

SOUTH AFRICA / JUDGMENT

Transpaco Flexibles (Pty) Limited and Others v National Regulator For Compulsory Specifications and Others (84000/14) [2014] ZAGPPHC 988 (17 December 2014)

[2014] ZAGPPHC 988

COURT

North Gauteng High Court, Pretoria

BEFORE

Ismail

CASE / FILE NUMBER

84000/14

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REPUBLIC
OF SOUTH AFRICA
GAUTENG
DIVISION, PRETORIA
CASE NO: 84000/14
DATE: 17 DECEMBER
2014

In the matter

between:

TRANSPACO
FLEXIBLES (PTY)
LIMITED.....First
Applicant
PREMIER
PLASTICS (PTY)
LIMITED.....Second
Applicant
PAK
PLASTICS
CC.....Third
Applicant
ITB
MANUFACTURING (PTY)
LIMITED.....Fourth
Applicant
LEADER
PACKAGING

CC.....Fifth
Applicant
and
THE NATIONAL
REGULATOR FOR
COMPULSORY
SPECIFICATIONS.....First
Respondent
MOODLEY,
ASOGAN.....Second
Respondent
MADZIVE,
THOMAS.....Third
Respondent
THE
MINISTER OF TRADE AND
INDUSTRIES.....Fourth
Respondent

JUDGMENT

Ismail J:

- [1] This matter was brought by way of urgency and was set down for the 3 December 2014. It was ultimately heard on the 11 December 2014 and an undertaking was given by the respondents that the plastic bags referred to hereunder would not be destroyed pending this court's ruling.
- [2] In this application the applicants seek an interdict prohibiting the respondents from destroying , confiscating or removing any plastic bags which do not comply with all the specifications prescribed by the Compulsory Specifications for Plastic Carrier bags and flat bags- VC8087 as published in the Government Gazette of 8 September 2013 from the premises of the applicants or their customers pending the decisions of the applicants sales permits.
- [3] No order was sought against the fourth respondent, the Minister, who did not oppose this application.

Background to the dispute.

- [4] The applicants are all members of the Plastic Converters Association of South Africa [“the PCASA”]
- [5] The PCASA met with the first respondent, NRCS, during October-November 2013 and expressed the view that the administrative process were not in place and that manufacturers would not be able to comply with VC 8087 on the effective date.

- [6] The applicants are local manufacturers of plastic bags/carriers. It is common cause that the bags which they manufacture for wholesalers and retail outlets [their customer] comply with the technical and qualitative standards or characteristics of plastic bags or carriers.
- [7] Clause 4 of the Compulsory Specifications [V8087] require unique approval numbers to be allocated to manufacturers, such as the applicants. These numbers must be printed onto the bags. The reason being that the first respondent [The Regulator] would then by simply examining the bag through the unique number be able to ascertain who manufactured a specific bag.
- [8] The disputed bags, which the applicants seek an order in respect of complied in all respects with the technical specifications apart from the fact that they do not display the approved numbers or letters of authority [LOA] numbers as required by the September 2013 regulation.
- [9] The disputed bags according to the applicants were manufactured during an interim period, prior the allocation of the LOA's. The regulator gave the manufacturers a period of six months from publication of the notice to comply with the new regulation. The effective date thereby, being March 2014. By March 2014 all bags had to comply with the regulation, in that they had to have the unique numbers printed on them, as prescribed by the regulation.
- [10] The applicants submitted that they manufactured some 265 million bags for their respective customers which do not have the printed LOA numbers on them. The value of the bags, which the respondents seek to confiscate, and/or destroy amounts to R71,6 million.

They also contend that they paid a levy of 6 cents per bag to the South African Revenue Services (SARS). The levy paid equates to approximately R15, 925 722.42 which the authorities benefitted and they now seek to destroy the bags.

- [11] The applicants submitted that they tried to engage the Regulator to grant them an extension of time whereby they could comply with the legislation, however, the attitude of the third respondent was simply that no further extensions would be allowed.
- [12] To this end a meeting was held between the respondents and the applicants on the 10 September 2014.
- [13] The applicants are of the view that an agreement was reached at this meeting referred to in para [12], supra, however the third respondent in his affidavit submitted that there was no agreement reached between the parties.
- [14] As a consequence of discussions between the NRCS and the bag industry representatives an extension of time was sought to comply with the September Regulation. Those manufacturers who were in possession of LOA's in terms of the regulations would not be required to have approval numbers printed on bags or carriers for a period of six months after the effective date. According to the respondents up to the 6 September 2014. The applicants on the other hand are of the opinion that it commences from 6 September 2014

and it would thereby terminate on 6 March 2015.

[15] A letter dated 17 April 2014 was addressed to the industry whereby the first respondent granted a general sales permit in terms of section 14 (4) of the Act to all importers, sellers and suppliers of plastic carrier bags. This general sales permit was granted in respect of the disputed bags manufactured prior to 22 October 2014.

[16] This general sales permit was granted in order to accommodate plastic bags which did not have the approval numbers on them. The respondent at page 194 of the paginated papers at [para] 56 stated

“It bears mentioning that the 6 months extension was provided solely for the purpose of facilitating the sale of plastic carriers and flat bag which did not have an approval or LOA number on it. It did not confer on manufacturers of plastic carrier bags and flat bags the right to manufacture non-compliant plastic bags - where a manufacturer continue to manufacture non-compliant plastic bags it did so at its own peril”

[17] The 6 September regulations would only take effect six months pursuant to that date namely 6 March 2014.

[18] After 22nd October 2014 all those bags which did not contain the LOA numbers were to be confiscated. Bags from customers of the applicants were confiscated and seized, and form the subject matter of this dispute.

Legal

submissions.

[19] Mr Pretorius SC, acting on behalf of the applicants, submitted that the view of the third respondent was not tenable in that he was not present at that meeting. That his statements deposed to are firstly hearsay in nature, secondly that it was a bare denial of the agreement reached at the meeting. Thirdly that Miss Lotter’s e-mail, contained at page 34 of the paginated papers, suggested that an agreement was reached. In that e- mail miss Lotter stated:

"Thank you for a productive meeting this afternoon..."

An attendance register is attached to the e-mail and noticeably absent on the register, of that meeting is the third respondent.

[20] Mr Pretorius submitted that this dispute was a matter which fell squarely within the ambit of administrative law, since a government functionary took a decision that the unique approved numbers had to appear on the bags by a certain date and no later, failing which they would be confiscated and destroyed.

[21] Mr Fine SC, acting for the respondents, on the other hand submitted that the issue is to be determined within a context of the Minister and his department legislating and regulating the industry. He submitted that the courts should be cautious to interfere with legislation and/or interfere therewith unless it was unconstitutional or irrational. He submitted that the matter ought to be seen from the perspective of the notion of Legality, and that the law should be applied as it was not unconstitutional.

In this regard he submitted that the legislation was intended to monitor the bag and carrier industry and to obviate the proliferation of non-compliant bags.

[22] Mr Fine, also submitted that in view of the matter not being an administrative law issue and the legislation being in compliance with the law, at best the applicants were seeking a declaratory order from the court and that an interdict should not succeed.

[23] Mr Fine submitted that the Regulator gave the importers and manufacturers of bags more than 12 months to comply with the regulation. Where they manufactured bags after 22 October 2014 they did so at their own peril.

[24] Section 24 of the Act imposes criminal penalties upon those who do not comply with the compulsory specifications. The section imposes penalties on those who contravene section 14 (1), (2) and (3) of the Act. Anyone convicted of an offence would be liable to a fine or imprisonment not exceeding 1 year.

[25] The respondents contend that the failure to comply with the Specifications and in the absence of an exemption in terms of section

14(4) of the Act, those applicants whose conduct falls contrary to compliance and the exemption acted illegally, a quo the court cannot grant interdictory relief to a party whose conduct is illegal.

They rely upon the following authorities for this proposition, namely:

United Technical Equipment Co (Pty) Ltd v Johannesburg City Council 1987(4) SA 343 9W) and Lester v Ndlambe Municipality [2014] 1 All SA 402 (SCA) at para [22].

The court should uphold the law and enforce the principle of legality, by putting an end to the applicants' illegal conduct, and thereby permit the respondents to destroy the disputed bags.

[26] It is trite that the courts are not to legislate, however the courts are permitted to interpret legislation and/or a document as stated in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012

(4) SA 593 (SCA) at para [18] Wallis JA stated:

"[18].....Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context is to make a contract for the parties other than one they in fact made. This 'inevitable

point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.”

[27] The purpose of the legislation is common cause between the parties namely to regulate plastic carrier and bag industry. It was clear that there were problems which were anticipated regarding the production of bags with the specified numbers on them during the intermediary period.

To this end the parties negotiated and held meetings between the role players.

[28] The applicants suggested that the meeting of the 10 September 2014 was crucial and that an agreement was reached to grant them some leeway to utilize the disputed bags. This is denied by the third respondent. The third respondent was not present at the meeting. I do not propose to repeat that which is stated in para [19] above. In this regard Miss Lotter’s e-mail stated that was a productive meeting. She is from the department of trade and industry and her e-mail appears to support the view expressed by the applicants namely that there was an agreement reached.

[29] The parties are at variance with each other regarding the 6 months period raised on 6 September. The applicants seem to suggest that the 6 months period would not run from March but rather from September thereby taking them into March 2015.

[30] As far as I am concerned there is no interpretational problem which this court has to determine. It appears that the parties through negotiations endeavoured to resolve the issue of the disputed bags by having the time period extended. The dispute revolves around that issue, namely the extension period. Whether the date is 22 October 2014 as suggested by the third respondent, Mr Madzive, or whether the September meeting gave an additional extension.

[31] In the light that the court was told that the disputed bags are technically manufactured in exactly the same quality and specifications apart from the specified numbers being on them - because they were manufactured during the interim period, I am of the view that to destroy them as intended would be a great financial loss to the applicants, particularly where they already paid a levy to 3ARS.

Furthermore, to impute criminal penalties to businessman or businesses who have been complying with the legislation would in my

mind leave an unpalatable taste and to say the least would not inspire ecor.ornic and commercial confidence.

Costs

[32] Both parties agreed at the hearing that the application warranted the court to award costs to include the costs of a senior counsel. The usual costs order which I intend to make is that the costs should follow the result. I see no reason why I should deviate from the norm, and

in any event the applicants tried everything to resolve the current application by approaching the regulator and others to resolve the disputed bag impasse. The third respondent was adamant that no permits would be authorized or considered after October 2014 and that is what prompted this application.

Order

[33] Accordingly I am of the view that an appropriate order would be to afford the applicants an opportunity to resolve the issue regarding the disputed bags and as such I make an order in terms of prayer 2 of part A to the following effect:

- (1) That the NRCS may not destroy, confiscate or remove any plastic bags that comply with all the specifications prescribed by the Compulsory Specifications for Plastic Carrier Bags and Flat Bags- VC 8087 as published in the Government Gazette of 6 September 2013 save that those bags (sic) do not display the NRS approval numbers as required by paragraph 4 of the specifications , manufactured prior to the applicants receiving the unique approval numbers (“disputed bags”) from the premises of the applicants or their customers pending decisions on the applicants’ application for sales permits in terms of section 14 (4) of the National regulator for Compulsory specification Act, 5 of 2008.
- (2) the First second and third respondents are ordered to pay the cost of the applicants jointly and severally, such costs to include the costs of senior counsel. The one paying the other others to be absolved.

Ismail J

15/xii/2014

APPEARANCES:

For the Applicants: Adv G C Pretorius SC, instructed by

Anton Bekker Inc, Brooklyn Pretoria.

For the First- third Respondent: Adv D.Fine SC assisted by Adv

T R Mafukidze instructed by Bowman

Gilfilian Inc

Date of hearing: 11 December 2014.

Judgment delivered on: 17 December 2014.

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