

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION – PORT ELIZABETH

CASE NO: 3687/11

Heard: 15 December 2011`
Delivered: 31 January 2012

In the matter between:

MUSTEK LIMITED

APPLICANT

and

MATILDA MARIE ROUX

1ST RESPONDENT

BENEFIT IT SERVICES (PTY) LTD
t/a METRO COMPUTER SERVICES

2ND RESPONDENT

JUDGMENT

MAGEZA AJ

[1] Applicant approached this Court by way of urgency seeking the following relief:

“1...

2. That the First Respondent be and is hereby declared to be in contempt of the order issued by this Court in Mustek Limited v Matilda Marie Roux and Others (Unreported) under case No. 345/11 delivered on 1 April 2011 ("the order");

3. That the First Respondent is directed to pay a fine of R10 000,00 by no later than 15h00 on 14 December 2011, such fine being payable at the office of the Registrar of this Court;

4. That the First Respondent is sentenced to three months imprisonment in the event of the fine mentioned above not being paid timeously, fully or at all;

5. That the First Respondent is sentenced to three months imprisonment, wholly suspended until 12 February 2012, on condition that she not again be committed for contempt of the order during the period of suspension;

6. In the alternative to paragraphs 3 to 5, that this Honourable Court impose such fine and/or imprisonment on the First Respondent as it may deem fit;

7. To the extent only that it may be deemed necessary, that it be declared that the 12 month period referred to in paragraph 6 of the order terminates on 12 February 2012;

8. That the First Respondent pay the costs of this application on an attorney and client scale;

9. That in the event of the Second Respondent opposing this application, it be ordered to pay the costs of the application on a party and party scale jointly and severally with the First Respondent, the one paying the other to be absolved."

The relief sought is not opposed by the Second Respondent.

[2] The salient background covers by way of detail that First Respondent was previously employed by the Applicant, an Information Technology company whose main business entails the assembly, marketing, sale, distribution and support of computer hardware. First Respondent was employed as a Regional Sales Manager and later promoted to Divisional Director exclusively managing Applicant's sales relationships with its customers within the Eastern Cape Province for a period of about 10 years. In sum, she had been in the employ of the Applicant for a total of some 17 years. In this last senior position, she became the face of the Applicant's business. Her employment with Applicant came to an end when she submitted a letter of resignation dated 11 November 2010, which resignation was contingent on her serving a three month notice period ending February 2011. As part and parcel of the First Respondent's employment agreement, a restraint of trade clause in favour of Applicant bound her not to accept employment for 12 months with any of the Applicant's competitors in the event of the termination of her employment with Applicant. It is common cause that the agreed restraint period is a 12 month period from date of termination of the employees' services with the employer. One of the principal differences of opinion in this dispute is the date on which such termination took effect.

[3] Following what the Applicant refers to as a previous breach of this restraint provision, Applicant sought and successfully obtained an interdict against the First Respondent under Case No 345/11 before Alkema J on 1 April 2011. Save to say First Respondent had in the aforesaid matter, been found by Alkema J to have taken up an employment opportunity with a competitor in contravention of the restraint alluded to above, and the Court having made the Order on which the present relief is premised, the balance of the facts therein are not particularly material for my findings herein.

[4] The Contempt of Court alleged and on which the Applicant proceeds, is founded on Applicant's view that the only reasonable construction or interpretation of that Court's Order is that despite the resignation (subject to the 3 month notice period) having been tendered on 11 November 2010, the resignation was effective only from 12 February 2011 and the restraint consequently expires on 12 February 2012. The reasoning, in Applicant's view, underlying this proposition is set out in its founding and replying papers as will be evident herein.

[5] Paragraph 6 of the Order of Alkema J confirming the Interdictory relief is worded as follows:

“...The order set out in paragraphs 1.1 to 1.5 of the *Rule Nisi*, as amended above, shall operate against first respondent for a period of 12 months calculated from the date of her resignation from her employment with applicant.” (my underlining).

Applicant contends that in flagrant disregard of the Order of Alkema J, the First Respondent on 14 November 2011, yet again took up employment with a competitor of the Applicant, the Second Respondent, in breach of the restraint and in contempt of the Order. That despite this transgression being brought to her attention by way of a letter dated 16 November 2011, First Respondent refused to desist from her unlawful conduct. Second Respondent is, as the name suggests, an Information Technology entity based in Port Elizabeth. Applicant describes the Second Respondent as a competitor in the fields of the sale, marketing, distribution and support of computer products and services in the Eastern Cape within the Municipal and Government markets as well as in the corporate field.

[6] The First Respondent's challenge to the relief sought, ably argued on her behalf by Mr Moorhouse, is based on the following propositions, that;

6.1 First Respondent disputes that the restraint commenced 12 February 2011 and contends that the same took effect on the date of the submission of the notice to resign dated 11 November 2010;

6.2 The Second Respondent does not carry on business in competition with the Applicant;

6.3 The First Respondent furthermore contends that she commenced her employment with the Second Respondent in the *bona fide* belief that the Order had ceased to be of effect on 11 November 2011, a belief said by First Respondent to have been strengthened by legal advice received by her from her legal advisors. This being the position it is argued, nothing suggests that First Respondent acted wilfully and *mala fide* in the alleged disobedience of the Order.

[7] Applicant in reply emphasises that First Respondent was at all material times aware of the provisions of her employment agreement inclusive of the requirement of serving a 3 month notice period prior to the formal effective termination of her employment. Applicant contends that despite the Applicant opting to accelerate the payment of her salary for the agreed 3 month notice period, she remained employed for the period paid for and could therefore not claim such period as part of the agreed restraint period. Applicant contends that the practice of relieving a senior employee in a sensitive position such as that occupied by the First Respondent immediately upon resigning is a standard practice to prevent what is feared as potential prejudice that could be caused to the employer by an incumbent with possibly conflicting interests.

[8] Applicant repeats the assertion that Second Respondent is a competitor and provides as an example instances of communications previously exchanged between itself and Second Respondent relating to price comparisons in respect of the supply of equipment tendered for from an educational facility in the Western

Cape. Relevant emails are annexed to Applicant's papers. Quite curiously, some of these emails requesting comparative quotes and prices from Applicant were penned by the First Respondent in the days immediately after she left the Applicant to take up the position in the Second Respondent's business.

[9] In considering the first contention pertaining to when exactly the resignation took effect, it is important to refer to the reasons alluded to by Alkema J in coming to his finding where, in particular at paragraph 9 of his judgment, he commented:

"The outcome of the hearing was that the first respondent was relieved of her duties as Divisional Director, and she was offered the position as Sales Executive. Her response was to resign from the employment of applicant. Her letter of resignation became effective on 12 February 2011. She intended to commence employment with Fourth Respondent from 1 March 2011. All of the aforesaid is common cause between the parties." (my underlining).

Moreover, at paragraph 78, the learned Judge had this to say;

"The effect of the aforesaid is that the first respondent will be restricted in her freedom to trade for 12 months calculated from her date of resignation in the geographical area of the Eastern Cape Province only..."

[10] Clause 9.2 of the employment agreement provided that;

"Subject to compliance with provisions of the Act the parties shall during the currency of this agreement have the right to terminate the employment relationship:

9.2.1. ...

9.2.2. On 3 (three) months written notice to the other party where the reason for the termination is based on a no fault termination.”

[11] First Respondent addressed a letter on 11 November 2010 to Applicant tendering her resignation worded in the following terms:

“Clearly our relationship no longer has the element of trust. In light thereof I hereby tender my resignation effective 11 November 2010.

My three month notice period shall start on 12 November 2010. Please indicate as to whether you require me to work my notice period or to be paid in lieu thereof.”

Applicant elected to pay the First Respondent all her salary and emoluments for the said 3 month notice period on the condition that she vacates its premises that same day. As is evident from the judgment of Alkema J, despite the Applicant’s decision to financially settle the three month salary without requiring the First Respondent to provide it with the services contracted for in its employment agreement, the effective date of resignation still remained 12 February 2011. The reference by Alkema J at paragraph 9 of his reasons could not be clearer and all ambiguity is removed by his reference therein that this effective date was at the time, common cause between the parties. It is also clear from the Court’s comments that the First Respondent had at the time abided the 3 month notice period well aware of her responsibilities towards the Applicant for the accelerated salary payment made to her encompassing the notice period. She was aware that she was still bound to the Applicant and could not take up employment in the paid-for period until, in her view, 1 March 2011. This view turned out to be correct save to add that this meant the restraint provisions in her employment contract did not allow her to take up employment with competitors for another 12 months from the effective date of termination, 12 February 2011. The restraint provisions were found to be valid by Alkema J, who in the process stated that Applicant’s interests in the sanctity of the contract weighed quantitatively and qualitatively against the First Respondent’s interests not to be restricted in her

economic activity and productivity thus upholding the principle of *pacta servanda sunt*.

[12] Taking into account not only that a simple reading of the judgment contains this reference to the effective date of resignation as 12 February 2011, but also the fact that this had been an issue that had been common cause between the First Respondent and the parties involved in the said matter, it eludes me as to how the First Respondent would now assert the contrary in her papers before me in this sequel. I am also at a loss as to how First Respondent can confidently state that her legal advisors had gainsaid the explicit finding by the said Court that the effective date had in those proceedings been collectively acknowledged and agreed as 12 February 2011 and advised her otherwise.

[13] Mr Moorhouse argued that the act of resignation is a unilateral act by an employee and is an act which validly terminates the employment contract and relationship between the employer and employee from the moment that the employer becomes aware of the said resignation. On this basis he argued therefore that the First Respondent's employment with the Applicant was terminated on 11 November 2010, that is, on the date of her resignation. Mr Moorhouse referred me to, *inter alia*, the decision in Mafika v South African Broadcasting Corporation Ltd [2010] 5 BLLR 542 (LC).

For a start, this decision is distinguishable as the contract involved therein was a 36 month fixed term contract as opposed to that pertinent herein, that is, a long term contract making provision for a 3 month notice period. All that was at issue in the said decision was whether the Applicant therein, having sent an SMS (short message service) communicating through a mobile phone with his employer that he "quit with immediate effect", then changing his mind 6 weeks later, was a lawful and binding notice of resignation from the moment it came to the employer's attention and became irrevocable without requiring acceptance by the employer.

On the contrary, I am persuaded by the decision of Cheadle AJ in Lottering v

Stellenbosch Municipality [2010] 12 BLLR 1306 (LC), where he had this to say at para 14 and 15:

“14. In an indefinite contract, either party may terminate the contract on notice. A resignation in this context is simply the termination by the employer on notice. There does not have to be a specific provision to that effect, it is an inherent feature of an indefinite contract and if there is no agreed notice, the notice must be reasonable (provided that it is not less than the minimum notice prescribed in section 37 of the BCEA). If the contract is for a fixed term, the contract may only be terminated on notice if there is a specific provision permitting termination on notice during the contractual period – it is not a feature of this kind of contract and accordingly requires specific stipulation.

15. The common law rules relating to termination on notice by an employee can be summarised as follows:

15.1 Notice of termination must be unequivocal (*Putco Ltd v TV & Radio Guarantee Co (Pty) Ltd* 1985 (4) SA 809 (SCA) at 830E).

15.2 Once communicated, a notice of termination cannot be withdrawn unless agreed (*Rustenburg Town Council v Minister of Labour* 1942 TPD 220 and *Du Toit v Sasko (Pty) Ltd* (1999) 20 ILJ 1253 (LC)).

15.3 ...

15.4 Subject to the waiver of the notice period and the possible summary termination of the contract by the employer during the period of notice, the contract does not terminate on the date the notice is given but when the notice period expires (*SALSTAFF obo. Bezuidenhout v Metrorail* [2001] 9 BALR 926 (AMSSA) at paragraph [6]).” (my underlining).

This in my view disposes of the contention that the resignation took effect on 11

November 2010 prior to the notice period being served. First Respondent does not propose that the Applicant waived the notice period provided for in the agreement. The Applicant has performed its obligations in accordance with the agreement by in fact settling her emoluments for the full 3 month period and First Respondent happily accepted this accelerated payment. All that First Respondent was reciprocally expected to do in turn was to honour the notice period without the need for her to present herself to Applicant's offices on a daily basis due to what Applicant says it feared and as a precautionary measure.

[15] I have already pointed out that despite Second Respondent being joined in these proceedings, it did not oppose the relief sought by Applicant. It thus fell on First Respondent to raise issue with whether the Second Respondent is a competitor of Applicant operating within the sphere of product sales and supply as well as client base. First Respondent offers a simple denial that the Second Respondent is such a competitor but does not offer any assistance by way of explaining what her intended future employer precisely does. Her own expertise is in Information Technology and indeed she has been hailed as having had a stellar and impressive history in that field whilst with Applicant. There is no suggestion that she is looking to engage in any vocation other than what she is best qualified to do, that is, continued sales and marketing within the sector.

[16] When considering the meaning of a provision contained in an Order of Court,

“The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well known rules. See *Garlicke v Smartt and Another*, 1928 A.D. 82 at 87; *West Rand Estates Ltd, v New Zealand Insurance Co. Ltd* 1926 A.D. 173 at p.188. Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention.”
– per Trollip J.A., Firestone South Africa (Pty) Ltd v Genticuro A.G.

1977 (4) SA 298 (A) at 304 D-F.

[17] Contempt of court as an offence is fundamental to the administration of justice and the rule of law. It:

“requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained”

Per Sachs J in, Coetzee v Government of the Republic of South Africa; Matiso v Commanding Officer, Port Elizabeth Prison 1995 (4) SA 631 (CC).

Furthermore:

“It permits a private litigant who has obtained a court order requiring an opponent to do or not do something (*ad factum praestandum*), to approach the court again, in the event of non-compliance, for a further order declaring the non-compliant party in contempt of court, and imposing a sanction.”

See: Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) at page 332 para C-D per Cameron JA (as he then was).

[18] The test for when disobedience of a civil order constitutes Contempt has come to be stated as whether the breach was committed ‘deliberately and *mala fide*’. See: Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg Co Inc 1996_(3) SA 355.

[19] In Fakie NO (above) the court at p 333 para C-E, went on to state:

“A deliberate disregard is not enough, since the non-complier may genuinely,

albeit mistakenly, believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith).

These requirements – that the refusal to obey should be both wilful and *mala fide*, and that unreasonable non-compliance, provided it is *bona fide*, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent.”

[20] As regards the standard of proof required, the decision of Pickering J in Uncedo Taxi Service Association v Maninjwa & Others 1998 (3) SA 417 (ECD) at page 428 para A to the effect:

“In my view, therefore, insofar as the summary procedure by way of notice of motion places an *onus* upon the offender and requires proof of guilt only upon a balance of probabilities, it is in conflict with the Constitution and such conflict is neither reasonable nor justifiable in terms of s 36. I am in the circumstances satisfied that in motion proceedings the guilt of the offender must be proved beyond reasonable doubt...”

[21] This position has since been confirmed by the full bench of this court in Burchell v Burchell [2006] JOL 16722 (E). There the court found (a) that ‘civil contempt’ remains a criminal offence and that a Respondent is an accused person; (b) that whilst the Applicant has to prove the elements of civil contempt beyond reasonable doubt, the application procedure is constitutionally competent to accommodate the altered onus.

[22] I am not persuaded that Applicant and her legal representatives could misinterpret the Order of Alkema J preceded in his reasoning by the reference to the effective date of resignation as being 12 February 2011. The authorities clearly require that the Order be read in context and within the ambit of the judgment as a whole without isolating the Order. This position was on a plain reading of the judgment one which was commonly understood to be so by the parties at the time and accepted by the Court on that basis. I can come to no conclusion other than that First Respondent was and remains well aware that this is the position. This being the case, Applicant and her legal advisors could not have entertained a *bona fide* belief that it could commence employment prior to the lapse of the restraint period dating the 12 months from 12 February 2011.

Furthermore, I am also unable to find any support for the First Respondent's denial that the Second Respondent is a competitor in the terms and manner alluded to by Applicant. Indeed, once she took up employment with the Second Respondent, First Respondent brazenly communicated by email sourcing product from Applicant for onward supply. There was a product supply agreement between Second Respondent and Applicant, which supply agreement was understandably cancelled by Applicant on First Respondent taking up employment with Second Respondent. She had joined them well aware of the nature of this business model and in contravention of the restraint.

I say this mindful of the unfortunate consequences that flow from this type of infraction. The bar to reach in order to come to the conclusion that a Respondent acted wilfully and *mala fide* is not light and proof beyond reasonable doubt is the imperative standard. I have no doubt in the present matter that on the facts, this obligatory requirement has been met. Not only does the Order of Alkema J (read in the context of the reasons and judgment as a whole) not present doubt or ambiguity, it alludes to the effective date of her resignation as one commonly understood to be the case at the time that that matter was heard. Moreover, the plain language of the judgment and Order avoids any obscurity or double meaning. First Respondent's allegation that she was wrongly advised provides little detail and is unsupported by

any evidence of, for example, communications exchanged with legal advisors, something which is normally the case in matters of such importance. She knew with complete precision and particularity that Second Respondent's business interests were of the same nature as that of the Applicant. She herself was involved in requesting comparative pricing from Applicant. I can do no more than refer to the decision of Alkema J in the previous matter where he stated that this restraint of trade agreement is in place to prevent the salesperson from damaging the business of the employer, which damage may be considerable or even fatal, and the employer has a right to expect the Courts to enforce the terms of such agreement.

[23] I am also sufficiently satisfied that this matter is urgent. First Respondent took up employment on 14 November 2011 and a demand for her to desist was addressed to her 2 days later on 16 November 2011. She refused to abide by the demand and failed to assuage the Applicant's distress by providing it with the undertaking required of her by 17 November 2011. This conduct being in the correct view of Applicant evidently in breach of the restraint Order, necessitated an immediate response.

In Protea Holdings Ltd v Wriwt and Another 1978 (3) SA 865 (W) at 868H, Nestadt J held that as:

“One of the objects of contempt proceedings is by punishing the guilty party to compel performance of the order, it seems to me that the element or urgency would be satisfied if in fact it was shown that the respondents were continuing to disregard the order of 3 August 1977. If this be so, the applicant is entitled, as a matter of urgency, to attempt to get the respondents to desist by the penalty referred to being imposed.”

In addition, it is certainly in the public interest that in the administration of justice and the vindication of the Constitution that an ongoing failure or refusal to obey an Order of Court is a matter attended by urgency and must be dealt with as expeditiously as

circumstances and the dictates of fairness allow. – See in this regard the observations of Plasket AJ in Victoria Park Ratepayers Association v Greyvenouw CC and Others [2004] 3 All SA 623 (SE) at paras [26] and [27].

[24] In the view I take of the matter and there being no evidence to establish a reasonable doubt both in so far as the effective date of the resignation and date of lapse of the restraint being 12 February 2012, as well as the fact that Second Respondent is a competitor, I am left with little else but to find that the principles governing Contempt of Court have been established beyond reasonable doubt.

[25] In arriving at a proper sentence a Court must have regard to the triad of factors, that is, the crime, offender and interests of society. - S v Zinn 1969 (2) SA 537 (A). Furthermore punishment must be reasonable, taking into account the individual's moral blameworthiness. All factors in mitigation and aggravation must be similarly considered. One of the difficulties of sanctioning an errant respondent in these sort of proceedings is the dearth of suitable precedent, taking into account the specific facts of the case at hand. The facts herein are based on a restraint of trade as a tool for the protection of private commercial and business interests. The infraction arises simply by reason of the breach of the Order in the sense of taking up employment with another and not so much by causing the harm the restraint seeks to protect, for example, by inveigling the customers of the erstwhile employer. In other words, unlike in theft cases where some object or item is in fact appropriated or an attempt is made to unlawfully appropriate with an intention to deprive its owner, no such act is required to commit the offence. There is consequently no discernible loss to the employer. The offence has been authoritatively described in the following terms:

“In the hands of a private party, the application for committal for contempt is a peculiar amalgam, for it is a civil proceeding that invokes a criminal sanction or its threat. And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience of its orders, since disregard sullies

the authority of the courts and detracts from the rule of law.”

See Fakie N.O. v CCII Systems (Pty) Ltd [2006] ZASCA 52; 2006 (4) SA 326 (SCA) at 334 F-G.

I do not imagine that this exposition of the law intends to convey that the underlying premise for the infraction, in this case the breached restraint clause, should not guide the Court in assessing and weighing the various factors in an attempt to arrive at a suitable penalty. Indeed I imagine that would constitute weighty misdirection. In the matter before me for example the most part of the restraint was indeed observed and served. This is a factor that I must consider. First Respondent took up employment less than 3 months before the expiry of the restraint. This restraint lapses on 12 February 2012 from which date First Respondent can lawfully pursue her career and make a living. There is, to all intents and purposes, no more than a moderate number of weeks left of this restraint and she did dutifully observe the overwhelmingly substantial part thereof. There is also no real or actual loss occasioned the Applicant.

[26] The next factor to take into cognisance is that this being a civil matter, costs ordinarily follow the result and if, as I intend to order, the Respondent is to pay the Costs herein, she will needless to say be more disadvantaged than an offender appearing in connection with an ordinary criminal matter. This is another peculiarity of civil Contempt. Clearly she has been unemployed for a considerable duration whilst lawfully abiding the restraint. In this period she was clearly without income and a substantial fine in itself may well be imposing an unaffordable obligation. Direct imprisonment without the option of a fine is certainly out of the question.

[27] I am of the view that in all the circumstances, the following Order must ensue;

1. The Application succeeds.

2. First Respondent is found guilty of Contempt of Court.
3. In the result First Respondent is directed to pay a fine of R1 000.00 by no later than 15 February 2012.
4. In the event of the fine mentioned above not being paid timeously fully or at all, First Respondent is to undergo ten days imprisonment.
5. First Respondent is to pay the costs herein. .

MAGEZA AJ

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