

SOUTH AFRICA / JUDGMENT

LCOM CC v Botha and Another (156/2017) [2017] ZAECHGC 67 (1 June 2017)

[2017] ZAECHGC 67**COURT**

Eastern Cape High Court, Grahamstown

BEFORE

G H Bloem

CASE / FILE NUMBER

156/2017

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Source record**IN****THE HIGH COURT OF SOUTH AFRICA****EASTERN****CAPE DIVISION, GRAHAMSTOWN****CASE****NO. 156/2017****In**

the matter between:

LCOM
CC Applicant
and
FREDERICK BIERMAN
BOTH A First
Respondent
BREEDENET (PTY)
LIMITED Second
Respondent**JUDGMENT**

Bloem J.

[1] On 3 July 2013 the applicant employed the first respondent, Frederick Bierman Botha, as its agent for the magisterial district of Sakhisizwe Municipality for the marketing and extension of its wireless internet and telecoms services. Mr Botha's

employment was regulated by a written contract of employment (the contract) which the parties signed on 3 July 2013. Mr Botha's

services were terminated on 13 September 2016, on his version. He is currently employed by the second respondent, the applicant's

business competitor.

[2] On 18 January 2017 the applicant launched this application wherein it sought an order essentially that Mr Botha be interdicted from breaching the confidentiality and restraint of trade clauses in the contract, that Mr Botha make discovery of certain documents and costs. No relief was sought against the second respondent. Mr Botha opposed the application on the basis that the applicant did not satisfy the requirements for a final interdict, that the applicant did not set out exceptional circumstances to be entitled to discovery in these (application) proceedings and that the application should accordingly be dismissed with costs. At the commencement of the hearing Mr Cole, counsel for the applicant, informed me that the applicant did not persist with the relief relevant to the discovery of documents. The only issue therefore was whether the applicant was entitled to an interdict against Mr Botha. The reasonableness or otherwise of the confidentiality and restraint of trade clauses was not in dispute.

[3] For purposes of this application, clauses 1, 2.1, 5.1, 5.2 and 6 contain the relevant terms of the contract. Clause 1 reads as follows:

"The AGENT is hereby appointed as an AGENT of LCOM for the Magisterial District of Sakhisizwe Municipality (hereinafter referred to as "the District") for the Marketing and Extension of its Wireless Internet and Telecoms Services in general. The said LCOM undertake to supply General Maintenance, Training and continued Support Service to the clients of the AGENT, subject to the terms and conditions specified in this Agency Contract."

[4] Clause 2 deals with Mr Botha's undertakings. Clause 2.1 reads as follows:

"The AGENT hereby undertakes that it will at all times during the continuance in force of this agreement, observe and perform the terms and conditions set out in this agreement and in particular:

2. Marketing and Promotion and Sales

The AGENT will use his best endeavours to diligently promote and extend the Marketing and Promotion of the Wireless Internet and Telecoms Service of LCOM, throughout the DISTRICT, to all present and potentially Clients of the AGENT.

[5] Clause 5 deals with the termination of the contract. Clause 5.1 deals with the termination of the contract by the applicant and clause 5.1.1 deals with the termination of the contract should Mr Botha breach any of the terms of conditions thereof. It reads as follows:

"Without prejudice to any other remedies that LCOM may have against the AGENT, LCOM shall have the right at any time by giving notice in writing to the AGENT, to terminate the agreement forthwith in any of the following events:

5.1.1 In Breach

Should the AGENT commit a breach of any of the terms or conditions of this Agency Contract.”

[6] Clause 5.2 deals with the termination of the contract by either party. It reads as follows:

“Either party may, after a period of 2 (TWO) years from the commencement date of this Agency Contract, terminate this Contract by providing the other party with 6 (SIX) month’s written notice, per registered post, or courier service, to the office of LCOM, or the AGENT, whichever may be the case.”

[7] Clause 6 deals with the non-disclosure of the applicant’s affairs. It reads as follows:

“6.1 The AGENT hereby undertakes that it will not at any time, whether during the continuation in force of this agreement or at any time after the termination thereof, divulge any information in relation to LCOM’s affairs or business, or method of carrying on business.

6.2 The AGENT shall not, without the written consent having been obtained from LCOM in advance, during a period of 1 (ONE) year after the termination of this Agency Contract, enter into an agreement as Employer, Service Provider, or AGENT for a Service Provider other than LCOM, with any other Wireless Internet and Telecoms Service Provider in the Service Region of LCOM, either as Employer, Trustee, Director, Member Principal, AGENT or Employee.”

[8] It is common cause that the applicant is a wireless internet and telecommunications business which essentially supplies internet

services to companies, members of the general public and government within the magisterial districts of Sakhisizwe and Emalahleni (the above areas). Mr Botha operated from Elliot where he built up a substantial client base for the applicant. His duties were primarily the fulfilling of the functions of an information technology technician in the applicant’s business operations. Those duties involved the marketing of the services offered and provided by the applicant, inclusive of the marketing of internet services, the operational management of the applicant’s business and the provision of wireless internet technology related services. The above services were rendered in the Queenstown area and in the above areas.

[9] Mr Botha admitted that while he was employed by the applicant, he acquired and retained a full database and contact details relating to the applicant’s clients within the magisterial district of Sakhisizwe. He also admitted that as part of his activities as the applicant’s agent he became intimately involved in the technological needs of the applicant’s clients with whom he had built a working relationship.

[10] Mr Koekemoer, counsel for the respondents, raised two submissions. The first related to when the confidentiality and restraint of trade clauses would commence in terms of the contract. The second related to the duration of some of the restrictions sought by the applicant in the event of the interdict being granted.

[11] With reference to clauses 6.1 and 6.2 of the contract, Mr Koekemoer submitted that the confidentiality and restraint of trade provisions contained in those clauses would commence only after the termination of the contract. Save to point out that clause 6.1 prohibited Mr Botha from divulging any information set out therein “during the continuation in force of

this agreement”, both clauses refer to the period after the termination of the contract. In terms of clause 5.2 if the applicant or Mr Botha wanted to terminate the contract after two years after its commencement, it or he could do so by giving the other with six months’ written notice. It is common cause that neither party gave the other the agreed notice. Mr Koekemoer submitted that, because no notice was given in terms of clause 5.2, the contract was not terminated by either party. In terms of clause 5.1 if the applicant wanted to exercise its right to terminate the contract in the event of Mr Botha having committed a breach of any of the terms or conditions, it could do so by giving written notice to Mr Botha. It is common cause that the applicant also did not give written notice to Mr Botha.

- [12] The applicant contended that it was Mr Botha who terminated the contract. The applicant relied on an email dated 13 September

2016 that Mr Botha addressed to the applicant’s managing director, Alec Sahd. Therein the applicant declared that “I have decided to end my relationship with LCOM” and gave reasons therefor. He expressed regret “that it had to come to this, but I have no other option.” Mr Cole submitted that the contents of the email amount to a resignation by Mr Botha. Mr Koekemoer, on the other hand, submitted that the email did not lead to the termination of the contract because notice of termination was not given in terms of the contract. There can be no doubt that the email constituted a resignation by Mr Botha because he conveyed therein to the applicant that he had decided to terminate the contract.

- [13] It was submitted on behalf of Mr Botha that, in the event of it being found that the email constituted a resignation, such resignation was withdrawn with the applicant’s consent. There is a dispute in that regard. Mr Botha alleged that on receipt of his email, Mr Sahd telephoned him, apologised for the manner in which the applicant treated him and requested him to withdraw his intention to terminate the contract which Mr Botha did. Mr Botha then instructed his attorney to address a letter to the applicant to formalise his work relationship with the applicant. His attorney addressed a letter dated 14 September 2016 to the applicant wherein the applicant was informed that Mr Botha was ill. In that letter a request was made to the applicant to allow Mr Botha until 26 September 2016 to furnish the applicant “with his written response as to the discussed aspects involving his continuation of the mentioned agreement.” Mr Botha alleged that he was surprised to discover on 15 September 2016 that his personal particulars relating to his work relationship with the applicant had been removed from the applicant’s computer system. He accepted such conduct as a unilateral termination of the contract by the applicant.

- [14] Mr Sahd admitted that on receipt of the email from Mr Botha he telephoned him because he wanted to establish the reasons for the termination of his services. Mr Sahd denied that Mr Botha withdrew his resignation. He alleged in his replying affidavit that Mr Botha’s personal particulars were removed from the system because he had resigned on 13 September 2016. Mr Botha could not thereafter respond to Mr Sahd’s allegations. Had Mr Sahd dealt with his telephone conversation with Mr Botha following the latter’s email and the letter dated 14 September 2016 from Mr Botha’s attorney in his founding affidavit, Mr Botha could have

responded to those allegations in his answering affidavit. Mr Sahd surprisingly did not mention the telephone call and the letter in his founding affidavit. Mr Botha should not be prejudiced by Mr Sahd's omission to make reference to those important developments in his founding affidavit.

- [15] On the application of the test enunciated in *Plascon-Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd*[1], I find that Mr Sahd consented to Mr Botha's withdrawal of his resignation. If Mr Sahd did not consent to the withdrawal of Mr Botha's resignation, it is improbable that Mr Botha's attorney would have written a letter to the applicant on the day following the telephone call between Mr Botha and Mr Sahd wherein he requested some time to furnish the applicant with Mr Botha's written response in respect of the aspects discussed by them "involving his continuation of" the agreement. The effect of my finding that Mr Botha's resignation was withdrawn by consent is that, after the telephone conversation between Mr Sahd and Mr Botha, the contract continued to subsist.
- [16] When the applicant removed Mr Botha's personal particulars from the system, it communicated thereby to him that it had decided to terminate the contract. Clause 5.1 of the contract provides for the termination of the contract by the applicant. In such a case the applicant must give written notice to Mr Botha. The applicant did not give notice of the termination. It was accordingly in breach of the contract. The breach was not the applicant's decision to terminate the contract but its failure to give notice to Mr Botha in terms of the contract. That breach entitled Mr Botha to hold the applicant to the contract, which means holding the applicant to a salary during the notice period (which period is not defined in clause 5.1) or to cancel the contract summarily and sue for damages. Mr Botha elected to cancel the contract summarily. The

following remarks by Cheadle AJ in *Lottering and others v Stellenbosch Municipality*[2] are apposite in this regard:

"... as a matter of principle a decision to terminate on notice can never be a repudiation or a breach although the failure to properly give notice may do so. The breach is not the decision to terminate but the failure to give proper notice – a breach that entitles the employer to hold the employee to the contract (ie what is left of it) which means holding them to work their notice in full or to cancel the contract summarily and sue for damages."

- [17] In summary, since the applicant consented to the withdrawal of Mr Botha's resignation, the contract continued to subsist.

The applicant thereafter terminated the contract when he removed Mr Botha's personal particulars from the computer system.

The applicant was in breach of the contract because it did not give notice to Mr Botha of its decision to terminate the contract, as required by the contract. Mr Botha elected to cancel the contract.

[18] It was submitted on behalf of Mr Botha that, without notice, the contract could not be terminated. Mr Koekemoer's

submission that the confidentiality and restraint of trade provisions contained in clauses 6.1 and 6.2 will commence only at the end of the notice period can accordingly not be sustained. Firstly, it is common cause that no notice was given with the result that there is no commencement and completion date of the notice period. Secondly, when he discovered the removal of his personal particulars from the system, Mr Botha alleged that he had "accepted that the agency agreement had been unilaterally terminated by the applicant". Thirdly, after the applicant had communicated its decision to terminate the contract without giving notice to Mr Botha, he had an election to either hold the applicant to the contract, that is, that he will work (and must be paid) during the notice period or cancel the contract. He elected to accept the applicant's breach, that is, the applicant's failure

to give notice to him. He is bound by that election and cannot now insist that the applicant give notice in terms of the contract.

[19] The three requisites for a final interdict are (a) a clear right on the part of the applicant; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy available to the applicant.[3]

[20] Although Mr Botha alleged in his answering affidavit that the applicant has failed to show that it had a proprietary interest

worthy of protection, at the hearing Mr Koekemoer conceded, correctly in my view, that the applicant has established that it has a clear right which requires protection by way of an interdict. He also conceded, once again correctly in my view, that the applicant has established that it had a well-grounded fear that, unless the interdict was granted, Mr Botha was likely to breach the confidentiality and restraint of trade provisions in the contract which breach would in all probability damage the applicant's

business interests. The above concessions will be appreciated only against the background of the facts of the case.

[21] While he was employed by the applicant Mr Botha did extensive marketing of the applicant's services in the above areas.

During the course of marketing the applicant's services and managing its business, Mr Botha acquired all the contact details of the applicant's clients with whom he built up working relationships and with whose technical requirements he became intimately involved. As a result of being employed by the applicant since 3 July 2013 Mr Botha became au fait with the manner in which the applicant operated in the above areas.

[22] It is common cause that during June 2016, when Mr Botha was employed by the applicant, he installed a network at Maidenhead Farm in the Queenstown district. That is work that he should have done for and on behalf of the applicant. Instead he did it for himself without the

applicant's knowledge. Mr Botha's purported justification for the installation of that network was that it was done outside the restricted area. He admitted that the applicant operated business in Queenstown and in the above areas. In terms of clause 6.2 of the contract the applicant sought to protect its business interests in the region in which it serviced clients, which region included Queenstown. The contract refers to the area in which the applicant rendered services as "the Service Region of LCOM". If Mr Botha was able to conduct himself in a manner that went against the spirit of the contract while he was employed by the applicant, he will in all probability breach the provisions of clauses 6.1 and 6.2 unless interdicted from doing so.

[23] Mr Botha also admitted that during August 2016, when he was still employed by the applicant, he had discussions with the second

respondent regarding the possibility of taking up employment with it. He commenced working for the second respondent during

September 2016 after his services were terminated by the applicant. After being employed by the second respondent Mr Botha signed up many clients in the second respondent's towers in Elliot. The applicant alleged that Mr Botha signed up at least 12 clients while Mr Botha claimed not to have knowledge of the exact number of clients that he signed up. It is immaterial how many clients Mr Botha signed up in the second respondent's towers. What is important is that he was rendering the same service for the second respondent that he used to render for the applicant, in breach of the provisions of clause 6.2 of the contract.

[24] In my view, the above events show that, unless Mr Botha is interdicted from doing so, he is likely to breach the provisions of clause 6.1 and is likely to continue breaching the provisions of clause 6.2 of the contract. The above events show that the applicant's fear that its business interests are likely to be damaged is well grounded. It has no other satisfactory remedy to it other than an interdict. In all the circumstances, I am satisfied that the applicant has established that it is entitled to have its business interests protected in accordance with the contract that it concluded with Mr Botha. The applicant is accordingly entitled to the relief substantially in terms of the notice of motion.

[25] Mr Koekemoer pointed out that if the relief sought in some of the paragraphs in the notice of motion were to be granted, the effect thereof would be that Mr Botha would be permanently interdicted from breaching the provisions of clause 6.2, from utilising the database of its clients or any person who has done business with it since 3 July 2013 and from copying, transmitting, transcribing or rendering in usable form any data relating to any of its clients. Mr Cole suggested that a restriction for a period of five years would be reasonable in those cases. I agree with Mr Koekemoer that such a restriction will be unreasonable. Mr Botha has a right to engage in trade and commerce. A long period, even of five years, would unreasonably limit his exercise of that right. In view of the fact that the parties agreed that the restraint of trade will last for a period of one year from the termination of the contract, in my view all the restrictions on Mr Botha should last for a year from the termination of the

contract.

- [26] There is no reason why the general rule that costs should follow the result should not apply in this case. The second respondent did not file answering affidavits. Although Mr Koekemoer appeared on behalf of both respondents, there is no reason to order the second respondent to pay the applicant's costs of the application.
- [27] The applicant has attached documents to Mr Sahd's replying affidavit which are, in my view, unnecessary. In his founding affidavit Mr Sahd alleged that, as part of his activities as the applicant's employee, Mr Botha had access to information of its clients, including all their contact details. In his answering affidavit Mr Botha admitted that allegation. He furthermore admitted that he had limited administration rights. However, according to him those rights did not include access to the preferences of the applicant's clients, business information, trade secrets and trade connections. Mr Sahd attached emails received by and from Mr Botha to which applications by the applicant's for wireless internet services were attached. Those applications were completed either by the applicant's clients or Mr Botha. Those applications then formed the contracts between the applicant and its individual clients. The emails and application forms confirmed Mr Botha's involvement in the administration insofar as it related to a client's application for wireless internet services. They did not, as alleged by Mr Sahd, show a client's preferences, business information, trade secrets and trade connection, the aspect that Mr Botha placed in issue.
- [28] Similarly, when one reads Mr Sahd's replying affidavit the impression is created that an email dated 14 January 2014 (Annexure AS.30) was sent from the second respondent to Mr Botha for him to receive training while he was still being employed by the applicant. The email shows that it was sent by one Laurent Kotze from an email address belonging to the applicant. Furthermore, Annexures AS.31 to AS.36 were attached to Mr Sahd's replying affidavit to indicate "where preferential pricing was known by Mr Botha and given to the clients." Those documents show only that Mr Botha informed the applicant's administrators, after a client had made an application for wireless internet services, that a client would be a "5gig R250" package. Mr Sahd did not show in his replying affidavit or in the annexures how clients were given preferential pricing by Mr Botha when he gave that information to the above administrators. Mr Sahd also attached to his replying affidavit a copy of the particulars of claim in the case that the applicant instituted against Mr Botha. Various annexures formed part of those particulars of claim. He did that in an attempt to gainsay Mr Botha's denial that the list of the applicant's clients constituted confidential information. With respect, the particulars of claim do not show that such information is confidential. The particulars of claim show only that the applicant alleged that such information constitutes confidential information. They do not establish that claim. In my view, all the above documents were unnecessary. It would accordingly be unreasonable to order Mr Botha to pay the costs relevant thereto.
- [29] In the result, it is ordered that the first respondent, Frederick Bierman Botha:

29.1. be and is hereby interdicted until 15 September 2017:

29.1.1. from breaching the restraint of trade conditions contained in clause 6.2 of the contract signed by LCOM CC, the applicant herein, and the first respondent on 3 July 2013, such restrictions being limited to the magisterial districts of Sakhisizwe and Emalahleni (“the restricted area”);

29.1.2. from competing in the restricted area with the business interests of LCOM CC, directly or indirectly;

29.1.3. from marketing or promoting activities or services of the second respondent, Breedenet (Pty) Ltd, or any other rival, or competing internet service provider in the restricted area;

29.1.4. from utilising in any manner whatsoever, either directly or indirectly, the personal client database of any clients of LCOM CC, or any person who has done business with LCOM CC since 3 July 2013;

29.1.5. from communicating with or contacting, whether directly or indirectly, or whether through an intermediary or otherwise, any existing client of LCOM CC, or any person, or any entity, who has done business with LCOM CC since 3 July 2013 in the restricted area;

29.1.6. from canvassing, soliciting, or diverting, or attempting to do the foregoing, any existing client of LCOM CC, since 3 July 2013 in the restricted area;

29.1.7. from any conduct which will have the effect of damaging the goodwill, or client, or business relationships of LCOM CC in the restricted area;

29.1.8. from copying, or transmitting, or transcribing, or rendering in usable form, any existing client data relating to existing clients of LCOM CC since July 2013;

29.2. pay the applicant’s costs of the application, such costs to exclude the costs relevant to Annexures AS.9 to AS.37 of Mr Sahd’s replying affidavit.

G H BLOEM

Judge of the High Court

For the applicant: Adv S H Cole, instructed by Wheeldon Rushmere & Cole, Grahamstown

For the respondents: Adv J R Koekemoer, instructed by Huxtable Attorneys, Grahamstown

Date of hearing: 25 May 2017

Date of delivery of the judgment: 1 June 2017

[1] Plascon-Evans Paints Ltd v van Riebeeck Paints (Pty)Ltd

[1984] ZASCA 51; 1984 (3) SA 623 (A) and Omni Technologies (Pty) Ltd t/a Gestetner Eastern Cape v Barnard and others

[2008] 2 All SA 207 (SE) at 210c-d.

[2] Lottering and others v Stellenbosch Municipality

[2010] 12 BLLR 1306 (LC) at 1313F-G.

[3] Setlegelo v Setlegelo 1914 AD 221 at 227 and Sanachem (Pty) Ltd v Farmers Agri-care (Pty) Ltd and others

[1995] ZASCA 2; 1995 (2) SA 781 (AD) at 789B-G.

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