

SOUTH AFRICA / JUDGMENT

Videx Wire Products (Pty) Ltd v Cronje and Another (JS2338/14) [2014] ZALCJHB 409 (13 October 2014) [2014] ZALCJHB 409

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JS2338/14

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Source record

REPUBLIC
OF SOUTH AFRICA
THE
LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
NOT REPORTABLE
CASE
NO JS 2338/14
In

the matter between:

VIDEX
WIRE PRODUCTS (PTY)
LTD
APPLICANT
and
FRANS
CRONJE
1ST
RESPONDENT
RSC
EKUSASA MINING (PTY)
LTD
2ND RESPONDENT
Application
heard: 7 October 2014
Judgment
delivered: 13 October 2014

JUDGMENT

VAN NIEKERK J

Introduction

- [1] This is an application in which the applicant seeks, on an urgent basis, to interdict and restrain the first respondent from pursuing, canvassing or procuring any business for the second respondent from any of the applicant's clients or potential clients at operations that are located within the Republic of South Africa, and to interdict and restrain the first respondent from engaging in the same activities in relation to three mines situated in Zimbabwe.
- [2] The applicant supplies roof bolts and related supplies to the mining industry. These are specialised products used to secure earthworks and tunnels in mines. The applicant employed the first respondent as a sales and marketing manager during 2002. The terms of the applicant's contract of employment incorporated a confidentiality and restraint agreement, to which I shall refer below. The first respondent resigned from the applicant's employ during October 2013 to take up employment with a company with whom the applicant trades, but which is not in direct competition with the applicant. The first respondent's employment with that company terminated in mid-2014 on account of its operational requirements. The second respondent has since become employed by the third respondent a competitor of the applicant. The applicant avers that the first respondent has been actively contacting and canvassing its clients in South Africa and Zimbabwe. The applicant seeks to restrain the first respondent from using his customer connections and reputation in the industry to compete with it, for the remainder of the period of the restraint.

The terms of the restraint

- [3] The restraint agreement is not drafted in particularly elegant terms. The relevant provisions of the restraint are the following:

13.1.2 ... It is agreed therefore that in order to protect the interests of the company, the employee shall not: –

13.2.1 Compete or be concerned, associated, engaged or interested in any business similar to or competing with the business with the business of the Company.

13.2.2 Directly or indirectly solicit seek to obtain from himself or from any other person, firm or corporation or not enquiries or orders for any service or product which is within the ambit of any of the activities carried on by the company.

13.2.5 Reveal to any person, firm or corporation, any of the trade secrets confidential operations, procedures or dealing or any information concerning the organisation, functions, transactions or affairs of the company or any details of the client of the company will their requirements or the services provided to them by the company...

[4] The following clauses assumed some significance during the course of these proceedings:

13.4 The restraint set forth in Paragraph 13.1 above shall apply during the course of the employees employment with the company and for a period of 2 (two) years after date of termination of his employment with the company.

13.5 The restraints referred to above shall operate only within the borders of the Republic of South Africa as presently constituted.

[5] During the course of the hearing, Adv. Fourie, who appeared for the applicant, sought by way of a draft order to limit the ambit of the relief initially sought and effectively to interdict the first respondent from pursuing, canvassing or procuring any business for the second respondent from clients or potential clients at operations located within the Republic of South Africa, and from pursuing, canvassing or procuring any business for the second respondent from the following entities in Zimbabwe, namely Zimplats, Unki Mine, Mimosa Mine. The draft order seeks further to have the restraint operate from the date of any order granted by this court, and for a period of 12 months thereafter.

Analysis

[6] I deal first with the relief sought in respect of the mines located in Zimbabwe. Adv. Goosen, who appeared for the first respondent,

submitted that on a proper interpretation of the terms of the restraint, the applicant was not entitled to enforce any element of the restraint in respect of operations geographically situated outside of the borders of South Africa and in particular, in

Zimbabwe. Adv. Fourie submitted that the operations targeted by the first respondent in Zimbabwe were centrally controlled from South African-based holding companies. This was particularly so in respect of Zimplats (part of Impala Platinum Ltd) and Unki Mine, part of the Anglo-American group. In these companies, it was submitted, decisions on procurement and supplies are more often than not taken at a centralised level, or by way of joint decision-making with the mine concerned. The fact that some of these mines were based outside of South Africa, so it was submitted, does not mean that the applicant's proprietary interests were not being infringed. Any revenue from sales made by the first respondent to any of the operations concerned would flow to in the second respondent, a South African company.

- [7] There may be merit to these submissions in so far as they concern the procurement policies of mining houses with operations in neighboring countries, the applicant has failed to make out a sufficient case on the papers to sustain this submission. In any event, what is at issue is the meaning of clause 13.4, and in particular, the meaning to be ascribed to the provision that the restraints in issue apply ‘only within the borders of the Republic of South Africa...’. This is a matter to be determined objectively.
- [8] The principles of interpretation to be applied were recently affirmed by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Edumeni Municipality* 2012 (4) SA 593 (SCA). What the judgment underscores is that the exercise of interpretation does not require a court to discern the intention of the legislature only by reference to plain meaning of words with a deferential nod, if so required, in the direction of the OED. Wallis JA said the following:
- ‘[18]...The present state of the law can be expressed as follows: interpretation is the process of attributing meaning to the words use in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document....’
- [9] The placement of the word ‘only’ precisely before the words intended to be limited is a clear indication of what is to be limited (i.e. the application of the restraints to the geographic area of the Republic). In other words, the placement of the word ‘only’ is an unambiguous indication that none of the restraints apply outside of the Republic. The structure of the restraint clause as a whole leads to a similar conclusion. The agreement sets out the specific terms of each element of the restraint (recorded in paragraph 13.2.1 and following) and concludes with clause 13.5, which serves to limit the activities that form the subject of the specific restraints to a geographic construct in the form of the boundaries of the Republic as defined. In my view, the construction of clause 13.5 and the context in which it is located serves to limit the operation of all of the restraints to the geographic entity that comprises the Republic of South Africa.
- [10] For these reasons, it follows that the relief sought by the applicant in respect of the mining operations in Zimbabwe referred to in paragraph 2.2 of the draft order is not sustainable having regard to the terms of the restraint.

- [11] I turn next to the South African operations. The primary basis on which an order is sought is that of customer connection. In essence, the applicant seeks to restrain the first respondent from using his customer connections and reputation in the mining industry, built up over more than a decade, to compete with it. Despite the lapse of some 11 months since the termination of his employment with the applicant, the applicant submits that the first respondent's customer connections in the industry remain still alive and effective, and that he is actively canvassing key decision-makers. In this regard, the applicant contends that the first respondent remains in a prime position to exploit his customer connections and in particular, to contact key decision-makers at particular mines to endeavour to sell the competing products of the second respondent.
- [12] A party seeking to enforce a contract in restraint of trade is required only to invoke the restraint and to prove a breach of its terms. Once a restraint agreement has been invoked and a breach of the agreement proved, the onus is on the respondent to prove on a balance of probabilities that the restraint agreement is unenforceable because it is unreasonable (see *Magna Alloys and Research SA (Pty) Ltd v Ellis* [1984] ZASCA 116; 1984 (4) SA 874 (A)).
- [13] In *Basson v Chilwan* 1993 (2) SA 742 (A), the court held the determination of the reasonableness or otherwise of a restraint requires, in addition to the existence of an interest deserving of protection, a consideration of the following:
- (a) whether that interest is being prejudiced by the other party;
 - (b) if so, whether the interest weighs up qualitatively and quantitatively against the interest of the latter party that he or she should not be economically inactive and unproductive; and
 - (c) whether there are any considerations founded in public policy which require that the restraint should either be maintained or rejected (at 767 G-H).
- [14] Not every contact between an employee and the employer's customers constitutes or forms the basis of a protectable interest in the form of customer connection. The need of an employer to protect a trade connection arises where the employee has access to customers and is in a position to build up a particular relationship with the customer. It is sufficient for the applicant to show that the customer contacts exist and that they can be exploited by the former employee. In *Rawlins v Caravan Truck (Pty) Ltd* [1992] ZASCA 204; 1993 (1) SA 537 (A) at 541 C-D it was said that the need of an employer to protect its trade connections arises where the employee has access to

customers and is in a position to build up a particular relationship with the customers, and could easily induce the customers to follow him or her to a new business. Once that conclusion has been reached and it is demonstrated that the prospective new employer is a competitor of the applicant, the risk of harm to the applicant if its former employee would take up employment becomes apparent.

[15] In the present instance, I must necessarily take into account that the first respondent was employed by the applicant for a significant period prior to his resignation, and that during this period, he is likely to have established customer connections on a basis that deserves different consideration to an employee engaged for a short period. It is not disputed that the market in which the parties operate is a small one, and that key persons in that market, be they buyers or sellers, are likely to develop relationships to the benefit of parties such as the applicant. The duration of the restraint is not on the face of it so unreasonable that interference is warranted. The evidence discloses restraints of one year in respect of some employees, and two years in respect of others. In this regard, it is significant that the first respondent was employed at a senior level, and that he was not similarly situated in all respects to those employees subject to year-long restraints.

[16] In so far as the balancing of interests required by the applicable test is concerned, to uphold the restraint in respect of the applicant's South African operations would not deprive the first respondent of the means to earn a living. He remains free to canvass opportunities outside of South Africa. I must necessarily bear in mind that the first respondent voluntarily entered into the restraint agreement and the obvious broader interest in ensuring that contracts are upheld.

[17] The draft order proposed by Adv. Fourie contemplates a provision to the effect that the restraint be enforceable for 12 months after the date of the order. I would prefer simply to uphold the restraint for the balance of the agreed period of two years, commencing as it did from the date of the first respondent's termination of employment with the applicant.

[18n] Finally, in relation to costs, the applicant has only partially succeeded in its claim. In these circumstances, it seems to me appropriate that each party pay its own costs.

I make the following order:

1. The first respondent is interdicted and restrained, for the balance of the restraint period agreed between the parties, from pursuing,

canvassing or procuring any business for the second respondent from any of the applicant's clients or potential clients at

operations located within the Republic of South Africa.

2. There is no order as to costs.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Adv. G Fourie, instructed by Wright Rose Innes

For the respondent: Adv. Goosen, instructed by Horn Attorneys

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Prepared on 14 October 2026 · Esheria