

SOUTH AFRICA / JUDGMENT

Medical Nutritional Institute (Pty) Limited v Advertisings Standard Authority (15/30142) [2015] ZAGPJHC 317 (18 September 2015)

[2015] ZAGPJHC 317**COURT**

South Gauteng High Court, Johannesburg

BEFORE

EF Dippenaar

CASE / FILE NUMBER

15/30142

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****(GAUTENG****LOCAL DIVISION, JOHANNESBURG)****CASE****NUMBER: 15/30142****In****the matter between****MEDICAL****NUTRITIONAL INSTITUTE (PTY)****LIMITED.....Applicant****And****THE****ADVERTISING STANDARDS****AUTHORITY.....Respondent****PRIVATE****CLUB REGISTRATION NO 1995/00781/08****Neutral****citation: Medical Nutritional Institute (Pty) Limited v The
Advertising Standards Authority [2015] (15/30142) (9 September
2015)
(ZAGPJHC)****Coram:****EF DIPPENAAR AJ****Heard:****9 September 2015**

Delivered: 18 September 2015

Summary: Application for interim interdict pending finalisation of trial action to be instituted. Complicated legal issues in dispute encompassing fields of private, public and constitutional law relating to legitimacy of respondent's adjudication of complaints on behalf of its members in respect of entities which are not its members. Whether prima facie right to relief illustrated. Applicant illustrated prospects of success. Interim interdictory relief granted
ORDER

An

order is granted in the following terms:

[1]

Condonation is granted for the late filing of the respondent's answering affidavit;

[2]

The applicant is granted leave to amend prayer 3 of its notice of motion by inserting a claim for damages in an amount of R25 million;

[3]

Pending the final determination of a trial action to be instituted by the applicant against the respondent within 20 days of this

order an interim order is granted:

[3.1]

interdicting the respondent from imposing any form of sanction referred to in its code, including an ad-alert, on the applicant in respect of advertisements of the product AntaGolin;

[3.2]

interdicting the respondent from taking any steps to preclude the applicant from asserting in its advertisements in all media that AntaGolin combats insulin resistance and assists with weight loss;

[3.3]

interdicting the respondent to forthwith remove from its website all rulings, and any other publication by or on behalf of the respondent,

in respect of (or referring to) the applicant, to the effect that the assertion by the applicant that AntaGolin combats insulin

resistance and assists with weight loss are unsubstantiated;

[4]

Directing that the order in [3] above shall lapse in the event that the applicant does not institute the trial action within the stipulated period and/or in the event that the applicant fails to timeously pursue the action, unless good cause is shown for any delay

in the prosecution of applicant's claims;

[5]

Directing the respondent to pay the costs of this application,

including the costs consequent upon the employment of senior counsel.

JUDGMENT

EF Dippenaar AJ

[1] This is an urgent application claiming interim interdictory relief pending the finalisation of an action to be instituted by the

applicant against the respondent. The application was launched by way of urgency on 25 August 2015.

[2] The applicant, Medical Nutritional Institute (Pty) Ltd (“MNP”), manufactures and sells complementary medicines, including a product styled AntaGolin, which the applicant contends combats insulin resistance and assists in weight loss. It is undisputed on the papers that the sale of AntaGolin represents 70% of the applicant’s income.

[3] The respondent, the Advertising Standards Authority (“the ASA”) is an industry established voluntary association in terms

of the Companies Act 71 of 1973. No proof has been provided that the respondent has complied with the necessary requirements of the Companies Act 71 of 2008. The respondent styles itself as an independent industry funded body established to promote and enforce standards in the advertising industry. It is common cause that the applicant is not a member of the respondent.

[4] The background to this application relates to the steps taken by the respondent pursuant to complaints which were laid with it by

two individuals, Goldstein and Steinmann (“the complainants”) that the advertising assertions made about AntaGolin, viz that it combats insulin resistance and assists with weight loss, are unsubstantiated. The respondent upheld the complaints and issued a series of rulings, effectively directing that the advertisements in their current form be withdrawn and ultimately on 29 June 2015 directing that sanctions would imminently be imposed on the applicant in terms of the respondent’s advertising code (“the code”) for breaching its rulings.

[5] Pursuant to the applicant obtaining legal advice from its present attorneys of record, substantial correspondence ensued between the parties in an attempt to avoid urgent litigation.

[6] When these attempts failed, the applicant launched the present proceedings for interim relief on an urgent basis.

- [7] The applicant contends that this application is aimed at preserving and/or restoring the applicant's reputation and commercial viability. It contends that it has been prejudiced and detrimentally affected by the respondent's rulings, the publication thereof and the consequences of the sanctions which may be imposed on the applicant in relation to this product, pending the

determination

of the disputes between the parties in the proposed trial action.

- [8] At the centre of the disputes between the parties lies an attack on the legitimacy of the respondent's adjudication of complaints in respect of the advertising of non-members; whether the applicant has any lawful basis to exercise jurisdiction over such

entities and the extent to which the respondent (in exercising jurisdiction over its members) is entitled to interfere in the contractual arrangements of non-members.

- [9] In its notice of motion, the applicant seeks the following relief:

[9.1] Pending the final determination of a trial action to be instituted by the applicant against the respondent within 30 days of the order ("the trial action") seeking an interim order:

[9.1.1] interdicting the ASA from imposing any form of sanctions including an ad-alert on MNI in respect of advertisements of the product AntaGolin (or any other);

[9.1.2] interdicting the ASA from taking any steps to preclude MNI from asserting in its advertisements in all media that AntaGolin combats insulin resistance and assists with weight loss;

[9.1.3] directing the ASA to remove from its website all rulings, and any other publication by or on behalf of ASA, in respect of (or referring to) MNI, to the effect that the assertion by MNI that AntaGolin combats insulin resistance and assists with weight loss are unsubstantiated;

[9.2] That the costs of this application are reserved for determination in the trial action;

[9.3] The notice of motion further states that in the trial action MNI will seek, inter alia, the following relief:

[9.3.1] declaring that all the rulings purportedly made by the ASA in respect of MNI's product AntaGolin ("the contested rulings") are unlawful, and of no force and effect;

[9.3.2] declaring that any sanctions purportedly imposed by the ASA in respect of the alleged breach of the said ASA rulings are unlawful,

and of no force and effect;

[9.3.3] declaring that the ASA has no entitlement to:

[9.3.3.1] style itself as an "Authority of South Africa";

[9.3..3.2] investigate complaints lodged against non-members and in particular MNI, issue rulings in respect of the acceptability of advertising assertions made in respect of MNI's AntaGolin product and/or ingredients nor to impose any sanctions in respect of an alleged breach of any such purported ruling;

[9.4] Directing the ASA to record in any correspondence conducted with any non-member of the ASA (including MNI) that it is a voluntary association and not an organ of state, and has no legitimate remit to regulate the advertising industry or issue any rulings restricting the content of advertisements or assertions made therein other than by consent;

[9.5] Costs on the attorney and client scale.

[10] The papers filed of record are extensive and run to some 960 pages. The application was launched on 25 August 2015. The applicant

filed a founding and a supplementary founding affidavit on 4 September 2015, in which it is, inter alia, contended that the respondent had failed to adhere to the time limits stipulated in the notice of motion. The respondent filed an answering affidavit on 4 September 2015 in which it, inter alia, reserved the right to file a supplementary affidavit and sought condonation for the late filing of

its answering papers. A supplementary answering affidavit was filed on 7 September 2015. An extensive replying affidavit was filed on 8 September 2015, necessitating the matter to stand down on the urgent roll until 9 September 2015, when argument was presented on all

issues.

[11] In its answering affidavit, the respondent reserved the right to supplement its papers as it contended it had insufficient time to

deal with the extensive founding papers and specifically the factual matter and expert evidence presented in relation to qualities of the applicant's product, AntaGolin, which supports the applicant's contentions that it combats insulin resistance and assists with weight loss. The founding papers comprised of a 159 page founding affidavit and annexes, amounting to some 500 pages.

[12] The answering affidavit raised mainly legal issues and did not deal with the various factual issues raised by the applicant in relation to certain rulings and directives made by the respondent regarding AntaGolin. Despite filing a supplementary affidavit, these factual issues were not addressed. Ultimately, the respondent simply contended that the adverse rulings made against AntaGolin by it[1] were reasoned and considered. It did not dispute that no medical expertise was invoked by the respondent in considering the complaints

made against the product, nor did it attack the substantial volume of expert evidence presented by the applicant. At the hearing, the respondent did not seek any postponement or leave to supplement its answering papers and the matter was argued on the papers as filed of record.

[13] The respondent sought condonation for the late filing of its answering affidavits. This application was not opposed. I am satisfied that good cause has been shown and accordingly condonation for the late filing of respondent's answering affidavit is granted.

[14] At the hearing of the application, the applicant sought an amendment to its notice of motion by including a reference to a claim

for damages in an amount of R25 million in prayer 3. There was no opposition to this relief which is consequently granted.

[15] At the hearing of the application the respondent indicated that it did not intend filing any further affidavits relating to the various factual issues which were not addressed in its answering papers. It contended that those issues were not required for the

determination of the application.

[16] The issues raised in the application papers are wide ranging and complicated and encompass issues of private, public and constitutional law. It is not for purposes of this judgment necessary or appropriate to deal with all the issues raised. These will be dealt with and determined in the proposed trial proceedings in due course.

[17] The applicant's case in summary is that the respondent has no lawful basis to exercise jurisdiction over it, as it is not a

member of the respondent and is not obliged to adhere to the code. It contends that the respondent is acting unlawfully in purporting to be the regulator of the advertising industry and that it has no enabling legislation to execute a public function as regulator and is acting in a manner which is inconsistent with its self-proclaimed limitations.

[18] The applicant contends that the advertising of its products is regulated under the Medicines and Related Substances Control Act[2] and by the Medicines Control Council ("MCC"), an organ of the National Department of Health; which in terms of the Medicines Act and its regulatory framework is the body duly empowered by Statute to regulate medicines, together with the Minister of Health, the Director General of the Department of Health and the Registrar of Medicines[3]. This is not disputed on the papers. As such, applicant contends that the respondent's contention that absent regulation by it, companies such as the applicant would be permitted to advertise their products in a manner that is misleading or detrimental to the public, is false.

[19] The applicant further contends that the advertising of its products also falls within the domain of the Consumer Protection Act[4] ("CPA") which affords protection against false and misleading advertisements[5]. It is not disputed on the papers that the respondent did not obtain accreditation as a regulator under section 97 of the CPA as a consumer protection group or as industry ombud[6]. Absent statutory recognition by means of a regulation to this effect by the Minister of Trade and Industry to this effect under section 82 of the CPA, the respondent is not entitled to apply the code to non-members.

[20] The applicant attacks the legality of respondent's power to regulate advertising, which as public function has expressly been entrusted by Parliament to other bodies[7] and attacks its power to regulate advertising in South Africa.

[21] The applicant further claims infringements of its constitutional rights to freedom of association (including the right to disassociate[8]), freedom of expression and access to courts under sections 18, 26 and 34 of the Constitution.

[22] The applicant further contends that the respondent's adverse rulings are not only defamatory of and concerning it, but are

injurious and constitute a wrongful interference on the part of the respondent with the applicant's ability to contract for

services. The applicant avers that the respondent's exercise of power in this fashion offends against the applicant's

constitutional rights to freedom of association, freedom of expression, trade and access to the courts.

[23] The applicant contends that it is suffering harm on an ongoing basis and has already suffered damages in an amount of some R25 million as a result of the publication of the respondent's adverse rulings as the credibility of its product, AntaGolin has been tarnished consequent upon the respondent's unlawful conduct. It also claims that respondent's conduct has precluded it from asserting, as is the truth; that AntaGolin combats insulin resistance and assists with weight loss, which has resulted in diminished sales causing substantial losses. It seeks interim relief aimed at restoring applicant's ability to appropriately advertise the product AntaGolin, without the restraints imposed on such advertising by the respondent.

[24] The respondent's case, in overview, is that it enjoys statutory recognition under section 55 of the Electronic Communications Act ("the ECA")[9] and has the power and statutory duty to adjudicate complaints in respect of advertisements that are broadcast by broadcast service

licensees in terms of the ECA, irrespective of whether the advertiser is a member of the respondent. Its conduct in considering complaints in accordance with the code is lawful, legitimate and a constitutionally permissible exercise of its members' rights of freedom of expression and association, which includes the right not to publish the applicant's advertisements.

[25] It relies on the fact that all of the major broadcasting licensees in South Africa are members of the respondent by virtue of their membership of the National Association of Broadcasters, which is undisputed. This includes MNet, the broadcaster of the television

advertisements pertaining to AntaGolin, which prompted the launching of the current application.

[26] In its heads of argument, the respondent for the first time contends that it is an organ of State for purposes of its duties and

powers under section 55(1) of the ECA as envisaged by section 239 of the Constitution. This case was not made in the respondent's

answering papers although the answering papers relied on the provisions of the said section.

[27] The respondent contends that this is fatal to the applicant's case for an interim interdict as such relief would prohibit the respondent from exercising a statutory power and fulfilling a statutory duty, which would only be granted in exceptional circumstances[10].

[28] The effect of the interim relief sought by the applicant would be to exempt it from the respondent's system of complaint adjudication pending the finalisation of the proposed trial action. It contends that the effect of interim relief insofar as it applies to advertising broadcast in terms of the ECA, would be to interdict the respondent from fulfilling a statutory duty in terms of the ECA and would disable the members of the respondent from using their chosen system of self-regulation to determine, on their behalf, whether they wish to publish the applicant's advertising in the event that it fails to comply with the respondent's advertising

code.

[29] The respondent contends that the applicant has no prima facie right to the relief sought because it has no right to insist on or

compel members of the respondent to publish its advertisements. The respondent's members are constitutionally entitled to refuse to publish the applicant's advertisements on the ground that they do not comply with the system of self-regulation which those members have adopted.

[30] The respondent further contends that absent regulation of the applicant's advertising by it (the respondent), the applicant

would be free to publish misleading advertising claims to the peril of South African consumers at large and that its members would be obliged to publish applicant's advertisements if interim relief is granted.

[31] It is contended that the applicant has not illustrated that it has suffered irreparable harm if no interim relief is granted and the interim limited undertaking provided by the respondent deals with the vast majority of harm contended for by the applicant. The remainder of the harm contended for is said to arise from the mere publication of an adverse ruling by the respondent, but the applicant has failed to show that the respondent would not have any sustainable defence to a mere publication thereof, which are not injurious or defamatory and has not illustrated such harm to be irreparable.

[32] Respondent relies on the fact that the applicant's founding papers expressly recognise that it has an alternative remedy available, namely an action for damages. The applicant's belated attempt to suggest that such claim is not available by virtue of the respondent's precarious financial position is to be struck, as the respondent has not had any opportunity to deal with it. The respondent did not however seek any opportunity to file a further affidavit and no formal striking application was launched.

[33] The respondent lastly contends that the balance of convenience does not favour the granting of relief as the public interest weighs

against the applicant. The only prejudice which applicant would suffer is that in the interim period it would have to ensure that its advertising is substantiated, decent and honest in accordance with the respondent's code. It is moreover only required to do so to the extent that it wishes the applicant's members to continue publishing its advertisements.

[34] This by necessary implication includes the applicant being constrained not to assert in its advertisements that AntaGolin combats insulin resistance and assists with weight loss until the trial proceedings have been finalised.

[35] It bears mentioning that extensive reference was made by the respondent to certain 'parallel litigation' presently pending in this court in a matter between it and Herbex (Pty) Ltd[11] ("the Herbex matter") in which the respondent contends the issues raised in the present matter will be determined. From the notice of motion in those proceedings, which form part of the record herein, it appears that there is a substantial overlap of issues. As the applicant however correctly points out, the factual matrix of the applications are different and each matter will have to be determined on its own merits. The parties are also different.

[36] The crux of the dispute between the parties is whether the respondent has any lawful basis to exercise jurisdiction over persons

who are not its members, such as the applicant and the extent to which the respondent, in exercising jurisdiction over its members, is entitled to interfere in the contractual arrangements of non-members.

[37] For purposes of the present application it must be determined whether the applicant has complied with the requirements of the interdictory relief sought. In addition, preliminary issues relating to urgency and the non-joinder of the complainants to the proceedings before the respondent to this application must be determined.

[38] The first ground of opposition raised by the respondent pertains to the urgency of the application.

[39] In summary, the applicant contends that the application is urgent as, despite the long history of interaction between the parties relating to the AntaGolin product which commenced during February 2014 and which culminated in a contested decision by the respondent on 29 June 2015, it only became aware of its rights and the misleading nature of

the respondent's correspondence and conduct on or about 24 July 2015 when the applicant appointed new attorneys and was furnished with legal advice. In terms of the respondent's decision of 29 June 2015, the imposition of sanctions on the applicant was imminent and would have disastrous consequences for the applicant.

[40] Consequent upon a series of correspondence between the parties' respective legal representatives aimed at avoiding urgent litigation which came to nought on 12 August 2015, the application was launched on an urgent basis on 25 August 2015, after the services of new counsel were obtained. The applicant contends that it acted expeditiously in the circumstances after becoming aware

of their rights. The respondent attacks the veracity of applicant's averments regarding when, it became aware of its rights and contends that the application was brought with undue haste and contends that a limited undertaking not to issue an ad-alert pending determination of the present application, alternatively determination of the Herbex matter, sufficiently addressed the urgency of the application. The undertaking tendered was rejected as being inadequate.

[41] The respondent complains about the limited time afforded to it to respond to the application and points out that it has not had the

opportunity to address most of the factual averments in the founding papers due to the condensed time periods in which it was obliged to respond. At the hearing however, the respondent expressly made the election to proceed with arguing the matter and did not seek a postponement or any opportunity to supplement its papers. For purposes of this application, the respondent must be held to its

election.

[42] In light of the respondent's decision of 29 June 2015 and the stance adopted by the respondent, the applicant contends that the imposition of sanctions against it by the respondent are imminent which sanctions will have far reaching consequences. The applicant

further relies on the substantial and ongoing financial prejudice which it is suffering consequent upon the respondent's conduct and the loss of credibility of AntaGolin, exacerbated by the threatened loss of shelf space at Clicks and the retrenchment of six of the applicant's employees due to the financial losses suffered. From the undisputed facts presented by the applicant, it appears that commercial urgency exists to prevent the financial demise of the applicant.

[43] The respondent contends that any objective urgency in the matter was resolved by the undertaking provided to the applicant on 28 August 2015 in which it undertook not to issue an ad-alert pending the hearing of the application in the ordinary course or the

determination of the Herbex litigation in which the applicant's present attorney of record represents Herbex and in which the same legal issues are raised.

[44] Respondent further contends that the applicant makes out no case in respect of sanctions and processes other than the ad-alert, that it can obtain adequate relief at a hearing in due course and that other remedies are also available to the applicant, being

internal appeals and judicial review. It contends that any financial prejudice can simply be addressed as damages. This view appears unrealistic.

[45] In reply, the applicant points out that the respondent is in a precarious financial position and may well not be able to pay any damages claim. The respondent takes objection to such averment, contending that the applicant is not entitled to make out a case in reply[12] and raise its financial position. This argument however disregards the fact that the respondent in its answering papers itself alludes to its financial constraints and its inability to generate revenue apart from its membership fees.[13]

[46] The respondent has pointed out that it has been held in this court that exceptional reasons must exist why an opposed and voluminous matter which involves some complexity and novel points of law in urgent court should not be referred to the ordinary motion roll.[14]

[47] Without in any way creating a precedent regarding the urgency of applications of this nature, I am of the view that in the present

instance there are compelling reasons justifying the application being heard at this time.

[48] In addition to the commercial urgency of the matter, considerable time has been spent on reading the voluminous application papers in preparation for the hearing, the matter is ripe for hearing and counsel have prepared extensive heads of argument. The present state of the urgent roll can accommodate the matter being heard and disposed of.

[49] It would simply unnecessarily burden another court with again spending considerable time and effort in reading the voluminous papers if the application is dealt with in due course, and I am of the view that in all these circumstances it would be inappropriate to

do so. In addition, it would simply increase the legal costs incurred by both parties substantially. Moreover, the respondent complains

that the applicant has every incentive to extend the finalisation of the proposed trial action for as long as possible if the applicant is afforded any interim relief. If any interim relief is granted at this stage, and the application is enrolled for hearing in the normal course, it would simply have the effect of further extending the finalisation of the proposed trial proceedings, which will only commence once the application has been dealt with in the normal course.

[50] For all the aforesaid reasons I am of the view that the present application must be dealt with expeditiously and should not be struck from the roll.

[51] The second objection raised by the respondent is that there has been a material non-joinder of the complainants who had laid complaints against the applicant's product, AntaGolin with the respondent. The respondent contends that the complainants should have

been joined as parties to the application as they have a direct and substantial interest in these proceedings.

[52] The respondent contends that the applicant's case is based in significant part on contested rulings which it contends are invalid and of no force and effect. As the complainants obtained relief from the respondent, it is contended that the present proceedings directly affects the rights and interests of the complainants and that they will be deprived of that relief if the applicant obtains interim relief and halt the complaints made by the complainants.

[53] The applicant in contrast contends that the complainants have no legal interest in the present proceedings and that the complainants and their interests are not sufficiently articulated in the answering papers to pass muster as a pleading of non-joinder.

[54] Both parties place reliance on *Gordon v Department of Health, Kwazulu-Natal*[15] in which the test is stated as follows: The test is whether the party who is alleged to be a necessary party, has a legal interest in the subject matter, which may be affected prejudicially by the judgment of the court in the proceedings concerned'[16].

[55] In applying this test, I am not satisfied that the respondent has illustrated that the complainants have a legal interest in the subject matter of these proceedings and that the order which may be made may affect their rights prejudicially or that the order cannot be sustained or carried into effect without prejudicing them.[17] The complainants do not participate in the decision making processes of the respondent and their role is simply to place information

before the respondent in substantiation of their complaints and on which the respondent, in conjunction with the applicant's

submissions, makes a decision.[18]

[56] I am further not convinced that it can be said that the complainants obtained relief from the respondent which the present application seeks to deprive them of, simply because the respondent received and investigated such complaints and made its own decisions in relation thereto. The present application primarily seeks to halt the implementation of the results of the respondent's decision

making process on an interim basis, pending the determination of the respondent's entitlement to regulate the applicant's

advertisements and the validity and enforceability of the decisions have been determined. It is unclear how this would prejudice the complainants' rights and the respondent has made out no case for such prejudice on its papers.

[57] The respondent further relies on the principle that where damaging allegations are made against a third party in affidavits and where those allegations are in issue between the parties to the litigation, the third party is entitled to intervene in the proceedings.[19] This principle is used in support of its contention that Steinmann should have been joined in the proceedings in order to answer the allegations made against him.

[58] In the context of this application, the allegations pertaining to Steinmann are not however relevant to determine whether the applicant is entitled to the interim interdictory relief and it is entirely irrelevant whether his complaints are bona fide or mala fide. The extent to which the allegations regarding Steinmann are in issue between the parties to the litigation does not in my view therefor require the joinder of Steinmann as a party to the proceedings as a necessity. Steinmann did not seek leave to intervene

in the present proceedings.

[59] In the circumstances the respondent's point of non-joinder must fail. I express no view as to whether the complainants have a legal interest in the proposed trial proceedings to be instituted by the applicant.

[60] It is now necessary to consider the applicant's entitlement to the interim interdictory relief sought.

[61] The requirements for the granting of an interim interdict are trite[20] and can be summarised as follows:

[61.1] That the right which is the subject matter of the main proceedings and which the applicant seeks to protect by means of interim relief is clear or, if not clear, is prima facie established though open to some doubt;

[61.2] If such case is only prima facie established, there is a well-grounded apprehension of irreparable harm to the applicant if the interdict is not granted and the applicant ultimately succeeds in establishing his or her right;

[61.3] There is no other satisfactory remedy; and

[61.4] The balance of convenience favours the granting of interim relief.[21]

[62] In the present application the disputes between the parties are mainly based on complex legal issues, rather than factual disputes, and although the application is underpinned by a substantial factual matrix, the respondent has not taken issue with most of the factual averments made by the applicant.

[63] The different formulations of the approach to be taken in granting interim relief are discussed in some detail by Malan J (as he then was) in *Johannesburg Municipal Pension Fund v City of Johannesburg*[22], including the approach to be followed where the disputes between the parties were mainly of a legal nature. In this context, consideration

was given to the nature of the legal dispute and whether it involved ‘ordinary legal issues’ or ‘difficult questions of law’.

[64] Reference is made to *Fourie v Olivier en ‘n Ander*[23] where Viljoen J held that where a legal issue can dispose of the issue, the court hearing the relief should decide the matter and not leave it for the trial court to adjudicate.[24]

[65] Reference is also made with approval to *Ward v Cape Peninsula Ice Skating Club*[25], wherein the different approaches were reconciled by finding that ‘ordinary’ questions of law should be decided at the interim stage.

[66] I am of the view that the approach adopted in *Johannesburg Municipal Pension Fund* is the appropriate one to be followed in the present instance and respectfully intend following the rationale of Malan J’s reasoning in the said matter. Consideration was given to the nature of the legal issues involved in making a preliminary assessment of the applicant’s *prima facie* right. In doing so, consideration was given to whether the issues were ‘ordinary legal issues’, which obliged a court to determine the matter and not to leave it to the trial court to adjudicate[26], or whether the issues involved ‘difficult questions of law’.

[67] As held by Heher J (as he then was) in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others*[27], in order to determine whether a ‘*prima facie* case though open to some doubt’ has been made out by an applicant, a preliminary assessment of the merits of the applicant’s claim is required and it must be shown that the claim is not frivolous or vexatious and that there is a serious question to be tried, when deciding whether interim relief should be granted in constitutional cases²⁸.

[68] As concluded in by Heher J[28]:

'1. A *prima facie* right though open to some doubt exists when there is a prospect of success in the claim for the principal relief albeit that such prospect may be assessed as weak by the Judge hearing the interim application.

2. Provided there is a prospect of success, there is no further threshold which must be crossed before proceeding to a consideration

of the other elements of an interim interdict.

3. The strength of one element may make up for the frailty of another.

4. The process of measuring each element requires a holistic approach to the affidavits in the case, examining and balancing the

facts

and coming to such conclusion as one may as to the probabilities where disputes exist.’

[69] It is necessary to remember the balance in considering the prospects of success and the balance of convenience; the stronger the prospects of success, the less need for the balance of convenience to favour the applicant; the weaker the prospects of success, the greater the need for the balance of convenience to favour the applicant.[29]

[70] All the issues of law referred to in the application which I have already referred to involve difficult questions of law which encompass issues of private, public and constitutional law and should not be determined at this interim stage. For purposes of this

judgment

it is not feasible to deal with all of them in any detail. Suffice it to state that both parties submitted intricate and comprehensive heads of argument dealing with the various issues which in the proposed trial action will enjoy considerable and lengthy debate.

[71] It would be undesirable at this stage to rule at this interim stage that there is no prospect of success on any of these issues.

They are by their nature of such gravity and complexity that they cannot and should not be disposed of in the present interim proceedings, further bearing in mind that certain of these issues are also in issue in the Herbex matter.

[72] The dispute between the parties persists notwithstanding the fact that the respondent accepts that it has no jurisdiction over the

applicant and that its rulings do not bind the applicant.

[73] The applicant contends that the conduct of the respondent is unlawful in purporting to be the regulator of the advertising industry and it cannot arrogate to itself the right to control the advertisements sought to be placed by non-members who do not subscribe to the respondent’s code. It is contended that the respondent has no enabling legislation to execute a public function as regulator. There are existing statutory regulators governing the advertising of applicant's products, including AntaGolin and the

respondent is precluded from acting as a rival or even concurrent regulator. The applicant further contends that the adverse rulings

against it which appear on the website of the respondent are defamatory and injurious of the applicant and constitutes a wrongful

interference with its ability to contract for services. It is further contended that the respondent's exercise of power in this fashion offends against the applicant's constitutional rights to freedom of association, speech, trade and access to the courts as envisaged in sections 18, 26 and 34 of the Constitution. *Prima facie*, I am of the view that these contentions have prospects of success.

- [74] It is common cause between the parties that the applicant is not a member of the respondent, is not bound by respondent's code and that the respondent does not enjoy any authority or power (contractual or otherwise) to exercise any jurisdiction over it.
- [75] It is common cause that the contested decisions made by the respondent arise primarily from complaints in respect of the applicant's television advertisements, mainly on MNet. It is also common cause that MNet and other broadcasters are members of the respondent.
- [76] The respondent's code, containing standards for the industry, is a contract concluded between the members of the respondent for the purpose of self-regulation.
- [77] The respondent contends that it enjoys statutory recognition and that Parliament has given it the power and duty to adjudicate complaints in respect of advertisements that are broadcast by broadcast service licensees in terms of the ECA.
- [78] It relies solely on the provisions of section 55(1) of the ECA, which provides as follows:
'Control over advertisements (1) All broadcasting service licensees must adhere to the Code of Advertising Practice (in this section referred to as the Code) as
from time to time determined and administered by the Advertising Standards Authority of South Africa and to any advertising regulations prescribed by the Authority in respect of scheduling of adverts, infomercials and programme sponsorships'.
- [79] Section 1 of the ECA contains, *inter alia*, the following definitions:
- [79.1] 'Advertising Standards Authority of South Africa means the entity which regulates the content of advertising, or any entity
that replaces it but has the same functions';
- [79.2] 'broadcasting service licensee means a person to whom a broadcasting service licence has been granted in terms of this Act'.
- [80] The respondent does not contend for any other statutory provisions affording it regulatory powers.
- [81] Relying on section 55(1), respondent contends that it has the statutory duty and authority to determine whether television advertisements comply with its advertising code, irrespective whether the advertiser is a member of the respondent.
- [82] I agree with the applicant that the respondent's reliance on the ECA underpins the respondent's basis of opposition to the interdictory relief sought in this application.

[83] The applicant contends that reliance on the ECA does not assist the respondent. It points out that the ECA regulates electronic communication and broadcast licensees, not advertisers. The obligations imposed by section 55(1) on a plain reading of the section, rests on the broadcast licensee and not on an advertiser. In its terms it does not afford the respondent a regulatory power over

advertisers such as the applicant. Moreover, under section 55(2) it is I CASA and not the respondent who is enjoined to deal with any complaints regarding alleged breaches of the code by broadcasting licensees who are not members of the respondent. Prima facie, it appears to me that the provisions of section 55(1) of ECA do not avail the respondent in resisting the applicant's claims.

[84] The applicant's contention that the statutory provisions of the Medicines Act and the CPA, already referred to, regulate the advertisement of the applicant's products, including AntaGolin, and provide a statutory framework for such regulation which does not clothe the respondent with any statutory powers or duties, appears to be well founded. There are certain requirements which must be followed before an entity such as the respondent can acquire accreditation as a consumer protection group under section 78 of the CPA or as an industry ombud under section 82 of the CPA. It is undisputed that the respondent applied for such accreditation, but did not acquire it. The respondent contends that it has never purported to exercise any jurisdiction under section 82 of the CPA, but has acted under the authority of section 55 (1) of the ECA[30]

[85] It is common cause that the respondent does not enjoy recognition as a statutory regulator under either of these Acts.

[86] The applicant contends that for the respondent to apply its code to non-members of the respondent, what would be required is

a regulation to this effect by the Minister of Trade and Industry in compliance with the CPA and specifically section 82 thereof.

[87] The respondent disputes this contention on the basis that the CPA does not apply to its consideration of complaints on behalf of

its members. It is contended that nothing the respondent does in considering such complaints is inconsistent with the provisions of the CPA relied on by the applicant as the respondent is not a regulatory authority as defined in the CPA and does not purport to exercise such powers. It contends that the only consequence of the fact that the respondent's application for accreditation in terms of section 82 of the CPA was not granted, is that the respondent cannot exercise any powers under that section.

[88] The CPA does not preclude the respondent from considering complaints on behalf of its members so that its members may decide whether or not they want to publish that advertisement or any advertising by an advertiser who breaches the code or declines to participate in the respondent's system of self-regulation. The respondent further relies on the *maxim generalia specialibus non derogant* for its

contention that the CPA cannot be interpreted to remove the specific authority conferred on the respondent by section 55 (1) of the ECA. It is further contended that the respondent does not require accreditation in order to lawfully consider complaints in respect.

[89] The respondent's argument is thus again predicated on section 155(1) of the CPA being interpreted as affording the respondent the specific statutory power to lawfully consider complaints in respect of advertising of non-members and to regulate advertising by non-members. *Ex facie* the said section, it imposes an obligation on broadcasting licensees, not advertisers to adhere to the respondent's code and does not in its terms afford the respondent the power to regulate advertising of advertisers, specifically ones such as the applicant, who are not members of the respondent.

[90] If it is ultimately found that the respondent is not clothed with the statutory powers contended for, the applicant's contentions of infringement of their constitutional rights *prima facie* appear well founded.

[91] The applicants have in my view established at least a *prima facie* case (although open to some doubt) and there is substance to the applicant's contentions and they are not frivolous or vexatious, but constitute serious issues which must be tried in the

proposed trial action. It would however be inappropriate to voice any final views on the ultimate determination of these issues.

[92] As such I am satisfied that the applicant has succeeded in meeting the threshold that it has a *prima facie* right to relief, although open to some doubt.

[93] The next issue which must be considered is whether the applicant has established that it has a well-grounded apprehension of harm.

[94] The applicant contends that the harm to it if it is subjected to any sanction would be manifest as the publication of adverse rulings on the website occasions immediate prejudice to the advertisers as it damages the credibility of the product and inhibits sales. The publication of the rulings is wrongful, injurious and prejudicial to a non-member of the respondent who is subjected thereto and constitutes a wrongful interference with its entitlement to contractually procure advertising services on the open market. The

respondent has not sought to factually dispute these averments, but has baldly stated that the applicant has made out no case in relation thereto and contend that any damages which applicant may suffer may form the subject matter of a damages claim in due course. I have already commented on this contention.

[95] The applicant further contends that it has been precluded from asserting, as is the truth that AntaGolin is insulin resistant and it may assist with weight loss. This has diminished sales causing substantial loss. The sales figures provided by the applicant in support of this contention have not been meaningfully challenged in the answering papers other than by way of speculation and the contention that the proof provided is inadequate. I am of the view that the confirmation of the losses by the directors of the applicant as being directly attributable to the inability to market its products is sufficient, absent any genuine factual dispute on the issue.

[96] The applicant points out that the respondent has not disputed any of its assertions regarding the qualities of AntaGolin other than

by way of balu denials which do not create genuine disputes of fact. For purposes of this application it must thus be accepted that the applicant's assertions regarding the qualities of AntaGolin, viz that it combats insulin resistance and assists in weight loss are true.

[97] It is not disputed that advertising is essential to the applicant's business and that advertising is used to inform the public and potential purchasers of its products, of the nature of its products and the specific qualities of its products.

[98] The respondent, in not dealing with the assertions of the applicant in relation to such qualities and in not seeking any opportunity to deal therewith, ran the risk, for purposes of the present application, that the expert evidence presented by the applicant in relation to these qualities are undisputed and must for purposes of the present proceedings be accepted. The respondent made no effort to refute these averments and did not in its papers state that the product, AntaGolin, is in any way harmful or does not

possess the qualities contended for.

[99] The respondent simply contends that no case is made out that the applicant will suffer irreparable harm if relief is refused other

than in relation to an ad-alert and that its limited undertaking, viz not to issue an ad-alert until such time, as the main application is heard in the normal course, alternatively until the Herbex litigation in which it contends the same legal issues arise, has been determined, cures any prejudice. A determination of the Herbex application would however not per se be dispositive of the disputes between the present parties, considering that the parties and the facts are different.

[100] Respondent contends that the mere publication of an adverse ruling by the respondent does not cause any harm to an advertiser, as

the rulings are measured, reasoned and justified by reference to the evidence before the respondent. This view entirely disregards the reputational and financial issues which result from such adverse rulings and disregard the obvious detrimental results of such adverse

ruling.

[101] The respondent points out that in measuring the test for determining whether a statement is defamatory, as contended by the applicant, consideration must be given to whether the words have the tendency to undermine, subvert or impair a person's good name, reputation or esteem in the community.[31] The applicant must illustrate that there is no sustainable defence to a claim of defamation.[32] The respondent contends that its defences of truth and public interest and protected comment would be sustainable.

[102] The respondent would have to show that the sting in its ruling was substantially true and in the public interest. The respondent has not in its answering papers presented any facts which would sustain such a defence. It is however not necessary for purposes of the present application and in order to evaluate whether the applicant has illustrated an entitlement to interim relief and specifically a well- grounded apprehension of harm, to make any finding on this issue.J From the available facts, it is in any event not possible to do so.

[103] The respondent further contends that even if it is found that mere publication of an adverse finding is harmful to the applicant,

such harm is not irreparable as the applicant may appeal any adverse ruling or launch review proceedings under PAJA, in addition to which it has a damages claim. I do not agree that such steps would successfully negate any harm suffered by the applicant.

[104] Having regard to the available facts and for purposes of determining this application, in which the respondent has failed to provide any factual information in defence of its rulings and decisions against the applicant and in relation to the AntaGolin product, it is not apparent that the respondent would have any sustainable defence and the respondent's adverse rulings are prima facie harmful to the reputation of the applicant or prevent any such harm from being irreparable.

[105] In the circumstances, I am satisfied that the applicant has sufficiently illustrated a well-grounded apprehension of irreparable

harm.

[106] The respondent intends to pursue its code and to impose any of the sanctions referred to therein as deemed appropriate pursuant to

its ruling of 29 June 2015. In the interim and until the proposed trial has been finalised, the limitations imposed on the applicant's

ability to advertise the stated qualities of AntaGolin hamper its ability to properly advertise this product, remain as does the

publication of the adverse rulings made against the applicant and AntaGolin.

[107] In considering the balance of convenience, consideration must be given to the consequences which this will have on the business of

the applicant if interim relief is not granted and it is ultimately found that the conduct and decisions of the respondent are unlawful and of no force and effect. It will be extremely difficult, if not impossible to undo the financial and reputational harm which will occur if the status quo is not preserved.

[108] The applicant's reliance on substantial financial losses and the loss of sales it has experienced and the imminent loss of

shelf space threatened by Clicks is not meaningfully disputed by the respondent. Future harm can only be avoided if further loss of credibility to AntaGolin is avoided as the respondent's rulings are available on respondent's website, published to members and accessible to members of the public. The applicant's averments that the consequences were it to be prevented from advertising AntaGolin in the mainstream print and broadcast media would be catastrophic to its business, are not directly contested.

[109] The respondent contends that the public interest weighs heavily against the applicant. It relies mainly on public interest on not being exposed to misleading advertising. It however does not provide any facts from which it can be determined that the public interest would indeed be harmed or that the product is harmful. Moreover the public interest is in my view sufficiently protected by the Medicines Act and the CPA, which afford statutory protection and alternative channels of complaint if the applicant's

advertising of AntaGolin is in any way offensive or misleading.

[110] The respondent's contention that the only prejudice applicant would suffer if no interim relief is granted is that it will be required to ensure that its advertising is substantiated, decent and honest in accordance with the respondent's code, which the applicant only has to do to the extent it wants the respondent's members to continue publishing its advertisements

does not bear scrutiny.

[111] The respondent's view does not take cognisance of the reality of the effects its adverse rulings have on the advertising of

products such as AntaGolin, which is illustrated in substantial detail by the applicant.

[112] The respondent's views that the granting of interim relief to the applicant would oblige its members to publish the applicant's advertisements, is misconceived. The interim relief sought would not place any obligation on the members of the respondent to publish the advertisements of the applicant but they would be at liberty to make their own decisions whether to do so or not.

[113] A further ground of prejudice relied on by the respondent if interim relief is granted, is a deprivation of the entitlement of its

members to adhere to their chosen self-regulatory forum. This view disregards the fact that the respondent's members will not be obliged to publish the applicant's advertisements, but can decide whether to do so or not.

[114] The respondent relies on the principle that under the common law an interdict to restrain the exercise of a statutory power will only be granted in exceptional circumstances, which is strengthened by the principle of separation of powers contained in the Constitution, as enunciated in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* ("Outa")[33]. The separation of powers is particularly relevant to the enquiry into the balance of convenience and it must be borne in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of the separation of powers harm.

[115] It further relies on the dictum in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*[34] that 'when a court is invited to intrude into the terrain of the executive, especially when the executive decision making process is still uncompleted, it must do so only in the clearest of cases and only when irreparable harm is likely to ensue if interdictory relief is not granted'.

[116] These stringent requirements must be adhered to where it is clear that it is an executive decision making process which is still

uncompleted. I am not convinced that the relief sought by the applicant may well have the effect of not being constitutionally

appropriate in the circumstances. The very issue of whether the respondent enjoys the statutory recognition contended for is one of the central issues to be determined in the proposed action and I am mindful that it would be inappropriate for me to finally determine this issue in the present proceedings.

[117] The respondent's contentions are predicated upon a determination that the conduct of the respondent is not unlawful and that it has the statutory powers and duties contended for under section 55(1) of the ECA. In light of my earlier finding that the applicant has a *prima facie* right (although open to doubt) to challenge the legitimacy of the respondent's conduct, I am not satisfied that these stringent requirements find application in these proceedings as it is not clear that the respondent indeed has the statutory powers contended for. This is the very issue which must be determined in due course and on which I have already expressed a *prima facie* view.

[118] In the circumstances, the balance of convenience favours the applicant and its prejudice outweighs the prejudice contended for by

the respondent.

[119] It is finally necessary to consider whether there is an alternative suitable remedy available to the applicant.

[120] The applicant contends that it intends instituting a damages claim against the respondent but that this will not be sufficient to

protect it from irreparable harm, more so in light of the respondent's precarious financial position.

[121] The applicant further points out that in addition to the ad-alert, there are various other sanctions which the respondent may imminently impose pursuant to its ruling of 29 June 2015, including a disciplinary hearing, a requirement that the respondent be afforded an opportunity to approve the content of AntaGolin advertisements in advance of their publication, publication on a defaulters list or a directive that advertisements be withdrawn. The applicant further relies on the substantial funding it has already expended on advertising and details the catastrophic consequences to its business if the respondent is allowed to pursue its processes in relation to AntaGolin.

[122] The respondent contends that there are appropriate alternative remedies available including internal appeals to the respondent in

terms of its code and judicial review under PAJA. It also places great emphasis on the applicant's recognition that it has a damages claim against the respondent.

[123] I am not satisfied that the pursuit of these remedies would however provide a suitable remedy for the irreparable harm contended

for by the applicant.

[124] The issue whether applicant indeed has a damages claim against the respondent is inextricably tied in to the issue whether the respondent's conduct is indeed unlawful, as the applicant contends, and can therefor be classified as wrongful. These are issues which must be determined in due course in the proposed trial action. In the circumstances I am not satisfied that a damages claim would be an appropriate alternative remedy.[35]

[125] The applicant's reliance on the precarious financial position of the respondent is attacked by it as being raised for the first time in reply. However, the respondent in its own answering papers, alludes to its limited financial resources and the applicant

was thus entitled to deal with this issue in its replying affidavit.

[126] In the circumstances I am satisfied that the injury envisaged will be irreparable if allowed to continue and no alternative satisfactory remedy will sufficiently protect the applicant[36].

[127] Although for purposes of this judgment the various requisites for interdictory relief were separately discussed, I have considered them in conjunction with one another in order to determine whether I should exercise a discretion in favour of granting the interim interdictory relief sought[37] and have come to the conclusion that the discretion should be exercised in favour of the applicant.

[128] It is necessary to comment on the ambit of the interim relief sought by the applicant.

[129] As correctly pointed out by the respondent it may be some years before the proposed trial proceedings are finalised. As such, the interim relief should strike a proper balance between the interests of the parties and afford the necessary protection to the applicant without prejudicing the respondent or public interest until the proposed proceedings are finalised. It is also necessary to incentivise the applicant to proceed to trial as expeditiously as possible and not to preserve the interim relief indefinitely by allowing the trial to drag on.

[130] The range of sanctions which the respondent may seek to impose under its code include the withdrawal of an advertisement in its current format, a direction to submit advertisements to the respondent for pre-publication advice, a direction to publish a summarised version of a ruling in all or some of the media considered appropriate by the respondent and to bear the costs thereof, referral

to a disciplinary hearing and publication on a list of defaulters. The consequences of any of the other sanctions, other than an

ad-alert are equally potentially harmful to the applicant and no cogent basis exists to limit relief only to the ad-alert aspect as tendered by the respondent.

[131] I am satisfied that the relief sought in respect of the interim removal of the respondent's adverse findings against the applicant and AntaGolin is required to afford the applicant reasonable protection in the interim and until the trial has been finalised.

[132] The respondent did not challenge the wide formulation of the second category of interdictory relief sought in prayer 2.2 of the

notice of motion which effectively entitles the applicant to advocate the qualities of AntaGolin despite the issues pertaining to the lawfulness of respondent's adverse rulings only being determined in the proposed trial action and without the respondent's

rulings in relation thereto having been set aside or declared as being of no force and effect.

[133] I have been persuaded to grant such relief in light of the fact that the respondent has not meaningfully challenged the applicant's averments that the relief is necessary to restore credibility in AntaGolin in order to effectively prevent the applicant's business from demise, which absent such relief, may well occur. I have also taken into account that the respondent has not in its papers contended, nor provided any evidence that AntaGolin does not in fact have the properties contended and has not contended

that the product is harmful in any way. I am comforted by the fact that the Medicines Act and the CPA provide sufficient protection to consumers if the applicant's advertising relating to AntaGolin is in any way misleading.

[134] In my view the time period of thirty days proposed by the applicant for the institution of the proposed action proceedings against the respondent is *oo long. Mindful of the fact that any relief granted should endure for an interim period and to alleviate any potential prejudice which the respondent may suffer, a period of twenty days would afford sufficient time for the institution of the proposed legal proceedings.

[135] Although the notice of motion seeks the costs of the application to be reserved for determination by the trial court, the parties were ad idem that the costs of the application should follow the result. It would in my view not be appropriate to reserve the costs at this stage and to lumber a future court in due course with its determination.

[136] In their respective heads of argument, both parties sought a punitive costs order. I am not satisfied that the conduct of either

party justifies the granting of such an order.

[137] I accordingly grant the following order:

[138] Condonation is granted for the late filing of the respondent's answering affidavit;

[139] The applicant is granted leave to amend prayer 3 of its notice of motion by inserting a claim for damages in an amount of R25 million;

[140] Pending the final determination of a trial action to be instituted by the applicant against the respondent within 20 days of this order an interim order is granted:

[140.1] interdicting the respondent from imposing any form of sanction referred to in its code, including an ad-alert, on the applicant in

respect of advertisements of the product AntaGolin;

[140.2] interdicting the respondent from taking any steps to preclude the applicant from asserting in its advertisements in all media that

AntaGolin combats insulin resistance and assists with weight loss;

[140.3] directing the respondent to forthwith remove from its website all rulings, and any other publication by or on behalf of the respondent, in respect of (or referring to) the applicant, to the effect that the assertion by the applicant that AntaGolin combats insulin resistance and assists with weight loss are unsubstantiated;

[141] Directing that the order in [140] above shall lapse in the event that the applicant does not institute the trial action within the stipulated period and/or in the event that the applicant fails to timeously and properly pursue the action, unless good cause is shown for any delay in the prosecution of applicant's claims.

[142] Directing the respondent to pay the costs of this application, including the costs consequent upon the employment of senior counsel.

E F DIPPENAAR

ACTING JUDGE OF THE HIGH COURT

Date of hearing : 9 September 2015

Date of judgement 18 September 2015

For Applicant : Adv S Symon, SC

Fluxmans Inc

For Respondent : Adv N Ferreira

Mr M Williams (pupil)

[1] That the applicant's claims were unsubstantiated

[2] 101 of 1965, as amended ("the Medicines Act"), specifically sections 18, 18(2), 18C, 20(1), 29, 35(x) and 34A and regulation 45 which deals with advertisements of medicines

[3] Record, p53-55, par104-109

[4] 68 of 2008

[5] sections 5(1)(b), 24(2), 29, 41, 48(1)(b), 48(2)(c) and 97

[6] Under sections 78 and 82 of the CPA respectively.

[7] *Clur v Keil and Others* 2012 (3) SA 50 (ECG) paras 13, 23; *Pedal Power Association v Cycling South Africa and the South African Sports Federation and Olympic Committee* 2014 JDR 0306 (WCC)

[8] *The Law Society of the Transvaal v Tloubetla* 1999 JDR 0309 T

[9] 36 of 2005

[10] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 CC par 44

[11] Herbex (Pty) Ltd v Advertising Authority Case No 45774/14 High Court, Gauteng Local Division, Johannesburg, special two day allocation to be heard during late April 2016

[12] Titty's Bar and Bottlestore (Pty) Ltd v ABC Garage (Pty) Ltd 1974 (4) SA 362 T

[13] Record, p560, par 128

[14] In Re Several matters on the Urgent Roll 2013 (1) SA 549 par 15

[2008] ZASCA 99; 2008

(6) SA 522 SCA par 9 and 10

18 This position has been restated in Judicial Services Commission and Another v Cape Bar Council and Another 2013 (1) SA 170 SCA par 12

[17] Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 A at 659

[18] See Vambe v Chairperson, Medical & Dental Professions Board and Others 2011 ZAGPPHC 70 (19 April 2011)(36873/09) par 62

9 SA Commercial Catering and Allied Workers Union and Another v Lehapa NO and Another (Mostert NO Intervening) 2005 (6) SA 354 W at paras 6-7

[20] Olympic Passenger Services (Pty) Ltd v Ramlagan 1957 (2) SA 382 D at 383, referring to the classic exposition in Setlogeio v Setlogelo 1914 AD 221 at 227

[21] Summarised by Malan J (as he then was) in Johannesburg Municipal Pension Fund v City of Johannesburg 2005 (6) SA 273 WLD at 280F-H and authorities cited therein

[22] Fn 21, supra at 280H-282B

[23] 1971 (3) SA 274T

[24] A different approach was adopted in Beecham Group Ltd v B-M Group (Pty) Ltd 1977 (1) SA 50 T at 55H

25 As per Fourie v Olivier en 'n Ander 1971 (3) SA 274 T

[26] Applying the test in American Cyanamid Company v Eithicon Ltd [1973] 1 All ER 504 (HL)

[27] 1995 (2) SA 813 W at 824I-825D, 832I-833B

[28] Ferreira, supra 832I-833B, quoted with approval in Johannesburg Municipal Pension Fund 282A-C

[29] Olympic Passenger Services (Pty) Ltd v Ramlagan 1957 (2) SA 382 D 383

[30] These submissions were made in supplementary submissions submitted by the respondent, with the consent of the applicant on the afternoon of 17 September 2015. At the time of finalising this judgment, no supplementary heads have been received from the applicant

E.g. South African Associated Newspapers Ltd and Another v Yutar 1969 (2) SA 442 A at 451

Lieberthal v Primedia Broadcasting (Pty) Ltd 2003 (5) SA 39 W at 431; Hlx Networking Technologies v System Publishers (Pty) Ltd and Another [1996] ZASCA 107; 1997 (1) SA 391 A at 402H

[33] 2012 (6) SA 223 CCpar44

[34] 2012 (4) SA618 CC par 101

[35] See for example Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA 2006 (1) SA461 SCA

[36] See Ncongwane v Molorane 1941 OPD 125 at 130

[37] Olympic Passenger Services, supra 383E-F

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Prepared on 12 October 2026 · Esheria