IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO. 9193/19P

In the matter between:

MATTHEW THOM CONINGHAM	**FIRST APPLICANT**
TAMIN CONINGHAM	**SECOND APPLICANT**

and

CSG HOLDINGS LIMITED	**RESPONDENT**

ORDER

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1. The application to declare unconstitutional the Restraint of Trade Clause in the Sale of Shares Agreement is stayed pending the outcome of arbitration proceedings to determine the dispute between the parties.
2. The costs of the application are reserved.

JUDGMENT

Bedderson AJ

[1] The Applicants seek a declaratory order wherein they seek to have a restraint of trade clause in a Sale of Shares Agreement[1] (which they had concluded with the Respondent) declared unconstitutional, contrary to public policy, unreasonable as to duration and extent and set aside. Alternatively, they seek to have the duration and extent of the restraint reduced.

[2] The application is opposed by the Respondent primarily on the basis that the Sale of Shares Agreement contains an agreement to arbitrate which is applicable to the present dispute between the parties. The Respondent contends that in light of the agreement to arbitrate, the application falls to be dismissed alternatively, the application be stayed pending finalisation of the arbitration proceedings.

Background Facts

[3] As stated above, on 23 October 2014 the Applicants and the Respondent concluded a Sale of Shares Agreement in terms of which the Second Applicant sold her members interest in Conninghamlee and Associates CC ('the Close Corporation') to the Respondent for the purchase price of R24 million. The Second Applicant was the sole member of the Close Corporation. The First Applicant was responsible for the day-to-day management of the Close Corporation and was the driving force behind the business of the Close Corporation. The Close Corporation conducted the business of a personnel and recruitment agency. I pause to mention that the First Applicant is the husband of the Second Applicant.

[4] The restraint of trade clause[2] is applicable to both Applicants and covered the geographical area of the whole of South Africa. The material terms of the restraint were inter alia that the Applicants had agreed and undertook that they will not for a period of five years from the effective date compete with the Respondent in any manner whatsoever.

[5] The effective date in the agreement, being 1 November 2014, it followed that the restraint was applicable from 1 November 2014 to 1 November 2019. The present application was issued on 6 December 2019, a period of approximately one (1) month after the restraint had come to an end.

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[1] Annexure "MC1" at pgs 29 - 70 of the indexed papers.
[2] Clause 22 at pg 62 of the indexed papers.

The Dispute

[6] On 19 September 2019, approximately six weeks before the restraint was to lapse, the Respondent addressed a letter of demand[3] via email to the Applicants drawing to their attention that they had breached clause 22.1.2 of the Sale of Shares Agreement[4] and further that in terms of clause 22.3 the Applicants were liable to pay the Respondent an amount equal to R20 million as a result of the breach. The Respondent demanded payment of said sum. The Applicants attention was also drawn to the arbitration agreement set out in clause 22[5] in the event of the Applicants disputing their indebtedness to the Respondent. It is alleged that the First Applicant is a member and director of Sarafin Services (Pty) Ltd, a company which conducts business in direct competition with the Respondent.

[7] The Applicants, through their attorneys of record, in an email dated 30 September 2019, denied being in breach. It was conceded that the First Applicant is a director of Sarafin Services (Pty) Ltd but that it was a holding company which did not trade. The Applicants alleged that the restraint was unreasonable and unenforceable with regard to duration, scope and area, and unenforceable with regard to the damages claimed. It was further contended that arbitration proceedings are not appropriate because the arbitrator would not be able to determine the reasonableness and enforceability of the duration, scope and area of the restraint clause.

[8] It is noteworthy to mention that prior to 30 September 2019, there is no evidence from the Applicants that they had communicated to the Respondent and complained that the restraint was unreasonable and unenforceable with regard to duration, scope and area. The present stance adopted by the Applicants appears only to have been adopted after the demand for payment was made. The present application in my view appears to be self-serving when one has regard to the fact that the Applicants had complied with the restraint for a period of approximately four (4) years and eleven (11) months at the time when the demand was sent.

[9] Further correspondence was exchanged between the parties' legal representatives with regard to the powers conferred on the arbitrator in terms of the

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[3] Annexure "MC3" at pg 80 of the indexed papers.
[4] Clause 20 of Sale of Shares Agreement at pg 60 of the indexed papers.
[5] Clause 22 at pg 62 of the indexed papers.

agreement. The Applicants attorneys in an email dated 24 October 2019[6] indicated their willingness to arbitrate provided that it is specifically agreed that the arbitrator will have the powers to determine the relief sought in the present application. The Respondents view was that the powers of the arbitrator flow from the agreement, the Arbitration Act 42 of 1965 ('the Arbitration Act') and the common law and that no purpose would be served by debating the powers of the arbitrator.[7]

[10] For ease of reference I set out hereunder clause 20 of the Sale of Shares Agreement:-

'20. **ARBITRATION**

20.1 Save as otherwise expressly provided in this Agreement, should any dispute arise between the Parties in regard to –

20.1.1 the interpretation of;

20.1.2 the effect of;

20.1.3 the Parties' respective rights or obligations under;

20.1.4 a breach of;

20.1.5 the termination of;

20.1.6 any matter arising out of the termination of; and/or

20.1.7 the rectification of;

this Agreement, that dispute shall be decided by arbitration in the manner set out in the clause 20 by a single arbitrator without the right of appeal.

20.2 The arbitrator shall be appointed by the Parties by way of unanimous agreement, and failing agreement, shall be nominated by AFSA. Should AFSA not be in existence at the time, the nomination shall be by the Chairman for the time being of the Pretoria Bar Council.

20.3 The arbitration shall be held in English at Pretoria.

20.4 The arbitration shall be held in accordance with the rules of AFSA, or if AFSA is not in existence at the time, in accordance with the formalities and procedures settled by the arbitrator, which shall be in an informal and summary manner, that is, it shall not be necessary to observe or carry out either the usual formalities or procedure or the strict rules of evidence.

20.5 The arbitrator shall be entitled to –

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[6] Annexure "MC6" at pg 85 of the indexed papers.
[7] Annexure "MC7" at pg 87 of the indexed papers.

20.5.1 investigate or cause to be investigated any matter, fact or thing which he considers necessary or desirable in connection with any matter referred to him for decision; and

20.5.2 make such award, including an award for specific performance, an interdict, damages, a penalty, the costs of arbitration or otherwise, as he in his discretion may deem fit and appropriate.

20.6 The arbitration shall be held as quickly as possible after it is demanded, with a view to it being completed within 30 (thirty) after it has been so demanded.

20.7 The arbitration shall be held in camera and the Parties shall maintain the utmost confidentiality with regard to all matters in issue in the arbitration.

20.8 This clause is severable from the rest of the Agreement and shall therefore remain in effect even if this Agreement is terminated.

20.9 The provisions of this clause 20 shall not preclude any of the Parties from due access to the courts of law for an interdict or any urgent relief, even when a dispute exists.'

[11] It is significant that clause 20.9 of the arbitration agreement sets out only two instances entitling the parties to have recourse to courts of law, namely for the purposes of an interdict or urgent relief.

[12] Prior to the commencement of the hearing of the matter, I enquired from counsel whether this court has the power to grant the declaratory relief sought in light of the agreement to arbitrate and, whether the terms of the arbitration agreement were wide enough to empower the arbitrator to determine the validity of the restraint. I drew counsels' attention to the recent judgement of Ploos Van Amstel J in the matter of *Endless Vacation CC v Club Leisure Sales (Pty) Ltd and Flexi Holiday Club* which was recently decided in the Durban High Court under case number D13241/2018 which dealt with a similar issue. The only difference being that in the aforementioned matter the arbitration proceedings had already commenced. The court found in that matter that the terms of the agreement were wide enough to enable the arbitrator to determine whether he had jurisdiction to deal with the issue at hand. Although the facts in the present application are different, I am of the view that the same principle applies. Copies of the judgement were handed to counsel for their consideration and input.

The Applicants case

[13] As stated above, the Applicants in the main contend that the duration and extent of the restraint is unreasonable and contrary to public policy. Further, that it is

unconstitutional as well as being an unreasonable limitation on the Applicants rights set out in sections 9, 10, and 22 of the Constitution.

[14] The Applicants further contend that the demand of R20 million is inequitable and unconstitutional and in any event is subject to a reduction in terms of the provisions of the Conventional Penalties Act 15 of 1962 ("the Act").

[15] Mr *Dickson SC*, who appeared for the Applicants, submitted both in argument and in his heads that the proposed arbitrator cannot make any findings in respect of the aforesaid issues because the arbitration agreement does not give the arbitrator the power to determine whether the restraint is enforceable because it is unconstitutional and/or contrary to public policy. Further, that the arbitrator does not have the same powers as a court to decide the matter in terms of the Act unless it has been specifically agreed upon by the parties. He further submitted that the arbitration agreement in the present instance does not permit the arbitrator to decide upon the enforceability of the restraint, only a court has the power to do so.

[16] A declaration of invalidity of the restraint of trade clause Mr *Dickson* submitted would effect of the validity of the whole agreement. A number of authorities were referred to me by Mr *Dickson* in both his heads of argument and his oral submissions to support the Applicants' case.

The Respondent's case

[17] Mr *Bothma,* who appeared for the Respondent, in his heads of argument and in his oral submissions to this court submitted that the period of the restraint has lapsed, and as a result the issue surrounding the validity of the restraint has become moot. He further submitted that contrary to what is contended for by the Applicants, it was not the intention of the Respondent to take the point that the arbitrator does not have the jurisdiction to deal with the enforceability of the restraint and to determine whether the restraint was unconstitutional, unlawful and unenforceable. As for as the Respondent was concerned, the agreement to arbitrate specifically gave the arbitrator the power to decide any dispute between the parties relating to interpretation of and the effect of the terms of the agreement. Further, that the Respondent would not have entered into the agreement without the specific restraint clause being part of the Sale of Shares Agreement. The application, it was submitted, cannot be adjudicated upon without the hearing of oral evidence to give context to the surrounding facts which

gave rise to the conclusion of the agreement and to the present dispute between the parties. In this regard he submitted that context in the present matter is important and referred me to the decided case of *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

[18] It is clear from a reading of the Sale of Shares Agreement that the terms of the agreement were negotiated between the parties. In my view, in determining whether the restraint of trade agreement should be enforced, it is important to have regard to the circumstances that gave rise to the agreement as well the circumstances which gave rise to the present dispute between the parties. This approach has been cited with approval in *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) para 10 where Malan AJA in referring to the landmark judgement in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 847 (A) stated that the effect of the judgement in *Magna Alloys* was summarized in *J Louw and Co. (Pty) Ltd v Richter & Others* 1987 (2) SA 237 (N) at 243A-C as follows:

> "Covenants in restraint of trade are valid. Like all other contractual stipulations, however, they are unenforceable when, and to the extent that, their enforcement would be contrary to public policy. It is against public policy to enforce a covenant which is unreasonable, one which unreasonably restricts the covenantor's freedom to trade or to work. Insofar as it has that effect, the covenant will not therefore be enforced. Whether it is indeed unreasonable must be determined with reference to the circumstances of the case. Such circumstances are not limited to those that existed when the parties entered into the covenant. Account must also be taken of what has happened since then and, in particular, of the situation prevailing at the time enforcement is sought."

[19] I have raised with Mr *Dickson* that in light of the Applicants' contending that the dispute surrounding the validity of the restraint is not capable of being dealt with via arbitration because the agreement did not give the arbitrator the power to do so, whether the Applicants ought to have launched an application for relief in terms of s - 3(2)(b) of the Arbitration Act. He submitted that the present application is in essence a s 3(2)(b) application. I disagree with this submission. In my view, the terms of the arbitration agreement are wide enough to enable an arbitrator to rule on whether the present dispute falls within the scope of the arbitration agreement. In this regard I align myself with what was stated by Gorven AJA in *Zhongji Development Construction Engineering Co. Ltd v Kamoto Cooper Co. SARL* 2015 (1) SA 345 (SCA):

'[54] If the high court were to have pronounced on these issues, it would have acted contrary to the provisions of the arbitration clause by determining issues that are within the province of the arbitrator in terms of the arbitration agreement. A court is not entitled to do that unless an order has been granted in terms of s 3(2)(b) of the Act that those particular disputes shall not be referred to arbitration. No such order has been sought or granted.

[55] This approach, and the underlying rationale for circumscribing the powers of a court which has jurisdiction conferred by an arbitration agreement, shows appropriate deference for the autonomy of the parties to decide on the forum which should resolve their disputes. The supreme irony of the application is that Zhongji, in ostensibly seeking to enforce the arbitration clause, in effect sought to have the court act contrary to some of the terms of the agreement it invoked.'

[20] My view is further fortified by clause 20.9 which only provides for two instances where the parties are not precluded from having access to courts of law namely, for the purposes of an interdict or any urgent relief. The present application does not fall within either category.

[21] I also disagree with the submission that a finding of invalidity of the restraint of trade clause will result in the whole agreement being invalid. Clause 25.3[8] which deals with the severability of each and every provision of the agreement militates against such a finding.

[22] I disagree with the submission that the arbitrator does not have the power to determine the issue relating to the penalty imposed because in terms of the Act only a court can do so. Mr *Dickson* has overlooked the fact that the Sale of Shares Agreement records that the arbitration is to be conducted in accordance with the rules of the Arbitration Foundation of Southern Africa (AFSA).

[23] Where parties have agreed that the rules governing arbitrations under the auspices of AFSA apply, article 11 of the Commercial Rules of AFSA provides that the arbitrator shall have the widest discretion and powers allowed by law to ensure the just, expeditious, economical and final determination of all the disputes raised in the proceedings. Arbitrators in my view are entitled to assume that they may deal with applications under s 3 of the Act as if they were a court.

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[8] Annexure "MC1" at pg 66 of the indexed papers.

[24] In any event, in *Radon Projects (Pty) Ltd v NV Properties (Pty) Ltd and Another* 2013 (6) SA 435 (SCA) at para 31 the court held that when an arbitrator is confronted with a jurisdictional objection, what is called for 'is sound judgement by the arbitrator on the course that should be followed, based on his view of the strength of the objection, and the circumstances that present themselves in the particular case'.

[25] Having heard argument from both counsel and having considered all the authorities referred to by them in their heads of argument as well as in argument, I am in agreement with the Respondent that the dispute between the parties should not be dealt with piecemeal and that the dispute falls to be determined by way of arbitration.

[26] Counsel are in agreement that in the event that I should find that the matter should be referred to arbitration that the appropriate order would be that the present application be stayed pending arbitration and that the costs of the application be reserved.

[27] I accordingly grant the following order:

1. The application to declare unconstitutional the restraint of trade clause in the Sale of Shares Agreement is stayed pending the outcome of arbitration proceedings to determine the dispute between the parties.

2. The costs of the application are reserved.

Bedderson AJ

CASE INFORMATION

APPEARANCES

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Date of Hearing	:	20 August 2020
Date of Judgement	:	28 August 2020