

SOUTH AFRICA / JUDGMENT

Bikebuddi International Ltd v Bikebudi Holdings Ltd (3726/2011) [2011]

ZAECPEHC 59 (13 December 2011)

[2011] ZAECPEHC 59

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

N Dambuza

CASE / FILE NUMBER

3726/2011

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, PORT ELIZABETH)

CASE NO: 3726/2011

Date Heard: 9 December 2011

Date Delivered: 13 December 2011

In the matter between:

BIKEBUDDI INTERNATIONAL LTDApplicant

and

BIKEBUDI HOLDINGS (PTY) LIMITEDRespondent

J U D G M E N T

DAMBUZA, J:

In this application, brought as a matter of urgency, the applicant seeks an interim order that a website under the address www.bikebudi.net be removed from the internet and that the respondent be interdicted and restrained from manufacturing or causing to be manufactured, marketed, distributed and/or sold, a “Bikebuddi trailer system” pending the finalization of anticipated arbitration proceedings between the parties.

The trailer system which is the subject of these proceedings was invented by the respondent. It comprises of a motorcycle trailer (also referred to as a “motorcycle transporter” or “the product”) which is securable to the tow hitch of a motor vehicle.

Having developed the trailer system and secured intellectual property rights (IPR) over it, the respondent granted to the applicant a licence to manufacture, market and distribute the trailer system and to grant sub-licences to agents in this and other countries. The agreement in terms of which the licence was granted to the applicant was concluded by the parties on 13 July 2010 and became effective on that date.

In this application NICO FRANCOIS VENTER (Mr Venter), who deposed to an affidavit on behalf of the applicant alleges that the respondent is in breach of the terms of the licencing agreement between the parties in that, through the internet website mentioned above, the respondent markets and distributes the trailer system.

In opposing the application, the respondent takes issue with the urgency with which the matter was brought to court and contends that, apart from the applicant’s failure to meet the requirements for an interim interdict, the applicant is, itself, in breach of the agreement between the parties and therefore the court should not exercise its discretion in its (the applicant’s) favour.

In the answering papers the respondent also challenges the applicant’s locus standi and requires that the respondent be caused to file security for costs. However, at the hearing of the application Mr Rorke, who appeared on behalf of the respondent advised that the respondent had abandoned these issues as it was desirous of having the matter finalized. The issues before me therefore are whether the matter was properly brought on an urgent basis, whether the requirements of an interim interdict have been met by the applicant and whether, if such requirements have been met, I should exercise my discretion in favour of the applicant by granting the order sought.

There is also an application by the respondent for condonation of the late filing of its answering affidavit. I may as well, at this early stage state that, for reasons that will become apparent later in this judgment, I am satisfied that the late filing of the answering affidavit was through no negligence or tardiness on the part of the respondent.

URGENCY

In support of its contention that the application merits consideration as a matter of urgency the applicant contends, in the main, that the quality and safety of the trailer system marketed and distributed by the respondent are causes for concern. It contends that the product marketed and sold by the respondent is “inferior and unsafe” and that this “will have the effect of poisoning the public and its perception of the safety and value of this product”. In the founding affidavit Mr Venter states that it was the respondent’s inability to manufacture the product to “a desirable standard” that led to the conclusion of the licencing agreement between the parties.

[9] Indeed it is common cause on the papers that in 2008 the respondent had a prototype of the product tested by the SOUTH AFRICAN BUREAU OF STANDARD (SABS). The result was that certain aspects of the products were condemned by SABS. The respondent contends that

subsequent thereto the product was modified by the respondent and the condemned parts were removed or rectified. This much is confirmed, to some extent, by the applicant. Mr Venter states in the founding affidavit that “the version of the product that the respondent tested with the SABS had a rod that extend(s) through the hollow rear axle of the motorcycle. In the production version (as far as the applicant can glean from the photographs on the website), the respondent has replaced the rod with a set of straps to support the wheel from below”.¹

[10] But even before I consider the issue of the quality and safety of the product I first deal, in particular, with the manner in which the application came before court, as pertinently and correctly raised by the respondent.

[11] According to the founding affidavit Mr Venter became aware of the existence of the offending website on 16 November 2011. Thereafter on 17 November 2010 the applicant’s attorneys sent a letter to the respondent, seeking an undertaking, within 48 hours, that the respondent should remove the website from the internet and stop manufacturing and distributing the product. Having received no response to the letter of demand the applicant then launched this application on 24 November

2011. The application was served on the respondent on the same day it was launched. In the Notice of Motion the respondent was given until 17h00 on the day following service, to notify the applicant’s

attorneys of its intention to oppose the application and until 17h00 on 30 November 2011 (6 calendar days), to file its answering papers.

[12] Furthermore the application was set down on the unopposed motion roll for hearing on Tuesday 6 December 2011 (14 calendar days after it was launched). No certificate of urgency was filed prior to its launch and it was never brought to my attention as the judge who would hear the application or to the attention of any other judge prior to it being enrolled.

[13] Rule of practice 12 of the Rules of Practice (or Practice Directives) in this Court provides that:

“URGENT APPLICATIONS

(a) In urgent applications:

“The practitioner who appears for the applicant must sign a certificate of urgency which is to be filed of record before the papers are placed before the judge in which the reasons for urgency are fully set out.....” (my emphasis).

Details of why the applicant alleges a matter is urgent should also be set out in the founding papers.

(b) In all applications brought as a matter of urgency, the matter should be set down for hearing at a time which has been determined as convenient for the judge who is to hear the matter”.

- [14] Mr Venter explains in the replying affidavit that the applicant's Johannesburg attorneys were advised by their local correspondents that the certificate of urgency need not be filed at the time of launching the application; unless the intention is to move the application on the day that it is issued or when the matter is "set down on the unopposed roll and when the matter is heard becomes opposed and you wish for the matter to be heard on that same day"..
- [15] Nothing can be further from the truth. As apparent from a mere reading of the Practice Directive the certificate of urgency must be filed of record before the papers are placed before the judge. The Rule appears in this form in Erasmus; Superior Courts Practice.² I fail to understand what the basis of the interpretation of this Rule by the applicant's attorneys could be.
- [16] As submitted on behalf of the respondent, the purpose of Rule of Practice 12 is to guide the Judge concerned, without him or her reading the papers as such, as to the alleged urgency and the propriety of hearing the matter on an urgent basis. The correct procedure in this case was to have the certificate of urgency placed before me and the matter pertinently brought to my attention or the attention of the duty judge during the preceding week(s), rather than it being enrolled in the unopposed motion roll at the applicant's sole discretion. The fact that the day chosen by the applicant for the hearing happened to be a day on which unopposed applications are usually heard does not justify non compliance with the Rule. Had the applicant complied with the Rule, the application would, in all probability, not have been set down for hearing on an urgent basis.
- [17] This issue is not a mere "technical defence" as the respondent contends. Practice Directives complement the Rules of Court. They are designed to promote efficiency in the functioning of the Courts and to inform the parties as to what the courts expect of them in respect of the practice and procedure of the Court. One should not even have to say this but it is incumbent on the practitioners to acquaint themselves and comply with these Rules and Directives. And it is rather surprising, to say the least, that the applicant entertains hope that it could be awarded costs occasioned on a day that the matter was improperly enrolled.
- [18] Further, and in any event, the applicant has in my view failed to show that the curtailment of the time periods stipulated in Rule 6 of the Uniform Rules of Court was justified. The circumstances which, as alleged on behalf of the applicant, render the matter urgent and departure from the rules justifiable, have been stated above. My view is that these circumstances, as set out in the founding papers amount to nothing more than mere speculation and unsubstantiated allegations.
- [19] Although in the replying affidavit the applicant contends that its concerns over the safety and quality of the trailer system are not the only reasons the application was brought on an urgent basis, it seems to me that they are the main factors on which the applicant relies for urgency. The applicant maintains that it also relies, for urgency, on concerns about public perceptions, the protection of the applicant's markets both nationally and abroad, the

protection of the applicant against consumer claims and the preservation and protection of its potential revenue stream relating to the trailer system. I am of the view that the concerns about public perceptions and protection against consumer claims find their origin in the concerns about the perceived inferior quality and unsafe nature of the product, to which I shall revert shortly.

[20] The concerns about the applicant's market and preservation of the applicant's potential revenue stream from the product are, in reality, one and the same concern which emanates from the applicant's rights deriving from the licencing agreement. The applicant's case in this regard is that the licencing agreement entitles it to the markets with which the respondent is now interfering. I do not consider it necessary to deal in any depth with this issue as it will be properly determined at the arbitration proceedings. But it does appear that, at the time of launching the application the applicant should have anticipated that a dispute of fact would probably surface as to whether the applicant is, in infact, entitled to the rights deriving from the agreement. The respondent's version is that:

1 since 2008 the applicant has failed to perform its obligations under the agreement;

2 Mr Venter had expressed a desire to have the applicant released from the licencing agreement as it wished to market and distribute a trailer system developed by the respondent's competitor, Mr Kotlar; and

3 the respondent had cancelled the agreement in a letter forwarded to the applicant's domicilium citandi et executandi, in Hong Kong.

[21] It is trite that where, in proceedings on notice of motion, dispute of facts arise on the affidavits, the relief sought may be granted only if the facts averred in the applicant's affidavits that have been admitted by the respondent, together with the facts alleged by the respondent, justify the order sought.³ I am not satisfied that the rights to the markets and to protection of income, deriving from the agreement, and which the applicant urgently seeks to protect have been established on the papers. Therefore any urgency based thereon is unsubstantiated.

[22] Reverting to the applicant's concerns about the quality and safety of the product as the basis for urgency my view is that these concerns are based on speculation rather than established facts or facts reasonably believed by the applicant. It is trite that an affidavit is a solemn assurance of a fact known to the person who makes the statement. In the founding papers the applicant prefaces its concerns by stating that it "has no way of knowing whether the trailer systems produced by the respondent is of adequate specification, quality, engineering and safety standards". Nevertheless the applicant proceeds to make definite bold pronouncements on the quality and the safety of the product.

[23] I can only conclude from the papers that the applicant's concerns are based on the condemnation, by SABS of certain parts of the prototype developed and tested in 2008, to which I have already referred. Although this much is not clear from the evidence, it seems to

me that the applicant's reasoning is that since the prototype was condemned the product currently on the market must necessarily be of a sub-standard quality, unsafe and poses danger to the users of the product. But there is no evidence on the papers to show that the absence of certification by SABS is support for the applicant's suspicions about the quality and safety of the product.

- [24] More significant in this application is the fact that even if the quality and safety of the product is compromised there is no evidence as to the extent to which the condition of the product constitutes such danger as to justify non-compliance with the Rules of this Court to the extent that the applicant has done. There is no evidence of complaints by users of the product and no evidence as to the particular shortcomings of the product. The impression I get from the evidence before me is that on becoming aware of the existence of the website no investigation was done by or on behalf of the applicant as to when the website was set up, how long the product has been on the market and what its track record has been for that time. These are some of the fundamental investigations which, in my view, the applicant should have conducted to properly determine which relief to seek if and when approaching the Court.
- [25] In the end my view is that no proper case has been made out for urgency with which the application has been brought and, on that ground alone, the application must fail.
- [26] The respondent seeks costs consequent upon the employment of two counsel. The applicant contends that such an order for costs is not justified. In considering the question of costs the court has adiscretion, to be exercised judicially, upon consideration of the facts of each case. In essence, the decision is a matter of fairness to both sides.⁴ My view in this case is that the applicant in launching the application on an urgent basis escalated the level of effort with which it had to be considered by the respondent. It was therefore fair and reasonable for the respondent to pool as much resources as it could summon to adequately consider the matter in order to be able to respond within the stringent time limits set by the applicant (or as reasonably soon thereafter as was possible in the circumstances). I am therefore satisfied that the employment of two counsel was reasonable in this matter and that the applicant is entitled to the costs consequent thereto.

For the above reasons:

The application is struck off the roll;

the applicant is ordered to pay the respondent's wasted costs; such costs to include the costs consequent upon the employment of two counsel.

N. DAMBUZA

JUDGE OF THE HIGH COURT

Appearances:

For the Applicant: Adv. C. K Mey instructed by Douglas Smart Attorneys of Sandton and c/o Daniel & SACS INC. Port Elizabeth

For the Respondent: Mr. SC Rorke instructed by Pieterse attorneys of Port Elizabeth

1Page 18 of founding affidavit.

2At D-7

3Plascon Evans Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 at 634H-I.

4Fripp v Gibbon & Co 1913AD354

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