IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

Case No 44614/10

Date heard: 07/09/2012

31/10/2012.

In the matter between

MARCUS MEDICAL (PTY) LIMITED **APPLICANT**

AND

GEBRUDER MARTIN GmBH & CO. KG **RESPONDENT**

Coram : PAKATI J

Date of judgment : 31 October 2012

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL

PAKATI J

1. The applicant, Marcus Medical (Pty) Ltd, applies for leave to appeal my judgment granted on 14 February 2011. Mr J Muller SC appears for the applicant and Mr A. Solomon SC for the respondent.

2. In their notice of Appeal dated 04 March 2011 the applicant listed the following grounds:

2.1 That I erred in concluding that the agreement between the parties was not an exclusive distributorship agreement at the time when the notice of cancellation was delivered.

2.2 That I erred in law in failing to approach the resolution of the dispute on this issue in accordance with the approach outlined in the authorities such as *Soffiantini v Mould 1956 (4) SA 150 (E) at 154 G-H; Fakie NO v CC Two Systems (Pty) Ltd 2006* (4) SA 326 (SCA) at paras [55] and [56]; Rosen v Ekon 2001 (1) SA 199 (W) at 215B-D.

3. Alternatively, it was contended that I erred in failing to refer the dispute for the hearing of oral evidence as requested by the applicant, and by incorrectly applying the practice and principles underlying such requests as reflected in authorities such as *Kalil v Decotex (Pty) Ltd & Another 1988 (1) SA 943 (AD) at 981 D-F; Marques v Trust Bank of Africa Ltd & Another 1988 (2) SA 526 (W) at 530 E-531I; Fax Directories (Pty) Ltd v SA Fax Listings CC 1990 (2) SA 164 (N) at 167B-J; Administrator, Transvaal, & Others v Theletsane & Others 1991 (2) SA 192 (A) at 200C-D; Bocimar NV v Kotors Overseas Shipping Ltd 1994 (2) SA 563 (A) at 587D-G; De Reszke v Maris & Others 2006 (1) SA 401 (C) at 412-413 and Law Society, Northern Provinces v Mogami 2010 (1) SA 186 (SCA) at 195C;* and by,

3.1 Failing to take any cognizance of, alternatively failing to attach sufficient weight to the fact that the applicant had given notice in its replying papers, in its heads of argument, and at the outset of oral argument, that it intended applying for the dispute on this issue to be referred to oral evidence in the event of the Court concluding that it was unable to resolve the dispute in the applicant's favour on the papers.

3.2 That I erred in concluding that in all the circumstances less than four months' notice of termination of the agreement was reasonable and that the notice was therefore valid and effectual.

3.3 That I erred in dismissing, with costs, the whole of the applicant's application to strike out portions of the affidavit of Cecil Gelbart headed "Further Answering Affidavit" dated 4 November 2010, together with annexures thereto and, in particular, items 1, 2 (in relation to paragraph 41 of the affidavit), 4 and 5 of the applicant's application to strike out, and in this regard erred in concluding that the respondent was entitled to respond to these passages in the applicant's replying affidavit by Max Peter Goldberg.

4. In my judgment I found that there was a factual dispute and therefore applied the principle enunciated in **PLASCON-EVANS PAINTS v VAN RIEBEECK PAINTS 1984 (3) SA 623 (A) at 634H-I** which states that where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred by the applicant which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order subject to the exceptions that where the respondent's allegations or denial are so far-fetched or untenable that the court is justified in rejecting them merely on the papers.

5. The applicant in this application relied on the following cases:

5.1 **SOFFIANTINI v MOULD 1956 (4) SA 150 (E)** at 154G-H where Price JP held:

"It is necessary to make a robust, common-sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem. The Court must not hesitate to decide an issue of fact on affidavit merely because it may be difficult to do so. Justice can be defeated or seriously impeded and delayed by an over-fastidious approach to a dispute raised in affidavits".

5.2 In **FAKIE NO v CC TWO SYSTEMS (Pty) LTD 2006 (4) SA 326 (SCA)** at paras 55 and 56 Cameron JA held:

"[55] That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings and in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this Court determined that a Judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be 'a bona fide dispute of fact on a material matter. This means that an uncreditworthy denial or a palpably implausible version can be rejected out of hand, without recourse to oral evidence. In Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd, this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.

[56] Practice in this regard has become considerably more robust, and rightly so. If it were otherwise, most of the busy motion courts in the country might cease functioning. But the limits remain, and however robust a court may be inclined to

be, a respondent's version can be rejected in motion proceedings only if it is 'fictitious' or so far-fetched and clearly untenable that it can confidently be said, on the papers alone, that it is demonstrably and clearly unworthy of credence."

5.3 In **ROSEN v EKON 2001 (1) SA 199 (W) at 215B-D**
Wunch J held:

"Bearing in mind the approach to contradictory affidavits mandated by Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 635 H-636 C, but agreeing with the statement in Truth Verification Testing Centre v PSE Truth Detection CC and Others 1998 (2) SA 689 (W) at 698 I-J, referred to by the applicant's counsel, that the 'so-called "robust, common-sense approach" which was adopted in cases such as Soffiantini v Mould 1956 (4) SA 150 in relation to the resolution of disputed issues on paper' should also be applied in assessing a detailed version which is wholly fanciful and untenable, I consider the respondent's defence to be unsustainable. If this confession to being a party to a fraud on the fiscus is true and he wants to be spared from the obligation of falsely signing a declaration for transfer duty purposes that the 'full and true consideration passing to the seller for such sale is R1 400 000' and 'that there is no agreement, condition or understanding between the seller and the purchaser or any other person whereby the purchaser has paid or is to pay to the seller or any other person whomsoever for or in respect of or in connection with the sale or acquisition of the said property any sum of money or valuable consideration over and above the aforesaid amounts save and except certain charges which fall under s7 of the Transfer Duty Act, 1949'".

6. In my view the approach in the above mentioned cases is not applicable in the instant matter. There was no allegation by the

applicant that the version of the respondent was far-fetched or clearly untenable.

7. Referral of the matter to oral evidence was considered in my judgment having regard to the criteria expounded in the case of **LAW SOCIETY, NORTHERN PROVINCES v MOGAMI 2010 (1) 186 (SCA)** at 195C where Harms DP held:

> *"An application for the hearing of oral evidence must, as a rule, be made in limine and not once it becomes clear that the applicant is failing to convince the court on the papers or on appeal. The circumstances must be exceptional before a court will permit an applicant to apply in the alternative for the matter to be referred to evidence should the main argument fail."*

I found that no exceptional circumstances were shown by the applicant for such a referral. I further dismissed the application for striking out portions of the further answering affidavit by Mr Cecil Gilbart together with its annexures for reasons stated in my judgment which I deem to be sound.

8. During the hearing of the application it was common cause (a) That the agreement was terminable on reasonable notice; (b) That the distribution agreement was never reduced to writing; and (c) That the present owners, the Goldbergs' and Senior Management of the applicant, acquired control and management of the applicant only in 2007.

9. The applicant contended that the distribution agreement that it had with the respondent was an exclusive one. It contended further that at the time of the termination of the agreement three months' notice was unreasonable.

10. I found that there existed no exclusive distributorship agreement between the parties. Mr Kenneth Marius, the Managing Director of the applicant, confirmed that the business dealings between the applicant and the respondent were conducted in terms of a potential relationship and practice which had developed over the years in terms of a "gentleman's agreement of mutual trust and understanding", but that the applicant nevertheless never enjoyed legally exclusive rights to the exclusion of all others; as proof of which two local distributors, Dr Duhalde and Carl Stortz distributed certain products of the applicant in those 30 years. Nothing in the Heads of Agreement suggested that the distribution agreement between the parties was to be exclusive.

11. Mr Muller argued that less than four months' notice of termination of the agreement was unreasonable. Regard must be had to the actual circumstances existing at the time of the notice or those that existed at the time of the contract in determining what period is reasonable for termination of a contract. Mr Marius and Mr Wirthel, both senior personnel of the applicant and who have been involved in this industry for 30 years, expressed the view that three months' notice period was reasonable. Pursuant to the termination of the agreement the applicant retrenched a number of employees involved in the selling of the respondent's products at the end of August 2010. Other staff members resigned at the time the notice was given. The applicant also did not dispute that the respondent's products were "historically purchased by the applicant on an entirely ad-hoc and arm's length basis according to the terms of the order of confirmations incorporating the respondent's general conditions of sale, on the basis that all ownership and risk in the goods passed to the applicant upon delivery to the applicant *ex factory*." This, to me, shows that the applicant was in a position to regulate its own affairs upon termination of the agreement. In the draft agreement the parties

consented that the distribution agreement would be terminable on three months' notice.

12. In my view there are no reasonable prospects on appeal and also no possibility that another court may arrive at a different decision.

ORDER

Application for leave to appeal is dismissed with costs.

BM Pakati

BM PAKATI

ACTING JUDGE OF THE NORTH GAUTENG HIGH COURT

FOR THE APPLICANT: **MR J. MULLER SC**

FOR THE RESPONDENT: **MR A SOLOMONS SC**