

SOUTH AFRICA / JUDGMENT

Coleman v Sleep (44/04/01) [2004] ZAGPHC 36 (11 November 2004)

[2004] ZAGPHC 36**COURT**

High Courts - Gauteng

BEFORE

Willis

CASE / FILE NUMBER

3644/04

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

NOT REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO: 3644/04

DATE:2004-11-11

In the matter between

CLIFFORD CHARLES COLEMAN..... Applicant

and

LUKE JAMES SLEEP..... Respondent

JUDGMENT

WILLIS, J: The applicant has approached the court by way of motion proceedings seeking payment of the sum of R275 000, interest thereon and costs. The causa upon which he relies is an agreement which, it is common cause, was entered into between the parties. It was an agreement in terms of which the applicant sold to the respondent a member's interest in a CC known as Security Without Any Trauma ("SWAT").

In addition, the purchaser agreed to pay the seller a payment in respect of a restraint of trade. The relevant clause is 6.1 thereof which reads as follows:-

"The seller in order to protect the goodwill of SWAT and the interest of the purchaser in the goodwill of SWAT, agrees and undertakes in favour SWAT and the purchaser that he will within the area of Gauteng Province of the Republic of South Africa and for a period of three years after the effective date, either as principal, agent, partner, representative, shareholder, member, director, employee, consultant, adviser, financier or in any like of similar capacity, directly or indirectly not be associated or concerned with, interest or engaged in any firm, business, company, close corporation or other association of persons which carries on a business or activity similar to the business carried on by SWAT on the effective date, save for the insulation of electric security fencing and CCTV systems." In respect of this restraint the respondent undertook to pay the applicant a sum of money.

On 28 November 2003 the respondent in the present application was the applicant in an application in terms of which he sought to enforce the restraint agreement. No answering affidavit has been filed in this matter and the respondent has made an application for security for costs which has not yet been resolved. The present application was launched during February of this year.

It is common cause that the sum of money in question has not been paid by the respondent to the applicant. The respondent relies upon the applicant's alleged breach of agreement, namely that the applicant is acting in breach of the restraint of trade clause to which I have already referred.

The applicant in his founding papers makes no mention of whether or not he has complied with his obligations in terms of this particular

agreement and in reply does not dispute that he may be operating a business of the nature alleged by the respondent but simply relies upon the fact, which is common cause, that SWAT has been placed in liquidation and accordingly he is relieved of his obligations in terms of this agreement.

During the course of argument Mr Smit who appears for the applicant drew my attention to a clause in the agreement which provides that should any party commit a breach, the other party is obliged to give 14 days notice calling upon the party committing the alleged breach to remedy such breach. He submits that in view of the fact that this obligation was not complied with by the respondent, the respondent cannot avoid payment of his obligations in terms of this agreement. I would wish to emphasise that this particular aspect raised in argument does not appear anywhere in the papers before me.

In the case of *International Executive Communications Ltd t/a lift v Turniey* 1996(3) SA 1043 (W) Cloete J *fas* he then was) said at 1047F:-

"So far as final relief is concerned, the applicant's performance of its obligation (payment of a percentage of its net profit) is obviously reciprocal to the first respondent's obligation to abide by the restraint after leaving the employ of the applicant and would have had to have been performed first. The onus of proving that there was performance of that obligation or that such performance was excused, is on the applicant: *BK Tooling (Edms) Bpk v Scope Precision*

Engineering (EdmsJ Bpk 1979(11 SA 391 (A) at 419H; and 'solank as iets nog oorbly wat geprester moet word, kan die persepsie dat vervulling nie gevolg het nie, teen beide die eiser self en sy erfgenaam geopper word - selfs as die kleinste deel van die kontrak nie vervul is nie of die nie-vervulling slegs op accidentalia.'" In the BK Tooling case to which Cloete J referred, the Appellate Division reviewed in some detail the history and scope of what have come to be known as the principle of reciprocity and the exceptio non adimplenti contractus.

Because the plaintiff's performance or tender of performance is part of his cause of action, he must plead it specifically and his failure to do so will make his declaration excipiable. In the present context the failure of the applicant specifically to allege that he has complied with his obligations in terms of the agreement must in my view prove to be fatal. The situation is particular exacerbated by the fact that the applicant must have been aware that there was another application pending in terms of which it had been specifically alleged that he had acted in breach of his obligations in terms of the restraint.

In so far as the argument that SWAT CC has been placed in liquidation and therefore the applicant is relieved of his obligations is concerned, this, in my view, also holds no water. The agreement was not entered into between either of the parties to this application

and SWAT but between the two of them. Furthermore, the wording of the relevant clause, which I have already quoted, refers to "any

business" etc which "carries on a business or activity similar to the business carried on by SWAT".

In my view, the plain ordinary meaning of this clause is that notwithstanding what may happen to SWAT during the course of the period of the restraint of trade, the applicant is nevertheless restrained from carrying on a business or activity similar to that

which was that of SWAT. It is not difficult furthermore to detect an underlying ratio for this interpretation on the clause. Clearly, the respondent as purchaser, even if SWAT went into liquidation, may have an interest in establishing another similar business for which he is paying the applicant to refrain from operating. In my view, therefore, the application must fail.

Mr Cohen who appears for the respondent argued that costs should be ordered on an attorney and client scale by reason of the fact that the applicant would have been aware of the application to restrain him in terms of this agreement. Notwithstanding this fact, I do not believe that the conduct of the applicant goes so far as to justify a punitive costs order.

The following order is made: The application is dismissed with costs.

COUNSEL FOR THE APPLICANT: ADV N SMIT

Instructed by :LMeiamed & Hurwitz inc

COUNSEL FOR THE RESPONDENT :ADV S COHEN

Instructed by :David Khan & Associates

DATE OF JUDGMENT: 11 NOVEMBER 2004

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPHC/2004/36.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/coleman-v-sleep-unknown-topic-agphc-2004>

Prepared on 13 October 2026 · Esheria