

SOUTH AFRICA / JUDGMENT

Zan Technologies CC and Another v Grey and Another (093403/2024) [2024] ZAGPJHC 884 (6 September 2024) [2024] ZAGPJHC 884

COURT

South Gauteng High Court, Johannesburg

BEFORE

TP Mudau

CASE / FILE NUMBER

093403/2024

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

Number: 093403/2024

1.

REPORTABLE: NO

2.

OF INTEREST TO OTHER JUDGES: NO

3.

REVISED: YES

6

September 2024

In

the matter between:

ZAN
TECHNOLOGIES CC
First
Applicant
WARREN
PIERSON MASSEY
Second
Applicant
AND
BRANDON
DAVID GREY
First
Respondent
PRESSURE
AND GAS TECHNOLOGIES (PTY) LTD
Second
Respondent
This

judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 6 September 2024.

JUDGMENT

Mudau, J:

- [1] The applicants seek relief on an urgent basis pursuant to Rule 6 (12)
- (a) of the Uniform Rules. Firstly, an order amending the court order under case number 2024-05903, dated 11 June 2024 and signed by the Registrar of the High Court Johannesburg on 13 June 2024, marked as annexure "ZT1" to the notice of motion, in accordance with the draft order marked as annexure "ZT2" to the notice of motion. Secondly, the issuing of a rule nisi calling upon the respondents to show cause as to why they ought not to be declared in contempt of the consent order, together with relief ancillary thereto that includes imprisonment for a period of 30 days, wholly suspended on condition that the order is complied with. As it will become apparent, this application is predicated on the fact that Grey communicated with certain individuals who are employed by entities identified in paragraph I of the consent order, ZT2.
- [2] Paragraph 1 of the consent order, ZT2 interdicts and restrains the respondents until 11 September 2024 at 23h59, from directly or indirectly soliciting the custom of, or in any way transacting with the customers of the first applicant as specified in subparagraphs 1.1 to 1.9 of the order (these being Renergen Limited, Wilken Development Cobra Grupo, Coega Steels (Pty) Ltd, LOG Industrial Automation and Control CC, Denemic, Fisher Installations, Axis Solutions Africa Engineering (Pty) Ltd trading as Mitak). It became apparent, during argument that, asking for a rule nisi also makes no practical sense, because even if the

applicants had made out a case, the rule nisi will only be determined after the expiry of the restrictions contained in paragraph I of the consent order. This part of the relief was abandoned.

- [3] The respondents consent to the relief aimed at substituting the consent order with the order that was stamped by the Registrar and accordingly agree to paragraph 2 of the applicants' draft order. The respondents however dispute that the applicants are entitled to relief in respect of contempt as alleged.

Background

- [4] The first respondent was previously employed by the first applicant ("Zan-Tech") and retains a 10% shareholding therein. He is the sole director and shareholder of the second, respondent, Pressure and Gas Technologies (Pty) Ltd trading as PRG-TECH, a company with limited liability duly registered and incorporated in terms of the company laws of the Republic of South Africa.
- [5] On 28 May 2024, an urgent application was launched against the respondents in which; relief was sought, inter alia, preventing the respondents "from competing with the first applicant, using the first applicant's confidential information, customer

connections and supply connections to springboard the second respondent's business in competition with the first applicant".

That application was not argued, and those papers do not serve before this court. However, the parties reached agreement on the terms of a consent order which was to be made an order of court. This consent order is annexure "ZT2" to the applicants' notice of motion referred to above.

- [6] The first respondent whilst employed by the first applicant had use of the email address of b[...] which email address falls within the Zan-Tech domain owned by the first applicant. On 11 August 2024, the deponent to the founding

affidavit whilst checking for emails sent to such email gained access to documentation having been sent, by Cell-C in respect of the first respondent. It was established that there were 7 calls made by the first respondent to a cell phone number belonging to a Warren Hollingsworth, the Managing Director of Hi-Tech; 6 calls were made to a cell phone number belonging to Rudy Rudolph, the Managing Member of LOG Industrial Automation and Control CC; 6 calls were made to a cell phone number of Mr Michiel Christiaan Elardus Joubert, a Director of Denemic; 3 calls were made to a cell phone number belonging to Gordon Anderson of MIS Engineering (Pty) Ltd trading as Mitak; and 3 calls were made to the cell phone number of Dennis Kent, a Procurement Manager in the employ of Renergen Limited.

- [7] The applicants contend that the inference is inescapable that Grey is communicating with them for one reason and one reason only, namely, to solicit their custom now or in the future as the nature of their respective relations was always business.

- [8] The respondents take umbrage on the question of urgency that the applicants had supposedly learnt of the facts giving rise to this application on 11 August 2024, yet only launched it on 20 August 2024, a period of seven court days to launch this application but required the respondents to respond within three court days, affording themselves a further four court days to reply. This criticism is without merit given the limited duration of the restraint period. Restraint matters are often dealt with urgently for that reason.
- [9] The respondents contend that there is not a shred of evidence that they have approached any of the customers referred to in subparagraphs 1.1 to 1.9 of the court order, or the individuals identified in the applicants' founding affidavit, either to directly or indirectly solicit the custom of, or in any way to transact with customers or individuals. They decry that the deponent

to the founding affidavit, Massey has unlawfully invaded Grey's privacy by scrutinising his cellular telephone records without any basis or suspicion which might entitle him to do so; and consequently, drawn unsubstantiated conclusions from the fact that

these records show that Grey has telephonically communicated with these individuals.

- [10] The respondents point out that Zan-Tech's accessing of Grey's cell phone records is in contravention of the Regulation of Interception of Communications and Provision of Communication-Related Information Act[1] ("RICA"). It is the respondent's case that, access to such information may only be granted to specified entities following a specified procedure. Zan-Tech is not such an entity and did not follow the requisite procedure. It was accordingly not entitled to access the information which constitutes the gravamen of its case. However, as the applicants contended, correctly, in argument on the authority of *Bernstein and Others v Bester and Others* NNO[2] in which it was held that privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activity such as business and social interaction the scope of personal space shrinks accordingly.
- [11] Grey explains that over the years, he developed personal relationships and friendships with individuals with whom he

previously worked or did business with. Grey has annexed letters from the customers in question confirming no transactions have been concluded supported by confirmatory affidavits by Mitchel and Anderson. In an urgent application, a court always has the power to accept allegations which constitute hearsay, at paragraph 40 of the replying affidavit, Massey accepts that the individuals providing letters are friends of Grey.

- [12] It is trite that civil contempt requires proof of (i) the existence of the court order, (ii) service of the order or knowledge thereof (iii) and that non-compliance therewith was wilful and mala fide.[3] It is equally trite that, where a committal is sought, the third requirement i.e. wilful non-compliance must be shown on the criminal

standard, beyond a reasonable. However, where something less than a committal is sought, the contempt must be demonstrated on a balance of probabilities.

[13] There is no evidence that the calls that were made constitute an attempt to solicit custom of any of the identified customers in the relevant paragraphs of the consent order or the conclusion of any transactions with the named individuals particularly more so that two of them, under oath disputed the allegations. Grey has explained these calls and there is no onus on him to elaborate on the contents of those calls as this would amount to a breach of the privacy of the other participants as he contended. In my finding, it is not improbable that parties who have previously worked together or interacted for business purposes subsequently became friends.

[14] Accordingly, I reach the ineluctable conclusion that the applicants failed to make any case that the respondents have breached the consent order or are in wilful contempt thereof, either beyond a reasonable doubt or at all. The application falls to be dismissed with the question of costs following the result.

[15] Order

15.1. The order sought and granted under case number 2024/059036, annexed to the notice of motion marked as annexure “ZT1” and heard before the Honourable Justice Marcus, AJ on 11 June 2024 be, and is hereby amended to read in accordance with the relief sought, and agreed to between the parties in annexure “ZT2” to the notice of motion.

15.2. The remainder of the application is dismissed with costs, including the costs of senior counsel on scale C.

TP MUDAU

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, JOHANNESBURG

Date of Hearing: 3 September 2024

Date of Judgment: 6 September 2024

APPEARANCES

Counsel for the Applicants: Adv. A Stokes, SC

Instructed by:

Aliscia Brits Attorneys

Counsel for the 3rd Respondent: Adv P Strathern SC

Instructed by:

LDA Attorneys Inc.

[1] 70 of 2002.

[2]

[1996] ZACC 2; 1996 (2) SA 751 (CC) at paras 65 to 70.

[3] Fakie NO v CCII Systems (Pty) Ltd [2006] ZASCA 52; 2006

(4) SA 326 (SCA); Pheko and Others v Ekurhuleni City 2015

(5) SA 600 (CC); Mthimkulu and Another v Mahomed and Others 2011

(6) SA 147 (GSJ) at para 16.

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