

JESS WATSON  
and  
MARICK TRADING (PRIVATE) LIMITED  
versus  
SPECIALISED CASTINGS (PVT) LTD

HIGH COURT OF ZIMBABWE  
MAKONI J  
HARARE, 13 November 2015 and 1 March 2017

### **Opposed Matter**

*P.C.P Paul*, for the applicants'  
*M.S.C Mushanyari*, for the respondent

MAKONI J: The applicants approached this court seeking an order in the following terms:

“1. That respondent is interdicted from supplying the following components produced from molds or patterns furnished by 1<sup>st</sup> applicant to respondent to any person other than 1<sup>st</sup> applicant or a company that he represents;-

Feeder Chamber  
Chamber Compression  
Head  
Single Flight Worms  
Double Flight Worms  
Steam Locks  
Bearing Housings  
Clamp Halves  
Drive Pullies”

The background to the matter is that the respondent is in the business of producing castings which it sells to customers including the applicant.

The applicants avers that in 1994 the first applicant made and supplied wooden moulds which he gave to the respondent to manufacture components which the second applicant would then sell to its customers. There was no formal agreement entered into. The respondent was to manufacture the components as per the moulds for the applicants only. The respondent could not copy the moulds and patterns in question for purposes of supplying other customers. The applicants had paid large sums of money for the services rendered by the respondent in terms of the agreement.

Contrary to the agreement, the respondent is now copying the applicants' moulds for the purpose of supplying other customers. By so doing, it is adopting an unfair trade practice which is causing them financial loss.

The respondent opposes the application and takes two points *in limine viz* that no cause action has been disclosed in the founding affidavit and that the requirements for a final interdict have not been met.

On the merits, the respondent avers that it produces the components in question utilising its own moulds and patterns. It denies committing an unfair trade practice against the applicant or that it has caused any financial loss to the applicant.

I will first of all deal with the points *in limine*.

#### The Founding Affidavit Does Not Disclose A Cause of Action

Mr *Mushonyari* submitted that unfair trade practice is a delictual action. There is need for proof that the respondent was using the applicants' patterns and is causing financial prejudice to the applicants. The applicants only attached the letter of demand. They have failed to establish the essential elements of unfair trade practice. The application should therefore be dismissed.

Mr *Paul* contended that the founding affidavit in para(s) 3, 4, 6 and 7 sets out the applicants' case. There is no denial at all from the respondent that that is what happened. The respondent admits that it was commissioned by the applicant to produce its products.

It is trite that in application proceedings the cause of action should be fully set out in the founding affidavit. Order 32 r 230 of the High Court Rules 1971 the Rules provides

“A court application shall be in Form No. 29 and shall be supported by one or more affidavits setting out the facts upon which the applicant relies.”

In others words, the founding affidavit must contain essential averments in support of the relief claimed. See *Herbestein Van Winsen: The Civil Practice of the High Courts of South Africa* 5<sup>th</sup> Ed p 425. The learned authors continue at p 439 and state the following.

“If the affidavit does not contain the essential averments relied on the respondent is entitled to ask the court to dismiss the application on the ground that it disclosed no basis on which the relief can be granted.”

It is also trite that an application stands or falls by its founding affidavit and the averments alleged therein. In *Mudhini v Adams & Others* SC 47/13 ZIYMABI J had this to say on the above general rule

“It is trite that an application stands or falls on the averments made in the founding affidavit. See *Herebestein & Van Winsen the Civil Practice of the Superior Courts in South Africa* 3<sup>rd</sup> ed p 80 where the authors state:

‘The general rule, however, which has been laid down repeatedly is that an applicant must stand or fall by his founding affidavit and the facts alleged there in and that although sometimes it is permissible to supplement the allegations contained in that affidavit, still the main foundation of the application is the allegation of facts stated therein, because these are the facts which the respondent is called upon either to affirm or deny. If the applicant merely sets out a skeleton case in his supporting affidavits any fortifying paragraphs in his replying affidavits will be struck out.’

I would want to agree with Mr *Paul* that the applicants’ founding affidavit sets out their cause of action. What the applicants are seeking is an interdict and not damages for unfair trade practice. What the applicants’ need to establish are the requirements for an interdict and not the essential element of unfair trade practice. I will therefore dismiss the point *in limine*.

2. The applicant has failed to establish the requirements of a final interdict

The point raised by the respondent, *in limine*, touched on the merits of the matter since what the applicants seek is a final interdict. I therefore will deal with the issue on the merits.

Mr *Mashanyari*, submitted that the applicants’ did not establish the requirements of a final interdict. They did not establish a clear right, the harm that they might suffer and that there is no other remedy. The founding affidavit does not establish the above elements. The applicants make bold averment that the respondent is using its patterns without substantiating the claims. The elements of a final interdict are then brought out in the Heads of Argument.

Mr *Paul* submitted that the applicants has established a clear right in that the respondent does not dispute their averment that it received some moulds from the applicant. It was commissioned to manufacture patterns from those moulds.

He further submitted that the balance of convenience is obvious.

The requirements of an interdict are trite. These were set out in *Econet Wireless Holdings & Ors v Min of Finance & Others* 2001 (1) ZLR 373 at 374 B.

“What the appellants in this case sought was a final interdict. In order to succeed in obtaining such an interdict they had to establish: (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of similar protection by any other ordinary remedy. See *Setlogelo v Setlogelo* 914 AD 221 at 227 ; *Sanachem (Pty) Ltd v Farmers Agricare (Pty) Ltd & Ors* 1995 (2) SA 781 (A) at 789 B-C; *Charuma Blasting & Earthmoving Svcs (Pvt) Ltd v Njanjai & Ors* 2000 (1) ZLR 85 (S) at 89 D”

The applicants' contend that they have established a clear right in that the respondent does not dispute that it was commissioned to manufacturing and selling products from its moulds. As was rightly contended by the respondent, the applicants have made bare allegations that the respondent is producing components made from the applicants' moulds and supplying them to other customers. No evidence was attached to the applicants' affidavit to establish this factor. It is settled that in application proceedings, the affidavit constitute not only the pleadings but also the evidence in the matter. See *Herbestein and Van Winsen: The Civil Practice of the High Courts of South Africa* 5<sup>th</sup> Edition p 425 where they state the following

“While it is not necessary that the affidavits should set out a formal declaration, these documents should contain, in the evidence they set out, all that would have been necessary at trial.”

The respondent contends that it has manufactured and supplied components to the applicants. It however disputes that the components are produced using the moulds owned by the applicants.

If it were a trial, the applicant would have to lead evidence to establish that the components that the respondent was producing were produced from its moulds. Since the applicants opted to use motion proceedings, such evidence should have been contained in the founding affidavit. From reading the applicants' founding affidavit, it is clear that the applicants have failed to establish that they have a clear right in this matter.

The applicants contend that the respondents' conduct has caused the second respondent to suffer financial loss in that many of its customers are now obtaining the parts which it commissioned the respondent to produce directly from the respondent. The respondent, in its opposing papers denied causing any financial loss to the applicants. For the applicants' to be able to establish an injury actually committed or reasonably apprehended they would need evidence from customers who used to buy from them but who are now buying directly from the respondent. This would entail filing supporting affidavits from the customers. None were filed. A bare averment to that effect is not enough to establish harm.

The applicants did not make any averments relating to the third and fourth requirements at all. It is not enough to make submissions that the balance of convenience is obvious.

From the above analysis, it is clear that the applicants have not established the requirements of final interdict. They have failed to establish a basis for the relief sought.

I will therefore proceed to make the following order.

1. The application is dismissed.
2. The applicants to pay the respondent's costs of suit.

*Wintertons*, applicants' legal practitioners

*Dube, Manikai & Hwacha*, respondent's legal practitioners