

Sneller Verbatim/sem

IN THE HIGH COURT OF SOUTH AFRICA


(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO: 8520/05

2005-08-05

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(1) REPORTABLE	<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO
(2) APPLICABLE TO ALL JUDGES	<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO
(3) APPLICABLE	<input checked="" type="checkbox"/> YES <input type="checkbox"/> NO
DATE	31/8/2005
SIGNATURE 	

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In the matter between

THEBE INVESTMENT CORPORATION

(PTY) LIMITED

1st Applicant

THEBE TOURISM GROUP (PTY) LIMITED

2nd Applicant

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and

CHARLOTTE STEERE AND OTHERS

Respondents

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J U D G M E N T

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WILLIS J: The applicants have approached the court on motion proceedings seeking the following relief by way of an order "restricting and restraining the respondents from publishing statements of and concerning one or more of the applicants to the effect that one or more of the applicants have conducted themselves in an unethical manner, a manner lacking integrity, or have conducted

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themselves fraudulently", together with costs of suit.

When Mr Morison, who appears for the applicants, commenced his argument yesterday he submitted that it would be appropriate for the court to make the following order:-

- "1.1 The respondents are interdicted and restrained from publishing  
any statements to the effect that the applicants have conducted  
themselves fraudulently, pending a finding by courts of law that  
the applicants have conducted themselves fraudulently. 5
- 1.2 The first respondent is interdicted and restrained from using the  
word "fraud" in relation to the applicants or directly accusing 10  
them of any other crime, pending any determination to that  
effect by a court of law.
2. Pending the determination by a court as contemplated in  
paragraph 1 above, the respondents are interdicted and  
restrained from publishing any statements of and concerning 15  
the applicants to the effect that the applicants have conducted  
themselves unethically or without integrity.
3. Costs."

The basis upon which the applicants moved for the interim order referred to was certain statements which appear in the respondents  
answering affidavits: 20

"I hereby voluntarily undertake not to publish any further  
statements to the effect that, or which suggest that the  
applicants have acted fraudulently prior to any court making a  
determination in that regard." 25

and:

"We, the respondents, nevertheless voluntarily undertake that we will not publish any further statements to the effect that the applicants have conducted themselves fraudulently."

and:

"I continue to believe that the second respondent's retention of the leave agreement relating to the waterfront store and the conduct of its officers in relation thereto is tantamount to fraud. In the interest of avoiding technical debates about legal meanings of words, however, I am willing to voluntarily refrain from using the word fraud in relation to the applicants or directly accusing them of any other crime, pending any determination to that effect by a court of law."

and

"We, the respondents, will not make any further public accusations of fraud or other criminal conduct against the applicants until such time as a court of law may have made a finding."

Mr Morison submitted that this amounted to a tender and it was therefore open for acceptance by the applicants and accordingly, so the argument went, the applicants were entitled to the relief in paragraph 1 of the recommended interim order. The argument went further that in view of the fact that such an undertaking had been given, and in view of the first respondent's clear lack of ability to distinguish between fraud, theft and other acts of dishonesty or other acts lacking integrity or ethical standards, the relief in paragraph 2 of the proposed interim order would be appropriate.

I disagree that these statements appearing in the answering affidavits amount to tenders. I cannot, either by looking at them themselves, and more particularly by looking at them in the context of the answering affidavits as a whole, glean from them that they were offers seriously and deliberately made with a view to settling the dispute and avoiding further litigation. On the contrary, they clearly appear to me to have been remarks made together with others that indicated there is no need whatsoever for the interdict in the form in which it is sought.

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Significantly the applicants only sought to amend their particulars of claim seeking alternative relief this morning. I have not yet given a ruling on this matter and my ruling will be made during the course of this particular judgment.

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Mr Morison submitted that really all that was happening was that lesser relief than that initially sought by the applicants was being sought, and that there was no surprise for the respondents in the matter and accordingly the amendment should be granted.

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I disagree. The proposed interim order is made pending "a finding by a court that the applicants have conducted themselves fraudulently", and in regard to fraud or any other crime, "pending any determination to that effect by a court of law", and this qualification is not added in respect of the proposed order 2 in the interim order.

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There is nothing in the founding papers to suggest, as a reasonable possibility, that an appropriate order may be one that was interim in nature. After all upon what peg would the interim relief be hung? Furthermore, as I have said, there was not, in my view, a

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tender which was open to the applicants to accept. And furthermore both the wording used by the respondents and the wording in the proposed order by the applicants is altogether too vague and imprecise for a court properly to make such an order.

What is one to make of the words: "Pending a finding by a court that the applicants have conducted themselves fraudulently"? In which courts is such a finding to be made? Between which parties and in what period of time? All of this is left vague and "up in the air". It cannot seriously be contemplated that this court would make such a vague and imprecise order. Indeed the very vagueness and imprecise nature of the "undertakings" by the respondents, to my mind, indicates that once again those "undertakings" were not tenders in the sense that we, as lawyers, would understand them to be.

Accordingly the application for an amendment of the relief sought by the applicants must fail.

I now turn to deal with the more substantive merits of the case. I do not believe it is necessary to analyse in any particular detail the evidence which appears in fairly voluminous papers. Essentially the respondents do not deny that they have criticised the applicants' ethical standards and their integrity in their business dealings. They allege, however, various defences such as truth plus public benefit, fair comment and privilege.

In respect of at least some of these defences, if not all, one cannot dismiss the averments in the respondents' affidavits as being so obviously fanciful or far-fetched that they can be dismissed on the basis of the *Plascon Evans* test. Furthermore, it is well settled law

that in defamation matters before a court will restrain publication of defamatory matter "it must be satisfied that the matter complained of is libellous, that is that there is no defence e.g. that the statement is true and for the public benefit, could be successfully set up in an action on the libel; that nothing has occurred, e.g. consent to publication, to deprive the plaintiff of his remedy. If there be any doubt upon any of these points then the interdict should be refused and the case is one to be decided at the trial." See *Roberts v The Critic Limited and others* 1919 WLD 26 at 29. See also *Heilbron v Blignaut* 1931 WLD 167 at 168/9; *Buthelezi v Poorter* 1974 (4) SA 831 (W) 836H-837A; *Hix Networking Technologies v System Publishers (Pty) Limited and other* 1997 (1) SA 391 (A) at 402H and *Lieberthal v Primedia Broadcasting (Pty) Limited* 2003 (5) SA 39 (W) at 43E-45B.

On the papers before me the applicants therefore have obviously failed to establish the alleged clear right to the relief which they claim, and on this basis alone the application must be dismissed.

The following order is made:

The application is dismissed with costs.

ADVOCATE obo APPLICANT : ADV L.J. MORISON  
ATTORNEY'S FIRM obo APPLICANT : BRIAN KAHN INC  
ADVOCATE obo RESPONDENT : ADV J.W.G. CAMPBELL  
ATTORNEY'S FIRM obo RESPONDENT : MERWYN TABACK INC  
DATE OF HEARING : 4 AND 5 AUGUST 2005  
DATE OF JUDGMENT : 5 AUGUST 2005