

SOUTH AFRICA / JUDGMENT

# Absolute Africa Supply Chain Services (Pty) Ltd v Brink and Another (J2402/2016) [2016] ZALCJHB 437 (29 November 2016) [2016] ZALCJHB 437

## COURT

Labour Court Johannesburg

## BEFORE

Mooki

## CASE / FILE NUMBER

J2402/2016

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IN THE LABOUR COURT OF SOUTH AFRICA ,JOHANNESBURG

## JUDGMENT

Not Reportable

Case No: J2402/2016

In the matter between:

ABSOLUTE AFRICA SUPPLY CHAIN SERVICES (PTY) LTD Applicant and GEFFREY BRINK First  
Respondent ADVANCED TECHNOLOGY SUPPLIERS (PTY) LTD Second Respondent

Heard: 3 November 2016

Delivered: 29 November 2016

Summary: Restraint of trade. Application dismissed

## JUDGEMENT

MOOKI AJ

## Introduction

1. The applicant seeks to enforce restraint of trade undertakings given in its favour by the first respondent. The applicant employed the first respondent on 13 October 2009. The first respondent concluded a restraint of trade and confidentiality undertakings in favour of the applicant as part of his employment. The first respondent later resigned and took-up employment with the second respondent. The applicant contends that the first respondent has since breached his restraint and confidentiality undertakings. The applicant seeks an

order holding the first respondent to those undertakings. The second respondent has not participated in the proceedings.

2. The applicant is essentially a procurement agent. It carries mining and industrial related-goods and services for its customers. The business is essentially as follows: clients of the applicant would make it known that they require particular goods and/or services. They issue a tender in that regard. The applicant then issues requests for quotations from potential service providers. The applicant adds a mark-up to the quotations that it receives. It then works out the final price and advises its customer.
3. The first respondent held various positions whilst employed by the applicant, beginning with “junior expeditor”. He moved to the procurement department as a buyer. In this department, the first respondent obtained quotations on a daily basis from suppliers, distributors and manufacturers of the applicant. He would then communicate with suppliers and clients and supervise the orders being executed. He was ultimately promoted to key account manager. He was responsible for accounts of the applicant’s customers and suppliers in this position.
4. The first respondent established business relationships with the applicant’s customers, suppliers and distributors during his employment with the applicant. He became exposed to the applicant’s pricing of products, mark-ups, margins and, in some cases, payment terms.
5. The first respondent resigned from the applicant on 22 June 2016 and took-up employment with the second respondent on 1 August 2016 as Procurement Manager. The applicant contends that the second respondent is its competitor and that the first respondent breached his undertakings on account of various episodes as detailed below.
6. The applicant contends that the first respondent breached his undertakings because the first respondent “... has been in direct contact with Farhad (an employee at one of the applicant’s suppliers) as well as being included in communication... with the [applicant’s] customer and supplier”. The applicant also contends that the first respondent “has used” the following information:
  - 6.1. Knowledge of and influence over the applicant’s clients, customers, suppliers and other business associates;
  - 6.2. Knowledge of the applicant’s marketing strategies;
  - 6.3. Knowledge of the applicant’s strategic plan;
  - 6.4. The financial details (including credit and discount terms) relating to the applicant’s clients, customers and suppliers.
7. The applicant further contends that the first respondent “has”:
  - 7.1. Rendered, carried on, be associated and concerned with, services which are similar and which competes with the business of the applicant and services provided by the applicant;

7.2. Be associated and concerned with, interested and engaged in, and employed by the second respondent which directly renders, carries on, is associated and concerned with, services which competes with the business of the applicant, and services provides (sic) by the applicant;

7.3. Has attempted to directly solicit orders from the applicant's suppliers for the rendering of competing services and/or products;

7.4. Directly approached the applicant's customers.

8. The first respondent denies that the second respondent is a direct competitor of the applicant. He avers that the business of the second respondent is "exclusively in the brewing, food and beverage industry"; that the second respondent does not compete with the applicant; that products used in the brewing industry, like boilers, ball joints and bearings, may overlap with those used in the mining industry.

9. The applicant disputes that the second respondent operates exclusively in the brewing, food and beverage industry. It referred to quotations on behalf of the second respondent for equipment used in mining. The applicant further pointed out that the second respondent records on its website that it renders services in the mining industry. The first respondent states that reference to mining equipment on the second respondent's website is because the second respondent "initially had the intention of also doing business in the mining industry." The first respondent admits that the products from the applicant and the second respondent's respective websites "are similar" when compared.

10. The second respondent does not operate "exclusively" in the brewing, food and beverage industry. The explanation by the second respondent that reference to mining equipment on the second respondent's website is because the second respondent initially intended to conduct business in the mining industry is self-serving. The second respondent has been conducting business for more than ten years. The entry on the website is dated 13 October 2016. The second respondent also sources material for use in the mining industry. This is illustrated by an exchange regarding an order made on behalf of the second respondent addressed to Flore Koudou, who is described as the "purchasing officer" for "Newcrest Mining Limited". I am satisfied that the applicant and the second respondent are competitors.

11. The applicant pleads that the first respondent breached his restraint undertakings by:

11.1. Making direct contact with Farhad, one of the applicant's suppliers and

11.2. Being copied in correspondence about one of the applicant's customer and supplier.

12. The first respondent admits writing to Farhad at BMG Exports and requesting quotations for items used in mining. He denies that his conduct constitutes a breach of the agreement. He points out that he did not solicit BMG Exports to supply the second respondent because BMG Exports was already a supplier of the second respondent. The applicant does not dispute that BMG Exports was a supplier to the second respondent before the first respondent took up employment with the second respondent.
13. The applicant's second basis for alleging breach of the restraint undertaking is that Petrus Botha, an employee of the second

respondent, wrote to one of the applicant's customer and supplier and copied the first respondent in that correspondence. The applicant did not plead that it (i.e. the applicant) had exclusive dealings with the customer and supplier in which correspondence the first respondent was copied. This is relevant in that nothing suggests that the entity that formed the subject-matter in the

correspondence was any different from BMG Exports, namely, that there was a pre-existing relationship between that entity and the second respondent.

14. The applicant asserts that first respondent "has used" the following information:
  - 14.1. Knowledge of and influence over the applicant's clients, customers, suppliers and other business associates;
  - 14.2. Knowledge of the applicant's marketing strategies;
  - 14.3. Knowledge of the applicant's strategic plan;
  - 14.4. The financial details (including credit and discount terms) relating to the applicant's clients, customers and suppliers.
15. The first respondent denies using the information as contended for by the applicant. The applicant did not demonstrate the respect in which the first respondent "used" the information as set out above.
16. The applicant also contends that the first respondent "has":
  - 16.1. Rendered, carried on, be associated and concerned with, services which are similar and which competes with the business of the applicant and services provided by the applicant;
  - 16.2. Be associated and concerned with, interested and engaged in, and employed by the second respondent which directly renders, carries on, is associated and concerned with, services which competes with the business of the applicant, and services provides (sic) by the applicant;
  - 16.3. Attempted to directly solicit orders from the applicant's suppliers for the rendering of competing services and/or products;
  - 16.4. Directly approached the applicant's customers.

17. The applicant pegged the stated breach of the restraint undertakings on the two bases referred to above. For example, the applicant does not contend that the first respondent breached his restraint undertakings because the first respondent:

17.1. Rendered, carried on, was associated and concerned with, services which are similar and which competes with the business of the applicant and services provided by the applicant, and

17.2. Is associated and concerned with, interested and engaged in, and employed by the second respondent which directly renders, carries on, is associated and concerned with, services which competes with the business of the applicant, and services provides (sic) by the applicant.

18. I am not satisfied that the applicant has made out a case that the first respondent breached his restraint undertakings in the manner

contended for by the applicant. This conclusion is based on how the applicant pleaded its case. The stated “breach” is that the first respondent made direct contact with a supplier of the applicant and that the first respondent was copied in correspondence on behalf of the second respondent, which correspondence was directed at a supplier and customer of the applicant.

19. The applicant has set out its contentions regarding why the matter is urgent. This court has held that matters involving restraint

undertakings are urgent because of their very nature.[1] The court is satisfied that the matter is urgent. The applicant could not have meaningfully sought to vindicate its rights by enrolling the matter in the ordinary Roll. This is not to suggest that a party can simply fold its arms and approach the court when its suits a party and seek to be heard on an urgent basis only because the application concerns restraint undertakings.

20. I make the following order:

20.1. The application is urgent.

20.2. The application is dismissed.

20.3. The applicant is ordered to pay costs.

O MOOKI

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Judge of the Labour Court (Acting)

Appearance:

For the Applicant: D. Block

For the First Respondent: W.A. de Beer

[1] ARB Electrical Wholesalers (Pty) Ltd v Grove and Others (C335/14) [2014] ZALCCT 31 (3 June 2014), at para 20

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