

SOUTH AFRICA / JUDGMENT

Peter Cooper Estates CC t/a Harcourts v Havenga and Another (1673/2014) [2014] ZAECPEHC 55 (5 August 2014) [2014] ZAECPEHC 55

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

RWN Brooks

CASE / FILE NUMBER

1673/2014

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IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL, DIVISION PORT ELIZABETH

CASE NO: 1673/2014

DATE HEARD: 31/07/2014

DATE DELIVERED: 05/08/2014

In the matter between

PETER COOPER ESTATES CC t/a

APPLICANT

HARCOURTS

and

LYNETTE ROCHÈ HAVENGA 1ST RESPONDENT

CHAS EVERITT ST FRANCIS BAY/ J BAY 2ND RESPONDENT

JUDGMENT

BROOKS AJ:-

INTRODUCTION

- [1] On 29 May 2014 the applicant commenced proceedings against the two respondents by the issue of a notice of motion in which were

reflected truncated time periods in respect of the filing of notices of opposition, the filing of answering affidavits and the dates upon which the matter would be heard either as an unopposed application or as an opposed application. In doing so, the applicant included a prayer for an order permitting the matter to be treated as an urgent application.

- [2] Although both dates nominated by the applicant in the notice of motion on which the matter might be heard were dates designated on the court calendar as motion court dates, which relieved the applicant of the need to first obtain a directive from the duty judge prior to the issue of the notice of motion in accordance with the Joint Rules of Practice for the High Courts of the Eastern Cape Province and in order to regulate the proceedings, the applicant's counsel prepared a certificate of urgency for inclusion in the application papers to be issued. In argument, he expressed uncertainty as to whether this was necessary in circumstances where no directive is sought on the time periods and dates to be included in the notice of motion. In my view, it was appropriate to prepare a certificate of urgency.
- [3] On 2 June 2014 the respondents filed a notice of opposition. This was in compliance with the injunction in the noticed of motion of which the applicant was the author. Accordingly, the date on which the matter was to be set down by the applicant ought to have been 12 June 2014, again in terms of the content of the notice of motion. For no apparent reason, and notwithstanding the opposition, the matter came before the court on the unopposed roll on 3 June 2014, the date proposed in the notice of motion in the event that the matter was unopposed.
- [4] Inevitably, on 3 June 2014, the applicant was obliged to seek a postponement of the application. In granting the postponement,

I considered the time frame nominated by the applicant in the notice of motion to be unduly tight in the context of the allegations which had been made in the founding affidavit. In the circumstances, the postponement granted was to 31 July 2014, being the first available date for opposed motion proceedings in the third term.

The issued of wasted costs occasioned by the postponement was reserved.

- [5] On 6 June 2014 an answering affidavit with annexures and certain confirmatory affidavits were filed.
- [6] On 9 June 2014 a replying affidavit was filed.
- [7] In my view, as the respondents filed their notice of opposition timeously, the applicant ought not to have set the matter down on the unopposed roll on 3 June 2014. It follows that any wasted costs occasioned by the inevitable postponement should be for the applicant's account.
- [8] The applicant is a close corporation which operates as an estate agency. The first respondent is a former employee of the applicant who is now employed as an estate agent by the second respondent.

- [9] In the founding affidavit, the applicant complains of behaviour on the part of the first respondent since her employment by the second respondent which the applicant contends entitles it to an interdict with a limited lifespan which will lapse in the event that the applicant does not institute an action against the respondents within the nominated lifespan (180 days). The notice of motion is crafted accordingly. The interdict contemplated targets three areas of activity which the applicant seeks to prohibit. Costs are sought from the respondents jointly and severally.

THE APPLICABLE LAW

- [10] When the matter was called. MR JOOSTE, who appeared on behalf of the applicant, properly conceded that whilst the interdict sought was for a limited period only, if granted it would have the effect of final relief. This accords with the submissions made by MR STYLIANOU in heads of argument prepared on behalf of the respondents and later confirmed in his submissions on their behalf. Accordingly, the court is enjoined to consider the grant of relief only if the facts alleged on behalf of the applicant which are admitted by the respondents in the answering affidavit, together with the facts expressed by the respondents therein, justify such relief.[1]

The position may be different if the respondents' version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.[2]

- [11] Upon the consideration of the allegations of fact contained in the affidavits filed of record in accordance with the principles

expressed in the preceding paragraph, the applicant would be entitled to relief if it is able to establish the following:

[11.1] that there is a clear right on the part of the applicant;

[11.2] an injury actually committed or reasonably apprehended;

[11.3] the absence of any other satisfactory remedy available to the applicant.[3]

- [12] Where the authorities[4] pertaining to the requirements for a final interdict have consistently referred to the requirement to establish a clear right as a requirement to establish, on the balance of probability, facts and evidence which prove that the party has a definite right in terms of substantive law, the reference is rather to a right which is clearly established.[5] Whether the applicant has a right is a matter of substantive law; whether that right is clearly established is a matter of evidence.[6]

- [13] The specific behaviour on the part of the respondents complained of in the founding affidavit is identified collectively therein by the applicant as "spring-boarding"; the term would be appropriate where the respondents are shown to have made improper use of confidential information in which the applicant has an interest, in a manner offensive to the fiduciary relationship which existed or continues to exist between the applicant and the

respondents and which demonstrates that the respondents have knowingly used the confidential information to obtain unfair advantage over the applicant and thereby have caused the applicant to suffer damage. In such circumstances, confidential information can be protected by means of an interdict and/or a claim for damages.[7]

THE ALLEGATIONS OF FACT

- [14] It is common cause between the parties that the applicant commenced its activities as an estate agency in 1991. It was a franchisee for Aida Real Estate for 13 years. Thereafter, for a period of 10 years, it was a franchisee for Chas Everitt. This relationship terminated in approximately September 2013. Thereafter, the applicant became a franchisee for Harcourts.
- [15] The first respondent commenced employment with the applicant on 1 June 2011, whilst the applicant was a franchisee for Chas Everitt. The employment relationship came to an end on 25 March 2014, the applicant accepting the first respondent's resignation with immediate effect.
- [16] The employment relationship had been governed by the terms of a written agreement. This included provision for a period of restraint of trade in favour of the applicant. The period is short, and plays no part in the issues with which this application is concerned.
- [17] The employment agreement also contained provisions aimed at the protection of intellectual property belonging to the applicant and prohibiting the first respondent from making contact, or communicating with sellers and landlords from whom the applicant holds a mandate, or from interfering with the contractual relationships in existence between such persons and the applicant.

Both broad areas of protection are available to the applicant accordingly in such circumstances as may arise after the termination

of the employment contract and which require that the protection be invoked. The notice of motion contains three areas within the ambit of the interdict sought. Two address the protection available to the applicant in respect of its intellectual property

and the integrity of its external contractual relationships. At the commencement of proceedings, MR JOOSTE expressly abandoned the applicant's pursuit of relief in both these areas.

- [18] The remaining portion of the interdict sought addresses the applicant's concerns about the appearance on the internet of advertisements in the hands of the first and second respondents for properties listed with the applicant. It is the applicant's

case that the details of these properties have been obtained unlawfully from the applicant.

- [19] The applicant's complaint arises from alerts which it received on an internet website known as "Property 24" and which alerted the applicant to the fact that various properties advertised thereon by the applicant, pursuant to the applicant holding a mandate from the

sellers, are now being advertised by the first respondent through the vehicle of her employer, the second respondent. Copies of the relevant advertisements downloaded from the internet are annexed to the founding affidavit. An examination of them reveals that three properties are so advertised.

[20] The applicant has alleged that the properties were sourced by the applicant, which had expended effort in obtaining mandates from the sellers, and had been marketed by the applicant for a substantial period of time. In the result, the applicant claims that the information relating to these properties constitutes a trade secret worthy of protection. The allegation is that the use of this information by the respondents constitutes an abuse which “spring-boards” them into the market.

[21] In addition, the applicant draws attention to the similarity in wording and use of photographic material in the advertisements

placed by the respondents to the applicant’s advertisements. This, says the applicant, gives reason to believe that the respondents have not gone to the effort of obtaining joint mandates from the sellers and are consequently unlawfully holding out to the world that they are entitled to market these properties. A resultant sale brought about by the respondents would mean that the applicant would suffer damages.

[22] In light of the view adopted in respect of the true nature of the interdict sought by the applicant, the manner in which the relevant allegations have been met in the opposing affidavits is determinative of the outcome in this matter. The so called Plascon Evans rule is applicable.

[23] In respect of all three properties referred to in the advertisements targeted by the applicant, and of which printed copies form annexures to the founding affidavit, the respondents make the point that the founding affidavit falls short of containing an allegation that the applicant holds a sole mandate to sell any of the properties concerned. In such circumstances, it is alleged, estate agents know which properties are on the market and it is customary for many agents to actively seek a buyer for the same property.

[24] Moreover, the first respondent denies that she has obtained the applicant’s client base. She makes the point that the information which the applicant is trying to protect in any event has been on the Chas Everitt database since 2007 (in respect of the one property) and since 2011 (in respect of the remaining two properties), dating back to when the applicant was a franchisee for Chas Everitt.

[25] In respect of the first property identified in the advertisements, the first respondent states that on the first day of her employment with the second respondent, an electronic pamphlet, referred to as an “e – card”, was sent out in respect of all properties listed on a municipal spreadsheet which reflects the registered owners of immovable properties falling within the Kouga Municipal area. The owner of this particular property replied to the first respondent’s e-mail and asked her to market his property. A printed record of relevant e-

mail correspondence is annexed to the answering affidavit and confirms this allegation. In the circumstances, the first respondent states that she did not obtain the details of the owner of this property from any data base belonging to the applicant.

- [26] In respect of the second property referred to in the advertisements relied upon by the applicant, the first respondent annexes a print out of a sequence of communications between her and the owner of the property which occurred utilising the facility known as “WhatsApp”. A consideration of this annexure reveals content which supports the allegation then made that the owner of this property gave the first respondent a mandate to sell the property. It is apposite to record at this juncture that in the same stream of communication, the first respondent had informed the owner that she would be leaving her employment with the applicant, who would continue to market the property, and would thereafter be employed by the second respondent.

The first respondent recalled the owner signing a Chas Everitt mandate whilst she was employed by the applicant and the latter was a franchisee for Chas Everitt. She also recalls that she took the photographs used in the resultant advertisements herself, and was the author of the property description.

- [27] In respect of the third property referred to in the advertisements relied upon by the applicant, the first respondent states that she found the property through the Kouga Municipal Spreadsheet. This enabled her to contact the owner, who gave her a mandate to sell the property. When she went to take photographs of the property, she found it to be in a state that was less than picturesque. Accordingly, she was then instructed to use what she describes as “general photographs” which she was able to source from the websites of three different estate agencies.

- [28] Upon receipt of the applicant’s complaint, and prior to taking legal advice, the second respondent caused the advertisements

relating to the three properties to be removed from the Chas Everitt website, and accordingly from the listing on “Property 24” “in order not to aggravate the situation”. However, much is made in the answering affidavit of the fact that prior listing of the properties on the Chas Everitt database entitles the second respondent to deal with the information relating to the properties. This is accepted by the applicant in the replying affidavit.

- [29] Subsequent to the emergence of the complaint and the removal of the advertisements from the internet, the owners of two of the properties have withdrawn the mandates to sell which were extended to the respondents. In one instance, the “withdrawal” is qualified by an undertaking to furnish a mandate in the event that a buyer is found. In my view, this amounts to an implied mandate.

ENTITLEMENT TO RELIEF

[30] In argument, MR JOOSTE identified as the clear right which the applicant sought to protect, the expectation of fair competition by the respondents. In my view, particularly when consideration is given to authority on the elements of qualification for a final interdict,[8] this description of a clear right is too broad and unspecific to pass muster.

[31] In contrast, MR STYLIANOU identified the clear right which the applicant appears to address in the notice of motion and founding

affidavit to be the preservation of the integrity of confidential information which may be unique to the applicant against unauthorised

use or access. In my view, this is a more accurate identification of the nature of the clear right contended for.

[32] On behalf of the respondents, MR STYLIANOU submitted that no clear right was established on the facts put forward by the applicant.

The first respondent had access to data made available by the Kouga Municipality as a source of information for the issue of her

electronic marketing. Moreover, he stated that once advertisements were posted in respect of the properties, whether on the internet or by way of physical signage or media advertisement, the information relevant to the affected properties cannot be claimed to be the confidential property of the applicant. Certainly, no trade secrets unique to the applicant were ever at risk.[9] In my view, these arguments are well made. They are further underpinned by the observation that, in any event, the three

properties concerned have all appeared on the Chas Everitt database since 2007 and 2011 respectively, which is openly available to the second respondent and to which the first respondent has legitimate access by virtue of her current employment.

[33] In the circumstances, I am of the view that no clear right has been established by the applicant.

[34] It is unnecessary to determine the matter in relation to the remaining requirements for a final interdict much further.

Suffice it to say, in my view, that by necessary extension of the same arguments put up on behalf of the respondents and against the background of the appropriate facts in this matter, the applicant has not succeeded in demonstrating that an injury has been committed or is reasonably apprehended. "Spring boarding" certainly has not been demonstrated.

[35] The manner in which the notice of motion has been crafted envisages an interdict for a limited length of time. The purpose is simply to enable the applicant to institute an action to claim damages from the respondents arising from the circumstances disclosed

in the affidavits. In my view, this action would afford the applicant with a satisfactory alternative remedy. Again, this disqualifies the applicant from obtaining a final interdict.

[36] It follows that the application falls to be dismissed.

COSTS

[37] The concluding portion of the answering affidavit urges the court to dismiss the application and to award the respondents costs of suit on a punitive scale. Whilst retained as a submission by MR STYLIANOU, in argument it was not wholeheartedly pursued. In my view, this restraint on the part of MR STYLIANOU is commendable. Whilst the applicant may have been overzealous in the identification of an appropriate legal threshold from which to challenge the respondents, and may have been obliged to abandon significant portions of the initial interdict sought once the nature and extent of the opposition became known, nothing emerges from the conduct of this application which, in my view, would attract a punitive costs order.

ORDER

[38] In the circumstances, I make the following order:

The application is dismissed with costs, such costs to include the wasted costs occasioned by the postponement on 3 June 2014.

RWN BROOKS

JUDGE OF THE HIGH COURT (ACTING)

Appearances:

For the Applicant: Adv P E Jooste instructed by, Schoeman Oosthuizen Attorneys, Port Elizabeth

For the Respondents: Adv X Stylianou, instructed by BLC Attorneys,

Port Elizabeth

[1] Plascon Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A) 634 – 635.

[2] National Director of Public Prosecution v Zuma [2009] ZASCA 1; 2009 (2) SA 277 (SCA) para [26].

[3] Setlogelo v Setlogelo 1914 AD 221 at 227.

[4] Nienaber v Stuckey 1946 AD 1049 at 1053 and 1054; Mosii v Motseoakhumo 1954

(3) SA 919 (A) and De Villiers v Soetsane 1975 (1) SA 360 (E) at 362.

- [5] Edrei Investments 9 Ltd (In Liquidation) v Dis-Chem Pharmacies (Pty) Ltd 2012 (2) SA 553 (ECP) at 556 B – C.
- [6] Erasmus, Superior Court Practice, Supplementary Volume, page E8 – 6D.
- [7] Waste Products Utilisation (Pty) Ltd v Wilkes and Another 2003 (2) SA 515 (W) at 573 F – I.
- [8] Paras
- [11] and [12] Supra
- [9] Compare Waste Products Utilisation (Pty) Ltd v Wilkes and Another 2003 (2) SA 515 (W) and Terapin Limited v Builders' Supply (Hayes) Ltd., Taylor Woodrow Ltd., and Swiftplan Ltd. [1960] RPC 12 (CA).

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Prepared on 13 October 2026 · Esheria