THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J1005/21

In the matter between:

RADIO DATA COMMUNICATIONS (PTY) LTD **Applicant**

and

LUKAS HENDRICK VAN EMMENIS **First Respondent**

ORLAM (PTY) LTD **Second Respondent**

Heard: **10 September 2021 (virtually)**

Delivered: **20 September 2021 (This judgment was handed down electronically by emailing a copy to the parties. The 20th September 2021 is deemed to be the date of delivery of this judgment).**

Summary: Due to Covid19 lockdown, this application was determined by hearing oral submissions virtually and the parties agreed to this arrangement. Enforcement of a restraint of trade. A restraint is not enforceable if unreasonable and does not protect proprietary interests. A party seeking enforcement must allege and prove protectable proprietary interests and prejudice thereof if a restraint is not enforced. Costs following the results based on section 162 of the LRA fairness principle. Held: (1) Application granted (2) The first respondent to pay the costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] More and more, employees are seeking to resist legal handcuffs that allegedly minifies competitiveness, productivity and labour mobility. This, despite the ephemeral nature of the restraint clauses. Courts are then troubled with a toilsome and operose task of reconciling two conflicting policies; namely (a) a person must be free to use his or her skill and experience to the best advantage; and (b) that covenants should be observed and enforced – *pacta sunt servanda*. It must be admitted that this task is a backbreaking, gruelling and laborious on for the judges. Often times Courts fail to adequately balance the protection. In some instances, Courts lean comfortably in favour of *pacta sunt servanda* to the detriment of the freedom of employees and *vice-versa*. For that reason, no case can serve as a precedent in this exercise simply because no case is similar to another.

[2] That said, before me serves an application where Radio Data Communications (Pty) Ltd (Radio) seeks to enforce a restraint of trade against its former employee, Lukas Hendrik Van Emmenis (Emmenis). The existence of the restraint is not placed in dispute. Emmenis disputes its enforceability at this stage.

Background facts

[3] Radio is an entity involved in the security communications industry. It designs, manufactures and distributes data communication products for the security industry. The communication devices designed and manufactured by Radio, are connected to third party alarm panels and the devices perform the function of communication of alarm signals from the alarm system to a security armed

response company control room or to a mobile phone application. The system serves as a communication link between the end user and the alarm system.

[4] Radio is located in Johannesburg but has sales and technical support representatives in Cape Town, Durban and beyond the borders of South Africa. Its alleged direct competitor Olarm (Pty) Ltd (Olarm) is located in Cape Town but its reach extends to all the South African Provinces. It is alleged that Olarm is also involved in the security communications field.

[5] Emmenis commenced employment with Radio on 1 April 2016 as a Technical Consultant and Trainer (TCT). In this TCT role Emmenis's primary function was to develop a training program modelled on the products of Radio and to provide technical sales and support for customers of Radio. At the same time Emmenis concluded a Restraint, Confidentiality and Non-Solicitation (RCNS) agreement with Radio. In short in the RCNS, Emmenis agreed not to take up employment with the competitor of Radio. Owing to his excellent performance, within 11 months of his employment, Emmenis was promoted to the position of Technical Sales Manager, which is a head of department role. This role provided technical support to the service and repair teams of Radio. Around mid-2018, Emmenis was yet again promoted to another head of department role of Customer Experience Manager. In this role Emmenis developed close and intimate relationships with customers. Effective 1 February 2021, Emmenis moved up the ladder to another head of department and became the Sales Manager of Radio.

[6] It is alleged that during these various positions, Emmenis was exposed to confidential information; had customer connections; and trade secrets of Radio. This exposure is not disputed by Emmenis. On 29 July 2021, Emmenis tendered his resignation from Radio and accepted a position as a Regional Manager at Olarm. Emmenis was to serve a notice period from 1 August 2021 to 31 August 2021. Owing to the fact that Emmenis was about to join a known competitor and fearing for the prejudice of its proprietary interests to which Emmenis was exposed, on 26 August 2021, Radio launched the present

application on an urgent basis. The application is duly opposed by Emmenis. Olarm filed a notice to abide. The application was enrolled for 9 September 2021. Due to the congested Court roll, the parties were only heard on 10 September 2021. For the period 10 August 2021 up to 26 August 2021, Radio attempted in vain to obtain undertakings from Emmenis. Radio did this in order to avert litigation over this contractual dispute.

Evaluation

[7] Emmenis resisted that the matter be heard as one of urgency simply because he resigned on 29 July 2021 and Radio launched the present application on 26 August 2021. At that time he had unequivocally informed Radio that he would not comply with any undertaking sought and shall be taking employment with Olarm. This Court after listening to submissions ordered that the matter shall be entertained as one of urgency. Inasmuch as Emmenis resigned from his position on 29 July 2021, he was only due to commence employment with the competitor on 1 September 2021. It was appropriate for Radio to attempt an amicable solution before rushing to this Court. Such an approach is encouraged by this Court. The fact that on 10 August 2021, Emmenis made his position clear is of no moment since the danger had not manifested itself by then. Making a further attempt, despite the recalcitrance of Emmenis, to avoid litigation was the most appropriate and welcomed step.

[8] Trade secrets and customer connections are proprietary interests and are protectable. As indicated earlier, there is no dispute that Emmenis was exposed to the trade secrets or confidential information of Radio as well as having connections with its customers. This Court fails to understand the assertion of Emmenis that Radio failed to show a protectable interest. Emmenis confines the interests of Radio to prices of its products. He contends that such prices are freely available on the website of Radio. He further contends that customers are shared and Olarm already shared customers with Radio.

[9] Radio makes a case that in the HODs positions, Emmenis was privy to a system known as ACCPAC which exposed him to much more than just prices. On the issue of customers, Radio specifically states that Emmenis had direct communication with key individuals within Radio's existing clients and potential clients, those few clients were mentioned. Of material significance, Emmenis does not dispute such a connection but simply downplays the contact made. Emmenis had access to the system of the applicant which contained client base, suppliers, cost prices, selling prices and discount structures. His only defence is that he did not play a role in determining selling prices and discount structures. Such is an irrelevant defence. The veritable question is whether he was exposed to this proprietary information? It is undisputed that he was.

[10] The fact that Olarm and Radio share customers attest to the fact that they are competitors. This Court in *Inter-waste (Pty) Ltd v Smith and another*[1] had the following to say:

> "[22] …There exists an element of rivalry between the two of them. There is no doubt that both of them vie for industrial cleaning business. In that market segment the two are rivals. As held above the degree of rivalry is of no moment for the purposes of determining whether there is rivalry between the two. As rivals, given an opportunity one will use that opportunity to out-rival another…"

[11] By taking employment with Olarm, Emmenis breached the RCNS. To suggest that taking up employment with a competitor will not prejudice the protectable interests of Radio undermines the very undeniable fact that the information exposed to and carried by Emmenis in his head may be useful to Olarm. The issue is not whether he will deliberately prejudice the protectable interests but it is whether a possibility exists that he may expose that information to Olarm, a known competitor of Radio. The answer is an emphatic yes. Inasmuch as Emmenis contends that Radio uses old technology and Olarm uses new technology, such does not imply that Emmenis is incapable of disclosing for

[1] (J107/2021) dated 31 March 2021.

instance discounts strategies that he got exposed to. Such a disclosure is detrimental to the proprietary interests of Radio.

[12] This Court is satisfied that Radio does have protectable proprietary interests. Radio seeks protection in all the provinces of the Republic of South Africa. Emmenis contends that the area is too wide which renders the restraint unreasonable. I disagree. It is uncontested evidence that the service offering is a specialized one in South Africa and Radio has approximately five competitors inclusive of Olarm. It is also not disputed that although headquartered in Cape Town, Olarm as a direct competitor has tentacles in all the South African provinces. Therefore, it must be so that the risk Radio is exposed to extend to the whole of South Africa. It is thus reasonable to obtain protection for the whole of South Africa. It shall not be against public policy, to afford Radio such a protection for the limited duration of one year.

[13] Accordingly, this Court is satisfied that it is indeed reasonable to enforce the restraint as is without performing any surgery to it.

[14] In summary, Radio has protectable proprietary interests. It is not against public policy to protect the interests of Radio in all the provinces in South Africa as agreed to by Radio and Emmenis in April 2016. Thus Radio is bound to succeed.

The issue of costs

[15] These type of applications come to this Court under the banner of section 77 (3) of the Basic Conditions of Employment Act[2] (BCEA) since they involve or concern an employment contract. In terms of that section, the Labour Court has concurrent jurisdiction with the civil Courts. Thus it can be said that the Labour Court in hearing these matters exercises its civil jurisdiction as opposed to jurisdiction under the Labour Relations Act[3] (LRA) jurisdiction. In order to

[2] No. 75 of 1997.
[3] No. 66 of 1995.

demonstrate the point, the parties before me could have comfortably debated this matter in the High Court.

[16] Now that they are in the Labour Court, this Court is not hearing a "*labour matter*" but a civil matter. In the Labour Court, the Constitutional Court decreed indiscriminately that the ordinary rule of costs following the results does not apply. Conversely, if these selfsame parties were in the High Court the ordinary rule would have applied with relative ease. Recently the Constitutional Court in *UPSCO v SACM (Pty) Ltd*[4] decreed that the exclusion of the ordinary rule finds expression in the provisions of section 162 of the LRA.

[17] It may be competently argued that section 162 operates for matters under the banner of the exclusive jurisdiction of the LRA as opposed to contractual matters under section 77 (3) of the BCEA. I suppose, the Constitutional Court should with absolute certainty clarify what is meant by labour matters. However, there is some indication when the following, as said by the Court in *UPSCO*, is heeded:

> "[31] …The crisp point I am making rather, is this: when costs orders are too readily made against those who seek to vindicate their constitutionally-entrenched labour rights in the specialist institutions created by the LRA, employers and employees alike may be left with no option but to resort to industrial action to remedy disputes that the LRA places beyond the purview of protected industrial action. That would cultivate unlawfulness and be inimical to the foundational value of the rule of law underpinning our democratic order.
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> [32] It is therefore imperative for our democracy that the doors of labour dispute resolution be kept wide open for litigants to air their grievances, so that unlawful industrial action, and all its potential consequences, is generally avoided. That accords with the scheme of the LRA, which contemplates industrial action only where no other avenues are readily available. The rule against automatic costs orders is an integral part of that scheme in that it ensures access to labour dispute resolution

[4] (CCT192/20) [2021] ZACC 26 (7 September 2021)

institutions and no doubt enlarges the width by which the doors of those institutions are kept open."

[18] It must be indisputable from the above, reference is made to the Labour Court as a specialist labour disputes resolution body. Involved herein is a contractual dispute as opposed to a labour dispute. It is accepted that at another level this may be seen as a constitutional matter since the provisions of section 22 of the Constitution of the Republic of South Africa, 1996 (the Constitution) are implicated. However, regard being had to the defences raised by Emmenis, he is not placing any reliance on the provisions of section 22 of the Constitution. In any event, this matter does not involve the State where Emmenis is seeking to enforce his constitutional rights against the State.

[19] This Court must assume that the rule of no automatic cost orders does not find application in contractual disputes. What obtains is the ordinary rule of costs following the results. This rule is grounded on the principle that a successful party must not be deprived of its success costs. It is a principle that is constitutionally defendable. Radio achieved outright success. In my view the opposition by Emmenis was unwarranted.

[20] In the result the following order is made:

Order

1. The forms, service and time period as prescribed in terms of Rules of this Honourable Court ("the Rules") are dispensed with and the matter is heard as one of urgency in terms of Rules 8 of the Rules.

2. The First Respondent is interdicted in the following terms:

    2.1. The First Respondent is interdicted and restrained until 31 August 2022, within the Republic of South Africa, whether directly or indirectly, in any manner whatsoever and whether alone or jointly or together with or as

an agent or as the employee of or consultant or contractor to any other person, partnership, company, close corporation, trust, body corporate, or association of any nature whatsoever from Commencing, carrying on or being engaged, interested, concerned or involved, whether financially or otherwise and whether directly or indirectly, in any competitor of the Applicant and in particular the Second Respondent;

2.2. That:

2.2.1. the First Respondent is interdicted and restrained, until 31 August 2022, within the Republic of South Africa, from soliciting any customers of the Applicant;

2.2.2. the First Respondent is interdicted and restrained, until 31 August 2022, within the Republic of South Africa, from being employed by any person, business or entity, operating in competition to the Applicant or operating as a business which is similar to or the same as the Applicant;

2.2.3. the First Respondent is ordered to maintain as confidential the confidential information of the Applicant as defined in the Restraint, Confidentiality and Non-Solicitation Agreement attached to the founding affidavit of BRENT ANDREKA and not to, at any time, divulge and/or disclose and/or disseminate it to any third party or entity;

2.2.4. the First Respondent is interdicted and restrained from using for his own benefit, or for the benefit of any other person or entity, or to derive a profit of any other person or entity, any confidential information of the Applicant as defined in the Restraint, Confidentiality and Non-Solicitation Agreement attached to the founding affidavit of BRENT ANDREKA;

2.2.5. the First Respondent is directed to pay the costs of this application, alternatively, if the Second Respondent opposes the relief sought herein, both Respondents are directed to pay the costs of this application jointly and severally, the one paying and the other to be absolved.

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G. N. Moshoana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr C Levin of Clifford Levin Inc, Johannesburg.

For the Respondent: Mr F Van Der Merwe.

Instructed by: Gioia Engelbrecht Inc, Pretoria.