THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 2516/17

In the matter between:

A & A CONTAINERS (PTY) LTD **Applicant**

and

THOMAS MUKOSI **Respondent**

Heard: **26 October 2017**

Delivered: **14 November 2017**

Summary: A party seeking to enforce a restraint of trade must allege and prove the agreement as well as its breach by the other party. Clear, admissible and concise evidence of breach required from a party alleging breach. Absence of proof of breach means that the party is not prejudiced. In *casu*, agreement alleged and proved, no duress as alleged by the other party seeking to resile from the agreement. Held (1): The application is dismissed. Held (2): The applicant to pay the costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is an application to restrain and interdict a former employee of the applicant. The application is opposed by the respondent the former employee. The applicant seeks to interdict him from effectively poaching its customers, to disclose confidential or business information and to work for a competitor for a period of 12 months in the Western Cape, Free State, Kwazulu-Natal and Gauteng.

Background facts

[2] The respondent commenced employment with the applicant on 1 February 2005. He was employed as an Operations Manager. After nine years of employment, the respondent signed a restraint of trade agrement. The respondent contends that he signed the restraint under duress. The applicant conducts the business of procuring, fitting and supplying shipping containers to customers in South Africa. The applicant makes most of its income from what is generally referred to as container conversions, which entails refurbishing of containers, leasing out containers selling them and being used for various purposes. The applicant thus claims protectable interest in its customer connections as well as confidential information.

[3] Over the years, the applicant built a customer base and amassed various confidential information in respect of its customers. On 01 June 2017 the respondent handed his resignation. He was to start a transport company to transport school children. This being what he told the owner of the applicant at a farewell party. The respondent left on 23 June 2017.

[4] Around 11 September 2017 it came to the attention of the applicant through a customer that the respondent was working for a competitor JM West Engineering (JMW). One of the customers-RWW, which the respondent had closely worked with whilst in the employ of the applicant, was observed at JMW's premises. An undertaking was sought from the

respondent; which undertaking was not forthcoming. As a result, the applicant was advised to launch the present proceedings. The respondent opposes the application.

[5] Effectively the defence of the respondent is that he does not work for JMW. The owner of JMW is his co-director in a newly formed business which builds hydroponics containers. The company was registered on 2 May 2017. As pointed out earlier he says he signed the restraint of trade under duress. He was threatened with dismissal. Therefore, he is not bound by the restraint. He considers the restraint to be unreasonable as he would be unable to work in the shipping container industry for a period of 12 months anywhere in South Africa.

[6] For reasons unknown to me the applicant chose not to respond to the evidence of Mr Wood, who categorically stated that the respondent did not influence him in any way or even suggested at any time that he should move his work to JWW.

Evaluation

[7] In order to succeed in a matter like this the applicant bears the onus to prove the existence of a restraint and its breach[1]. In order to preserve sanctity of contracts once the above is alleged and proven, the court is bound to uphold enforcement of the restraint. I have no hesitation in my mind that the applicant has proven the restraint. The respondent's belated defence of duress cannot be upheld.

[8] It seems so that the De Klerk experience made the applicant's owner wiser. The fact that it took him nine years to be wise is of no moment. It was necessary for the applicant, given the De Klerk experience, to protect itself. Accordingly, I do not believe the respondent's version that he was threatened with dismissal. The other employees were made to sign similar restraints following the De Klerk's experience. Accordingly, I find that the restraint has been proven.

---

[1] *Basson v Chilwan and others* 1993 (3) SA 742 (A) at 776H-777B.

Was the restraint breached?

[9] It is trite that a party in motion proceedings is to make his or her case in the founding affidavit. The case of breach is made thus in this matter:

> 'During the week of 11 September 2017, a customer of the Applicant (namely Yusef of Design Initiative came to see me and advised me that the Respondent was working for one "Frikkie"… Frikkie was working for the applicant as a sub-contractor having terminated his involvement with us and commenced competing business which he conducts through a company called JM West Engineering ("JMW").[2]
>
> I decided to and drove past JMW on 14 September 2017 where I witnessed the respondent's vehicle parked outside… When driving past, I also saw a branded motor vehicle of RWW parked at JMW. RWW is one of the applicant's largest customers which, the respondent worked closely with whilst under the applicant's employ'.[3]

[10] This evidence seeks to demonstrate that clause 1 and 3[4] of the restraint of trade is being breached. On the allegation of working for the competitor, the respondent denied same and testified that Chotia informed the owner of the applicant that he only saw him at premises of the competitor. The evidence of the applicant on this point amounts to hearsay. The probity of this evidence lies with Chotia. There is no confirmatory evidence from Chotia.

[11] When confronted with a denial, the owner testified thus:

> 'Futcher and I have no reason to lie as to what Chotia told us. The fact that the respondent's involvement with Botha has been uncovered through what Chotia told us supports our version.'

[2] Para 72 of the Founding Affidavit.

[3] Para 74 of the Founding Affidavit.

[4] Clause 1-employee agrees to not approach, canvas or solicit any contacts, clients, customers, suppliers, subcontractors, service provider's or other employees for employment or business reasons of the employer for a period of 12 months after leaving the employer. Clause 3-work for a competitor of the employer's business for a period within a year (12 months)

[12] It is observed that he now calls it an *involvement* and not employment as allegedly told by Chotia. The applicant bears the onus to prove the breach. The evidence of the applicant on this aspect is weak. Applying the *Plascon Evans* principle the applicant must fail on this point. However, it seems obvious why the applicant brought this application. Such reason is exhibited by the following evidence:

> 'Had the respondent disclosed the true reasons as to his departure on resignation, I may have acted differently. It is as a result of his actions that this application has been launched…'[5]

[13] Accordingly, I have no option but to accept the version of the respondent that he was not employed by a competitor. Accordingly, he cannot be held to have breached clause 3 of the restraint.

[14] On the aspect of breaching clause 1, the respondent denied such breach. Most importantly Wood testified as follows and his evidence was not challenged at all:

> 'I can categorically state that Mr Mukosi (the respondent) did not influence me in any way or even suggested at any time that I should move my work to JM West Engineering (Pty) Ltd.[6]
>
> I wish to categorically state that the last order that was placed with A & A Containers (Pty) Ltd was in April 2017, which order was completed in June 2017 and no further orders were placed with A & A Containers (Pty) Ltd.'[7]

[15] There is no cogent evidence that the respondent breached clause 1 of the restraint.

Confidential or business information

[16] The respondent agreed not to use or disclose confidential or business information. For the respondent to be in breach, he must either use the

[5] Para 48 of the Replying Affidavit.

[6] Para 9 of Wood's Affidavit.

[7] Para11o Wood's Affidavit.

information or disclose it. Again the onus is on the applicant to set out such information and to show that the respondent used or disclosed it. The respondent went to great lengths to set out what the confidential information of the applicant was.[8] However when it comes to breach the applicant's case enters the realm of speculations. Other than verily believing that the respondent removed the information[9], there is no averment that the respondent used or disclosed the information to any person. Accordingly, there is no evidence of breach of the clause of confidentiality. Since the applicant has failed to show that the respondent is employed by a competitor, what was said by Mbha J (as he then was) in *Experian South Africa (Pty) v Haynes and another*[10] is not applicable in this case.

Conclusion

[17] I come to the conclusion that there is a valid and enforceable restraint and that the interest of the applicant is worthy of protection. However, I am not satisfied that the respondent is prejudicing such an interest. As to costs, I find no reason why the losing party should not be mulcted with costs.

[18] In the results I make the following order:

Order

1. The application is dismissed with costs.

_____

GN Moshoana

Judge of the Labour Court of South Africa.

[8] Para 42-63 of the Founding Affidavit.

[9] Para 76 of the Founding Affidavit. - Notably the respondent denied that. There was nothing said in reply.

[10] [2013] 34 ILJ (GSJ) at para 21

Appearances

For the Applicant:	Mr A Bishop
Instructed by:	Aucamp, Gittings & Youngman Inc, Bedfordview.
For the Respondents:	Mr A R Van Der Merwe.
Instructed by:	Vos Attorneys, Roodepoort.