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IN THE HIGH COURT OF SOUTH AFRICA
(TRANSVAAL PROVINCIAL DIVISION)

DATE: 15/6/2005
CASE NO: 10802/2005

UNREPORTABLE

IN THE MATTER BETWEEN:

RADHA MOODLEY NO	FIRST APPLICANT
ABBOTT TRADING (PTY) L TD	SECOND APPLICANT
AND	
INCISIVE TRADING (Pty) Ltd t.a. DOUBLE D LOGISTICS	FIRST RESPONDENT
SHUNMAGNUM LOGANATHAN MOODLEY	SECOND RESPONDENT

JUDGMENT

DANIELS. J

On 22 April 2005 De Villiers J made the following order-

1. That the matter is found to be urgent;

2. That the applicant will file any replying affidavits on or before 26 April 2005;

3. That the matter is removed from the roll.

(3) REVISED.

15/6/2005
DATE

4. That pending final determination of the application paragraphs 2, 3 and 4 of applicant's notice of motion are to operate as interim orders forthwith;

5. That the respondents pay the costs of today (22/4/2005) jointly and severally.

The matter subsequently came before Smit .J when the matter was again postponed and the applicants were allowed to file a replying affidavit to the respondents' answering affidavit. The matter was postponed to 1 June 2005 and costs were reserved.

The matter came before Van Rooyen AJ on 1 June 2005 when the matter was again postponed to 9 June 2005 (on the urgent roll). The court ruled that "The further sets of affidavits are allowed", and ordered that the costs of those further sets of affidavits and the costs of 1 June 2005 be reserved.

The matter was today argued before me. Urgency had been disposed of by De Villiers J. I understood that in respect of the interim order an application was launched for leave to appeal that order. It was never heard. I also understand that the one point *in lmine* raised by Mr.

Gudelsky who appeared for the respondents, was decided by De Villiers J on that occasion. He apparently found, not to my surprise, that the applicant did have the required *locus standi* notwithstanding the fact that the applicant was not duly authorised by the trust to have brought the application. There are only two trustees: the applicant and the second respondent. They are now divorced. She brings the application in her capacity as a trustee and a director and shareholder of the second applicant. She and the second respondent are the two directors and shareholders of the first respondent. Mr. Gudelsky indicated that De Villiers J in fact did make such a finding, and argued that he was entitled in any event to again raise the issue. He argued the point. I indicated then, as I now find to the extent that it is necessary, that the applicant

does have *locus standi.*

Having said that I now turn to the merits.

I do not intend dealing with each and every allegation and denial in any detail. In the circumstances and having regard to the nature of the defence this is not warranted.

Mrs. Moodley and the second respondent were previously married. They have two minor children, both boys. The parties are now divorced.

The second respondent now lines with one Germaine Nicola Gabriela. They are not married. It is common cause that the said Gabriela was at all relevant times the director and sole shareholder of the first respondent. She is employed by Momentum Insurance Company. She is not in the least involved in the business affairs or the day to day running of the first applicant. I would be surprised if she knew anything about the first respondent. I am inclined to believe that the second respondent has at all material times been in possession of blank signed transfer forms and her share certificates.

The second respondent is by his own admission in the complete control of the second applicant and oversees its day to day activities to the exclusion of Gabriela.

It is common cause that the first respondent carries on business on the premises where the second applicant caries on business. It is common cause that the first respondent utilised for the greater part the full force of the second applicant's infrastructure such as telephone, administrative staff offices etc. It is common cause that this very peculiar arrangement was indeed agreed upon between the second respondent and his erstwhile wife. The second respondent was registered some time in January 2004. At the time the second respondent reported to the applicant (in both her

personal and representative capacity) that he registered the company with the two sons as the shareholders. The business which is similar to that carried on as the second applicant on the same premises was to have been conducted by the second respondent for and on behalf of the two minor sons. The "Double D Logistics" would indicate this, the names of the sons being Darry and Dylan. Acting under this, as it turned out misapprehension of the true facts, the applicant in her personal and representative capacity allowed the arrangement. She agreed to assist in rendering the first respondent commercially viable. During February 2005, the applicant discoved that Gabriel was in fact the sole shareholder. Up to that stage she considered the first respondent to be something like a subsidiary of the second applicant, and that it was erected and conducted its business for the sole benefit of their children. This was obviously not the case.

It is difficult to understand, Mr. Gudelsky's argument not withstanding, the defence raised by the respondents. It is somewhat convoluted. At best it can be said that the respondents claim that it was agreed upon between the parties, and that the second applicant conducted and still conducts the business on behalf of and for the benefit of the two minor children. It is common cause that no form of accounting has ever taken place. The first respondent occupies the premises but pays no

rental. It utilises the accounting system and the basic infrastructure of the second applicant. It is effectively conducting a business in competition with the second applicant at no or very little expense to itself save that it provides to an extent its own drivers ad vehicles (but then not always). It is common cause that it passes off his business as that of the second applicants' - as said by the first applicant - almost like a subsidiary. The respondents have secured customers, using the goodwill, name and reputation of the second applicant. Customers are being misled. The second respondent clearly acts in breach of his fiduciary duties in utilising and misappropriating the second applicant's facilities.

Upon a proper analysis of the content of the voluminous papers filed, one is constrained to find that a proper defence is totally lacking.

It is unlawfully competing with the second applicant. It should be pointed out that the first defendant has not in any way sought to defend itself. The company has remained silent in the face of all the allegations made. I only have the ramblings of the second respondent.

To illustrate the absence of a viable defence I should refer to Mr. Gudelsky's opening remarks as to what my approach should be: the submission was made that I should look at the best interests of the

children, since the business of the first respondent was carried on in their best interests.

The second respondent also attempted to have the matter settled. In so attempting a further affidavit was filed wherein the first respondent offered to have the shares in the first respondent placed under the control of a third party, who then would act on behalf of the two children. This nominee would be acting in their interests. This offer was rejected by the applicant.

As a last resort mention was made of disputes of fact which cannot be effectively resolved on the papers. These disputes are more apparent than real and cannot to my way of thinking be taken seriously.

I am satisfied that a proper case for the relief claimed has been made out.

The following order is made -

1. An order shall issue in terms of prayers 2, 3 and 4 of the Notice of Motion.

2. The respondents are ordered, jointly and severally the one paying the other to be absolved, to pay the costs of the application, including the costs which were reserved on 1 June 2005 and 9 June 2005.

H DANIELS
JUDGE OF THE HIGH COURT