

SOUTH AFRICA / JUDGMENT

Totally Board (Pty) Ltd v Meyer and Another (037796/2022) [2024] ZAGPPHC 417 (3 May 2024) [2024] ZAGPPHC 417

COURT

North Gauteng High Court, Pretoria

BEFORE

Nyathi

CASE / FILE NUMBER

037796/2022

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 037796/2022

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

(4)

Date: 03 May 2024

Signature:

In

the matter between:

TOTALLY
BOARD (PTY)
LTD
Applicant
And
ANGELA
MEYER
1st Respondent
CITIWOOD
HOLDINGS (PTY)
LTD
2nd Respondent
t/a
CITIWOOD

JUDGMENT

NYATHI J

A.

INTRODUCTION

[1] The applicant approached this court urgently to enforce a restraint of trade agreement between the applicant, and the first respondent, its erstwhile employee as well as the second respondent, who is the new employer of the first respondent. The application is opposed by the first respondent.

[2] By its very nature, the application is for final interdictory relief.

B.

BACKGROUND

[3] The first respondent was employed as a sales representative by the applicant from 16 May 2022.

[4] The applicant and the second respondent are both businesses involved in the selling of wood products such as chipboard, melamine boards and related products.[1]

[5] The respondent entered into a restraint of trade agreement with the applicant on 16 May 2022 which, inter alia, provided that she could not be employed as a sales representative by a competitor for a period of twelve months after the date upon which the first respondent's employment terminates.

[6] The restraint of trade agreement (attached to the founding affidavit) provides for the payment of an amount of R5 000.00 per month in reciprocation for the restraint.[2]

- [7] The first respondent left the applicant's employ on 29 August 2022.
- [8] The first respondent was employed by the second respondent as a sales representative from 1 September 2022.
- [9] The applicant seeks enforcement of the restraint agreement on the premise that it has a protectable interest consequent to the resignation of the first respondent and her subsequent taking up of employment with the second respondent who it regards as its competitor who stands to benefit from confidential information which the first respondent is privy to.
- [10] The applicant more particularly alleges that it has come to its attention that the first respondent has seemingly already approached one of its medium sized customers, namely Atlas Kitchens, Boksburg, to buy products from the second respondent.[3]

Applicant's case

- [11] The applicant contends that the second respondent is its competitor. The applicant thus has a protectable interest which should be protected by the enforcement of the restraint of trade agreement.
- [12] The protectable interest referred to includes, inter alia, access to and knowledge of the applicant's trade secrets and confidential information, including the identity of its customers.

Respondent's case

- [13] The first respondent disputes that she is bound by the restraint of trade agreement referred to supra on various grounds, including, inter alia, the following:

13.1 The applicant and the second respondent are not competitors.

13.2 The applicant has not shown any protectable interest.

13.3 The applicant has not made the necessary allegations that it has performed a reciprocal obligation in terms of the employment contract with her, namely, to pay her an amount of R5,000.00 per month in respect of the restraint of trade. The first respondent does not deny that the applicant has performed its part of the bargain.

13.4 The applicant has failed to make out a case for urgency and/or has created its own urgency by not immediately launching this application at the first available opportunity and/or that there is no reason why this application could not be brought in the normal course.

- [14] Adv. Malan submitted on behalf of the respondents that the applicant is in fact seeking a final interdict. This is so whilst the application is mired in factual disputes. The court ought to deal with this application as guided by the Plascon-Evans rule.

- [15] The first respondent does not dispute the conclusion of the restraint of trade agreement, she however, submits that due to only being employed with the applicant for a period of three months, that the enforcement thereof is against public policy and that considering the nature of the first respondent's employment, that she was not exposed to any confidential information, that she was not provided with customer lists of the applicant and that the relief sought should therefore not be granted.
- [16] It was contended by the first respondent that she had already been in the second respondent's employment for several months now and that consequently, the proverbial horse has bolted.
- [17] Furthermore, the Applicant has not offered any evidence that any of its customers had followed her to her new place of employment.

C. THE LEGAL PRINCIPLES

- [18] Applications for final order must satisfy the following requirements:

18.1 a clear right needs to be established;

18.2 the injury complained of must be actually committed (and not apprehended);

18.3 the absence of any other satisfactory remedy.

- [19] The decision in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*[4] is a landmark decision on the enforceability of contracts in restraint of trade in South Africa. In one fell swoop it moved away

from the influence of English law which held that contracts in restraint of trade were contrary to public policy and therefore

invalid.

- [20] *Magna Alloys* made it clear that covenants in restraint of trade were generally enforceable, unless their enforcement would be unreasonable and

therefore against public policy.[5]

- [21] *Didcott J* then succinctly set out the effect of the *Magna Alloys* judgment in *J Louw & Co (Pty) Ltd v Richter & Others*[6] as follows:

"...Covenants in restraint of trade are valid. Like all other contractual stipulations, however, they are unenforceable when, and to the extent that, their enforcement would be contrary to public policy. It is against public policy to enforce a covenant which is unreasonable, one which unreasonably restricts the covenantor's freedom to trade or to work. In so far as it has that effect, the covenant will not therefore be enforced. Whether it is indeed unreasonable must be determined with reference to the circumstances of the case. Such circumstances are not limited to those that existed when the parties entered into the covenant. Account must also be taken of what has happened since then and, in particular, of the situation prevailing at the time

enforcement is sought. Therefore, a party who seeks to enforce a contract in restraint of trade must invoke the contract and prove the breach thereof. Thereafter, a respondent who seeks to avoid the restraint bears an onus to demonstrate, on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable."

[22] To determine whether the restraint of trade is reasonable or not, one needs only look at the decision in *Basson v Chilwan and Others*[7] where four principles were enunciated in the following terms:

22.1 Does the one party have an interest that deserves protection after termination of the agreement?

22.2 If so, is that interest threatened by the other party?

22.3 In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically

inactive and unproductive?

22.4 Is there an aspect of public policy having nothing to do with the relationship between the parties that requires the restraint be

maintained or rejected?

[23] In some instances, a fifth principle has been recognized. Namely, "Is the restriction necessary to protect the interests, or does it go further than is necessary?"[8]

[24] In *Reddy v Siemens Telecommunications (Pty) Ltd*[9] the facts were, as in this case, that Reddy had resigned from Siemens, with whom he had signed a restraint of trade agreement and joined a competitor. Siemens in response, approached the court in a bid to hold Reddy to the restraint clause in his contract of employment. The court held that the information in Reddy's possession, if disclosed, could be used to the disadvantage of Siemens. The risk of disclosure alone, was considered by the court to be sufficient, and Reddy was accordingly held to his contractual undertakings.

[25] Over and above obtaining an interdict, the aggrieved employer may also seek for damages. [10] This is not up for decision herein.

D. EVALUATION

[26] Although there is no closed list of proprietary interests, there exist two main categorises which can be protected by a restraint of trade, namely trade connections (e.g. customers) and trade secrets (e.g. confidential information).[11]

[27] In casu, the respondents breached both categories of proprietary interests which the applicant had sought to protect by resorting to the restraint of trade agreement. The applicant has set out in its founding affidavit a case on a balance of probabilities that it has a protectable interest in this regard.

[28] The first respondent does not deal with the content of the restraint of trade agreement save to allege that the applicant has not made out a case in its founding papers.[12] She then makes a blank denial on the existence of a protectable interest therein.

[29] The answering affidavit is also devoted to technicalities on urgency and an allegation that Mr. Coetzee, who deposed to the founding affidavit on behalf of the applicant lacks authority to represent it.

E.

CONCLUSION

[30] In consideration of the above, it is my conclusion that the applicant has made out a case for the relief it seeks as set out in the notice of motion. There is in addition no reasons to deviate from the standard rule that in such circumstances the successful party is entitled to its costs.

[31] The following order is made:

- i. The application succeeds.
- ii. The respondents are ordered to pay the applicants costs jointly and severally, the one paying the other to be absolved.

J.S. NYATHI

Judge of the High Court

Gauteng Division, Pretoria

Date of hearing: 08 February 2023

Date of Judgment: 03 May 2024

On behalf of the applicant: Adv. SLP Mulligan Duly instructed by: Nixon & Collins Attorneys; Pretoria e-mail: law@nixcol.co.za On behalf of the respondent: Adv. L. Malan Duly instructed by: Fullard Mayer Morrison Inc. Pretoria e-mail: fullard@fullardmayer.co.za , lorinda@jpkruyshaar.co.za

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[1] Founding affidavit by Mr. H.C. Coetzer para 2.5.

[2] Ibid clause 5.3.4 and the restraint agreement clause 2.1.11 which reads as follows: "'restraint payment" means the monthly payment of R5 000.00 per month being paid as specific compensation for agreeing to the terms and conditions of this agreement;'

[3] Founding Affidavit para 15.

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- [4] 1984
- (4) SA 874 (A), [1984] 2 All SA 583.
- [5] Christie's Law of Contract 7ed – G.D. Bradfield p421.
- [6] 1987
- (2) SA 237 (N) at 243B.
- [7]
- [1993] ZASCA 61; 1993
- (3) SA 742 (A).
- [8] Tor Industries (Pty) Ltd v Gee-Six Superweld CC and Others 2001 (2) SA 146 (W) at 161J to 162A; Kwik Copy (SA) (Pty) Ltd v Van Haarlem 1999 (1) SA 472 (W).
- [9] 2007
- (2) SA 486 (SCA) [13].
- [10] Waste Products Utilisation (Pty) Ltd v Wilkes 2003 (2) SA 515(W) at 573F.
- [11] Basson v Chilwan and Others supra; Dickinson Holdings Group (Pty) Ltd and Others v Du Plessis and Another 2008 (4) SA 214 (N)
- [12] Answering affidavit para 11 to 15.
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