

SOUTH AFRICA / JUDGMENT

Drywonder Propriety Ltd and Another v Carpet Dryclean and Others (75564/2015) [2016] ZAGPPHC 469 (27 May 2016)

[2016] ZAGPPHC 469**COURT**

North Gauteng High Court, Pretoria

BEFORE

Ranchod

CASE / FILE NUMBER

75564/2015

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****GAUTENG****DIVISION, PRETORIA****CASE NO:75564/2015****DATE:**

27 MAY 2016

NOT

REPORTABLE

NOT

OF INTEREST TO OTHER JUDGES

REVISED

In the matter

between:

DRYWONDER

PROPRIETARY LIMITED FIRST APPLICANT

ROY

SELWYN BERMEISTER SECOND APPLICANT

and

CARPET

DRYCLEAN CC FIRST RESPONDENT

WAYNE

HALLIDAYSECOND RESPONDENT

TWO OCEANS

MARKETING PROPRIETARY LIMITED THIRD RESPONDENT

JUDGMENT

RANCHOD J

- [1] In this opposed matter the applicants launched the application to be heard in the urgent court in October, 2015. However, as the application, together with the counter-application by the respondents comprised of some 732 pages and the hearing was expected to last more than a day, it was referred to the Deputy Judge President by the presiding Judge for the allocation of a special date for the hearing of the matter. It was allocated to be heard as a special motion in the Third Motion Court on the 28th and 29th January 2016. Costs of the hearing in the urgent court were reserved.
- [2] The applicants sought the following interim interdicts, to restrain the respondents from:
- "2.1 unlawfully competing with the first applicant by passing-off their goods and services as being those of, or associated with, the first applicant or using any get-up which is confusingly or deceptively similar to the first applicant's DRY WONDER get-up as depicted in the affidavit of Roy Selwyn Bermeister or the trade marks METSAN, DRY WONDER and SNOWMAN DEVICE;
- 2.2 unlawfully competing with the first applicant by interfering with its contractual relationships, including intentionally, and without lawful justification, inducing or enticing the third respondent to breach its agreements with the first applicant;
- 2.3 infringing the first applicant's copyright in terms of section 23 of the Copyright Act 98 of 1978 by making unauthorised reproductions and/or adaptations of the first applicant's SNOWMAN DEVICE and the first applicant's product packaging as depicted in the affidavit of Roy Selwyn Bermeister pending the final outcome of this application or an action to be instituted for final relief within 20 days from the date of the grant of this order."
- [3] The applicants also sought the following final interdicts:
- "3. Compelling the first and second respondent (sic) to comply with their contractual obligations to the first applicant by continuing to manufacture the DRY WONDER product referred to in paragraph 4.1 of the affidavit of Roy Selwyn Bermeister for a period of 6 months, calculated from the date of the order requested.
4. Directing first and second respondents to deliver to the first applicant the 19,936kg of DRY WONDER product that should be in its possession and which belongs to the first applicant, alternatively to compel such respondents to manufacture it for the first applicant."
- [4] However, at the commencement of the hearing before me, Mr Michau SC, informed me that the applicants were no longer seeking the relief set out in prayers 2.2 and 2.3 nor prayers 3 and 4 (the final interdicts). Applicants seek an order in terms of prayer 2.1 only together with costs.

- [5] No relief is sought against the third respondent save if it opposes the application in which case costs are sought against it. The third respondent is not opposing the application, hence, for the sake of convenience, where I refer to the first and second respondents jointly, they will be referred to as 'the respondents'. The third respondent will be referred to as 'Two Oceans Marketing'.
- [6] The first respondent is a manufacturer of chemical products and, in particular, carpet dry cleaning products. It has been operating in this field since 1992. Through the first applicant, the second applicant has been the de jure distributor of a particular product manufactured by the first respondent branded DRY WONDER.
- [7] The de facto distribution of the DRY WONDER product has, for the past approximately 20 years been effected by Two Oceans Marketing. As of November, 2014, the respondents have been dealing directly with Two Oceans Marketing.
- [8] The applicants relied on an alleged oral agreement between the parties for an order compelling the respondents to comply with their contractual obligations. The respondents produced a written agreement signed by the parties in 1995 (the 1995 agreement) which, they said, governed the relationship between the parties.
- [9] During the hearing, when relief was now sought only in terms of prayer 2.1 of the notice of motion the applicants' arguments shifted, as I understood them, to a denial that the 1995 agreement was the true written agreement. It was contended that a draft agreement had been prepared - and the terms contained therein were what was agreed upon between the parties based on the oral agreement. The second applicant says the 1995 agreement was presented to him by a Mr Sean Rens whilst he was preparing to catch a flight to Australia and, under the impression that it was essentially the same as the draft, he signed it without realising that it was in material respects different from the draft. For this reason the relief in prayer 2.1 is sought on a temporary basis, pending the outcome of an action to be instituted with leave of the Court, to determine inter alia the validity of the 1995 agreement which is at the heart of the dispute between the parties; and, if the 1995 agreement is valid, whether it was validly terminated.
- [10] The relief, say applicants, is aimed at maintaining the status quo, being the business relationship between the parties that has been in place for the past 20 years.
- [11] The first applicant claims to be the proprietor of the DRY WONDER trade mark. The respondents dispute this and allege that the first applicant assigned ownership of the DRY WONDER trade mark to the first respondent in terms of the 1995 agreement.
- [12] The question here is whether the applicant is entitled to interim relief.
- [13] The respondents have filed a counter-application in which the following relief is sought:
- 13.1 enforcement of a contractual restraint of trade against the applicants for a period of 3 years;

13.2 an interdict restraining the applicants from using the mark DRY WONDER (or any mark similar thereto);

13.3 an interdict (as provided for in the written agreement) restraining the applicants from divulging the formula of the product;

an interdict ordering the applicants to remove any reference to the mark from websites, company names, advertising material etc. and to transfer the domain name www.drywonder.co.za to the first respondent; an order directing the applicants to deliver all packaging, advertising material etc. upon which the mark is represented and

an order confirming cancellation of a written agreement between the parties. [The 1995 agreement].

[14] It is apparent that the counter application is based on the 1995 agreement.

[15] Counsel for the applicants submitted that it was not necessary for me to determine the issue whether the 1995 agreement is valid or not. That may be determined in the action to be instituted if this court grants the interim interdict. However, during the hearing the thrust of the applicant's arguments were about whether the 1995 agreement was valid or not as the respondents rely on inter alia clause 5(e) of the agreement, which provides:

'The parties agree that at all time the trademark and/or patent in to the product shall remain the ownership of the MANUFACTURER and no rights in respect of such patent or trademark and/or the formula shall vest in the DISTRIBUTOR. In particular the DISTRIBUTOR undertakes to ensure that any knowledge which it may obtain in respect of the formula relating to the product during the continuance of this agreement, shall remain strictly confidential, and it shall not be entitled to divulge any information regarding the formula or any portion thereof to any other party whatsoever.'

[16] It was submitted that it is apparent from the history of the relationship between the first applicant and the first respondent that the parties have for the past 20 years conducted business as though the first applicant is the proprietor of the DRY WONDER trade mark.

[17] From the papers it is evident that the applicant is the sole director of the first applicant since 2 January 1994. He was also a director of first applicant's predecessor-in-title, Snowchem (Pty) Ltd (Snowchem) since 9 January, 1973.

[18] The second applicant is a party to the 1995 agreement in his personal capacity.

[19] The first respondent was previously a close corporation which was converted to a limited liability company and registered as such on 8 September 1995 under the name Wayne Halliday Chemicals (Pty) Ltd. It was re-converted to a close corporation on 15 May 2009.

[20] The second applicant (Bermeister) says DRY WONDER was formerly known as METSAN and METSAN DRY WONDER and was first developed by Snowchem in 1984. Snowchem was finally de-registered on 16 July 2010.

- [21] Snowchem applied for and secured registration of three trade marks viz. METSAN in 1983 and DRY WONDER and SNOWMAN DEVICE in 1990. However, all three trade marks have lapsed.
- [22] Snowchem had manufactured, distributed and sold METSAN DRY WONDER until about 1993, when its directors resolved to outsource the manufacture and distribution thereof to a third party, while Drywonder marketed, distributed and sold DRY WONDER for the past 20 years in South Africa.
- [23] Mr Bermeister says Snowchem appointed second respondent (Halliday) and a Mr Sean Rens (Rens) to manufacture the METSAN DRY WONDER in terms of an oral agreement between Snowchem (represented by himself) and Halliday and Rens who were former employees of Snowchem and had been involved in Snowchem's manufacturing of METSAN DRY WONDER.
- [24] However, the respondents aver that there were in fact two companies by the name Snowchem (referred to as Snowchem 1 and Snowchem 2) and questioned which of the two companies the applicant was referring to. Only in the replying affidavit in the application was it clarified which of the two Snowchem companies was being referred to and that only after the respondents raised the issue.
- [25] During 1995, says Bermeister, Halliday and Rens expressed their desire to formalise the manufacturing agreement with Drywonder which prepared a draft agreement for their consideration. The applicants have attached a copy of the alleged draft agreement as annexure 'RB17' to the founding affidavit. It reflects the parties to the agreement as Drywonder and W.H Chemicals CC. In terms of the draft agreement W.H Chemicals was to manufacture METSAN DRY WONDER for Drywonder and that the proprietor of the trade marks METSAN, DRY WONDER and a SNOWMAN DEVICE as well as the product formula for METSAN DRY WONDER was Drywonder.
- [26] Bermeister says the draft agreement was provided to Halliday and Rens who said they wished to make a few minor amendments to it. On 6 September 1995 he was preparing to fly to Australia when he was contacted by Rens who requested that the agreement be formalised before he (Bermeister) left. He says he was presented with an agreement of which, Rens assured him, the material terms were the same as the draft agreement. Bermeister says he was not informed by Rens of the significant changes he and Halliday had made. He signed the agreement presented by Rens (the 1995 agreement) without reading through it diligently and accepting in good faith that there had been no changes and thus did not notice the significant amendments which had been made. Even after signing it he did not read through it again as there was never a need to.

- [27] The 1995 agreement was not referred to again or consulted by the parties until 20 years later when a dispute arose between them. This was, says Bermeister, because nothing changed in the manner in which the business was conducted after the signing of the 1995 agreement and the parties had continued as before on the basis of their oral agreement.
- [28] Bermeister says the 1995 agreement misrepresented and sought to change the entire basis of what, in essence, had already been agreed upon.
- [29] The respondents emphatically dispute most of the allegations made by the applicants - particularly those made by the second applicant. The respondents are adamant that the 1995 agreement governed the relationship between the parties over the years. The factual disputes are numerous. Allegations have also been thrown by the parties at each other about perjury, insult and defamation. I deem it prudent not to detail all the disputes of fact raised by the respondents in their answering affidavit nor the further factual disputes raised in the replying affidavit (in the main application) and those in the counter-application as I am unable to determine on the papers whether the oral agreement relied on by the applicants or the 1995 agreement relied on by the respondents is the valid one.
- [30] In the application the founding affidavit comprises of 55 pages and 229 pages of annexures thereto. The answering affidavit is 86 pages long with 71 pages of annexures. The replying affidavit is 85 pages in length with 24 pages of annexures. Then follows the replying affidavit in the counter-claim by the respondents which is 46 pages long with 102 pages of annexures. All told, the application and counter-application together comprise 730 pages. The applicant's heads of argument were 29 pages while that of respondent 68 pages.
- [31] In *VENMOP 275 (Pty) Ltd and Another v CLEVERLAD PROJECTS (Pty) Ltd and Another* 2016(1) SA 78 GJ at 86 para [12] Peter AJ referred to the tendency by litigants to confuse facts and argument and the cluttering up of affidavits with argumentative matter and inclusion of unnecessarily prolix and repetitive material. The result is that a judge has to trawl through the papers and it leads to substantial delay - more so in this Division of the High Court which is one of the busiest if not the busiest in the country. To make matters worse, in *casu* I was informed only at the commencement of the hearing that the applicants were abandoning a substantial part of their claim.
- [32] The applicants have not established the requisites for the granting of an interim interdict as there is serious doubt (not 'some' doubt) whether they have a *prima facie* right in the face of the 1995 agreement which has been signed by the second applicant. Furthermore, the applicant's attorneys seemingly accepted the validity of the 1995 agreement when they relied on its provisions relating to whether the respondents had given proper notice of termination or cancellation of the agreement. The applicants do have another satisfactory remedy, i.e. a claim for damages if it is eventually found that the oral agreement relied on by the applicants is the valid one and not the 1995 agreement.

[33] It follows that the counter-application cannot be granted as the final relief sought therein is based on the 1995 agreement, which, as I said, is in dispute.

[34] In the circumstances, the following order is made:

1. Both the application and the counter-claim are referred to trial.
2. The notice of motion stands as a simple summons. A declaration shall be filed within 15 days of date of this order and thereafter the Uniform Rules dealing with pleadings and the conduct of trials will apply.
3. Costs of the application and the counter-application as well as those reserved in the urgent court on 13 October 2015 are reserved.

Appearances:

Counsel on behalf of Applicants : Adv R. Michau SC

Instructed by: Spoor & Fisher

Counsel on behalf of first and second Respondents

: Adv

0. Salmon (SC) Adv M. Freed

Instructed by: Rademeyer Attorneys

Date heard: 28 & 29 January 2016

Date delivered: 27 May 2016

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Prepared on 9 October 2026 · Esheria