

SOUTH AFRICA / JUDGMENT

Bujini Projects (Pty) Ltd v Jadoonandon (2022/4054) [2024] ZAGPJHC 1268 (10 December 2024) [2024] ZAGPJHC 1268

COURT

South Gauteng High Court, Johannesburg

BEFORE

Lucas van Tonder

CASE / FILE NUMBER

2022/4054

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL

DIVISION, JOHANNESBURG)

CASE NO: 2022/4054

(1)

REPORTABLE: NO(2)

OF INTEREST TO THE JUDGES: NO(3)

REVISED: NOSIGNATURE:

DATE: 10 December 2024
In the matter between: -
BUJINI PROJECTS (PTY)
LTD
APPLICANT
And
AMITH JADOONANDON
RESPONDENT
(Identity
Number: 8[...])
Coram: Lucas van Tonder
AJ
Heard: 11 November 2023
Delivered
(electronically): 10 December 2024

JUDGMENT

LUCAS VAN TONDER AJ:

Introduction:

- [1] The Applicant company (Bujini) seeks a final interdict against Mr Jadoonandon in the form of a restraint of trade through opposed motion proceedings.
- [2] The relief sought reads:
- “Interdicting and restraining the Respondent from:*
- a. Using the Applicant’s property namely the Felix the Fire Bunny suit, the speaker, and the microphones;
 - b. Approaching any of the Applicant’s clients and offering them training programs similar to the training programs offered by the Applicant; and
 - c. Operating, and or advertising, and or mascaraing (sic) and or giving the impression that he is an employee of the Applicant, and offering services on behalf of the Applicant.
 - d. To compel the Respondent to forthwith return movable property belonging to the Applicant, namely the Felix the Fire Bunny suit (“the suit”), the speaker, and the microphones (“the equipment”).
- [3] Evidently the complaint and relief sought relies to a large extent on alleged possession of Bujini’s property, namely “the Fire Bunny suit, the speaker, and the microphones”.
- [4] Mr Jadoonandon was an employee of Bujini until 30 December 2020.
- [5] The application was issued during February 2022, more than two years later.

- [6] Bujini complains that Mr Jadoonandon was the last person to use Felix the Fire Fighting Bunny suit, the speaker and microphones, during November 2020.
- [7] Bujini alleges Mr Jadoonandon has been approaching its customers and offering services to them as if he is still involved with Bujini.
- [8] Bujini relies on a two confirmatory affidavits by one Ms Kock and one Ms Richards relating to two events, one in March, another in May 2021, when allegedly Mr Jadoonandon used the Felix the Fire Bunny

suit.

- [9] The founding papers are at best vague about the lapse of time between the last date of employment and the launch of the application. It is not clear on what basis a restraint more than two years later would still be justified.
- [10] In response to the allegation by Ms Kock and Ms Richards, Mr Jadoonandon disputes that he used the bunny suit, but alleged that instead he presented an Easter egg hunt with an easter bunny suit ordered by his wife. The absence of a confirmatory affidavit does not water down the patent dispute of fact, more so when Bujini's confirmatory affidavits appear to be irregular.
- [11] The confirmatory affidavits appeared to have been deposed to in January 2021, but only date-stamped in 2022. The confirmatory affidavits are arguably null and void due to non-compliance with the formalities applicable to the oath. They were purportedly deposed to before the founding affidavit existed or had been deposed to.
- [12] Even if the manuscript dates on the confirmatory affidavits are wrong, then such confirmatory affidavits pre-date the founding affidavit which they purport to confirm.
- [13] In *Wingaardt and Others v Grobler AND Another* 2010 (6) SA 148 (ECG) the court held at:

Para [8] - "An affidavit is a written statement sworn to before a commissioner of oaths. An oath is administered in terms of the regulations made in terms of s 10 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963. In terms of rule 6(1) of the rules of this court, a notice of motion must be supported by an affidavit as to the facts upon which the applicant relies for relief. As such, an affidavit constitutes the factual evidence before a court, upon which the matter is to be adjudicated... It follows that, if there is no affidavit before a court in application proceedings in support of the relief claimed, there is no evidence upon which the relief can be granted."; and

Para [9] - "It is trite that in certain circumstances a court has the discretion to condone strict compliance with the regulations prescribing the administration of oaths, but, where no oath was administered, there is no evidence before the court and the unattested statement is *pro non scripto* and incapable of condonation. The second and third appellants are accordingly not before this court, and they were also not before the court *a quo*."

- [14] In *Hano Trading CC v J R 209 Investments (Pty) Ltd* (650/11)

[2012] ZASCA 127 (21 September 2012) the court held at Para [10]:

“A litigant in civil proceedings has the option of approaching a court for relief on application as opposed to an action. Should a litigant decide to proceed by way of application, rule 6 of the Uniform Rules of Court applies. This rule sets out the sequence and timing for the filing of the affidavits by the respective parties. An advantage inherent to application proceedings, even if opposed, is that it can lead to a speedy and efficient adjudication and resolution of the disputes between parties. Unlike actions, in application proceedings the affidavits take the place not only of the pleadings, but also of the essential evidence which would be led at a trial... It follows thus that great care must be taken to fully set out the case of a party on whose behalf an affidavit is filed.”

[15] This judgment does not hinge on the failure to have complied with the provisions applicable to affidavits, albeit that it could arguably be a ground in support of dismissal.

[16] On the critical underlying facts, Mr Jadoonandon disputes that he took ownership or possession of the bunny suit and equipment and disputes that he uses it in the manner alleged by Bujini, which disputes, if absent cross-examination cannot be resolved on the papers, the relief related thereto must fail.[1] The ownership and use of the bunny suit and equipment appear to be linked to the alleged breach of the restraint, at least to some

extent, if only relevant to credibility in the context of Mr Jadoonandon alleging and arguing that the application is malicious

after such a long time since his involvement with Bujini.

[17] In *Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) -At 202-203 this principle is dealt with as follows:

“His lordship said it was obvious that a claimant, who elected to proceed by motion, ran the risk that a dispute of fact might be shown to exist, in which event the court had a discretion as to the future course of proceedings; and that it was improper for an applicant to commence proceedings by motion with a knowledge of the probability of a protracted enquiry into disputed facts not capable of easy ascertainment, but in the hope of inducing the court to apply rule 9 to what was essentially the subject of an ordinary trial.”

...

“While it may well be, once a genuine dispute of fact has been shown to exist, that a respondent should not be compelled to set out his full evidence in his replying affidavits, a bare denial of applicant’s material averments cannot be regarded as sufficient to defeat applicant’s right to secure relief by motion proceedings in appropriate cases. Enough must be stated by a respondent to enable the court to conduct a preliminary examination of the position and ascertain whether the denials are not fictitious, intended merely to delay the hearing. The respondent’s affidavits must at least disclose that there are material issues in which there is a bona fide dispute of fact capable of being decided only after viva voce evidence has been heard.”

- [18] An additional challenge for Bujini is the fact that contract relied on by Bujini did not stipulate a duration for the intended restraint and stipulates applicability to the entire Republic of South Africa.
- [19] The relief sought by Bujini did not seek to limit the time period or geographic extent of the restraint, assuming it would have been allowed, nor did it present any detailed facts that Bujini conducts business throughout the entire Republic. To succeed with an interdict, a clear right in relation to those features had to be established.
- [20] In *Nampesca (SA) Products (Pty) Ltd and another v Zaderer and others* 1999 (1) SA 886 (C) the Court held at 898G-H:
- “Is the restraint wider and what is necessary to protect the specific interest? The third restraint is unlimited as regards duration. Paragraph 1.4 of the rule nisi interdicts first, second and third respondents, with immediate effect and up to and including 3 November 1998, from in any way, directly or indirectly, soliciting the custom of any customer or supplier of the applicants. Without any restrictions as regards duration the third restraint is clearly too wide as it is unlikely that the first applicant's customers and suppliers would remain static.” (emphasis added)*
- [21] Absent allegations substantiating the geographic scope for the intended restraint, even if merely applicable to the entire Republic
- of South Africa, it presents a serious obstacle to a final interdict.
- [22] The court in *Labournet (Pty) Ltd v Jankielsohn and Another*
- [2017] 5 BLLR 466 (LAC); (2017) 38 ILJ 1302 (LAC) (10 January
- 2017) succinctly stated the law on restraint of trade in par 42 to 45:
- “[42] According to the Appellate Division in Basson v Chilwan and Others, the following questions require investigation, namely, whether the party who seeks to restrain has a protectable interest, and whether it is being prejudiced by the party sought to be restrained. Further, if there is such an interest – to determine how that interest weighs up, qualitatively and quantitatively, against the interest of the other party to be economically active and productive. Fourthly, to ascertain whether there are any other public policy considerations which require that the restraint be enforced. If the interest of the party to be restrained outweighs the interest of the restrainer – the restraint is unreasonable and unenforceable.*
- [43] It is now clear from, inter alia, *Basson and Reddy* that the reasonableness and enforceability of a restraint depend on the nature of the activity sought to be restrained, the rationale (purpose) for the restraint, the duration of the restraint, the area of the restraint, as well as the parties' respective bargaining positions. The reasonableness of the restraint is determined with reference to the circumstances at the time the restraint is sought to be enforced. With reference particularly to the facts of this matter, it is an established principle of law that the employee cannot be interdicted or restrained from taking away his or her experience, skills or knowledge, even if those were acquired as a result of the training

which the employer provided to the employee.

- [44] Even though it is acknowledged that it is difficult to distinguish between the employee's use of his or her own knowledge, skill and experience, and the use of his or her employer's trade secrets, it is accepted that an employee cannot be prevented from using what is in his, or her, head.
- [45] Also relevant to this matter are the principles relating to the reasonableness of the duration of the restraint. This aspect is generally assessed as part and parcel of assessing the reasonableness of the restraint, but it bears mentioning that the duration must be rational and reasonable. It cannot be reasonable if it is not rational.
- [57] There is also, inter alia, a dispute concerning the reasonableness of the area and duration of the restraint. The period of the restraint is three (3) years. Labournet contended on the papers and in the court a quo that the area and duration of the restraint was reasonable. However, at the hearing before us Mr Snyman, for Labournet, conceded that given Jankielsohn's level and experience, the three-year period was probably too long and sought to persuade us that a restraint period of about 12 months (or a year) was justifiable. Even though the concession was, in my view correctly made, no particular reason was furnished why 12 months would be reasonable, or why a lesser period than that would not be reasonable. In any event, the reasonableness of the duration of a restraint is a value judgment to be arrived at upon a consideration of all the relevant facts." (emphasis added)
- [23] The founding papers are not very helpful to assist the Court to reach the requisite value

judgment.

- [24] In *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* Page 487-488 of 1991 (2) SA 482 (T), Spoelstra and Harms JJ held:

"It follows from the foregoing that the restraint clause can therefore not protect any interest of the appellant in either its trade secrets or its confidential information. To enforce the restraint clause under such circumstances would be contrary to public policy."

It was, however, argued that the restraint clause as formulated does not only protect trade secrets or confidential information, but that it also contains a general prohibition against competition. Therefore, it was said, it also protects the appellant's interests in its trade connections and that first respondent has failed to allege and prove that the clause is unreasonable in that respect.

Appellant, in its founding affidavit, made some vague allusions to its trade connections with Sasol. It stated that Sasol no longer awards its contracts to any particular tenderer but that work is carried out on the basis of 'first come first served' when the services are required and that Sasol then takes into account the price structures. He said that the first respondent had also previously worked at Sasol and consequently had a good relationship with a number of its engineers. It is then said that the relationship with the engineers and his proximity to Sasol will ensure that the second respondent would be able to secure the majority of the leak-sealing services with Sasol.

Although most of these allegations are in dispute, they can be accepted as correct for purposes of establishing a prima facie case. I shall assume for purposes of this judgment that the appellant had a protectable interest in its trade relations. First respondent is, however, a technician and not, say, a salesman. He was employed as a technician. The ratio of the restraint clause was the fact that the first respondent in his capacity as technician would come into contact with specialised knowledge of a confidential or secret nature. It was not contemplated by the parties that the clause had to perform the function of protecting the appellant's trade relations. The clause can therefore not be applied to protect interests which it was not intended to protect. In any event, as indicated, the first respondent has established that the restraint clause is unreasonable to the extent that it attempts to protect confidential information or trade secrets. As was said in *Sunshine Records* (supra at 795 - 6) it would have been incumbent upon the appellant, if it had wished to rely on less than the complete contract, to raise this issue pertinently and to deal with it in evidence. That it has not done.” (emphasis added)

[25] Apart from geographical extent and duration, the founding papers failed to assist the Court to understand whether any fixed relationship comes into being with clients or customers, and if so whether long term agreements came into being, if not why not, at least as an easy measure to protect existing or continuing business relationships. It would appear that once a show had been presented it is not difficult to replicate.

[26] In *Basson v Chilwan* [1993] 2 All SA 373 (A), at para 28, Nienaber JA held this:

“Klousule 11 van die ooreenkoms is 'n blatante poging om 'n monopolie oor Basson se bekwaamheid, vaardigheid en kundigheid as busbakbouer te verwerf deur Basson vir 5 jaar as busbakbouer buite aksie te stel. Daardie belang, met daardie oogmerk, kan na my mening nie opweeg teen die nadeel wat dit vir Basson inhou indien hy verhinder word om sy gekose beroep vir 'n periode van vyf jaar te beoefen nie. Na my oordeel het Basson daarin geslaag om aan te toon dat die beperking onredelik en gevolglik onafdwingbaar is.

Daar was geen versoek aan die hof a quo, of aan hierdie hof, om die beperking na sy omvang of tydperk in te kort nie. Gevolglik is dit onnodig om verder aan die hipotese aandag te skenk dat 'n mindere beperking dalk wel redelik sou wees (vgl. die *Sunshine Records*-saak supra te 795-6).” (emphasis added)

[27] The application is fundamentally flawed in respect of one, more or each of the principles articulated above.

Costs:

[28] Bujini sought costs on the “attorney and own client” scale, not even merely in the event of the respondent opposing it. The approach was factually unfounded and legally unjustified. It prompts a respondent to oppose the matter on that basis alone, which it would be justified to do, even if the relief sought on the merits was entirely justified.

[29] In *Johannesburg City Council v Television & Electrical Distribution (Pty) Ltd*,^[2] the court held that “. . . in appropriate circumstances the conduct of a litigant may be adjudged "vexatious" within the extended meaning that has been placed on this term in a number of decisions, that is, when such conduct has resulted in "unnecessary trouble and expense which the other side ought not to bear". See also *In re: Alluvial Creek Ltd* 1929 CPC 532 at 535, *Phase Electrical Co Ltd v Zinman's Electrical Sales (Pty) Ltd* 1973 (3) SA 914 (W) at 918H – 919B, and *Hyperchemicals International (Pty) Ltd v Maybaker Agrichem (Pty) Ltd* 1992 (1) SA 89 (W) at 101G – 102D.

[30] In *Gois t/a Shakespear's Pub v Van Zyl and Others*,^[3] the court held as follows:

"...this court may make a punitive costs order such as costs on an attorney and own client scale where it believes it (is) appropriate to do so. Factors to consider whether or not to grant such punitive costs order include where the conduct of the party is vexatious and amounts to an abuse of legal process, even though there is no intention to be vexatious; evinces a lack of bona fide; and is reckless, malicious and unreasonable."

[31] In *Brown v Papadatis and Another NNO*,^[4] what Davis J held at 545J-546D is apposite here. The learned Judge said:

"Mr Khan submits that he was given instructions to so pursue this course of action, but attorneys must surely apply a professional standard in deciding to do this. See the dictum of Innes CJ in Vermaak's Executor v Vermaak's Heirs 1909 TS 679 at 691. Applicants have rights, but the courts are not playthings, to be abused at the convenience of litigants who raise spurious, reckless arguments which jeopardize the integrity of the court, so as to postpone proceedings, when they, as in this case, have clear rights, which can protect any interest or rights which they may have."

In my view, this is a case where the court should say: Of course, litigants have rights; of course, courts must fastidiously respect

these rights; of energetically as he or she may be able, to protect these rights. But when the boundary is overstepped so grossly in circumstances where there is no legal basis, no precedent, no serious evidential edifice on which to launch such an application (ie even on these vague affidavits could a recusal application ever be brought?), the court should say, you have overstepped the mark and have crossed a bridge in circumstances where an order of costs de bonis propriis must follow."

[32] It should be discouraged to provoke an opposing party into litigation merely because of a threat of a punitive costs order. The applicant's approach is vexatious in that regard because there was "no legal basis, no precedent, no serious evidential edifice" on which to seek such costs order.

Order:

[33] The following order is made:

- a. The application is dismissed with costs;
- b. The applicant shall pay the costs of the respondent on the attorney and client scale;
- c. The costs shall be taxed by on the initiative of the applicant within 90 days, from date of this order;
- d. The costs shall be paid by the applicant within 10 days after taxation.

LUCAS J VAN TONDER AJ

Heard: 14 November 2023

Judgment:

10 December 2024

Appearances:

For the Applicant: Adv Monique Arroyo

Instructed by: Kern Armstrong and Associates

For the Respondent: In person

Instructed by: In person

[1] Room Hire Co. (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) p202-203.

[2] 1997 (1) SA 157 (A) at 177 C – F.

[3] (2003) 24 LJ 2302 (LC).

[4] 2009

(3) SA 542 (C).

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