IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED

DATE:...**31 JANUARY 2025**

SIGNATURE:.....[redacted]

Case No.078549/2024

In the matter between:

BYRNE, CHARLES WINSTON **APPLICANT**

And

BLU SPEC HOLDINGS (PTY) LTD FORMERLY FANSTATION (PTY) LTD t/a RENEW – IT SANDTON **RESPONDENT**

Coram: Millar J

Heard on: 27 January 2025

Delivered: 31 January 2025 - This judgment was handed down electronically by circulation to the parties' representatives by email, by being uploaded to the *CaseLines* system of the GD and by release to SAFLII. The date and time for hand-down is deemed to be 10H00 on 31 January 2025.

JUDGMENT

MILLAR J

[1] This is an application in which the applicant (Mr. Byrne) seeks an order compelling the respondent (Renew-It) to comply with the terms of an agreement in terms of which it undertook to make certain payments to him. The order sought, is an interim order, pending the finalization of an action which he has instituted for specific performance on the part of Renew-It.

[2] On 27 February 2023[1], Mr. Byrne, who was at the time the Operations Director of Renew-It, entered into a written retrenchment agreement (the agreement). Mr. Byrne was at the time an employee of some 23 years standing at Renew-It and had long passed the usual retirement age of 65. He was 77 years old at the time of his retrenchment and is currently 78 years of age.

[3] The agreement is comprehensive and besides providing for the termination, by agreement, of Mr. Byrne's employment, also provided for payments to be made to him as well as undertakings given by him in favour of Renew-It. The agreement

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[1] Mr. Byrne accepted the offer of retrenchment on 21 February 2023, but the written agreement was only signed on behalf of Renew-It on 27 February 2023.

also provides a framework setting out how each of the respective parties would conduct themselves in the event of a breach by any other party.

[4] The relevant portions of the agreement relative to these proceedings, relate to, firstly, the payments to Mr. Byrne as the Employee by Renew-It as the Employer, the undertakings given by Mr. Byrne to honouring of which payment was conditional upon and the breach clause.

[5] The relevant clauses are firstly in respect of the payments as follows:

> *"5.1 In full and final settlement of any and all claims arising out of the Employee's employment, the Company shall make the following payments to the Employee on the terms and conditions set out hereunder:*
>
> *5.1.1 the Employee will receive a severance pay of R5 600 000 made up as follows:*
>
> *5.1.1.1 R5 000 000 gross before tax, with a net payment of R3 447 500, payable from 01 March 2023 for 40 months.*
>
> *5.1.1.2 Medical aid payment of two dependants (Main Member and Spouse) at R14, 550 per month will be payable by the Company for 40 months from 01 March 2023 (Medical aid payment will be adjusted based on yearly increases)".*

And

> *"5.3 It is specifically recorded that payment of the amounts referred to above is conditional upon the Employee upholding his obligations in terms of the provisions of this agreement."*

[6] The relevant clauses in respect of the undertakings as follows:

"7.1 *Without derogating from any existing confidentiality undertakings, for the purposes of this clause 7 (Confidentiality Undertakings), "confidential information" also includes any information belonging or relating to the Company, which is not in the public domain and shall include, without limiting the aforegoing, all discoveries, inventions, improvements and innovations, whether or not patentable or copyrightable, methods, processes, techniques, formulae, computer software, equipment, research data, marketing, pricing and sales information, personnel data, financial data, plans and all other know-how, trade secrets and proprietary information of the Company.*

7.2 *The Employee shall not use to the detriment or prejudice of the Company nor divulge to any person any trade secrets or any other confidential information concerning the business or affairs of the Company which may have come to his knowledge during his employment."*

And

"11.2 *. . . For the avoidance of doubt, the Employee undertakes that he shall not disclose any of the Company's confidential and/or proprietary information to any third parties after the Termination Date and shall be bound by the restraint of trade undertakings. The parties agree that this constitutes a material term of this Agreement."* [my underlining]

[7] The relevant clauses in respect of breach are identically worded with clause 12.1 being in respect of a breach committed by Mr. Byrne and clause 12.2 a breach in respect of Renew-It. These clauses provide:

"12.1 *Should the Employee commit any breach of his obligations as set out above, the termination of the Employee's employment shall continue to be of full force and effect but the Company shall be entitled, in its absolute*

discretion, to claim damages from him arising out of his breach provided that the Company shall not be entitled to exercise any right arising from the breach by the Employee unless he has been afforded five (5) days after receipt of a written notice calling upon him to remedy such alleged breach and, despite such notice and the elapse of five (5) days, the breach has not been remedied.

12.2 Should the Company commit any breach of its obligations as set out above, then the termination of the Employee employment shall continue to be of full force and effect but the Employee shall be entitled to institute a claim for damages against the Company in respect of such breach provided that the Employee shall not be entitled to exercise any right arising from any alleged by the Company unless the Company has been afforded five (5) days after receipt of a written notice calling upon it to remedy such alleged breach and, despite such notice and the elapse of five (5) days, the breach has not been remedied."

[8] After the conclusion of the agreement, Mr. Byrne duly left his employment with Renew-It and the monthly payments commenced. Renew-It honoured all its obligations from 1 March 2023 until 24 May 2024.

[9] On 25 June 2024, Renew-It ceased making payments. On 27 June 2024 and in compliance with clause 12.2, Mr. Byrne addressed a letter to Renew-It calling upon it to rectify its breach within 5 days. It did not do so and on 10 July 2024, the present proceedings were instituted.

[10] It is not in dispute that Renew-It did not at any stage notify Mr. Byrne in writing of any alleged breach of the agreement by him or affording him any opportunity, if he had committed any such breach, to rectify it.

[11] Mr. Byrne seeks an interim interdict to compel the honouring of the agreement by Renew-It.

INTERIM INTERDICT

[12] It is settled law[2] that in respect of an interim interdict, an applicant must establish the following:

[12.1] A *prima facie* right.

[12.2] A well-grounded apprehension of irreparable harm.

[12.3] A balance of convenience in favour of the granting of an interim order.

[12.4] The absence of any other satisfactory remedy.

PRIMA FACIE RIGHT

[13] It was argued for Mr. Byrne that *ipso facto*, the signed agreement and his compliance with the breach clause established his *prima facie* right. It was argued for Renew-It, that Mr. Byrne has no *prima facie* right in terms of the agreement because of a dispute.

[14] It was argued on behalf of Renew-It that Mr. Byrne had breached the agreement purportedly by attending a meeting at the offices of a competitor.

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[2] *Setlogelo v Setlogelo* 1914 AD 221 at 227.

[15] Despite the fact of the meeting having been conveyed to Renew-It and it having formed the view that there had been a breach of the agreement by Mr. Byrne, it did not act in accordance with the terms of the agreement and afford Mr. Byrne the opportunity to explain the purpose of the meeting. It unilaterally decided to cease making the payments which it was obliged to do in terms of the agreement.

[16] The crux of the case for Renew-It was that its Chief Operating Officer asserted:

> *"During May 2024 I was informed by Warren Tollman ("Tollman"), the Chief Executive Officer of RSB Auto Group, that the applicant was attending at the premises of Revive Autobody ("Revive") in Rivonia. Revive Autobody is a direct competitor of the respondent.*
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> *Tollman contacted Will Maseko ("Maseko"), the owner of Revive Autobody and enquired from him why the applicant was at Revive's premises. Maseko confirmed that the applicant was consulting with and advising Maseko with a view of acquiring an interest in Revive. A confirmatory affidavit by Tollman will be filed in support of the above.*
>
> *From the aforesaid, it became patently clear that the applicant was consulting in the business of Revive and was utilizing and disclosing the applicant's trade secrets and confidential information to assist Revive to compete with the respondent. In addition, the applicant had demonstrated a clear intention to re-enter the panel-beating industry and thus act in contravention of the confidentiality undertakings in the agreement.*
>
> *The applicant's conduct constituted both a breach, and a clear repudiation of the agreement. It was manifest that the applicant had not complied with his reciprocal obligations under the agreement and had no intention of doing so."*

[17] There is no explanation as to why having discovered that the meeting had taken place, Renew-It did not act in accordance with clause 12.1 of the agreement and bring this to the attention of Mr. Byrne so that he could proffer an explanation. It was not in issue that such a meeting had in fact taken place.

[18] Had Mr. Byrne been placed on terms in terms of clause 12.1, he would no doubt have clarified that he personally had no intention of acquiring any interest in Revive but that he had in fact met with Mr. Maseko on behalf of a third party, who was in fact interested in acquiring an interest in that business.

[19] These facts, which would no doubt have been brought to the attention of Renew-It had they placed Mr. Byrne on terms, were confirmed on oath by both Mr. Maseko and the third party. In fact, Mr. Maseko, with whom Mr. Tollman spoke, specifically records in his affidavit that *"the applicant has never had a personal interest in acquiring an interest in my company"* and *"the applicant did not share any information with me that could be deemed the confidential information of the respondent."*

[20] On a consideration of the facts before the Court, the basis upon which Renew-It seeks to justify its breach of the agreement or for that matter any alleged breach on the part of Mr. Byrne seems to me to be entirely contrived.[3] Mr. Byrne explained this as being rooted in his son's termination of employment with Renew-It, absent any restraint of trade and taking up employment with a competitor.

[21] Whether or not this is the reason that actuated Renew-It is not for this Court to decide. What is clear is this – insofar as Renew-It relies on Mr. Maseko's report

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[3] *Webster v Mitchell* 1948 (1) SA 1186 (W).

to Mr. Tollman and I am to accept its veracity, so too must I accept the Mr. Maseko's assertion as to what transpired at the meeting.[4]

[22] There is no conflict between the two versions, and they are reconcilable with the version of Mr. Byrne. [5]On this basis there is absolutely no reason to conclude that there was a breach of the agreement by Mr. Byrne and consequently that there is any genuine dispute of fact on this aspect.[6] The contention by Renew-It in this regard is rejected.[7]

[23] On what is before the Court, there is a valid and binding agreement in terms of which Mr. Byrne is entitled to receive payment. Mr. Byrne has at all times conducted himself in accordance with the agreement while Renew-It has failed to do so. I find that Mr. Byrne has established prima facie right in terms of the agreement to receive the payments he is entitled to in terms of it.

APPREHENSION OF HARM

[24] Insofar as the apprehension of harm is concerned, Mr. Byrne asserted that he and his wife are unable to survive without the payments due to him in terms of the agreement. Renew-It for its part sought to dispute this by referring to the income that had been earned by Mr. Byrne while working (it was by no means modest) together with various payments he had received and the fact that he lives in what is regarded as an upmarket area.

[25] Much was made by Renew-It in its papers of the fact that Mr. Byrne had failed to lay bare his and his wife's financial affairs to establish the apprehension of harm which he said would befall him if Renew-It was not held to the agreement.

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4 *Soffiantini v Mould* 1956 (4) SA 150 (E) at 154G-H.
5 *Fakie N.O v CCII Systems* 2006 (4) SA 326 (SCA) at para [55].
6 *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at para [13].
7 *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) 623 (A) at 634I.

[26] In consideration of this ground, sight ought not to be lost of the fact that it does not lie in the mouth of the party who is in breach to impose an onus upon a party who has complied fully with its obligations in terms of the agreement. In my view on a consideration of all the facts, it cannot be said that Mr. Byrne will not suffer the harm that he alleges, and it seems somewhat obvious that given his and his wife's advanced age that if any harm were to befall them in consequence of the non-payment of what is due, it would be irreparable.

BALANCE OF CONVENIENCE

[27] It was argued that the balance of convenience favoured the granting of the order sought. It was argued by Mr. Byrne that an order granted in his favour would only reinstate the status quo as far as payments were concerned. He was not seeking an expedited payment or payment of anything not due to him in terms of the agreement.

[28] The argument for Renew-It was that since it would be able to honour its obligation once ordered to do so by a Court, in due course, that it would be prejudiced were the order sought in these proceedings to be granted. The prejudice claimed by Renew-It is that it was by no means certain that based on Mr. Byrne's allegation that he required the continuation of the payments to survive, that if an interim order was granted and Renew-it was ultimately successful, that it would not be able to recover whatever is ordered to be paid.

[29] The lynchpin of this argument was that since it was unlikely that the action that had been instituted would be brought before the Court for hearing before the last installment due by Renew-It was paid, the proverbial horse would have bolted and that in effect the interim interdict sought here would be final in effect. The

basis for this was the fact that the time it takes for actions to be brought before the court is substantial – years in most cases.

[30] It is so that it does take time before actions are set down for trial and heard. This is not a unique feature in the present case. It is a reality that confronts and affects every single litigant seeking interim relief where this is tied to a subsequent action.

[31] If this factor were to be determinative as far as the consequences of the interim order and the timing of when the subsequent action would be heard was concerned, in whether such an interim order should be granted, then it follows that no interim orders should ever be granted.

[32] If this was so, it would result in injustice. The facts of the present matter demonstrate this amply – an elderly applicant who needs payment to survive against a defaulting respondent who has the means to pay and for what is ostensibly no rational basis whatsoever, has decided to stop payments, and is then rewarded in its default with the time it takes for the case to come to Court.

[33] On the facts of the present matter, in my view the balance of convenience favours the granting of the order sought.[8]

ABSENCE OF AN ALTERNATIVE REMEDY

[34] It was argued on behalf of Mr. Byrne that notwithstanding the institution of the action for specific performance, there is in fact no alternative remedy available to him. The action for specific performance will simply be a declarator of the respondent's current obligations. On the basis contended by Renew-It, any harm

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[8] *Fleming Fabrications Ltd v Albion Cylinders Ltd* [1989] RPC 47.

which it may suffer would be purely financial. A deductible business expense. The same cannot be said for Mr. Byrne.

[35] The parties are both confronted by the same litigation landscape and time challenges. The time it takes for the any action to be heard has consequences for both. The consequences for Mr. Byrne are more severe in their effect and given his age and the purpose for which the agreement was entered into he faces the reality that in practical terms has no alternative remedy.

[36] For the reasons set out above I intend to make the order that I do. The costs will follow the result. It was argued for Mr. Byrne that a punitive order for costs was warranted but I am of the view that an order for costs as between party and party is appropriate. Regarding the costs of counsel, such costs will be on scale B.

[37] It is ordered:

[37.1] Pending final determination of an action instituted by the Applicant against the Respondent under case number 2024-149268, that the Respondent is ordered to:

[37.1.1] Comply in all respects with the provisions of clause 5.1.1 of the retrenchment agreement annexed to the founding affidavit as Annexure FA2 ("the retrenchment agreement") and to make such payments as are due in terms thereof.

[37.1.2] Make payment of the arrear amounts due to the Applicant, in the amount of R698 200.00, in terms of clause 5.1.1 of

the retrenchment agreement within 3 days of the granting of this order.

[37.1.3] The Respondent is ordered to pay the costs of the application on the scale as between party and party, counsels costs to be taxed on scale B.

[redacted]

A MILLAR

JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

HEARD ON:	27 JANUARY 2025
JUDGMENT DELIVERED ON:	31 JANUARY 2025
COUNSEL FOR THE APPLICANT:	ADV. N LOUW
INSTRUCTED BY:	WARRENER DE AGRELA ASSOCIATES INC.
REFERENCE:	MS. A DE AGRELA
COUNSEL FOR THE RESPONDENT:	ADV. N REDMAN SC
INSTRUCTED BY:	RHK ATTORNEYS
REFERENCE:	MR. L HASSAN