

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2020/21526

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

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DATE

MOKOSE SNI

In the matter between:

SOUTH AFRICAN MEDICAL ASSOCIATION NPC

Applicant

and

SOUTH AFRICAN MEDICAL ASSOCIATION

TRADE UNION

GERHARD VOSLOO N.O.

DR CEDRIC SIPHAMANDLA SIHLANGU

DR TSHILIDZI ORECIOUS SADIKI

DR NKATEKO G MNISI

DR MALOSE MARAKALALA

DR JOHANNE M MKHABELA

1st Respondent

2nd Respondent

3rd Respondent

4th Respondent

5th Respondent

6th Respondent

7th Respondent

JUDGMENT

MOKOSE J

[1] The applicant approaches this court on an urgent basis and seeks final relief to restrain the respondents from representing to the public, media and/or government departments that they represent or form part of the applicant as well as interdicting them from using certain trademarks which the applicant contends are their own.

[2] It is common cause between the parties that the first respondent was established as a consequence of the applicant wanting to represent its members within the forums established in terms of the Labour Relations Act 66 of 1996. The first respondent was registered as a trade union which never operated as an entity separate from the applicant and was managed under the umbrella of the applicant.

[3] During September 2019 a number of respondents, namely the third to the fifth respondents, brought an urgent application in the Labour Court which resulted in the first respondent being put under administration and the appointment on 27 February 2020 of the second respondent as administrator.

[4] The applicant contends that although there had been some symbiosis between the applicant and the first respondent, the appointment of an administrator meant that the dependent relationship previously shared between the parties fell away. Accordingly, the members of the first respondent could not, unless duly authorized, represent to third parties that they represent the applicant. They could also not utilize the intellectual property of the applicant.

[5] The applicant further contends that during April 2020 the first respondent used its logo to represent to the reader of a media statement that it is related to the applicant. The sixth respondent, without authority purported to represent the applicant on national television. The seventh respondent, also without authority, purported to represent the applicant and used its trademark. The applicant then forwarded a letter to the administrator demanding an unconditional undertaking that all structures of the first respondent, including its members refrain from passing itself off as the applicant as well as to cease using its logo without authority. The respondents failed to give the undertaking as required by the applicant as set out in the letter of demand.

Urgency

[6] The applicant contends that the urgency lies in the respondents' refusal to give an undertaking to desist from infringing its personality rights despite demand from 24 April 2020. It alleges that the respondents persisted in infringing the said rights even after the demand had been sent to the respondents. As such, the applicant contends that it had no other conceivable remedy available to it.

[7] The first respondent concedes that it made use of the trademark but that none of the respondents have purported to represent the applicant. The respondents have, in the past, made use of the trademark in particular in March 2020, notwithstanding the fact that the first respondent had been placed under administration. Furthermore, the first respondent is registered as a trade union and its constitution bears the applicant's logo which they believe possibly belongs to the first respondent. More so, the applicant has since the appointment of the administrator, never raised any issue regarding the use of such logo nor withdrawn its consent in respect of the use thereof. Consequently, the respondents are of the view that there is no logic in the argument by the applicants that the two organisations must now be

regarded as two separate entities and the applicant has accordingly failed to provide any facts to suggest that the matter is urgent.

[8] The test of urgency in applications of this nature is whether, if this application is brought in the normal course, the applicant will be able to achieve sufficient relief. The applicant must set out in his or her founding affidavit explicit circumstances on which he or she relies to render the matter urgent as well as the reason why the applicant claims it will not be afforded substantial relief at a hearing in due course.

[9] The applicant avers in its founding affidavit that when it became evident that the administrator and the first respondent would not adhere to the demand made and more specifically after the further use of its logo, it proceeded to launch the application as it realized that it had no other remedy available to it to interdict the respondents. It has a clear right to protect its good name and accordingly brought this application as the respondents had persisted in their unlawful conduct.

[10] The respondents are of the view that the applicant has failed to deal with urgency sufficiently. The applicant only says in its affidavit that the reason for bringing the application urgently is the failure of the first and second respondent to give the undertaking as set out in its letter of demand and that it had no alternative but to approach this court on an urgent basis. The respondents are of the view that the clauses in the affidavit that dealt with urgency are generic and general in nature.

[11] Furthermore, the respondents suggest that the applicant could have approached the Registrar of Labour Relations to file a complaint. The Registrar is empowered to act against a trade union such as the first respondent should there be any wrongdoing on its part.

[12] The applicant, in reply, says that the Registrar of Labour Relations has no authority to order a trade union to desist from utilizing the intellectual property of any company. The Registrar only has authority in so far as the matter falls within the ambit of labour relations.

[13] I am in agreement with the applicant that the Registrar of Labour Relations does not have the authority over the respondents in respect of issues such as the proper or improper use of a company's intellectual property. I am satisfied that the applicant's matter is urgent as the respondents have failed to respond as demanded neither have they given the applicant an assurance that the name and logo of the applicant will not be used. The respondents' allegation that the first respondent has used the logo quite recently does not mean that the applicant may not withdraw its consent to continue to use it. Furthermore, the applicant has indicated that it would suffer harm should the interdict not be granted in that it would create confusion to the world at large. Accordingly, I am of the view that the matter is urgent and that non-compliance with the normal Rules of Court regarding service, form and time-periods as contemplated in Rule 6(12) of the Uniform Rules of court is condoned.

[14] The respondents indicated that they are not persisting in the issue on non-joinder of the Registrar of Trade Unions.

[15] For a court to grant a final interdict against the respondents, the court must find on the evidence presented that:

- (i) the applicant has established a clear right;
- (ii) the respondents have infringed upon that right; and
- (iii) the absence of a similar protection by any other remedy.

Setlogelo v Setlogelo¹

[16] In determining whether the applicant has a clear right and that the respondents have infringed the applicant's trademark, one has to ascertain whether a registered association becomes a *legal persona* distinct from the natural persons who compose it and that it is entitled to protect its identity.

[17] The court in the matter of **Kumalo v Cycle Lab (Pty) Ltd²** said in respect of identity, that identity is defined as a person's uniqueness which individualises such a person and is manifested in various facets of personality which include, *inter alia*, one's physical appearance or image and is considered a separate right of personality. The features of a person's identity have been held to be deserving of legal protection.

[18] Counsel for the applicant further brought to the court's attention an acknowledgment by the judge that academic writers are divided as to whether it is the right of privacy or identity that is primarily violated when a person's image is used without permission for advertising purposes but was of the view that it is unnecessary to resolve whether it goes to the root of individual autonomy or privacy. However, one needs to ascertain whether a particular act constitutes an *iniuria* which must necessarily be determined by the facts and circumstances of each case and consideration of legal policy and the convictions of the community.

[19] The applicant was of the view that a court can order an interdict against the unlawful infringement of its rights. It may also order the removal of the infringement mark on all of the

¹ 1914 AD 221 at 227

² [2011] ZAGPJHC 56 (17 June 2011)

respondents' documents as also an order for damages. However, the applicant is of the view that the court should order an interdict as the continued unauthorised use by the respondents of its logo would perpetuate the confusion which has already been experienced by the general public as also its members. It also avers that the respondents' defence that it had the applicant's consent would only succeed if the respondents' actions fell within the limits of the consent given.

[20] I am in agreement with the applicant that an interdict may be granted as the continued use of the logo can result in confusion to the world at large as has already been seen with the media statement which was made by the sixth respondent. I accept submissions by counsel for the respondents that they were not responsible for the caption in respect of the television programme complained about by the applicant but that is proof enough of the confusion to the public at large.

[22] Accordingly, I am of the view that the applicant has complied with the requirements of the granting of an interdict and grant the following order:

- (i) The respondents, and any member of the first respondent with its authority or otherwise, are interdicted and restrained from presenting, either orally or in writing, to the general public or the media or otherwise that the first respondent forms part of the applicant alternatively, that the business of the first respondent is that of or is associated with that of or relates to the applicant;
- (ii) The respondents, and any other member of the first respondent with its authority or otherwise, are interdicted or restrained from presenting, either orally or in writing, to the general public or the media or any government department and/or government official or otherwise that they individually and/or jointly act on behalf of alternatively speak for, alternatively represent the applicant in any capacity whatsoever;

- (iii) The respondents, and any other member of the first respondent with its authority or otherwise, are interdicted and restrained from individually and/or jointly using, as its or his or their name, the name alternatively the trademark(s) of the applicant, being trademark numbers **TM1668ZA42**, **TM1668ZA16** and **TM166809**, in any communication, either orally or in writing, addressed to the general public or the media or any governmental department and/or governmental official or otherwise;
- (iv) The respondents, jointly and severally the one paying the others to be absolved, are ordered to pay the costs of this application.

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Signed electronically

MOKOSE J

Judge of the High Court of South Africa

Gauteng Division, Pretoria

For the Applicant:

Adv TP Kruger SC

instructed by

Welman & Bloem Inc

For the Respondents:

Adv GA Fourie SC

Adv DJ Groenewald

instructed by

Serfontein Viljoen & Swart Inc

Date of Hearing:

13 May 2020

Handed down electronically on:

19 May 2020