

SOUTH AFRICA / JUDGMENT

True North Holdings (Pty) Limited and Others v Sky Gecko Software Lab (Pty) Limited and Another (23149/23) [2024] ZAWCHC 148 (29 May 2024)

[2024] ZAWCHC 148

COURT

Western Cape High Court, Cape Town

BEFORE

A Katz

CASE / FILE NUMBER

23149/23

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FLYNOTES: CIVIL PROCEDURE – Referral for oral evidence – Restraint of trade – Issue of whether applicants enjoy protectable interest – Applicants elected to proceed by way of motion – Claimed

that application was urgent – Referral to oral evidence will slow matter down rather than speed up resolution of main

application – Referral to oral evidence would not conduce to effective and speedy resolution – Referral application

dismissed – Application for interim relief pending application for leave to appeal dismissal of referral application

also dismissed – Uniform Rule 6(5)(g).

IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

CASE NO: 23149/23

TRUE NORTH HOLDINGS (PTY) LIMITED First Applicant CASH CONVERTERS SOUTHERN AFRICA (PTY) LIMITED Second Applicant TRUE NORTH FRANCHISING (PTY) LIMITED Third Applicant and SKY GECKO SOFTWARE LAB (PTY) LIMITED First Respondent GLYNN-ROBERT HENDRICKS Second Respondent

Reasons for the Dismissal of the Application for Referral to Oral Evidence and Judgment in the Application for Interim Relief

KATZ AJ:

Introduction

- [1] In this matter important and unusual procedural issues have arisen. Certain aspects of the conduct of the applicants in these proceedings are not only intriguing and inexplicable, but unfortunate. And some of their conduct may constitute an abuse of process.
- [2] In simple terms, the applicants brought what they regard as an urgent or semi urgent application, and then have done what they can to delay the finalisation of the application.
- [3] Dare I say that the certain of the steps adopted by the applicants is a model of how not to litigate. To appreciate the serious difficulties, it will be necessary to detail the course of the litigation.
- [4] In saying this I accept that litigation is tough. Its results can have a long-lasting impact on the lives of the parties and often the general population. Hard choices by the parties often need to be made between numerous possible routes. And the choices may involve decisions if, and when to take certain steps. The choices often need to be made under time pressure and other constraints.[1] And each of the courses can have serious consequences for the prospects of success and the nature and parameters of any order that may be made.[2]
- [5] This application comprises urgent or semi-urgent relief seeking a restraint of trade[3] and the interdicting the respondents from disclosing confidential information[4] by three separate companies playing different roles in the Cash Converters franchise business.[5] An alternative prayer seeking interim relief pending the determination of any issues that may be referred to oral evidence or to trial was included in the notice of motion.
- [6] The business comprises the buying and selling of second-hand goods, limited new wholesale goods and the provision of short-term credit, and in particular pawn loans.
- [7] It is said that the business requires sophisticated information technology related services to comply with a suite of legislative requirements, such as the National Credit Act and taxation associated laws.
- [8] The respondents are Glynn-Robert Hendricks (an individual) and his alter ego, a company called Sky Gecko Software Lab. They entered into various contractual arrangements with Cash Converters as consultants. Their services were for the provision of the information technology related services required by Cash Converters, or at least certain of the applicants.
- [9] In mid-October 2023 it came to the attention of Cash Converters that the respondents were working with other businesses competing in the marketplace with Cash Converters.
- [10] After brief interaction, including a meeting and an exchange of correspondence between the parties the contractual relationship between the parties ended on 23 October 2023.

- [11] Thereafter further correspondence flowed between them. The essence was that the applicants claimed that the respondents were in breach of a restraint of trade and were in violation of confidentiality provisions. The respondents in effect denied the claims.

The parties and the franchise agreement

- [12] The first applicant, True North Holdings (Pty) Limited is the holding company of the “Cash Converters Group” of companies and holds one hundred percent of the issued share capital in the second and third applicants.
- [13] The second applicant, Cash Converters Southern Africa (Pty) Limited, is the operational arm of the franchise business and holds the franchise rights in respect of the franchised group of Cash Converters stores throughout Southern Africa.

At present there are a total of ninety stores – in Southern Africa (eighty-six stores) and Namibia (four stores). The second applicant stands in a direct contractual relationship with each franchisee in terms of a written franchise agreement that delineates the rights and obligations of the parties. It receives a royalty based on the percentage of retail turnover charged to the franchisees and a fixed percentage royalty on the pawn fees generated by the franchisees.

- [14] The third applicant, True North Franchising (Pty) Limited, plays an operational support role to each franchisee by licensing a bouquet of software applications including the computer programs while it charges the franchisees a monthly software license fee for use of the bouquet of software applications.
- [15] The first respondent is Sky Gecko (Pty) Limited, and the second respondent is Glynn Roberts – Hendricks, who is a director of the first respondent, and the sole shareholder of the first respondent.
- [16] Numbering about 90 stores owned by 78 separate legal entities, the heart of the franchised system is that the Cash Converters franchisees operate their business within the second-hand goods sector, pawnbroking industry, and unsecured short-terms loans industry.
- [17] The franchises employ the operational and technological platform granted to them under the auspices of the second and third applicants.
- [18] Unlike a pawnbroker or micro-lender that start a business operation de novo, franchisees are immediately allowed the benefit of the accumulation of years of intellectual capital and unique technology that they would not otherwise have been exposed to, but for the fact that they enjoy the status of franchisee under a franchise agreement. This is the unique benefit arises from the franchise relationship.
- [19] In terms of the standard franchise agreement:
- (i) the franchisor (the second applicant) granted the franchisee the right to operate the Franchised Business (defined as the business of a franchised pawnbroker and/or second-hand dealer and/or money lender to be conducted in terms of the franchise agreement) for

the terms of the agreement under the Franchise System (defined to mean the franchisor's specialised system for the operation, management and promotion of a business incorporating the use and application of the Intellectual Property (defined to include know-how, all confidential, technical and commercial information relating to the operation of the Franchise System and the Franchise Business), copyright, goodwill (defined as the goodwill arising out of the Franchise System and the Intellectual property by the franchisor and/or franchisee, trade dress, trademarks and trade secrets);

(ii) the franchisee undertook not to engage or become concerned in the promotion, organisation or similar business to the Franchise Business; and

(iii) the franchisee undertook not to be party to any act or omission whereby the goodwill or trade of the Franchise Business, the Franchisor or the Intellectual Property may be endangered, jeopardised or prejudicially affected.

The litigation

[20] On 19 December 2023 this application was launched.

[21] The notice of motion does not include a date for the hearing of the matter, despite the inclusion of the usual prayer seeking condonation for non-compliance regarding service and the time limits prescribed by the Rules, and permitting the application to be heard on a "semi-urgent basis" in terms of rule 6(12). The respondents were given 5 days for the delivery of a notice of

intention to oppose and to file answering affidavits within 15 days of filing the notice of intention to oppose. If those dates were not complied with then the matter would be placed on the third division roll - that is the unopposed roll in this Division

- for hearing on 31 January 2024.

[22] The matter somehow, despite it being opposed, came before Kusevitsky J in the urgent court on 31 January 2024.[6] By agreement the application was postponed for hearing to 17 May 2024 on the semi-urgent roll. The applicants did not apply for interim relief on 31 January 2024, and they appeared satisfied for the application to be postponed for nearly five months with no protection by way of interim interdict. A time- table was agreed to which required, inter alia, the respondents to file their answering affidavits by 23 February 2024 and the applicants, their replying affidavits by 28 March 2024 with dates for the filing of heads of argument and practice notes, viz. the applicants by 26 April 2024 and the respondents by 3 May 2024.

[23] The founding affidavit consisted of 225 paragraphs in 99 pages with approximately 450 pages of annexures.

[24] To motivate the obtaining of a date on the urgent or semi-urgent roll the applicants' deponent in the founding affidavit averred:

“217. Most businesses shut down now over the Christmas and New Year period and the applicants do not think that the respondents will do much harm to their business during this time. The resultant effect is that there is no such urgency that requires the intervention of this Court before the New Year. Having said that, the applicants cannot await a hearing in the ordinary course since the respondents would by then have effectively harmed the Cash Converters business.

218. In this regard, I am advised that if the matter is brought in the ordinary course the first hearing date on the opposed roll is likely to only be in late 2024 which will largely render the relief academic if the application is only heard then.”

[25] The answering affidavit of 40 pages (121 paragraphs) was signed on 27 February 2024, and a replying affidavit of 119 pages[7] (259 paragraphs) was signed on 26 April 2024.[8]

[26] Significantly, the lengthy replying affidavit made no mention of any bona fide disputes of fact raised in the answering affidavit.

[27] The applicants filed their heads of argument and a practice note in accordance with this Division’s Practice Directives on 26 April 2024.

[28] Once again there was no suggestion of any disputes, bona fide or otherwise by the applicants.

[29] The applicants in their practice note effectively requested the Acting Judge President to make an early allocation of a judge to hear the application because the matter would be ready for argument on 17 May 2024, there were remote prospects of the matter settling and the pleadings exceeded 500 pages (the full papers consisted of more than 900 pages including annexures)

[30] The respondents filed heads of argument and a practice note a week before the hearing scheduled for 17 May 2024.

[31] Two days before the hearing of the application I sent the parties an email, inter alia, stating.

“At the hearing of the above application on Friday 17 May 2024, it would be appreciated if counsel could address me on at least the following two aspects:

- (i) The applicability of paragraph [80 of Minister of Environmental Affairs and Tourism and Others v Phambili Fisheries (Pty) Ltd and Another (32/2003, 40/2003) [2003] ZASCA 46; [2003] 2 All SA 616 (SCA) (16 May 2003), which reads:

“Replying affidavits

[80] There is one other matter that I am compelled to mention – replying affidavits. In the great majority of cases the replying affidavit should be by far the shortest. But in practice it is very often by far the longest – and the most valueless. It was so in these reviews. The respondents, who were the applicants below, filed replying affidavits of inordinate length. Being forced to wade through their almost endless repetition when the pleading of the case is all but over brings about irritation, not persuasion. It is time that the courts declare war

on unnecessarily prolix replying affidavits and upon those who inflate them. “

I request this, bearing in mind that, as I have it, the answering affidavit consists of 40 pages, and 121 paragraphs (record, 598 - 637) and the replying affidavit consists of 119 pages, and 259 paragraphs (record 687 – 805) together with a further 100 pages of annexures.

Also, the founding affidavit consists of 99 pages, and 22 paragraphs. (record 9 – 107) with annexures running from record 108 - to effectively 575, taking into account the applicants' supplementary affidavit beginning at 576 -597)].”[9]

[32] The hearing was scheduled to commence at 10h00 on Friday 17 May 2024.

[33] At 08h36 on that morning (less than an hour and a half before the hearing was to commence) I received an email from the applicants' Cape Town correspondent attorneys attaching an application in terms of Rule 6(5)(g) read with Rule 11 (the referral application) by the applicants.

[34] The referral application was for the issue of whether the applicants enjoy a protectable interest for the purposes of the enforcement of contractual rights provable by the applicants to be referred to oral evidence at a date and at a time to be arranged with the Registrar.

[35] The referral notice included provisions concerning discovery and the filing of notices regarding the tendering of expert evidence. [10] Discovery was to be made within 21 days of the making of the referral order and the Registrar was to direct that the hearing of oral evidence be heard on the semi urgent roll, alternatively a date as directed by the Court.

[36] Notably the applicants' referral application was not coupled with an application for interim urgent relief of any kind at all. Although as I have mentioned interim relief in the alternative was contemplated in the notice of motion.

[37] So: were the referral application to succeed it is difficult to conceive of the main application being heard, let alone decided before the end of 2024, the date by when the applicants averred the relief would have become largely academic.

[38] The basis for the application was set out in a short supporting affidavit.

[39] The motivation for the referral application was the affidavits “raised bona fide disputes of fact which cannot be properly decided on affidavit.”

[40] The following averment was the high-water mark of why the referral application was filed at such an extraordinarily late stage: “During the final preparation of the hearing and on the advice of senior counsel, the applicants were advised that the nature of the disputes which are the subject of this interlocutory application are such that they cannot be decided on affidavit.”

[41] At the commencement of the hearing the applicants moved for the referral application. No written argument was provided to the Court.

[42] During the engagement several concerns were debated.

[43] The applicants could not assist the Court as to when the oral evidence they sought to adduce could and would be heard. They did not know the next available date that could be allocated for the hearing of the oral evidence. When I put it to counsel that it was unlikely to be within the next few months they could not disagree. In other words, the application could and would only be argued well into the second half of 2024 at best for them. And even this is doubtful.

[44] When I asked for an explanation for the lengthy and prolix replying affidavit, the answer seemed to be: “Well there was bald denial by the respondents in the answering affidavits, so it was necessary to explain in detail the relevant issues in the replying affidavit.”

But if that were indeed so why would there be the need for oral evidence? That question was not satisfactorily answered.

[45] I questioned whether exceptional circumstances were required for a referral at this late stage. Again, no satisfactory response was forthcoming. It was not clear whether exceptional circumstances were required, and if so, what they were.

[46] Throughout the debate I gained the impression that the applicants took the view that referral to oral evidence was there for the taking.

[47] When I asked what should the Court do if it took the view that there was no bona fide dispute to justify the referral to oral evidence, I recall the answer effectively being that the Court should be guided by the applicants’ view.

[48] The respondents’ stance to the application was instructive. Their attitude was that a part of the main case should proceed to argument immediately, and only were the applicants to be successful in that part should the application for referral be considered.

If the respondents succeeded in that first part of the case that would be the end of the main application and the referral issue would not arise.[11]

[49] Thus, it was not immediately apparent whether the respondents opposed the referral application. Understandably so.

[50] While the case dragged on their impugned conduct could continue. A referral to oral evidence would have suited their purpose. The main application would be drawn out, and the issue of mootness would raise its head. And the respondents could and would, if so minded, continue to operate in what the applicants considered an unlawful manner. But by the nature of

things the respondents could not be seen to be supporting the referral because they said they had a strong (unanswerable) case on the merits.

[51] I suggested in argument they were “hedging their bets,” and that their suggested course was a classic case of undesirable piece meal litigation. The response was that they opposed the referral application.

[52] I should mention that the applicants curiously had no difficulty with their main application only being heard in 2025. They suggested that despite them saying on oath that the application needed to be resolved before late 2024 there would still be some

benefit to them were the restraint and confidentiality relief be granted in 2025.

[53] I stood the matter down for approximately forty minutes to consider the referral application.

[54] I dismissed the referral application with costs of two counsel. I indicated that I would give my reasons when delivering the judgment in the main case.

[55] Counsel for the applicants immediately asked for the matter to stand down so they could take instructions, bearing in mind my ruling dismissing the referral application. The matter stood down for approximately half an hour.

[56] At the resumed hearing the applicants indicated they intended to apply for leave to appeal against my referral ruling and that because I hadn't yet given the reasons for the dismissal, they could not file the application for leave to appeal at that stage.

And they then sought an interim interdict pending the application for leave to appeal the referral ruling.

[57] I indicated that I would hear argument on the interim interdict and give reasons for my refusal of the referral application and my judgment on the interim application together.

[58] The respondents opposed the interim relief application. Argument on the interim application proceeded. No written argument was provided.

[59] During argument, I pointed out that the relief in the main application was not geared strictly speaking in its formulation for interim relief and there were issues and cases referred to in oral argument which were not contained in any of the written arguments. Both parties undertook to provide me with written heads of argument and draft orders concerning the interim relief a week later, that is by 24 May 2024. Counsel for both parties complied and submitted useful heads.

[60] I turn to give a summary of applications for referral to oral evidence and the reasons for my refusal.

[61] I will then deal with the application for interim relief.

Applications for referral to oral evidence - Rule 6(5)(g)

[62] Motion proceedings concern the resolution of legal issues based on common cause facts.

- [63] Unless it is interim relief that is sought or the circumstances are special, motions cannot be used to resolve factual issues because, inter alia, they are not designed to determine probabilities.
- [64] If the material facts are in dispute and there is no request for the hearing of oral evidence, a final order will only be granted if the facts as stated by the respondent together with the facts alleged by the applicant that are admitted by the respondent, justify such an order.
- [65] That is unless the court is satisfied that the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is so farfetched or so clearly untenable or so palpably implausible as to warrant its rejection merely on the papers.
- [66] If the court is satisfied as to the inherent credibility of the applicant's factual averments, it may proceed based on the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief sought.
- [67] But in certain instances a court may refer a motion for the hearing of oral evidence.
- [68] The Rules provide for the referral to oral evidence.

Rule 6(5)(g) states: "Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as it deems fit 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 specified 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 such deponent 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." (emphasis added)

- [69] A court, where an application cannot properly be decided on affidavit, may make such order as it deems fit with a view to ensuring a just and expeditious decision.
- [70] Erasmus' commentary on Rule 6(5)(g) includes the following:

"In resolving to refer a matter to evidence a court has a wide discretion. In every case the court must examine an alleged dispute

of fact and see whether in truth there is a real dispute of fact which cannot be satisfactorily determined without the aid of oral

evidence; if this is not done a respondent might be able to raise fictitious issues of fact and thus delay the hearing of the matter to the prejudice of the applicant. The test is a stringent one that is not easily satisfied. Vague and insubstantial allegations are insufficient to raise the kind of dispute of fact that should be referred for oral evidence.

A bare denial of the applicant's allegations in his affidavits will not in general be sufficient to generate a genuine or real dispute of fact. It has been said that the court must take 'a robust, commonsense approach' to a dispute on motion and not hesitate to decide an issue on affidavit

merely because it may be difficult to do so. This approach must, however, be adopted with caution and the court should not be tempted to settle disputes of fact solely on the probabilities emerging from the affidavits without giving due consideration to the advantages of viva voce evidence.”

[71] In *Lombaard v Droprop CC and Others* (377/09) [2010] ZASCA 86; 2010 (5) SA 1 (SCA); [2010] 4 All SA 229 (SCA) (31 May 2010) the SCA had occasion to consider some of the issues arising in motions when oral evidence may be called for to resolve material disputes of fact.

[72] Heher and Shongwe JJA (dissenting[12]) stated:

“[29] It has long been recognised that a discretion resides in a high court, derived from the rules of court, to refer a disputed issue of fact which cannot be decided on affidavit for the hearing of oral evidence regardless of whether the parties request it. The present uniform rule is 6(5)(g). The overriding consideration in the exercise of the discretion is ensuring a just and expeditious decision. In short, in the case of a dispute of fact, the court must be persuaded that the hearing of evidence will be fair to the parties and will conduce to an effective and speedy resolution of the dispute and the overall application.”

(emphasis added)

[73] A full bench of this Court (Binns-Ward, Samela and Francis JJ) upheld in *Repas v Repas* (A151/2022)

[2023] ZAWCHC 24 (13 February 2023) an appeal against the dismissal by Hockey AJ an application for the dissolution and winding up of a partnership. The dismissal was based on the fact that a material dispute of fact which could not be resolved on the papers had arisen, and the applicant had failed to satisfy his onus. Hockey AJ had refused to refer the matter to oral evidence because, in his view, the dispute of fact was foreseeable prior to the institution of the application proceedings.[13]

[74] Francis J in upholding the appeal accepted:

“[32] Counsel for the respondent also argued that the appellant ought to have applied for a referral to oral evidence as soon as a dispute was evident on the papers and before full argument was heard by the court below in respect of the application. It is indeed so that an application for a referral to oral evidence or trial, where warranted, should be applied for by a litigant as soon as the affidavits have been exchanged and not after argument on the merits. Whilst this is a salutary rule, it is by no means an inflexible one. In any event, in the matter at hand, the appellant raised the issue of a possible material dispute of fact in reply to the respondent’s answering affidavit. This was the earliest opportunity to do so because it was only in her answering affidavit that the respondent for the first time really nailed her colours to the mast.”

(emphasis added, footnotes omitted)

[75] Binns-Ward J agreed with the upholding of the appeal. He explained his understanding of a court’s discretion to refer to oral evidence.

- [39] It is not altogether clear to me that a court faced with deciding an appropriate order in terms of rule 6(5)(g) has a choice of the relatively unfettered nature that characterises well recognised truly discretionary decisions such as in matters of sentencing, general damages and costs etc. A court has to have regard to a number of disparate and incommensurable features in coming to an appropriate decision in terms of rule 6(5)(g): (i) the foreseeability of the dispute, (ii) the degree of blameworthiness, if any, in the circumstances of the given case of the applicant having proceeded in the face of a foreseeable dispute, (iii) the nature and ambit of the dispute in question, (iv) its amenability to convenient determination by a reference to oral evidence on defined issues, as distinct from in action proceedings to be commenced de novo,
- (v) the probabilities as they appear on the papers (if those are against the applicant, the court will be less inclined to send the dispute for oral evidence) (vi) the interests of justice, and (vii) the effect of any other feature that might be relevant in the circumstances of the given case.

and

- [41] It seems to me, on the face of matters, that the decision that a court has to make under rule 6(5)(g) involves what EM Grosskopf JA referred to in *Media Workers Association* as ‘a determination ... [to be] made by the court in the light of all relevant considerations’. The appropriate decision has to be informed by those considerations.
- [76] My approach in considering the referral application was to have regard to all the relevant considerations. In particular, I had regard to whether referral would have in the words of Lombard conducted to “an effective and speedy resolution of the dispute and the overall application.”
- [77] I concluded that referral to oral evidence would not conduce to an effective and speedy resolution.
- [78] My reasons were that the applicants elected to proceed by way of motion. That may have been, and probably was, in the circumstances, a reasonable choice.
- [79] They claimed their application was urgent and requested condonation for non-compliance with the Rules relating to service and time periods.
- [80] But inexplicably they did not, as they were entitled to, enrol the matter on any particular nominated date, truncating the time periods for the filing of papers.[14]
- [81] As it was put in *Arvrum* (see below) “almost all requirements of urgency can be managed by using Form 2(a) with shortened time periods, or by mere adaptation of an aspect of the form, for example advance nomination of a date for hearing or omitting notice to the Registrar, accompanied by changed wording when necessary.”

- [82] If the applicants were of the view that the matter was urgent, they could and should have set the application down on a nominated date with a timetable, commensurate with that urgency, for the filing of papers and the respondents would have ignored the applicants' chosen timetable at their peril.[15] They could have sought to set the matter down on the urgent roll at the outset.[16]
- [83] And if it is a complex or voluminous application, immediately after launching the application, the applicants' attorneys or counsel could address a practice note to the Acting Judge President. In the practice note a short explanation is given as to the nature and urgency of the matter and the Acting Judge President may in her discretion make an early allocation of the Judge to be seized with the matter.[17] The allocated judge then manages the case.
- [84] This useful practice serves the administration of justice and works well. The Court's experience as to this custom and how successfully it operates is well -known and established in this Division.
- [85] When the answering affidavit was served in late February 2024 the applicants should have been immediately considered whether a material bona fide dispute of fact was raised.
- [86] They could have immediately launched an urgent interlocutory referral (Rule 6(5)(g)) application. But they did not.
- [87] In their lengthy replying affidavit filed nearly two months after receipt of the answering affidavit no mention is made of any such dispute. Compare *Repas* where the applicant raised the issue of a possible material dispute of fact in the reply to the respondent's answering affidavit. In the present case no mention of a dispute was made in the replying affidavit.
- [88] The applicants did not mention the apparent dispute in their heads of argument. Indeed, they were content to proceed with the application in the absence of a referral to oral evidence.
- [89] The respondents' heads of argument elicited no "dispute of fact complaint" from the applicants.
- [90] At literally the eleventh hour the referral application was made on the basis that senior counsel in final preparation for the hearing advised that a dispute of fact required referral to oral evidence.
- [91] I considered whether oral evidence would result in the effective and speedy resolution of the application on a conspectus of all relevant considerations.
- [92] Could the hearing of oral evidence result in an effective remedy? The hearing of oral evidence would inevitably have resulted in the application only being finalised in 2025. But for any relief arising from the application to be effective it would need - on applicants' version - to be granted (well) before late 2024.

- [93] The hearing of oral evidence would have rendered any orders that may be granted ineffective. There were no exceptional circumstances at all to justify a referral to oral evidence.
- [94] A referral to oral evidence will slow the matter down rather than speed up resolution of the main application.
- [95] And I also took into account as part of the conspectus of all the circumstances that the answering affidavit allegedly raising the dispute was served at the end of February 2024, and yet the referral was only launched nearly three months later on 17 May 2024 at the last possible moment.
- [96] Those were my reasons for dismissing the referral application.

The Interim relief sought

- [97] It is not in issue the first respondent was paid over R8 164 562.50 (8 million rand) from April 2019 to the end of September 2023 by the applicants for consultancy services relating to the secondhand goods, pawn broking and the micro-lending industries.
- [98] Common and business sense dictates that the applicants would not have engaged and continued to use the respondents' services and allowed them to perform information technology work exposing them to the full spectrum of confidential information if they did not believe they had the benefit of restraint and confidentiality agreements in place during this time.
- [99] And so, when they believed (from mid - October 2023) that their contractual rights had been and were being violated they launched the main application in late December 2023.
- [100] After my refusal of the referral application, they sought interim relief. Oddly the interim relief was not pending finalisation of the main application. It was pending the outcome of an application for leave to appeal my dismissal of the referral application.
- [101] The applicants seek interim relief in the following terms together with a punitive costs award;

"Pending the outcome of an application for leave to appeal against the Court's order of 17 May 2024 in terms of which the Court dismissed an application for a referral to oral evidence brought on behalf of the applicants:

1 The first and second respondents are interdicted and restrained from:

1.1 having any involvement in an operation which deals with second hand goods, pawn broking and the micro-lending industries directly or indirectly either solely or jointly or as employee, manager, agent for any person, firm, partnership, joint venture or body corporate;

1.2 carrying on, assisting or being engaged, concerned or interested in, either financially or otherwise as director, shareholder or as consultant or advisor in respect of any business which is similar to an operation which deals with second hand goods, pawn broking and the micro-lending industries;

1.3 accepting instructions whether directly or indirectly for purposes of rendering information technology related services comprising inter alia the design and development of software systems for the benefit of any entity, member or person associated therewith conducting business in the second hand goods, pawn broking and the micro-lending industries regardless of whether they act as franchisee or in any like capacity.

2 The first and second respondents are interdicted and restrained from disclosing whether directly or indirectly any confidential information:

2.1 acquired from the applicants which shall include but not be limited to all calculations, strategy documents, spreadsheets, computer programs, papers, drawings, models, samples and other materials;

2.2 concerning the business methods, operations, business relationships, products, commercial, financial, marketing information and trade secrets of the third applicant.”

[102] I shall refer to the relief sought in paragraph 1 as the restraint relief and that in paragraph 2 as the confidentiality relief.

[103] It seems to me the respondents should have had no difficulty with being restrained and interdicted from disclosing “confidential information” as a matter of principle. And the details of that information which would be covered included in 2.1 and 2.2 should also be of no moment to them.

[104] How can they complain about being prohibited from disclosing confidential information acquired from the applicants concerning the business and the trade secrets of the third applicant?

[105] For information to be confidential and subject to prohibition it must satisfy three requirements.

The information must be

- (i) capable of application in trade or industry, that is, it must be useful and not be public knowledge;
- (ii) known only to a restricted number of people or a closed circle;
- (iii) of economic value to the person seeking to protect it.[18]

[106] The question arises as to what information is constituted as part of confidential information.

[107] The uncontested evidence shows that the first respondent was paid over R8 164 562.50 from April 2019 to the end of September 2023 by the applicants.

[108] The applicants suggest that were an interim interdict to be granted: “No prejudice will be suffered by the respondents who are free to pursue their trade, even in the development of point-of-sale software provided they do not do so with reference to the pawn industry, second hand goods and micro-lending. Their capacity to trade up and down the wholesale and retail value

chain accordingly remains undisturbed.”

[109] I tend to agree.

[110] They also argue that “As the relief is therefore of shorter duration for present purposes, the relief is only temporary and not finally decisive of the parties’ rights with the result that a degree of proof less exacting than that required for the grant of a final interdict will suffice.”

[111] The respondents on the other hand point to the sorry tale of the applicants’ curious litigation mishaps. And so they argue, inter alia, that the applicants must show they have prima facie prospects of success in the further proceedings. They correctly point out that by late 2024 the relief the applicants seek will probably have become moot, and there are no prospects of success in their application for leave to appeal my refusal of the referral application.

[112] I must be guided by what the Supreme Court of Appeal stated in *Fischer and Another v Ramahlele and Others* (203/2014) [2014] ZASCA 88; 2014 (4) SA 614 (SCA); [2014] 3 All SA 395 (SCA) (4 June 2014):

“[13] Turning then to the nature of civil litigation in our adversarial system it is for the parties, either in the pleadings or affidavits, which serve the function of both pleadings and evidence, to set out and define the nature of their dispute and it is for the court to adjudicate upon those issues. That is so even where the dispute involves an issue pertaining to the basic human rights guaranteed by our Constitution, for ‘it is impermissible for a party to rely on a constitutional complaint that was not pleaded’. There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.

[14] It is not for the court to raise new issues not traversed in the pleadings or affidavits, however interesting or important they may seem to it, and to insist that the parties deal with them. The parties may have their own reasons for not raising those issues. A court may sometimes suggest a line of argument or an approach to a case that has not previously occurred to the parties. However, it is then for the parties to determine whether they wish to adopt the new point. They may choose not to do so because of its implications for the further conduct of the proceedings, such as an adjournment or the need to amend pleadings or call additional

evidence. They may feel that their case is sufficiently strong as it stands to require no supplementation. They may simply wish the issues already identified to be determined because they are relevant to future matters and the relationship between the parties. That is for them to decide and not the court. If they wish to stand by the issues they have formulated, the court may not raise new ones or compel them to deal with matters other than those they have formulated in the pleadings or affidavits.”

[113] Were I to be of the view that on the papers the applicants are entitled to the main relief or an interim interdict pending the finalization of the main application that is irrelevant.

I am constrained to consider the interim relief as in fact sought by the applicants and nothing else.

[114] And the serious and ultimately insurmountable difficulty I have is that the interim relief sought is pending the application for leave to appeal my dismissal ruling. It is not sought pending the finalisation of the main application.

[115] The applicants in their well-crafted heads of argument do not point to any authority where an interdict was granted pending any event other than that inextricably linked to the substance of the interim interdict, that is the further or main proceedings. This is perhaps for good reason. A court considering interim relief will invariably take into account the prospects of success in the main case.[19] If the prospects are strong, a court will be more likely to grant the interim relief. Where it is weak, a court will be less likely to do so.[20] The main case is crucial to how the court hearing the interim relief balances the competing considerations.

[116] Interim interdicts are usually and almost always sought and granted pending an action or a constitutional challenge or review or other application. But not in relation to an interlocutory to a main application. Surely the interdict in casu could and should have been pending the main application.

But it is not, and as Fischer [21] requires, it is not for me to raise and compel the parties to argue and seek relief they have not chosen, for whatever reason. That would be inappropriate and wrong. As it was put by the SCA this calls for judicial restraint on my part.

[117] This approach does not elevate form over substance. It gives effect to fairness in litigation between the parties, which is an essential

component of the right to have disputes determined through the application of law. The respondents were called upon to meet a case

concerning an interim interdict pending an application for leave to appeal. They were not called upon to meet a case for an interim

interdict pending the main proceedings. A court is not entitled to refashion the relief sought by the applicants because it would be unfair to do so in an adversarial system such as ours.[22]

[118] The applicants in their heads in the application for interim relief suggest the prima facie right asserted is the contractual right. They say: “The applicants have therefore established the existence of a prima facie right rooted in contract that entitles them to relief. “

[119] But the problem is the interdict is sought pending the application for leave to appeal the dismissal ruling. And the leave to appeal application has not yet been filed because I have not delivered my reasons in the referral application.

[120] The future possibilities the route chosen by the applicants are endless in number. Were I to grant leave to appeal then what would happen next? A relatively long appeal process would ensue. If the appeal succeeds then all that would happen would be for the application to be referred back to this Court for the hearing of oral evidence and the merits? How long would that

process take? At least a year or more. And what would happen to the interim interdict? It would have come to an end when I granted leave to appeal, with the possibility of an application for an extension. And that would clearly result in the granting of final relief without the merits being decided. That cannot be right.

If I were to refuse leave to appeal what would happen? The interdict would come to an end and there could be an application for its extension pending a petition to the SCA.

[121] The mind boggles at the various weird and wonderful permutations that could arise.

[122] But that is because of how the applicants in exercising their rights have chosen to litigate and the strategic different routes they adopted.

[123] The applicants have not shown they have a prima facie right in respect of their application for leave to appeal and they are not entitled to an interim interdict.

Concluding remarks

[124] I am by no means convinced that the applicants have not made out a case for the restraint and confidentiality relief in the main application. But I cannot and do not make any finding on that issue – it is not before me.

[125] I am constrained to decide the case on the papers, and particularly the relief as sought. The applicants have not moved for final relief before me, and I am not persuaded that the alternative relief couched in the manner it has been should be granted.

[126] In the circumstances the application for interim relief pending the application for leave to appeal my dismissal of the referral application is dismissed with costs of two counsel on the C Scale.

ANTON KATZ AJ

Counsel for the applicants: L Kuschke SC CC Bester Counsel for the respondents: A R Sholto Douglas SC R Patrick SC

[1] Examples include whether to engage senior counsel, and if so at what stage. And whether to only engage out of town counsel.

[2] See the comments of the Constitutional court in *S v Dlamini, S v Dladla and Others; S v Joubert; S v Schietekat* (CCT21/98, CCT22/98, CCT2/99, CCT4/99) [1999] ZACC 8; 1999 (4) SA 623; 1999 (7) BCLR 771 (3 June 1999) at paras [93] – [94].

[3] For twenty-four months from the date of any order the Court makes.

[4] The confidentiality relief was final and included a prayer for the return of the confidential information.

[5] A further prayer concerning the infringement of copyright of one of the applicants was abandoned.

[6] None of the counsel who appeared before the Court on 17 May 2024 could explain how it came about that the matter came before Kusevitsky J on 31 January 2024. The closest the Court received as to an explanation was that it was a mistake or that it was on the applicants' insistence.

[7] The replying affidavit was three times longer than the answering affidavit.

[8] The applicants filed a few days out of time, whereas the respondents filed a month later without any formal application for condonation,

although the reasons for the lateness were fully set out in the replying affidavit.

[9] I sent a further email to the parties thereafter requesting submissions on certain cases, which are not relevant for purposes of this judgment.

[10] The notice of application was in line with the customary order of this nature developed in *Metallurgical and Commercial Consultants*

(Pty) Limited v *Metal Sales Co (Pty) Limited* 1971 (2) SA 388 (W).

[11] Such an approach would result in the application being managed and dealt with in a piecemeal manner. This was clearly undesirable.

[12] The majority (Navsa and Malan JJA, Mhlantla JA concurring) did not disagree with the minority on this aspect.

[13] Repas at para [2]

[14] The common and generally accepted practice in this Division, unlike other Divisions, is for an applicant to follow that route.

- [15] See generally *Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk* 1972 (1) SA 773 (A), and more recently *Magashule v Ramaphosa and Others* [2021] 3 All SA 887 (GJ) and *Phalatse and Another v Speaker of the City of Johannesburg & Others* [2022] ZAGPJHC 1054 (25 October 2022).
- [16] The Practice Directives of this Division dated 12 September 2023 issued by Acting Judge President Goliath, and *Arvum Exports (Pty) Ltd and Others v Costa NO* (18979/2013)
- [2013] ZAWCHC 176 (20 November 2013) reflect a somewhat different approach. Binns Ward J in *Arvum* endorsed the approach of Flemming DJP in *Gallagher v Norman's Transport Lines (Pty) Ltd* 1992 (3) SA 500 (W).
- [17] The respondent may still argue that application lacks urgency and should be struck from the roll. That is the risk an applicant takes in setting the matter down on this “urgent” basis.
- [18] *Townsend Productions (Pty) Ltd v Leech & Others* 2001 (4) SA 33 (C) at 53J-54B; *Mossgas (Pty) Ltd v Sasol Technology (Pty) Ltd*
- [1999] 3 All SA 321 (W) at 333F; see also *Avis Southern Africa (Pty) Limited v Porteous and Another* 2024 2 SA 386 (GJ) at para 87.
- [19] *Economic Freedom Fighters v Gordhan and Others* 2020
- (6) SA 325 (CC) at para [42] where the Constitutional Court held “Before a court may grant an interim interdict, it must be satisfied that the applicant for an interdict has good prospects of success in the main review”.
- [20] *Olympic Passenger Services v Ramlagan* 1957
- (2) SA 382 (D) at 383E-F.
- [21] At para [15].
- [22] *National Commissioner of Police and Another v Gun Owners of South Africa* 2020
- (6) SA 69 (SCA) at para [25 – 27].

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