

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NUMBERS: 2022/035571

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

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B.C. WANLESS

23 June 2023

In the matter between:

NDUMISO SIYABULELA MDLETSHE

First Applicant

SIPHELELE MBONGI DUNYWA

Second Applicant

and

YOUTUBE CHANNEL

First

Respondent

AMBITIOUS GROUP (PTY) LTD

Second Respondent

JUDGMENT

WANLESS AJ

Introduction

[1] In this matter one NDUMISA SIYABULELA MDLETSHE, adult male, a music producer, musician, businessman and founding member of a music group by the name of BLAQ DIAMOND ("*Blaq Diamond*") is the First Applicant. The Second Applicant is SIPHELELE MBONGI DUNYWA, adult male, musician, producer and businessman. The First and Second Applicants collaborate and/or partner with one another in the field of music production and, as such, unless there is a need to

specifically refer to either of them in their individual capacities, will be referred to collectively as “*the Applicants*”.

- [2] The First Respondent in this matter is YOUTUBE (“*the First Respondent*”) an American online video sharing and social media platform situated in San Bruno, California. The First Respondent has not opposed this application and has not filed any affidavits in this application. Service was effected upon the First Respondent via email which this Court was not specifically requested to condone at the hearing of the application. Insofar as it is necessary, such service is hereby condoned. With regard to the jurisdiction of this Court in respect of the First Respondent, this question was also not raised at the hearing of the application before this Court. Having considered the nature of the relief sought by the Applicants in this application, this Court is satisfied that no relief is sought which directly affects the First Respondent. In the premises, any jurisdictional requirements insofar as they pertained to the First Respondent were not raised as issues on the application papers before this Court and were not dealt with in argument before this Court. Further, this Court declines to deal with same in this judgment.
- [3] The Second Respondent in the application before this Court is AMBITIOUS GROUP (PTY) LTD (“*the Second Respondent*”). Whilst no specific description has been provided in the application papers as to how the Second Respondent derives its income, it can be gleaned from the nature of the agreements entered into between the Applicants and the Second Respondent that the Second Respondent carries on business as, *inter alia*, a manager and agent of artists and their music.
- [4] On the 27th of October 2022 the Applicants instituted this application in the urgent court seeking the following relief:

“PART A: URGENT INTERDICTIONARY RELIEF PENDENTE LITE.

1. Dispensing with the forms and service provided in the Uniform Rules of Court and condoning non-compliance with the Rules relating to service and time periods in terms of Rule 6(12);
2. That pending final determination of Part B attached to this notice of motion and marked Annexure “**FA1**”, any person or entity acting in concert with the Respondents, are hereby interdicted from removing and/or deleting the account of the Applicants Youtube channel;
3. That it be ordered that the Second Respondent be interdicted from raising any copyright/ownership dispute against the works of the Applicants with any other Digital Streaming Platform (“**DSP**”) inclusive of the First Respondent, Spotify, iTunes, Deezer, authored by the Applicants from 15 June 2022, pending final determination of Part B.

PART B

4. That it be declared that the Exclusive Management Agreement, the Artist Management Agreement and the Publication Agreement (“**the Agreements**”) entered into between the Plaintiffs and the Defendant on 10 January 2020, be declared terminated as of 7 January 2022 alternatively 15 January 2022 alternatively it be declared that the Agreements are null and void *ab initio* and hereby terminated;
5. That an independent auditor be appointed within 30 (thirty) days of this order to perform a debatement of the accounts in order to determine amounts due to the Plaintiffs from January 2017 to date, in respect of the following;
 - a. The First Schedule of the Exclusive Management Agreement;
 - b. The Second Schedule of the Publication Agreement; and
 - c. Clause 9, 10 and 11 of the Artist Management Agreement.
6. That the independent auditor provide the Court as well as the Parties with a report, within 60 (sixty) days of making this order.
7. That the Defendant be ordered to pay the costs of the independent auditor.
8. That the Defendant be ordered to pay the costs of the action on an attorney and client scale, inclusive of the costs of counsel.
9. Further and alternative relief.
10. Ordering the Respondents opposing Part A of this application to pay the costs thereof; and
11. Further, and/or alternative relief.

[5] On the 27th of October 2022, Dosio J made the following order:

1. *The matter is struck off the roll for lack of urgency.*
2. *Each party to pay their own costs.*

[6] The matter was set down on the Opposed Motion court roll and was heard by this Court on the 13th of March 2023. It was always the intention of this Court to deliver a written judgment in this matter. In light of, *inter alia*, the onerous workload under which this Court has been placed, this has simply not been possible without incurring further delays in the handing down of the judgment. In the premises, this judgment is being delivered *ex tempore*. Once transcribed, it will be “converted”, or more correctly “transformed”, into a written judgment and provided to the parties. In this manner neither the quality of the judgment nor the time period in which the judgment is delivered, will be compromised. This Court is indebted to the transcription services of this Division who generally provide transcripts of judgments emanating from this Court within a short period of time following the deliver thereof on an *ex tempore* basis.

The facts

[7] It is common cause between the parties that on the 10th of January 2020 the Applicants and the Second Respondent entered into no less than three (3) written agreements, namely:

7.1 The Exclusive Management Agreement (“*the Management Agreement*”);

7.2 The Publishing Agreement (“*the Publishing Agreement*”); and

7.3 The Artist Management Agreement (“*the Artist Agreement*”).

[8] During the course of approximately the two (2) years following the entering into of the agreements as aforesaid the Applicants allege that they became increasingly dissatisfied with, *inter alia*, the service and payments they were receiving from the Second Respondent in terms thereof. This gave rise to the Applicants (on their version) cancelling all three (3) agreements on the 7th of January 2022. Whilst it was conceded (correctly) on behalf of the Applicants by their Counsel that the letter of the Applicants purporting to terminate the agreements on 7 January 2022 does not expressly rely on breach as a ground for termination, it does mention “*outstanding performance funds owed to Blaq Diamond*”.

[9] Thereafter and on the 14th of March 2022 the Applicants gave notice of breach to the Second Respondent in respect of the Artist Agreement. On the 15th of June 2022 the Applicants purported to terminate an agreement in terms of the notice given on the 14th of March 2022. However, the agreement the Applicants sought to terminate was the Publishing Agreement and not the Artist Agreement.

[10] The Second Respondent denies that it has committed a material breach of any of the agreements and that the Applicants are entitled to lawfully cancel the agreements.

[11] It is further common cause between the parties that whether or not the Applicants were entitled to lawfully cancel the agreements entered into between the parties, what did happen, was that the Applicants:

11.1 with effect from 1 July 2022 entered into an exclusive digital distribution agreement with ELECTROMODE (“*the Electromode agreement*”); and

11.2 established their own record label called “*Umuthu*” on or about the 21st of February 2022.

For the record, these dates may not be accurate but are as recorded by the Applicants on the application papers and, as stated by the Second Respondent, not much turns on the actual dates of these events.

[12] What *is* relevant, is that the Applicants released three (3) songs through this record label, namely “*Quoma*”, “*Llanga*” and “*Fireworks*” (“*the songs*”). The songs were released on the Applicants’ channel on the First Respondent. In reaction to this and because the Second Respondent was of the opinion that the agreements between the parties were still in existence, it served what have been loosely referred to as “*take down notices*” upon the First Respondent. These notices advised the First Respondent that the Applicants were in breach of the agreements between themselves and the Second Respondent by releasing the songs on the First Respondent’s platform and that they should be removed. This in turn resulted in the First Respondent advising the Applicants that if the songs were not removed the First Respondent would remove the Applicants’ account from its channel. Hence, the urgent application by the Applicants for the interim interdict on the 27th of October 2022.

The nature of the relief sought by the Applicants

[13] The relief sought by the Applicants before this Court is identical to that as was sought before the urgent court on the 27th of October 2022.¹ In the premises, this Court must decide whether or not to grant the Applicants the relief sought in PART A of the Applicants’ Notice of Motion which is in the form of a prohibitory interim interdict pending the final determination of PART B of the same Notice of Motion.

[14] It is trite that the requirements for the granting of an interim interdict are, in general, the following:

14.1 *A prima facie* right;

14.2 A reasonable apprehension that if the interim relief is not granted the Applicant will suffer irreparable harm;

¹ Paragraph [4] *Ibid.*

14.3 The balance of convenience favours the granting of the interim relief (this is often linked to the issue of prejudice); and

14.4 The absence of any other satisfactory remedy.

[15] Whilst Senior Counsel for the Applicants spent some time dealing with all of the aforesaid requirements in his argument before this Court (as well as anticipating the argument that would be forthcoming from Counsel representing the Second Respondent as set out in his Heads of Argument) the Second Respondent's Counsel focused his argument primarily, if not solely, on a single point. In the premises, it is appropriate that this Court deal therewith at the outset.

The point *in limine* relied upon by the Second Respondent that the Applicants have no cause of action.

[16] Despite the fact that the Second Respondent had raised various points *in limine* the point *in limine* upon which the Second Respondent ultimately relied upon was the third point *in limine* in Advocate Van Nieuwenhuizen's Heads of Argument bearing the title "NO VALID CAUSE OF ACTION".

[17] In the first instance, the point was made on behalf of the Second Respondent that it appeared from the Heads of Argument filed on behalf of the Applicants that the Applicants' case (or part of the Applicants' case) was that the Applicants' constitutional rights had been affronted or violated. However, the effect of the relief claimed by the Applicants is to prohibit the Second Respondent from interfering in the contractual relationships between the Applicants and third-party Digital Streaming Platforms ("DSP's"), including the First Respondent.

[18] The cause of action to interdict interference in a third-party contractual relationship is delictual.² In light of the fact that the Applicants have a common law remedy available to them, it was submitted on behalf of the Second Respondent that they are precluded from seeking to directly invoke constitutional rights by virtue of the principle of subsidiarity.³

[19] It was further submitted by Counsel for the Second Respondent that in light of the foregoing, it was necessary for the Applicants to plead the necessary requirements to establish their right to delictual relief, namely an (I) act (II) which was wrongful (III) caused by the fault (*dolus* or *culpa*) of the Second Respondent, (IV) which caused (*causality*) (V) the Applicants to have suffered a patrimonial loss.

² *Masstores (Pty) Ltd v Pick 'n Pay Retailers (Pty) Ltd 2017 (1) SA 613 (CC) at paragraph [10]; Atlas Organic Fertilisers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others 1981 (2) SA 173 (T) at 202G.*

³ *Organisasie vir Godsdienste-Onderrig en Demokrasie v Laerskool Randhart and Others 2017 (6) SA 129 (GJ) at [26], [57] and [70]*

- [20] Finally, it was submitted that despite raising the question of unlawfulness on several occasions the Applicants had not raised the requirement of fault at all and thus no cause of action had been disclosed. Moreover, it was submitted that the legal representatives of the Applicants had been forewarned in respect of these deficiencies in the application and the Second Respondent sought an order that the application be dismissed with costs *de bonis propriis, alternatively*, on the scale of attorney and client.
- [21] It is true that the Heads of Argument filed on behalf of the Applicants dealt extensively with the fact that the constitutional rights of the Applicants had been affronted or violated whilst no specific averments of this nature appear in the Founding Affidavit. In the premises, it would have appeared that it was the intention of the Applicants to invoke constitutional rights in their argument as to why they were entitled to the relief as sought in PART A of the Notice of Motion. However, when the matter was argued before this Court the “Notes for Argument”, submitted by Senior Counsel who appeared for the Applicants, contains no reference whatsoever to the constitutional rights of the Applicants. In addition thereto, Counsel made no reference whatsoever during the course of his argument to any of those rights. Arising therefrom, it can be safely assumed that the Applicants abandoned any reliance previously placed upon their constitutional rights in support of the relief sought for the granting of an interim interdict. In the premises, it is not necessary for this Court to consider the applicability of the principle of subsidiarity in this matter.
- [22] As to the question of whether the Applicants have a cause of action which would entitle them to the interim relief sought, it is not clear to this Court whether the Second Respondent alleges they do not have a cause of action as a matter of law, or as a matter of fact. With regard to the question of the Applicants having a cause of action as a matter of law, Counsel for the Second Respondent relied heavily on *Masstores*⁴ which is authority for the principle that where there is an alleged interference of a contractual relationship between parties by a third-party the cause of action is delictual and not contractual.⁵
- [23] On that basis, it appears to have been submitted that because the Applicants’ cause of action was based on contract it did not sustain the granting of an interim interdict as sought in this application. This cannot be correct. Whilst the relief sought seeks to protect a contractual relationship (that is the contractual relationship which exists or may exist between the Applicants and any DSP including the First Respondent) the basis therefor is the interference thereafter by a third-party (in this case the Second Respondent and any other parties) which is clearly a cause of action based on the

⁴ *Ibid.*

⁵ At paragraphs [8] to [10].

lex aquilia (a delictual cause of action). In the premises, there is nothing barring the Applicants, in law, from seeking the relief as sought.

- [24] As a matter of fact, the averment is made in the Second Respondent's Heads of Argument that whilst averments of unlawfulness abound, averments of fault (*dolus* or *culpa*) are lacking in the Applicants' Founding Affidavit. This supports the fact that the Applicants' cause of action is based in delict. Whilst it is true that no specific allegations in this regard are made, it is clear from the said affidavit (and it is common cause in this application as dealt with earlier in this judgment) that the Second Respondent has caused several take down notices to be served upon the First Respondent in respect of the Applicants' songs. In the context of this application, these actions constitute fault in the form of intent (*dolus*) and clearly did not need to be specifically identified as such in the Founding Affidavit of the Applicants to satisfy the requirements of the *Lex Aquilia*. In the premises, the point *in limine* as raised by the Second Respondent cannot be sustained either in law or on a factual basis.

Have the Applicants satisfied the requirements for an interim interdict?

- [25] Having placed such considerable weight on the point *in limine* as dealt with above the Second Respondent, whilst not conceding outright that in the event of this Court failing to uphold the aforesaid point *in limine* that the Applicants had proved the requirements necessary for the granting of an interim interdict, did not spend much time, if any, presenting argument as to why this Court should not grant the relief sought by the Applicants. On the other hand, on behalf of the Applicants, Senior Counsel, in submitting the Applicants had satisfied all the requirements entitling this Court, in its discretion, to grant to the Applicants the relief sought, not only took the Court through the application papers and referred this Court to the relevant portions thereof in support of his submissions but also referred this Court to various authorities which set out the legal principles in support thereof.
- [26] This judgment will not be burdened unnecessarily by dealing with each and every point made by Applicants' Counsel. Rather, an overview of the submissions made and the relevant legal principles in support thereof (where applicable) will be set out in deciding whether the Applicants have satisfied the onus incumbent upon them and met the requirements for an interim interdict pending the finalisation of PART B in the Notice of Motion.

A prima facie right

- [27] The reluctance of Second Respondents' Counsel to become too embroiled in the intricacies of whether or not the Applicants had indeed satisfied the requirements of an interim interdict probably stems from the nature of the relief sought by the Applicants in PART B of the Notice of Motion. In this regard and whilst paragraph 4

seeks a declarator (the termination of the agreements) the remainder and purpose of the relief to be sought is for a debatement of an account (the amounts allegedly due, owing and payable by the Second Respondent to the Applicants in terms of the agreements). As such this relief should be classified as review proceedings.

- [28] In the matter of *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* (“OUTA”)⁶ it was held, *inter alia*, that where there is an application for interim relief pending review proceedings in PART B, an outcome as to whether or not a *prima facie* right exists is not dispositive.⁷ What must be decided by this Court at this stage is, if the interim interdict is not granted, will the right which the Applicant seeks to protect be irreparably harmed.⁸
- [29] Based on the foregoing, it was submitted on behalf of the Applicants that it must follow that the less stringent test of establishing a *prima facie* right applies. Authority for this proposition is to be found in the matter of *Bombardier Africa Alliance Consortium v Lombard Insurance Company Ltd*⁹ where this was referred to as a “*prima facie* right, although open to some doubt.”¹⁰
- [30] It was further submitted on behalf of the Applicants that in light of the lack of (if any) dispute of fact in respect of irreparable harm and the balance of convenience on the application papers before this Court, this has also lightened the need for the Applicants to establish a *prima facie* right. This principle was established in the matter of *Resilient Properties (Pty) Ltd v Eskom Holdings Soc Ltd*.¹¹
- [31] Of course, at the end of day, to obtain an interim interdict the version of an applicant does not have to be completely free from doubt. Interim relief ought to be granted even though there is some doubt.¹²

Conclusion and the remaining requirements of an interim interdict

- [32] The submissions made on behalf of the Applicants by Applicants’ Counsel in this matter are all sound, based as they are on accepted principles of our law and the facts as set out in the application papers before this Court. In addition thereto, it must be accepted that this Court has a wide discretion when determining whether or not to grant an interim interdict.¹³

⁶ 2012 (6) SA 223 (CC).

⁷ OUTA at paragraph 52.

⁸ OUTA at paragraph 50.

⁹ 2021 (1) SA 397 (GP).

¹⁰ Bombardier at paragraph 14.

¹¹ 2019 (2) SA 577 (GJ) at paragraph 49.

¹² Webster v Mitchell 1948 (1) SA 1186 (WLD) at 1189.

¹³ Messina (Transvaal) Development Co Ltd v South African Railways and Harbours 1929 AD 195 at 215-216; Hix Networking Technologies v System Publishers (Pty) Ltd and Another 1997 (1) SA 391 (AD) at 398I-399A; Shepherd Bushiri Investment (Pty) Ltd and Others versus JM Busha Investment Group (Pty) Ltd [2020] ZAGPJHC 294 at paragraph 5; Machingwane v National African Federated Chamber of Commerce and Industry and Another [2022] ZAGPJHC 461 at paragraph 2; Mtakati v Ntombela N.O. and Others [2021] ZAFSHC 106 at paragraph 5.

- [33] In the premises, this Court has no difficulty in accepting same. As to the requirement of a *prima facie* right this Court accepts, once again based on the principles of law as set out above and on the facts so clearly set out by the Applicants' Counsel during the course of argument (not specifically disputed by Counsel for the Second Respondent) that this requirement has been satisfied by the Applicants. This is particularly so in respect of the fact that, on a *prima facie* level, it would appear that the Second Respondent has not paid royalties to the Applicants and that the Applicants have cancelled the agreements, *alternatively*, in the case of the Management Agreement, this agreement has come to an end by the effluxion of time (due to notice and regardless of breach). This Court understood Counsel for the Second Respondent to effectively (and correctly) concede same.
- [34] As to the remaining requirements for an interim interdict, there is, as submitted by Counsel for the Applicants, a strong case established by the Applicants in respect of irreparable harm which has simply not been addressed by the Second Respondent in the application papers before this Court. In the opinion of this Court it is no answer for the Second Respondent to aver that it too may be suffering reputational damage by the Applicants' breaching the agreements and continuing to play their songs on various DSP's. Rather, in the discretion of this Court and in light of the failure of the Second Respondent to place any rebutting evidence before this Court, this Court is satisfied that the Applicants have shown that if the interim interdict is not granted, they will suffer irreparable harm.
- [35] For essentially the same reasons this Court also finds that the Applicants have satisfied the requirements in respect of both the balance of convenience and the absence of another satisfactory remedy. Once again, the averments of the Applicants have been met with bare or broad denials. In this matter it clearly cannot be to the ultimate prejudice of the Second Respondent if it is found that the Applicants did not lawfully cancel the agreements and the interim relief is granted, since a percentage of the income generated by the playing of the songs on the DSP's will ultimately filter its way down into the Second Respondent's coffers.
- [36] In the premises, this Court holds that the Applicants should be granted the relief as sought in PART A of the Notice of Motion. The Applicants handed in a Draft Order at the hearing of the matter. No objections thereto were placed on record by the Second Respondent. The Applicants also seek costs. It is trite that costs fall within the discretion of the Court to be exercised judicially. Costs generally follow the result unless there are unusual or special circumstances. None were brought to the attention of this Court. Further, no objection was raised on behalf of the Second Respondent as to the fact that the Applicants were represented by two Counsel. In the exercise of this Court's discretion there is no reason why the Second Respondent should not pay the costs of this application, such to include the costs of two Counsel.

Order

[37] This Court makes the following order:

1. That pending final determination of Part B attached to this application, any person or entity acting in concert with the Respondents, are hereby interdicted from removing and/or deleting the account of the Applicants' Youtube channel;
2. That it be ordered that the Second Respondent be interdicted from raising any copyright/ownership dispute against the works of the Applicants with any other Digital Streaming Platform ("**DSP**") inclusive of the First Respondent, Spotify, iTunes, Deezer, authored by the Applicants from 15 June 2022, pending final determination of Part B.
3. The Second Respondent is ordered to pay the costs of this application including the costs of two Counsel, one of which is Senior Counsel.

B.C. WANLESS
Acting Judge of the High Court
Gauteng Division, Johannesburg

Heard: 13 March 2023
Ex Tempore: 12 June 2023
Transcript: 23 June 2023

Appearances:

For Applicants: TN Ngcukaitobi SC (with MT Matlapeng)
Instructed by: Friedland Hart Solomon & Nicolson Attorneys
c/o AJ Scholtz Attorneys

For Second Respondent: HP van Nieuwenhuizen
Instructed by: Richen Attorneys Inc.