



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)**

In the application between:

Case no: A 166/2012

DEREK FREEMANTLE

First Appellant

PUMA SPORT DISTRIBUTORS (PTY) LTD

Second Appellant

v

ADIDAS (SOUTH AFRICA) (PTY) LTD

Respondent

Court: Griesel, Yekisoet Cloete JJ

Heard: 22 July 2013

Delivered: 26 July 2013

JUDGMENT

CLOETE J:**INTRODUCTION**

- [1] This is an appeal with the leave of the court *a quo* against interdicts granted in favour of the respondent ('*Adidas*') against the first appellant ('*Freemantle*') to enforce restraint of trade and confidentiality clauses contained in his employment contract; and prohibiting the second appellant ('*Puma*') from offering employment to, or employing, Freemantle for the six month period of the restraint which commenced on 1 August 2011 and expired on 31 January 2012, i.e. some 18 months ago. It was accepted by all parties that the duration of the relief granted against both Freemantle and Puma had long since lapsed and that, in this sense at least, setting aside the orders of the court *a quo* would have no practical effect or relevant result. The court *a quo* declined to grant the other relief sought against Puma, namely to interdict it from passing on or disclosing the confidential trading information of Adidas to any third party.
- [2] The appellants were alive to the obstacles that they faced in the form of s 21A(1) and (3) of the Supreme Court Act 59 of 1959 ('*the Act*'), namely that in appeal proceedings where the issues are of such a nature that the judgment or order will have no practical effect or result, the appeal may be dismissed on that ground alone; and that, save in exceptional circumstances, this determination must be made without reference to the costs incurred by the aggrieved party concerned. The only other exception to this general rule is the appeal court's discretion to allow an appeal, even where the actual dispute has become academic, when the issue itself presents as a discrete legal issue of public importance that would, or will, affect

matters in the future: *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape and Others (Pty) Ltd* 2013 (3) SA 315 (SCA) para [5]; cited with approval in *The Kenmont School and Another v D M and Others* (454/12) [2013] ZASCA 79 (30 May 2013) [para 12]. The parties filed affidavits dealing with the aforementioned obstacles prior to the hearing of the appeal and their respective submissions will be considered later in this judgment. It will only become necessary to consider the merits of the appeal if the appellants succeed in overcoming this hurdle.

BACKGROUND

- [3] Freemantle took up employment with Adidas as a field account manager on 1 March 2006. His written contract of employment contained both a restraint of trade clause and a confidentiality clause. The restraint prohibited Freemantle from working in the sporting goods industry for a period of six months after the termination of his employment. The confidentiality clause recorded Freemantle's acknowledgment that, in his association with Adidas, he would have access to its confidential trading information; and that he was under an obligation not to pass on or disclose any of its information or systems. Freemantle was subsequently promoted to the position of Key Account Manager in April 2009 and held this position with Adidas until his resignation on 3 May 2011.

- [4] On the same date Freemantle entered into a written contract of employment with Puma, one of the main competitors of Adidas. He was appointed as Puma's National Sales Manager '*with effect from 22 May 2011 or earlier*'. The employment contract does not contain a restraint of trade clause but it does contain a

confidentiality clause prohibiting Freemantle from using any of Puma's trade secrets or confidential information for his own benefit or for the benefit of any third party.

- [5] When Freemantle resigned he informed Adidas that he intended taking up employment with Puma. The latter was not aware of the restraint clause contained in Freemantle's employment contract with Adidas when it appointed Freemantle on 3 May 2011; however Adidas made Puma aware thereof some seven days later on 10 May 2011. Puma sought legal advice and was informed that the restraint was not enforceable against Freemantle. Puma decided to accept this advice but did not communicate this to Adidas. Puma continued during the period of the restraint to actively engage with Freemantle in finalising the practical aspects of his future employment, which included the scheduling of a business trip to East Africa for the first week of August 2011..
- [6] On 22 June 2011 Puma was reminded by the attorney appointed by Adidas of the terms of the restraint and was pertinently asked whether it had employed Freemantle and when his employment was due to commence. The response of Puma's managing director, Mr Rink, on 24 June 2011 was simply that '*I find it totally inappropriate that a competitor of PUMA, through its counsel, seeks to obtain information about PUMA's possible current or future plans*'. It bears mention that all of the attempts made by Adidas to obtain clarity from Freemantle as to his future employment with Puma had been unsuccessful. It was only on 25 July 2011 that Adidas obtained information that Freemantle intended to take up employment with Puma as from 1 August 2011.

- [7] The application which has given rise to this appeal was launched three days later, on 28 July 2011. The terms of Freemantle's contract of employment with Puma were disclosed to Adidas for the first time on 5 August 2011.

BASIS OF RELIEF SOUGHT IN THE COURT A QUO

- [8] The basis of the relief sought against Freemantle was contractual, i.e. to compel him to comply with the restraint and confidentiality clauses contained in his contract of employment with Adidas. The relief sought against Puma was delictual in nature and was founded on unlawful competition. The deponent to the founding affidavit alleged that:

'I have been advised that PUMA, as his putative employer, ought properly to be included in this application as it is and will be complicit in assisting Freemantle to breach his covenant of restraint of trade and will thus be a party to the invasion of the rights of adidas. This, I am advised, is a species of unlawful competition and adidas is entitled to be protected from being harmed in this manner.'

- [9] Although the respective bases for the relief sought by Adidas against Freemantle and Puma were different, the two made common cause on virtually every ground of opposition advanced. Thus, both disputed that Adidas had an interest deserving of protection; that the restraint of trade agreement was enforceable; and that Freemantle could or would in any way use confidential information that he might have acquired during his employment with Adidas to benefit Puma.

- [10] As to the allegation of complicity, Puma's response was limited to the following, namely that: (a) if it had been informed of the restraint prior to Freemantle's appointment, it would have taken legal advice on its enforceability already at that stage; (b) once it became aware of the restraint, and on the basis of legal advice, it took the decision to honour its contract with Freemantle; and (c) it would have abided the decision of the court had no relief been sought against it. Puma also alleged that it was Freemantle who had made the first approach to it. It was against this background that Puma contended that its conduct was not unlawful.
- [11] The court *a quo* found that: (a) Adidas had an interest deserving of protection; (b) Freemantle's employment with Puma posed a direct threat to that interest; (c) the restraint of trade clause contained in Freemantle's employment contract with Adidas was not contrary to public policy, nor cast in terms that were too vague or wide and was thus enforceable; and (d) Freemantle should thus be interdicted as sought. It also found that there was no evidence that Puma had used, or was using, the confidential information of Adidas and, as previously mentioned, declined to interdict Puma from doing so. However, the court *a quo* granted an order prohibiting Puma from offering employment to, or employing, Freemantle for the six month period of the restraint. Unfortunately the basis upon which the latter order was made is not apparent from the judgment of the court *a quo*. Costs were awarded against Freemantle and Puma jointly and severally.

FREEMANTLE'S SECTION 21A SUBMISSIONS

[12] Freemantle contended that the appeal was not academic and would indeed have a practical effect and a relevant result because of his resultant loss of income during the period of the restraint as well as the costs awarded against him. During argument before us Mr *De Kock*, who appeared on Freemantle's behalf, correctly conceded that the latter's loss of income had no bearing on a determination in terms of s 21A. That left the costs that Freemantle had incurred, which, it was contended, were substantial and thus constituted '*exceptional circumstances*' as envisaged by s 21A(3).

[13] Freemantle's averments relating to costs were limited to the following, namely that: (a) the application in the court *a quo* was heard over a number of days and the fees paid by him to his own legal representatives were substantial in the context of what he was earning as a salary at the time (the salary that he was earning was not disclosed by him); (b) he had been advised that he and Puma would each be held liable for one half of the costs awarded against them; and (c) were the appeal to succeed on the merits he would not be burdened with costs '*which could potentially ruin me in my endeavours to seek further career advancement in my chosen occupation*' (the reasons for this contention were not explained).

PUMA'S SECTION 21A SUBMISSIONS

- [14] Puma similarly contended that the appeal was not academic and would indeed have a practical effect and relevant result, essentially on three grounds.
- [15] First, it was submitted that the '*suggestion*' by Adidas (in its papers) that Puma is a company which engages in unlawful competition, which was '*impliedly confirmed*' by the order of the court *a quo*, is viewed by Puma in a serious light; given its reputation as an international brand of some standing, the effect of the court *a quo*'s judgment on it is indeed a '*living issue*'.
- [16] Second, the industry in which Puma operates has been left uncertain regarding the circumstances in which companies such as itself may employ persons who are subject to restraints of trade, and it would thus be '*in the public interest*' to have this issue definitively determined, given *inter alia* the effect that it may have on employees' scope for career advancement.
- [17] Third, the costs incurred by Puma in opposing the application, as well as the costs awarded against it, were substantial, in that: (a) there was a total of four court appearances with one counsel representing each party; (b) Puma employed the services of senior counsel; and (c) the papers ran to 399 pages together with heads of argument and additional notes of 212 pages, thus 611 pages in all. Accordingly, it was submitted, these factors constituted '*exceptional circumstances*' within the meaning of s 21A(3).

EVALUATION

- [18] I will deal first with Puma's submissions as to its reputation and the public interest argument and thereafter with the submissions made by both it and Freemantle in regard to costs since they are essentially one and the same.
- [19] The first ground advanced by Puma, namely that pertaining to its reputation, cannot be sustained. On its own version the order of the court *a quo*, at best, only '*impliedly confirmed*' the allegation of complicity with Freemantle in the breach of his restraint of trade. No factual finding was made to that effect. Furthermore, in refusing to grant the further interdictory relief claimed by Adidas, the court *a quo* found that there was no evidence of Puma's misuse of confidential information belonging to Adidas. The fact of the matter is thus that, whether or not the order was wrongly granted against Puma, setting it aside will have no practical effect or relevant result.
- [20] During argument before us Mr *Stelzner*, who appeared on behalf of Puma, correctly accepted that the second ground advanced, namely the '*public interest*' argument, was doomed to failure, for the simple reason that Puma was, in effect, seeking legal advice from this court in a matter that is essentially fact-bound. In *The Kenmont School* case the Supreme Court of Appeal set out the legal position at para [12] as follows:

'It is trite that every case has to be decided on its own facts. And efforts to compare or equate the facts of one case to those of another are unlikely to be of assistance. For, as we well know, parties endeavour to distinguish their case on the facts from those reported

decisions adverse to them.'

Moreover, *'[c]ourts of appeal do not give advice gratuitously. They decide real disputes and do not speculate or theorise. . .'*(See: *Radio Pretoria v Chairman, Independent Communications Authority of South Africa and Another* 2005 (1) SA 47 (SCA)para 44).

[21] I now turn to the remaining ground advanced, namely that relating to the costs incurred by both Freemantle and Puma in the application. Freemantle contented himself with bare allegations and did not take us into his confidence about the actual amount that he had expended on his own legal representation, nor the salary that he claimed to have earned during the course of the litigation. Puma gave an indication of the length of the papers and the number of days spent in court, but was similarly silent on the amounts expended by it. Puma is a large, well-established company and there is no suggestion that the costs order which it is required to meet will cripple it financially. During argument we were informed that the costs incurred were in the region of R500 000 in total.

[22] Although each case must be decided on its own facts, it is nevertheless instructive, in order to place the appellants' contentions in proper perspective, to refer to what the Supreme Court of Appeal regarded as *'exceptional circumstances'* in relation to costs as envisaged by s 21A(3). In *Oudebaaskraal (Edms) Bpk v Jansen van Vuuren* 2001 (2) SA 806 (SCA) the trial in the Water Court had lasted a number of days; the record consisted of some 2379 pages, contained in 35 volumes, 9 copies

of which had already been filed with the appeal court; the appellant had been represented by senior and junior counsel, the respondents by an attorney, and the Department of Water Affairs and Forestry by senior counsel; and several experts had testified.

[23] Those circumstances are a far cry from what this court is faced with in the present matter, namely a relatively straight-forward opposed motion, requiring attendances at court on four separate occasions in the court a quo; a record of some 400 pages excluding heads of argument; and only one of the parties represented by senior counsel, who appeared alone without a junior.

[24] I am thus not persuaded that the costs incurred by either Freemantle or Puma are such as to constitute '*exceptional circumstances*' as envisaged in s 21A(3) of the Act; and it follows that this ground must also fail.

[25] Having found that neither Freemantle nor Puma have overcome the obstacles that they face in terms of s 21A, it is not necessary to consider the merits of the appeal.

CONCLUSION

[26] The parties are in agreement that the costs incurred in the rule 49(11) application, which were reserved, should follow the result.

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

Both appeals areDISMISSED with costs, including the costs of the application in terms of rule 49(11), all such costs to be paid by the appellants jointly and severally.

J. I. CLOETE
Judge of the High Court

GRIESEL J: I agree and it is so ordered.

B. M. GRIESEL
Judge of the High Court

YEKISO J: I agree.

N. J. YEKISO
Judge of the High Court