

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case Number: 74406/2017

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO	(NO)
(2) OF INTEREST TO OTHER JUDGES: YES/NO	(YES)
(3) REVISED. ✓	
<div style="font-size: 1.2em; font-family: cursive;">31/5/18</div> <div style="font-size: 0.8em; margin-top: 5px;">DATE</div>	<div style="font-family: cursive; font-size: 1.2em;">[Signature]</div> <div style="font-size: 0.8em; margin-top: 5px;">SIGNATURE</div>

In the matter between:

SIYANDISA MUSIC (PTY) LTD

APPLICANT

And

SUN INTERNATIONAL LTD
THE SOUTH AFRICAN HALL OF FAME
MIRIAM MAKEBA FOUNDATION NPC
LUMUMBA NELSON LEE N.O.
ZENZILE MONIQUE LEE N.O.

1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT
5TH RESPONDENT

JUDGMENT

Fabricius J,

1.

In the present application the Applicant seeks the following relief, subsequent to an urgent application which was removed from the Roll on 3 November 2017 with costs reserved:

1. That the third to fifth respondents be interdicted and restrained from holding themselves out as the proprietors of and in respect of the intellectual property and the associated rights that attach to the works of the late Miriam Makeba, in the absence of the prior written approval and consent of Siyandisa;
2. That the respondents be interdicted and restrained from dealing in any manner with the intellectual property and the associated rights that attach to the works of the late Miriam Makeba, in the absence of such prior written approval;

1. That the first and second respondents are interdicted and restrained from

inducting the late Miriam Makeba into the South African Hall of Fame in the

absence of the prior written approval and consent of the applicant.

2.

The Answering Affidavit is dated 11 December 2017. Apart from dealing with particular allegations as per the Founding Affidavit, the Third to Fifth Respondents' answer deals with a point which they say is dispositive of the application as follows:

"The ZM Makeba Trust

7. The applicant claims that it has the sole and exclusive rights and authority to

the late Miriam Makeba's intellectual property, consisting of depiction rights,

personality rights, recording rights, as defined.
8. These rights are said to arise from the late Miriam Makeba taking steps to

commercialise her intellectual property during her lifetime, but to persist after

her death. She is alleged to have done so through the creation of both a

trust and a company. However, from what is set out hereunder, it will emerge

that it is the trust, registered as the ZM Makeba Trust, and not the company, being Siyandisa Music (Pty) Ltd, that is the lawful holder of the late Miriam Makeba's intellectual property rights.

9. The ZM Makeba Trust was registered under IT10304/O4 on 1 December 2004, as appears from the Letters of Authority attached to the founding affidavit.

10. The licence agreement in terms of which the applicant is alleged to have acquired its rights, was however entered into by the late Miriam Makeba in her capacity as purported trustee on behalf of the Miriam Makeba Trust on 28 August 2004, being a time prior to the registration of what eventually was registered as the ZM Makeba Trust, and not the Miriam Makeba Trust.

11. I am advised that section 6 (1) of the Trust Property Control Act 57 of 1988 provides that trustees may only act in their capacity as such once authorised to do so in writing by the Master.

12. At the time when the late Miriam Makeba purported to enter into the licence agreement on behalf of the ZM Makeba Trust, she was not authorised to do so in writing by the Master.

13. The licence agreement is accordingly void *ab initio* and any rights which the ZM Makeba Trust purported to licence to the applicant, including the rights pertaining to the late Miriam Makeba's intellectual property were not validly transferred to it.

14. This being the legal position, the applicant is not entitled to the relief it seeks in paragraph 2 of its notice of motion as it is not the legal holder of the late Miriam Makeba's intellectual property rights.

15. What is more, as far back as July 2009, the deponent to the founding affidavit, Gilfillan, recognised that the rights to the late Miriam Makeba's intellectual property vested in the ZM Makeba Trust and not in the applicant.

16. It is by virtue of the Deed of Assignment attached to the founding affidavit that the ZM Makeba Trust acquired, with effect from 10 December 2004, the full and beneficial ownership of the trade-marks of the late Miriam Makeba.

This being the position, it remains the ZM Makeba Trust, and no other party, that has the right to grant permission for the use of the late Miriam Makeba's name.

17. Furthermore the ZM Makeba Trust is an interested party in these proceedings because, on the applicant's version, it is the entity that transferred the intellectual property rights which vested in it, to the applicant.

18. The current trustees of the ZM Makeba Trust are Dumisani Johannes Motha, Gilfillan, being also the two directors of the applicant, myself and the fifth respondent.

19. While the third to fifth respondents contend that there has been a non-joinder of the ZM Makeba Trust in these proceedings, by virtue of the fact that the point pertaining to section 6 (1) of the Trust Property Control Act is a legal one and that all trustees of the ZM Makeba Trust know of this application because of their involvement with other parties cited herein, the non-joinder of the ZM Makeba Trust in these proceedings ought not to constitute a bar to the facts set out in this affidavit being taken into consideration by this Court

and a decision thereon being made." (References to annexures have been omitted).

3.

A lengthy Replying Affidavit of some 117 pages was then filed on 19 January 2018.

It set out the amended relief now sought. It dealt with chronological facts since 1999. It dealt with the registration of a trademark in 2002 and the details pertaining to the signing of the Licence Agreement on 28 August 2004. It introduced for the first time a resolution taken on 9 June 2009, where the trustees of the "Makeba Trust" resolved that: "Going forward Siyandisa is to act as the exclusive licensee of the intellectual property of Miriam Makeba on a commercial basis and take any risk concerning licensing. The Trust would no longer issue any agreements concerning Miriam's intellectual property with all such being issued by Siyandisa."

It gave substantial and detailed facts of how the parties conducted themselves since 2004 and alleged that the Third to Fifth Respondents were therefore estopped to contend otherwise.

It was said that this particular resolution, in no uncertain terms, conclusively confirms that:

1. The Makeba intellectual property rights were, and are in fact, recently exclusively licensed to Siyandisa, even if only in terms of the said resolution;

and
2. That Siyandisa is consequently endowed with commensurate rights, deserving of interdictory protection under the prevailing circumstances and, more importantly, sufficient to sustain the relief sought by Siyandisa in this application.

4.

It was therefore Siyandisa's case that:

1. Makeba duly assigned the subject Makeba intellectual property to the Makeba Trust as aforesaid;
2. The dominion of such intellectual property consequently vests in the Makeba Trust;

3. The rights relating to the commercialization of the Makeba intellectual property and such associated rights, have been licenced to Siyandisa by the Makeba Trust, on the terms and conditions as set out in the licence agreement.

It was also said that the defence of the Respondents was offered on a mala fide basis, and in an attempt to hijack Siyandisa's rights with the Court's assistance.

On 14 May 2018, I was provided with an affidavit by Mr T. Mthembu, the Applicant's Attorney. The purpose of the affidavit was to address a specific point raised in the Respondents' Heads of Argument. In the context of the introduction of the resolution of 9 June 2009, he explained why the evidence contained in the Replying Affidavit, with reference to the facts and this particular resolution, was that this defence was not foreseen or anticipated, and that is why the Applicant did provide him with resolution for purposes of including it in the founding papers. It was only when the relevant defence was raised, that further investigations were made, and that this resolution was accordingly "rediscovered". He submitted that it was important to note that neither one of the Respondents can factually contest the truth,

voracity, authenticity or correctness of the resolution. Mr N. Cassim SC on behalf of the Respondents, submitted that this topic was not the issue before me, and would have to be decided in future proceedings. Mr Mthembu said that neither he, nor his Counsel, were instructed as to the existence of the resolution at the time the Founding Affidavit was drafted. He contended that there was no prejudice to the Respondents, and that it would be just and equitable for this evidence to be received and taken into account.

5.

Section 6 (1) of the *Trust Property Control Act 57 of 1988*, provides that trustees may only act in the capacity as such once authorized to do so in writing by the Matser.

It has been held that this section is coached in peremptory terms and that the consequences of an act performed by a person who had no authority, is that such act is null and void.

See: *Simplex (Pty) Ltd v Van der Merwe 1996 (1) SA 111 W*, and, *Van der Merwe v Van der Merwe 2000 (2) SA 519 C*.

Also, such act can not be ratified subsequently.

6.

Faced with this argument, the Applicant's Counsel Mr Lourens, referred to clause 10.2.14 of the Trust Deed as a basis for contending that the late Miriam Makeba's signature on the licence agreement, was nevertheless authorized or ratified by the Trust Deed. This argument has to fail, as "there can be no ratification of an agreement which a statutory prohibition has rendered *ab initio* void, in the sense that it is to be regarded as never having been concluded", with reference to the *Simplex* decision *supra* at 113F. Furthermore, the fact that the Trust Deed permitted the trustees to adopt and accept for the trust benefits, under contracts entered into for its benefit, before or after its creation, can not avail the Applicant according to Mr Cassim, as:

1. The licence agreement was not to the ZM Makeba's Trust benefit, but constituted a purported assignment of its rights to the Applicant; and
2. The clause does not refer to the Trust itself being a party or signatory to the envisaged contracts prior to its creation, understandably so, given the provisions of s. 6 (1) of the *Act*.

It was therefore contended that applying the laws of interpretation to the relevant clause of the Trust Deed, it was clear that the aim of the document as a whole, that it was only agreements entered into by persons, having capacity and which would be to the benefit of the beneficiaries, and/or objectives of the ZM Makeba Trust, that could be adopted and accepted by the trustees *ex post facto*. None of these facts apply in relation to the licence agreement. On the Applicant's version, the licence agreement in fact disposed of the Trust's rights.

7.

It is clear that the Applicant, throughout its Founding Affidavit, relied upon the licence agreement as a basis for contending that it has the "sole and exclusive"

rights to the late Miriam Makeba's intellectual property. In reply, it refers to a resolution having been adopted by the then-trustees of the ZM Makeba Trust, in which it is stated that the Applicant would act as exclusive licensee of the intellectual property in question. It was contended that in the first instance, this constituted a belated attempt to establish a new factual basis for the relief sought in reply, and ought properly be struck out. Secondly, it was submitted that this alleged resolution would not have been required, had the licence agreement relied upon by the Applicant, in its founding papers, been valid and of force and effect, as the Applicant had, all along maintained was the legal position. Thirdly, it was said that it is of no assistance to the Applicant, because there is no evidence before this Court that the ZM Makeba Trust in fact ever held the intellectual property rights of the late Miriam Makeba. The only evidence was that it held the right to the trademarks.

8.

The fact that the parties may have, at times, acted in accordance with the belief that the Applicant held the intellectual property rights of the late Miriam Makeba, and had

been enabled to licence them, does not alter the legal position that it does not in law have such a right. The intentions of any of the parties similarly do not alter this situation. The defence of estoppel was not applicable when it would result in conduct which would be contrary to law: see: *City of Tshwane Metropolitan Municipality v RPM Bricks (Pty) Ltd 2008 (3) SA 1 (SCA)*.

9.

Having regard to the *ad hominem* attacks made on the Third to Fifth Respondents, and references to dishonesty and self-enrichment, it was submitted that I ought to consider the statements when considering the appropriate cost order to be made. Mr Lourens on behalf of the Applicant, submitted that no new cause of action was introduced by the Replying Affidavit and the said resolution, but that the Applicant's case was merely "augmented". I do not agree with this contention. The Replying Affidavit, with reference to, and reliance upon, the said resolution, introduces a new cause of action. It is also clear, in any event, that the Court will not, save in exceptional circumstances, allow an Applicant to make or supplement a case in a

Replying Affidavit. Whilst under certain circumstances, a Court has a discretion to allow the introduction of new matter in a Replying Affidavit, the abandonment of an existing claim, together with its cause of action, and the substitution of a fresh, and completely different claim based on a different cause of action, does not amount merely to the introduction of "new matter". It in fact introduces a new cause of action. It is not permissible to make out new grounds for an application in a Replying Affidavit.

See: *Herbstein and Van Winsen, The Civil Practice of the High Court of South Africa, 5TH Edition, Vol. 1 at p. 440.*

10.

I may add that nothing prohibits the Applicant, in general terms, to launch an application basing its cause of action on the said resolution, if it is so advised. That topic can then be fully debated in those proceedings. I therefore agree with the Third to Fifth Respondents' contentions that the provisions of s. 6 (1) of the said *Act* stand in the way of me granting the Applicant's relief sought, and that the

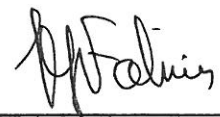
introduction of the said resolution makes out a new case in reply, which ought not to be countenanced. I also do not agree, as suggested by Mr Lourens, that if his argument is not accepted, I ought to make no order as envisaged by *Rule 6 (6)*.

This is not appropriate herein. Applicant's case fails on a point of law, namely the peremptory provisions of s. 6 (1) of the *Act*.

8.

In the result, the following order is made:

The application is dismissed with costs, including costs of two Counsel.



JUDGE H.J FABRICIUS

JUDGE OF THE HIGH COURT GAUTENG DIVISION, PRETORIA

Case number: 74406/2017

Counsel for the Applicant:

Adv P. Lourens

Instructed by: Mthembu Attorneys

Counsel for the Respondents:

Adv N. A. Cassim SC

Adv S. Freese

Instructed by: Jarvis Jacobs Raubenheimer Inc

Date of Hearing: 22 May 2018

Date of Judgment: 31 May 2018 at 10:00