

SOUTH AFRICA / JUDGMENT

FP Specialty (Pty) Ltd v Dorasamy and Others (D6694/2022) [2023] ZAKZDHC 49 (27 July 2023)

[2023] ZAKZDHC 49

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Mossop

CASE / FILE NUMBER

D6694/2022

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FLYNOTES:

CIVIL PROCEDURE – Interdict – Former employee – Company proceeding against respondent for alleged scheme to defraud it – Private investigator and police officer getting involved – Appearing that engaged in a shakedown of the applicant and its customers – Respondent has her back to the wall because of the steps taken by the applicant after it discovered her scheme – Private investigator and police officer were improperly prepared to assist her in her – Applicant made out a case for a final interdict.

IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

Case

no: D6694/2022

In

the matter between:

FP
SPECIALTY (PTY) LTD APPLICANT
and
ELVINA
DORASAMY FIRST
RESPONDENT
JULIAN
KASAVALA SECOND
RESPONDENT
WARRANT
OFFICER RICKY CHETTIAR FIRST
INTERESTED PARTY
THE
CAPTAIN, WESTVILLE POLICE STATION SECOND
INTERESTED PARTY
DIRECTOR
OF PUBLIC PROSECUTIONS, THIRD
INTERESTED
PARTY
KWAZULU-NATAL

Coram:

Mossop J

Heard:

24 July 2023

Delivered:

27 July 2023
ORDER
The

following order is granted:

1.
The
rule granted on 18 June 2022 is confirmed and the first and second
respondents are directed to pay the applicant's costs
jointly
and severally, the one paying the other to be absolved.
2.
The
Registrar of this court is directed to deliver a copy of this
judgment to the Provincial Head of the South African Police Services,
KwaZulu-Natal to permit the Provincial Head to consider the conduct
of the first interested party, Warrant Officer Ricky Chettiar.

JUDGMENT

Mossop J:

[1] The first respondent in this application is a former employee of the applicant. She left that employ somewhat under a cloud. This happened because it was believed by the applicant that she had devised, constructed, and operated a scheme to defraud it. The scheme was constituted, inter alia, by the incorporation of four private companies (the four companies) by the first respondent. She was the only director of three of those companies. The fourth company had two directors, of which she was one. The four companies were unable to perform any services, had no resources to do so and operated using fraudulent VAT numbers. Yet, it was represented by the first respondent to the applicant that the four companies had provided services to the applicant when they had not, and they were accordingly paid by the applicant for such non-existent services at inflated rates.

[2] When the first respondent's scheme was discovered, it triggered a whirlwind of legal action by the applicant over a relatively

concentrated period. On 24 January 2022, the applicant brought an urgent Anton Piller type application against the first respondent and three of the four companies. The application was granted. The first respondent was then directed by the applicant to appear at a disciplinary hearing on 17 February 2022 to answer allegations arising out of her conduct. She chose rather to resign from her employment than to attend those proceedings. On 25 February 2022, the four companies were all provisionally wound up by the applicant. On 31 March 2022, provisional liquidators were appointed to the four companies. On 14 April 2022, the order in the Anton Piller type application was confirmed against the first respondent. On 13 May 2022, the applicant instituted action proceedings against the first respondent and her co-director of the company in which she was not the sole director. In those proceedings, the applicant seeks to recoup the losses that it suffered through the first respondent's conduct in the amount of approximately R2,7 million. On 1 June 2022, the four companies were finally wound up.

[3] It is against that factual backdrop that this application must be considered. It was launched by the applicant as an urgent application

and the following relief was initially claimed in its notice of motion:

'1. That both the First Respondent and Second Respondent are hereby interdicted and restrained from:

1.1 contacting the Applicant's customers either in person or by email or other means of communication and from engaging with the Applicant, its directors or staff in any way;

1.2 defaming or impairing the reputation of the Applicant and/or seeking to impair its reputation either verbally and/or in written communication to its staff, customers or any third party;

1.3 harassing and/or intimidating the Applicant's directors, staff and/or personnel;

1.4 trespassing at and/or entering the Applicant's premises unless authorised by Court Order, warrant or subpoena; and/or

1.5 committing any act of extortion either directly or through the agency of others.

1.6 that the first and second respondents are directed to pay the of (sic) the costs of this application.

2. That the orders referred to in paragraph 1.1 to 1.5 above operate as interim relief with immediate effect.'

[4] The application initially came before Henriques J on 18 July 2022. The learned judge made some minor changes to the order, changed it to a rule nisi, and then granted it. The learned judge also noted the following:

'It is recorded that the First Respondent has given undertakings in terms of paragraphs 1.1 to 1.5 of the Notice of Motion dated 1 July 2022 without any admission of liability and/or fact and with questions of costs reserved.'

What is thus before me is the extended return date of the rule nisi granted by Henriques J.

[5] When the matter was called, Mr Shapiro SC appeared for the applicant and Ms Moodley appeared for the second respondent. There was no appearance for the first respondent. Both counsel are thanked for their most able arguments.

[6] The application has two respondents and three parties who have been cited as 'interested parties'. Nothing further need be said about the first respondent. The second respondent describes himself as being a 'forensic investigator',[1] and states that he was hired in that capacity by the first respondent. The first respondent confirms in her answering affidavit that she had engaged the services of the second respondent:

'... to whom I reported certain matters that I had brought to his attention and in turn to the South African Police Services for their investigations.'

The first interested party cited is a member of the SAPS who is allegedly the investigating officer appointed to investigate the complaint made by the first respondent to the SAPS. The first interested party has not opposed the application but has delivered a confirmatory affidavit in support of the version advanced by the second respondent. The second interested party is the captain of Westville SAPS. He has not participated in this application. The third interested party is the Director of Public Prosecutions for KwaZulu-Natal. She has, understandably, also not participated in this application, and has delivered no papers.

[7] I shall refer to the parties in the capacity in which they are cited and not by name.

[8] What has precipitated the bringing of this application is that on 26 April 2022, at the height of the applicant's legal proceedings

against the first respondent, the second respondent visited the applicant's business premises which are situated in Jacobs,

Durban. On the applicant's version he was alone, on the second respondent's version he was accompanied by the first interested party. Whichever version is correct, and for the purposes of argument Mr Shapiro accepted the second respondent's version, by the time that visit occurred, the first respondent was aware that the applicant had uncovered her scheme and she had already left its employ. Allegedly without permission, the second respondent entered the applicant's business premises and met the applicant's representative, a Mr Joel Mutero (Mr Mutero), who is the applicant's general manager. He was granted a hearing by Mr Mutero and was later allowed to access the applicant's premises where he took several photographs. He informed Mr Mutero that he was working with the first interested party:

'...to obtain access to confidential information about the Applicant's business.'

There is no evidence that he informed Mr Mutero that he was employed by the first respondent. The second respondent then explained that:

'... the charges he was investigating pertained to allegations that the Applicant was importing certain goods illegally by not following the correct procedure at customs.'

[9] While he may not explicitly have mentioned his employment by the first respondent, it may have been apparent to Mr Mutero that this was the case by virtue of what the second respondent next apparently demanded. The second respondent demanded of Mr Mutero that the applicant drop all the legal suits that it had preferred against the first respondent, and all the claims for costs against her, and then went further and stated that the applicant would have to pay something to the first respondent for her to drop the case against the applicant that she had reported to the SAPS. He apparently also threatened that he would contact the applicant's customers if the applicant did not agree to comply with his demands.

[10] The second respondent then allegedly made good on his threat and on 9 May 2022, he telephonically contacted a customer of the applicant called Pefco. To the representative of Pefco, he advised that he was acting as a forensic investigator for the SAPS. When faced with certain demands for information from the second respondent, the representative of Pefco requested that he formulate his questions in writing and requested that he also explain his legal standing entitling him to make such demands of Pefco. To this the second

respondent acceded and directed an email to Pefco the same day. That email had as a heading the words:

'Westville CAS 35/04/2022'.

It is, however, not an email on a SAPS letterhead, but it bears the second respondent's name as the sole author of the email. In it, the second respondent informed Pefco that:

'It is alleged, amongst others, that the company does not state all the products that they import from India on the import documents.

It is further alleged that they import flammable and hazardous materials and do not advise/notify/mark the containers.'

The reference to 'the company' is a reference to the applicant. The email concludes with the following words:

'We require all documentation for the products that you purchased from FP Specialty (Pty) Ltd for the past one (1) year.'

[11] It coincidentally happened that Pefco and the applicant make use of the services of the same firm of attorneys. Those attorneys came to know of these events and responded to the second respondent's email in a letter dated 11 May 2022 on behalf of Pefco. In essence, the attorney's letter pointed out that the second respondent's email of 9 May 2022 created the impression that Pefco was obliged to respond to his demands and to provide the requested information. However, the attorneys requested the second respondent to explain what the legal basis was for him contacting Pefco and for making such a demand.

[12] The second respondent responded the same day in a further email. He stated that when he had telephonically contacted Pefco, he and the first interested party 'were together' and added that:

'For the record, we have been mandated by the complainant, Ms E Dorasamy, to work with the police in this matter.'

The second respondent goes on to state that:

'I have since forwarded your letter to DWO Chettiar and he will make the request directly from the police.'

DWO Chettiar is the first interested party. The second respondent allegedly likewise also contacted four other customers of the applicant and made similar demands of them. The applicant submits that the second respondent would not have independently known of the identity of these customers and can only have been given their names by the first respondent.

[13] In his answering affidavit, the second respondent explains what he was employed to do by the first respondent:

'... I was approached on or about 21st February 2022 by the First Respondent who instructed me to do certain investigations regarding various illegalities including crimes

allegedly perpetrated by the Applicant.'

[14] What those illegalities or crimes amount to are never disclosed by the second respondent in his answering affidavit. He explains why:

‘I do not intend disclosing the confidential information obtained by me which are (sic) sensitive in nature and which I have shared with the SAPS. In any event the information and evidence received thus far are (sic) privileged as it constitutes part of an ongoing investigation conducted by the SAPS.’

[15] The applicant objects to the first and second respondents’ conduct. It claims that the SAPS are tasked with investigating crimes that are prosecuted by the State, when established. The first respondent has no business as a private individual in involving himself in those investigations, so the applicant says, or in passing himself off as being associated with any SAPS investigative activities. Mr Shapiro forcefully submitted that had the second respondent disclosed his association and employment by the first respondent to Mr Mutero up front, he would never have been granted a hearing by him. It appears to me that this is likely, given the first respondent’s history with the applicant.

[16] As a private member of the public, the second respondent had no right to demand information from the applicant or its customers. The information demanded was private and confidential to the applicant and its customers. The first respondent had no personal knowledge of what he asked for because it was not publicly known information. It seems to me that private information are facts that are not within the knowledge of outsiders and are accordingly not known by such outsiders. The right to privacy in its most basic form is ‘simply the right of a person [or a juristic entity] to be left alone, to be free from unwarranted publicity and to live without unwarranted interference by the public in matters with which the public is not necessarily concerned’.[2]

[17] Obviously, the SAPS have the power to officially investigate crime. But the second respondent may not blur the line between his chosen method of earning a living, which does not come with the power to make demands for information from the subject of the investigation, and the SAPS’s obligation to investigate allegations of criminal activity.

[18] During argument, Ms Moodley referred me to *S v Burger*. [3] However, it appears to me that rather than assist the second respondent, that matter seems to support the applicant’s position. At paragraphs 40 and 41 of that judgment, Navsa JA states as follows:

‘[40] The second issue concerns the undesirable fusion of private and police investigations. It appears from the evidence referred to earlier that AIN commanded the resources of the SAPS when it saw fit. The police officials involved readily complied. The SAPS is not up for privatisation, nor for direction by parties such as AIN. This too is a matter that should be dealt with by the relevant authorities.’

- [41] Lastly, it is not only that the lines between the AIN and police investigations became blurred, but, as set out above, police officials acted in two capacities, even going to the extent of doing AIN work whilst on police “sick leave”. This is untenable and should be investigated by the relevant ministry.’
- [19] The second respondent claims that whatever he is alleged to have done, he acted in conjunction with the first interested party and under his authority. The first interested party has confirmed this in a confirmatory affidavit. The applicant, however, has noted that the first interested party would not ordinarily have the jurisdiction to be involved in the matter. The first interested party acknowledges that he is stationed at SAPS Westville which, as its name suggests, is in the western suburbs of Durban. The applicant’s business is not located in Westville or its surrounding areas. It states in its founding affidavit that it has its business premises in Jacobs, which is part of the southern suburbs of the city. How the first interested party became involved in the matter is accordingly not clear to the applicant. The applicant invited the first interested party to disclose how this has happened, but he resisted that invitation. His confirmatory affidavit is brief, terse and unadorned with any facts.
- [20] Mr Shapiro submitted that while the first respondent may have been provided with a case number after reporting her complaint to the SAPS, what the second respondent is involved with is not, in truth, a proper and official SAPS investigation. Several reasons were advanced for this submission:
- (a) Firstly, the second respondent stated in his answer to Pefco’s attorney’s letter that the first interested party would write to Pefco and formally request the information that he had sought in his first email. This was never done. It is difficult to understand why this was not done if this was an official investigation and the information sought was genuinely required by the SAPS to advance a legitimate investigation.
 - (b) Secondly, it appears that the first interested party never personally did anything. The second respondent, who had no real power of his own, appears to have taken the lead in virtually all contact with the applicant and its customers. The first interested party is referenced by the second respondent but appears to have adopted a totally supine attitude to the investigations admittedly conducted by the second respondent. Why this should be the case is not immediately apparent but this modus operandi could support the inference that the second respondent was permitted by the first interested party to do as he wished and to subsequently justify his conduct by reference to the first interested party.
 - (c) Thirdly, since the launching of this application, it appears that no further investigations into the applicant have been undertaken by the SAPS, as no further overtures have been made to the applicant and it has never been charged with any offence. While the second respondent could not continue with his investigation by virtue of the interim order granted by Henriques J, there was no reason for the SAPS to stop its investigations if there was anything legitimate in the complaint made to it by the first respondent. But the investigation came to a sudden grinding halt consequent upon the interim order granted by Henriques J. The first

respondent nonetheless claims that this application is:

‘... an abuse of process and ill conceived (sic) as it attempts to prevent or discourage, directly or indirectly the South African Police Services, from conducting a full and proper investigation into the business affairs of the Applicant.’

There is no merit in that submission. The relief claimed by the applicant does not impact upon the SAPS at all: it prevents the first and second respondents, neither of whom are employees of the SAPS, from acting unlawfully.

[21] The interplay of these factors creates the disturbing impression that what the second respondent and the first interested party were engaged in, was what could be classified as a ‘shakedown’[4] of the applicant and its customers. Indeed, Mr Mutero reports that the second respondent tried to extort both information and money from the applicant when he visited its business premises. If the investigation allegedly headed by the first interested party was

genuine and officially sanctioned and if the SAPS had officially engaged the services of the second respondent, it would surely have been confirmed by the captain in charge of the Westville SAPS, who is a party to these proceedings. He has, however, remained silent and the first interested party has put up no proof of the official involvement of the second respondent in a legitimate SAPS investigation.

[22] After the granting of the interim order by Henriques J, it appears that the second respondent changed his attitude to the proceedings. This change is summed up by his attorneys in a letter sent to the applicant’s attorneys on 20 July 2022 in which they state:

- ‘(i) The First Respondent gave you an undertaking which was recorded in Court. Our client’s employment by First Respondent terminated well before your Application papers were prepared;
- (ii) An interim order was granted against our client;
- (iii) Our client has not, since sending the emails to the three (3) customers, been involved in any investigations in the matter, nor with the police and undertakes not to do so in the future;
- (iv) Our client has not and will not act in any manner complained of by your client and/or covered by the terms of the interim order or the final interdict sought;
- (v) In the circumstances, the need for the interdict has fallen away and we respectfully suggest that the Rule be discharged on the next occasion with the Applicant and Second Respondent bearing their own costs.’[5]

[23] The applicant’s attorneys responded to this letter in a letter of their own and stated that it had no knowledge of when, or if, the employment of the second respondent was terminated by the first respondent. No proof of the date of the termination of that employment has been put up by either the first or second respondents. Ms Moodley submitted that the termination of the employment of the second respondent by the first respondent indicates that the issue

of the second respondent's involvement in the SAPS investigation has become moot, as he is no longer employed by the first respondent and there can be no question of him again involving himself in the fashion of which complaint is made. I do not agree with this submission.

[24] The general principle is that a matter is moot when a court's judgment will have 'no practical effect on the parties'.^[6] It is accepted that courts should not make rulings on matters that are properly moot, as its decision will amount simply to an advisory opinion on the identified legal questions, which are abstract, academic or hypothetical.^[7] In *President of the Republic of South Africa v Democratic Alliance*,^[8] the Constitutional Court stated that:

'... courts should be loath to fulfil an advisory role, particularly for the benefit of those who have dependable advice abundantly

available to them and in circumstances where no actual purpose would be served by that decision now'.

[25] This general principle is, however, not an absolute bar to the determination of matters that are recognised to be moot. Such matters

may still be considered by a court if they involve issues of public importance that may have some future effect on similar matters and on which the adjudication of a court is required.^[9] In my view, the matter is not moot. It is not impossible that the second respondent could again be employed by the first respondent in the future. The word of the first respondent that she has, in fact, terminated the services of the second respondent and will not again instruct him is not accepted by the applicant. In my view, it has good reason to doubt the bona fides of the first respondent.

[26] Despite being the source of the allegations of alleged criminal conduct on the part of the applicant, the first respondent has not put up a detailed rebuttal of the applicant's allegations. Indeed, her answering affidavit is rather threadbare. She does not explain why she regarded it to be necessary to instruct the second respondent. If she had evidence of criminal wrongdoing by the applicant, why did she need his services? Why not simply report the matter to the SAPS and allow them to investigate the matter? Why incur the expense of the second respondent, when on her own version, she declined to incur the expense of rebutting the damning allegations made against her in the Anton Piller type application and the liquidation of the four companies, which abound with allegations concerning her perfidiousness and dishonesty? None of this is explained by her.

[27] It appears probable to me that in instructing the second respondent, the first respondent was engaged in a stratagem that had the goal of extricating her from the obvious difficulties that she found herself in at the hands of the applicant. In stating that this application has been brought to thwart a '... full and proper investigation into the business affairs of the Applicant', the first respondent, perhaps unintentionally, reveals something of what motivates her. The impression created by that statement is not that she has discrete, precise

knowledge of any alleged wrongdoing on the part of the applicant: to the contrary, it appears that she requires an investigation of all that the applicant does to determine whether it has done anything criminal.

[28] Ms Moodley stated that there was nothing prohibiting the second respondent from investigating the applicant if he was instructed to do so by the first respondent. She was correct in making that submission. But the second respondent and the first interested party may not purport to be conducting official SAPS business when they are not and try to extort a benefit for the first respondent from the applicant and its customers by claiming an entitlement to information and a corresponding obligation for those parties to co-operate and comply with their demands.

[29] The first respondent obviously has a motive to dig up something, anything, that reflects badly upon the applicant and it appears to me that she will do whatever needs to be done to improve her position. She has her back to the wall because of the steps taken by the applicant after it discovered her scheme. The second respondent and the first interested party were improperly prepared to assist her in her endeavours.

[30] The applicant has made out a case for a final interdict and there is no reason to depart from the usual rule that costs follow the result.

[31] I am consequently satisfied that the following order should issue:

2. The registrar of this court is directed to deliver a copy of this judgment to the Provincial Head of the South African Police Services,

KwaZulu-Natal to permit the Provincial Head to consider the conduct of the first interested party, Warrant Officer Ricky Chettiar.

MOSSOP J

APPEARANCES

Counsel for the applicants Mr W N Shapiro SC Instructed by: MacGregor Erasmus Bond Square 1st Floor, 12 Browns Road The Point Durban Counsel for the first respondent No appearance Instructed by N G Pillay and Company 86 Silverglen Chatsworth Counsel for the second respondent Ms C J Moodley Instructed by Attorneys Anand- Nepaul 9th Floor, Royal Tower 30 Dorothy Nyembe (Gardiner) Street Durban

Date of argument

: 24 July 2023

Date of Judgment

: 27 July 2023

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- [1] He was also previously a member of the South African Police Services.
- [2] Smuts and another v Botha
- [2022] ZASCA 3; 2022 (2) SA 425 (SCA) para 23.
- [3] S v Burger and others [2010] ZASCA 12; 2010 (2) SACR 1 (SCA).
- [4] This is defined as ‘extortion, as by blackmail or threats of violence’ (www.collinsdictionary.com/dictionary/english/shakedown).
- [5] While it may be considered that what was contained in the letter quoted was privileged, any privilege was waived when the second respondent attached it to his supplementary answering affidavit.
- [6] AB and another v Pridwin Preparatory School and others [2020] ZACC 12; 2020 (5) SA 327 (CC); 2020 (9) BCLR 1029 (CC).
- [7] National Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) para 21 fn 18.
- [8] President of the Republic of South Africa v Democratic Alliance and others [2019] ZACC 35; 2020 (1) SA 428 (CC); 2019 (11) BCLR 1403 (CC) para 35.
- [9] Centre for Child Law v Hoërskool Fochville and another [2015] ZASCA 155; 2016 (2) SA 121 (SCA); [2015] 4 All SA 571 (SCA) para 14. See also MEC for Education, KwaZulu- Natal, and others v Pillay [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) para 32.
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