IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: J 326/24

In the matter between:

SA RANGER FORCES SECURITY DIVISION CC **Applicant**

and

CLIVE WANNENBURG **First Respondent**

ODYSSSEY SECURITY MANAGEMENT SOLUTIONS (PTY) LTD **Second Respondent**

Heard: **9 May 2024**

Delivered: **This judgment was handed down electronically by circulation to the parties' legal representatives by email and publication on the Labour Court's website. The date and time for hand-down is deemed to be on 4 June 2024**

JUDGMENT

TLHOTLHALEMAJE, J

Introduction:

[1] With this opposed urgent application, the applicant seeks an order interdicting and restraining the first respondent from breaching his restraint of trade undertakings and confidentiality agreement given in its favour. In this regard, the applicant seeks to restrain and interdict the first respondent for a period of 24 months, from being employed by the second respondent or any competitor in any capacity in areas known as Booysens Sector 1, and Mondeor Sector 2 in Johannesburg South. These sectors/areas constitute no less than 17 suburbs where the applicant has its client base.

[2] The applicant seeks further relief related to the prohibition of disclosure of any of its confidential or proprietary information, contacting its clients, and an order that the first respondent be compelled to transfer to it all contact details of its current clients, and thereafter remove delete all such information from his data base.

Background and the submissions:

[3] The applicant is in the business of providing security services including armed responses, installation of alarm systems, guarding and pro-active patrols. It employed the first respondent with effect from 20 May 2022 as its Sales Manager in accordance with an employment contract and restraint of trade and confidentiality agreement. The restraint provisions were to endure for three (3) years. The applicant however only seeks their enforcement for a period of 24 months.

[4] The first respondent handed in his letter of resignation on 12 January 2024 with two weeks' notice. At the time of his resignation he informed the applicant's Director and deponent to the founding affidavit, (Mr Clinton Dennis), that he intended taking up employment with the second respondent. According to Dennis, the second respondent as a security company also offers security services similar to that of the applicant, and is its direct competitor. The first respondent denied that the second respondent was the applicant's direct competitor in the light of the different security services and solutions it provided.

[5] Dennis' contention was that at the time he was not aware that the second respondent's also conducted its business in the Booysens Sector 1 and Mondeor 2 areas, hence he did not raise any objections or concerns that the first respondent would breach his restraint undertakings. He contended that the second respondent was known previously to only operate in Alberton, Pretoria, George, East London and Gqeberha. He averred that it was only upon the first respondent having joined the second respondent that the latter commenced trading in the Booysens Sector 1 and Mondeor Sector 2 areas.

[6] Dennis further contended that during the first respondent's employment with the applicant, he was privy to its confidential information including its trade secrets, technical and business know-how, customer and supplier information, work methods and pricing structures, and that he had forged close customer connections with the applicant's customers and clientele. The first respondent denied that he was exposed to any confidential information or that he was in possession of any confidential or proprietary information.

[7] Dennis averred that the first respondent has since 08 January 2024, solicited the applicant's clientele. Further incidents of alleged breaches of the restraint undertakings are said to have taken place on 15, 18, 19 January 2024. It was only upon these incidents having been reported that Dennis had terminated the first respondent's services on 22 January 2024, rather than wait for his notice period to come to an end on 26 January 2024. He contended that even after his termination on 22 January 2024, the first respondent had continued the breach on 26 January 2024.

[8] The applicant had on 29 January 2024 through its attorneys of record demanded from the first respondent to cease any breaches of his restraint provisions. Correspondence was also sent to the second respondent demanding *inter alia* that it ceases any employment with the first respondent or alternatively suspend his employment pending a determination of the matter by this Court.

[9] The first respondent's attorneys of record, who also act for the second respondent responded to the applicant's attorneys of record on 31 January 2024,

and advised *inter alia* that after consultation with the clients, it was established that no employment relationship existed between the first and second respondents at the time, and that the former was only to start his employment with effect from 1 February 2024 in the position of Operations Manager. The applicant's attorneys of record were further advised that the first respondent had informed the applicant on 12 January 2024 of his intentions when he handed in his resignation, and that a period of 17 days after the first respondent had disclosed his intentions will be raised as an issue when urgency of the matter was argued. The respondent's attorneys of record further made undertakings that the applicant's proprietary interests will not be utilised even if the first respondent had none in his possession.

[10] Dennis contends that settlement discussions between the parties ensued and as at 21 February 2024, these discussions had broken down. This application was launched on 2 April 2024, setting the matter down for 9 May 2024. The first respondent delivered an answering affidavit on or about 15 April 2024 (date-stamped by the Registrar on 2 May 2024) and the applicant delivered a replying affidavit on or about 24 April 2024 (date-stamped by the Registrar on 25 April 2024).

Urgency and evaluation:

[11] Other than opposing the merits of the application, the first respondent disputed that the application deserved the urgent attention of the Court. The applicant's contention on the other hand was that applications of this nature were inherently urgent, and that given the backlog in this court, the application would be rendered moot if it were to be heard in the normal course. It was contended that the matter was also urgent as it continued to suffer financial losses due to the misappropriation of confidential information and client contacts by the first respondent, and for the benefit of the second respondent.

[12] The applicant contended that the first respondent had since January 2024, breached his undertakings and that a demand was made within a week after the breach was known that he should comply with his restraint undertakings. The applicant further contended that it needed to exhaust all other reasonable remedies available short of approaching the Court, and that it was only on 5 March 2024 (and

not on 21 February 2024) that it became evident that the first and second respondents had no intention of complying with the restraint undertakings. It was contended that it was at that point that urgency arose. The applicant further submitted that the court could not be approached prior to receiving confirmation that the restraint undertakings would not be complied with, as this would not have been in the interests of justice, and would have amounted to abuse of court.

[13] Dennis further submitted that after the applicant's attorneys of record were instructed, counsel was not available, and further delays were occasioned by the need to gather the necessary funds to pursue this application. He contends that it was only on 13 March 2024 that counsel was available. Thereafter, all the necessary documents had to be gathered, and were forwarded to her on 15 March 2024, and leading to the drafting, finalisation and delivery of the application. He further contended that the applicant would not be able to obtain substantial redress in due course as the first respondent's continuation of the breach would lead to the applicant losing more clients and thus leading it to financial distress.

[14] There is no doubt that applications for the enforcement of a restraint of trade agreements can be said to be urgent by the nature of these agreements being time-bound, and also as the aim is invariably to seek to interdict breaches of agreements and undertakings made by an ex-employee. This is because a failure to grant urgent relief may lead to an applicant party's financial losses resulting from the breach, which losses are difficult to quantify or to recover by way of ordinary action[1].

[15] The contention however that such applications should be accorded urgency without more, because of their 'inherently' urgent nature is incorrect. In *Volvo Financial Services Southern Africa (Pty) Ltd v Adamas Tkolose Trading CC*[2]*,* it was

[1]See *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another* 2009 (3) SA 78 (C) at 88J; *Advtech Resourcing (Ply) Ltd t/a Communicate Personnel Group v Kuhn* 2008 (2) SA 375 (C) para [4] at 378;

[2] [2023] ZAGPJHC 846 (1 August 2023) at para 4 – 8. See also *Chung-Fung (Pty) Ltd and Another v Mayfair Residents Association and Others* (2023/080436) [2023] ZAGPJHC 1162 (13 October 2023) at para 30 where it was held;

held that there is no class of proceedings that enjoys inherent preference and that effectively, the concept of “inherent urgency” of a matter was a misnomer. The Court in *Volvo* further appreciated that some types of cases are more likely to be urgent than others. The issue however was that urgency does not arise from the nature of the case itself. It arose from the imminence and depth of harm that an applicant will suffer if relief is not given, and not because of the category of right the applicant asserts. The point being made in *Volvo*, which I agree with is that more than just an assertion that a matter is inherently urgent is required. Irrespective of the nature of the case, it is still required of the applicant seeking urgent relief to satisfy the Court that a matter ought to be accorded urgency, and why time frames ought to be abridged[3].

[16] The requirements to be met when urgent relief is sought are trite emanating from various authorities[4]. This Court under the provisions of Rule 8 of its Rules may dispense with the forms and manner of service provided for in the Rules of Court where urgent relief is sought. The applicant must demonstrate explicitly why the

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‘[30] Although this court has recently eschewed the use of the phrase "inherently urgent" in relation to certain causes of action, it has recognised that the harm claimed by an applicant is linked to the nature of the right sought to be enforced and protected rather than any category that the "right" may fall into (i.e. the cause of action relied upon). This may well, in appropriate circumstances, render the relief claimed "inherently urgent", but may have little to do with the cause of action.

[31] Thus, while it is long established that urgent relief may arise from various and divergent causes including the protection of commercial interests and, I dare say, matters that require expeditious adjudication in the public interest, each case must be determined on its own merits and both the requirement of absence of substantive redress in due course and the reasonableness of the abridgment of time periods must be properly traversed by an applicant approaching the court for urgent relief.’

[3] See also *Macneil Jhb (Pty) Ltd v Cocolaras and Another* (J1722/17) [2018] ZALCJHB 2 (11 January 2018); *White River Marketing (Pty) Ltd t/a Wizard Polythelene Manufacturers and Another v Rothwell and Another* (2022/12218) [2022] ZAGPJHC 282 (29 April 2022); *Sapcor Harrismith (Pty) Ltd v Horn* [2016] JOL 35021 (FB)

[4] See *Jiba v Minister: Department of Justice and Constitutional Development and Others* (2010) 31 ILJ 112 (LC) at para 18; *Tshwaedi v Greater Louis Trichardt Transitional Council* [2000] 4 BLLR 469 (LC) at para 11; *Dynamic Sisters Trading (Pty) Limited and Another v Nedbank Limited* [2023] ZAGPPHC 709 (21 August 2023); *Luna Meubel Vervaardigers v Makin and Another* 1977 (4) SA 135 (W) at 136H-137F).

matter is said to be urgent and why it will not be afforded substantial redress at a later hearing. Further considerations the Court must take into account are whether the urgency claimed is not self-created; the interests of the respondent party, and any prejudice it may suffer if the matter is disposed of on an urgent basis[5].

[17] Central to the above principles is that an applicant is not entitled to rely on urgency that is self-created when seeking a deviation from the Rules. Thus, an applicant is expected to act with the necessary haste in order to prevent the prejudice or harm complained of as soon as it comes to its attention, and thus bring the application before the Court at the first available opportunity. Even more pertinent in this case is that an applicant who comes to court on an urgent basis for final relief bears an even greater burden to establish his right to urgent relief than an applicant who comes to court for interim relief[6]. Thus, inasmuch as it is appreciated that disputes related to the enforcement of restraint of trade provisions are urgent because of their time-bound nature, at the same time, there is nothing that shields applicants in such disputes from compliance with the requirements of Rule 8 of the Rules of this Court, and all applicable principles in any urgent applications

[18] In this case, it follows in the light of the conclusions made regarding the concept of 'inherent' nature of restraint applications as above, that the question is whether the applicant has satisfied the requirements of urgency. The first respondent's main contention was that the application was brought on exceptionally unreasonable and prejudicial time periods, and that the applicant has not demonstrated urgency. In this regard, he contended that the application was launched some 2 and a half months since his resignation. He averred that on 22 January 2024, he was instructed by Dennis to return all the applicant's property, cleanse his mobile phone of the details of all the applicant's clients and take 'garden

[5] *Vumatel (Pty) Ltd v Majra and Others* (J2400/18) [2018] ZALCJHB 335; (2018) 39 ILJ 2771 at paras 4 – 6; See also *Association of Mine Workers and Construction Union and others v Northam Platinum Ltd and another* [2016] 11 BLLR 1151 (LC) at paras 25 – 25.

[6]See *Ntombela and Others v United National Transport Union and Others* (2019) 40 ILJ 874 (LC) at para 28; *Tshwaedi v Greater Louis Trichardt Transitional Council* [2000] 4 BLLR 469 (LC) at para 11; *Association of Mineworkers and Construction Union and Others v Northam Platinum and Another* 2016 (37) ILJ 2840 (LC) para 23

leave'. He had complied with the instructions, including wiping off all the customer data from his pone in the presence of Dennis, who had also confirmed that he (first respondent), had nothing in his possession.

[19] He further averred that it was not correct that the applicant was not perturbed by him joining the second respondent in that as at 29 January 2024, he had received a letter of demand to which his attorneys of record had responded to. He averred that it was incorrect despite attempts to resolve the matter, that it only became clear on 21 February 2024 that a resolution would not be reached. This was so in that in the correspondence between the parties, he had consistently since 29 January 2024 denied any wrongdoing. To this end, it was contended that the Court was presented with an urgent application that was launched after inordinate extent of time waited by a supine applicant.

[20] Against the principles already referred to, I agree that a period of 2 and half months before the applicant could launch this application is inordinate. This is particularly so in view of the date that the first respondent resigned and announced his intention to be employed by the second respondent, as against the imminence and depth of harm that the applicant claims it would suffer if relief were not granted. Even on its own version, the applicant was aware as far as 08 January 2024 and into 26 January 2024, that the first respondent had allegedly solicited its customers in breach of his restraint undertakings. Effectively, the harm alleged took place long before 21 February 2024 when the urgency is claimed to have arisen.

[21] The explanation proffered for the delays is essentially three-fold. The first was that there were ongoing attempts to resolve the matter with effect from at least 31 January 2024 after the first respondent's attorneys of record had responded to the complaints about the alleged breaches of the restraint provisions. Significant with that response was that it was made clear that the first respondent intended to take up employment with the second respondent with effect from 1 February 2024. Yet no steps were taken to approach the Court particularly in view of previous incidents of alleged breaches.

[22] There is nothing to gainsay the first respondent's contention that his consistent position including in the settlement discussions had always been that he had done nothing wrong as evident from his attorneys of record's correspondence of 31 January 2024. As already indicated from the authorities cited above, fundamental to urgent relief is that a party must act with the necessary alacrity to prevent a harm. It is appreciated from *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*[7] that a delay in instituting proceedings is not, on its own a ground for refusing to regard the matter as urgent, as the delay may have been due to *inter alia,* the applicant having made attempts to settle the matter.

[23] The proposition that delays may be condoned where they were caused by attempts to resolve a dispute is however not without qualification, even if it is appreciated that litigants are within their rights to make such attempts prior to rushing to court. As correctly pointed on behalf of the first respondent, there is no requirement that the parties must exhaust all reasonable remedies available before approaching a court. This was even moreso in instances where there is discernible ongoing harm from the conduct of the other party, and further where the relief claimed is time bound. These circumstances in my view would call for immediate action at the very first indication that the harm would not cease.

[24] The second consideration is that there is a limit beyond which the Court may overlook a delay caused by settlement discussions. This is particularly so in instances where the primary complaint is that restraint provisions were being breached. To reiterate, the applicant was aware as far back as 8 January 2024 that the first respondent had acted in breach. It was aware and was warned on 31 January 2024 that the first respondent would take employment with the second respondent on 1 February 2024. Any alleged breach would have been even more apparent from 8 January 2024 or at the latest on 1 February 2024, when the first respondent took up employment with the second respondent. This was the earliest available opportunity for the applicant to have approached the court. Notwithstanding knowledge of that breach, for reasons that are not clear, the applicant indulged it

[7] *Supra East Rock Trading 7 (Pty) Limited and another v Eagle Valley Granite (Pty) Limited and others* (2012) JOL 28244 (GSJ) at para 8.

until when on its version, discussions collapsed on 21 February 2024. Worst still nothing of substance was proffered in regard to the reason any discussions were persisted with when the first respondent's posture throughout was that he did nothing wrong. From this observation, and what is is even more apposite in this case, is that there are matters where there is a potential settlement, whilst others are incapable of resolution as the one party would have unequivocally made it clear that it will not settle the dispute on terms sought by the other party. Thus, it would be a futile exercise for a litigant to attempt to resolve a dispute where no prospects of resolution exist.

[25] A further explanation proffered by the applicant for delays was that it had to source funds in order to pursue the application. Clearly this explanation is unsatisfactory. Where a party decides to approach a court on an urgent basis, one can assume that it would have properly reflected on its course of action it intends to embark upon, with due to consideration to the resources it has. It would be ridiculous for the Court's rules and time frames to be abridged purely for the convenience of and at the pleasure of a litigant that approaches the Court based on its financial means rather than consideration of the applicable rules.

[26] A further delay was attributed to the non-availability of counsel to launch and settle the application. This explanation is equally not reasonable nor acceptable in view of the fact it is not explained why any other counsel could not have been briefed in view of the urgency claimed and the breaches alleged. In the end, it needs to be reiterated that bringing an urgent application is an extraordinary measure, which is why there are stringent conditions that must be met in order to bring one successfully.

[27] This application was launched on or about 2 April 2024 and the first respondent was afforded three days within which to file a Notice of intention to oppose and was afforded until 10 April 2024 to deliver an answering affidavit. The applicant further enrolled the matter for 9 May 2024. As was correctly pointed out on behalf of the first respondent, given the date of enrolment, the truncated time periods were indeed unreasonable and bordered on abuse of the Court's process. Equally so, there is no explanation as to the reason the applicant chose the enrolment date

of a further month after the application was launched, given the alleged breaches and the urgency claimed. It ought to be concluded that the applicant was supine since at least 8 January 2024 and to have imposed such truncated periods in the light of its own delays was clearly prejudicial to the first respondent.

[28] Whether the applicant will be able to obtain substantial redress in due course is dependent on the facts and particular circumstances of each case[8]. It has already been said that the restraint provisions are time bound. The restraint provisions as signed by the first respondent were to endure for three years even though the applicant in the founding affidavit only sought that they should be enforced for 24 months. In the replying affidavit, the applicant however reverted to the original period of three years, which approach as correctly pointed out on behalf of the first respondent, is indeed confusing as it is not known what case should be met in that regard.

[29] Equally confusing is the nature of relief sought, whether it is a final or interim order. It was correctly pointed out on behalf of the first respondent that a party cannot claim a different form of relief in the founding affidavit as in this case. Whilst in the Notice of Motion it was final relief that was sought, at paragraph 14 of the founding affidavit, the applicant averred that to the extent that any material dispute of fact arose in the papers in respect of its allegations, it would be fair, equitable and

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[8] See *East Rock Trading 7 (Pty) Limited and another v Eagle Valley Granite (Pty) Limited and others* at para 6 and 7; See also *Export Development Canada and Another v Westdawn Investments Proprietary and Others* (6151/2018) [2018] ZAGPJHC 60; [2018] 2 All SA 783 (GJ) at para 11; and *Mogalakwena Local Municipality v The Provincial Executive Council, Limpopo and others* (2014) JOL 32103 (GP) at para 63 – 64, where it was held;

"It seems to me that when urgency is an issue the primary investigation should be to determine whether the applicant will be afforded substantial redress at a hearing in due course. If the applicant cannot establish prejudice in this sense, the application cannot be urgent.

Once such prejudice is established, other factors come into consideration. These factors include (but are not limited to): Whether the respondents can adequately present their cases in the time available between notice of the application to them and the actual hearing, other prejudice to the respondent's and the administration of justice, the strength of the case made by the applicant and any delay by the applicant in asserting its rights. This last factor is often called, usually by counsel acting for respondents, self-created urgency."

inherently necessary to avoid future mootness, that it be granted interim relief pending the final determination of the disputed facts by way of oral evidence.

[30] Clearly the applicant's position is untenable especially where matters are brought on an urgent roll, and where no attempt was made to either seek such relief in the Notice of Motion, or where no amendment was sought. A further difficulty raised by the applicant's approach is that it puts the first respondent in an invidious position in knowing which case needs to be met in the light of the different requirements to be met where final or interim orders are sought. Ordinarily, in instances where final relief is sought, and where disputes of fact arise from the papers, the ordinary principles set out in *Plascon-Evans*[9] will find application.

[31] In the end, whatever the applicant's position on the duration of the period of enforcement may be, or the nature of relief it seeks, the point being made is that a mere claim that a party was continuing to haemorrhage clients and that it make take long to determine the application on the ordinary roll is not on its own sufficient for a finding to be made that it will not be afforded substantial redress in due course. As stated in *Mogalakwena*[10]*,* even if there is some prejudice demonstrated by an applicant, the court must still take into account other factors including the prejudice

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[9] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C, where it was held;

'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact . . . If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court ... and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks . . . Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers . . .'

[10] *Supra (fn 8)*

to the respondent and the administration of justice, the strength of the case made by the applicant ,and any delay by the applicant in asserting its rights (self-created urgency).

[32] Against the above considerations, it ought to be concluded that the position that the applicant finds itself was because of its very own inaction. A party cannot be supine and merely claim a lack of substantial relief in due course. The facts of this case as illustrated elsewhere in this judgment and the unacceptable reasons proffered in regards to the delays, clearly indicates the self-created nature of the urgency sought. In regards to the strength of the case made by the applicant, on its version, there are disputes of facts which even on the application of the *Plascon-Evans* principle, there can be no basis for any conclusion to be made that the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court would be justified in rejecting them.

[33] Equally so, it is not correct in instances such as these, that an applicant may not be afforded substantial redress in due course as any relief against the first respondent can still be pursued for contractual damages. Thus, striking the matter off the roll on account of lack of urgency as the Court proposes to do in this case, is not in my view, the end of the matter for the applicant.

[34] In regards to costs, it was submitted on behalf of the first respondent that the applicant ought to be mulcted with a punitive costs order in the light of its abuse of the process of this Court, and further in circumstances where the respondent had not evinced any intention to unfairly and unlawfully compete with it. The applicant equally sought a punitive cost order against both the first and second respondents. Having had regard to the facts and circumstances of this case, and further with the acknowledgement that this was a contractual claim which meant that costs should ordinarily follow the results, I am however of the view that it would be appropriate that each party be burdened with its own costs.

[35] Accordingly, the following order is made;

Order:

1. The Applicant's application is struck off the roll on account of lack of urgency.
2. Each party is to pay its own costs.

Edwin Tlhotlhalemaje
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv. T Mirtle, instructed Paul T. Leisher & Associates Attorneys INC

For the First Respondent: Adv. S Swiegers, instructed by LM Du Toit Attorneys INC (Heads of argument drafted jointly with Adv. A Jansen van Vuuren)