

SOUTH AFRICA / JUDGMENT

Superfecta Trading (209) Pty Ltd v Special Investigating Unit and Another (GP06/2022) [2023] ZAST 10 (13 July 2023)

[2023] ZAST 10

COURT
Special Tribunal

BEFORE
L.T. Modiba

CASE / FILE NUMBER
GP06/2022

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IN THE SPECIAL
TRIBUNAL ESTABLISHED IN TERMS OF SECTION 2 (1) OF THE SPECIAL
INVESTIGATIONS UNIT AND
SPECIAL TRIBUNALS ACT
74 OF 1996
(REPUBLIC OF SOUTH
AFRICA)
CASE NO: GP06/2022
In

the application between: SUPERFECTA
TRADING (209) PTY LTD
Applicant
And
SPECIAL
INVESTIGATING UNIT
First
Respondent
TRANSNET
SOC LTD
Second
Respondent
In

re:

SPECIAL
INVESTIGATING UNIT
First
Applicant
TRANSNET
SOC LTD
Second
Applicant
And
SUPERFECTA
TRADING 209 (PTY) LTD
First
Respondent
BBDM
BROS ADVERTISING AGENCY (PTY) LTD
Second
Respondent
ZAKHELE
EZEKIEL 'THABO' LEBELO
Third
Respondent
ZAKHELE
EZEKIEL LEBELO N.O.
In
his representative capacity as a Trustee of
the
Thabo Lebelo Family Trust
Fourth
Respondent
ALETTA
MOKGORO MABITSI N.O.
In
her representative capacity as a
Trustee
of the Thabo Lebelo Family Trust
Fifth
Respondent
PHATHUTSHEDZO
BRIGHTON MASHAMBA
Sixth
Respondent
MATLHODI
PHILLICIA MASHAMBA
Seventh
Respondent
INDUSTRIAL
DEVELOPMENT CORPORATION
OF
SOUTH AFRICA LIMITED
Eighth
Respondent

TRANSNET
RETIREMENT FUND
Ninth
Respondent
AVIWE
NDYAMARA N.O.
Tenth
Respondent
OFFICE
OF THE DEEDS REGISTRY, PRETORIA
Eleventh
Respondent
STANDARD
BANK OF SOUTH AFRICA LIMITED
Twelfth
Respondent

Summary:

Civil procedure –
separation of the claim against Superfecta from
the claim against BBDM – compel better discovery of the record
and render
the rules of discovery applicable in the main application
– condonation for the late filing of Superfecta's
answering
affidavit in the main application – leave to file
further affidavit – proper case not made up for all the relief
sought
– application dismissed with costs.

JUDGMENT**MODIBA J:**

- [1] In this interlocutory application, Superfecta Trading 209 (Pty) Ltd (Superfecta) requires four types of relief. Firstly, it requires the relief sought against it in the main application separated from that sought against BBDM Bros Advertising Agency (Pty) Ltd (BBDM). I conveniently refer to this relief as the separation relief. Secondly, it requires a set of relief in respect of the discovery of documents in the main application. I collectively refer to these as the discovery relief. Thirdly, it requires condonation for the late filing of its answering affidavit in the main application. I conveniently refer to this relief as the condonation relief. Lastly, it requires leave to file a supplementary founding affidavit. I conveniently refer to this relief as leave to file a supplementary founding affidavit. The Special Investigating Unit (SIU) and Transnet SOC Limited (Transnet) oppose all the relief sought by Superfecta.
- [2] Superfecta is the applicant in this interlocutory application. It is the first respondent in the main application. In this application, Superfecta did not cite the rest of the parties in the main application. BBDM is the second respondent in the main application. The SIU and Transnet are the first and second respondents respectively in this application. They are the

first and second applicants respectively in the main application. For convenience, I refer to Superfecta and BBDM individually by their names. I also refer to the SIU and Transnet individually by their names. Where I need to reference the SIU and Transnet jointly, I use 'the applicants', being their nomenclature in the main application.

[3] I deal with each relief under the relevant headings.

SEPARATION APPLICATION

- [4] Superfecta seeks the relief sought against it separated from that sought against BBDM because the relief sought against these two entities is 'discrete and distinct'. Consequently, it will be inconveniently, inappropriately and prejudicially belaboured with the costs of having to answer allegations against BBDM.
- [5] Superfecta also contends that there is no cognisable or justifiable legal basis or procedural justification for the applicants' approach of pursuing discrete and distinct claims against it and BBDM in one application. This forced marriage and conflation of discrete and distinct causes of action is inappropriate, inconvenient and prejudicial to Superfecta and the interests, pursuit and administration of justice. Belatedly, in its replying affidavit, Superfecta complains that the applicants have clustered the respondents in order to rely on similar fact evidence.
- [6] The applicants deny these contentions. They contend that in the main application, the applicants seek relief against Mr Lebelo and Mr Mashamba, the fourth and sixth respondents in the main application, as alleged joint wrongdoers and Superfecta and BBDM as their alleged co-conspirators. Superfecta need only answer the allegations against it. The separation is neither required nor in the interests of justice.
- [7] In the main application, the applicants allege that while employed by Transnet, Mr Lebelo and Mr Mashamba recommended or approved the appointment of Superfecta and BBDM as service providers to Transnet Property for lucrative contracts. In return, Mr Lebelo and Mr Mashamba (through his wife's Ms Mashamba's company) derived bribes, kickbacks, gratification or gratuity from Superfecta and BBDM in the form of properties and payments. The properties and payments constitute and/ or were acquired with secret profits that Mr Lebelo and Mr Mashamba earned from Transnet suppliers, for the benefit of themselves and/or their relatives, in conflict with their duties and relationships of trust as employees of Transnet. The properties constitute the proceeds of unlawful activities, as contemplated in rule 24(2) of the Tribunal Rules (read with the definition of 'unlawful activities' in rule 3 of the Tribunal Regulations). It seeks the profits disgorged and the properties forfeited to Transnet.
- [8] In respect of Superfecta, the applicants seek the following relief:

8.1 To have the decision of the Transnet Property Acquisition Council (TPAC) and Transnet (made provisionally on 27 November 2015 and finally on 18 January 2016) to award the tender for the installation of two generators for the Carlton Precinct under tender number TPCCT/JHB/730 (the Generators Tender) to Superfecta, and the resulting contract (including any and all addenda thereto) (the Generators Contracts) declared inconsistent with the Constitution of the Republic of South Africa (the Constitution), unlawful and invalid ab initio and to be reviewed and set aside;

8.2 Superfecta to be ordered to refund to Transnet SOC Limited (Transnet) the amount of R8 540 641.00 with interest;

8.3 Superfecta to be ordered to repay Transnet the net profit earned under the Generators Contract with interest;

8.4 To have the decision of the Group Executive: Transnet Property and Transnet (made on 22 October 2017) to appoint Superfecta as the maintenance contractor for electrical and mechanical services at Transnet's Carlton Centre precinct (the Maintenance Appointment) and any resulting contract (including any and all addenda thereto) declared inconsistent with the Constitution, unlawful and invalid ab initio and reviewed and set aside; and

8.5 For Superfecta to be ordered to repay Transnet the net profit earned by it as a result of the Maintenance Appointment and any resulting contract with interest.

[9] In respect of BBDM, the applicants seek the following relief:

9.1 To have the decision of the Group Chief Executive Officer and Transnet (made on 2 February 2015) to approve the lease and the written lease concluded by the Group Executive: Transnet Property (including any and all addenda thereto) (the Carlton Skylink Building Lease) declared inconsistent with the Constitution, unlawful and invalid ab initio, and reviewed and set aside;

9.2 To have the decision of the Group Executive: Transnet Property and Transnet made on 12 June 2015 to amend the terms of the Carlton Skylink Building Lease and the amended lease (the amended lease) declared inconsistent with the Constitution, unlawful and void ab initio and reviewed and set aside; and

9.3 For BBDM to be ordered to pay Transnet the net profit earned from the tenant installation allowance payments made to it by Transnet under the Carlton Skylink Building Lease and the amended lease with interest.

[10] The trite test applicable to determine whether an order for separation should be granted is convenience, not only to the parties but also to the Tribunal.

- [11] The applicants' case against Superfecta and BBDM is clearly separate and distinct. Against Superfecta, the main application pertains to the Generators and Maintenance Contracts. Against BBDM, it pertains to the Carlton Skyrink Building Lease. It is indeed so that Superfecta and BBDM are not party to the contracts that ground the relief sought against the other and that the relief sought against each is irrelevant to the other. But that is of no moment.
- [12] Superfecta has not pleaded misjoinder. It clearly cannot because it would not pass the test for it. It has not provided authority for its proposition that the forced marriage and conflation of discrete and distinct causes of action by the applicant is inappropriate, inconvenient and prejudicial to Superfecta and the interests, pursuit and administration of justice. As contended by the applicants, the primary basis for the main application are allegations of impropriety, abuse of power, bribery and corruption involving the same wrong-doers at Transnet namely Mr Mashamba and Mr Lebelo. The applicants as parties who are dominus litis have elected to seek relief against these alleged joint wrongdoers and Superfecta and BBDM as their alleged co-conspirators in the same application. Superfecta may dislike being clustered with BBDM in one application, but has not set out a legally recognised basis to gainsay the applicant's' contention that this approach promotes expeditious and cost saving disposal of the litigation against all the parties.
- [13] Superfecta has also not established the practicality of the relief it seeks. Even if the separation is granted, Superfecta would still need to distil the allegations against it from the founding affidavit and answer to them. It is not seeking a withdrawal of the application against it and an institution of a fresh application where only the relief sought against it is sought. Therefore, the separation would be of no practical effect in addressing Superfecta's complaint.
- [14] Superfecta stands to suffer no prejudice if its request for separation is not granted. It need only answer to the allegations that pertain to it. Its complaint that it will incur considerable costs is undermined by this interlocutory application. It was tardy to bring it. Its conduct of it was also tardy. As a result, the application also took considerable time to be ripe for hearing, thus offsetting the dates set for the hearing of the main application. The parties have incurred additional costs as a result of the interlocutory application. If it incurs additional costs as a result of the clustering of parties, it may always seek a compensatory cost order.
- [15] It is rather the applicants, Mr Lebelo and Mr Mashamba who will suffer immense prejudice if the separation relief is granted. They would have to engage in duplicate, parallel proceedings with all the attendant additional costs and delays. Mr Lebelo and Mr Mashamba, would have to participate in two separate proceedings, both of which concern them and call for an account of their conduct while employed at Transnet. The separation thus undermines the expeditious and cost-effective resolution of the main application and is manifestly inappropriate.

- [16] Belatedly raised in reply, Superfecta's similar fact evidence complaint does not appropriately ground its quest for the separation relief. It does not sustain Superfecta's apprehension about prejudice as it has an opportunity to raise the inadmissibility of similar fact evidence as a ground of defence in the main application.
- [17] Under these circumstances, it is actually convenient to all the parties and Tribunal that the main application proceeds on the basis of the application as currently set out. Separating the application against Superfecta would allow this litigation to proceed on a piece-meal fashion, thus ignoring the Supreme Court of Appeal's warning against the fragmentation of application proceedings.[1] Therefore, the separation relief stands to be refused.

DISCOVERY

- [18] The discovery relief that Superfecta seeks is two-pronged. Firstly, it seeks discovery of the record of the impugned decisions in terms of Tribunal Rule 17(4) read with Uniform Rule 35(13), (1) and (2). It also seeks an order in terms of which Uniform Rules 35(1), (2), (3) and 35(14) are made applicable to the main application.

- [19] I consider this relief separately.

Discovery of the record

- [20] Superfecta accuses the applicants of failing to discover the full record of the impugned decisions to which it is entitled as these are self-review proceedings. It has further accused the applicants of disclosing only parts of the record that support their case. Superfecta has categorised the documents it contends the applicants have not disclosed as part of the record in four parts:

20.1 documents listed in paragraph 48 of the founding affidavit. These include the complete forensic report prepared by Motsoeneng Bill Attorneys (the MBA report), a report prepared by Ligwa Advisory Services (the Ligwa report) and all reports submitted by Bosch Projects (Pty) Ltd (Bosch reports);

20.2 documents listed in paragraph 49 of the founding affidavit. These documents have no bearing on the case against Superfecta but, it contends that they are in Transnet's possession as apparent from the answering affidavits filed in the main application by Mr Lebelo and Mr Mashamba and persons and Trusts associated with them;

20.3 documents listed in paragraph 50 of the founding affidavit. These documents relate to Mr Lebelo and Mr Mashamba's level of authority within Transnet, Mr Mashamba's promotion letter and documents evidencing the alleged bribery and corruption by Superfecta;

20.4 documents referred to in paragraph 51 of the founding affidavit. Superfecta has not particularised these documents. It has described these documents as follows:

“It is overwhelmingly probable that there is a panoply of other relevant and material documents pertaining to the impugned decision and relevant to issues in dispute in the application insofar as they pertain to Superfecta, which have not been disclosed and to which Superfecta is entitled.”

- [21] The applicants contend that most of the documents that Superfecta complains of are part of the record but have not been disclosed as they are part of the MBA and Ligwa reports. It specifically mentioned in its founding affidavit that it did not annex them to avoid proximity but tendered to make them available to any party that requires them. Superfecta failed to take up this offer in the two and half months it had available to prepare its answering affidavit. When it subsequently addressed a letter to the attorney for the applicants in this regard, when invited, it did not identify the documents it contends are missing from the record.
- [22] Superfecta and the Tribunal are legally entitled to the record of the impugned decision. The applicants accept their responsibility to avail the record to Superfecta and to the Tribunal. In their answering affidavit, they offered to upload the relevant documents to the extent they exist and are in Transnet's possession on to Caselines. It appears that they have since fulfilled this undertaking. On 12 April 2023, documents were filed on Caselines under 076: Record of Proceedings Review Application
- referenced by the paragraphs in Superfecta's founding affidavit filed in this interlocutory application.
- [23] The applicants have not included the documents listed in paragraph 25 of their answering affidavit because they are not part of the record of the impugned decisions. Superfecta has not disputed this allegation. I therefore find, as contended by the applicants, that Superfecta is not entitled to these documents, as they do not form part of the record.
- [24] In reply, Superfecta does not dispute that the applicants' allegation that it failed to take up their tender to make available to it the MBA and Ligwa reports. It puts up no explanation regarding why it did not call for these documents when it determined that it requires them to prepare its answering affidavit. It puts up no substantive basis to find that the applicants did not act in good faith when they prepared the record.
- [25] I adjudicate this application oblivious to whether Superfecta remains unsatisfied with the additional documents filed on 12 April 2023. Its contention that it is unable to identify missing documents because it does not know what documents form part of the record takes matters no further. It is clearly not in a position to dispute that the applicants have filed the complete record of the impugned decisions.
- [26] This application would not have been necessary had Superfecta timeously took up the applicants' offer to avail to it the MBA and Ligwa reports and when the applicants invited it to do so, identified additional documents it contends form part of the record. It could have simply particularised these documents in a written request to the applicants' attorney as it did in its founding affidavit.

[27] In the circumstances, the relief for the discovery of the record has become moot as the applicants have since filed the documents that form part of the MBA and Ligwa reports which they had initially not filed. Since the applicants had tendered these documents and thus did not only file them documents as a result of this application, Superfecta is not entitled to the resultant costs of the application.

THE APPLICABILITY OF DISCOVERY RULES

[28] Ordinary rules that pertain to discovery are not applicable in motion proceedings. They are only made available in exceptional circumstances.[2] Superfecta has established none. It has therefore not made up a proper case for the relevant relief.

CONDONATION

[29] Superfecta seeks condonation for the late filing of its answering affidavit. It was due on 31 January 2023 as determined at the 15 November 2022 case management meeting.

The applicants contend that it has failed to take up its offer to make available to it additional documents, was dilatory in bringing this application and the application lacks merit. Therefore, the condonation application must be dismissed.

[30] While the applicants' contentions are correct, it is not in the interests of justice to shut the door to Superfecta and not afford it more time to file its answering affidavit. Superfecta has clearly been dilatory in bringing this application. It has displayed disregard for Tribunal's directives. It has been dilatory in its conduct of the interlocutory application. However, its conduct does not demonstrate a lack of intention to oppose the main application.

[31] Therefore, it is in the interest of justice to afford Superfecta time to file its answering affidavit.

LEAVE TO FILE A SUPPLEMENTARY FOUNDING AFFIDAVIT

[32] After this application became ripe for hearing, Superfecta sought leave to file a supplementary founding affidavit to place before the Tribunal evidence it contends belatedly came to its attention and supports its case in respect of both the separation and discovery relief. The applicants oppose Superfecta's request.

[33] This evidence came to Superfecta's Director Mr Mphephu's attention when the SIU filed its intervention application in the matter of Transnet and Lanele Group (Pty) Ltd presently pending in the High Court under case number 16122/2020 ("the Lanele matter"). He contends that the SIU has knowingly put up a contradictory version in its analysis of the source of the alleged R2 million bribe Mr Khoncha paid towards the purchase of Mashamba's Diepsloot property.

[34] I disagree that this evidence bolsters Superfecta's case in this application. The purported contradictions do not lie in the alleged facts. It lies in the SIU's analysis to which the High Court and the Tribunal is not bound. Superfecta is well entitled, as it indicates it intends

doing, to raise in its answering affidavit points in limine that are grounded on this newly discovered evidence. However, it is trite that Superfecta cannot simply only raise points in limina in its answering affidavit. It must plead over unless of course it elects to stand or fall by its points in limina. Therefore, it is presumptuous of Superfecta to move from the premise that its points in limina will be determined first. Our appellate courts have constantly not only discouraged piece-meal litigation, but have also impelled courts of first instance to determine all issues before them and not only those considered to be dispositive of a course of action. Such an approach enables the court of appeal not to inadvertently consider the remaining issues in the first instance but to derive benefit from the determination of the issues by the court of first instance.[3]

[36] Therefore, the alleged contradiction in the SIU's versions in the main application and in the Lanele matter bears no relevance in the present application. It is an issue for the main application.

[37] Superfecta is simply using the discovery of the new evidence to bolster its case for a widespread discovery. As already stated, the discovery of the new evidence does not constitute exceptional circumstances that warrant rendering the rules of discovery applicable in this application. Mr Mphephu ought to have access to the bank statements that pertain to the flow of funds.

[38] Therefore, Superfecta's application for leave to file a supplementary affidavit also stands to be dismissed.

MODE OF ADJUDICATION

[39] I initially determined and directed that I would dispose of this application on the papers filed because it is interlocutory in nature. Both the factual and legal issues it raises are not complex. Superfecta belatedly sought an oral hearing, contending that the matter has become complex as a result of the discovery of new evidence in the Lanele matter. I offered to accommodate its request on condition that a mutually convenient date for the hearing before the end of the second term is identified. Regrettably for Superfecta, this condition was not met. It stands to suffer no prejudice from the disposal of the application on the papers. As appears from this judgment, the purported discovery of new evidence in the Lanele matter did not in any manner render this application factually or legally complex.

[40] In the premises, the following order is made.

ORDER

1. The application is dismissed with costs.
2. Superfecta shall file its answering affidavit by 2 August 2023.
3. The applicants shall file their replying affidavit by 18 August 2023.

4. By 25 August 2023, the applicants shall deliver a set of hard copies of the indexed and paginated papers - with the exclusion of the full MBA and Ligwa reports - to the Tribunal offices. By the same date, the parties shall email all their affidavits to the Tribunal Registrar in word format.
5. The applicants shall file their heads of argument by 8 September 2023 by uploading them on Caselines and sending the word format to the Tribunal Registrar by email.
6. The respondents shall file their heads of argument by 22 September 2023 by uploading them on Caselines and sending the word format to the Tribunal Registrar by email.
7. The Registrar shall arrange a date of hearing for the main application in the fourth term 2023.

JUDGE L.T. MODIBA

PRESIDENT OF THE SPECIAL TRIBUNAL

Appearances For Superfecta Trading 209 (Pty) Ltd Counsel: Adv. M.R. Hellens SC, assisted by Adv. G. Amm and Adv. L. Acker Attorney: Ms S. Roberts, Small-Smith & Associates Inc. Attorneys For The Special Investigating Unit and Transnet SOC LTD Counsel: Adv. K. Hofmeyr SC, assisted by Adv. J. Bleazard Attorney: Ms S. Machado, Bowman Gilfillan Attorneys

Date of hearing

Not applicable. Application determined on the papers filed as Directed by the presiding Judge.
Last day of filing of heads of arguments 5 June 2023.

Date of judgment

13 July 2023

Mode of delivery

This judgment is handed down by email transmission to the parties' legal representatives, up loading on Caselines and release to SAFLII and

AFRICANLII. The date and time for delivery is deemed to be 10 am.

- [1] Democratic Alliance and Others v Acting National Director of Public Prosecutions and Others 2012
- (3) SA 486 (SCA) ([2012] 2 All SA 345; 2012 (6) BCLR 613; [2012] ZASCA 15) para 49; Louis Pasteur Holdings (Pty) Ltd and Others v ABSA Bank Ltd and Others 2019 (3) SA 97 (SCA) para 33; Theron and Another NNO v Loubser NO and Others 2014 (3) SA 323 (SCA) para 26
- [2] Moulded Components and Rotomoulding South Africa (Pty) Ltd v Coucourakis 1979 (2) SA 457 (W) 470D-E. See also SIU and Another v LNG Scientific (Pty) Ltd In re: LNG Scientific (Pty) Ltd v SIU and Another (GP03/2022) [2022] ZAST 15 (29 June 2022) para 27.2.

[3] See authorities referenced in fn1.

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