

SOUTH AFRICA / JUDGMENT

Micah Kitchens CC v Botha and Others (2018/3463) [2018] ZAGPJHC 56 (19 February 2018) [2018] ZAGPJHC 56

COURT

South Gauteng High Court, Johannesburg

BEFORE

RM Keightley

CASE / FILE NUMBER

2018/3463

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REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG
CASE
NO: 2018/3463

DATE: 19/2/2018
Not
reportable
Not of
interest to other judges
Revised.
In the
matter between
MICAH KITCHENS
CC Applicant
and
BOTHA
ROMARNO 1ST
Respondent
NIEHAUS HEINRICH
JOHANNES 2ND
Respondent
DU PLESSIS RUDOLPH
JOHANNES 3RD

Respondent
CHAVALALA SEVHA
CHRISTOPHER 4TH
Respondent
MALITSHE
NKOSINATHI 5TH
Respondent
ALTO KITCHENS (PTY)
LTD 6TH
Respondent

JUDGMENT

KEIGHTLEY J

INTRODUCTION

1. This is an urgent application in terms of which the applicant, Micah Kitchens CC, seeks to enforce restraint of trade covenants against 5 of its ex-employees. They are the first to fifth respondents (“the employee respondents”). The sixth respondent, Alto Kitchens, is their current employer. It is common cause that both Micah and Alto manufacture, sell, supply and install kitchens, cupboards and the like, and that they both do so, inter alia, in the corporate environment. This means that they both tender for large work from developers, builders and contractors who require whole developments to be outfitted. It seems that both parties understand this to be “corporate work”. Alto confirms that it has often tendered against Micah in competition for corporate work.
2. The first respondent was previously employed by Micah as a design consultant, and then a sales consultant. He has been employed by Alto since July 2017 as a project manager.
3. The second Respondent was previously employed by Micah as a sales consultant. Since January 2018 he has been employed by Alto in its Cape Town branch, which is a show room, as its manager/sales consultant.
4. The third respondent was employed by Micah as a sales consultant and since 1 January 2018 has been employed by Alto as a sales consultant. He and Alto aver that he operates in this capacity outside of the sphere of Alto’s corporate work. Micah disputes this. I return to this issue later.
5. The fourth and fifth employees were employed by Micah as kitchen and cupboard installers. They and Alto aver that they have not been employed by Alto but are subcontracted by Alto on an ad hoc basis to carry out installations when the need arises.
6. Save for the usual procedural relief sought in urgent applications, Micah seeks an order in the following terms:

“2. That the Respondent be interdicted and restrained from either alone or jointly, directly or indirectly (including through any other entity in which he is directly or indirectly interested, engaged or concerned) for a period of 24 (twenty four) months from 14 July 2017 and within a radius of (one hundred) kilometers from 2 Salinga Street, Boksburg;

2.1 solicit work of whatever nature from, accepting work of whatever nature from or being interested or engaged in any capacity whatsoever or in connection with any person who was a client of the Applicant at any time within 2 (two) years prior to 14 July 2017;

2.2 competing with the Applicant in the field of corporate work;

2.3 engaging or contacting any person who was employed by the Applicant as at 14 July 2017 with an intention to solicit or encourage such person to terminate his employment with the Applicant and taking up employment elsewhere;

2.4 disclosing any of the Applicant’s confidential information and trade secrets to anybody”.

URGENCY

7. There is no real dispute by the respondents that the matter is urgent. Although the first respondent has been in the employ of Alto for a number of months, Micah only came to know about this fact recently. Second and third respondents left Micah’s employ on 15 December 2017, and the fourth and fifth respondents left in about mid-January 2018.
8. I am satisfied that the matter is urgent.

RESTRAINT PROVISIONS

9. It is common cause that all employees of the respondent signed the same restraint of trade agreement when they entered into the employ of Micah. Clauses 16.2 and 16.3 are the critical portions of the restraint order. They read as follows:

“16.2 The Employee undertakes to the Employer that he/she will not, either alone or jointly, directly or indirectly (including through any other entity in which he/she is directly or indirectly interested, engaged or concerned), or in any other manner whatsoever, for the duration of the agreement (save insofar as the performance of this agreement is concerned) and for a period of 24 (twenty-four) months from the termination of his/her employment with the Employer (“the restraint period”) and within a radius of 100 kilometers from the head office of the Employer (“the restraint territory”) for whatsoever reason:-

16.2.1 solicit work of whatever nature from, accept work of whatsoever nature from, refer work to or be interested or engaged in any capacity whatsoever in or for in connection with, any person (person includes natural and juristic persons) who is a client of the Employer at the termination of the Employee’s employment, or who such a client at any time within 2 (two) years prior to such termination, within the restraint territory; or

16.2.2 compete with the Employer in the field of corporate work within the restraint territory; or

16.2.3 engage or contact any person who was employed by or contracted to the Employer at any time within 2 (two) years prior to the termination of the Employee's employment, or encourage or solicit such person's termination of his/her employment or contract with the Employer, or in any way be involved with the said persons termination of employment or contact with the Employer and the taking up by such person of employment or contractual relationship elsewhere; or

16.3 During any part of the restraint period and thereafter, to the extent that same are protected by law, the Employee shall not disclose any confidential information and are/or trade of secrets of the Employer”.

10. In summary, the restraint serves the purposes of preventing an employee for a period of two years after leaving Micah's employ, and within a radius of 100km from:

- Soliciting or accepting work from one of Micah's clients;
- Competing with Micah in the field of corporate work;
- Engaging or contacting any of Micah's employees with the intention of enticing or encouraging them to become employed elsewhere; or
- Disclosing Micah's confidential information.

11. The onus lies on Micah, as the applicant/employer, to establish the existence of a valid and binding covenant in restraint of trade and its breach by the employee respondents. It must also show that it has a proprietary interest that is worthy of protection. If Micah succeeds in this, in order to avoid enforcement, the employee respondent's must show that the restraint is unreasonable and contrary to public policy.[1]

12. It has been held that:

“Covenants in restraint of trade are valid. Like all other contractual stipulations, however, they are unenforceable when and to the extent that their enforcement would be contrary to public policy. It is against public policy to enforce a covenant which is unreasonable, one which unreasonably restricts the covenanter's freedom to trade or to work. Insofar as it has that effect, the covenant will not therefore be enforced. Whether it is indeed unreasonable must be determined with reference to the circumstances of the case. Such circumstances are not limited to those that existed when the parties entered into the covenant. Account must be taken of what has happened since then and, in particular, of the situation prevailing at the time when the enforcement is sought.”[2]

13. A similar point was made in *Sunshine Records (Pty) Ltd v Frohling and Others*: [3]

“In determining whether a restriction on the freedoms or trade or to practice a profession is enforceable, a court should have regard to two main considerations. The first is that the public interest requires, in general, that parties should comply with their

contractual obligations even if these are unreasonable or unfair. The second consideration is that all persons should, in the interests of society, be permitted as far as possible to engage in commerce or the professions or, expressing this differently, that it is detrimental to society if an unreasonable fetter is placed on a person's freedoms of trade to pursue a profession. In applying these two main considerations, a court will obviously have regard to the circumstances of the case before it. In general, however, it will be contrary to the public interest to enforce an unreasonable restriction on a person's freedom to trade."

14. It is common cause that the employee respondents entered into the restraint of trade covenants with Micah as part of their employment contracts. As far as the alleged breach of the restraints are concerned, Micah relies primarily on the fact that all of the employee respondents are now employed by, or are rendering services to, an entity that is a competitor in the field of corporate work. As I have already indicated, it is common cause that Micah and Alto are such competitors.
15. It is also common cause, and expressly accepted by Micah at the hearing, that Micah does not have any evidence that any of the employee respondents have solicited work from clients in breach of clause 16.2.1, or that they have disclosed confidential information in breach of clause 16.3. There is some dispute about whether respondents one to three breached clause 16.2.3 by allegedly enticing the others to leave Micah and join Alto. I deal with this issue separately later.

INTERPRETATION OF CLAUSE 16.2 AND 16.2.2

16. The first issue for consideration is the interpretation of clause 16.2 read with clause 16.2.2 of the restraints. Does it per se prohibit the employee respondents from being employed by a corporate work competitor? In other words, does the fact that they are employed by a corporate work competitor in and of itself constitute a breach of the covenant. The parties contend for competing interpretations of the clause.
17. Micah avers in effect that on a proper interpretation, clause 16.2.2 read with clause 16.2, amounts to an out-and-out prohibition against the respondent employees being employed by Alto, which is Micah's competitor. This is because, so the submission goes, by taking up employment with Alto, the employee respondents are "jointly ... indirectly ... competing with Micah in the field of corporate work", if one reads clause 16.2 and 16.2.2 together. Micah accepts that the clauses require it to establish that there is competition for corporate work. However, it submits that this is satisfied by the common cause fact that Micah competes with Alto for corporate work.
18. On this interpretation, it is Alto's competitive status that satisfies the element of "competing" in clause 16.2.2, and it is not necessary for Micah to establish any competitive conduct on the part of the employee respondents, save for their employment with Alto. Taking this argument further, it does not matter in what capacity they are now employed by Alto, what

their responsibilities with Micah are, or what their contact with corporate work customers may be; the fact that they have taken up employment with Alto within 24 months of their termination with Micah, means that they have breached their restraints.

19. The employee respondents and Alto contend that this is not what clause 16.2.2 means. Their contention is that in order to establish a breach of clause 16.2.2, Micah must show more than merely that each of the employee respondents is now employed by Alto. On their case, the prohibition is directed at competitive conduct by the employee, not by Alto. Thus, Micah must establish that an employee respondent is actually competing with Micah through his employment with Alto by virtue of, for example, his particular position within Alto, his responsibilities, his customer contacts etc. In other words, Micah must establish conduct, circumstances or facts beyond their mere employment with Alto that amounts to competition by the employee respondent for corporate work.
20. In my view it is instructive that clause 16.2 does not expressly prohibit an employee from taking up employment with a competitor in the field of corporate work. As I read clause 16.2 and 16.2.2, the thrust is that an employee respondent may “not compete” in the field of corporate work. Thus, the conduct that is prohibited is not employment, but rather competition by the employee.
21. It seems to me to be plain that regardless of how the alleged competition comes about, i.e. whether through new employment, a new venture or otherwise, what Micah must establish is that its ex-employee is conducting himself (possibly jointly with a new employer) in a manner that amounts to prohibited competition. The prohibited competition is competition for corporate work. The mere fact that the employee respondents are now employed by Alto (even on an ad hoc basis on the part of fourth and fifth respondents) is not sufficient for Micah to establish that they have breached the restraint

covenant.

22. This interpretation finds support in the principle that only reasonable restraint covenants can be enforced. The corollary of this principle is that if there is a dispute about the meaning of a particular provision in the covenant, as is the case here, the provision must be given a meaning that has reasonable, rather than one that has unreasonable, consequences. An interpretation that would unreasonably impinge on an employee’s right to ply his trade must give way to a competent interpretation that does not do so.
23. In this case, to adopt Micah’s interpretation would mean that the employee respondents would be unable to find alternative employment with a competitor in the same corporate work industry for a period of two years, regardless of the nature of that employment. This would unfairly and unreasonably impinge on their rights to ply their trades. For these employee respondents, it would have the effect that the restraint, without more, would be enforceable. They would have to resign from their new employment and would be prohibited from finding further employment with any other competitor for corporate work. The more reasonable prohibition, and hence the more reasonable interpretation of the

covenant, is one that does not prohibit outright such employment, but looks at whether, in their individual capacities at Alto, they are engaging in conduct that amounts to prohibited competition.

24. Accordingly, I find that the mere employment by Alto of the employee respondents does not constitute a breach of the restraint covenants, and Micah is not entitled to enforce the covenant solely on this basis. Micah must establish further grounds for the alleged breach by the employee respondents of the restraint provisions. To some extent counsel for Micah accepted this position because he submitted that there may be instances where employment with Alto would not give Micah the right to enforce its restraint. Counsel submitted that this would apply in circumstances where by nature of the type of employment held at Alto, Micah would not have a proprietary interest to protect.

FOURTH AND FIFTH RESPONDENTS

25. Bearing this in mind, it seems to me to be clear that even on Micah's interpretation there is simply no case for the fourth and fifth respondents to meet. In the first case, Micah has failed to put forward any facts, beyond their alleged employment by its competitor, to establish that these respondents are competing for corporate work. This alone would be sufficient to

dismiss the claim against them on the interpretation I have adopted.

26. Even if I am wrong on my interpretation, Micah would still have to show a proprietary interest. Both of these respondents were employed as installers at Micah. They now do work for Alto (whether ad hoc or not, it is unnecessary to decide) as installers. Micah avers that both of these respondents were exposed to its special installation methods and techniques and that they were exposed to Micah's customers and suppliers, building up special relationships with them. This, says Micah, constitutes a proprietary interest.
27. These respondents submit that the skills they have built up are part of their general skill and knowledge set, and are not protectable.[4] It has been held in this regard that:

"A man's skills and abilities are a part of himself and he cannot ordinarily be precluded from making use of them by a contract in restraint of trade. An employer who has been to the trouble and expense of training a workman in an established file of work, and who has thereby provided the workman with knowledge and skills in the public domain, which the workman might not otherwise have gained, has an obvious interest in retaining the services of the workman. In the eye of the law, however, such an interest is not in the nature of property in the hands of the employer. It affords the employer no proprietary interest in the workman, his know-how or skills. Such know-how and skills in the public domain become attributes of the workman himself, do not belong in any way to the employer and the use thereof cannot be subjected to restriction by way of a restraint in of trade provision. Such a restriction, impinging as it would on the workman's ability to compete freely and fairly in the market place, is unreasonable and contrary to public policy."[5]

28. Micah makes out no case, beyond the broad averment stated above, about what the special techniques and installation methods are in respect of which it claims a proprietary interest. Without meaning to undervalue the skills involved in the installation of kitchens, cupboards and the like, it is difficult to comprehend what proprietary interest Micah can claim in this regard.
29. As far as customers and suppliers are concerned, it follows logically that an installer comes into the picture long after a sales contract is concluded. It is not the job of an installer to attract business. Again, it is difficult to comprehend what proprietary interest Micah could claim on this score.
30. In my view, the case against the fourth and fifth respondents was devoid of any merit from the start.

SECOND RESPONDENT

31. It is convenient to turn to second respondent next, as his case has a unique feature. He is employed in Alto's Cape Town branch. This is outside of the 100km radius of the restraint covenant, and for this reason alone, the application against the second respondent has no merit. There is no merit in the submission by Micah that because Alto's head office is within the prohibited radius, second respondent also falls within it.
32. Even if there were merit in Micah's contention that second respondent ought to be regarded as falling within the 100km radius, there is still no case against him. On its own case, Micah is situated in Boksburg, and conducts its business mainly in Gauteng. Significantly, it says that it "does not source work in other provinces, but if a client requests work to be done in any of the other provinces, the applicant will assist the client". It is clear from this that Micah does not regard itself as having any real presence in the corporate work field in Cape Town. In these circumstances, it can hardly be said that Micah has established that the second respondent is competing with it by managing Alto's Cape Town branch. On Micah's own version, its customers are overwhelmingly in Gauteng. Thus, Micah has failed to establish a breach of clause 16.2.2 by virtue of the second respondent's employment with Alto.
33. In light of my finding that second respondent falls outside of the restraint radius, and that, in any event, Micah has failed to show that he is competing with it in breach of clause 16.2.2, the application against second respondent in this regard must be dismissed. In the event that I am wrong on my interpretation of clause 16.2.2, I find, for the reasons set out below regarding the issue of proprietary interest, that Micah has not established a protected proprietary interest in respect of second respondent.

FIRST RESPONDENT

34. Turning to the first respondent, it is common cause that while he was employed by Micah as a sales consultant, he is now employed by Alto as a site manager. On the interpretation that I have adopted of clause 16.2 read with 16.2.2, the consequence of this is that Micah has failed

to establish that he is competing with it. It is undisputed that as a site manager he only comes into the picture after a contract is concluded. There is thus no evidence that he plays any part in securing contracts (and thus competing) with Micah for corporate work. Even if I am wrong on my interpretation of clause 16.2.2, I find, for the reasons set out below regarding the issue of proprietary interest, that Micah has not established a protected proprietary interest in respect of first respondent.

THIRD RESPONDENT

35. The third respondent is the only employee respondent to be employed by Alto within the radius of the restraint, and in the same position of sales consultant. This puts him in somewhat of a different position to the other employee respondents. However, while he is a sales consultant, he avers (which averment is confirmed by Alto) that he is employed to develop its business

outside corporate work. Micah in reply contended that this was simply a convenience, implying that this was not the true state of affairs.

36. On the papers before me (and for the reasons dealt with more specifically below in relation to competing versions of facts in motion proceedings for final relief) I cannot reject the third respondent's and Alto's version as being clearly untenable or palpably implausible, and his version must be accepted. Further, if Micah obtains actual evidence that the third respondent is indeed acting as a sales consultant for Alto's corporate work, the provisions of the restraint will continue to provide Micah with a remedy if necessary. For this reason, on my interpretation of clause 16.2 read with clause 16.2.2, Micah has

failed to establish that the third respondent is in breach by competing with Micah in the field of corporate work.

37. In the event that my interpretation is incorrect, I proceed to deal with the issue of whether or not Micah has established a protected proprietary interest as regards the first to third respondents.

PROPRIETARY INTEREST

38. Micah's claims the following common proprietary interests in respect of the first to third respondents:
- a) They received in-house training from Micah.
 - b) They were exposed to all facets of the business and placed in possession of customer lists (corporate and individual), lists of suppliers, and Micah's pricing structures including prices, discounts from suppliers, profit margins and customer prices.
 - c) They attended regular sales meetings at which they interacted with other employees and where Micah's strategy was discussed.

- d) They were exposed to all customer leads at these meetings.
 - e) They were exposed to Micah's know-how, processes, systems, business methods, marketing methods, financial methods, pricing structures, tendering processes and strategy.
 - f) They were placed in a position to form good customer relations, and did so.
 - g) They were all very successful sales consultants. Micah cites the amount of business written by each of respondents one, two and three over two years. It does not give any indication of what proportion these figures represented of Micah's overall corporate work business.
39. Save for the specific details given regarding of individual sales figures for first to third respondents, Micah gives no further details to flesh out its averments on its proprietary interests. They are stated in the broadest of terms, and as a matter of common sense would seem to be applicable to most sales consultants in any business.
40. The respondents do not dispute most of these broad averments. They take issue with the averments regarding pricing structures, discounts from suppliers, prices, profit margins and customer prices. The common response of these respondents may be summarized as follows:
- a) All sales consultants were provided with the same price list. None were privy to how it was compiled.
 - b) None of them were aware of Micah's profit margins, input costs, costs centers or how the prices were made up.
 - c) With one exception, all of them were only involved in pricing for work falling outside corporate work. They were never involved in pricing for corporate work. The exception was first respondent who says that he dealt with one corporate work client but he was not involved in the determination of prices for that client.
 - d) Pricing outside non-corporate work was determined solely with reference to the price list.
 - e) Corporate work was priced by Mr Adamson who did not use the price list.
 - f) The price list was updated annually, usually at the start of the year.
 - g) All discounts were dealt with by the deponent to Micah's founding affidavit, Mr Adamson.
41. Mr Adamson denies the respondent's averments that they were never involved in pricing for corporate clients. He contends that the respondents were aware of profit margins for corporate clients because he would meet with them to discuss this and to decide on discounts to make their pricing competitive. He also contends that the ordinary pricing list was used as the starting point for corporate work quotations.
42. This being an application for final relief, where there are disputes of fact between the parties, the rule laid down in Plascon-Evans applies and I must accept the respondents' version unless it is palpably implausible, far-fetched or clearly untenable.[6] I do not find the

respondent's version to be any of these things as regards the question of pricing and price lists, and I proceed on their version. I should add that even if the price lists were used as a starting point for corporate work, as Mr Adamson says, on his own version, this was not determinative of the ultimate pricing for the job as he (Mr Adamson) oversaw that decision.

43. In its answering affidavit, Alto says that it has its own cost centres, its own supplier costs and overhead expenses that determine its pricing. According to Alto, for this reason, Micah's price list would be of no use to Alto. It points out that outside of the corporate work field, prospective clients in the industry will obtain competitive quotes, and thus pricing is not confidential. Where pricing is a decisive factor for clients, the relationship between customer and sales consultant

becomes irrelevant. In addition, Alto says that corporate work is always secured through a tender process.

44. Micah does not deal with these averments in reply.
45. Even if it were so that Micah's price lists are confidential (despite Alto's denial), this does not assist Micah. It is significant that Micah does not deny that it updates its price lists annually, at the start of each year. This means that the probabilities are that Micah has or will shortly have new price lists superseding those to which the employee respondents were privy.
46. As far as most of the remainder of the alleged proprietary interests of Micah are concerned, I have already noted that they are stated in the broadest terms, and that they would seem to me, in the main, to be the kind of general business practices adopted in most entities that sell products like those supplied by Micah and Alto.
47. Micah alleges an interest in what it says is the special relationships built up between these respondents and the customers with whom they dealt. However, Alto avers, which averment is not disputed, that the corporate work in respect of which it and Micah competed was awarded on a tender basis. The very purpose of tenders is to rule out the influence that any special relationships might affect the awarding of a contract. This being the case, it follows that Micah cannot claim a proprietary interest in the respondents' customer relations in the field of corporate work. In any event, first respondent is now working in the Cape Town branch, second respondent is not dealing with customers at all at the pre-contract stage, and third respondent is

dealing with non-corporate clients. Consequently, Micah does not have a protectable interest in this regard.

CLAUSE 16.2.3

48. Finally, as regards first to third respondents, Micah contends that they are in breach of clause 16.2.3 in that third respondent enticed second and first respondent to leave Micah's employ for Alto. Further, these three respondents acted in cahoots to entice fourth and fifth respondents. These averments are all denied by first to third respondents for reasons that appear to me to be entirely plausible. I must accept their version. Accordingly, I find that there was no breach in respect of clause 16.2.3.
49. For all of these reasons, and even if I am wrong on my interpretation of clause 16.2.2 read with clause 16.2, I find that Micah has failed to make out a case for the enforcement of the restraint covenants against any of the employee respondents.

SIXTH RESPONDENT

50. Micah's case against Alto, being the sixth respondent, is based on the delict of unlawful competition. In *IIR v Hall*[7] it was held that a competitor's employment of an ex-employee with or without knowledge of a restraint cannot of itself amount to the depict of unlawful competition. It must be established that the new employer, through the ex-employee used confidential information of the ex-employer. As I have already indicated, Micah accepts that it has no evidence to this effect. In the circumstances, there is no basis for its claim against Alto.

CONCLUSION

AND ORDER

51. The result is that Micah has failed to establish grounds for the relief sought.
52. I make the following order:

The application is dismissed with costs.

RM KEIGHTLEY

JUDGE OF THE HIGH COURT,

GAUTENG LOCAL DIVISION

DATE OF HEARING: 02 FEBRUARY 2018

DATE OF JUDGMENT: 19 FEBRUARY 2018

APPEARANCES

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INSTRUCTED BY : DELPORT VAN DEN BERG INC.

- [1] Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 974 (A)
- [2] J Louw and Co (Pty) Ltd v Richter and Others 1987 (2) SA 237 (N) at 243 B-C
- [3] 1990 (4) SA 782 (A) at 794B-D
- [4] See Automotive Tooling Systems (Pty) Ltd v Wilkins 2007 (2) SA 271 (SCA) at 282F-G
- [5] Amanda Textile Mills (Pty) Ltd v Hurn and Another [2004] 4 All SA 183 E
- [6] National Director of Public Prosecutions v J G Zumba [2009] ZASCA 1; 2009 (2) SA 277 (SCA) at [26]
- [7] 2004
- (4) SA 174 (W) at [20]

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