IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

CASE NO. 1784/2021

In the matter between

SCIBIT SCIENTIFIC BITWARE (PTY) LTD **APPLICANT**

versus

CHRISTIAAN JOHANNES RUDOLPH POTGIETER **RESPONDENT**

JUDGMENT – APPLICATION FOR LEAVE TO APPEAL

CORAM: **NAIDOO J**

HEARD ON: **7 MARCH 2022**

DELIVERED ON: **18 MAY 2022**

[1] This is an application by the respondent for leave to appeal against a judgment of this court, delivered on 2 November 2021, in which the court granted an order in favour of the applicant. The relief sought by the applicant was in essence the enforcement of a restraint of trade clause in an employment contract entered into between the parties. Adv J Els represented the applicant and Adv WA Van Aswegen represented the respondent.

[2] The respondent alleges that the application should be granted as the appeal would have reasonable prospects of success. He assailed the judgment on the grounds that the court erred in:

2.1 rejecting the respondent's version that his written contract of employment with the applicant was terminated in May 2014;

2.2 rejecting the respondent's version that it would be unreasonable and against public policy to enforce the restraint of trade agreement;

2.3 not refusing to enforce the restraint of trade covenant as the period of restraint was unreasonable;

2.4 reading down the period of restraint.

[3] Both counsel correctly acknowledged that Section 17 of the Superior Courts Act 10 of 2013 (the Act), now regulates the test to be applied in an application for leave to appeal. The relevant provisions of section 17(1) provide as follows:

"(1) Leave to appeal may **only** be given where the judge or judges

concerned are of the opinion that

(a) (i) the appeal **would** have a reasonable prospect of success; or

(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration;" (my emphasis and underlining).

[4] The respondent also submitted that not only would the appeal have reasonable prospects of success but in terms of section 17(1)(a)(ii), there is some other compelling reason why the appeal should be heard. In this regard the respondent averred that this matter raises a substantial point of law, and one which is of profound importance not only to the respondent but to the public as well. In substantiation of this aspect, he alleged that the court did not take into account all the evidence, as it was obliged to do. The facts and evidence he referred to was that the respondent took up permanent employment with Ocellics Software Solutions (Ocellics) in the Western Cape. The other

"fact" that the respondent referred to is the email that the respondent sent to Ocellics informing them that he had arranged a meeting with the applicant's Mr Venter to inform him that the respondent was leaving the applicant's employ.

[5] The respondent alleges that this is support for his version that he told Venter that he had obtained employment with Ocellics. This is in direct contrast to the appellant's version that the respondent advised Venter that he did not find suitable employment in the Western Cape and hence returned to Bloemfontein. The evidence and documents filed by the applicant bears out its version. The respondent alleges that the court did not consider the legal substance of the relationship between the parties after his move to the Western Cape, and did not apply the Plascon-Evans Rule correctly. I will return to these aspects shortly.

[6] Previously, an applicant was merely required to show that there is a reasonable possibility that another court, differently constituted, would find differently to the court against whose judgment leave to appeal is sought. It is clear from section 17(I), set out above, that the situation is now somewhat different, and an applicant for leave to appeal is required to convince the court that there is a reasonable prospect of success and not merely a possibility of success. In this regard, both counsel referred to the matter of *The Mont Chevaux Trust v Tina Goosen + 18 2014 JDR LCC,* where Bertelsmann J held that:

> "It is clear that the threshold for granting leave to appeal against a judgment of a high court has been raised in the new Act. The former test whether leave to appeal should be granted was a reasonable prospect that another court might come to a different conclusion….The use of the word 'would' in the new statute indicates a measure of certainty that another court will differ from the court whose judgment is sought to be appealed against."

Mont Chevaux has been followed in a number of decisions. See *Matoto v Free State Gambling and Liquor Authority (4629/2015) [2017] ZAFSHC 80 (8 June 2017)*, The Full Court in *Acting National Director of Public Prosecutions and Others v Democratic*

Alliance (19577/2009) [2016] ZAGPPHC 489 (24 June 2016) also cited Mont Cheveau with approval.

[7] I mention that the court raised with Mr Van Aswegen during oral argument in this application, the fact that by the time the appeal is heard, the 18-month restraint period would have expired, rendering the appeal academic. His response was that as they stood at that time (7 March 2022, when this application was heard), the respondent's right is being restricted. The respondent resigned from the applicant's employ on 30 September 2020 and left at the end of October 2020. The order of this court was that the restraint of trade clause would operate for a period of 18 months from the date of termination of the employment agreement. The restraint period would have expired on 31 March 2022. Even if the termination date is deemed to be 31 October 2020, the restraint period would have lapsed on 30 April 2022.

[8] The respondent simply glosses over the evidence put up by the applicant showing that the respondent knowingly and intentionally continued as an employee of the applicant, whilst also being in full time employment with Ocellics. This latter fact was not known to the applicant at the time. The evidence of the email correspondence, worklogs and the like fled by the applicant show that the respondent even directed how the applicant should pay his salary while he was in the Western Cape. Even on his return to Bloemfontein, he did not disclose to the applicant the he was in full time employment in the Western Cape, but said that he was unable to find suitable employment. It does not assist the respondent to now allege that the court was required to consider the legal substance of the relationship between the parties. This was in fact done and in the face of the evidence presented, the court found that the respondent's version was not candid and could not be accepted, leading to the finding that the employment contract remained in force. Therefore, the point of law which the respondent alleges merits the attention of the appeal court, is not supported by the evidence put up by the respondent. In any event an appeal will not be heard simply to make an order which is of academic value.

[9] For the reasons set out in the judgment, together with what I have said above, I am of the view that the appeal in this matter does not enjoy reasonable prospects of

success. Furthermore, it serves little purpose to refer a matter for the attention of the appeal court on a point of law that has already enjoyed judicial attention. The judgment deals comprehensively with the issues raised in the other two grounds of appeal and I do not intend to repeat those here.

[10] In the circumstances the following order is made:

10.1 The application is dismissed with costs

S NAIDOO J

On behalf of the Applicant:	Adv J Els
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