 41(4) that the settlement agreement (referred to as a consent order in applicant's heads of argument) would be sought, the application against ASA to be postponed sine die, costs to be reserved for the decision of the trial court in case number: 2466/2013.

[31] The reply refers to the fact that this suggestion, having already been made by correspondence, had been rejected by ASA who insisted that the matter proceed, alternatively be withdrawn by RGT with a costs tender.

[32] Consistent with the above RGT on 25 June 2013 filed a "Notice in terms of Rule 41(4)", giving notice of its intention to apply at the hearing of the matter for an order in terms of the draft annexed to the deed of settlement. This notice was not supported by affidavit and is presumably what is referred to in the final paragraph of the replying affidavit. I wish to make it clear that the order actually to be sought (pages 20 – 21: Application) in terms

of Rule 41(4)) related simply to interdictory relief against Swanepoel and did not in any way deal with the proceedings between RGT and ASA. It does however clearly impact on the aCE System of second respondent.

[33] At a late stage on 25 September 2013, ASA filed an answering affidavit in the Rule 41(4) "application", resisting the relief sought in the Rule 41(4) notice and advising that it did not regard it as competent for such relief to be either sought or granted. ASA went further however and stated that it was a materially interested party in the settlement, which was in any event fundamentally flawed, or so it was contended.

[34] ASA contended in its papers and in argument:

34.1 That procedurally Rule 41(4) required an application supported by affidavit in terms of Rule 6 (1) and (2) of the Rules of Court;

34.2 That ASA was a materially interested party and that the matter could not simply be settled without its concurrence;

34.3 That the settlement did not relate to the proceedings as a whole or provide closure, and thus was incompetent;

34.4 That the settlement agreement in any event amounted to the offence of compounding and was contrary to public policy.

The Rule 41(4) Issue:

[35] When the matter was called, counsel for RGT informed me that, having regard to the late filing of the answering affidavit in the Rule 41(4) application, he sought a postponement thereof in order to file replying affidavits and further to consider applicant's position.

[36] This postponement was resisted by counsel for ASA on a number of bases, but principally that, not only was there no application before the court which was capable of being postponed, it being procedurally flawed, but that having regard to the various issues raised by ASA in the answering papers, the postponement would simply serve no purpose whatsoever.

[37] Whilst the applicant's counsel initially contended that he would need time to deal with the procedural objection, in reply he stepped back from this position, stating that while still seeking a

postponement in order to reply, that he had made such submissions on the procedural issue as were relevant thereto.

[38] Having regard to the conclusion that I have reached relevant to the Rule 41(4) matter, it is unnecessary to deal with the issues applicable to the merits thereof as opposed to the procedural points raised.

[39] Rule 41(4) reads as follows:

> "Unless such proceedings have been withdrawn, any party to a settlement which has been reduced to writing and signed by the parties or their legal representatives but which has not been carried out, may apply for judgment in terms thereof on at least 5 days' notice to all interested parties."

[40] It is trite that a settlement may, on notice, be made an order of court. See *Massey - Ferguson (South Africa) Ltd* v *Ermelo Motors (Pty) Ltd 1973 (4) SA 206 (T)*.

[41] Rule 41(4) does not apply to a formal consent to judgment under Rule 31 (1). See *Estate Huisman and Others v Visse and Others 1967 (1) SA 470 (T)*. Confession to relief sought in the Notice of Motion would, by virtue of the definition of "civil

summons" in the rules, nevertheless still fall under the Rule 31(1) provision. Further a consent to judgment need not follow the rules, but may be given in terms of the common law. See *Ntlabezo and Others v MEC for Education, Culture and Sport, Eastern Cape 2001 (2) SA 1073 (TkH) at 1080*. Under the common law, application on notice to the defendant is required to be made to the court, relevant to a settlement being made an order of that court.

[42] In this matter the attempt to have the order (attached to the deed of settlement), made an order of court was brought clearly with the provisions of Rule 41(4) in mind, and not by way of a confession to judgment or in terms of the common law.

[43] In my opinion, the reference in Rule 41(4) to the entitlement to "apply for judgment" requires application on notice to all relevant parties, as stipulated in the Rules.

[44] Such an application is again, in my opinion, not interlocutory to be dealt with in terms of Rule 6(11), but is a substantive application as envisaged in Rule 6(1).

[45] "Incidental to an application" (in Rule 6 (11)) means "subordinate or accessory to, while at the same time being distinct

from" the main proceedings. See *Massey - Ferguson (supra)*; *Antares (Pty) Ltd v Hammond 1977 (4) SA 29 (W) at 30 D.*

[46] Interlocutory applications do not require notice by way of a Notice of Motion. All that is required is a notice to the other side that an application will be brought on the date assigned by the registrar or directed by a judge.

[47] There is no indication, in my view, in Rule 41(4) which stipulates in any sense that such an application is interlocutory. Such applications must be brought in terms of Rule 6 (1) by way of Notice of Motion, supported by affidavit.

[48] That a settlement agreement disposes of the main proceedings (providing all relevant parties are joined), is clear and accordingly the making of such settlement agreement an order in terms of Rule 41(4), is clearly not incidental to those proceedings and more especially as the rule requires that for Rule 41(4) to be relevant, the settlement agreement must be one "…which has not been carried out…".

[49] In the result, I conclude that the purported application in terms of Rule 41(4) was initially doomed to failure having regard to its incorrect procedural basis by way of notice and it not being

supported by an affidavit, and further failed to comply with the provisions of Rule 6(1) or the requirements of the common law relevant to consent judgments.

[50] In the circumstances, I conclude that the purported application in terms of Rule 41(4) is no application at all, and that it would serve no purpose accordingly to grant applicant a postponement relevant thereto.

[51] In seeking the dismissal of the “application” in terms of Rule 41(4) counsel for ASA sought no order as to costs.

[52] It seems inevitable then that the purported application falls to be dismissed with no order as to costs as appears in the order hereafter.

[53] The determination of this aspect of the matter does not however dispose of the entire application.

The Application for Interdictory Relief:

[54] Faced with various difficulties pertaining to the draftsmanship and effect of the main Notice of Motion, counsel for applicant was driven to seek an amendment to paragraph 3 thereof, which I granted, by agreement, in the following terms:

"3. Paragraphs, 2.1, 2.2, 2.3 and 2.4 above shall operate with immediate effect as interim interdicts and orders, pending final determination of the action referred to in paragraph 2.5."

[55] Whilst this immediately converted the original application for final relief on the return date, into one for interim relief, the fact remains that Swanepoel and ASA were entitled to and in fact did oppose the relief sought on a final basis, until the time of this late amendment.

[56] By the time argument was heard on the application, and as pointed out quite correctly by applicant, the entire application had been overtaken by events insofar as RGT was concerned, RGT having obtained what it sought from Swanepoel.

[57] Clearly RGT had no wish to proceed further in the application against ASA, it seeking to avoid same (and a costs order) by virtue of its resorting to Rule 41(4).

[58] Precisely what the RGT had in mind in this regard, remains to me somewhat unclear. Clearly on the replying papers the alleged reasonable apprehension that the continuance of the

alleged wrong would cause irreparable harm (by ASA) to RGT, if it had ever been established, had in any event fallen away.

[59] Even had RGT been successful in the Rule 41(4) proceedings, this would still have left RGT's proceeding against ASA largely unaffected, RGT having sought wide ranging relief against ASA which it had failed to withdraw or abandon.

[60] It was not surprising that ASA took the stance which it did and persisted in seeking either that RGT withdraw against it tendering costs, alternatively, that the application be determined (it having been initially for final relief), inclusive of a costs order.

[61] In argument when faced with these difficulties counsel for RGT simply sought an order in terms of the redrafted paragraph 3 of the Notice of Motion referred to above.

[62] In the face of its own attitude and reply that the relief sought in this regard was no longer required and effectively that it no longer required interim protection against ASA, and further the express statement that it would seek only the issue of the "consent order" proceeding, it hardly lies in RGT's mouth to now seek relief in terms of the redrafted paragraph 3 of the Notice of Motion, and in any event in the face of its concessions and reply, such an order

would not only be inappropriate but unnecessary, and on the requirements applicable could not be granted.

[63] Counsel for ASA sought dismissal of the main application, not only having regard to RGT's attitude in reply, but maintaining in any event that this had been fatally procedurally flawed, having been brought on the wrong form and by way of incorrect procedure. I add, that the final relief originally sought could in no circumstances have been granted having regard to the usual test applicable to final interdictory relief and in the existence of deep disputes of fact that could not in any circumstances in my view, have been resolved on the papers. That there must exist disputes of fact, which could not be resolved on affidavit, should have been foreseen by RGT at the outset, and to seek final relief was not only inappropriate, but incompetent.

[64] It is trite that all applications, other than those brought ex parte must be brought on Notice of Motion as near as possible in accordance with the prescribed Form 2 (a). See *Waltloo Meat and Chicken SA (Pty) Limited v Silvy Luis (Pty) Limited 2008 (5) SA 461 (T)*; *Patcor Quarries CC v Issroff 1998 (4) SA 1069 (SE)*; *Gouws v Scholtz 1989 (4) SA 315 (EC)*.

[65] In fact it appears from the papers that RGT abandoned its original stance relevant to almost immediate interim relief affording ASA until 23 August 2013 to file its answering papers.

[66] Neither counsel found it necessary to address me on the merits of the application itself although these were dealt with by ASA in extensive heads of argument.

[67] Indeed, ASA submitted in its heads that the inescapable conclusion was that RGT was attempting to extricate itself from the proceedings against ASA, with costs to be reserved for the decision of the trial court in due course.

[68] In the face of applicant's attitude to the matter, ASA seeks that I dismiss the application, ordering costs against applicant on the scale as between attorney and client.

[69] In my view, applicant launched this application on a procedurally flawed basis, seeking a Rule Nisi, which on the return date, would be transformed into final relief.

[70] Not only was it inevitable that there would be deep disputes of fact between the parties applicable to the usual final relief test (which RGT should have foreseen), but applicant misconceived

the procedure upon which it could launch such an application and persisted in the application nevertheless.

[71] Embarrassed by the vigorous response, and having reached an agreement with Swanepoel, applicant attempted then to extricate itself, seeking that costs be determined by the trial court in due course, attempting to delay the day of reckoning in this regard.

[72] I have no doubt that the application in this matter against ASA falls to be dismissed on procedural grounds, as contended for by ASA.

[73] The only question which remains is one of costs.

[74] The only thing that can be said for applicant's argument in respect of costs is that in due course, at the trial, facts may be disclosed which are such as to point a finger at ASA and which may, so the argument goes, persuade a judge in due course that having regard to issues surrounding the original allegations made and the alleged abuse by ASA of Swanepoel's knowledge of RGT's operations and customers, point to bad faith on the part of ASA, and that this is relevant to costs.

[75] It may also be, in my assessment, that in due course having regard to ASA's submission, that it should have its costs on an attorney and client basis, that matter disclosed at the trial in due course may impact on this aspect of the relief sought.

[76] Certainly on what is before me in the application, and from what has transpired between the parties, there are issues which I cannot decide which may bear on which party should pay the costs, and the level at which costs might be awarded, and which may well be able to be determined more accurately at trial once all has been disclosed and tested before the trial judge.

[77] In the result, I am of the view, that in respect of the submissions made as to costs by counsel for both RGT and ASA, there is good reason to suppose that the trial judge in due course will be in a better position than I to determine who should pay whose costs and on what scale, having heard the evidence relevant.

[78] In the result I propose to reserve the costs of the application for determination at the trial in case number: 2466/2013.

[79] In the circumstance the following order issues:

1. The application for postponement of the Rule 41(4) proceedings is refused, with no order as to costs;
2. The application in terms of Rule 41(4) is dismissed, with no order as to costs;
3. The application under case number: 1662/2013, as against second respondent, is dismissed with costs;
4. The costs of the application in case number: 1662/2013 are reserved for decision of the trial court in case number: 2466/2013, in respect of second respondent.

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LOWE J
JUDGE OF THE HIGH COURT

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