

SOUTH AFRICA / JUDGMENT

Micro-D Limited v Duba and Others (44997/2018) [2019] ZAGPJHC 6 (21 January 2019) [2019] ZAGPJHC 6

COURT

South Gauteng High Court, Johannesburg

BEFORE

EF Dippenaar

CASE / FILE NUMBER

44997/2018

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NUMBER: 44997/2018

In

the matter between:

MICRO-D
LIMITED Applicant
and
DUBA
NGOAKO
ALAN First
Respondent
MOYO
UNANGONI Second
Respondent
DYANTI
JABU ABEL
JACOB Third
Respondent
BAKWENA
IT DISTRIBUTION (PTY)
LTD Fourth
Respondent

JUDGMENT

EF DIPPENAAAR J:

Introduction

- [1] This is an urgent application seeking final interdictory relief aimed at restraining the respective respondents from breaching their contractual non-solicitation restraint obligations and unlawfully competing with the applicant. The first to third respondents are former employees of the applicant and are all directors of the fourth respondent. The applicant and the fourth respondent are competitors and operate as distributors of computer hardware and software products of various manufacturers.
- [2] At the hearing, the respondents conceded the issue of urgency. I am satisfied that the applicant cannot obtain adequate redress at a hearing in due course, specifically considering the periods of restraint which the applicant seeks to enforce.

The relevant facts

- [3] The applicant is a private company with its principal place of business in the United Kingdom. It operates a satellite sale office in Kyalami, Midrand at which the first, second and third respondents ('the employee respondents') were employed by the applicant as account managers from February 2015, December 2016 and February 2015 respectively.
- [4] It is undisputed that as account managers of the applicant, the employee respondents were effectively the face of the applicant's business, The said respondents were the liaison between the applicant and its customers and facilitated the marketing of the applicant's products and the placement of orders for the applicants products by processing requests for quotations and converting such quotations into purchase orders. In this position, the employee respondents were fully appraised of the applicant's customer lists, profit mark ups and prices and had access to the applicant's documentation.
- [5] Each of the employee respondents concluded a written employment agreement with the applicant in substantially similar terms, which contained various restraint provisions. The applicant has not sought to enforce the restraint provisions pertaining to competition contained in clause 14 of the agreements, but only the restraint provisions contained in clause 15 of the respective agreements. The relevant portions of clause 15 of each of the employment agreements contains the following provisions:

'Notwithstanding termination of this contact, you hereby covenant and undertake to the company that you shall not during your engagement hereunder and for a period of twelve months following the termination date (whether solely or jointly with any person, company, firm, organisation or business entity) as principal, manager, agent, officer, employee, consultant or otherwise directly or indirectly:

- (i) Solicit or assist in soliciting in competition with the company the custom of a business of any customer with whom the employee has had personal contact or dealings on behalf of the company during the twelve months prior ending on their termination date and/or with whom employees reporting to the employee have had personal contact or dealings on behalf of the company during the twelve months ending on their termination date; or
 - (ii) Accept or facilitate the acceptance of, or deal with, in competition with the company, the custom or business of any customer with whom the employee has had personal contact or dealings with on behalf of the company during the relevant period and/or with whom employees reporting to the employee have had dealings on behalf of the company during the relevant period; or
 - (iii) Knowingly or recklessly do or say anything which is or is calculated to be prejudicial to the interests of the company or its business or which results in or may result in the discontinuance of any contract or arrangement or benefit to the company’.
- [6] The employee respondent’s employment with the applicant terminated in September 2018, October 2018 and December 2018 respectively. The third respondent had been suspended on 20 November 2018.
- [7] The fourth respondent was incorporated in November 2015 and has the same business address as the applicant’s satellite office in Kyalami. The employee respondents have been directors of the fourth respondent during the currency of their employment with the applicant and from November 2015 and July 2017 respectively. It was not disputed that the applicant was not aware of these facts until November 2018.
- [8] On 16 November 2018, whilst processing a purchase order from one of its customers, Custom IT (Pty) Ltd, the applicant discovered that the order had been diverted into the name of the fourth respondent. After investigation, the applicant discovered that the fourth respondent was doing business with certain of its customers including Custom IT and Wires & Wireless.
- [9] On 20 November 2018, the applicant, via its attorneys demanded from each of the respondents that the non-solicitation restraint be honoured and the fourth respondent desist from soliciting business from its customers. The respondents all refused to provide any undertakings, prompting the launching of this application on 3 December 2018.

The issues

- [10] The respondents raised various issues and disputed the applicant’s entitlement to interdictory relief. Their main opposition was grounded in objections against enforcement of the non-competition restraint contained in clause 14 rather than against the provisions of clause 15, on which the applicant relied. The respondents baldly contended that IT Custom and Wires & Wireless were customers of the fourth respondent, without providing any particularity regarding such business relationships and disputed

any breach of the restraint provisions of the employment agreements. The respondents contended that the evidence presented by the

applicant in support of the alleged breaches and solicitation of its customers constituted inadmissible hearsay evidence and challenged

the documentary evidence on the basis that it was not authenticated. Significantly, the respondents failed to deal with the express

averments of the applicant; but contented themselves with bald denials of such averments.

[11] The respondents further challenged the court's jurisdiction and alleged that the applicant was conducting business in South Africa unlawfully due to non-compliance with sections 14 and 15 of the Immigration Act[1] ('the Act'), thus rendering the employment contracts void and disentitling the applicant to relief.

Jurisdiction

[12] The respondent's challenge to the court's jurisdiction lacks merit. In argument, the respondents sought to rely on the contra proferentem rule and alleged acceptance of the employment agreements by the applicant in the United Kingdom[2]. Irrespective of the demerits of such arguments, the place of conclusion of the employment agreements is not definitive of the

jurisdiction issue.

[13] It was undisputed on the papers that the respondents are all resident within the court's jurisdiction and that the applicant's offices, where the employee respondents performed their duties under the employment agreements is within the court's jurisdiction.

[14] It follows that the respondent's challenge to jurisdiction must fail.

Unlawful trading by applicant

[15] The respondents placed reliance on the provisions of sections 14 and 15 of the Act in contending that the business of the applicant was being conducted unlawfully as no business visa/s had been issued. It was contended that as such, the agreements between the applicant and the employee respondents are void and unenforceable.

[16] The argument lacks merit. The Immigration Act applies to individuals and not corporate entities and no facts were put up supporting any finding that the agreements are void.

The merits: final interdict

[17] It is trite that to obtain final interdictory relief, the applicant must illustrate a clear right, injury actually committed or reasonably apprehended and the absence of an alternative remedy[3]. The so-called Plascon Evans test is to be applied[4].

- [18] The applicant averred that the first to third respondent secretly redirected requests for quotations from the applicant to the fourth respondent. In support of this contention, the applicant relied on WhatsApp texts and various emails emanating from the employee respondents found on the computers used by them whilst in the employ of the applicant and on confirmation by certain of its clients that requests for quotations to the applicant had been redirected to the fourth respondent.
- [19] The respondents objected to this evidence on the basis that the email and WhatsApp communications were not authenticated and that the evidence constituted inadmissible hearsay evidence. The applicant sought the introduction of any hearsay evidence in terms of section 3 of the Law of Evidence Amendment Act[5]. Considering the relevant requirements of section 3 and in exercising the discretion afforded to this court[6], I am satisfied that the necessary requirements were met and consider it in the interests of justice to admit the hearsay evidence in the present circumstances.
- [20] The applicant further contended that the fourth respondent, through the majority of its directors, the employee respondents, was aware that the employee respondents were breaching the restraint provisions and were luring customers to it in breach of their fiduciary duties and employment agreements and that the solicitation of the applicant's customers was wrongful and constituted unlawful competition.
- [21] The respondents were afforded an opportunity to deal with the applicant's averments but elected not to do so. Other than an admission of the existence of a business relationship between the fourth respondent and certain customers of the applicant, being Custom IT and Wires & Wireless, the respondents did not put up any substantive version or provide any particularity regarding the alleged business relationships. The respondents did not grapple meaningfully with the facts set up by the applicant but contented themselves with bald denials of the applicant's version.
- [22] Despite this the respondents contended that there are factual disputes on the papers which disentitles the applicant to relief.
- [23] In *Fakie NO v CCII Systems (Pty) Ltd*[7], the following was said in the context of factual disputes:

*"55. That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings, and in the interests of justice courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than sixty years ago, this court determined that a judge should not allow a respondent to raise 'fictitious' disputes of fact to delay the hearing of the matter or to deny the applicant its order. There had to be 'a bona fide dispute of fact on a material matter'. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, this court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact,*

but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.

[24] In *Wightman t/a J W Construction v Headfour (Pty) Ltd and Another*[8], it was said:

“[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must in the event of conflict, accept the version set up by his opponent unless the latter’s allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E-635C. See also the analysis by Davis J in Ripoll-Dausa v Middleton NO [2005] ZAWCHC 6; 2005 (3) SA 141 (C) at 151A-153C with which I respectfully agree. (I do not overlook that a reference to evidence in circumstances discussed in the authorities may be appropriate.)

[13] A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say ‘generally’ because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognise or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them. There is thus a serious duty imposed upon a legal adviser who settles an answering affidavit to ascertain and engage with facts which his client disputes and to reflect such disputes fully and accurately in the answering affidavit. If that does not happen it should come as no surprise that the court takes a robust view of the matter.”

[25] In the present instance, the respondents have not seriously and unambiguously addressed the facts said to be in dispute. Instead, the respondents baldly alleged that the applicant’s customers are also customers of the fourth respondent and baldly denied that their conduct was untoward. In my view, this is not sufficient to create any real bona fide dispute/s of fact. The evidence put up by the applicant, including emails emanating from the employee respondents themselves, illustrated a diversion of quotations requested from the applicant to the fourth respondent through the efforts of the employee respondents.

[26] Moreover, the primary thrust of the respondents' opposition to the enforcement of the contractual restraint provisions was aimed at the competition restraint provisions[9], rather than the non-solicitation provisions of clause 15. The applicant did not seek to enforce the provisions of clause 14 and the respondents' averments do not assist them.

[27] The respondents have further failed to illustrate that the non-solicitation restraint is unreasonable[10] or that the applicant has no proprietary interest threatened by the involvement of the employee respondents in the fourth respondent[11]. The applicant's averments on these issues have not been cogently disputed and the answering affidavit did not expressly

engage on these issues.

[28] The applicant has in my view established in its founding papers that it has a proprietary interest in precluding the solicitation of its customers by the respondents[12] in the present circumstances where the employee respondents have been in a position to build up a particular relationship with its customers so that they are in a position to influence the customers to place their business with the fourth respondent. This is inter alia evidenced by the email correspondence and other evidence regarding the communications with and regarding the applicant's

customers, IT Custom and Wire & Wireless.

[29] I am further satisfied that the 12 month period imposed by the non-solicitation restraint does not impose an unreasonable limitation on the respondents' economic activity, considering the applicant's undisputed evidence that it takes about 12 months to appoint and train replacement employees and to enable them to build up a rapport with its customers.

[30] In respect of the fourth respondent, the employee respondents are the majority of its directors and as such, direct its affairs. The express refusal by the respondents to provide the undertakings sought by the applicant, and their version that the fourth respondent has various of the applicant's customers as its clients, evidence that the respondents have no intention to restrict any business dealings with these customers or the solicitation of their business. Such conduct would constitute intentional assistance by the fourth respondent in the breaching of their non-solicitation restraint by the employee respondents and is wrongful.[13]

Conclusion

[31] In the circumstances, I am satisfied that the applicant has illustrated a clear right to relief.

[32] The issue of irreparable harm was not cogently disputed on the papers. The applicant's contention that in each instance where a quotation was misdirected to the fourth respondent, it was able to produce a quotation, was not disputed. The applicant has further illustrated that the employee respondents precluded the applicant from rendering a quotation to various customers, in circumstances where those customers expressed interest

in procuring a quotation from the applicant. I am satisfied that the applicant has illustrated prejudice and an injury actually committed and a reasonable apprehension of further injury.

[33] I am fortified in this view by the respondents' failure to provide any undertakings when requested by the applicant's legal representatives to do so and the stance adopted by them in these papers, inter alia by contending that the certain of the applicant's clients are also the clients of the fourth respondent. In my view it has been sufficiently illustrated that the risk of irreparable harm is ongoing.

[34] I am further satisfied that the applicant has no alternative remedy and that the existence of a damages claim in the circumstances would not constitute a sufficient alternative remedy as it would not afford the applicant any protection against a continued infringement of its rights.

[35] In the circumstances, I am satisfied that the applicant is entitled to the relief sought. There is no reason to deviate from the normal principle that costs should follow the result.

[36] I grant the following order:

[36.1] The first, second and third respondents are interdicted and prohibited from, solely or jointly with any person, company, firm, organisation or business entity, as principal, manager, agent, officer, employee, consultant or otherwise, directly or indirectly:

[36.1.1] soliciting or assist in the soliciting, in competition with the applicant, the custom or business of any customer of the applicant, including the customers listed on FA30 to the founding affidavit, with whom the first, second and/or third respondent had personal contact or dealings on behalf of the applicant during the twelve months prior to the termination of their respective employment with the applicant;

[36.1.2] knowingly or recklessly doing or saying anything which is or is calculated to be prejudicial to the interests of the applicant or which results or may result in the discontinuation of any contract or arrangement or benefit of the applicant.

[36.2] The order in [36.1] above shall operate against the first respondent until 25 September 2019, against the second respondent until 8 October 2019 and against the third respondent until 30 November 2019.

[36.3] The fourth respondent is interdicted and prohibited from soliciting or assisting in the soliciting, in competition with the applicant, the custom or business of any customer of the applicant, including the customers reflected on list of customers attached to the founding affidavit as FA30, with whom the first to third respondent had personal contact or dealings on behalf of the applicant during the twelve month period prior to the termination of their respective employment with the applicant.

[36.4] The order in [36.3] shall operate against the fourth respondent until 30 November 2019.

[36.5] The first, second, third and fourth respondents are directed to pay the costs of the application jointly and severally, the one paying, the other to be absolved.

EF DIPPENAAR

JUDGE OF THE HIGH COURT JOHANNESBURG

APPEARANCES

DATE OF HEARING: 15 January 2019

DATE OF JUDGMENT: 21 January 2019

APPLICANT'S COUNSEL: Adv HP Pretorius

APPLICANT'S ATTORNEYS: Adams Attorneys

Mr A Adams

RESPONDENTS' COUNSEL: Adv KSD Mohoto

RESPONDENTS' ATTORNEYS: MS Moloto Inc

Mr D Khutso

[1] 13 of 2002

[2] An issue not fully canvassed on the papers

[3] Setlogelo v Setlogelo 1914 AD 221 at 227

[4] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E-635C.

[5] 45 of 1988.

[6] Hlongwane v Rector, St Francis College 1989 (3) SA 318 D at 324E-F; Lagoon Beach Hotel (Pty) Ltd v Lehane NO 2016 (3) SA 143 SCA at 150H-151D

[7] 2006 (4) SA 326 (SCA)

[8] (66/2007)

[2008] ZASCA 6; [2008] 2 All SA 512 (SCA); 2008 (3) SA 371 (SCA) (10 March 2008)

[9] As set out in clause 14 of the employment agreements

[10] The onus to do so, rests on the respondents. See Reddy v Siemens Telecommunications (Pty) Ltd 2007 (2) SA 486 (SA) para [10].

[11] Digicore Fleet Management (Pty) Ltd v Steyn 2008 JDR 1195 (SCA) para [7].

[12] Rawlins v Caravantruck (Pty) Ltd [1992] ZASCA 204; 1993 (1) SA 537 A 541

[13] Genwest Batteries (Pty) Ltd v Van der Heyden 1991 (1) SA 727T; Lanco Engineering CC v Aris Bros Manufacturers (Pty) Ltd 1993 (4) SA 378 (D) at 382B-383i

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