

**IN THE HIGH COURT OF SOUTH AFRICA
(EAST LONDON CIRCUIT LOCAL DIVISION)**

**CASE NO: 592/14
ECD 1192/14**

In the matter between:

**MMPA QUANTITY SURVEYORS AND
PROJECT MANAGERS (Pty) LTD**

APPLICANT

and

JASON BURET

RESPONDENT

JUDGMENT

PAKADE ADJP:

[1] This is a contempt of court application. The applicant seeks an order declaring the respondent to be in contempt of the Order of this Court which was issued on 28 May 2013. The effect of the Order was to make a settlement agreement (The agreement) between the parties, marked “HSL3” an Order of the Court. The

Agreement was signed by HS Lemmer for the applicant and by J Buret, the respondent, on 23 May 2013.

[2] The applicant had instituted application proceedings against the respondent for the enforcement of the restraint of trade provisions of the agreement against the respondent. It is that application that resulted in the settlement which was made an Order of the Court on 25 May 2013. Those restraint of trade provisions are embodied in the applicant's shareholders agreement. The respondent was the employee and the shareholder of the applicant. It is imperative that I reproduce the Settlement Agreement. It reads:

“NOW THEREFORE IT IS AGREED:

1. That , subject to the proviso contained in paragraph 3 below , Respondent is interdicted and restrained , for a period of two years from the date of last signature of this agreement, whether as proprietor, partner, director, shareholder, member, executive, consultant, contractor, financier, agent, representative, assistant , trustee or beneficiary of a trust or otherwise and whether for reward or not , directly or indirectly , from carrying on or being interested or engaged in or concerned with or employed by any company Close corporation, firm, undertaking or concern that carries on in the Eastern Cape Province which provides quantity surveying and project management services .

2. That Respondent is interdicted and restrained, for a period of two years from the date of last signature of this agreement, from soliciting or canvassing business from any client of Applicant or using any other means or taking any other action which is directly or indirectly designed , or in the ordinary course of events , to result in any such client terminating his association with the Applicant and or transferring his business to any person other than Applicant, or attempting to do so.

3. That notwithstanding the terms of paragraph 1 and 2 above , Respondent shall be entitled to provide the services of a quantity surveyor , project manager and construction consultant to the client Terry Cook and or Misty Mountain Trading 101(Pty) Ltd and any of Cook's subsidiary or trading entities and in respect of which Respondent undertakes pay to Applicant 30% (Thirty percent) of the gross proceeds of all services provided to Terry Cook and/or Misty Mountain Trading 101 (Pty) Ltd and any of cook's subsidiary or trading entities earned by Respondent or any entity in which he is involved or any entity with which he is associated and which attends to the work of Terry Cook or Misty Mountain Trading 101 (Pty) Ltd, during the two year period of restraint provided for in paragraph 1 above.

4. That Applicant and/or the purchasing shareholder /s shall purchase the Respondent ' s twenty (20) shares in the Applicant for a purchase price of R 800 000.00(Eight Hundred Thousand Rand) which amount shall be set off against the Respondent's debit loan account in the Applicant in the sum of R 536 300.00 and a contribution toward Applicant 's costs of this application

in the sum of R 50 000.00, and the balance shall be paid to the Respondent within 14 (Fourteen days) of last signature of this agreement.

5. Should the Applicant or purchasing shareholder/s not make payment of the sum of R 213 700.00 within the time period referred to in 6 above the outstanding sum shall attract interest at the prime overdraft rate expressed by the Applicant's bankers from time to time from the due date of such amount to date of final payment .

6. That this settlement agreement shall be in full and final settlement of all the issues between the parties and subsequent to the signature thereof neither parties shall have any claim, arising from whatsoever cause of action, against the other.

7. That this agreement be made an order of Court ".

[3] In his founding affidavit filed in the contempt of court application, Hermanus Siegfriedt Lemmer describes himself as the Quantity Surveyor, the shareholder and the Managing Director of the applicant. The applicant seeks to enforce paragraph 1 and 2 of the Settlement Agreement set out in paragraph [2] above which it alleges the respondent breached intentionally and willfully.

[4] For me to find that the respondent has contravened the provisions of paragraph 1 of the Agreement I must have found that from the date of the last signature of the Agreement he has carried on or was interested or engaged in or concerned with or employed by a company, close corporation, firm, undertaking or concern that

carries on business in the Eastern Cape Province, which provides quantity surveying and project management services. Hermanus Lemmer averred that after the last signature of the Agreement some rumour circulated that the respondent was conducting business of Quantity Surveyor surreptitiously. During the latter part of 2013 the applicant became aware from a source that the respondent had accepted a brief on behalf of Investec Bank, an existing client of the applicant, to attend a meeting on its behalf on 3 September 2013 for a construction project described as Mdantsane Spar. Investec Bank was funding that project. The minutes of that meeting confirm the respondent's attendance of that meeting on behalf of Investec Bank. The minutes describe the respondent as the Quantity Surveyor. Hermanus Lemmer further averred that it is the practice in the surveying industry that the funder of a project briefs an independent quantity surveyor to represent its interest in the construction work and Investec Bank has been briefing the applicant. Lemmer then concludes that in accepting brief from Investec Bank the respondent breached paragraph 1 of the Agreement.

[5] Again on or about March 2014 the applicant received another information that the respondent had been engaged by the Clarendon Preparatory School in East London to provide quantity surveying services in the construction of a new swimming pool complex. Meanwhile the project had been given to the applicant which had already prepared initial estimates on cost on behalf of Clarendon Preparatory School. That brief was given to the applicant at the time the respondent was in its employment and was attended to during that time.

[6] The respondent has opposed the application. In his answering affidavit Jason Buret acknowledges himself to be a Quantity Surveyor. He denied that he is in

contempt of the Court Order issued on 28 May 2013. However, in paragraph 14 of his answering affidavit the respondent admitted that he continued to conduct business of a Quantity Surveyor completing the projects he had obtained prior to the Settlement Agreement and had not been interdicted in completing that work. He admits that he prepared estimates for cost when he was in the employment of the applicant and upon tendering his resignation, Clarendon Preparatory School engaged him to do the work. In January 2014 he discussed with the applicant whether it objects to him taking the work and the applicant indicated his objection. He then declined the work and the applicant was reinstated.

[7] But the applicant's version is that the respondent was, in March 2014 still engaged in the work of quantity surveyor for Clarendon Preparatory School. The respondent admitted that in January 2014 he was still so engaged with the project of Clarendon Preparatory School. He was conscious of the order issued on 28 May 2013 which embodied the Settlement Agreement interdicting and restraining him for 2 years from engaging himself in quantity surveying and project management services in the Eastern Cape Province.

[8] The respondent's defence that he was completing existing outstanding work is spurious. The respondent was employed by the applicant. He did the estimates on costing for Clarendon Preparatory School while he was still in the employment of the applicant. The respondent was bound by restraint of trade agreement to the applicant which operated upon the termination of his employment with the applicant. He was aware of the restraint of trade agreement embodied in the shareholders agreement because he was a shareholder. Notwithstanding the restraint of trade agreement the respondent after the termination of employment with the applicant successfully tendered for quantity surveying work from Investec

Bank and Claredon Preparatory School, the clients he knew to be serviced by the applicant.

[9] The applicant was obliged to enforce the restraint of trade agreement by a court order and those proceedings culminated in the Settlement Agreement which was made an order of court on 28 May 2013. The fact that the respondent agreed to be interdicted and restrained from carrying on or engaging himself for two years in the work of quantity surveyor indicates an admission that he had breached the restraint of trade agreement. However, the respondent again went around the Settlement Agreement and sought to introduce terms that were never intended by the parties when they concluded the Settlement Agreement. It was not an express or implied term of the agreement that the respondent would contrary to clause 1 and 2 of the agreement, be allowed to complete on his own account, the existing outstanding work of the applicant to its clients.

[10] The respondent does not say it is part of the agreement that he could complete the existing work in which event the *onus* would be on the applicant to prove that it was not. In my view this issue must be decided on the version of the applicant.

[11] The respondent was aware of the order which made the Settlement Agreement an order of court. He had signed the agreement in person. In fact he does not plead unawareness of the order issued on 28 May 2013. All he did was to admit that he continued to conduct the business as a Quantity Surveyor but was completing work he had obtained prior to the Settlement Agreement. If that was work contracted by the respondent prior to the Settlement Agreement it should have been mentioned and excluded expressly from paragraph 1 and 2 of the Agreement.

[12] The version of the respondent evinces a blameworthy state of mind which in my view, proves beyond a reasonable doubt that in carrying out and engaging in the work of a quantity surveyor in the Province of the Eastern Cape he was in contempt of Court.

[11] The following order is therefore made:

ORDER

1. That the respondent is declared to be in contempt of Court of Order issued on 28 May 2013.
2. That the respondent is directed to show cause on Thursday, 29 January 2015 at 9h30 why an order should not be made that:
 - 2.1 The respondent is convicted of contempt of court.
 - 2.2 in the event of the respondent failing to appear personally before court and/or failing to provide an adequate explanation which the court accepts as satisfactory, a Writ of Arrest be issued directing the Officer Commanding Beacon Bay Police Station, or such other person as the officer commanding may direct to arrest the respondent and to commit him to jail for a period of (30) thirty days.
3. That the respondent pays the costs of this application on a party and party scale.

LP Pakade

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

For the Applicant : **Adv Watt**
Instructed by : **Drake Flemmer & Orsmond Inc**
22 St James Road
Southernwood
For the Respondent : **Adv Bester**
Instructed by : **Andre Schoombee Attorneys**
10 Berea Terrace
Berea
Heard on : **21 August 2014**
Delivered on : **06 January 2015**