

SOUTH AFRICA / JUDGMENT

SPX Technologies (Pty) Ltd t/a Lightnin Africa v Els and Another (11374/2007) [2007] ZAGPHC 35 (23 April 2007)

[2007] ZAGPHC 35

COURT

High Courts - Gauteng

BEFORE

Botha

CASE / FILE NUMBER

11374/2007

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IN

THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL

PROVINCIAL DIVISION)

NOT

REPORTABLE DATE: 23 APRIL 2007

CASE

NO: 11374/2007

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In the matter between:

SPX TECHNOLOGIES

(PTY) LTD

t/a

LIGHTNIN AFRICA

APPLICANT

vs.

EUGENE ELS FIRST

RESPONDENT

AFRICAN

MIXING TECHNOLOGIES (PTY) LIMITED

SECOND RESPONDENT

JUDGMENT

BOTHA J:

The applicant is SPX Technologies (Pty) t/a Lightnin Africa.

The first respondent is Mr Eugene Els who, until 18 July 2006, was employed by the applicant as an after sales manager.

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The second respondent is African Mixing Technologies (Pty) Ltd trading as Afromix.

The first respondent is presently employed by the second respondent.

The relief claimed in prayer 2 of the notice of motion is:

2. THAT First Respondent be interdicted or restrained,

within the whole of the Republic of South Africa from rendering services in any capacity to AFROMIX (PTY)

LTD or any other person, natural or corporate, that competes with Applicant, until 18 July 2007;

The reference to Afromix (Pty) Ltd in prayer 2 must be accepted as a reference to the trade name of the second respondent.

Mr Beaton, who appeared for the applicant, only asked for an order that the first respondent be interdicted from being employed by the first respondent until 18 June 2007 in the Republic of South Africa.

The applicant relies on a restraint of trade clause contained in a written employment agreement between the applicant and the first respondent dated 10 January 2005. Clause 16.7 of that agreement reads as follows:

16.7 For a period of 12 (twelve) months after termination of

this employment agreement, the Employee will not, without prior written approval of the Employee:

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16.7.2

Solicit or attempt to solicit business from any existing customers of the Employee, or Engage in any business, directly or indirectly,

related to the business of the Employer in any of the countries or territories in which the Organisation and its subsidiaries or affiliates operates.

16.7.1

The 12 month restraint to which the first respondent was subject in terms of this clause will expire on 18 July 2007.

The case of the applicant is set out in paragraph 7 of the founding affidavit which I shall quote in full:

7.1 Applicant has a legitimate interest in the enforcement of

the above provisions. Applicant has been active in SOUTH AFRICA, from where it services the rest of Africa and has been manufacturing, since late 2001. Until then it permitted a local company to market its products under licences. In the nature of things the equipment supplied by Applicant is of a specialized nature. During his tenure with Applicant as an Aftersales Manager, First

Respondent acquired knowledge of the identity of Applicant's customers in Africa and of their various

needs and requirements.

He is also aware of the

products produced and marketed by Applicant. This knowledge is most useful to any entity starting up in competition with Applicant. It is especially useful to an entity such as Second Respondent, which appears to

7.2

7.3

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have an established relationship with EKATO, which has, to date, not marketed in Africa;

The object if this application is thus to protect Applicant's confidential information and established customer relations. First Respondent is wrongfully using such information to benefit Second Respondent and EKATO. It is also apparent from Annexure "C"

hereto that Second Respondent is intent upon competing directly with Applicant. The description of the goods and services it provides in that Annexure coincides exactly with the business of Applicant;

Since Applicant was, prior to First Respondent's resignation, virtually the only supplier of the agitators and mixers it supplies, in the whole of the Republic, the restraint should cover that area as well.

The reference to Ekato is a reference to the principal international competitor of SPX Corporation, an American company of which the applicant alleges it is a subsidiary.

What I have cited above is what I consider to be the high water mark of the applicant's case in respect of the interest it seeks to protect. In my view the allegations are vague and of a general nature. They give no specific detail of the type of work done by the first respondent, the nature of the knowledge acquired by him, the marketing methods of the applicant, and the nature and composition of the applicant's customer base. It is not clear whether the knowledge of the identity of the customers and their needs could only be acquired in the service of the applicant.

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If, as appears from the papers, the applicant sells specialized products to a limited market, one would expect that a competitor like the first respondent, already in the field, would also have knowledge of the identity of such customers and their needs.

The mere allegation that the first respondent has knowledge of the identity and needs of customers is in my view not enough to prove a protectable interest. See in a different context *Automotive*

Tooling Systems (Pty) Ltd v Wilkins & Others 2007(2) SA 271 SCA at 281 B-C.

The applicant, in its replying affidavit gave some more information.

In paragraph 18 the following is said:

The companies identified in this paragraph compete with

Applicant in respect of certain products it produces, with the exception of Jaguar mixers of which I have never heard. The Applicant, however, has a virtual monopoly on the biological oxidation application of mixing and agitating technology, which involves the making of certain blades, in the Republic.

The important allegation here is that the applicant has a virtual monopoly in the biological oxidation application of mixing and agitating technology, which involves the making of certain blades, in the Republic.

This allegation prompted the respondents to file further affidavits one by the first respondent and one by Mr Warren Dale.

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Mr Beaton indicated that he had no objection against the affidavit of Mr Dale. He objected against the further affidavit of the first respondent, mainly because it did not deal with the new matter. In my view there is no reason why the further affidavit of the first respondent should not be admitted to the extent that it deals with the allegation that the applicant had a virtual monopoly in the biological application of mixing and agitating technology. It is enough to say that the allegation of a virtual monopoly is refuted by both Mr Dale and the first respondent. According to Mr Dale the applicant's market share in this field may be 10%. He also says that the first respondent was never involved with the biological oxidation technology (called the BIOX process).

Mr Dale had a contract as an independent contractor with the applicant until June 2006. After he had terminated that contract he began a business in competition with the applicant, apparently the second respondent.

These allegations have to be accepted in view of the final relief claimed by the applicant.

In my view the applicant has not proved that it has a protectable interest which would justify the court in restraining the first respondent from continuing his employment with the second respondent.

In the result the application is dismissed with costs.

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C.BOTHA JUDGE OF THE HIGH COURT

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