

SOUTH AFRICA / JUDGMENT

Evrigard (Pty) Ltd and Another v Select PPE (Pty) Ltd (44317/2021) [2023] ZAGPJHC 374; 2023 BIP 13 (GJ) (25 April 2023)

[2023] ZAGPJHC 374

COURT

South Gauteng High Court, Johannesburg

BEFORE

Strijdom

CASE / FILE NUMBER

44317/2021

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IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG DIVISION,
JOHANNESBURG)
Case No: 44317/2021
Date of hearing: 6
February 2023
Date judgment

delivered: 25 April 2023
NOT REPORTABLE
NOT OF INTEREST TO
OTHER JUDGES
REVISED
In

the matter between: EVRIGARD
(PTY) LTD
FIRST
APPLICANT
RONDO
(PTY) LTD
SECOND
APPLICANT
AND
SELECT
PPE (PTY) LTD
RESPONDENT
Neutral

Citation: Evrigard (Pty)Ltd and Rondo (Pty)Ltd v Select PPE (Pty)Ltd (Case No: 44317/2021) [2023] ZAGPJHC 374 (25 April 2023)

JUDGMENT

Strijdom AJ

1. The applicants instituted motion proceedings against the respondent in terms of which declaratory and interdictory relief is sought against the respondent for (inter alia) alleged defamatory statements and injurious falsehoods committed by the respondent.
2. The respondent's conduct complained of giving rise to the alleged defamatory and injurious falsehood statements made against the applicants are based on a letter of demand from the respondent's attorneys dated 10 June 2021 and as published to third parties (viz Builders Warehouse).[1]
3. In its notice of motion, the applicants sought an order (inter alia) directing the respondent to pay damages to the applicants for

defamation and injurious falsehoods.[2] At the commencement of this matter, I was informed by the applicants that no order is sought for damages.

4. The salient issues requiring determination by this Court are as follows:

4.1 Whether the alleged statements complained of are defamatory of the applicants?

4.2 Whether the applicants have made out a case for interdictory and declaratory relief based on a defamation and injurious falsehood cause of action?

4.3 The merits of the defences raised by the respondent, including but not without limitation that it acted during the cause of a privileged occasion?

4.4 Whether the Court in the exercise of its discretion should not- suit the applicants on the basis that they have not demonstrated why a damages action does not constitute appropriate alternative relief?

5. The first applicant is the manufacturer, and the second applicant the distributor, of PPE products to the mining industry.[3]
6. The applicants have been selling gloves under the brand STORM and FORCE since at least 2016, to the knowledge of the respondent.[4]
7. The applicants contended that the respondent unlawfully interfered in their business relationship with Sibanye Stillwater by, inter alia: -

7.1 Replicating the unique colours of the first applicant's gloves;

7.2 Falsely representing to Sibanye Stillwater that the first respondent's dusk masks were out of stock across South Africa knowing this to be untrue.

7.3 Unlawfully substituting the first respondent's products with those of competitors.

8. This resulted in the applicants instituting application proceedings against the respondent under case no 21896/2021 (the "Substitution

Application") and laying a complaint with the competition commission.[5]

9. On 10 June 2021, and after the Substitute Application was served, the respondent's attorneys sent the contentious letter to the applicants attached as "FA 4" to the Founding Affidavit[6] alleging that: -

9.1 The applicants were marketing gloves under the product ranges of Tyson "Force" and "Storm";

9.2 These products were "clearly intended to be passed off as our client's product ranges" as the respondent was the registered holder of certain trademarks;

9.3 The applicants' products infringed on the respondent's registered intellectual property and constituted an attempt to "pass off your goods as our clients under the common law."

9.4 The applicants were contravening Section 34 (1) of the Trade Mark Act, 1993 and the sale of the products was intended "to create deception in public eye that they are in fact purchasing our client's products, such deception which is also unlawful.";

9.5 The applicants were invited to deliver to the respondents all the infringing products "for purpose of destruction."

9.6 The respondent would address Builders Warehouse on this issue, requiring them to remove all infringing products from their shelves; and

9.7 The respondent would institute legal proceedings in terms of Section 34 (1) of the Trade Marks Act if the goods were not delivered to it by 15 June 2021.

10. On 11 June 2021 and under cover of an e-mail[7] the respondent wrote to Builders Warehouse alleging the "the offending goods are sold in your stores" and that "we request you to immediately remove the offending goods from your stores and return them to the supplier."

11. Builders Warehouse approached the applicants on 6 July 2021 advising of the respondent's publication of the letter.[8]

12. The respondent contended that its actions were not unlawful because: -

12.1 The statements are not defamatory and "do not have the tendency, nor are they calculated to undermine the status and good name of the applicants.[9]

12.2 There is “no competent cause of action disclosed for purpose of the claim based on an injurious falsehood in that the applicants have not alleged that the respondent intended to injure them in their reputations.”[10]

12.3 The respondent was “vindicating its statutory and common law intellectual property rights” and lacked the intention to defame the applicants;

12.3.1 In this regard, the respondent contended that it was “of the view that its registered trade marks were being violated and that the applicants were guilty of passing off”.

12.4 If it is found that the statements were defamatory, the respondent alleges that such statements were published “during the course of a privileged occasion which had the effect of excluding any wrongfulness.”[11]

12.4.1 In this regard, the respondent contended that it is entitled to “express its views freely on the subject so as to jealously guard and enforce what it considers to be valuable intellectual property assets” and that it had the “right to bring these matters to the attention of Builders Warehouse” who had a “reciprocal right to receive the information contained in the letter of demand.”[12]

12.5 The applicants have not made out a case for interdictory relief.

Declaratory Relief

13. In this matter the applicants sought a declaratory that the respondent has defamed the applicants.

14. It was stated in *Economic Freedom Fighters and Others v Manuel* (Media Monitoring Africa Trust as amicus curiae)[13] that:

14.1 not all cases can be dealt with by motion proceedings for declaratory orders and followed by referrals to trial court for the determination of quantum;

14.2 where an applicant elects this course, it runs the risk of being told by a court that the chosen method to prosecute the matter is simply wrong; and

14.3 defamation proceedings ought to be dealt with by action proceedings and, unless there are exceptional circumstances, they should not be dealt with piecemeal through a combination of motion and action proceedings.

15. In *Cadac (Pty) Ltd v Weber Stephen Products Company and others*[14] it was stated that:

“a court may conclude that the issues of liability and quantum are so interlinked that it is unable to decide the one without the other.”

16. It is trite law that a party must claim all its relief, arising from a single cause of action, in the same action.

17. The elements of a defamation are i) the wrongful, and ii) intentional, iii) publication of, iv) a defamatory statement, v) concerning the plaintiff/applicant.
18. The statement may have a primary or secondary meaning. The applicants relied on the primary meaning of the statement and have not alleged a secondary meaning. The meaning of the statement is determined objectively by the legal conduct of the reasonable reader and is not a matter on which evidence may be led.
19. A defamatory statement includes a statement that can injure the reputation of a person concerning his trade or business profession,
and extend to trading corporations.
20. Once it is proven that a defamatory statement has been published, two presumptions arise: -
 - 20.1 Firstly, that the publication was wrongful; and
 - 20.2 Secondly, that the defendant intended to act animus iniuriandi.
21. It was submitted by the applicants that the statement is defamatory per se, that the statements was made animus iniuriandi and that the respondent's defence of qualified privilege is not a valid defence.
22. The applicants further contended that the statements were, in fact, injurious falsehoods.
23. For the purpose of declaratory relief, the applicants must prove that:
 - 23.1 The representation was false;
 - 23.2 The respondent knew the representation was false; and
 - 23.3 The respondent intended to cause the applicant loss by the false representation (animus iniuriandi).
24. The factors necessary to determine quantum and those necessary for the determination of whether the declaratory order ought to be granted are in my view inextricably linked. The Court considering the quantum aspect of this matter (assuming the applicants succeed) would not be in a position to properly consider all the relevant factors necessary for determining quantum.
25. One of the factors to be considered in determining damages in a defamation claim relates to the Trial Court's perception of the defendant's witnesses on matters concerning the entire claim. Once a Court has considered all the evidence pertaining to the merits and quantum it then exercises a discretion on what appropriate remedy ought to be. That discretion should not be exercised piecemeal but with regard to the totality of evidence before the Court including the conduct of the parties which is predominantly an issue that arises at the merits stage of the proceedings.

26. The approach adopted by the applicants to bring the proceedings on motion and request a referral for oral evidence as regard damages has been endorsed in some types of claims. However, it is not an approach that is automatically applicable in all types of claims.
27. It was submitted by the respondent that the issues in dispute have not crystallized as they would in action proceedings, with the result that the contours of the applicants' case in respect of the various causes of action are not clearly defined. I agree with this submission.
28. On a conspectus of the affidavits, I concluded that this court is not in a position to properly consider the various aspects raised in the matter as a Court would in trial proceedings.
29. In my view there is a procedural and substantive flaw in the process chosen by the applicants and that this Court cannot entertain the application for declaratory relief.

The Interdict

30. The requirements for interdictory relief are trite. The applicants must prove: -
 - 30.1 A clear right;
 - 30.2 An injury actually committed or reasonably apprehended; and
 - 30.3 The absence of any other satisfactory remedy.
31. Any person (juristic or natural) has a clear right to protect its dignity and reputation.[15]
32. As already demonstrated above, this Court cannot entertain the declaratory and cannot make a finding that the statement published by the respondent to Builders Warehouse is defamatory. Consequently, the Court cannot find that an injury has been committed to the applicants' right to dignity and reputation.
33. It is trite law that the interdict does not secure to afford protection against past invasions of a right. Even if the statements were defamatory, the applicants must establish a reasonable apprehension of harm.
34. The alleged apprehension of harm is based on the respondent having been required to give undertakings and the respondent refusing to give such undertakings. The applicants contended that the respondent will repeat the impugned statements.
35. Before the issues was addressed with Builders Warehouse, the respondent informed the applicants that it would approach Builders Warehouse.
36. There is no indication in the papers that the respondent wishes to make those statements to any other party: In my view there is no reasonable apprehension to harm.
37. The respondent contended that an interdict is not the appropriate remedy because an award of damages at a trial in due course "will

constitute adequate redress in vindicating the reputation of the applicants...”[16] The applicants contended that damages are not a suitable alternative remedy.

38. The notice of motion indicates that the applicants seek damages to be awarded in due course. There is no indication in the applicants’

affidavit why an award of damages would not vindicate the applicants’ rights.

39. It was stated in Herbal Zone[17] that:

“An interdict to prevent the publication of defamatory matter is directed at preventing the party interdicted from making statements in the future. If granted it impinges upon that party’s constitutionally protected right to freedom of speech. For that reason, such an interdict is only infrequently granted, the party claiming that they will be injured by such speech ordinarily being

left to their remedy of a claim for damages in due course. Nugent J A said in this court (Midi Television (Pty) Ltd t/a E-TV v Director of Public Prosecution (Western Cape) [2007] ZASCA 56; 2007 (5) SA. 540 SCA at para 20)”. Where it is alleged, for example, that a publication is defamatory, but it is yet to be established that the defamation is usually capable of vindicating the right to reputation if it is later found to have been infringed and an anticipatory ban on publication will seldom be necessary for that purpose.”

40. I concluded that an interdict is not the appropriate remedy because an award of damages at a trial in due course will constitute adequate redress in vindicating the reputation of the applicants.

41. In the result the application is dismissed with costs.

STRIJDOM JJ

ACTING JUDGE OF THE

HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION JOHANNESBURG

Appearances

For the Applicants: Adv J.M. Hoffman Instructed by: Kantor Myers Paslovsky Attorneys For the Respondent: Adv C.C. Bester Instructed by: Mc Naught & Company Inc.

[1] Case Lines; Annexure FA 4; 006-1 to 006-5

[2] Case Lines; Notice of motion; 001-2 para 6.

[3] Case Lines; FA, p 002-5.

[4] Case Lines; FA, p 002-10.

[5] Case Lines; FA 12, p 002-7

- [6] Case Lines; p 006-1
 - [7] Case Lines; p 020-170
 - [8] Case Lines; FA 5, p 007-1
 - [9] Case Lines; AA 11.1, p 020-4. AA 15, p020-5. AA 24, p020-7
 - [10] Case Lines; AA 27, p 020-8.
 - [11] Case Lines; AA 11.4 p 020-4.
 - [12] Case Limes; AA 36, p020-10 to AA 41, p 020-11.
 - [13] 2021 (3) SA 425 (SCA).
 - [14] 2011 (1) ALL SA 343 (SCA)
 - [15] Manuel v Economic Freedom Fighters and others 2019 (5) SA 10 at para 21.
 - [16] AA, Page 020-11.
 - [17] [2017] 2 ALL SA 347 (SCA)
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