

SOUTH AFRICA / JUDGMENT

Lemon v Prima Interactive (Pty) Ltd (J 246/2021) [2021] ZALCJHB 121 (10 June 2021) [2021] ZALCJHB 121

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

J 246/2021

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The
Labour Court of South Africa
(Held at johannesburg)
Not
reportable
Case
No: J 246/2021

In the matter between:

HAIDEE
LEMON
Applicant
and
PRIMA
INTERACTIVE (PTY) LTD
Respondent

In the matter of: PRIMA
INTERACTIVE (PTY) LTD
Applicant
HAIDEE
LEMON
First
Respondent
APEX
INTERNATIONAL (PTY) LTD
Second
Respondent
TRIGGERCRAFT
(PTY) LTD
Third
Respondent
Date of hearing: 9
June 2021
Date
of judgment: 10 June 2021. Judgment delivered by email.

JUDGMENT

VAN NIEKERK J

- [1] This is an application for leave to appeal against the whole of the judgment delivered by this court on 30 April 2021. In its judgment, the court upheld an application to enforce restraint undertakings given by the Applicant in favour of the respondent.
- [2] The application for leave to appeal was filed on 21 May 2021. In terms of Rule 30 (2), and application for leave to appeal must be made within 15 days of the judgment against which leave to appeal is sought. The applicant was required to make the application for leave to appeal by no later than 21 May 2021. Rule 4 (2) requires that any application be delivered. “Deliver” is defined to mean ‘serve on other parties and file with the registrar’. “Serve” means to serve in accordance with Rule 4 (1). Rule 4 (1) established the various modes by which service may be effected. Rule 5 makes clear that a document is filed with registrar on the date on which the document is handed to the registrar. In the present instance, the applicant’s attorney has deposed to a service affidavit in which he states that the application for leave to appeal was served on the respondent’s attorneys of record, via email. Service via email is not one of the permitted modes of service in this court. The court stamp on the original application bears the date 28 May 2021. For the purposes of section 18 (5) of the Superior Courts Act, 2013, this is the date on which the application for leave to appeal was lodged with the registrar. On this basis, the application for leave to appeal was filed late, and in the absence of an application for condonation, did not serve before the court.

- [3] After being called, the application stood down to allow the applicant's counsel to take instructions. Soon afterward, the applicant's attorney of record filed an affidavit in which he states that he attempted to serve the application by hand at the court on the last day for delivery but was unable to do so on account of the system of rostering in place during lockdown. Given the explanation that has been proffered, the late filing of the application is condoned (to the extent necessary), as is the late filing of the applicant's submissions in support of the application.
- [4] Turning then to the merits of the application, the applicant has raised four grounds of appeal. The first relates to the court's finding that the application was urgent. The applicant's complaint appears to be that there is no discrete finding on urgency, nor any reasons reflected as to why the application was considered to be urgent. The fact that the judgment does not address in any detail the issue of urgency is in itself indicative of the fact that the court accepted that the application was urgent. Had it not, the matter would simply have been struck from the roll. In any event, findings on urgency are not dispositive of a matter and that in the event that a court finds that the matter is not urgent, it remains open to the applicant to set the matter down again for hearing on its merits in the ordinary course. Findings on urgency thus constitute

rulings which are not appealable, as opposed to orders which are final in effect.

- [5] Insofar as the applicant now complains that the court failed to reduce the period of the restraint, as noted in the judgment, the applicant failed to produce any evidence to assist the court to find, as a fact, that the contractually stipulated period was unreasonably long. It should be recalled that the onus in this regard rested on the applicant. To the extent that the respondent has been criticised for failing to address this issue in its founding affidavit, it

should be recalled that it is incumbent on an applicant in proceedings to enforce restraint undertakings to establish only the

existence of those undertakings and a breach of them by the respondent. It was for the applicant to adduce evidence to establish

that the agreed period of the restraint was excessive, by way of facts that relate to the shelf life of the product sought to be

protected, and the like. No such evidence was adduced in the answering affidavit. Similarly, in regard to the area of the restraint, there were no demonstrable facts adduced in the answering affidavit to establish that the area within which protection was sought was too extensive. In these circumstances, it is not open to the applicant now to complain that the restraint undertakings to which she agreed was overly broad and to seek leave to appeal on this basis.

- [6] Thirdly, the applicant submits that the court erred in finding that the respondent had satisfied the requirements for the granting of final relief, particularly that on the facts, the respondent had failed to establish a reasonable apprehension of irreparable harm, and that no alternative remedy was at its disposal. First, in restraint disputes, it is sufficient for an

applicant in any proceedings to enforce restraint undertakings to establish that the respondent may compromise its proprietary interests either by way of customer connections and confidential information's. It is not necessary for an applicant to establish that the respondent has actually compromised its interests – the very purpose of the restraint undertaking is to avoid the prospect of that eventuality. The submission that the evidence discloses no more than the prospect of breach ignores this principle. It also ignores the facts. It was not disputed that the second respondent was a direct competitor of the applicant, nor was the evidence adduced by the applicant to the effect that the second and third respondents in the main application shared premises and that the applicant possessed an operative email address reflecting the second respondent's domain disputed. Further, the engagements with the applicant prior to the institution of proceedings, read with the answering affidavit, disclose a variety of versions that make the second and third respondents indistinguishable. None of this evidence was satisfactorily disputed

by the applicant. Insofar as any alternative remedy is concerned, the requirement is one that relates to the absence of a satisfactory

alternative remedy. Where an employer has sought and received the protection of restraint undertakings to protect its proprietary

interests, there is no reason why it should not, in principle, and subject to the relevant protections that the law affords the

employee, seek to enforce those undertakings. To suggest that in every case the alternative of a claim for damages is satisfactory is more often than not to render restraint undertakings meaningless.

[7] Finally, insofar as the applicant submits that the court erred in making an order for costs, the Labour Appeal Court has made clear that when this court exercises civil jurisdiction in terms of section 77 (3) of the Basic Conditions of Employment Act, 1997, the regime for costs is that which applies in the civil courts, i.e. that unless there are exceptional circumstances, costs follow the result (see *Baise v Mianzo Asset Management (Pty) Ltd* (2019) 40 ILJ 1987 (LAC)). It was thus not open to the court to canvas the demands of the requirements of the law and fairness as provided in section 162 of the LRA – that section was not applicable. I did not understand counsel for the applicant to dispute this position. What he submitted was that even if the test applied in the civil courts were to be adopted, the equitable order to be made in relation

to costs is one to the effect that each party bearing its own costs. In this regard, the applicant relies on the fact that she is unemployed, and her personal circumstances. While this may have been the appropriate order where section 162 to apply, the applicant's personal circumstances are not exceptional for the purposes of the application of the general rule and I fail to appreciate on what basis another court would come to a different conclusion in this regard.

I make the following order:

1. The application is dismissed, with costs, such costs limited to the costs of one counsel.

André van Niekerk

Judge of the Labour Court

APPEARANCES

For the applicant: Adv C Goosen, instructed by Wessels and Vorster Inc

For the respondent: Adv C Whitcutt SC, with him Adv Whittington, instructed by Du Preez and Associates

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Prepared on 23 October 2026 · Esheria