

SOUTH AFRICA / JUDGMENT

Spar Group Limited and Another v Superand Spar CC t/a Kilner Park Superspar and Others (61163/2017) [2017] ZAGPPHC 598 (11 September 2017)

[2017] ZAGPPHC 598

COURT

North Gauteng High Court, Pretoria

BEFORE

TM Makgoka

CASE / FILE NUMBER

61163/2017

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HIGH

COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Not

reportable

Not

of interest to other Judges

CASE

NO: 61163/2017

DATE:

11/09/2017

THE

SPAR GROUP

LIMITED First

Applicant

THE

SPAR GUILD OF SOUTHERN AFRICA

NPC

Second Applicant

and

SUPERAND

SPAR CC

t/a

KILNER PARK

SUPERSPAR

First Respondent
TLNN
LIQOUR STORE (PTY) LTD
t/a
TOPS at KILNER PARK
Second
Respondent
DIMITRIOS
THEODORIDIS Third
Respondent
ARTHUR
BLACK Fourth
Respondent
PICK
NP AY STORES
LIMITED Fifth
Respondent

JUDGMENT

MAKGOKA,J

- [1] On Friday, 8 September 2017, following the hearing of the urgent application on Thursday 7 September 2017, I made the following order:
1. The adjudication of prayers 2 and 3 of the notice of motion is postponed sine die;
 2. The costs of the application relating to prayers 2 and 3 are reserved;
 3. With regard to the relief sought in prayers 4 and 5 of the notice of motion, the matter is referred to trial;
 4. The applicants' notice of motion stands as a simple summons and the first, second and third respondents' notice of intention to oppose stands as a notice of intention to defend;
 5. The applicants are directed to file their declaration within 5 (five) days of this order;
 6. The respondents shall file their plea, if any, within 5 (five) days of the service of the declaration referred to above;
 7. Thereafter the Uniform Rules of Court regarding the filing of pleadings and all processes shall apply;
 8. Pending the final determination of the trial matter, the first and second respondents are interdicted and restrained from selling and/or transferring their businesses to the fourth respondent or any third party without due compliance with the provisions of clause 9 of the Spar Membership Agreement between the parties;

9. The costs of the application relating to the interdictory relief (Part C) are to be costs in the action.

[2] These are the reasons for that order.

[3] The applicants, the Spar Group Limited (the Spar Group) and the Spar Guild of Southern Africa NPC (the Spar Guild) sought, in parts 'A' and 'B' of their notice of motion, to perfect two notarial bonds against the first respondent, Superand Spar CC t/a Kilner Park Spar (Kilner Park Spar) and the second respondent, TLNN Liquor Store (Pty) Limited t/a TOPS at Kilner Park (TOPS). In part 'C' of the notice of motion, the applicants sought an interdict restraining those respondents from selling their businesses to the fourth respondent, Mr Arthur Black (Mr Black) or to any third party without complying with the applicants' pre-emptive rights in terms of the 'Spar Membership Agreement' concluded between the parties.

[4] At the hearing of the matter, it was conveyed to me that the applicants, on the one hand, and the first and second respondents, on the other, had reached agreement in principle with regard to the relief sought in parts 'A' and 'B' of the notice of motion. That agreement is reflected in paragraphs 1 and 2 of the order referred to in para 1 above.

[5] Accordingly, only the relief sought in part 'C' remained for determination. I consider that against the following backdrop. The third respondent, Mr Dimitrios Theodoridis, is the managing member of Kilner Park Spar and the sole director of TOPS. He is therefore the controlling mind of both entities, which are operated from the premises situated at 25 Lynette Street in Kilner Park, Pretoria, under the franchise of the Spar Guild.

[6] The contractual relationship between the applicants and the respondents is each governed by a written Spar membership

agreement. In respect of Kilner Park Spar, that agreement was concluded in 1987, while in respect of TOPS, the agreement was concluded in June 2015 and January 2016. The agreements constitute the contractual terms on which Kilner Park Spar and TOPS were granted membership by the Spar Group and Spar Guild to participate in the Spar voluntary trading group.

[7] At the heart of the dispute in part 'C' is the pre-emptive right pursuant to the Spar membership agreement. The

applicants say that the first and second respondents have concluded a sale agreement with Mr Black for the conversion of the businesses

from Spar to the fifth respondent, Pick n Pay Stores Ltd (Pick n Pay). That being the case, their pre-emptive rights are triggered, in terms of which the respondents are obliged, in terms of the Spar membership agreement, to give them the right of first refusal in respect of the sale of their businesses.

[8] Only Kilner Park Spar, TOPS, and by extension , Mr Theodoridis, oppose the application. Mr Black and Pick n Pay do not oppose

the application, although Mr Black has deposed to a confirmatory affidavit in support of Kilner Park Spar and TOPS. Therefore, for the sake of convenience, and where the context dictates, I shall refer to Kilner Park Spar and TOPS simply as 'the respondents'.

[9] A useful starting point is the Spar membership agreement, signed respectively on behalf of the respondents. Clause 3.3 thereof

provides, among others, that the respondents shall not give notice resigning their membership prior to the expiry of three years from the date of signature of the Spar membership agreement by the Spar Guild, except with the prior written consent of the Spar Guild. It is common cause that in respect of Kilner Park Spar, the 3- year period referred to in clause 3.3 has long expired.

[10] Clause 9, which deals with the sale of the respondents' business during the currency of the agreement, provides in clause 9.1 that the respondents shall not sell or otherwise alienate their businesses, or any part thereof, before the expiry of the period of three years except with the prior written consent of the Spar Guild.

[11] The sale of the respondents' businesses after the expiry of three years is governed by clauses 9.2 - 9.3 (inclusive) of the membership agreement. The clauses read:

' 9.2 After the expiry of the period referred to in clause 3.3 above, should the retailer member [the respondents] wish to sell his business, or any part thereof, the Guild [the second applicant] shall have a pre-emptive right in favour of the relevant retailer member ' s affiliated distribution centre member (or its nominee) to purchase same, on the terms set out in clause

9.3 below, unless the proposed sale of the business is to a purchaser who is either an existing retailer member of the Guild or wishes to become a member of the Guild in respect of the said business, is admitted as a retailer member in respect of such business and the said sale is duly concluded and implemented within a reasonable period following the approval of the purchaser's application for membership as a retailer member of the Guild. In the event of any such sale, the pre-emptive right in favour of the retailer member ' s affiliated distribution centre member (or its nominee) shall not apply.

9.3 The following provisions shall apply in those circumstances where the pre-emptive right as provided for above is applicable:-

9.3.1 The retailer member shall not be entitled to enter into any agreement with any third party whatsoever for the sale of the retailer member ' s business or any part thereof unless he shall by written notice first have offered to sell the business or the relevant part thereof to his affiliated distribution centre member (or its nominee) at the purchase price contained in a written offer from the third party or in a proposed sale agreement with the third party ... and on the standard terms and conditions contained in a SPAR purchase of business agreement, which notice shall be accompanied by a copy of the written offer from the third party or a copy of the proposed sale

agreement with the third party, as the case may be, and the distribution centre member (or its nominee) shall have failed to accept that offer within 30 days receipt of such written notice.'

[12] The issue in dispute is whether the pre-emptive rights of the applicants provided for in the Spar membership agreements have been triggered. The applicants contend they have, while the respondents submit otherwise. The applicants' contention is based on the fact that Pick n Pay has publicly announced an intention to operate its new franchise from the premises where Kilner Park Spar and TOPS are currently conducting business, effectively converting those stores from Spar stores to Pick n Pay ones. That occurred under the circumstances stated below.

[13] Mr Theodoridis' relationship with the applicants soured in March 2017 following a disagreement regarding his store's application of the Spar Group's rewards programme. According to Spar Guild, it was impermissible for Kilner Park Spar to apply the programme to bulk sales, as it was intended only for retail sales. The Spar Guild attributed fraudulent conduct on the part of Mr Theodoridis, which he denied.

[14] On 26 July 2017 Mr Theodoridis wrote a letter to the Spar Guild giving notice terminating Kilner Park Spar's membership of the Spar Guild with effect from 1 September 2017. Although the letter is dated 26 July 2017, it is common cause on the papers that it was only received by the Spar Guild on 7 August 2017. On 3 August 2017, Pick n Pay issued a notice announcing the opening of its new franchise store at the premises of the Kilner Park Spar on Friday, 1 September

2017. In the notice Mr Theodoridis was identified as the franchisee of the new Pick n Pay store. Upon receipt of the notice, the Spar Guild objected to the intended conversion of the Kilner Spar from a Spar franchise to a Pick n Pay one. On 10 August 2017, the Spar Guild gave its own notice of termination of the Spar membership agreements in respect of both Spar Kilner Park and TOPS, such termination to take effect on 8 September 2017.

[15] On 31 August 2017, Pick n Pay circulated an amended notice (to the one referred to at the beginning of the preceding paragraph) in which the date for the opening its new store, as well the franchisee, were changed. The new date was

11 September 2017, and the franchisee was Mr Black, and no longer Mr Theodoridis.

[16] On 4 September 2017 the applicants issued this application and served it on the respondents the same day. On 5 September 2017 Pick n Pay issued a notice in which it is stated that the notice of 31 August 2017 regarding the opening of its franchise store in Kilner Park was 'sent out in error' and implored the recipients to ignore the content of the notice and not open an account with it.

[17] Explaining these notices by Pick n Pay, the respondents say that indeed Mr Black approached Mr Theodoridis and proposed that they explore the possibility of the respondents selling their businesses to entities in which he (Mr Black) had an interest. However, they had not reached any agreement to sell the businesses to Mr Black or his

entities before 8 September 2017. Accordingly, they undertook to honour the applicants' pre-emptive rights should an agreement to sell the businesses be concluded before the termination of their membership on 8 September 2017.

[18] The applicants contend that the respondents' conduct, described above, evidences a clear intention to sell their businesses, which intention has become known to them during the currency of the respondents' membership of the Spar Guild. Accordingly, the

applicants argue, their pre-emptive rights in terms of clause 9.2 of the Spar membership agreement are triggered with the result that the respondents are obliged to give to them a right of first refusal in the proposed sales. On the other hand, as stated earlier, the respondents' construction of the clause 9 is that the applicants' pre-emptive rights are only triggered upon conclusion of a sale of the businesses by no later than 8 September 2017, which they say, has not occurred. In turn, the applicants argue that the respondents' denial is false and should be rejected, in the face of what they contend, is 'overwhelming circumstantial evidence' to the contrary.

[19] The dispute between the parties is twofold - one of law and the other, of fact. The former concerns the interpretation of clause 9 of the Spar membership agreement, and in particular, whether the pre-emptive rights are triggered by a mere indication of an intention to sell the business or only on the conclusion of a sale agreement in that regard. The latter concerns whether, in fact, a sale agreement has been concluded in respect of the businesses of the respondents. The determination of one might render the enquiry into the other, unnecessary.

[20] The dispute can simply not be resolved on the papers. Regarding the interpretation of the agreements, I have not, in the constrained

nature of a busy urgent court, had the benefit of 'detailed argument and mature consideration'[1] to dispose the issue at this stage. With regard to the factual part of the dispute, I am similarly, not able in motion proceedings, to make a positive factual finding regarding the dispute.

[21] Having come to this conclusion, I must determine the fate of the application, in the exercise of this court's discretion. In this regard, rule 6(5)(g) of the Uniform Rules of Court is of relevance. It provides:

'Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specific issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.'

[22] From the text of the rule, it is plain that the court enjoys a discretion, which must of course, be exercised judiciously. Rule 6(5)(g) should be considered also in light of s 173 of the Constitution of the Republic of South Africa, 1996, in terms of which this court, among others, has an inherent right to regulate its own procedures. Having considered the nature of the court's discretion conferred by the rule, I am of the view that the dismissal of the matter is not an appropriate option, given that it cannot be seriously argued that the dispute of fact was reasonably foreseeable. Besides, that dispute arose in the course of an urgent application.

[23] I therefore take a view that an appropriate order would be one referring the matter to trial, to enable the parties to ventilate

fully, the dispute between them, without being constrained to a particular issue or issues. Therefore, in all circumstances, the matter should be referred to trial, with the customary order as to the status of the papers filed to date and the further conduct of the matter.

[24] I turn now to consider the interim period pending the determination of the matter at trial. The applicants have, in the event of the matter being referred to trial, sought an interim an interdict. Here the applicants have to establish:

- (a) a prima facie right;
- (b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;
- (c) the balance of convenience favours the granting of the interim relief;
- (d) the absence of any other satisfactory remedy.

[25] In order to establish their prima facie right, the applicants must establish that their right is not open to serious doubt. They need not show that right on a balance of probabilities. The facts alleged by them, together only with those alleged by the respondents that they cannot dispute, must be considered, to determine whether they should obtain relief in due course. See *Spur Steak Ranches Ltd v Saddles Steak Ranch* 1996 (3) SA 706 (C). I am satisfied that the applicants have established a strong prima facie case with regard to the existence of their pre-emptive rights.

[26] The applicants have also established the threatened infringement of those rights by the conduct of the respondents, and a well-grounded

apprehension of irreparable harm if an interim relief is not granted. If an interim relief is not granted, and the respondents proceed with the sale of their businesses, but it is determined later that the applicants' pre-emptive rights had indeed been triggered, the damage would be irreparable. As to the balance of convenience, I must consider the applicants' prospects of success. This clearly favours the applicants in the circumstances, in view of the existence of their strong prima facie rights. There is clearly no other satisfactory remedy.

- [27] In the result the applicants have met all the requisites for an interim interdict.
- [28] To sum up, the parties have come to an agreement regarding the relief sought in parts ' A' and ' B' of the notice of motion. That is reflected in paragraphs 1 and 2 of the order. With regard to the relief sought in part ' C', a case has been made out for the referral of the matter to trial. The applicants have satisfied the requisites for the granting of an interim interdict. That is reflected in paragraphs 3 - 9 of the order.
- [29] For all of the above reasons, I made the order referred to in para 1.
- [30] Before I conclude, I make the following remarks. Regarding the process towards the trial, I have consciously and deliberately made provision for truncated time frames for the exchange of pleadings, given the urgency and importance of the matter to all the parties. In this regard I would suggest that the parties' legal representatives should approach the Deputy Judge President with a request for allocation of a judge to case-manage the matter, and for an allocation of a trial date on a preferential basis.

TM Makgoka

Judge of the High Court

APPEARANCES:

For the Applicant:

FP Strydom

Instructed by:

Moss Marsh & Georgiev, Johannesburg

Weavind & Weavind Inc., Pretoria

For the First, Second

and Third Respondents: HJ Smith SC

Edward Nathan Sonneberg, Johannesburg

MacRobert Attorneys, Pretoria

No appearance for the Fourth and Fifth Respondents

[1] Ward v Cape Peninsula 1998

(2) SA 487 (C) at 498C, 4980-H.

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