

SOUTH AFRICA / JUDGMENT

Canize Trading (Pty) Ltd and Another v Theron and Others (2025/021910) [2025] ZALCJHB 183 (22 April 2025) [2025] ZALCJHB 183

COURT

Labour Court Johannesburg

BEFORE

M Makhura

CASE / FILE NUMBER

2025/021910

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THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: 2025-021910

In the matter between:

CANIZE TRADING (PTY)
LTD
First Applicant
TRANSMART EXPRESS
(PTY) LTD
Second Applicant
and
ASHLEY
THERON
First Respondent
ERIKA
ENGELBERCHT
Second Respondent
LEONIE DE
VILLIERS
Third Respondent
MADELEIN
VENTER
Fourth Respondent
TMA EXPRESS ROAD (PTY)
LTD
Fifth Respondent

Heard: 17 April 2025

Delivered: 22 April 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 22 April 2025.

JUDGMENT

MAKHURA, J

[1] The first to fourth respondents are all former employees of the first applicant. The applicants seek a final order to enforce a restraint of trade agreement against each of them. The founding replying affidavits filed on behalf of the applicants are deposed to by Johannes Jacobus Cornelius Jooste (Jooste), who identifies himself as the Managing Director of both applicants.

[2] Jooste described the applicants respectively as Canize Trading (Pty) Ltd and Transmart Express (Pty) Ltd, private companies with limited liability, duly registered in terms of the Company Laws of South Africa and operating from the same business address. He claims that "the first applicant further trades as a second applicant". Being a company that trades as the second applicant as alleged, Jooste further described the first applicant as a:

'wholly owned subsidiary of the second applicant, sharing the same directors. The first applicant has no trading functionality and generates no independent income. The first applicant's only revenue comes from the second applicant, which deposits employee salaries into an account held by the first applicant. To reduce costs associated with the bargaining council, all blue-collar employees are employed by the second

applicant, whilst administrative staff fall under the first applicant. All the employees of the first applicant report directly

to the second applicant's managers and function as employees of the Second Applicant in practice.' (Own emphasis)

[3] The first, second, third and fifth respondents opposed the application and filed a joint answering affidavit, deposed to by the

first respondent, Ashley Theron (Theron). The three other respondents filed confirmatory affidavits. The fourth respondent, Madelein Venter (Venter), also opposed the application and filed her separate answering affidavit.

[4] In their answering affidavit, the first to third respondents contended first that the applicants are two separate legal entities. Second, that the first to third respondents and the first applicant concluded a restraint agreement and that the second applicant was not part of the agreement. Third, the restraint agreement did not seek to protect the interests of the second

applicant.[1] Fourth, there was no separate restraint agreement between the first to third respondents, and the second applicant. Fifth, the restraint agreement, which is contained in their contracts of employment, is formulated as follows:

‘It is clearly stated and understood by the employee that acceptance of this offer of employment shall be subject to a Restraint of Trade that will apply for a period of 24 (twenty four) months after resignation from this Company, inside geographic borders of the Republic of South Africa. This implies that the employee after termination of his/her service with the Company, for whatever reason, shall not enter into competition with this Company or any of its subsidiaries using or marketing any of its products or similar products that may be available on the market for the said period of 24 months.’

[5] For the above reasons, so the first to third respondents submitted, the restraint agreements which the applicants seek to enforce can only be enforced in favour of the first applicant and its subsidiaries, and not in favour of the holding company, to the extent

that the first applicant is a subsidiary company.

[6] Ruffled by the above contentions, Jooste sought to clarify the allegations and/or claims in his founding affidavit insofar as the

relationship of the two applicants is concerned. He contended in his replying affidavit that the applicants are not two separate legal entities although they trade separately. He introduced a foreign legal concept to company law – that the applicants are “subsidiaries of each other” and further alleged that:

‘all employees of the first applicant report directly to the second applicant’s managers and function as employees of the second applicant in practice.’ (Own emphasis)

[7] During the hearing, Ms Strydom, for the applicants, submitted that the claim that the two applicants are subsidiaries of each other was an error and that the correct position is that the first applicant is the subsidiary of the second applicant. She confirmed that the first applicant has no subsidiary company.

[8] Venter’s grounds of opposition of the application are aligned with that of the first to third and fifth respondents. In addition,

and for clarity of issues, she specifically raised a special plea of jurisdiction. She pleaded as follows:

‘The Labour Court lacks jurisdiction to determine the Applicants’ application.

My contractual employer is Canize. I concluded the Restraint Agreement with Transman. The Restraint Agreement is not incorporated [in] the Employment Contract. The Restraint Agreement is therefore a commercial agreement, and not a term and condition of my employment contract with Canize.

As such, a dispute about the Restraint Agreement is therefore not a matter concerning my contract of employment as envisaged by section 77 of Basic Conditions of Employment Act 75 of 1997 ("BCEA"), nor is it a dispute in respect of which the Labour Court has jurisdiction in terms of section 157 of the Labour Relations Act 66 of 1995 ("LRA").'

[9] The contract of employment signed by Venter clearly states that it is between her and the first applicant, not the second applicant. Clause 16 of Venter's contract of employment contains confidentiality undertakings. The applicants rely on annexure "C" to the contract of employment, titled "restraint of trade". This restraint agreement, as Venter correctly observed, was signed between her and the second applicant (not the first applicant, as the employer). Further, the applicants introduced and relied on a document titled "secrecy and confidentiality undertaking" signed by Venter. The applicants relied on the introductory clause of this undertaking, in terms of which Venter acknowledged that:

'pursuant to my employment as ... by Educated Risk Investments 164 (Pty) Ltd t/a Transmart and/or its subsidiary and associate companies from ... I have and will become possessed of and have and will have access to some or all of Transmart's trade secrets and confidential information including, but without limiting the generality of tea foregoing, the following matters, all of which are hereinafter referred to as "Transmart's trade secrets"...

[10] It is common cause between the parties that Venter was employed by the first applicant. Therefore, any suggestion that Venter was

employed "by" the second applicant is of no moment and must be disregarded, as it is also not borne out of the evidence

placed before this Court.

[11] The jurisdictional point raised by Venter, which was also pleaded by the first to fourth respondents, albeit not raised as a special plea, is, in essence, that the first to fourth respondents were employed by the first applicant and that to the extent that the second applicant (a third party) seeks to enforce a restraint agreement against them, particularly Venter in terms of the secrecy and confidentiality undertaking, must find an appropriate forum to enforce the restraint agreement because this Court lacks jurisdiction on the basis that there is and was no employment relationship between the second applicant and them. For the above legally sound submissions, the respondents place reliance on section 77 of the Basic Conditions of the Employment Act[2] (BCEA) and section 157 of the Labour Relations Act[3] (LRA).

[12] In the absence of a contract of employment, Venter correctly referred to the "restraint of trade" and "secrecy and confidentiality undertaking" documents as a purely commercial transaction. The jurisdiction of this Court, per section 77 of the BCEA and section 157 of the LRA, has not been engaged. In addition, this Court has no jurisdiction to entertain the second applicant's application to enforce a restraint agreement against the first to third respondents. The special plea raised by Venter must therefore succeed.

[13] I proceed to deal with the application by the first applicant. It is common cause that the first applicant and the first to third

respondents signed a restraint agreement. It is further common cause that the first applicant seeks to enforce the confidentiality clause against Venter, which is contained in clause 16 of her contract of employment. Clause 16.2 prohibits Venter, during the existence of the contract or thereafter and for an unlimited period, from divulging to any person or use to the first applicant's detriment or prejudice of the first applicant.

[14] The legal principles applicable to restraint applications are trite.[4] In *Automotive Tooling Systems (Pty) Ltd v Wilkens and others*[5], the Supreme Court of Appeal held that:

'At issue in this case, therefore, is whether the appellant does have a proprietary interest worthy of protection. An agreement in restraint of trade is enforceable unless it is unreasonable. It is generally accepted that a restraint will be considered to be unreasonable, and thus contrary to public policy, and therefore unenforceable, if it does not protect some legally recognisable interest of the employer but merely seeks to exclude or eliminate competition.'

[15] The applicant in a restraint application is required to invoke the contract and the breach. Thereafter, the onus is on the respondent opposing the enforcement of the restraint agreement to prove that the restraint agreement is unenforceable because it is unreasonable. In *Reddy v Siemens Telecommunications (Pty) Ltd*[6], the SCA held that:

'A final order can be granted in motion proceedings if the facts stated by the respondent together with the admitted facts in the applicant's affidavits justify the order, and this applies irrespective of where the onus lies.'[7]

[16] In casu, the first to fourth respondents were all employed by the first applicant, a separate legal entity. The applicants argued that the

first applicant is a subsidiary of the second applicant. There is no evidence to support this allegation. The mere fact that the directors of two companies are the same and that the employees of one company render their services at the second company does not mean that the first company is a subsidiary of another. In any event, this makes no difference because the restraint agreement is between the first to third respondents on the one hand and the first applicant and its subsidiaries on the other. The first applicant has no subsidiary company. The first to fourth respondents do not dispute the contract with the first applicant. However, they dispute that they breached the restraint agreement, alternatively that the first applicant has no proprietary interest and therefore the application should fail. In other words, the first applicant failed to discharge its onus of establishing a breach.

[17] Jooste has laid bare the purpose of establishing the first applicant

- to reduce the costs associated with the bargaining council. To do this, all employees in administrative capacities are employed by the first applicant, whilst all blue-collar employees are employed by the second applicant. On the applicants' own version, the first applicant was established as a vehicle solely for the purpose of avoiding paying the bargaining council costs. Jooste has also laid bare the fact that the first applicant has no trading functionality and generates no independent income.
- [18] Flowing from the above, an inevitable concession was made that the first applicant had no protectable proprietary interest. In fact, on the papers, the applicants did not plead any proprietary interest the first applicant has, let alone a protectable interest, in the founding and replying affidavits. The proprietary interest referred to in this application, whether protectable or not, is that of the second applicant. This is fatal to the first applicant's application. The absence of a protectable proprietary interest marks the end of the enquiry, and the first applicant failed to establish a breach. The first applicant is not in competition with any company, let alone the fifth respondent. The application by the first applicant stands to fail.
- [19] With regard to costs, I agree with Mr Lennox that, considering the manner in which the application was prosecuted, costs must be awarded in favour of the respondents. Mr Lennox submitted that there were a number of oversights by the applicants' attorneys, which included filing of an un-deposed but commissioned confirmatory affidavit, the institution of the application in Johannesburg against Theron who is based in Cape Town, the failure by the applicants to refer to the first to third respondents' response to the applicants' letter of demand in their founding affidavit and a suggestion that these respondents did not respond to the letter of demand when they did, and the manner in which service of the documents was effected with incomplete documents at times. For these reasons, Mr Lennox submitted that costs de bonis propriis should be granted against the applicants' attorneys, alternatively that costs must be awarded on an attorney and client scale.
- [20] Mr Orton, for the fourth respondent, argued for costs on an attorney and own client's scale. He relied primarily on the lack of merits in the application, which have been addressed above. Further, he submitted that Venter, who now formed his company, which is yet to start operating, is not in competition with the applicants, particularly the second applicant, even if the issue of jurisdiction did not defeat the second applicant's application. Mr Orton further submitted that the applicants' conduct, in establishing the first applicant to employ the administrative staff to reduce the costs of the bargaining council, is *fraus legis*. This argument was based on the nature of the 'relationship' between the employees of the first applicant and the first and second applicants. He referred the Court to the judgment of *Labournet Holdings (Pty) Ltd v McDermott & another*[8] (McDermott), which found that a court should not come to the aid of a party or parties who conclude misleading contracts and/or contracts that are against public policy. The argument is that the first applicant was established as a separate legal entity solely to avoid falling under the scope and jurisdiction of the National Bargaining Council for the Road Freight and Logistics Industry (NBCRFLI)

and to avoid paying prescribed or agreed increases, benefits and levies.

- [21] Whether or not there was *fraus legis* is not for this Court to determine. However, there is, on the face of it, merit in Mr Orton's argument, particularly considering the applicants' version that the first applicant was established to reduce the costs of the bargaining council. Further, the directors of the first and second applicants are the same. The first applicant has no trading functionality and does not generate any income on its own. However, it has employees who appear not to fall under any industry, simply because they are administrative employees. It essentially employed these employees on behalf of the second applicant, who appear to dedicate all their working hours to the second applicant. The second applicant pays the salaries of the employees by depositing the money into the first applicant's account. Because the employees are employed by the first applicant and not by the second applicant, which falls within the scope and jurisdiction of the NBCRFLI, the applicants are not liable to pay any monies in terms of the NBCRFLI collective agreements. For these reasons, the second applicant can argue that these are not my employees, and the first applicant can argue that it is not involved in the business of the road freight and logistics industry.
- [22] The applicants' subsequent *volte-face* attempt in their replying affidavit that the purpose of establishing the first applicant was for an administrative purpose (without providing any further details), is a ruse which is unhelpful to their case. Whatever the administrative purpose the first applicant was established, it was, on the face of it to hide the employees in this entity to avoid paying the NBCRFLI costs, per their version.
- [23] Whilst I accept that applications to enforce restraint agreements should not be dealt with and determined as purely and strictly contractual matters because they involve constitutional issues[9], that this Court retains its discretion on the issue of costs and that this is a court of equity, the current application, in my view, should never have been instituted or should have been abandoned and withdrawn after receipt of the answering affidavits. This application is an abuse of the court processes and a flex of the applicants' financial muscles. That this is a court of equity is not a license for meritless and frivolous applications to be launched and persisted with on the face of obvious and sound factual and legal opposition. This Court should rebuke unmeritorious claims by issuing costs orders, and where necessary, on a higher scale. The respondents should not be saddled with the costs of opposing this application.
- [24] For the above reasons, I am persuaded that an order for costs on an attorney and client scale is warranted. I am not persuaded that the applicants' attorneys' conduct constitutes negligence and/or negligence of such a degree or disregard for professional responsibilities that is so egregious that it deserves this Court's disapproval with costs *de bonis propriis*. [10] The applicants' attorneys have, in my view, explained most of what Mr Lennox complained of.
- [25] In the premises, the following order is made:

Order:

1. The fourth respondent's special plea of jurisdiction succeeds, and the application by the second applicant is dismissed for lack of jurisdiction.
2. The first applicant's application is dismissed.
3. The applicants are ordered to pay the respondents' costs on an attorney and client scale, jointly and severally, the one paying the other to be absolved.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicants:

Ms D. Strydom

Instructed by:

Pearson Attorneys

For the 1st – 3rd Respondents: Mr M. Lennox

Instructed by:

DH Hinrichsen Attorneys

For the 4th Respondent: Mr R. Orton of Snyman Attorneys

- [1] Does a third party (not the employer of the employee) have a legal standing to enforce a restraint agreement in this Court and/or does this Court have jurisdiction to entertain a third party's application to enforce a restraint agreement concluded between that third party and the employee of another employer? This issue is addressed later in the judgment in respect of Venter's

opposition.

- [2] Act 75 of 1997. See in particular section 77(3), which provides that this Court "has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract."
- [3] Act 66 of 1995, as amended. Section 157(1) and (2) provides that: "(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court. (2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the

Republic of South Africa, 1996, and arising from – (a) employment and from labour relations; (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and (c) the application of any law for the administration of which the Minister is responsible.”

[3] Act 66 of 1995, as amended. Section 157(1) and (2) provides that:

“(1) Subject to the Constitution and section 173, and except where this Act provides otherwise, the Labour Court has exclusive jurisdiction in respect of all matters that elsewhere in terms of this Act or in terms of any other law are to be determined by the Labour Court.

(2) The Labour Court has concurrent jurisdiction with the High Court in respect of any alleged or threatened violation of any fundamental right entrenched in Chapter 2 of the Constitution of the Republic of South Africa, 1996, and arising from –

- (a) employment and from labour relations;
- (b) any dispute over the constitutionality of any executive or administrative act or conduct, or any threatened executive or administrative act or conduct, by the State in its capacity as an employer; and
- (c) the application of any law for the administration of which the Minister is responsible.”

[4] See: *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) (*Reddy v Siemens*) 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; *Labournet (Pty) Ltd v Jankielsohn and others* (2017) 38 ILJ 1302 (LAC); [2017] 5 BLLR 466 (LAC) at paras 41 – 43.

[5] 2007

(2) SA 271 (SCA); (2007) 28 ILJ 145 (SCA) at para 8.

[6] *Reddy v Siemens* (supra).

[7] *Ibid* at para 4; see *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984

(3) SA 623 (A); [1984] ZASCA 51 at 634E – I and 634A – C.

[8]

(2003) 24 ILJ 185 (LC); [2002] ZALC 180.

[9] *Ball v Bambalela Bolts (Pty) Ltd & another* (2013) 34 ILJ 2821 (LAC); [2013] 9 BLLR 843 (LAC) at paras 29 – 30.

[10] See: Lekhesa: In re Ngwenya v Trustees for the Time being of Sishen Iron Ore Company Community Development Trust & another

(2024) 45 ILJ 1220 (LAC); [2024] 6 BLLR 585 (LAC) at para 17.

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