

SOUTH AFRICA / JUDGMENT

Zestibex CC t/a Silent Alarms v Willemse and Another (1094/2023) [2023] ZAFSHC 378 (26 September 2023) [2023] ZAFSHC 378

COURT

Free State High Court, Bloemfontein

BEFORE

N.M. Mbhele

CASE / FILE NUMBER

1094/2023

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FLYNOTES: LABOUR – Restraint – Poaching employees and clients – Applicant is provider of security services and employee left to join competitor – Allegations that she is poaching its employees and clients – Knowledge of pricing of products secured from supplier – Facebook post by former employee inviting members to contact her for security assessment – Tariffs of supplier not exclusive to applicant – Suspensions of poaching not supported by facts – No evidence that she used applicant's pricing strategy and profit margins to advance competitor's business – Application dismissed.

IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case Number: 1094/2023

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between: -

ZESTIBEX CC

APPLICANT

t/a SILENT ALARMS

[Registration number: 2011/048206/23]

and

MARIA MAGDALENA WILLEMSE

1ST RESPONDENT

BETHNET SECURITY

2ND RESPONDENT

t/a BETHSEC

CORAM:

MBHELE, DJP

HEARD ON:

15 JUNE 2023

DELIVERED ON: 26 SEPTEMBER 2023

[1] The applicant, an erstwhile employer of the 1st respondent, approached this court seeking a relief enforcing a restraint of trade. The relief is sought in the following terms:

1.1 The first respondent is interdicted until 28 February 2024, from either herself or as an agent, employee or partner of anyone else, persuade, solicit, encourage or provide any other employee of the applicant to become employee by, or interest in any matter whatsoever in any other business, firm or undertaking which is in direct or indirect competition with the business carried out by the applicant. (sic.)

1.2 The first respondent is interdicted and shall not until 28 February 2024, solicit, interfere, with or entice or endeavour to entice away from the applicant any person, firm or company who or which was a customer of the applicant or was accustomed to deal with the applicant.

1.3 The interdicts in paragraphs 1 and 2 of this order shall operate in respect of a 50 kilometre radius of Bethlehem until 28 February 2024.

[2] The following are common cause:

That:

2.1 The applicant is a provider of security services in the Bethlehem area which include the installation of CCTV cameras, off-site monitoring, armed response reaction and associated services.

2.2 The applicant buys its security products from Spectrum Security Services (Pty) Ltd (Spectrum)

2.3 The first respondent left the applicant's employment on 22 October 2022. During September 2022 the first respondent served a resignation letter on the applicant indicating that she would serve her notice until 22 October

2022. The applicant informed her on 14 October 2022 that it was no longer necessary for her to serve her notice period until 22 October 2022 and that she would be paid her full salary.

2.4 The first respondent signed an employment contract containing confidentiality clause and restrained

of trade clause with the applicant during January 2019. This contract imposed a restrained of trade for 12 months.

2.5 In terms of this contract the first respondent agreed to, within a period of one year after termination of her service with the applicant not be involved in a business that competes with the applicant within the Bethel area.

2.5 The first respondent became an employee of the second respondent (Bethnet) on 22 October. Bethnet

does to a large extent render the same type of security services as the applicant.

2.6 The applicant does not take issue with the first respondent's employment at Bethnet but however insists that the first respondent should refrain from persuading, inducing, soliciting, encouraging or procuring other employees or customers of the applicant to become employed by or contracted with Bethnet.

2.6 The first respondent advertised on her facebook page and invited members of the public to contact her for a free assessment of their security needs.

2.7 The first respondent was, over and above the employment contract signed in 2019, made to sign a restraint of trade contract in July 2021 which imposed 18 months' restraint of trade.

2.8 At the end of March 2022 the applicant presented the first respondent with another employment contract which was only signed by the applicant. This contract imposed 12 months restraint of trade period.

2.8 The Bethnet received its PSIRA certificate on 16 February 2023 and started operating on 1 March

2023.

[3] The applicant submits that the first respondent voluntarily signed another restraint of trade contract in July 2021 which increased the period of restraint from 12 to 18 months. The gravamen of the applicant's complaint is that after the departure of the respondent most of its clients left and three of its employees joined the second respondent. The applicant alleges that one of its clients, a certain Mr. Visser, informed the deponent to the founding affidavit (Mr. Raimondo) that the first respondent contacted him enquiring whether he would not consider appointing Bethnet to provide his business with security services. Raimondo suspects that three of the applicant's employees who resigned from the applicant to join Bethnet were enticed by the first respondent to join Bethnet. The applicant, further, contends that the first respondent invited the head of applicant's reaction unit, Mr. Anton

Dreyer, to join Bethnet and he turned down the offer. The applicant submits that the first respondent's knowledge of confidential information relating to tariffs and prices that the applicant pays at Spectrum enables her to provide more competitive pricing which would drive the applicant out of business. It is the applicant's view that the first respondent's use of the information violates her restraint of trade agreement and has injured the applicant's business.

- [4] The first respondent denies that the information about the pricing tariffs and models received by the applicant from Spectrum is confidential information that is worthy of protection because the tariffs are standard and accessible to all Spectrum clients. The first respondent submits that she did not sign page 1 of Annexure FA 14 to the founding affidavit and is not familiar with the contents thereof and the confidentiality agreement that is referred to in that document.
- [5] She in essence denies that she entered into a further restraint of trade agreement. She denies ever enticing the applicant's employees to join Bethnet. The deponent in the founding affidavit Messrs Vino Ferendale, Ivan Dicks, Jackie Windt and Schalk Koekemoer that the deponent in the founding affidavit, Mr. Raimondo, suspects the respondent enticed, confirmed in their affidavits that they were never approached by the first respondent. Mr. Dreyer whom the applicant alleges that the first respondent approached could not confirm that.
- [6] The only reason she interacted with one Mr. Visser, an applicant's client, was because he had concerns with his internet and wanted fibre which the applicant was not in the position to provide him with because he stays too remote from town. The first respondent, further, contends that the applicant's pricing strategy and profit margins are of no use to Bethnet because the applicant's profit margins on certain products are so high that the applicant priced itself out of the market.
- [7] These are motion proceedings which have to be adjudicated on the principles set out in Plascon Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd[1]

[1984] ZASCA 51; 1984 (3) SA 623 (A). It is a well-established principle that where a bona fide dispute of facts exists, the matter has to be decided on the respondent's

version together with the admitted or undenied facts in the applicants' founding affidavit which provide the factual basis for the

determination

unless the dispute is not real or genuine and the version of the respondent is untenable and farfetched. See Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another[2]

- [8] Although the first respondent acknowledges the existence of the restraint of trade signed in January 2019 she denies knowledge of the contents of the second restraint of trade agreement (Annexure FA14). She also denies knowledge of the confidentiality agreement that is referred to in Annexure FA 14. The applicant was unable to shed light on why the first page of this contract was not signed by the respondent although it was signed on behalf of the applicant on both pages. I am unable to find that the respondent's version, on whether or not she knew what the first page of FA 14 contained, is farfetched and untenable. This point has to be decided in favour of the first respondent.
- [9] Our constitution protects every citizen's right to practice their trade to earn a living and to freely sell their skills. It further protects their right to enter into legally binding contracts and once they have concluded such contracts they are expected to respect them and keep their end of the bargain. It is trite that restraints of trade agreements are valid and binding, as well as enforceable, provided the enforcement thereof is reasonable. See *Magna Alloys & Research (S.A) (Pty) Ltd. v Ellis*[3]
- [10] The test to determine the reasonableness of a restraint of trade agreement was set out in *Basson v Chilwan and Others*[4] . The test requires that the following must be assessed to determine the reasonableness of the restraint of trade agreement. (a) Is there an interest of the one party, which is deserving of protection at the termination of the agreement? (b) Is that interest being prejudiced by the other party? (c) If so, does the interest weigh up qualitatively and quantitatively against the interest of the latter party, that the latter should not be economically inactive and unproductive? (d) Is there another facet of public policy having nothing to do with the relationship between the parties, but which requires that the restraint should either be maintained or rejected?
- [11] In *Reddy v Siemens Telecommunications (Pty) Ltd* [5] Malan AJA remarked as follows when dealing with the reasonableness of the agreement in restraint of trade:

'[15] A court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a

restraint. The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim *pacta servanda sunt*. The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions. Both considerations reflect not only common-law but also constitutional values. Contractual autonomy is part of freedom informing the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life. In this sense freedom to contract is an integral part of the fundamental right referred to in s 22. Section 22 of the Constitution guarantees '[e]very citizen ... the right to choose their trade, occupation or profession freely' reflecting the closeness of the relationship between the freedom to choose a vocation and the nature of a society based on human dignity as contemplated by the Constitution. It is also an incident of the right to property to the extent that s 25 protects the acquisition, use, enjoyment and exploitation of property, and of the fundamental rights in

respect of freedom of association (s 18), labour relations (s 23) and cultural, religious and linguistic communities (s 31).

- [16] In applying these two principal considerations the particular interests must be examined. A restraint would be unenforceable if it prevents a party after termination of his or her employment from partaking in trade or commerce without a corresponding interest of the other party deserving of protection. Such a restraint is not in the public interest. Moreover, a restraint which is reasonable as between the parties may for some other reason be contrary to the public interest.'
- [12] Does the applicant have protectable interests. Is the information that the first respondent had access to while in the employ of the applicant that is worthy of protection. The applicant argued that the first respondent enticed its clients and employees to leave the applicant and join second respondent. These allegations are not supported by the available evidence.
- [13] In Pinnacle Technology Shared Management Services (Pty) Limited and Another Venter and Another [6]
- [57] It seems to me that, where a company has competitors, adjustments to its profit margins and discount packages will be made fairly often. Unlike a 'secret recipe', the exact amount of profit a company sets out to make or gives up by way of discount to attract business on any given deal is not an immutable piece of information. Likewise, knowing this information does not give a competitor a permanent advantage.
- [58] If the second respondent were to come to know this information, there is nothing to suggest that it would be able to better the prices the applicants already offer their customers. While it is not ideal that a competitor knows the applicant's exact mark-up, it strikes me that undercutting, itself, is a routine business threat.
- [14] The applicant's own version shows that on Spectrum's website potential clients are invited to contact spectrum for more information on pricing. This shows that the tariffs paid by the applicant to Spectrum are not exclusive to the applicant and as such not so confidential that no other client may have access to. What makes it more difficult to comprehend is that the applicant did not shed light on how its specialised tariffs, discounts from Spectrum and pricing strategy are structured and how unique are they from all other clients of Spectrum.
- [15] The applicant takes no issue with the first respondent's employment at Bethnet. The gravamen of the applicant's complaint is a facebook post by the first respondent wherein she invited members of public (potential clients) to contact her at Bethnet for assessment of their security needs. The post was not intended for the applicant's clients. The fear by the applicant that the first respondent is poaching its employees and clients is not supported by facts, it remains a suspicion which cannot be given credence to. There is, further, no evidence that the first respondent used the applicant's pricing strategy and profit margins to advance Bethnet's business. The application cannot succeed.

[16] Costs are in the discretion of the court. The applicant approached court in a belief that it has a protectable interest that has been breached based on the existence of the agreement between itself and the first respondent. I am unable to find that it was unreasonable in doing so. This is the type of matter where each party must pay its own costs.

[17] I therefore make the following order:

ORDER:

1. The application is dismissed
2. Each party to pay its own costs.

N.M. MBHELE, DJP

Appearances:

For the Applicant: Adv J.S Rautenbach

Instructed by

SYMINGTON & DE KOK

Bloemfontein

For the Respondents: Adv. M.D Steenkamp

VOSLOO ATTORNEYS

[1] 1984 (3) SA 623 (A)

[2]

(2009) 30 ILJ 1031(W)25

[3]

(1984) 2 All SA 583 (A); 1984 (4) SA 874 (A)

[4] 1993 (2) SA 742 (A)

[5] 2007

(2) SA 486 (SCA)

[6] (J1095/15) [2015] ZALCJHB 199 (14 July 2015)

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