

SOUTH AFRICA / JUDGMENT

Columbus Stainless (Pty) Ltd v Hemraj (2199/2021) [2024] ZAMPMHC 28 (3 May 2024) [2024] ZAMPMHC 28

COURT

Middelburg High Court, Mpumalanga

BEFORE

Ratshibvumo

CASE / FILE NUMBER

2199/2021

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THE HIGH COURT OF SOUTH
AFRICA

MPUMALANGA DIVISION,
MIDDELBURG LOCAL SEAT

CASE

NO: 2199 / 2021

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED.

DATE: 03 May 2024

SIGNATURE

In the matter between:

COLUMBUS STAINLESS
(PTY) LTD
PLAINTIFF
and
BEESHAM
HEMRAJ
DEFENDANT

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 09H00 on 03 May 2024.

JUDGMENT

—

RATSHIBVUMO ADJP:

Introduction

[1] In this trial, the Plaintiff claims for damages in the amount of R5 866 833.81 against the Defendant, a former employee. The trial was by default following the Defendant's failure to enter a notice to defend. The claim is based on a breach of employment contract or policy. The Plaintiff alleges that it suffered losses as a result of the Defendant's failure to disclose his financial interests or conflict of interest in a company known as PDK Global Enterprises (Pty) Ltd (PDK Global Enterprises). The amount claimed, was quantified as "overcharging" done by PDK Global Enterprises in respect of goods sourced and delivered

to the Plaintiff. The trial is the Plaintiff's attempt to prove the damages it suffered in line with Rule 31(2)(a) which provides,

"[W]henever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in sub-rule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as it deems fit."[1]

[2] The Plaintiff handed in an affidavit by Anthia Louverdis, the Plaintiff's Senior Legal Advisor and Company Secretary, in terms of Rule 38(2), and this was marked as Exhibits A. Affidavits by Tshegofatso Masete, Julian Smith and Marike Fraught, all of whom were employees at Bowman Gilfillan Incorporated, the attorneys of record for the Plaintiff were received and marked as Exhibits B, C and D. These exhibits confirm the contents of Exhibit A relating more particularly to the interview held with the Defendant,

following his suspension as an employee. Once the Plaintiff's case was closed, heads of argument were prepared for the Plaintiff

after the court requested the counsel to explain the nature of the cause of action against the Defendant and the legal basis for holding him, to the exclusion of PDK Global Enterprises, liable for the alleged losses. The heads of argument were made available on 15 March 2024.

Plaintiff's case.

- [3] From the exhibits received making the case for the Plaintiff, the following can be gleaned. The cause of action against the Defendant is rooted on the obligations arising from the employment contract, the breach of which resulted in the alleged damages suffered by the Plaintiff. For purposes of this judgment, it is not necessary to dedicate much time on the obligations that the Defendant had towards the Plaintiff, and/or the breach thereof as the matter is undefended, resulting in factual non-dispute. It is the actual loss and the causal link between the breach and the alleged loss suffered, that require the court's attention.

These two, form the backbone of the court's judgment as from them, one can dissect the alleged loss and the cause of action against the Defendant.

- [4] The Defendant was an employee of the Plaintiff from 22 March 2007 and he held various positions over the years until his resignation on 02 December 2020 when he chose to resign than face a disciplinary enquiry over his alleged breach of employment contract. At the time, he was a senior technician responsible for the management of large capital projects including "refurnish, rebuilds, descender pump rebuilds and maintenance."
- [5] The Code of Conduct that was approved by the Plaintiff on 25 October 2016, which was breached by the Defendant, provides,

"...no person with relevant economic or emotional interest in a supplier, whether current or potential, shall be involved, either directly or indirectly, in any decision associated with that supplier..."

Employees of Acerinox must avoid any situation involving a conflict between their personal interest, be they economic or otherwise, and those of Acerinox, and they shall refrain from intervening or influencing decision making in matters when there may be a conflict of interests, informing their hierarchical superior and the Internal Audit Service of the same...

In particular, any worker of Acerinox who may have an interest, either directly or through a relationship, with suppliers, competitors, clients or subordinate staff with whom they should have, or could reasonably have, a professional relationship, must inform the management of the respective company and the Internal Audit Service." Procurement by the companies of the Group shall be done under conditions which ensure transparency, efficiency, prevent conflict of interest and, where possible, promote competition.

A lack of honesty in the communication of information, both internally within the Group (to employees, internal departments and bodies, administrative bodies, etc) and externally (to auditors, shareholder and investors, regulatory body, the media, etc.) shall be in breach of this Code of Conduct. Such dishonesty also include submitting incorrect information, organising it incorrectly or attempting to mislead those who receive it.

Breach of the Code of Conduct and good practices of Acerinox can lead to labour sanction, without prejudice to the possible administrative or criminal proceeding which may also ensue"[2]

- [6] According to the Plaintiff, the Defendant breached the Code of Conduct in that he failed to declare his interests in PDK Global Enterprises. The Defendant was conflicted because the sole director of PDK Global Enterprises, a company that did business with the Plaintiff, was the Defendant's sister. Moreover, the Defendant did some work for this company in circumstances that he classified as "moonlighting". He also received remuneration for his work, although the amount thereof is unspecified or unknown. For his failure to disclose this, the Defendant was suspended pending a disciplinary enquiry, and he resigned before it could be finalised.
- [7] In explaining the cause of action, the Plaintiff submitted that the legal basis for the Defendant's liability emanates from the common law. It is trite that not every breach of employment contract or Code of Conduct translates into a loss by the employer for which there could be a delictual claim- against the employee. Where a loss flows from a breach by an employee, the employer is entitled to recover damages from the employee, subject to any restriction imposed by the labour legislation.
- [8] Counsel for the Plaintiff made this submission relying on a judgment by Makgoka J (as he then was) in *Value Logistics Ltd v Weinberg & Another*[3]. In that case, the court found ex-employees liable for the losses suffered by the employer based on common law. The employer was in a business of selling and renting motor vehicles. Certain motor vehicles were sold by the employees to third parties at under-priced

value, and the employees pocketed the proceeds thereof. The common law link and the cause of action were easy for the employer to prove as this was tantamount to theft from an employer, to whom the proceeds of sale were due. The circumstances are somewhat different in casu as illustrated hereunder. The Plaintiff has a burden to prove that it suffered some damages and that the Defendant alone, is liable for such total damages. This would entail unpacking the whole claim of the Plaintiff.

- [9] The Plaintiff's claims against the Defendant are computed as follows, as detailed in the particulars of claim:

9.1 Two orders totalling R13 185 738.10 were placed by the Plaintiff on PDK Global Enterprises for the purchase of rider bars;

9.2 In respect of the first order, the quote was R12 402 737.10 excluding VAT;

9.3 To the knowledge of the Defendant, the rider bars were manufactured by Jiaxin Casting at a cost of R6 476 536.99;

9.4 Applying a reasonable mark up of 15%, the plaintiff would have been able to purchase the rider bars for R7 448 017.54 and it accordingly suffered a loss of R4 954 719.56

9.5 In respect of the second order, the quote was R843 712.00, excluding VAT;

9.6 The Plaintiff is unaware of the costs of those rider bars, but if the rider bars in the second order were manufactured by Jiaxin Casting at the same price as those in the first order, then PDK Global Enterprises effected a mark-up of R424 930.66 equating to 101%.

9.7 Applying a mark-up of 15% to the amount, then the Plaintiff suffered a loss of R369 013.46.

[10] A further claim is of the amount of R102 550.76, a loss suffered by the Plaintiff as a result of cover quoting. According to the particulars of claim, this happened when RR Pumps and ASW, companies with which the Defendant is linked, submitted quotes to the Plaintiff, together with PDK Global Enterprises, but PDK Global Enterprises were the lowest. The Plaintiff claims that “[T]he quotes provided by the other entities were cover quotes, submitted so as to enable PDK Global Enterprises to submit lower quotes but PDK Global Enterprises’ quotes were at mark-ups on the price from the supplier to PDK Global Enterprises that were unreasonably large, and so large that had the Plaintiff known of the cover quoting and the markups imposed by PDK Global Enterprises it would not have accepted the quotes.” No details of the goods purchased or the dates thereof were furnished in the particulars of claim.

[11] Further losses suffered by the Plaintiff are computed as follows:

10.1 On 11 January 2019, the Plaintiff received a quote from PDK Global Enterprises of an auto backwash filter totalling R339 720.00 excluding VAT. The Defendant however commenced a new procurement process whereby he received a new quote from PDK Global Enterprises totalling R590 500.00; which was accepted by the Plaintiff.

10.2 The Plaintiff accordingly contends that it suffered a loss of R250 780.00 in regard to the purchase of the filter.

10.3 On unspecified date(s), the Plaintiff further purchased certain spare parts relating to the above mentioned backwash filter at a cost of R282 363.02;

10.4 The Plaintiff claims that the difference between the price it paid and what it should have paid had the mark-up been just 15% is R189 770.03, which is the loss it suffered in this regard.

Discussion.

[12] The Plaintiff’s claims presuppose that there are limitations in the business of making profits through sale. If this be the case, the following questions are inevitable: How much is the limit permissible in making profits out of sale and on whose yardstick is the same to be measured? Presuming that there are acceptable national or international figures on this, what can and cannot be included in the calculation of the profits? For example, there are costs associated with transportation of goods from the manufacturer by the seller and from the seller to the buyer, and in some cases, costs associated with the storage pending the sale and/or collection.

- [13] Similarly, the costs charged for transportation would have to be subjected to the same scrutiny on how much profit is permissible when the seller is charged for transportation and what it is that should be allowed in the calculation over and above the fuel costs. The Plaintiff suggests that 15% is a reasonable figure, but fails to attach any basis for this assumption. The amount claimed for damages is also based on the calculation of this figure.
- [14] If the limitation above exists in a sale of goods transactions, the Plaintiff failed to direct this court thereto. I am of the respectful view that if businesses were permitted to make profits when selling goods, to a maximum of 15% of the original value thereof, most of them would close down due to unsustainability. Given what should and should not be included in calculating the profit, enforcing such rules could be difficult and costly for any regulatory body.
- [15] The question on the existence of the limitation in profits described above is not the only concern for the court. The causal link between the profits pocketed by PDK Global Enterprises and the Defendant's liability as the only party liable or before the court, is missing. In other words, if it is the Plaintiff's case that claims were made and undue profit was made by PDK Global Enterprises, why is the claim being made against the Defendant? A claim against the Defendant suggests that he is the one who pocketed all the proceeds, but that is not the Plaintiff's pleaded case.
- [16] In *RFS Administrators (PTY) Ltd v Samons and Others*[4], the court held,
- "[W]ith regard to the alternative claim of the breach of clause 4 of the HR Policy, performance equates declaration of potential financial interest. If an employee fails to declare a potential interest, it is too remote a damage that should an employee achieve financial reward, then the reward is the equivalent of the failure to declare. Such damages would not have been within the contemplation of the parties when they contracted. Clause 4 does not prevent an employee to have financial interest; all it requires is the declaration of the potential. There is no monetary value that can be attached to a failure to declare. If there is any, the onus rests on RFS to show that monetary value and it has failed to do so before me."*
- [17] In dismissing the appeal by *RFS Administrators*, the Labour Appeal Court held,
- "[I]n any event, in my view, RFS has failed to establish any causal connection between the alleged breach of the contracts and the*
- damages it allegedly suffered as a consequence thereof. The monies were paid to the respondents directly from funds paid into the RFS bank account by the Funds and were earmarked for payment to the respondents. The money was thus specifically transferred to enable RFS to pay the respondents in accordance with the resolution adopted by the Funds. RFS's claim for contractual damages must therefore also fail."
- [18] In its attempts to distinguish the facts of this case from the judgments above, the Plaintiff submitted,

“[T]his action, although it involves a failure to declare interests, is distinguishable... The employee in RFS Administrators had received a financial reward (secret profit). The court held that a failure to declare a relationship where disclosure was required could not be said to have caused a loss equal to the secret profit made; because had the employee not breached, they would have made the disclosure. It was not shown that they would also not have made the profit. Here there is a direct causal link between the failure to disclose and the overpayments to PDK. Had the disclosure been made, the overpayments would likely not have occurred.”⁶ [My emphasis].

[19] The distinction drawn by the Plaintiff is based on the possibility that PDK Global Enterprises was “likely” not going to be preferred as the seller of the goods. This argument should be seen in light of the fact that other companies on the panel

of preferred providers for the Plaintiff had also given quotations for the goods and all their prices were found to be above the ones provided by PDK Global Enterprises. I fail to see the distinction in this regard, unless some weight is to be attached to the Plaintiff’s suspicion that the quotations supplied by the other supplying companies on its panel were being presented as “cover quotes”, in order to allow PDK Global Enterprises to be the cheapest. This however is submitted as a suspicion not a fact. Even if it was true, the presentation of “cover quotes” is not attributed to the Defendant as a person. As a result, I find that it has not been sufficiently proved that had it not been for the Defendant’s non-disclosure, the Plaintiff would not have proceeded to make purchases of the goods at the same or higher prices.

[20] The last aspect is the calculation and quantification of the value of the profit made by the Defendant as compared to the alleged damages suffered by the Plaintiff. This court was referred to Breetzke and Others NNO v Alexander NO and Others^[6], where the Supreme Court of Appeal held,

“[W]here the execution of a breach of fiduciary duty involves or requires the involvement or participation of a third party, and that third party has knowledge that the transaction in question involves a breach of a fiduciary duty, it seems to me clear that the legal convictions of the community demand that the third party share the liability of the person breaching the fiduciary duty. That is not because they owe a similar duty to the injured party, but because by aiding, enabling or facilitating the breach they are themselves equally responsible for the injury caused to, or the loss suffered by, the injured party. I can think of no good reason why the principal perpetrator would be liable, but the enabler should escape liability, any more than I can see any reason why a criminal should be subject to the rigours of the criminal law, but their accomplice, or an accessory after the fact, should not. As we know that is not the case in the criminal law because the legal convictions of the community would regard it as intolerable. No reason was advanced and none occurs to me why a breach of fiduciary duty would be viewed any differently.

The reason for the law imposing fiduciary duties in certain circumstances is to protect those who might otherwise be vulnerable to exploitation by the person on whom the duty is imposed. The community requires that the vulnerable should not be deprived of such protection and it can make no difference that the deprivation involves not only the person owing the primary obligation, but those who knowingly aid, enable or facilitate the deprivation. Knowledge of the

breach of fiduciary duty is central to the liability of the third party. It is their guilty knowledge that attracts liability and, as the two Yorkshire Insurance cases demonstrate, that may not be easy to establish. However, where it is established, the requirement of honesty and fairness in dealing with the property and property interests of others demands that liability should follow.”

[21] The Plaintiff accepted that from the quoted passage above, PDK Global Enterprises would be liable for aiding the Defendant in his breach of his fiduciary duties to the prejudice of the Plaintiff and that it would be jointly and severally liable with the Defendant; to which it submitted that the Defendant must bear liability too. To this extent, the Plaintiff argues that “it is pursuing an action against PDK Global Enterprises for the losses suffered. That action is defended. The Plaintiff will and must, reduce its claim against PDK Global Enterprises to the extent that it recovers its losses from the Defendant in this action.”

[22] No details have been furnished to this court regarding the said action against PDK Global Enterprises. This court is in the dark as to the amount claimed therein and how the same has been quantified from the full amount being claimed from the Defendant. The Plaintiff suggests that whatever would have been recoverable from the Defendant would be reduced from the claim and/or the award recoverable from PDK Global Enterprises. It however does not make a case on how much it is entitled to recover from the Defendant alone. If there is a valid claim against the Defendant in this regard, I hold a view that the same should have been claimed jointly and severally against the Defendant and PDK Global Enterprises.

[23] I am therefore not satisfied that the Plaintiff succeeded in proving the damages allegedly suffered against the Defendant.

[24] For the reasons set out above, I make the following order.

The Plaintiff’s claim is dismissed.

TV RATSHIBVUMO

ACTING DEPUTY JUDGE PRESIDENT

MPUMALANGA DIVISION

FOR THE PLAINTIFF: ADV K D ILES INSTRUCTED BY: BOWMANS ATTORNEYS C/O GFT
PISTORIUS INC MIDDELBURG DATES HEARD: 11 & 15 MARCH 2024

JUDGMENT

DELIVERED: 03 MAY 2024

[1] See also paragraph 5.3 of the Practice Directives of this Division which provides, “[A]s contemplated in Rule 31(2)(a) there shall be no default judgment in any claim which is not for a debt or liquidated demand like damages claim matters without hearing

evidence and only after the court shall have heard evidence will the court consider whether to grant default judgment or not.”

- [2] See paragraph 15 of Exhibit A on pages 36, 37 & 38 of the paginated bundle.
- [3] (54119/07)
- [2012] ZAGPPHC 17; (2012) 33 ILJ 849 (GNP) (29 February 2012).
- [4] (JS 641/17) [2022] ZALCJHB 110 (30 August 2022) at paragraph 81.
- [5] RFS Administrator v Samons and Others (JA114/22)
- [2024] ZALAC 10 (11 April 2024) at paragraph 71. 6 See para 22 of the Plaintiff's heads of argument.
- [6] (232/2019)
- [2020] ZASCA 97; [2020] 4 All SA 374 (GP); 2020 (6) SA 360 (SCA) (2 September 2020) paragraphs 37-38.
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