

SOUTH AFRICA / JUDGMENT

Backsports (Pty) Ltd v Motlhanke and Another (2025/009346) [2025] ZALCJHB 68 (18 February 2025)

[2025] ZALCJHB 68

COURT

Labour Court Johannesburg

BEFORE

M Makhura

CASE / FILE NUMBER

2025/009346

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

No: 2025-009346

In the matter between:

BACKSPORTS
(PTY) LTD
Applicant
and
OFENTSE
RETSHIDISITSWE MOTLHANKE
First Respondent
O MEDIA VISUALS (PTY)
LTD
Second Respondent

Heard:

14 February 2025

Delivered:

18 February 2025

This

judgment was handed down electronically by circulation to the parties' legal representatives by email. The date of hand-down is deemed to be 18 February 2025.

JUDGMENT

MAKHURA, J

- [1] The applicant, Backsports (Pty) Ltd, is a private company operating in the Internet Communications and Technologies industry and renders broadcasting, advertising, social media and production services.
- [2] The first respondent, Ofentse Retshidisitswe Motlhanke, was employed by the applicant as a Senior Stream Lead with effect from 1 January 2024. He was summarily dismissed by the applicant on 16 October 2024, nine and half months into his employment. The dismissal was effected following a disciplinary process in which the applicant was charged with seven allegations of misconduct.
- [3] The second respondent is O Media Visuals (Pty) Ltd. The first respondent is the sole director of the second respondent. He was so appointed with effect from 9 April 2019.
- [4] On 27 January 2025, the applicant filed an application in terms of which it sought to enforce the restraint of trade agreement against the first respondent. The terms of the order sought by the applicant are framed as follows:

‘3. Interdicting and restraining the first respondent for the remaining period of the restraint period in his contract of employment with the applicant dated 11 December 2023, alternatively for an unlimited period from:

3.1 soliciting work from the applicant's customers (including SuperSport Schools (Pty) Limited, Central Gauteng Athletics and Oban Productions (Pty) Limited) directly or indirectly;

3.2. soliciting applicant's current employees, and/or any persons who was employed by the applicant at any time during a 12 (twelve) month period preceding the termination date, from joining him in any intended business undertaking which operates in the same field of activity or industry in which the applicant is currently operating, indirectly or directly;

3.3. uttering threats in respect of the applicant's employees;

3.4. harassing applicant, applicant's directors and employees and from injuring applicant's directors and employees;

3.5. damaging or sabotaging applicant's assets (including any OB Trucks used by the applicant).’

- [5] The restraint of trade clause is contained in clause 16 of the contract of employment. This clause reads as follows:

‘16.1 You undertake to the Company and to each of the Group Companies that whilst you are employed by the Company and for a period of twelve

(12) months from the Termination Date, you will not, whether directly or indirectly:

· compete with the Company and/or any of its Subsidiaries or be interested in any business which trades in any field of activity

which is substantially similar to any of the fields of activity referred to in clause below within any of the areas of restraint set out in clause 16.3 below. For this purpose, the Manager shall be deemed to be so “interested in a business”, or “competing with the Company and/or any of its Subsidiaries” if he becomes engaged or interested, whether directly or indirectly, and whether as an employee, proprietor, partner, shareholder, agent, consultant, financier or otherwise, in any company, firm, business of undertaking which carries on business in any of the fields referred to in clause 16.2 below and in any of the areas of restraint set out in clause 16.3 below save for any investment of not more than 5 per cent of the shares of any company listed on a recognised stock exchange:

· persuade, induce, encourage or procure any employee of the Company and/or of any of the Group Companies, or any person who was an employee of the Company and/or any of the Group Companies at any time during a twelve (12) month period preceding the Termination Date, to become employed by or interested in any business which trades in any field of activity which is substantially similar to any field of activity referred to in clause 16.2 below, or to terminate his employment with the Company or any of the Group Companies other than in the proper execution of his duties as an employee of the Company.’

[6] The restraint agreement provides that the first respondent would be restrained in the fields of marketing, sales and/or distribution of corporate and promotional products. The geographical area in which the restraint agreement applied is every province of the Republic of South Africa, every other territory in which the applicant or any of its group companies operates and any other territory which the Board has resolved the Group should enter within 6 months of the Termination Date.

[7] The applicant lists SuperSport, CGA and Oban Productions (Pty) Limited, as some of its clients. It contends that shortly after the dismissal of the first respondent, it received rumours or unsubstantiated information that the first respondent was contravening the restraint agreement. It then, based on these rumours instructed its attorneys of record, AJ Stone Attorneys, to issue a warning letter to the first respondent, which it did on 26 November 2024.

[8] To support that the first respondent contravened or is contravening the restraint agreement, the applicant relies first on the evidence of Sihle Ndou (Ndou). Ndou is employed by the applicant. The applicant contends that at the Indaba Meeting on 10 January 2025, Ndou informed Erwin Schmidt (Schmidt), the applicant’s Chief Operations Officer, that the first respondent wanted to recruit him. On the same day, the first respondent contacted Ndou on his cellular phone. Ndou passed the cellular phone to Schmidt, who then “requested the first respondent to stop harassing the applicant’s employees whereupon the first respondent, just laughed”. Ndou sent the first respondent a message wherein he asked the first respondent to stop to be involved in his work “issues” or anything and asked him to not put his “work life at

risk” because he was working for the applicant and was “serious”.

- [9] The second respondent in response to Ndou’s allegation that he called Ndou, which he considers his friend, says that he wanted him to talk to one of his friends, Rethabile Kome (Kome) and arrange to go and take photos because he did not have a camera. He contends that Ndou and his brother take pictures during their spare time. The first respondent states that he did not want anything beyond this from Ndou.
- [10] The second alleged incident of breach happened on 14 January 2025. Schmidt was informed by Sean Everett (Everett) who is contracted by SuperSport Schools (the applicant's most important customer) and owns Oban Productions, the applicant’s client, that the first respondent had approached him and requested to work with them. The first respondent admits that he approached Everett, who he says is an independent worker and asked for employment. The first respondent states also that Everett used to say to him that he should let him know if he needs any assistance.
- [11] The third incident relates to an allegation made by Rolty Ramashidja (Ramashidja) to Schmidt on WhatsApp messages during November 2024. The allegation is that Ramashidja, Lazarus Zondi (Zondi) and the first respondent under the name of Optic Media delivered streaming services at the Central Gauteng Athletics (CGA) Award Ceremony.
- [12] The fourth incident, arising from Ramashidja’s statement, relates to an alleged threat and sabotage of the applicant’s

truck which is used in the execution of its services. The applicant states that:

‘According to Ramashidja, on the way to the CGA Awards, he was shown a person who had to assist “to take Erwin down and make sure that the new OB doesn't work”. An “OB” is an Outside Broadcasting Truck which the applicant uses in the execution of its business activities. The value of such trucks run into millions of rands. It further appears from the same message that Ramashidja was invited to work with the first respondent and Lazarus Zondi, “... to take back sports down especially Erwin”. The fact that the first respondent intends "to take Erwin down" is extremely disconcerting. It is also disconcerting to learn from Ramashidja that the first respondent has shown an interest to sabotage one of the applicant's trucks. These intended actions are in conflict with the aforementioned Restraint of Trade-provisions.’

- [13] Further, it is alleged that the WhatsApp messages show that the first respondent informed Ramashidja that he was the only one “who can help to take Erwin down and he will tell [him] what to say to Shawn” and that they intend to take the applicant down. The WhatsApp messages further allegedly indicate that the first respondent said to Ramashidja that he had all the big bosses from Supersports Schools and Supersports and that Ramashidja should do what the first respondent tells him to do. The first respondent disputes the allegations as “lies”.

[14] The first respondent contends that the applicant only seeks to bar him from using his skills and expertise, which he already possessed,

to deny him the right to make a living and the right to choose his trade, profession and occupation, and to bar him from competing,

after it had dismissed him from its employment. Further, the first respondent contends that:

‘The applicant is not contending that I am using trade secrets in order to gain an unfair advantage which would lead to an unfair competition in an open market.

I was in the employ of the Applicant as a senior lead streamer. The position requires me to use my skill and expertise in the business of production and streaming.

The position is in no way whatsoever at the center of dealing directly [with] client and customer personnel. The position did not allow me to gain access to customers nor was I in a position to build a particular relationship with the customer. Especially considering the length of my service with the Applicant.

The nature of the business is not one which allows the Applicant to enjoy exclusive access to customer.’ [Emphasis added]

[15] The legal principles for enforcement of restraint agreements are well established. An applicant to enforce a restraint agreement is only required to establish the existence of the restraint agreement and prove that its terms have been breached. Thereafter, the onus is on the respondent opposing the enforcement of restraint to prove that the restraint agreement is unenforceable because it is unreasonable.[1] The test to determine reasonableness of enforcing the restraint agreement is equally trite. It was set out in *Basson v Chilwan and others*[2] as follows:

28.1 Is there an interest of the one party which is deserving of protection?

28.2 Is such interest being prejudiced by the other party?

28.3 If so, does that interest weigh up qualitatively and quantitatively against the interest of the latter party that he should not be economically inactive or unproductive?

28.4 Is there another facet of public policy that requires that the restraint should either be maintained or rejected?

[16] Restraint agreements are not there merely to protect the former employer against competition from its ex-employee but as a necessary tool to protect the former employer’s proprietary interests. It is further trite that the protectable proprietary interests are all confidential information or matter that could be used by a competitor to gain a competitive advantage and the relationship with customers, suppliers and others that go to make up what is referred to as the trade connection of the business.[3]

[17] Therefore, where it is shown that there is (1) confidential information and/or trade connection

(2) to which the employee had access to and (3) which he could transmit to his new employer, the applicant would be entitled to the protection afforded by the restraint agreement.[4] Whether the information is confidential or constitutes a trade secret is a factual enquiry, to be determined by considering whether the information is useful and not in the public knowledge, whether it is known only to a restricted number of persons and whether it is of economic value to the applicant.[5]

[18] The existence of the restraint agreement has been proved. The question is whether the applicant established that it has protectable

proprietary interests in the form of confidential information or matter that could be used by a competitor or even the first respondent himself to gain a competitive advantage and the relationship with customers, suppliers and others that go to make up what is referred to as the trade connection of the business.

[19] I asked Mr Van Graan, counsel for the applicant, where the applicant established any protectable interests that it sought to protect with the enforcement of the restraint agreement. I also asked Mr Van Graan about the first respondent's duties and whether he had contacts with clients or whether his position allowed him to access confidential information. Initially, Mr Van Graan submitted that the applicant did not rely on the fact that the first respondent had access to the applicant's confidential information. Later, with his instructing attorney's assistance, Mr Van Graan referred the Court to the replying affidavit, where the applicant pleaded as follows:

'The first respondent was employed in a senior position dealing with major customers of the applicant. As is evidenced by the first respondent's interactions with Mr Shaun Everett of Oban Productions and Mr Mandla Radebe of CGA, the first respondent had access to the applicant's customers.

Moreover the first respondent had access to the applicant's Customers Lists and, in rendering the services at events on behalf of the applicant, the first respondent would have regular contact with the Production Right Holders and other staff members of customers involved at the events.

It is a common practice in our industry that WhatsApp groups are created by customers and the applicant for the streaming crews working at an event. The groups participants would consist of the applicant's employees, employees of the customers, responsible persons of the venue, event organisers etc. This is typically done for operational purposes to be able to communicate with everyone to ensure a smooth operation. The latter naturally resulted in the first respondent getting to know important individuals at customers of the applicant, venues and event organisers and obtaining their contact details.

Furthermore, at the commencement of the first respondent's employment he was introduced by Schmidt to the relevant contact persons at the applicant's customers.'

[20] The founding affidavit simply made the allegation that the first respondent was introduced to the applicant's customers and

attached a list of the applicant's clients. The replying affidavit sought to augment the insufficient information placed in the founding affidavit. However, the applicant still failed in its attempt to place the necessary averments to show that it has protectable proprietary interests.

[21] The applicant's case, as is apparent from above, is simply that the applicant held a senior position and dealt with "major"

customers, that he was introduced to the applicant's relevant customers at the commencement of his employment and by virtue of him being on a WhatsApp group the first respondent knew important customers, venue and event organisers.

[22] Mr Van Graan submitted that the above allegations are sufficient to establish that the first respondent had access to confidential

information and had during his employment made trade connections with the applicant's clients. I disagree.

[23] The first respondent has expressly pleaded that as a senior stream lead, he did not deal with the applicant's clients nor did have access to the clients and customers. He also contended that the applicant did not deal with its clients exclusively. The applicant did not provide the job description of the first respondent, nor did it plead with sufficient particularity the nature of the position of Senior Stream Lead and the day to day duties. Therefore, the Court is left to speculate what his duties entailed, whether he had access to any confidential information of the applicant and the type of the information he had access to in his capacity as a Senior Stream Lead, which means the Court is not even in a position to determine whether the information was exclusive or not. There are no details about the trade connections the first respondent had or may have made during his employment. The bare allegation that the first respondent had access to confidential information and was introduced to the customers at the commencement of his employment is no sufficient to show protectable interest. The Court is also not informed about the salary he earned as a Senior Lead Stream.

[24] On trade connections, the applicant relied exclusively on the first respondent's approach to Everett of Oban Productions, where the undisputed facts are that the first respondent was seeking employment from Everett, which did not materialise. From the pleadings, Oban Productions is the applicant's customer. Nowhere is it stated, as it was submitted from the bench, that Oban Productions is the applicant's competitor.

[25] The closest the applicant has come to establishing any breach is the allegation relating to the first respondent's attempted

poaching of its employee, Ndou. The first respondent has denied this. He said that Ndou and his brother are known for taking photos during his spare time and that because he did not have a camera, he contacted Ndou to arrange with his friend, Kome, to go and take pictures for him. Further, the message that Ndou sent to the first respondent does not prove that the first respondent wanted to poach him.

[26] Even if the first respondent was seen streaming for CGA awards, which is not in dispute, it would in my view be unreasonable to restrain the first respondent in the circumstances where the applicant woefully failed to show that the first respondent had access to confirmation information and used his trade connections to his advantage or his new employer to the prejudice of the applicant.

Further, the first respondent did not leave the employment voluntarily. It will be an injustice and unjustified limitation of an

individual's right to enforce a restraint agreement against him when his ex-employer dismissed him. The applicant, having fired the first respondent, now expects him to starve by interdicting and restraining him from earning a living and from his occupation and trade.

[27] The first respondent was permanently employed for a period of less than 10 months at the time of dismissal. This is a short period and it would be unreasonable to restrain the first respondent for 12 months from the date of his dismissal. In my view, the fact that the first respondent was dismissed has disentitled the applicant from enforcing the restraint agreement. In other words, the applicant waived its right to enforce the restraint when the first respondent left because of dismissal.

[28] Mr Van Graan submitted that even if I find against the applicant on the restraint, this Court should nevertheless interdict the first respondent from uttering threats against its employees, harassing the applicant and its directors and employees and damaging or sabotaging the applicant's assets. The applicant does not plead where this Court gets the jurisdiction from and the power to grant such an order. There is no employment relationship between the applicant and the first respondent. The application in this regard must fail for lack of jurisdiction.

Costs

[29] The first respondent, having been displaced from the applicant's employment, was forced to come to Court to oppose this application, and in the process protect his livelihood and career. The application was intended to and had the consequence of ruining the first respondent's livelihood and career. The application also focused on alleged criminal acts which have nothing to do with enforcement of restraint agreements.

[30] The application has nothing to do with the applicant's protectable interest but has to do with making the first respondent suffer. I do not believe that the application is made bona fide. The first respondent is entitled to the costs of these proceedings.

[31] In the premises, the following order is made:

Order

1. The application is dismissed with costs.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr E.S.J. Van Graan SC

Instructed by: A.J. Stone Attorneys

For the Respondents: Mr M. Koenane of Koenane Attorneys

[1] Magna Alloys and Research (SA) (Pty) Ltd v Ellis

[1984] ZASCA 116; 1984 (4) SA 874 (A)[1984] ZASCA 116; ; [1984] 2 All SA 583 (A); Reddy v Siemens Telecommunications (Pty) Ltd 2007 (2) SA 486 (SCA); (2007) 28 ILJ 317 (SCA) at paras 10 and 16; New Justfun Group (Pty) Ltd v Turner and others (New Justfun)

[2014] ZALCJHB 177; (2018) 39 ILJ 2721 (LC) at paras 9 and 10.

[2]

[1993] ZASCA 61; 1993 (3) SA 742 (A).

[3] Sibex Engineering Services (Pty) Ltd v Van Wyk and another 1991 (2) SA 482 (T), at 502C – F.

[4] ARB Electrical Wholesalers (Pty) Ltd v Grove and Others [2014] ZALCCT 31; New Justfun at paras 12 and 13.

[5] Townsend Productions (Pty) Ltd v Leech and others 2001

(4) SA 33 (C) (Townsend Productions) at 53J - 54B; New Justfun at para 13.

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