

Editorial note: Certain information has been redacted from this judgment in compliance with the law.



**IN THE HIGH OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO.: 21220/21

In the matter between:

PIENAAR BROTHERS PROPRIETARY LIMITED Applicant

and

BRIAN PIENAAR NORTH PROPRIETARY LIMITED First Respondent

BASI PIENAAR BROS PROPRIETARY LIMITED Second Respondent

BRIAN PIENAAR PROPRIETARY LIMITED Third Respondent

NKOSAZANA PIENAAR BROS PROPRIETARY LIMITED Fourth Respondent

ZAHARA PIENAAR BROS NORTH PROPRIETARY LIMITED Fifth Respondent

BRIAN VICTOR LAPINER (formerly PIENAAR) Sixth Respondent
(Identity Number: [...])

REGISTRAR OF TRADE MARKS Seventh Respondent

.ZA CENTRAL REGISTRY NPC Eighth Respondent

THE COMMISSIONER OF THE COMPANIES AND INTELLECTUAL PROPERTY COMMISSION Ninth Respondent

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email on 20 JUNE 2023.

JUDGMENT

FRANCIS, J

[1] This matter concerns opposed applications brought by Pienaar Brothers Proprietary Limited (the “applicant” or “Pienaar Brothers”) who seeks leave to amend its notice of motion and introduce a supplementary founding affidavit (“the interlocutory applications”), and an application in terms of rule 30 of the Uniform Rules of Court brought by the first to sixth respondents (collectively referred to as “the respondents”) in which they challenge the enrolment of the main application for hearing as being premature and irregular.

[2] Although the interlocutory applications have their own legal requirements, they are inextricably linked as the basis for the amendment sought is explained in the supplementary affidavit which the applicant seeks to have admitted as evidence in these proceedings. In this judgment, I will first consider the interlocutory applications jointly and thereafter the rule 30 application.

THE INTERLOCUTORY APPLICATIONS

Relevant background facts

- [3] Since 1961, the applicant and its predecessors have operated a business supplying and distributing personal protective clothing and equipment (“PPE”) for use in various industries in South Africa under the trade names “*Pienaar Bros*” and “*Pienaar Brothers*”. The applicant trades predominantly in the Western Cape (including certain areas in the Southern Cape and the West Coast), the Eastern Cape, Durban, and the area south of Durban in KwaZulu-Natal (collectively referred to as “the southern territory”). It also has operations and customers in the Northern Cape, Namibia, and Angola.
- [4] As a result of several decades of trading, the “Pienaar Brothers” and “Pienaar Bros” trade names have developed a public reputation in the PPE market.
- [5] The sixth respondent, Brian Victor Lapiner (formally Pienaar) (“Mr Lapiner”), was an employee of the applicant in or about 1983 and became a director in or about 1985. Thereafter, he decided to move to Johannesburg with a view to extending the family business and formed Brian Pienaar Proprietary Limited (“the third respondent” or “Brian Pienaar”) for this purpose and commenced trading in Wadestown, Germiston, in 1988. The “family business” referred to was the applicant’s predecessor.
- [6] Brian Pienaar traded in PPE from 1988 to 1999. Thereafter, it became a holding company with controlling interests in various trading companies, with the first respondent, Brian Pienaar North Proprietary Limited (“Pienaar North”), being the main trading company of what the parties refer to as the “Pienaar

North group". The group's operations have historically been confined to the northern region of the country ("the northern territory").

[7] The second respondent, Basi Pienaar Bros Proprietary Limited, is a franchisee of the tenth respondent, Rhino Safety Manufacturing (Pty) Ltd (formally the Pienaar Bros Franchising (Pty) Ltd). The second respondent provides a complete range of the Pienaar North group's PPE products and is obliged in terms of its franchise agreement to utilise the trademarks registered by the Pienaar North group.

[8] The fourth and fifth respondents, like the second respondent, are existing franchisees of the tenth respondent and are authorised (and obliged) to use the Pienaar North group's trademarks in the course of their trade.

[9] The nature of the relationship between the applicant and the respondents is in dispute.

[10] The applicant's case, as set out in the founding affidavit in the main application, is that an agreement was concluded between its predecessor and Pienaar North from 1988 ("the 1988 agreement") in terms of which consent was given to Pienaar North to use the "Pienaar Brother" and "Pienaar Bros" trade names. In terms of the 1988 agreement, the applicant and the nascent Pienaar North business would operate and be maintained as distinct businesses. The applicant would continue to trade and would build up a business in the areas where it already traded – the southern territory – while the Pienaar North business would trade in areas where the applicant did not

trade, that is, in the northern territory. Appropriate measures would be adopted by Mr Lapiner to distinguish his new business from that of the applicant to avoid confusion in the market. In this regard, Pienaar North would insert the word “North” in its branding and marketing to distinguish its business from that of the applicant.

[11] In essence, the applicant alleges that the first respondent breached the agreement by expanding outside of the agreed territory and failing to use the distinguishing term “North” in all or some of its branding. In addition, the first and third respondents applied for and obtained registration of the Pienaar Bros logo and Pienaar Bros word marks, and permitted entities such as the second, fourth and fifth respondents to use the Pienaar Bros trading names and styles without the applicant’s authority.

[12] The relief sought by the applicant (at least in prayers 1 to 3) was to enforce the terms of the 1988 agreement by way of interdicts against the first respondent and to the extent necessary, the third respondent. The applicant also sought an order for transfer of the domain name pienaarbros.co.za to the applicant (prayer 4), an order for cancellation of trade mark applications filed by the first and third respondents (prayer 5), interdicts against the second respondent in relation to use of the Pienaar Bros trademarks, trading getup and styles, and the alleged passing off (prayers 6 and 7), an order declaring the sixth respondent a delinquent director and his removal as a director of the applicant (prayer 8), and an order declaring that the company names of the fourth and fifth respondents are contrary to section 11 of the Companies Act

(prayers 9 and 10).

[13] Mr Lapiner deposed to an extensive answering affidavit on behalf of the respondents in which he refuted the form and content of the 1988 agreement as described by the applicant. He noted that the deponent to the founding affidavit had confused the first and third respondents. He pointed out that he had commenced business with the third respondent and that the first respondent was only established in 1999 due to a corporate restructure. Mr Lapiner denied that there was any trademark licence agreement in place and averred that there was instead a “*co-existence agreement*” in place from 1988 and that a “*territorial restraint agreement*” was entered into in the early 1990’s.

[14] According to the respondents: (i) the co-existence agreement was simply that the business in the north (however constituted) would trade as Pienaar Brothers; (ii) the consent extended to subsidiaries of Brian Pienaar, and included the right to confer licences on others to use the name for the ultimate benefit of Brian Pienaar and its subsidiaries; and (iii) the two businesses (the applicant and the Pienaar North group) have co-existed for more than 30 years and have used the same trading name over that period.

[15] Mr Lapiner stated that the concept of goodwill or reputation in the trading name “Pienaar Bros” was not discussed between the parties. His understanding was that the effect of the co-existence agreement was that the reputation in the trading name “Pienaar Brothers” and “Pienaar Bros” is shared (indivisibly) between them and that, as a result, neither party can now

lay claim exclusively to the reputation in the name, which is what the applicant seeks to do by way of the main application.

[16] There were also no conditions attached to the Pienaar North group's use of the trading name because everyone involved stood to benefit from the use of that name and were therefore content for the two business to co-exist, wherever they traded. [It must be mentioned that it is not in dispute that there were, and continues to be, cross-shareholdings and/or directorships in the applicant and the Pienaar North group of companies]. Finally, according to Mr Lapiner, there was never any agreement that the third respondent (and now the Pienaar North group) was required to use the word "North" as part of its trading name to distinguish its products and services from that of the applicant. Mr Lapiner, of his own accord, decided to add a geographic element to the Pienaar Brothers trade name but did so only to indicate the geographic region in which the Pienaar North group was operating.

[17] The respondents agree that there was a territorial restraint agreement between the parties which was, in effect, the 1988 agreement. However, according to Mr Lapiner, Brian Pienaar was already trading as "Pienaar Bros" (under the terms of the co-existence agreement) when the territorial restraint agreement was concluded.

[18] The applicant filed a replying affidavit in which it disputed the characterisation of the 1998 agreement as merely a territorial restraint agreement in terms of which each party agreed to operate in certain geographical areas. According

to the applicant, the 1998 agreement was in fact a trademark license agreement which permitted Pienaar North to use the “Pienaar Brothers” and “Pienaar Bros” trademarks. In its replying affidavit, and the supplementary founding affidavit it seeks to have admitted, the applicant stated that it considered the respondents’ version as set out in the answering affidavit to involve a clear repudiation of any agreement(s) in terms of which the Pienaar North group had consent (expressly or tacitly) to use the Pienaar Bros trademarks. According to the applicant, the content of the answering affidavit also demonstrated that the first and the third respondents acted in a manner that was completely inimical to a trademark licence agreement.

- [19] The applicant submitted that the conduct which constituted a repudiation includes: (i) the first and third respondents, without the applicant’s knowledge, claiming proprietary rights in the Pienaar Bros trademarks and clandestinely filing trade mark applications and obtaining registration in respect of them; (ii) the Pienaar North group, by their own admission, encroaching on the trading territory of Pienaar Brothers; (iii) the first and third respondents filing marker and leniency applications with the Competition Commission setting out a version of the relationship with the applicant which is at odds with the 1988 agreement that has been in place for decades; and (iv) the establishment of the tenth respondent as franchisor, and permitting that company to conclude agreements with franchisees (such as the second, fourth and fifth respondents), in terms of which it claims ownership of, or that it is licensed to use, the Pienaar Brothers or Pienaar Bros trademarks – the tenth respondent

was joined in the main application pursuant to an order granted on 14 October 2022.

[20] The applicant argued that repudiation makes it impossible, and untenable, for it to continue with any contractual relationship in place in terms of which the Pienaar North group would continue using the Pienaar Brothers' trademarks (on either the applicant's or the respondents' versions of the agreement(s)). It, accordingly, decided to accept the repudiation of any such agreement(s) (which would include the 1988 agreement on the applicant's version and/or the "*co-existence agreement*" and "*territorial restraint agreement*", on the respondents' version) and notified the respondents of its election to do so and its cancellation of the agreement(s).

[21] As a result of the cancellation of the agreement(s), the applicant seeks leave to amend its notice of motion by deleting any prayer in the notice of motion requiring relief to enforce the 1988 agreement, adding new prayers for relief consequent upon the cancellation of the agreement(s), and the re-numbering of paragraphs in the notice of motion. The amendments sought to the notice of motion are as follows:

[21.1] The insertion of a new prayer 1 for an order declaring that the conduct of the Pienaar North group constitutes a repudiation of the 1988 agreement, or any agreements found to have been in place between the parties, and that the agreement(s) have been validly cancelled. In this regard, the applicant maintains that the agreement which was

concluded was the 1988 agreement described in the founding affidavit and that this is the agreement that falls to be cancelled but argues that even if the respondents' version of two separate agreements is accepted, the outcome would be the same.

[21.2] Not persisting with the orders in prayers 1, 3 and 6 of the notice of motion;

[21.3] Amending prayer 2 to provide that the first, second, third, fourth, fifth and tenth respondents (and not merely the first and third respondents) be interdicted and restrained from using the trading names "Pienaar Brothers" or "Pienaar Bros", or any confusingly or deceptively similar names or trademarks, anywhere in South Africa. It was stated in the founding affidavit that it was not clear whether the fourth and fifth respondents were trading (and thus whether interdictory relief was required to be sought against them). The applicant submitted, however, that it became apparent from the respondents' answering papers that these entities are "franchisees", and so it is necessary to obtain interdictory relief against them as well. In addition, the tenth respondent has now been joined and the interdictory and ancillary relief based on passing off is also sought against it.

[21.4] Inserting a new prayer 3 that introduces an additional order for the delivery up or destruction of all and any materials in the possession of the first, second, third, fourth, fifth and tenth respondents which bear

the Pienaar Brothers' trademarks or any other names or trademarks confusingly or deceptively similar thereto.

[21.5] Renumbering prayer 4 as prayer 5;

[21.6] Inserting a new prayer 4 that introduces an additional order for an enquiry into the amount of any damages, or a reasonable royalty, as a result of the unauthorised use by the first, second, third, fourth, fifth and tenth respondents of the applicant's trademarks.

[21.7] Renumbering prayer 5 as prayer 6.

[21.8] Amending prayer 7 to extend the interdict in relation to the alleged passing off to include not only the second respondent but also the first, third, fourth, fifth and tenth respondents.

[21.9] Amending prayer 8 relating to the removal of Mr Lapiner as a director of the applicant with an order that the ninth respondent impose a ban on him from holding any directorship position for a period of 7 years from the date of the order. According to the applicant, this amendment is occasioned by the fact that Mr Lapiner resigned as director of the applicant on 6 April 2022, being the same day he signed the answering affidavit. Therefore, it was no longer necessary for the applicant to seek an order directing the ninth respondent to remove him as a director of the applicant, as the old prayer 8 did. The applicant still, however, persists in its request that he be declared a delinquent director.

[21.10] Amending prayers 9 and 10 to extend the ambit of the orders sought prohibiting the use of the word “Pienaar Bros” in the names of not only the fourth and fifth respondents but the second respondent as well.

[21.11] Amending prayer 11 by including an order for costs against the tenth respondent in addition to the first, second, third, fourth, and fifth respondents.

[22] The applicant has set out the amendments it seeks in its replying affidavit and explained that it considered it necessary and appropriate to also file a supplementary founding affidavit to canvass these issues, as opposed to simply dealing with the matter in reply. The applicant’s supplementary founding affidavit provides the respondents with an opportunity of dealing comprehensively with the new allegations in a supplementary answering affidavit (should it choose to do so), and also allows the applicant to file a replying affidavit in response to any new matter that may be raised therein, if necessary.

[23] The respondents filed an extensive opposing affidavit in which it was submitted, and argued, that if the amendment application was granted and the supplementary founding affidavit allowed, it would bring about a fundamental change in the nature of the case that the respondents are called upon to meet. They argued that the applications ought to be dismissed because their grant will occasion considerable prejudice to the respondents for at least the

following four reasons:

- [23.1] First, the applicant seeks to introduce a new cause of action not foreshadowed in the founding papers;
- [23.2] Second, the applicant seeks to introduce a new factual basis for the new relief sought, in the form of a new version as to nature of the contractual relationship between the parties. The new version is irreconcilable with the facts advanced in the founding affidavit and in circumstances where the facts stated in the founding affidavit have not been retracted or corrected;
- [23.3] Third, the supplementary founding affidavit is excipiable on account of the fact that (i) the applicant fails to plead the terms of the agreement upon which it relies for its new cause of action (repudiation of “any” agreement between the parties) with the requisite clarity; and (ii) no case has been made out for repudiation of the “trade mark licence” introduced for the first time in the supplementary founding affidavit.
- [23.4] Finally, it was submitted that the application was made in bad faith. Most of the facts relied upon by the applicant in support of its new case for repudiation were known to it before it launched the main application. Therefore, the applicant’s explanation for seeking to introduce them now, and change its case, is contrived.

[24] In support of its submission that the applicant seeks to impermissibly introduce a new cause of action based on irreconcilable versions of fact in the founding affidavit and the supplementary founding affidavit, the respondents submit that:

[24.1] The applicant's case previously concerned an alleged breach of the 1988 agreement by the first respondent arising as a result of encroachment into the applicant's territories and its failure to use the distinguishing term "North". The applicant's case for passing off was limited to a claim that the first and second respondents were passing off their business as that of the applicant because they were operating outside of the scope of the 1988 agreement.

[24.2] If the amendment and supplementation is permitted, the applicant's case will be concerned with an alleged repudiation and cancellation of a purported trademark licence granted to the Pienaar North group which was not pleaded in the founding affidavit and does not, and cannot, exist on the facts pleaded in the founding affidavit.

[24.3] The applicant's assertion in its founding affidavit that one of material terms of the 1988 agreement was the undertaking provided by the Pienaar North group to use the distinguishing term "North" in its marketing and branding, is wholly inconsistent and irreconcilable with a trademark licensing arrangement. The respondent argued that trademark law and the law of passing off serves only to protect a trade

mark proprietor (and permits the grant of interdictory relief) against the use of a mark by a respondent that is so similar to the registered trade mark as to give rise to confusion or deception. The Pienaar North group does not require a licence to use a trademark which does not cause confusion in the relevant trade.

[24.4] The respondents argue that for so long as the founding affidavit serves before this Court, those are the facts to which the respondents must respond and which this Court must have regard to. The difficulty for the respondents is that they do not know what case they are being called upon to answer: how do they reconcile an allegation, in the founding affidavit, that a material term of the 1988 agreement was that Pienaar North group was required to adopt measures to avoid confusion and use a distinguishing trade mark (and thus a version of the agreement which is the very antithesis of a trade mark licence) with the allegation, in the supplementary founding affidavit, that the 1988 agreement is a trade mark licence?

[25] The applicant's response was that the 1988 agreement is a trademark license agreement. According to the applicant, a trademark license is no more than permission to use a trademark. Mr Lapiner admitted that he was given consent to use the Pienaar Bros trademarks and thus can never claim *bona fide* proprietorship or common law rights in the trademark. The 1988 agreement was not a co-existence agreement but a licence to use the Pienaar Brothers trademarks. All goodwill arising from the use of the mark by the

Pienaar North group inures to the benefit of the applicant. The applicant also disputed that a distinguishing mark is antithetical to a trademark licence.

[26] Before considering the arguments and submissions of the parties, it is necessary to briefly outline the relevant legal principles applicable to the interlocutory applications¹.

[27] The ordinary rule (or default position) is that three sets of affidavits are allowed, namely: founding affidavits, answering affidavits, and replying affidavits. The court, however, has a discretion in terms of rule 6(5)(e) of the Uniform Rules to permit the filing of further affidavits in certain instances. Whilst a court is guided by the principle that the parties should be permitted to have the case adjudicated on the full facts, the court will only exercise its discretion to permit a further set of affidavits in exceptional circumstances², special circumstances³, or if a court considers it advisable⁴. It is essentially a question of fairness to both sides as to whether or not further sets of affidavits should be allowed.⁵

[28] In exercising its discretion, the court will consider factors such as the reason why the evidence was not produced timeously, the degree of materiality of the evidence, the possibility that the further affidavit may have been shaped to cure a material defect in the papers, the balance of prejudice to the applicant

¹ Both parties delivered detailed heads of argument on the legal principles applicable to all three applications for which I am grateful, and from which I have drawn liberally.

² *Kasiyamhuru v Minister of Home Affairs* 1991 (1) SA 643 (W) at 649 to 650.

³ *Joseph and Jeans v Spitz* 1931 WLD 48.

⁴ *Reiseberg v Reiseberg* 1926 WLD 59.

⁵ *Milne NO v Fabric House (Pty) Ltd* 1957 (3) SA 63 (N) at 65A.

if the application is refused and the prejudice to the respondent if it is granted, the stage which the particular litigation has reached, and the general need for finality in judicial proceedings⁶. If the court is satisfied on a conspectus of the aforementioned factors, it will generally be inclined towards allowing the further affidavits to be filed.⁷ While a further affidavit as contemplated in the above-cited authorities might frequently be a supplementary answering or replying affidavit, it could also be a supplementary founding affidavit.⁸

[29] The court has a discretion to refuse or grant amendments under rule 28 of the Uniform Rules. Whilst it is desirable that all facts be placed before the court to facilitate the effective ventilation of a dispute, the court's discretion must be exercised judicially and on proper principles.⁹ These principles are summarised by the Constitutional Court in *Affordable Medicines Trust and Others v Minister of Health and Others*¹⁰:

"[9] ... [A]mendments will always be allowed unless the amendment is mala fide (made in bad faith) or unless the amendment will cause an injustice to the other side which cannot be cured by an appropriate order for costs, or 'unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed'."

⁶ *Porter Straat 69 Eiendomme (Pty) Ltd v PA Venter Worcester (Pty) Ltd* 2000 (4) SA 598 (C); and *Mkwanazi v Van Der Merwe* 1970 (1) SA 609 (A) at 626 A – G.

⁷ *Transvaal Racing Club v Jockey Club of South Africa* 1958 (3) SA 599 (W) at 604 A – F.

⁸ *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA).

⁹ *Caxton Ltd v Reeve Forman (Pty) Ltd* 1990 (3) SA 547 (A) at 565 G.

¹⁰ *Affordable Medicines Trust And Others v Minister of Health and Others* 2006 (3) SA 247 (CC) at para 9.

[30] The courts have further emphasised that proposed amendments must raise a triable issue that is sufficiently important to justify the prejudice and costs to the other parties and the court.¹¹ The primary object of allowing an amendment is to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done.¹² There is no objection, in principle, to a new cause of action or defence being added by way of an amendment, even though it has the effect of changing the character of the action and necessitating the reopening of the case for fresh evidence to be led, if that is necessary to determine the real issues between the parties.¹³

Discussion

[31] The respondents filed an extensive opposing affidavit in which they strongly asserted that the interlocutory applications should not be permitted. They argue, in the main, that the proposed amendments would in effect result in the application failing to disclose a cause of action or being vague and embarrassing in the sense that the respondents do not know what case they are being called upon to meet.

[32] In essence, the type of objection raised by the respondents is akin to an exception in action proceedings. Rule 23(1) of the Uniform Rules provides *inter alia* that where any pleading is vague and embarrassing or lacks

¹¹ **Caxton Ltd And Others v Reeva Forman (Pty) Ltd And Another 1990 (3) SA 547 (A)** at 565, citing De Villiers JP in **Krogman v Van Reenen 1926 OPD 191** at 195.

¹² **Benjamin v Sobac South African Building and Construction (Pty) Ltd 1989 (4) SA 940 (C)** at 957 H – 958 C.

¹³ **Myers v Abramson 1951 (3) SA 438 (C)** at 449 H – 450 A.

averments to sustain an action, the opposing party may deliver an exception thereto and may set it down for hearing; provided that where a party tends to take an exception that a pleading is vague and embarrassing, the opponent must be given an opportunity of removing the cause of complaint. There is no comparable procedure for exceptions in application proceedings as rule 23 only applies to action proceedings. As Schippers J noted in ***WP Fresh Distributors v Klaaste NO & Others***¹⁴:

“[5] ... in applications there is no recognized procedure for raising an exception before the case comes to trial. Instead, rule 6(5)(d) requires any person opposing an order sought in the notice of motion to notify the applicant in writing that he or she intends to oppose the application; and to deliver an answering affidavit within 15 days of the notice of intention to oppose. If a respondent intends to raise only a question of law, he or she is required to deliver a notice of this intention, setting forth the question of law. Thus a respondent who wishes to raise a preliminary point that a case is not made out in the founding papers, must do so in the answering affidavit. This construction is buttressed by rule 6(14) which expressly states that rules 10, 11, 12, 13 and 14 apply mutatis mutandis to all applications. Rule 23 is not one of them.”

[33] Accordingly, where a respondent opposes the relief sought in the notice of motion and intends only to raise a point of law (such as that no cause of action is made out in the founding affidavit), he or she must file a rule 6(5)(d) (iii) notice. However, where the respondent also intends to oppose the merits

¹⁴ [2013] ZA WCHC 95 (23 April 2013) quoted with approval in *Lang v Wilhelmus* [2023] JOL 57874, at para 5. See also *Minister of Finance v Public Protector and Others* 2022 (1) SA 244 (GP) at para 13.

by way of an answering affidavit, it is preferable that the point of law be taken as a point *in limine* in the answering affidavit itself.

[34] In this matter, the objections raised by the respondents are not confined merely to points of law but traverses the merits as well. The respondents have already filed an answering affidavit and the applicant has filed its replying affidavit. In the circumstances, a notice in terms of rule 6(5)(iii) would not have assisted the respondents. The respondents could, however, have raised their points *in limine* or submissions relating thereto in a supplementary answering affidavit. If the application did not disclose a cause of action or the proposed amendments resulted in the applicant's pleadings being vague and embarrassing, the respondents could have pointed out any contradiction and have either denied the averment or pleaded that they are not able to confirm or deny any averment or portion thereof.

[35] The respondents have raised a plethora of issues for consideration by this Court. However, in my view, many of the arguments advanced by the respondents relate to issues on the merits which ought properly to be dealt with by the court hearing the main application: the precise terms of the 1988 agreement and whether or not, in context, it was in fact a trademark licensing agreement, the nature and ambit of the consent granted to Mr Lapiner when he commenced the new business, whether the use of a distinguishing mark is permissible in trademark law, the nature of a protectable interest in an unregistered trademark, whether the first and/or the third respondents could ever claim to be the *bona fide* proprietor in and to the "Pienaar Brother" and

“Pienaar Bros” trademarks, and the effect (if any) of the competition law issues raised by the respondents. What this court has to decide is simply whether the amendments sought to be effected to the notice of motion are *bona fide* and are such that they do not cause undue prejudice to the respondents.

[36] I am of the view that the founding affidavit, when read with the supplementary founding affidavit, is not so unintelligible or contradictory at a factual or legal level that it prejudices the respondent from furnishing a response thereto. From the detailed response provided by the respondents in their opposing affidavit to the interlocutory applications, it certainly appears that they know what case they must meet; indeed, much of the ground covered in their affidavit opposing the interlocutory applications was foreshadowed in their answering affidavit.

[37] The fact that the respondent chooses to provide a different version of historical events and a different interpretation of the nature of the consent granted to the third respondent in 1988, does not alter the applicant’s version in the founding affidavit or in the proposed supplementary founding affidavit. Quite simply, the applicant alleges that in terms of the 1988 agreement, the third respondent was granted the right to use the Pienaar Brothers and Pienaar Bros trademarks which the Pienaar North group has now impermissibly appropriated to itself. As noted, it is not the function of this Court to determine the merits of this matter. Suffice to say, I am of the view that there is some merit in the applicant’s contention that a trademark license

agreement was always the basis on which the agreement for Mr Lapiner to extend the family business was concluded. The respondents do not dispute that Mr Lapiner only started his business in 1988 with the consent of the applicant to use the latter's trade name and branding. At that stage, Brian Pienaar did not have any independent trademark of its own. What else could the applicant have consented to but the licence to use the applicant's trademarks which, it is not disputed, had at that stage developed considerable goodwill and reputation?

[38] Insofar as the respondents' argument that a new cause of action is sought to be introduced, namely "*repudiation of a trademark licence*", I am of the view that this is not the case and that there is some merit in the applicant's contentions in this regard. The repudiation is not an entirely different cause of action. The applicant's cause of action has always been based on contract, and the claim based on repudiation is thus merely an extension and modification of what was previously claimed in the contractual context. What is now expressly in issue is whether the conduct of the respondents constitute a repudiation which entitles the applicant to cancel the contract that was in place; if there has indeed been a valid cancellation of the contract, the respondents have no permission to use the Pienaar Brothers and Pienaar Bros trademarks, which is what the amended relief reflects.

[39] Even if it was to be found that a new cause of action would be introduced because of the amendment, that would not necessarily mean that the amendment must be refused. This Court can exercise its discretion to allow

such an amendment¹⁵ having regard to the fact that it involves the same parties, the same facts, and similar issues. The alternative would be for the applicant to withdraw the application, pay the wasted costs, and bring the application again supplemented by the new matter. This would result in a waste of time, costs, and a less than optimal use of scarce judicial resources.

[40] The respondents also argue that the interlocutory applications have been launched in bad faith and are designed to cure the initial difficulties in the applicant's founding affidavit, that the facts sought to be introduced were always within the knowledge of the applicant, and that the applicant seeks to avoid the competition law issues which it has to confront in light of the submissions in this regard in the respondents' answering affidavit. I do not agree. It is quite evident from the papers before me that some of the information could only have come to the applicant's attention when the answering affidavit was filed, such as the nature of the relationship between the first to sixth respondents *inter se* and, of course, Mr Lapiner's version of the consent granted in 1988. In addition, the competition law machinery has already been activated and the competition law authorities will no doubt act in accordance with the law, rules, practices and procedures which regulate their handling of any competition law issues; their actions are unlikely to depend on whether or not this Court grants the amendment sought or allows the introduction of the supplementary affidavit.

[41] In my view, there is no merit in any of the arguments raised by the respondents. The proposed amendments to the applicant's notice of motion

¹⁵ *Marigold Ice Cream (Pty) Ltd v National Co-operative Dairies Ltd 1997 (2) SA 671 (W)* at 677-678.

seeks to address the real issues between the parties as they have now crystallised; there can be no reasonable objection to that. Granting leave to file a supplementary founding affidavit provides the respondents with adequate opportunity to address the new allegations and prayers; again, the respondents could suffer no discernible prejudice therefrom.

Rule 30 application

[42] The respondents' rule 30 application is premised on the contention that the applicant prematurely applied to have the main application enrolled for hearing when it was not ripe for hearing as pleadings in the main application had not yet closed. In doing so, the respondents argued that the applicant failed to comply with rule 29 of the Uniform Rules and paragraphs 38 and 39 of section D (headed "*Trials and Opposed Matters*") of the Practice Directives of the Western Cape Division of the High Court dated 1 June 2022 ("the Practice Directives").

[43] The facts giving rise to the rule 30 application are not in dispute. The main application was filed on 10 December 2021. On 5 July 2022, after receipt of the answering papers in the main application, the applicant filed the following:

[43.1] a replying affidavit in the main application;

[43.2] a notice in terms of Rule 28(1) containing details of how it intended to amend its notice of motion;

[43.3] a supplementary founding affidavit and an application to have the supplementary founding affidavit admitted as evidence in the main application proceedings; and

[43.4] a joinder application in terms of which it requested the joinder of the tenth respondent.

[44] On 8 August 2022, the respondents filed a notice to oppose the application to have the supplementary founding affidavit admitted as evidence and a notice of objection to the applicant's Rule 28(1) notice.

[45] On 18 August 2022, the applicant's attorneys advised the respondents' attorneys that they had applied for the main application to be enrolled for hearing on the opposed roll and provided them with a copy of the notice of enrolment dated 17 August 2022. The respondents' attorneys, on 19 August 2022, addressed correspondence to the applicant's attorneys alleging, *inter alia*, that it was inappropriate for the applicant to have enrolled the main application for hearing and requested the applicant to "*remove the enrolment of the matter*". In this correspondence, the respondents' attorneys confirmed that they were of the view that the applicant's interlocutory applications should be set down for hearing on the same day and that the date for the hearing of these applications could be agreed to beforehand between the parties and the Registrar.

[46] The applicant's attorneys disagreed and, on 23 August 2022, responded to the respondents' attorneys and indicated, *inter alia*, that:

[46.1] the early enrolment of the matter was necessary due to the backlog in the Fourth Division of the Western Cape High Court, which meant that a hearing before May or June 2023 was highly unlikely;

[46.2] it is not customary in the Western Cape Division for parties to agree on hearing dates beforehand because it is less likely that the parties' respective legal counsel will be unavailable many months down the line;

[46.3] if the allocated date of the hearing of the main application turned out to be a problem, both parties could approach the office of the Judge President to seek to have a mutually acceptable alternative date secured;

[46.4] while the applicant was willing to accede to the respondents' request that the applicant's interlocutory applications be heard before the main application, this did not mean that the applicant was required to accept that the hearing of the main application should be delayed indefinitely;

[46.5] in the applicant's view, the parties should approach the Judge President to arrange a suitable date for the hearing of the interlocutory applications; and

[46.6] there would be more than enough time after the aforesaid interlocutory applications had been heard for the parties to exchange further supplementary answering and replying affidavits if the applications were granted, and for the main application still to proceed on the date, in the last week of July 2023, on which it had been set down.

[47] The respondents were not satisfied with this response and a rule 30(2)(b) notice was served on the applicant. The applicant still refused to remove the main application from the roll and the respondents then filed the rule 30 application on 3 October 2022.

[48] Meanwhile, on 13 September 2022, the respondents had filed an answering affidavit in opposition to the applicant's interlocutory applications. The applicant's replying affidavit in those applications was filed on 14 October 2022. Therefore, by 14 October 2022, the papers in the applicant's opposed interlocutory applications were complete.

[49] The joinder application – which was unopposed – was enrolled for hearing on 14 October 2022 and was granted on that day.

[50] After the tenth respondent had been added to the main application pursuant to the joinder application, a supplementary affidavit setting out the amended relief which would be sought against the tenth respondent was filed by the applicant on 4 November 2022

Relevant legal provisions and authorities

[51] Rule 6(5)(f) of the Uniform Rules – on which the applicant relies - reads as follows:

- “(f)(i) Where no answering affidavit, or notice in terms of sub-paragraph (iii) of paragraph (d), is delivered within the period referred to in sub-paragraph (ii) of paragraph (d) the applicant may within five days of the expiry thereof apply to the registrar to allocate a date for the hearing of the application.*
- (ii) Where an answering affidavit is delivered the applicant may apply for such allocation within five days of the delivery of a replying affidavit or, if no replying affidavit is delivered, within five days of the expiry of the period referred to in paragraph (e) and where such notice is delivered the applicant may apply for such allocation within five days after delivery of such notice.*
- (iii) If the applicant fails so to apply within the appropriate period aforesaid, the respondent may do so immediately upon the expiry thereof. Notice in writing of the date allocated by the registrar must be given by the applicant or respondent, as the case may be, to the opposite party within five days of notification from the registrar.” (my emphasis)*

[52] Rule 29 – on which the respondents” rely - provides as follows:

- “29 Close of pleadings and Notice of Set Down of trials**
Pleadings are considered closed if —

- (1)
 - (a) *either party has joined issue without alleging any new matter, and without adding any further pleading;*
 - (b) *the last day allowed for filing a replication or subsequent pleading has elapsed and it has not been filed;*
 - (c) *the parties agree in writing that the pleadings are closed and such agreement is filed with the registrar; or*
 - (d) *the parties are unable to agree as to the close of pleadings, and the court upon the application of a party declares them closed.*
- (2)
 - (a) *Upon allocation of a date or dates for trial, the registrar must inform all parties of the allocated dates.*
 - (b) *The party which applied for the trial date must, within 10 days of notification from the registrar, deliver a notice informing all other parties of the date or dates on which the matter is set down for trial.” (my emphasis)*

[53] Rule 30 – in terms of which the respondents’ application has been brought – reads thus:

“30 Irregular proceedings

- (1) *A party to a cause in which an irregular step has been taken by any other party may apply to court to set it aside.*
- (2) *An application in terms of subrule (1) shall be on notice to all parties specifying particulars of the irregularity or impropriety alleged, and may be made only if —*
 - (a) *the applicant has not himself taken a further step in the cause with knowledge of the irregularity;*
 - (b) *the applicant has, within ten days of becoming aware of the step, by written notice afforded his opponent an opportunity of removing the cause of complaint within ten days;*

- (c) *the application is delivered within fifteen days after the expiry of the second period mentioned in paragraph (b) of subrule (2).*
- (3) *If at the hearing of such application the court is of opinion that the proceeding or step is irregular or improper, it may set it aside in whole or in part, either as against all the parties or as against some of them, and grant leave to amend or make any such order as to it seems meet.*
- (4) *Until a party has complied with any order of court made against him in terms of this rule, he shall not take any further step in the cause, save to apply for an extension of time within which to comply with such order.”*

[54] Paragraphs 38 and 39 of the Practice Directives provide that:

“D. TRIALS AND OPPOSED MATTERS

38. *Upon the close of pleadings, the plaintiff’s Legal representative, or if he or she fails to do so, any party, may apply for a trial date by entering the relevant particulars as required by the Registrar in a register kept for that purpose.*
39. *Before applying for a date of set down, the Legal representative in question shall collate, number consecutively and suitably secure all pages of the pleadings and documents in the court file. A complete index thereof, together with a questionnaire substantially in accordance with form E in the Schedule hereto, shall also be prepared and delivered.”*

[55] In **SA Metropolitan Lewensversekeringsmaatskappy Bpk v Louw NO**,¹⁶

Flemming J described the object of Rule 30(1) as follows:

¹⁶ 1981 (4) SA 329 (O) at 333 G-H.

"I have no doubt that Rule 30(1) was intended as a procedure whereby a hindrance to the future conducting of the litigation, whether it is created by a non-observance of what the Rules of Court intended or otherwise, is removed."

[56] Rule 30 is only applicable to irregularities of form and not to matters of substance,¹⁷ and proof of prejudice is a prerequisite to be successful in a rule 30(1) application.¹⁸ The court moreover has a discretion under rule 30 and is entitled to overlook, in proper cases, any irregularity which does not cause any substantial prejudice to the other party.¹⁹ As stated by Cloete J (as he then was) in ***Uitenhage Municipality v Uys***:²⁰

*"The principle has repeatedly been laid down in our Courts that the Court is entitled to overlook, in proper cases, any irregularity in procedure which does not work any substantial prejudice to the other side...In ***Trans-African Insurance Co. Ltd. v Maluleka***, Schreiner JA says:*

"... technical objections to less than perfect procedural steps should not be permitted, in the absence of prejudice, to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits" (text-book reference and case citation omitted).

[57] While it is possible in principle for a rule 30 application to be brought complaining of a premature set-down²¹, it would need to be shown not only that the set-down was irregular, but also that this caused the complaining party real or substantial prejudice.

¹⁷ ***Singh v Vorkel*** 1947 (3) SA 400 (C) at 406.

¹⁸ ***Gardiner v Survey Engineering (Pty) Ltd*** 1993 (3) SA 549 (SE) at 551 C-D.

¹⁹ ***Trans-African Insurance Co Limited v Maluleka*** 1956 (2) SA 273 (A) at 276 F-H.

²⁰ 1974 (3) SA 800 (E) at 805 D-F (quoted with approval in ***Gardiner v Survey Engineering (Pty) Ltd***. Id. at 551G-H.

²¹ ***Santam Versekeringsmaatskappy v Leibrandt*** 1969 (1) SA 604 (C).

Discussion

[58] The respondents contend that the applicants set down of the main application is irregular in that the applicant failed to comply with rule 29 of the Uniform Rules and with paragraphs 38 and 39 of the Practice Directives. However, it is quite apparent from rule 29 that this rule applies to trials and not to opposed applications. Similarly, the relevant paragraphs of the Practise Directives relied on by the respondents apply to trials, notwithstanding the use of the words "**AND OPPOSED MATTERS**" in the heading. The form E referred to in the Practise Directives relates to a Rule 37 Questionnaire that must be completed on behalf of the parties to action proceedings. The set down by the applicant of the main application cannot thus be irregular on the basis argued by the respondents and must fail on this score alone.

[59] I agree with applicant's counsel that the operative rule in relation to the set down of applications is rule 6(5)(f). On the undisputed facts, the replying affidavit was filed on 5 July 2022. The applicant therefore became entitled to apply for a hearing date five (5) days thereafter, in terms of Rule 6(5)(f)(ii), ie from 13 July 2022 onwards. The main application was enrolled for a hearing date on 17 August 2022, and the enrolment was thus not premature or irregular.

[60] The respondents also contend that the main application was enrolled prematurely and irregularly because the two interlocutory applications would

have to be heard first. This is not quite so. Rather, opposed interlocutory applications, such as those of the applicant, would, in the ordinary course, be set down for hearing together with the main application, with a party resisting such applications conditionally “pleading over”, should they so choose, thereby catering for an eventuality in which they are unsuccessful in resisting the interlocutory applications. In this matter, the applicant agreed with the respondents to have the opposed interlocutory applications determined first. This did not mean, however, that the applicant was not entitled to apply for a hearing date in the main application. As it turned out, the applicant’s interlocutory applications were indeed set-down some four months before the hearing date of the main application.

[61] Since the set-down of the main application for hearing was not procedurally irregular or premature, the question of prejudice does not arise.

[62] Given the conclusion reached by this Court in respect of the interlocutory applications, it is likely that the main application will not be able to proceed on 26 July 2023. However, the applicant has already indicated that it is amenable to another set-down date, having stated the following in this regard in paragraph 4.12 of its answering affidavit in the rule 30 application:

“If circumstances beyond the parties’ control (not presently foreseeable) were to result in the main application being unable to proceed on the date that has been allocated, the parties could also agree to approach the office of the Judge President at that stage to make arrangements to possibly have a mutually acceptable hearing date secured.”

Hopefully, the parties will jointly approach the office of the Judge President to arrange a mutually convenient date for the hearing of the main application, should they wish to continue with this matter.

COSTS

[63] The applicant sought an indulgence with its interlocutory applications. As such, it would ordinarily bear the costs of these applications if the respondents' opposition was not unreasonable. Given the nature of the changes to the applicant's case foreshadowed by the interlocutory applications, the respondents' opposition was not unreasonable. However, the interlocutory applications were clearly as a consequence of the respondents answering affidavit. Given the detailed opposing affidavit and extensive heads of argument filed by the respondent, one wonders why the respondent did not adopt what might have been the more prudent course of filing a supplementary answering affidavit as was suggested by the applicant. In any event, the papers filed in the interlocutory applications may well lay the basis for any further papers which may have to be delivered in this matter. In the circumstances, it appears to be a much fairer result if the costs of the interlocutory applications were to be determined as costs in the cause.

[64] In so far as the rule 30 application is concerned, this is a discrete application and I do not see any reason to depart from the usual rule that costs follow the result.

[65] **ORDER**

In the circumstances, I grant the following order:

65.1. The application to have the supplementary founding affidavit of Jacqueline Bredebelet admitted as evidence in these proceedings, is granted.

65.2. The applicant is granted leave to amend its notice of motion as follows:

65.2.1 Deleting prayers 1, 3 and 6;

65.2.2 Inserting a new prayer 1 that reads as follows:

- *“Declaring that the conduct of the Pienaar North Group (as defined in paragraph 2.1 of the supplementary founding affidavit) constitutes a repudiation of the 1988 agreement (or any agreements found to have been in place between the parties) and that the agreement(s) has / have been validly cancelled.”;*

65.2.3 Amending the wording of prayer 2 to read as follows:

- *“Interdicting and restraining the First, Second, Third, Fourth, Fifth and Tenth Respondents from using the names ‘Pienaar Brothers’ or ‘Pienaar Bros’, or any other names or trademarks confusingly or deceptively similar thereto, anywhere in South Africa.”;*

65.2.4 Inserting a new prayer 3 that reads as follows:

- *“Ordering the First, Second, Third, Fourth, Fifth and Tenth Respondents, in the presence of an authorised agent of the Applicant, to destroy all printed matter and materials, product packaging, signage and the like bearing the names ‘Pienaar Brothers’ or ‘Pienaar Bros’ or any other names or trademarks confusingly or deceptively similar thereto, which are under their control; alternatively, at the option of the said respondents, to deliver up for destruction all such materials to the Applicant.”;*

65.2.5 Re-numbering prayer 4 to prayer 5;

65.2.6 Inserting a new prayer 4 that reads as follows:

- *“Directing that an enquiry be held for the purposes of determining the amount of any damages, or a reasonable royalty in lieu thereof, to be awarded to the Applicant as a result of unauthorised use by the First, Second, Third, Fourth, Fifth and Tenth Respondents of the infringing names ‘Pienaar Brothers’ and ‘Pienaar Bros’, or any other confusingly or deceptively similar names or trademarks thereto, in accordance with such procedures as the Honourable Court may deem fit, and that said Respondents be ordered, jointly and severally, to pay the amount found due to the Applicant.”;*

65.2.7 Re-numbering prayer 5 to prayer 6;

65.2.8 Amending prayer 7 replacing “*Second Respondent*” with the phrase “*First, Second, Third, Fourth, Fifth and Tenth Respondents*”;

65.2.9 Amending prayer 8 by replacing the phrase “*and directing the Ninth Respondent to remove him as a director of the Applicant*” with the phrase “*and directing the Ninth Respondent to impose a ban on the Sixth Respondent from holding any directorship position for a period of 7 years from the date of the order*”;

65.2.10 Amending prayer 9 by replacing the phrase “*Fourth Respondent, Nkosazana Pienaar Bros and the Fifth Respondent, Zahara Pienaarbros North*” with the phrase “*Second, Fourth and Fifth Respondents*”;

65.2.11 Amending prayer 10 by replacing the phrases “*Fourth Respondent and/or the Fifth Respondents*” with the phrase “*Second, Fourth and / or Fifth Respondents*”; and

65.2.12 Amending prayer 11 by replacing the phrase “*First, Second, Third, Fourth, Fifth and Sixth Respondents*” with the phrase “*First, Second, Third, Fourth, Fifth, Sixth and Tenth Respondents*”.

65.3. The costs of the applications referred to in paragraphs 65.1 and 65.2 above shall be costs in the cause.

65.4. The respondents’ application in terms of rule 30 of the Uniform Rules of Court is dismissed, and the first to sixth respondents are directed to pay the costs of this application, jointly and severally, the one paying the other to be absolved, including the costs consequent upon the employment of two

counsel, one of whom is a senior.

FRANCIS, J

APPEARANCES.

COUNSEL FOR THE APPLICANT: PBJ Farlam SC
LG Kilmartin

APPLICANT'S ATTORNEYS OF RECORD: Von Seidels
Hugo Prinsloo

COUNSEL FOR FIRST, SECOND, THIRD,
FOURTH, FIFTH, SIXTH AND

TENTH RESPONDENTS: S Symon SC
G Marriott
A Cachalia

FIRST, SECOND, THIRD, FOURTH,

FIFTH, SIXTH AND TENTH

RESPONDENTS ATTORNEYS OF RECORD:

BM Duchen Attorneys

Benji Duchen