

SOUTH AFRICA / JUDGMENT

Sapphire Corporate Solutions (Pty) Ltd v Buchanan and Another (1348/2020) [2020] ZAFSHC 215 (17 September 2020) [2020] ZAFSHC 215

COURT

Free State High Court, Bloemfontein

BEFORE

M.A. Mathebula

CASE / FILE NUMBER

1348/2020

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IN

THE HIGH COURT OF SOUTH AFRICA,

FREE

STATE DIVISION, BLOEMFONTEIN

Case

number: 1348/2020

In

the matter between:

SAPPHIRE

CORPORATE SOLUTIONS (PTY) LTD Applicant

and

KRYSTAL

CARMEN BUCHANAN 1st

Respondent

WORKHORSE

WORKWEAR (PTY) LTD 2nd

Respondent

HEARD

ON: 18 JUNE 2020

JUDGMENT

BY: MATHEBULA, J

DELIVERED ON: 17 SEPTEMBER 2020

[1] This is an opposed application in which an order to interdict and enforce the provisions of the restraint of trade and confidentiality

agreements concluded between applicant and first respondent is sought. A relief sought against the second respondent is based upon

unlawful competition. Before me appeared Mr S Tsangarakis for the applicant and the heads of argument were drafted by Mr P Corbett SC. Messrs S Grobler SC and L Els appeared for the first and second respondent respectively.

The

background**Applicant's case**

[2] During 22 July 2018 the applicant, the manufacturer and marketer of corporate clothing and other promotional goods, concluded a written employment agreement with the first respondent who had commenced employment as its sales executive a month earlier. It is common cause that clause 16 of the aforesaid agreement refers to the "Restraint of Trade and Confidentiality Undertaking". A further document titled "Confidentiality document regarding proprietary information" was signed by the parties. In it the first respondent undertook not to disclose any confidential information and that such information shall not be used for any other purpose other than the business of the applicant. As a result the first respondent was given access confidential information like names of customers, names and contact details of suppliers, pricing structures and marketing strategies. It is averred that those constitutes 70 percent of the annual turnover of the applicant.

[3] Due to economic downturn the applicant embarked on retrenchment exercise as required in terms of section 189 of the Labour Relations Act 66 of 1995. The first applicant was among the retrenchees with her last working day recorded as the end of February 2020. The first respondent returned to the applicant all the tools of trade namely laptops, cell phone etc. issued to her during the sustenance of the employment relationship.

- [4] During the restoration of the electronic devices, it was discovered that the first respondent had an active Gmail account. Attached to the e-mail sent on 19 February 2020 was a comprehensive list of the customers of the applicant as well as a list of scheduled meetings with them. Another e-mail relating to the quotation was sent to the first respondent from a person identified as Jaco holding the position of sales representative with the second respondent.
- [5] It also transpired that the first respondent informed her colleagues in her WhatsApp chat group about her interactions with the second respondent. Prior to the completion of the retrenchment process, the first respondent was already offered employment by the second respondent. The first respondent intended to hook up her colleagues with the second respondent for employment purposes.

First respondent's case

- [6] At the outset the first respondent denies any employment relationship with the second respondent. According to her, she did attend a scheduled interview with the hope of landing a post. In preparation she did perform certain functions for the second respondent. However nothing came to fruition as the latter opted not to employ her because of the issues with the second respondent. At the time of deposing to an opposing affidavit she is unemployed and intend relocating to Durban to be with her husband and find employment there.
- [7] The first respondent avers that she has not infringed any terms and restrictions of the restraint of trade and does not intend to do so. Her intention to comply with it was conveyed to the attorneys for the applicant but still they are continuing with the application against her.
- [8] In the opposing affidavit, she pointed out that the applicant has existing and binding agreements with its clients. This limit them to source goods from any supplier. Therefore its rights in the event of a breach are fairly secured and can institute the necessary action to enforce the agreement. She also referred to the vast difference of goods sold by the applicant and the second respondent. The difference lies in the fact that the applicant provides what is termed "corporate gifts" while the second respondent is in the personal protective equipment and related goods market. As such they do not swim in the same pond as far as the target market share is concerned.
- [9] The first respondent avers that paragraph 16.2 of the employment agreement states that period she is barred from competing with the applicant is limited to six (6) months. In an unexplainable manner the applicant is seeking relief for a period of two (2) years. Turning to the nature of the relief, and interdict, it is her averment that the very same employment agreement provides for a remedy of damages. It is on this basis she avers that the relief claimed is wholly inappropriate.

[10] Turning to the confidentiality of the information, the first respondent avers that there is nothing sensitive and it can readily

be obtainable from clients themselves. In the bigger scheme of things, there is nothing that is proprietary and exclusive to the

applicant. As far as contracts are concerned, the customers are locked in agreements which she cannot be of any threat to the applicant.

[11] It must be borne in mind that although her last working day was end February 2020, she was let go as of 13 February 2020. On 17 February 2020 she attended a job interview with the second respondent. In order to familiarise herself with her new working environment, she accompanied a salesman named Jaco on his visit to the client. On the next day she again went to the applicant's premises and set out with the sole purpose of sourcing new customers.

[12] Her explanation is that she created the Gmail account as the trial run with all the information pertaining to her names, position and address. She forwarded herself the day template that she used at the applicant as if she is employed by the second respondent. At no stage did she divulge the information to any of the employees of the applicant. Therefore the allegation that she shared the information with them is untrue.

Second respondent's case

[13] The second respondent denies that there was ever an employment relationship with the first respondent. What is confirmed is that the parties did discuss issues towards concluding one but it never materialised. It was dispelled as soon as it became apparent that the applicant intended enforcing the restraint of trade clause. There being no employment nexus between them there was no breach of restraint of trade and confidentiality agreement.

[14] As per averments in the opposing affidavit, it is set out clearly that the substantial part of the business of the second respondent is largely located in the supply of personal protective equipment. One tenth is focused on corporate wear. The bulk of the business of the second respondent is in Bloemfontein and surrounding areas. Importantly the second respondent has not attempted to entice any customer of the applicant. This is demonstrated by the fact that not even one customer is mentioned that an approach was made by or on behalf of the second respondent. As such there is no threat to the applicant as the second respondent is not doing business with any of the customers of the applicant.

Legal principles

[15] In a contract of restraint the party protects some proprietary interest in the form of confidential information or trade secrets or trade connections. The principle as set out in our courts is that restraints of trade are enforceable unless they are proved to be unreasonable.[1] That is the focus of enquiry and the party who alleges that he is not bound by it bears the onus of proving that the enforcement of the restraint is contrary to the public

interest.[2] The contentious issues between the parties are not located on whether the restraint of trade is reasonable or not. The real issue is whether the first respondent and/or second respondent have transgressed its provisions or not.

- [17] On the facts it is clear that the first respondent was not at any stage employed by the second respondent. This aspect was brought to the attention of the applicant about three months before the application was issued. Not only that, but the first respondent confirmed her commitment to comply with the argument and that she will not in any manner contravene it as she will be relocating but the applicant proceeded with the application. It was submitted that the explanation that there is no employment relationship was fallacious on the basis that the discussions on the WhatsApp group points in a different direction. This argument is baseless because there is no extrinsic evidence that the contrary is correct. That the first respondent sent an e-mail to herself is nothing farfetched in the version that it was a test e-mail.
- [18] The applicant has identified as its trade protectable proprietary interests a list of its customers. It is on these basis that it is alleged that the first respondent contravened the restraint of trade agreement and the second respondent is engaged in unlawful competition by using the customer lists and list of scheduled meetings with the sole view of competing with them. The question that remains is whether the applicant has made out a case in the papers for the relief sought against the respondents.
- [19] Generally interdicts as stated in the *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* matter is not a remedy for past invasion of rights but is concerned with present and future infringements.[3] In this matter it is not self-evident that the information was leaked to the second respondent. There is nothing untenable or farfetched in her version that she did not share the information with the second respondent. Even if it was, there is no basis to apprehend that it will be repeated. The first respondent in her opposing papers stated that she is unemployed and will be relocating to Durban to be with her husband and find another job which will not in any manner infringe the provisions of the restraint of trade. Even if I am wrong on this aspect, it needs to be examined what kind of information that can be to the detriment of the applicant. There is no allegation that the first respondent has such special bond with the customers that she can coax them to her side to the detriment of the applicant. The information is such, was gained in the cause of developing her skill and not in unexceptional circumstances.
- [20] Turning to the second respondent, it became known to the applicant prior to issuing the application that the employment relationship

between the two at any stage is denied. Despite all that the applicant persisted with the application irrespective of the current state of affairs. There is no reason to disbelieve the averments that the information was not shared with the first

respondent. Further that they are not competitors even though there is some minute overlap of common saleable products. There is no evidence that the second respondent engaged in any activity which entitle the applicant the relief sought against it.

[21] On the version of the applicant the confidential information has been leaked. This means that confidentiality has been lost and cannot be regained.[4] Therefore in the nature of the relief that an interdict is, it will not be appropriate relief. It will not be practical to enforce and as such be of no practical effect and use. The horse has already bolted and nothing can be undone. On this ground too, the application must fail.

[22] There is no reason to depart from the rule that the costs follows the event. Both respondents submitted that the applicant be ordered to pay the costs on the punitive scale of attorney and client. The case for such is premised on the conduct of the applicant in persisting with the application when there was really no need to do so. In the exchange of letters prior to launching the application, the applicant was informed that there was no employment relationship and information leaked between the parties. This litigation was nevertheless embarked upon. The applicant was even seeking orders outside the period stipulated in the agreement relied upon. It is clear that an all-out litigation was initiated and pursued despite the odds being stacked against the applicant. In the exercise of my discretion, I conclude that it will be appropriate that the applicant pays costs on the punitive scale.

[23] I make the following order.

23.1 The application is dismissed.

23.2 The applicant must pay the costs of both respondents on an attorney and client scale.

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M. A. MATHEBULA, J

On behalf of applicant: Adv. S. Tsangarakis

Instructed by: Symington & De Kok

BLOEMFONTEIN

On behalf of first respondent: Adv. S. Grobler SC

Instructed by: Kramer Weihmann & Joubert Inc

On behalf of Second respondent: Adv. J.H. Els

Instructed by: Rossouws Attorneys

[1] Magna Alloys and Research (SA) (Pty) Ltd v Ellis [1984] ZASCA 116; 1984 (4) SA 874 (A) at 897 F - 898 E

[2] Sibex Engineering (Pty) Ltd v Van Wyk and another 1991 (2) SA 482 (T) at 503 A

[3]

[2008] ZASCA 78; (2008) 4 All SA 225 (SCA) at para 20

[4] South African Airways SOC v BDFM Publishers (Pty) Ltd and two others Case 2015/33205 (GP)

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Prepared on 11 October 2026 · Esheria