IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case no: 3877/2015
Date heard: 5th May 2016
Date delivered: 24th May 2016

In the matter:

KEYPAK (PTY) LTD **Applicant**

Vs

M W DYAKALA **First Respondent**

NELSON MANDELA BAY MUNICIPALITY **Second Respondent**

JUDGMENT

TSHIKI J:

[1] On the 9th October 2015, the applicant filed an application against the respondents for an order in the following terms:

[1.1] that the first respondent is interdicted from threatening, harassing and intimidating the directors, employers and suppliers of the applicant;

[1.2] that the first respondent is interdicted from entering the area within a 50 meter radius from the boundary walls surrounding the applicant's premises situated at 4, 5, 25 and 32 York Road, North End, Port Elizabeth;

[1.3] that the first respondent is directed to pay the costs of this application on a scale as between attorney and client;

[1.4] further and/or alternative relief.

[2] Although there are two respondents, the main respondent who is the first respondent is employed by the second respondent as a municipal traffic officer at the department of licensing services at the corner of Sidwell Avenue and Cresswell Street, Sidwell in Port Elizabeth. The second respondent is the nominal defendant by virtue of being the employer of the first respondent.

[3] The applicant herein is a company known as Keypak (Pty) Ltd which is a limited liability company with *locus standi* to institute the proceedings against the respondents. Applicant is conducting a business of manufacturing corrugated solid board and litho laminate cartons to all regions of the Republic of South Africa. The applicant has conducted its business from several premises at, *inter alia*, 4, 5, 25 and 32 York Street, North End, Port Elizabeth. Its premises are in close proximity to each other being on the same block between Lancaster Street and Stockelback Road. The furthest distance between the business premises of the applicant is about 300 metres in between them and the shortest distance being only 4 metres in between.

[4] The first respondent is referred in the papers as *M.W. Dyakala* a traffic official duly employed by the second respondent at the Department of Traffic and Licencing Services at the corner of Sidwell Avenue and Cresswell Street, in Sidwell Port Elizabeth. It, therefore, follows that all the parties herein reside and are employed within the jurisdiction of this Court.

[5] The applicant's complaint against the first respondent is based on the events which emanated on the 18th August 2015 when the first respondent in his

employment capacity as a traffic officer issued traffic fines to the forklift drivers employed by the applicant. The first respondent justified his conduct on the basis that the drivers and/or applicant's employers did not comply with licensing and traffic regulations in respect of the use of the said forklifts and vehicles relative to the offloading on the public roads. Up to that stage, the applicant was not aware that its conduct and/or that of its employees were unlawful. In any event, according to the applicant, for the past twenty five years the applicant had not been informed of the alleged legal transgressions of the law. In a meeting between the parties also recorded in an email thread of 28th August 2015 from one *Noelene Jorgensen* the following was highlighted as discussed and agreed at the meeting as follows:

[5.1] *Visagie* confirmed that it is not illegal to operate a licensed and registered forklift on a public road on condition that the relevant provisions of the National Road Traffic Act are complied with;

[5.2] It is permitted by the National Road Traffic Act for the driver of a forklift to drive the forklift on a public road if he or she has a code B driving licence provided that its Gross Vehicle Mass of the forklift exceeds 3500kg, and such driver shall at least hold a Code C1 driving licence;

[5.3] According to the applicant the parties agreed that for the possible loading zone demarcations and possible prohibition of stopping on the opposite side of the road, one *Skosana* undertook to discuss the matter further with one *Kleyn* regarding the road marking that needed to be painted;

[5.4] the applicant will continue to use orange beacons for greater visibility when loading and offloading vehicles.

[5.5] According to the applicant the above arrangements resulted in the agreement between the parties in that the licensing regulations in respect of the

applicant's forklifts and drivers hold the correct licenses as proposed by *Visagie* provided that the forklifts were duly licensed and registered. If the above arrangements are complied with, the traffic regulations in respect of the use of the forklifts and loading vehicles on the public roads at York Road and Lancaster Street between the applicant and the second respondent would become lawful.

[6] Notwithstanding the arrangements and agreements between the parties mentioned herein the first respondent kept on attending the applicant's premises to catch out and issue fines to the applicant's forklift drivers and suppliers based on the same reason that the applicant was still contravening the same traffic laws. The applicant insisted and reiterated that it was not contravening any traffic or licensing law by way of operating its forklifts. The applicant contended that it also sought legal advice which was in the applicant's favour in that the conduct of the first respondent was unlawful and an abuse of power in its insistence of issuing fines against the respondent. There were also threats of arrests by the first respondent until the applicant filed an application for interdict which was opposed by the respondent.

[7] *Mr Menti* who appeared for the respondents contended in his argument mainly on four points *in limine* which are:

[7.1] That the applicant's replying affidavit was filed late and not on the 29th March 2016 as is required by the rules. There was also no application for condonation for non-compliance with Rule 6(5)(d)(ii) of the Uniform Rules of this Court. In *Mr Menti's* view the applicant should first had applied for condonation before it filed its replying affidavit.

[7.2] The relief sought by the applicant that first respondent be interdicted from entering the area within the 50 metre radius from the boundary walls surrounding applicant's premises at 4, 5, 25 and 32 York Road was bad in law and constitutes an abuse of the Court process. Therefore, the first respondent should not have been refused his right to do his duties as a traffic officer unless there was a lawful reason by the applicant to do so.

[7.3] The third point *in limine* is that there is a material dispute of fact which the applicant foresaw or should have reasonably foreseen that it existed. He listed them as follows:

- the first respondent disputes the applicant's allegation that the applicant does not contravene the traffic regulations as alleged;
- the first respondent also denied the assertion that he harassed applicant's employees;
- The next contention is that first respondent disputes having agreed with the applicant for harassing him without justification. It is, therefore, in dispute whether the first respondent acted *mala fides;*
- in his view *Mr Menti* contended that the application could not properly be decided on affidavits and that the applicant should have foreseen that the issues herein would be incapable of resolution on the papers and for that reason the Court should dismiss the application with costs;
- In any event, according to *Mr Menti* this Court should dismiss the application for the reason that it was clearly reasonably foreseeable that there are fundamental disputes of fact on the papers which could not be resolved by affidavits. He relied on the judgments in ***Room Hire Company (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*** 1949 (3) SA

155 (T) at 1162. See also ***Transnet Ltd trading as Metrorail v Rail Commuters Action Group*** 2003 (6) SA 349 (A) at 368 C-D and G-H;

- The last point *in limine* by *Mr Menti* is that in the founding affidavit paragraph 12.8 the first respondent deny that he is aware of an agreement between applicant and second respondent regarding his interpretation of the National Road Traffic Regulations. The first respondent attached annexures A, B and C as the fines issued by him to the applicant on a public road contrary to the allegations by the applicant who contended that the parties had resolved their disputes.

[8] There is proof confirming the allegation that the first respondent issued traffic fines to the applicant. The first respondent insisted with the issue of the traffic fines notwithstanding the fact that there is evidence that the matter was discussed with the applicant's employees. In my view, the traffic officer who issued the summons must be consulted if there is a request for the withdrawal of the summons.

[9] The first respondent's opposition to the application is based mainly on two grounds which are:

[9.1] the agreement reached between the applicant and the second respondent's representative or agent(s) could not amount to:

[9.1.1] an amendment to the regulations of the National Road Traffic Regulations;

[9.1.2] can also not interfere with the zoning scheme of the second respondent.

[10] It follows from the aforegoing that the first respondent insisted on his opposition of the contentions by the applicant. In his view the applicant's forklift on the public road was in violation of the National Road Traffic Regulations. In my view, it was for those reasons that the first respondent insisted on the validity of the fines issued by him. According to the first respondent the fines issued by him could be categorised into the following groups:

[10.1] licensing regulations in respect of the applicant's forklift; and

[10.2] traffic regulations in respect of vehicles loading and offloading on public roads. This conduct was the very act that was opposed by the first respondent hence the first respondent issued summons against the applicant and or its employees.

[11] According to the applicant the fines that were issued to the applicant's driver for contravention of Regulation 12(a) and (b) were issued, *inter alia*, for those reasons. Therefore, according to the applicant the fines were accepted by the applicant and accordingly paid. However, according to the applicant some of these fines were in turn withdrawn.

[12] Notwithstanding the issue of summons against the applicant's employees coupled with the meetings which, according to the applicant were held between the parties there was no resolution of the disputes between the parties. The first respondent also continued to issue the summons and/or traffic fines against the applicant's employees and/or owners on the grounds that they had violated the traffic regulations.

[13] In my view, had there been peace and a resolution of these issues, as the applicant has contended, this matter should never have come to this stage of the proceedings. This is also evinced by the failure of the parties to end their disputes. In the circumstances it does not appear to me that there was peace between the parties.

[14] In a situation where the application cannot properly be decided on affidavit the Court may dismiss the application or make such order as it seems meet with a view to ensuring a just and expeditious decision. This is so in a case where the applicant should have realized when launching his or her application that a serious dispute of fact, incapable of resolution on the papers was bound to develop.

[15] In the present application the first respondent contends in his answering affidavit that an agreement between *Noelene* and *Gary* and *Mr Kleyn* of the second respondent was invalid and could not be supported by any law or the National Road Traffic Regulation. In any event, according to the first respondent the said parties had no authority to interfere with the zoning scheme of the second respondent. *Mr Visagie* also does not state which relevant provision of the National Road Traffic Regulation ought to be interfered with. According to the first respondent the applicant operated and continued to operate a forklift on a public road in violation of Regulation 21(4) (a) and (b) of the National Road Traffic Regulations. According to the first respondent on the 18th September 2015 he issued a traffic fine to *Mr Deysel Jason* who was employed by the applicant for a contravention of section 12(a)read with section 89 of the National Road Traffic Regulation read with section 12(b) and further read with section 89 of the National Road Traffic Regulation. *Deysel Jason*

was issued with the fine because he operated a red Manhand-Huster on a public road without a valid driving licence. The first respondent also issued a traffic fine to the Manhand-Huster for permitting an unlicensed driver to drive the Manhand-Huster, registered number HJZ 088 EC CC no N37026OVCB and also for a notice to discontinue the operation of the said Man-Huster registered HJZ 088 EC. According to the first respondent, he issued the said traffic fine in terms of Regulation 21(4) (a) (b) and (c) of the National Road Traffic Regulation. It should be noted that the applicant in its papers has not made reference to the abovementioned documents by way of referring to them as annexures.

[16] The first respondent also denied the contents of paragraph 14.4.2 of the applicant's founding affidavit. He also denies that the applicant's forklifts and loading vehicles could not travel on public roads in particular in York Road and Lancaster Street. In his view, there was no such agreement made between himself and the applicant.

[17] The first respondent contended in his affidavit that a Manhand-Huster cannot be operated on a public road for the purpose of being driven to the premises of the owner in order for the owner to take delivery thereof. It also cannot cross a public road from the premises of the owner to another over a distance of not more than one kilometre. This is so, even if it is driven to that place for repairs.

[18] It seems to me that the main issues contended in the answering affidavit cannot be gainsaid by the applicant and in saying so I refer herein to the evidence of the first respondent. The applicant was given a traffic fine on the basis as stated in

the first respondent's affidavit. Applicant, in my view, is unable to contend that the contents of the first respondent's affidavit in that regard are not true. I have no reason not to believe the contentions averred by the first respondents and cannot say they are not true. In any event, in cases with facts similar to ours where the affidavits reveal certain disputes of fact, a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondent(s) together with the admitted facts in the applicant's affidavits justify such an order. Where it is clear that facts, though not formally admitted, cannot be denied and they are regarded as admitted. This has been the case in ***Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd*** 1957 (4) SA 234 (C) at 235 E-G. See also ***Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd*** 1984 (3) SA 623 (AD).

[19] In ***Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*** 2008 (3) SA 371 (SCA) [2008] 2 ALLSA 512 para [13] Heher JA had the following to say:

> "A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will be of course be instances where a bare denial meets the requirements because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment..."

[20] It follows from the aforegoing that in motion proceedings, as a general rule, decisions of fact cannot properly be founded on a consideration of probabilities, unless the Court is satisfied that there is no real and genuine dispute of facts in question, or that the one party's allegations are so far-fetched or clearly untenable as to warrant their rejection merely on the papers or that *viva voce* evidence would not

disturb the balance of probabilities appearing from the affidavits as it is the case herein. This rule, which is trite, applies to instances of dispute of fact (see eg ***Sewmungal and Another NNO v Regent Cinema*** 1977 (1) SA 814 (N) at 818 G-821G and the authorities discussed there) and also in cases where an applicant seeks to obtain final relief on the basis of the undisputed facts together with the facts contained in the respondent's affidavits (see ***Administrator, Transvaal, and Others v Theletsane and Others*** 1991 (2) SA 192 (AD) at 197).

[21] From what I have read in the papers the first respondent has never been in agreement with the applicant in any material issue that we have dealt with in this case. Generally, traffic offences are tried in a criminal court with a view to establish the guilt or innocence of the accused person. In my view, it is for that reason that the first respondent insisted that the issues between him and the applicant be referred to the Court for its adjudication of the relevant issues.

[22] The applicant's case does not answer the question why the first respondent insisted on carrying on with the issuing of the traffic fines against the applicant up to the last hurdle. This, in my view, is highly unlikely to happen if the parties had intended to resolve the issues between them as the applicant has suggested. There is also no explanation from the applicant why if they were initially in agreement with the first respondent their issues were not resolved. The first respondent insisted with his duties up to the last hour and until the applicant instituted the interdict proceedings and without any justification. Having said this, in my view, the respondents' averments appear to me to be more genuine than what the applicant has attempted to tell this Court in its affidavits.

[23] In the result, the application is dismissed with costs.

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P.W. TSHIKI
JUDGE OF THE HIGH COURT

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