REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 61246/2020

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

25 MARCH 2021

DATE

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SIGNATURE

SOUTH AFRICAN MEDICAL ASSOCIATION NPC — APPLICANT

And

SOUTH AFRICAN MEDICAL ASSOCIATION TRADE UNION — FIRST RESPONDENT

GERHARD VOSLOO N.O — SECOND RESPONDENT

DATE OF HEARING: This matter was enrolled for hearing on 1 March 2021, with appearance on Microsoft teams. DATE OF JUDGMENT: This judgment was hand down electronically by circulation to parties by email/caselines. The date and time of hand-down is deemed to be 25 March 2021.

JUDGMENT

Kollapen J

Introduction and the relief

[1] This application commenced as an urgent application but was not heard in the urgent court at the time due to the voluminous nature of the papers. By agreement between the parties the matter was then dealt with and allocated as a special motion.

[2] The applicant seeks both declaratory and interdictory relief in the following terms:-

2.1 That it be declared that the South African Registrars Association ("SARA") is a Special Interest Group ("SIG") of the Applicant;

2.2 Declaring that the Academic Doctors Association of South Africa ("ADASA") is a SIG of the Applicant;

2.3 Declaring that the Senior Doctors Association of South Africa ("SEDASA") is a SIG of the Applicant;

2.4 Declaring that the Junior Doctors Association of South Africa (JUDASA") is a SIG of the Applicant;

2.5 That the First and Second Respondents, and any other member of the First Respondent with its authority or otherwise, be interdicted and restrained from individually and/or jointly using, as its or his or their own, any or all of the SIG's of the Applicant identified in prayer 2.1 to 2.4 above, in any communication, either orally or in writing, addressed to the general public, the Applicant' members, including the members of the First Respondent, or the media or any government department and/or government official or otherwise;

2.6 That pending the registration of the SARA, ADASA, SEDASA or JUDASA trade marks in terms of s 29 of the Trade Marks Act, 194 of

1993 in the name of the Applicant, that the First and the Second Respondent, and any other member of the First Respondent with its authority or otherwise, be interdicted and restrained from individually and/ or jointly infringing within the meaning of s 34 of the Trade Marks Act, 194 of 1993 any of the said trademarks;

2.7 That the Respondents be interdicted and restrained from harassing and/ or intimidating any of the Applicant's SIG committee members by any means;

2.8 That the Respondents, jointly and severally, the one paying, the other to be absolved, be ordered to pay the cost of the application;

[3] Both the respondents oppose the relief sought.

The background facts

[4] There is an acrimonious relationship between the parties that has been characterised by ongoing litigation which at the present time also includes a pending application by the first respondent for the winding up of the applicant.

[5] Given that the dispute before this Court is essentially a contestation about whether the Special Interest Groups ('SIG's') that are referred to in the Notice of Motion are entities of the applicant or the first respondent, I will in the overview of the facts focus substantially on those facts that have triggered this dispute and are relevant to its determination.

[6] The applicant was established in 1927 and is registered as a non- profit company in terms of the company laws of South Africa. Its operations are overseen by a board of directors who have been elected in terms of its Memorandum of Incorporation (MoI).

[7] According to its MoI, the applicant was established with the commitment and objective of amongst other things to :-

a) uniting all doctors for the health of the nation and representing doctors on matters relating to their profession, and empowering the medical profession in the Republic of South Africa to bring health to the nation; and

b) regulating relations between employees and employers, including employer organisations, and fulfilling their role as trade union to represent the labour interests and rights of all medical doctors who are employees.

[8] Over time and in recognition that it had committed itself to representing its members in labour related issues, the applicant caused the establishment of the South African Medical Association Trade Union (SAMATU) and it was registered as such in terms of section 96(7)(a) of the Labour Relations Act No 66 Of 1995 on 7 October 2002.

[9] At this time SAMATU functioned as part of SAMA and did not enjoy a separate and independent status or identity but was managed under the auspices of SAMA. SAMATU experienced its own challenges in terms of its operations and its effective functioning leading to various interventions on the part of the applicant but matters came to a head in September 2019.

[10] An application was brought in the Labour Court by 3 doctors who sought declaratory relief to the effect that SAMATU was an independent and separate legal entity from SAMA.

[11] The Court granted an order placing SAMATU under administration. The second respondent is the duly appointed administrator of SAMATU and the

order of the Labour Court also provides that the applicant be entitled to participate in the management of the affairs of SAMATU.

[12] There was additional litigation between the parties that resulted in an order directing the applicant to provide SAMATU with information relating to SAMATU members which was in the possession of SAMA, declaring that stop order authorisations effected in terms of organisational or labour rights were the property of SAMATU and declaring that individuals in respect of whom such stop orders existed were members of SAMATU. Thus the effect of the order was to recognise the separate existence of SAMATU and to properly appropriate to it what would correctly fall under its mandate and control as a trade union.

[13] There was further litigation where the applicant secured an order that effectively interdicted SAMATU from claiming that it was an entity of SAMA or associated with it.

[14] It appears that both parties, despite their historical links, sought to carve out and establish an existence separate in law and in fact from each other which was probably as a matter of principle the right thing to do.

The position of the Special Interest Groups (SIG's)

[15] In all of this time though no Court was asked to pronounce on the position of the SIG's which is the subject matter of the current dispute.

[16] These special interest groups were established from about 1992 onwards and some of them predate the establishment of SAMATU. They were formed in accordance with the special interest they sought to advance of professionals in a particular category and the commonality of the professional interest was the key factor in how these groups were constituted.

[17] Those groups are:-

The Junior Doctors Association of South Africa (JUDASA)

The Senior Doctors Association of South Africa (SEDASA)

The Academic Doctors Association of South Africa (ADASA) and

The South African Registrars Association (SARA)

[18] These groups were formed having various objectives and they included advancing the professional interests and development of their members as well as their organisational and labour rights and until the order of the Labour Court of September 2019, they were so advanced by both the applicant as well as the first respondent, the latter as a structure of the applicant.

[19] In the organisational structure of the applicant as evidenced by its Memorandum of Incorporation and Company Rules the, SIGs are defined as being a part of the first respondent. The applicant says that these rules were never registered with the office of the Companies and Intellectual Properties Commission and are therefore not binding but at best are internal governance rules. While they may not have been registered it cannot be said that they do reflect a clear intention that from the perspective of the applicant, at the time, the SIGs were regarded as being part of SAMATU.

[20] What is also relevant however is that at the time of the adoption of the rules, SAMATU was regarded as being an integral part of the applicant and not a separate independent entity. This becomes important in the determination of where the SIGs could be said to be located for the purpose of determining this dispute.

[21] The Constitution of some of the SIGs also say that they are a part of SAMATU – all of these Constitutions however were adopted before the order of the Labour Court of September 2019. The applicant says that it was required to

ratify the amendments to the various constitutions of the SIGs and that such ratification did not take place with the consequence that the changes to those constitutions did not take effect.

[22] Finally the Constitution of SAMATU makes reference to the SIGs as forming part of SAMATU.

The Dispute

[23] Arising out of this the applicant maintains that all the SIGs predate the formation of SAMATU and that the SIGs were never intended to be a part of a separate, independent entity such as SAMATU has become and further that the main objectives of the SIGs were to advance the professional development of its members and not primarily as a vehicle to advance organisational and labour rights of those SIGs. They contend that SAMA never intended to gift the SIGs to SAMATU and that in addition reliance cannot be placed on the Company rules or the Constitutions of the SIGs as they did not take effect and in any event predated the independent existence of SAMATU.

[24] The respondent on the other hand place reliance on the Company Rules, the Constitutions of some of the relevant SIGs as well as its own Constitution as proving the evidence that the SIGs were regarded as a part of SAMATU and they therefore contend that the SIGs now properly reside within the organisational structure of SAMA.

[25] This application was triggered by events in November 2020 when the respondent wrote to the applicant taking issue with a communication addressed by the applicant to SARA members urging them to join a SARA interim structure. The first respondent's view was that SARA was a structure of the first

respondent and that the applicant was interfering in the business of the first respondent by communication with its structures.

[26] The applicant in turn denied that SARA and the other SIGs were structures of the first respondent and accused SAMATU who was in the process organising elections and sought to use the platforms of the SIGs for that purpose of unlawfully utilising the SIGs which they (the applicant) say are structures of and belong to the applicant. They sought an undertaking that the first respondent would desist from doing so on the basis that the SIGs belonged to and were a part of SAMA and that it was improper and impermissible for the first respondent to seek to use them as its own structures.

[27] At this time SAMATU also wrote to a member of JUDASA in the following terms :-

> *'This office wishes to bring to your attention that JUDASA is a subcommittee of the South African Medical Association Trade Union (SAMATU). It is therefore important to note that participation in this structure is only through being a member of SAMATU in good standing. Our records reflect that you are not a member of SAMATU and therefore your participation in JUDASA or purporting to be a representative of same is unlawful.'*

[28] The impasse as reflected in the correspondence between the parties remained unresolved and the applicant then proceeded with the launch of this application.

Analysis

[29] In the contestation for the ownership of the SIGs both parties seek to place reliance on a range of documents including the MOI and Company Rules of the applicant, the Constitution of the SIGs as well as the Constitution of the first respondent.

[30] What emerges from those documents is that the applicant, at a time when the first respondent was a part of its own structure located the SIGs within the structure of SAMATU. The Company Rules and the Constitutions of the various SIGs are clear and unambiguous in this regard. I am not convinced that the failure to register those rules with the office of the CIPC or indeed the fact that the applicant has not ratified the amendments to the Constitutions of the SIGs render those Rules or the respective Constitutions academic. At the very least what they evidence is that the applicant in organising its affairs and in setting up SAMATU as a trade union elected to locate the SIGs within the structure of the SAMATU which in turn is described as a division of SAMA. In addition, some of the SIGs by amending their Constitutions signalled where they would be located.

31. In the case of SARA and JUDASA as part of SAMA while in the case of SEDHASA and ADASA as part of SAMATU. At that time, it must be recalled that SAMATU was regarded and operated as a division of SAMA and therefore this signalling by reference to the Company Rules and the Constitutions of the SIGs is in my view of limited value and must be properly considered in context.

[31] In that regard, the Company Rules and the various Constitutions (both of the SIGs as well as SAMATU) were adopted at a time when SAMATU was still very much an integral part of SAMA and at a time when SAMA was operating as a professional organisation as well as a labour organisation, the latter through the vehicle of SAMATU. The same Company Rules the respondent relies upon

locates SAMATU within the structure of SAMA. It was only in September 2019 when the Labour Curt placed SAMATU under administration and thereafter appointed the second respondent as its administrator that SAMATU could be said to have enjoyed an existence separate and distinct from SAMA. In fact, the order of the Labour Court which provided that SAMA would participate in the management of SAMATU shows that the umbilical link that the order of September 2019 purported to sever was in part still extant.

[32] There is nothing before this Court after the order of the Labour Court placing SAMATU under administration and from which point it sought to operate as a separate and independent entity that suggests that any of the SIGs indicated that they regarded themselves as part of SAMATU.

[33] It would accordingly in these circumstances and against that context be erroneous and somewhat simplistic to contend that upon the separation of SAMA and SAMATU the SIGs would simply migrate and be a part of SAMATU. The respondent would have it that way and argue that it was one of the inevitable consequences of the divorce between SAMA and SAMATU that the SIGS who were located within the SAMATU structure would simply migrate with SAMATU.

[34] This ignores the reality that even when those SIGs were a part of SAMATU it was a SAMATU that was an entity of and under the control of SAMA. There is a significant difference in electing to being a part of an independent entity (as SAMATU now is) or electing to be part of an entity which was wholly controlled by another (as was the case when the SIGs were located within SAMATU which was then a part of SAMA).

[35] That was the legal and factual situation when the Company Rules were adopted in 2014 and when the amendments to the various Constitutions of the SIGs were effected before the 2019 separation mandated by the Labour Court.

[36] One cannot speculate if those same decisions would have been taken if SAMATU was an independent entity and it cannot simply be assumed that those who took those decisions such as SAMA and the SIGs would have taken the same decisions if the legal separation between SAMA and SAMATU had been effected. Such an assumption would be insensitive to and ignore the important associational rights of the various SIGs.

[37] SAMA say in this regard they would not under such circumstances gifted the SIGs to SAMATU. In fact, the applicant says that all of the SIGs submitted reports of their 2019 activities and participated in the National Council Meeting of the applicant in early 2020. Copies of those reports form part of the papers and provide compelling and uncontroverted evidence that notwithstanding what the Company Rules say and notwithstanding what their respective constitutions say, all of the SIGs submitted reports of their activities for the 2019 year to the National Council of SAMA when it met during February 2020.

[38] If indeed all of these SIGs were part of SAMATU alternatively regarded themselves as part of the structure of SAMATU then it is inexplicable why they would, even after the separation between SAMA and SAMATU submit reports of their activities to SAMA. If there was any single piece of evidence that points strongly in the direction of which structure the SIGs regarded themselves to be a part of, it is this.

Of course members of the various SIGs may well be a part of SAMATU to the extent that SAMATU is the structure that advances their organisational and

labour rights but there is no evidence that the SIGs to which such members may belong, have made an election to be a part of SAMATU.

[39] In particular there is nothing post the Labour Court order that indicated that any of the SIGs mindful that SAMATU was now an independent entity from SAMA, expressed a desire to be a part of SAMATU. Of course they may still do that but until then the evidence before this Court demonstrates that the SIGs can certainly not be said to be a part of SAMATU and I say this for the following reasons:-

a) The Company Rules and the Constitutions relied upon only provide evidence of the SIGS being part of SAMATU as a division of SAMA and not SAMATU as a separate and independent entity.
b) The activities report of the SIGs for 2019 and which served before the National Council of SAMA in February 2020 is the clearest evidence that those SIGs regarded themselves as part of SAMA and not SAMATU.
c) To suggest that the SIGs who were designated as part of SAMATU while it was a division of SAMA would automatically migrate to SAMATU upon its separation from SAMA would deny to those SIGs their right to decide on where they wish to associate. In any event the order of September 2019 does not deal with the position of the SIGs and is also not authority for the proposition that the SIGs would from then on form part of SAMATU.

[40] Freedom of association is enshrined in our Constitution and at its very core is the recognition that associational rights enable individuals and groups to exercise control over the various relationships and practises deemed critical to their self- understanding ***Currie I and De Waal The Bill of Rights Handbook 6th Edition (2013)*** say the following about the importance of associational rights :-

"Associational rights secure the space for those intimate associations we deem crucial to our self-understanding and prevent the state from exercising too totalising an influence over decisions about who to love and how to love them. Associational rights similarly safeguard primordial and cultural attachment from undue state of interference. Associational rights advance the goal of substantive equality by freeing labour to bargain with capital on a more equal footing, by freeing woman to form institutions suited to their particular needs, and by freeing historically disadvantaged groups to pursue shareholder equity through broad-based black economic empowerment initiatives. "

[41] In that context can it be said that the various SIGs in pursuance of their associational rights have made a conscious election to be a part of SAMATU in its currently constituted from. The answer must be in the negative and indeed the evidence supports the conclusion that by their conduct they continue to be associated with the applicant and regard themselves as part of its structures.

[42] The respondent also advances the argument that the applicant has acquiesced to the respondents exercising control and ownership over the SIGs. They rely on a transcript of a meeting held between the second respondent and Ms Carpenter, the secretary of the applicant and the deponent to the Founding Affidavit in these proceedings.

[43] In that discussion the second respondent in what he describes as 'skindering' (gossiping) says to Ms Carpenter that the first respondent says that the SIGs are theirs. In response thereto Ms Carpenter says 'That is fine' but then later states that it would be a matter for the SIGs to decide.

[44] This can hardly constitute acquiescence and given the context of the discussion and the remarks that Ms Carpenter makes about where such decision would lie (with the SIGs) I am not convinced that the transcript which on the respondent version was an indulgence in gossip and inconclusive in its conclusions can be elevated to constituting acquiescence.

[45] It is for these reasons that I am of the view that the applicant has made out a proper case that the SIG's constitute special interest groups of the applicant and that conclusion would accordingly entitle it to the declaratory relief it seeks in so far as it relates to the location of SARA, JUDASA, SEDHASA and ADASA.

[46] Section 21(1)(c) of the Superior Courts Act 10 of 2013 provides that the Court may in its discretion and at the instance of any interested person inquire into and determine any existing, future or contingent right or obligation. It does not matter that the person cannot claim relief consequential upon such a determination.

[47] The court's discretion to issue a declaration arises when the court is satisfied that the claimant is an interested person and that there is an existing, future or contingent right or obligations. In considering whether to exercise this discretion, the court may have regard to:

(a) whether there is an existing dispute;

(b) whether the order will be binding; and

(c) whether the claimant is entitled to claim consequential relief

[48] In this regard and given the very contested nature of the dispute and the rights in question I am also satisfied that the grant of such relief will not only be binding but will also be definitive of the rights of the parties and would also

entitled the applicant to the consequential relief it seeks in particular the interdictory relief it seeks that will prevent the respondents from using the vehicle of the SIGs in communicating with the public at large or the members of the applicant on the basis and as if the SIGs vested in the first respondent.

[49] Of course the associational rights to which reference has been made does not prevent the respondents from communicating with members of the applicant who are also in their individual capacities members of the first respondent. What they may not do however is to use the vehicle of the SIGs to do so. At the same time those SIGs may in the fullness of time determine whether they wish to be associated with and become a part of the first respondent's structure as an independent entity separate from the applicant.

[50] The requirements for a final interdict are usually stated as :-

(a) a clear right;

(b) an injury actually committed or reasonably apprehended; and

(c) the lack of an adequate alternative remedy.

See ***Masstores (Pty) Limited v Pick n Pay Retailers (Pty) Limited 2017 (1) SA 613 (CC)***

[51] I have already concluded that the applicant has a clear right in the SIGs and the very nature of the dispute demonstrates the injury committed where the first respondent has strongly asserted that the SIGs are part of its structures and thereby appropriating to it the exclusive right to use them in its organisational design and objectives. There is also no other remedy available to it.

[52] The interdictory relief sought in paragraph 2.5 must also be granted.

[53] The relief sought relative to the infringing of the trademark of the applicant in the respective SIGs is not necessary in the light of the interdictory relief I intend to grant. In any event there is a dispute about the status of the registration of those marks which calls into question the applicants right to relief on these grounds.

[54] Finally the alleged act of harassment complained of in respect of Dr Ntuli appears to have been triggered by the incorrect understanding and interpretation the respondents have laboured under in respect of their ownership of the SIGs. Given my conclusions on that aspect, there is no need to grant this relief and in any event I am not satisfied that the isolated letter which is what is at the heart of the relief claimed here constitutes harassment.

Costs

[55] There is no reason why costs should not follow the result.

I make the following order:-

1. It is declared that the South African Registrars Association ("SARA") is a Special Interest Group ("SIG") of the Applicant;

2. It is declared that the Acedamic Doctors Association of South Africa ("ADASA") is a SIG of the Applicant;

3. It is declared that the Senior Doctors Association of South Africa ("SEDASA") is a SIG of the Applicant;

4. It is declared that the Junior Doctors Association of South Africa (JUDASA") is a SIG of the Applicant;

5. The First and Second Respondents, and any other member of the First Respondent with its authority or otherwise, are interdicted

and restrained from individually and/or jointly using, as its or his or their own, any or all of the SIG's of the Applicant identified in prayer 1 to 4 above, in any communication, either orally or in writing, addressed to the general public, the Applicant' members, including the members of the First Respondent, or the media or any government department and/or government official or otherwise;

6. The Respondents, jointly and severally, the one paying the other to be absolved, be ordered to pay the cost of the application which costs shall include the costs of two counsel.

NJ. KOLLAPEN
JUDGE OF THE HIGH COURT, PRETORIA

APPEARANCES

COUNSEL FOR THE APPLICANT	:	**Adv TP KRüGER SC** **Adv F STORM**
Instructed by	:	**WELMAN & BLOEM INCORPORATED**
COUNSEL FOR THE RESPONDENT	:	**Adv GA FOURIE SC** **Adv DJ GROENEWALD**
Instructed by	:	**SERFONTEIN VILJOEN & SWART INC**
DATE OF HEARING	:	**1 MARCH 2021**
DATE OF JUDGMENT	:	**25 MARCH 2021**