

SOUTH AFRICA / JUDGMENT

FNB Insurance Brokers v Grange (J252/18) [2018] ZALCJHB 77 (21 February 2018) [2018] ZALCJHB 77

COURT

Labour Court Johannesburg

BEFORE

GN Moshwana

CASE / FILE NUMBER

J252/18

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

case

no: J252/18

In

the matter between:

FNB
INSURANCE BROKERS,
A
BUSINESS UNIT OF THE FNB BUSINESS
SEGMENT
OF FIRST NATIONAL BANK,
A
DIVISION OF FIRSTRAND BANK LIMITED (FNBIB)
Applicant
and
MARIA
SUSANNA ELIZABETH LE
GRANGE Respondent

Heard:

09 February 2018

Delivered:

21 February 2018

Summary: An application to enforce a restraint of trade is generally heard on an urgent basis provided the requirements of Rule 8 are met. Urgency follows as a matter of course when Rule 8 requirements are met. A party seeking to enforce a restraint of trade must allege and prove the agreement as well as its breach by the other party. Held (1): The respondents are interdicted and restrained. Held (2): The respondent to pay the costs of the application.

JUDGMENT

MOSHOANA, J

Introduction

- [1] This is an application to restrain and interdict a former employee of the applicant. The application is opposed. The applicant seeks, amongst others, a declaratory relief to the effect that the respondent breached the Confidentiality and Restraint Agreement and to interdict the respondent for a period of 12 months from the date of resignation from disclosing confidential information and soliciting its clients.
- [2] The opposing respondent challenged the urgency of the matter on the basis that the applicant did not enrol this application in line with the practice manual.[1]

Background

facts

- [3] The respondent commenced employment with the applicant on 1 May 2010 as a Commercial Broker at its Rustenburg office. On 11 May 2010, the respondent and the applicant concluded a Restraint Agreement. On 11 October 2010, the respondent signed the applicant's Articles of Agreement wherein she made confidentiality undertakings.
- [4] On 24 June 2010, the applicant and First Rand Bank Limited entered into a sale of business agreement in terms of which, the business of the applicant was transferred to First Rand Bank Limited. The transfer was done in line with section 197 of the Labour Relations Act. Clause 7.1.1 of the sale of business agreement specifically provided that restraint of trade agreements were transferred. The respondent was on the list of the employees whose contracts were transferred.
- [5] On 1 December 2017, the respondent resigned effective 31 December 2017. Following her resignation, she was reminded of her contractual obligations. Whereafter, as it is routinely done, the applicant conducted some investigations, which investigations revealed during the week of 22 January 2018 that the respondent gave her daughter a confidential list of the

applicant's clients. Further it revealed that the respondent took her daughter to a meeting with one of its clients, Wimpy in Carletonville. It was also discovered that prior to her departure, the respondent requested a schedule of the applicant's clients. The schedule contained information about names, policy numbers, product sold and the premium. Shortly after obtaining the schedule, one of the clients on the schedule cancelled a policy and immediately signed a new policy with another Broker. Few days after the resignation of the respondent, another client, which dealt directly with the respondent, appointed another Broker. Ultimately, it was discovered that about 30 clients, which dealt directly with the respondent, were solicited during November 2017 and December 2017. Consequently, the applicant through its attorneys placed certain demands and sought an undertaking from the respondent. No such undertakings were given. The applicant approached this court on 01 February 2018.

- [6] On 5 February 2018, the respondent made an offer effectively agreeing to an interim order. On 06 February 2018, the applicant accepted the respondent's offer. On 07 February 2018, the respondent sought to withdraw the already accepted offer.[2]

Evaluation

Lack of urgency

- [7] In its founding affidavit, the applicant set out the reasons why and urgent relief is required. [3] Other than a bare denial, the respondent did not raise any other basis why an urgent relief was necessary.[4] Only during argument did Mr Van Vuuren appearing for the respondent raise the non-compliance with the Practice Manual. This is

inappropriate. Counsel should not as matter of fact make a submission that is not borne out in the papers before court. A party in motion proceedings stands and falls by the allegations made in its affidavit. Generally, matters involving a restraint of trade are considered to be urgent in nature primarily because of the duration of the restraints. However, the requirements of Rule 8 remain relevant.

- [8] I am unable to agree with the respondent that the matter is not urgent. The applicant had set out the reasons why it believes that an urgent relief is necessary. All that the respondent did was to provide a bare denial. The non-compliance with the Practice Manual argument cannot and should not be entertained. Therefore the defence of lack of urgency is not upheld.

Is there a restraint agreement?

- [9] At paragraph 28 of the founding affidavit, the applicant testified that the respondent concluded and signed the restraint agreement on 11 May

2010. This allegation is admitted by the respondent.[5] The contention and argument that the respondent was employed by a company with registration number 1956/000269/07 has no merit. A transfer in terms of section 197 of the Labour Relations Act has taken place and accordingly in law the employment contract, inclusive of the restraint agreement has been transferred. I therefore conclude that there is a restraint agreement in place. Therefore, there exists a valid agreement between the parties.

[10] Any attempt to avoid the terms of the agreement cannot be upheld especially on the basis contended for by the respondent.

Is the agreement enforceable?

[11] The contention that there is no employer and employee relationship is rejected. Therefore the restraint is enforceable in law.[6]

[12] The allegation that since the 2016 agreement was not signed, there is no enforceable agreement is nothing but a red herring. The applicant before me seeks to enforce the undisputed agreement signed on 11 May 2010.

Was the restraint breached?

[13] It is trite that a party in motion proceedings is to make his or her case in the founding affidavit[7]. The applicant has made such a case[8]. The respondent does not seriously dispute the allegations. By and large, the respondent provides a bare denial and actually becomes

argumentative instead of placing before court a version to amplify the bare denial.

[14] When someone alleges that he or she is not bound by a restraint to which he had assented to in a contract, he or she bears the onus of proving that enforcement of the restraint is contrary to public interest.[9] Other than alleging that there is no employer and employee relationship, the respondent failed to demonstrate on a balance of probabilities why the restraint is unreasonable.[10]

[15] There can be no doubt that the respondent was exposed to the trade connections of the applicant given her position and her undisputed tasks[11] whilst in the employ of the applicant.

[16] Regarding confidential information and trade secrets, it is not seriously disputed that the former employee had access to the schedules[12]. I am satisfied that in the course of the access the respondent was availed to confidential information and trade secrets of the

applicant. There is real likelihood that she can use that and or disclose that to other parties. In fact the respondent does not

seriously dispute that she gave a list to her daughter and that she took her to Wimpy at Carletonville. Accordingly, the applicant is entitled to be protected in this regard.

[17] I am therefore satisfied that the respondent is in breach of the restraint. Accordingly, her conduct is prejudicing the applicant's protectable interest. On the basis of the above breaches, the applicant is entitled to the relief sought.

Issue of costs.

[18] The LAC in *Ball v Bambelela Bolts (Pty) Ltd*[13] has already decreed that since these matters raise a constitutional issue-breach of section 22 of the Constitution, a rule of costs

following the results does not apply. However the matter before me warrants a cost order. The respondent failed to give an undertaking

which would have obviated this application. She agreed to an interim order and without any justification made a volte face. Despite all of that I am not inclined to make a punitive costs order. To my mind the opposition was frivolous and vexatious. Therefore, the appropriate order to make is that of costs on a party and party scale.

Conclusion

[19] I come to the conclusion that there is a valid and enforceable restraint and that the interest of the applicant is worthy of protection. I am satisfied that the respondent is prejudicing such an interest. As to costs, the appropriate order to make is that of costs on a party and party scale.

[20] In the results I make the following order:

Order

1. The matter is heard as one of urgency.
2. The respondent breached the restraint agreement by disclosing confidential information to her daughter Carla.
3. The respondent breached the restraint agreement by not adhering to the non-solicitation undertaking.
4. The respondent is interdicted and restrained for a period of 12 months commencing on 01 December 2017 from using the confidential information of the applicant in any manner whatsoever, soliciting, canvassing business or providing prescribed services or products to the applicant's prescribed clients as defined in the agreement signed on 11 May 2010 and from disclosing the information to any third party.
5. The respondent to pay the costs of the applicant.

GN Moshwana

Judge of the Labour Court of South Africa.

Appearances

For the Applicant: Advocate T Manchu

Instructed by:

Hogan Lovells (SA) Inc, Sandton.

For the Respondents: Advocate M Van Vuren.

Instructed by:

Manong Badenhorst & Badenhorst Inc, Klerksdorp.

- [1] 12.3 The normal time for the bringing of an urgent application, whether during term or recess, is 10h00 on Tuesdays and Thursdays. If the urgent application cannot be brought at 10h00 on Tuesdays or Thursday of any week, it may be brought on any other day of the week at any time, but the applicant in the founding affidavit must set out facts which justify the bringing of the application at a time other than 10h00 on Tuesdays or Thursdays.
- [2] In the letter of 7 February 2018, the respondent's attorneys stated the following: "We now have instructions from our client that it will not be in the best interest for an interim order to be granted against her..." [My underlining and emphasis]
- [3] Paragraphs 65-68 of the Founding Affidavit;
- [4] Paragraphs 51.1-51.5 of the Answering Affidavit;
- [5] Paragraph 20.1 of the Answering Affidavit
- [6] Basson v Chilwan and others [1993] ZASCA 61; 1993 (3) SA 742 (A) at 776H-777B
- [7] Betlane v Shelly Court CC 2011 (1) SA 388 (CC) para 29 and De Beer v Minister of Safety and Security and Another
- [2011] 32 ILJ 2506 (LC)
- [8] Paragraphs 38-50 of the Founding Affidavit
- [9] John Saner Agreement in Restraint of Trade in South Africa Law issue 13 (October 2011) and Experian SA (Pty) Ltd v Haynes and Another 2013 (1) SA 135 (GSJ)
- [10] The allegations made in paragraph 10 of the AA remain argumentative and are not factual.
- [11] Paragraph 26 of the Founding Affidavit read with paragraph 20.1 of the Answering Affidavit.
- [12] See paragraphs 41.1-41.2 of the Founding Affidavit read with paragraphs 32.1 and 32.2 of the Answering Affidavit.
- [13]
- [2013] 9 BLLR 843 (LAC).

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Prepared on 13 October 2026 · Esheria