

SOUTH AFRICA / JUDGMENT

IPSOS South Africa (Proprietary) Limited v Duvenhage and Others (J 1618/2021) [2022] ZALCJHB 273 (3 October 2022) [2022] ZALCJHB 273

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

J 1618/2021

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case

No: J 1618/2021

In

the matter between:

IPSOS SOUTH AFRICA
(PROPRIETARY) LIMITED
Applicant
and
DUVENAGE,
ELZETTE
First Respondent
RYNDERS, KENDALL
URSULA
Second Respondent
ASK AFRIKA
(PROPRIETARY) LIMITED
Third Respondent
Decided in chambers
Delivered: 03 October
2022

(This
judgement was handed down electronically by circulation to the
parties' legal representatives, by email, publication
on the
Labour Court's website and released to SAFLI. The date on which
the judgment is delivered is deemed to be 03 October

2022.)

JUDGMENT

VAN NIEKERK, J

- [1] The present dispute has its roots in restraint and confidentiality undertakings given by the first and second respondents in favour of the applicant. The Court issued a rule nisi on 12 January 2022 coupled with an interim interdict, when the costs of the application were reserved. On 18 August 2022, after an extension of the rule nisi, and by agreement between the parties, the rule was further extended to the expiry dates of the respective restraint periods, and the parties afforded the opportunity to file heads of argument addressing the issue of costs. The third respondent did not oppose the application, and no costs are sought against it.
- [2] The interim interdict restrains the first and second respondents from soliciting the business of any of the applicant's clients, in favour of the third respondent or any third party; disclosing any of the applicant's confidential information to the third respondent or any third party; and soliciting any of the applicant's employees, current or former, to terminate their employment with the applicant or to take up employment with the third respondent.
- [3] Section 162 of the Labour Relations Act (LRA) provides that the Court may make orders for costs according to the requirements of the law and fairness. The Constitutional Court has made clear that when section 162 applies, costs do not necessarily follow the result. This Court must necessarily take into account the principle of fairness. (see *Union for Police Security & Corrections Organisation v SA Custodial Management (Pty) Ltd & others* (2021) 42 ILJ 2371 (CC). The applicant refers to *Member of the Executive Council for Finance, Kwa Zulu Natal v Dorkin* NO 2008 (29) ILJ 1707 (CC), where the Constitutional Court said the following:

In making decisions on costs orders this Court should strike a fair balance between, on the one hand, not unduly discouraging workers, employers, unions and employers organizations from approaching the Labour Court of the school to have their disputes dealt with, the other, allowing those qualities to bring to the Labour Court in this Court frivolous cases that should not be brought to court. That is a balance that is not always easy to strike but, if the court is to err, it should err on the side of not discouraging parties to approach these courts with their disputes.

(See also *Zungu v Premier of the Province of KwaZulu-Natal & others* (2018) 39 ILJ 523 (CC).)

- [4] Although the present matter is not one in which a disadvantaged party seeks access to court and where considerations of the right of access to justice play any particular role, nonetheless, the court is required to consider both the interests of the law and fairness. This, in turn, obliges the court to have regard to all of the relevant facts and circumstances. Where, as in the present instance, a disputed application is settled on a basis that disposes

of the merits but not the costs, the court is required to exercise the discretion and make a proper allocation as to costs on the basis of the material at its disposal. Costs must be decided on broad general lines rather than on lines which necessitate a full hearing on the merits (see *First National Bank of Southern Africa Ltd t/a Wesbank v First East Cape Financing (Pty) Ltd* 1999 (4) SA 1073 (SE); *Gamlan Investments (Pty) Ltd v and Another v Trillion Cape (Pty) Ltd and Another* 1996 (3) SA 692 (C)).

- [5] What the court has at its disposal is a notice of motion in terms of which the applicant sought an interim order, amongst other things, restraining the first and second respondents from breaching their respective confidentiality and restraint of trade undertakings. As I have indicated, the order taken by consent fixed a return date of 10 March 2022, with a timetable between the date of the interim order and the return date to permit the filing of an answering affidavit, a replying affidavit, and heads of argument. On 10 March 2022, the rule nisi was extended to 18 August 2022, again it would appear, for the purpose of the filing of further affidavits and supplementary heads of argument. In response to an averment by the applicant in reply to the effect that the first and second respondents had deleted

all information on their laptops when they were turned to the applicant, the first and second respondent's denied that averment and tendered for the laptops be inspected to determine the veracity of the applicant's contention. This request was refused and the first and second applicant then filed a formal application, on 9 March 2022, to compel the applicant to make the laptops available for inspection by an expert. The applicant in the present proceedings gave notice of its intention to oppose this application, but inexplicably failed to file an answering affidavit. The entire matter then became moribund, with no further action taken by any of the parties pending the return date of 18 August 2022.

- [6] What the papers disclose is that the applicant secured some but not all of the relief it sought when the interim order was granted on 12 January 2022, and further on 18 August 2022, when the parties agreed that the rule nisi would be extended to the expiry dates of the respective restraint periods. For the purposes of costs, the Court must take into consideration that the applicant has been at least partially successful in its attempt to enforce the restraint and confidentiality undertakings. The applicant submits further that the application was brought when undertakings sought were not provided and in circumstances where the applicant sought to protect its client base and confidential information. In particular, the applicant submits that there is no reason as to why the undertakings it sort could not have been given, or why the application needed to be opposed. The avoidability of the application is not as clear-cut as the applicant contends. As the applicant makes clear in the founding affidavit, it did not seek undertakings from either the first or the second respondent, who had resigned from its employer months prior to the date on which the application was filed. The applicant explains that it was in direct contact with Ms. Rademeyer, the CEO of the third respondent, and that undertakings had been sought from her. When these were not forthcoming, the application was filed. This explanation for a failure to seek undertakings prior to initiating proceedings is at odds with

the applicant's averment that no substantial relief is sought against the third respondent, which is cited as a party only in so far as it might have an interest in the relief sought against the first and second respondents. What appears to transpired is that the applicant's management engaged in correspondence with the management of the third respondent to address complaints regarding what the applicant alleged to be a breach by the first and second respondents of their restraint undertakings. However, neither the first nor the second respondent were personally put on terms prior to the filing of the application. It cannot be said therefore that the filing of the application was a direct consequence of the first and second respondents' failure or refusal to comply with any undertakings sought by the applicant, and that they ought consequently to be liable for the applicant's costs.

- [7] Further, the explanation proffered by the first and second respondent's that they agreed to the terms of the interim order only because they did not have sufficient opportunity to take advice has not been challenged.
- [8] In so far as the merits of the dispute are relevant, the first and second respondents do not dispute the existence of the restraint or the fact that they had taken up employment with the third respondent. The application was opposed, in essence, on the basis that the applicant had failed to prove that the first and second respondents were in breach of their respective restraint undertakings and that in any event, the terms of the restraint are unreasonable and thus unenforceable.
- [9] There are material disputes of fact that are disclosed on the papers, both in relation to any breach of the restraint and confidentiality undertakings and the nature and extent of any proprietary interest on the part of the applicant that the first and second respondents may have infringed. It is more likely than not that the matter would have

been referred to oral evidence had the application proceeded. At best, for present purposes, the merits of a neutral factor.

- [10] Finally, I must necessarily take into account the circumstances in which the present litigation has in suit. The applicant initiated the proceedings in early January 2022. By 18 January 2022, it had secured an interim interdict pending the final determination of the application. By the time of the return date of 10 March 2022, the matter was not in a position to be finally determined, and it fell to the court to issue directives on the filing of supplementary affidavits and heads of argument, and the delivery of a revised index. Then followed the extension of the rule nisi to 18 August 2022, a date not far removed from the expiry of the restraints sought to be enforced. It would appear that both parties acquiesced in what amounts to a state of limbo for more than 5 months; the applicant is content with the terms of the interim interdict, the first and second respondent similarly content to live with its terms, without any inclination or intention to anticipate the return date in order to pursue their defence that they were not in breach of the restraint and confidentiality undertakings, and that the applicant lacked any proprietary interest to justify the enforcement of those undertakings. In short, having secured some of the relief that it sought

to enforce the restraint undertakings, the applicant was content to live with the status quo, as were the first and second respondents, with neither party seeking to secure complete victory.

- [11] Having regard to all of the facts and circumstances, in my view, the requirements of the law and fairness are best served by the parties bearing their own costs in respect of the application itself, and the interlocutory proceedings.

Order

1. Each party is to bear its own costs in respect of the application, inclusive of the costs of the return dates of 10 March 2022 and 18 August 2022 respectively.

André van Niekerk

Judge of the Labour Court of South Africa

APPEARANCES

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