

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 27664/2022

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
<u>4/03/2022</u>	<u>[Signature]</u>
DATE	SIGNATURE

In the matter between:

**168 SHORT TERM SOLUTIONS
JOHANNESBURG (PTY)LTD**

First Applicant

STYLES AND COMPANY (PTY) LTD

Second Applicant

and

LESLIE HEPPELL

First Respondent

ALTERNATIVE RISK SOLUTIONS

Second Respondent

JUDGMENT

MIA , J

Introduction

[1] This is an urgent application for an interim interdict seeking the enforcement of a restraint of trade in an employment contract. The application is opposed.

Background

- [2] The first applicant is 168 Short Term Solutions Johannesburg (Pty)Ltd (STS), a company duly registered in terms of the company laws of South Africa. The second applicant is Styles and Company (Styles & Co), a company duly registered in terms of the company laws of South Africa. The two will be referred to as the applicants for convenience. Alternative Risk Solutions (Alt Risks) (the second respondent) is like the applicants also a company in short term insurance. Like the applicants, it is duly registered in terms of the company laws of South Africa. Alt Risk is cited only for its interest in the matter. It has not participated in these proceedings. The first and second respondents will be referred to as the respondents (collectively) when necessary.
- [3] On 19 August 2019, Styles & Co concluded a contract of employment with Mr Leslie Heppell, the second respondent. The contract included restraint of trade and confidentiality clauses. In July 2022, Styles and Co, entered into a contract with the first applicant, STS in terms of which STS purchased all the short-term insurance book debts of Styles and Co. When STS purchased the book debts, the second respondent, who was still in the employment of and paid by Styles & Co, was offered a new contract with STS for the period up to October 2022. The second respondent was unhappy with the terms and conditions of the new contract because it did not match his previous remuneration. This reduction in his terms and conditions of employment, was not negotiated with him initially. He indicated his unhappiness to the management of STS. After failed negotiations, he refused to sign the new contract, resigned and began working with Alt Risk. STS contends that the first respondent was transferred to its employment in terms of section 197 of the Labour Relations Act 66 of 1995 (LRA). Thus, the restraint of trade and confidentiality clauses applied were binding on him. The second respondent disputes that his transfer is in terms of section 197 of the LRA and denies that he was in breach of any contract.

Issues

- [4] The issues for determination before this court are:
- a. Whether the matter is urgent?

- b. Whether STS has made out a case for an interim interdict?
- c. If (a) and (b) are, whether the restraint of trade and confidentiality undertakings are enforceable against the second respondent; and

Urgency

- [5] In their founding papers, the applicants alleged that they became aware of the second respondent's alleged breach of his employment contract, on 14 October 2022. On 2 November 2022, they dispatched correspondence to him requesting his resignation from Alt Risk. Thereafter, when they did not receive any response, they launched the present application on 1 December 2022. Counsel for the applicants argued that the matter was urgent based on the very nature of restraint in trade clauses in commercial contracts. Moreover, that the applicants will not be able to obtain satisfactory relief if the application was brought in the ordinary course.
- [6] Furthermore, he submitted that because of this wrongful conduct on the part of the second respondent, the applicants' "client connection" is compromised. From their investigations, as a direct result of the second respondent's wrongful conduct (in breach of the restraint of trade and confidentiality clauses in his employment contract which was still in place); twelve clients have signed up with Alt Risk. The restraint is for a limited period of 12 months. If the matter were not heard on an urgent basis the applicants will continue to suffer economic loss which can be prevented by an order of court. The damages which STS will suffer will be huge to the extent that the second respondent will certainly not be able to satisfy a claim based on his wrongful conduct.
- [7] Counsel for the respondents argued that the applicants were aware of the alleged breach since 14 October 2022 and only launched the application on 1 December 2022 when they ought to have acted sooner. This was so, especially where the applicants were aware that the first respondent disputed the validity of the restraint and his transfer in terms of section 197 of the LRA. There was no documentary proof of the transfer as requested during the negotiations the applicants relied upon for their delay in launching the present proceedings. Counsel for the respondents submitted that it took the applicants 48 days to

launch the application since they obtained information about the alleged breach of the restraint, and 28 days expired after the demand that the second respondent must resign. This was no indication of any urgency so it was submitted.

- [8] In addition, counsel submitted there was no explanation for the delay except for the reference to the discussions conducted to maintain ethical conduct which results were subsequently communicated to the second respondent. The applicants' delay in bringing the application suggests self-created urgency notwithstanding that restraints of trade are inherently urgent. This is so, especially where the restraint is for a limited time of 12 months. This is exacerbated by the fact that counsel for the applicants and the respondents and their counsel had been discussing the matter.
- [9] Counsel for the respondents indicated that the first respondent raised the issue of his non-transfer early on, as is evident from the correspondence in response to Styles & Co's request to Alt Risk that the second respondent should resign¹. It was also raised in the answering affidavit as an issue which required attention reciprocally in relation to the restraint if regard was had to the binding nature of the contract between the second applicant and the second respondent. The latter in any event, disputed that there was a transfer and requested documentary proof that the transfer occurred in terms of section 197 of the LRA. Styles & Co paid his salary for August and September and leave for October 2022 after the sale of books occurred which suggested that he was still working for Styles and Co during that period. This view was reinforced when STS presented Styles & Co with a new contract with different terms and a different remuneration rate to the rate he worked for at Styles & Co. It was at this point that the second respondent resigned.
- [10] Over and above the submissions made on behalf of the second respondent, counsel also raised the defence of "*non exceptio adimpleti contractus*". In addition, counsel for the respondents argued that the short term insurance book was sold and that Styles & Co is not affected as a competitor.

¹ Caselines 009-38 Annexure B

- [11] The Uniform Rules of Court provide guidance with regard to urgent matters. Self-created urgency does not constitute urgency for the purposes of Uniform 6(12). The rule requires a litigant to set out explicitly the circumstances which rendered the application urgent and why it cannot be afforded substantial redress in due course. The urgency that the applicants seem to rely on is that they will not recover their losses from the second respondent if they fail to ensure the restraint of trade clause is enforced at this time. They seek to enforce an order that limits the second respondent from soliciting their clients and employees and indicate that because of the short duration of the restraint and confidentiality clause namely 12 months from the date of resignation, the second respondent, may thereafter continue in his field of employment.
- [12] Where the interim relief sought is alleged to be urgent it is appropriate to act with expedition in launching the application. This was not the case in the present matter. The applicants delayed in launching the application then prosecuted the application with haste leaving the respondents with little time to respond. The issues raised by the first respondent require substantial consideration. The discussions appear to have closed after the proof of transfer and questions of outstanding money and leave were raised by the respondents. Counsel for the applicants conceded that these issues could be addressed in Part B once the interim order was granted. The issues related to remuneration, leave and reciprocity and the transfer in terms of the LRA should also be dealt with in due course as they were raised for the first time in the heads of argument. On their own version and on the application of the *Plascon-Evans* rule² these issues were not raised in the heads of argument for the first time, they were raised in the answering affidavit and Styles & Co did not reply when the opportunity arose to address it.
- [13] In summary, I have had regard to the applicants' version that the matter is urgent as they stand to lose a substantial sum of money if the application was not considered urgently. However, the applicants did not indicate what amounts they

² *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 523 A at 634H-635B

consider “huge”. This may be premature at this stage if the matter were to proceed in the normal course. They, in any event, have an alternative remedy i.e a claim for damages. Mr. Sean Style’s intimation in correspondence attached to the affidavits that they will not walk away from R45 000 per month in commission and that over a period of 12 months translates to a loss of R1 260 000 to the applicants is not the issue.

[14] In any event, the second respondent indicates (without any contradiction) that Styles & Co did not pay his increased salary, and failed to pay his leave. The new contract offer made by STS effectively reduced his salary. The restraint, will limit his income earning ability having regard to his experience and his ability for the period of the restraint. It cannot be overlooked that the applicants have not attached proof of the transfer in terms of the LRA and there is no proof of payment by STS. Similarly, the respondents’ calculation relating to monies owed and the calculation thereof require expansion which the second respondent could not have accomplished in the two days afforded him to respond. There was also no affidavit indicating how the second respondent was instrumental in securing the change in respect of the 12 persons who changed to Alt Risk and whether it was service or support related or an unduly solicited change.

[15] Where an applicant seeks interim relief on an urgent basis, it must do so with maximum expedition. The non-compliance with the provisions of Uniform Rule 6(12) requires the applicant to explain the delay, the applicants’ explanation that the parties were in communication does not address the delay. The urgency is self-created. The prejudice which counsel alluded to is financial which can be recovered in due course as the applicants have proceeded against the respondents. Thus, the submission that they will not recover any losses ignores that they have launched this application against the respondents.

[16] The principles applicable in restraint of trade agreements are trite.³ In *Reddy v Siemens Telecommunications (Pty) Ltd*⁴, the Court noted the decision in *Magna Alloys* where the Court reversed the common law position and held that:

“agreements in restraint of trade were valid and enforceable unless they are unreasonable and thus contrary to public policy, which necessarily as a consequence of their common-law validity has the effect that a party who challenges the enforceability of the agreement bears the burden of alleging and proving that it is unreasonable. The effect of the judgment is summarised in *J Louw and Co (Pty) Ltd v Richter and Others* 1987(2) SA 237(N) at 243 B-C:

'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.'

[17] Recently, the Constitutional Court held:⁵

“It is clear that public policy imports values of fairness, reasonableness and justice. Ubuntu, which encompasses these values, is now also recognised as a constitutional value, inspiring our constitutional compact, which in turn informs public policy. These values form important considerations in the balancing exercise required to determine whether a contractual term, or its enforcement, is contrary to public policy.

[18] Applying the above dicta to the facts of this matter, the application was launched in December 2022 where the restraint is applicable for a limited period of 12

³ Gleaned from decisions in our law which comes from English law that restraints are valid and enforceable as long as they are not contrary to public policy (*Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984(4) SA 874 (A)).

⁴ *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA)

⁵ *Beadica 231 CC and Others v Trustees, Oregon trust and Others* 2020 (5) SA 247 (CC) para 72.

months. Reliance by counsel for the applicants on *Slo Jo (Pty) Ltd v Beedle and Another* [2023] 1 BLLR 68 LC does not assist the applicants because even if I accept that STS stepped into the shoes of Styles & Co and became the employer of the second respondent, it follows that they had to take on all obligations in terms of the agreement which included the payment of salary, leave pay due and commission in terms of the contract of employment. The second respondent has a claim against STS for the leave and salary and commission negotiated with Styles & Co. The reciprocity defence raised by the respondents is applicable against STS and Styles & Co.

[19] The present matter is similar to the facts in *Reddy* above⁶, where the restraint was for 12 months. On appeal, it was held that the court correctly treated the matter as a substantial application for final relief. In that matter, the Supreme Court of Appeal held that the applicants had also sought relief through motion proceedings where final relief may be obtained where the facts stated by the respondent together with the admitted facts in the applicants' affidavits justify an order irrespective of where the onus lies.⁷

[20] I am not persuaded that an urgent order for relief is justified on the facts of this matter.

[21] For the reasons given above I make the following order:

Order

'The application is struck from the urgent roll with costs.'



SC MIA
JUDGE OF THE HIGH COURT
JOHANNESBURG

⁶ *Reddy* above at para 4

⁷ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 523 A at 634H-635B

Appearances:

On behalf of the applicants : F A Darby

Instructed by : MC Attorneys

On behalf of the respondents : J W Kloek

Instructed by : Rudolf Buys Attorneys

Date of hearing : 13 December 2022

Date of judgment : 04 April 2023