

SOUTH AFRICA / JUDGMENT

Super Group Trading (Pty) Ltd v Labusschagne and Another (J2268/17) [2017] ZALCJHB 489 (14 November 2017) [2017] ZALCJHB 489

COURT

Labour Court Johannesburg

BEFORE

GN Moshwana

CASE / FILE NUMBER

J2268/17

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THE

LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

Reportable

Case

no: J

2268/17

In

the matter between:

SUPER
GROUP TRADING (PTY) LTD
Applicant
and
LABUSSCHAGNE
ISAK ABRAHAM
First Respondent
PALMTREE
DISTRIBUTORS (PTY) LTD
Second Respondent

Heard:

26 October 2017

Delivered:

14 November 2017

Summary:

An application to enforce a restraint of trade is generally heard on an urgent basis. Urgency follows as a matter of course. A party seeking to enforce a restraint of trade must allege and prove the agreement as well as its breach by the other party. Held (1): The applicant is interdicted and restrained. Held (2): Each party to pay its own costs.

JUDGMENT

MOSHOANA, J

Introduction

- [1] This is an application to restrain and interdict a former employee of the applicant. The application is opposed by the first respondent the former employee. The applicant seeks to interdict him from soliciting or touting whether directly or indirectly for his own benefit or the benefit of any other entity or person including the second respondent, any of the applicant's customers listed on the schedule attached to the notice of motion. Also from using the confidential information and trade secrets of the applicant in any manner whatsoever and from disclosing it to the second respondent or any other third party.

Background**facts**

- [2] As a sales representative at Namib Distributors (Pty) Ltd (Namib), the first respondent was recruited to join the applicant during May 2010. Upon joining the applicant, the first respondent's customers at Namib followed him and became the customers of the applicant. On 3 May 2010, the applicant and the first respondent entered into a restraint of trade agreement. The first respondent became a sales representative in Polokwane. He was the sole representative for the entire Polokwane region, which effectively covered the whole of Limpopo.
- [3] On 25 July 2017, after 7 years of employment with the applicant as set out above, the first respondent resigned with immediate effect. Attempts were made to dissuade the first respondent from resigning all of which drew blank. On 26 July 2017, the first respondent referred a dispute of alleged constructive dismissal. During a conciliation meeting, which happened on 31 August 2017, the applicant discovered that the first respondent has taken up employment with the second respondent. Upon that discovery the applicant's attorneys of record sought some undertakings from the first respondent. The first respondent refused to give any undertaking.

- [4] On 20 September 2017, 15 days after the refusal to undertake, the applicant launched the present proceedings. The first respondent opposed the reliefs sought by the applicant.

Evaluation

Lack of urgency

- [5] One of the defences raised by the first respondent was that the matter is not urgent at all. Generally, matters involving a restraint of trade are considered to be urgent in nature primarily because of the duration of the restraints. The restraint in casu is to endure for a period of a year. At the time of hearing this matter, the remaining period of restraint was about eight months. The basis for attacking urgency was simply that the applicant delayed in approaching the urgent court. In arguing that there was a delay, the first respondent commence reckoning the days from the date of his resignation. That is a wrong date. The applicant only became aware of the breach on 31 August 2017.
- [6] On 1 September 2017, the applicant sought an undertaking which if given would have obviated this application. On 5 September 2017, the first respondent refused to give an undertaking. Generally speaking, one would expect the applicant to approach the court at the very least a week thereafter. I am not in any manner suggesting that a week is a reasonable period to approach the court. Each case ought to be judged on its own facts. However, what the applicant did was to approach counsel and gave instructions on or about 12 September 2017. This is six days after the refusal to undertake. From 13 September 2017 to 19 September 2017, the applicant's IT department was seeking to gather evidence of breach.
- [7] I am unable to agree with the first respondent that the applicant delayed. To my mind the applicant acted swiftly and expeditiously and cannot be non-suited.[1] Therefore the defence of lack of urgency is not upheld.

Is there a restraint agreement?

- [8] There is no dispute that the parties entered into a restraint of trade agreement. The first respondent alleges that the restraint is unreasonable and restrictive. Therefore, there exists a valid agreement between the parties.

Is the agreement enforceable?

- [9] The first respondent is of the view that the agreement is unreasonable and therefore unenforceable. In law, it is the duty of the applicant to show that the restraint is reasonable. [2] In this regard the applicant's testimony is that the restraint is fair and reasonable in terms of duration and area.[3] In response the first respondent simply suggested that the covenant is overly burdensome and unreasonable. He poses no threat to the applicant since two months had lapsed after he left the applicant's employ. I have no reason to believe that the covenant is unreasonable. Therefore the restraint is enforceable in law.[4]

Was the restraint breached?

[10] It is trite that a party in motion proceedings is to make his or her case in the founding affidavit. Clause 17 states that one year after termination of employment, the first respondent would not be employed by a competitor. He shall not solicit or tout clients of the applicant[5]. The first respondent does not dispute employment with the second respondent, a competitor. He testified thus:

‘It submitted that I have a right to secure employment and so provide for my family. I have already set out my version that the restriction of the restraint is unreasonable and the area which the Applicant seeks to restrict my employment is burdensome. It cannot be said that it is in the interest of public policy to restrain a simple salesman such as me from earning a basic income’.

[11] When someone alleges that he is not bound by a restraint to which he had assented in a contract, he bears the onus of proving that enforcement of the restraint is contrary to the public interest.[6] Other than alleging that the covenant is against public policy, the first respondent has failed to prove how and in what manner. Since the first respondent is in the employ of the second respondent, he is in breach of the restraint.

[12] With regard to touting and soliciting the clients of the applicant, the applicant testified that one Matsemela found the first respondent at one of the applicant’s customers being there to solicit orders from them. In fact, two customers in Naboom were lost to the first and second respondent. The first respondent does not seriously challenge the allegations particularly that Matsemela found him at one customer soliciting orders. He attributes the loss of customers to poor service delivery. The question is how does he know this? He knew this because he approached those customers and made them to sign some declarations. Given the contents of the declarations, it requires no rocket scientist that the first respondent touted and solicited them. It does not appear to have been a wise move to do so.

[13] Regarding confidential information and trade secrets, it is undisputed that the first respondent had access to customers of the applicant. I am satisfied that in the course of access the first respondent was availed to confidential information and trade secrets. There is a real likelihood that he can use that and or disclose that to the second respondent or other parties. The applicant is entitled to be protected in this regard.

[14] I am therefore satisfied that the first respondent has breached the restraint. Accordingly, his conduct is prejudicing the applicant’s protectable interest. On the basis of the above breaches, the applicant is entitled to the interdict sought.

Issue of costs.

[15] The Labour Appeal Court (LAC) in *Ball v Bambelela Bolts (Pty) Ltd*[7] has already decreed that since this matters raises a constitutional issue-breach of section 22 of the Constitution, a rule of costs

following the results does not apply. To my mind it cannot be said that the opposition by the first respondent was vexatious. Therefore,

the appropriate order to make is that of each party paying its own costs.

Conclusion

[16] I come to the conclusion that there is a valid and enforceable restraint and that the interest of the applicant is worthy of protection. I am satisfied that the first respondent is prejudicing such an interest. As to costs, the appropriate order to make is that each party to pay its own costs.

[17] In the results I make the following order:

Order

1. The first respondent is hereby interdicted and restrained until after 31 July 2018 from soliciting or touting whether directly or indirectly for his own benefit or the benefit of any other entity or person including the second respondent, any of the applicant's customers listed on the schedule attached to the notice of motion issued on 20 September 2017.
2. The first respondent is ordered to immediately return to the applicant all confidential information including but not limited to information related to the applicant's customers, products, pricing, financial and commercial records, customer prospects, files, documents, and any other documentation and property belonging to the applicant or relating to any client of the applicant that are in his possession.
3. The first respondent is interdicted and restrained from using the confidential information and trade secrets of the applicant in any manner whatsoever and from disclosing it to the second respondent or any third party.
4. Each party to pay its own costs.

GN Moshwana

Judge of the Labour Court of South Africa.

Appearances

For the Applicant: Mr Miltz SC with Mr Pocock

Instructed by:

Fluxmans Inc, Rosebank.

For the Respondents: Mr R Venter.

Instructed by:

Louis Verveen Attorneys, Polokwane.

[1] See Wespoint Trading 91 CC t/a SkinPhd v Smit Case J967/16 delivered on 9 June 2016 para 9

[2] Marion White v Francis

[1972] 3 All ER 857.

[3] Paras 85-86 of the founding affidavit.

[4] Basson v Chilwan and others

[1993] ZASCA 61; 1993 (3) SA 742 (A) at 776H-777B

[5] Clause 17 page 61 of the pleadings.

[6] John Saner Agreement in Restraint of Trade in South Africa Law issue 13 (October 2011) and Experian SA (Pty) Ltd v Haynes and Another 2013 (1) SA 135 (GSJ)

[7]

[2013] 9 BLLR 843 (LAC)

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