

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

CASE NO.: 1919/2017

In the matter between:

IZIKHATHI SECURITY (PTY) LTD

Applicant

And

JOHANNES STEPHANUS ZAAYMAN

First Respondent

ORAZONE (PTY) LTD t/a PROPSEC

Second Respondent

JUDGMENT

BESHE J:

[1] Applicant approached this court for an order in the following terms:

That first and second respondents are hereby interdicted and restrained from date of this order from:

1.1 Approaching directly and indirectly, or assisting any other person in approaching directly or indirectly any existing client and or customer of the applicant or engaging with any of them in order to solicit their business for the benefit of the second respondent for a period of 6 months.

1.2 Approaching directly or indirectly, or assisting any other person in approaching directly or indirectly current employees of the applicant with a view to inducing and or enticing them to work for the second respondent and or first respondent.

[2] Applicant is a company that is duly registered in accordance with the company laws of this country. It is in the business of providing security solutions to corporate clients throughout South Africa.

[3] First respondent is an adult male person who was previously employed by the applicant. He is currently the director of second respondent. It appears to be common cause that second respondent also provides similar services to those provided by the applicant.

[4] The following facts emerge from the founding affidavit deposed to by the Group Managing Director of the applicant, **Mr Gary Michael Barnett**.

During the course of his employment in applicant, first respondent was tasked with, *inter alia*, attracting new clients and **Barnett** would then secure the business. During the period first respondent had access to applicant's clients' files, lists, contract information, requirements and budget as well as information relating to individual client security solution and cost thereof. He also had access to employee records which contained their salaries and benefits.

[5] First respondent resigned from the employ of the applicant on the 1 April 2017 giving one month's notice of his intention to leave on the 30 April 2017.

[6] It is common cause that second respondent was registered on the 9 February 2017. On the 15 March 2017 first respondent applied for registration with the Private Security Industry Regulatory Authority (PRISA). He got his certification from PRISA on the 7 April 2017.

[7] It is also common cause that first respondent resigned from applicant to start his own security company.

[8] According to **Barnett**, on 26 April 2017 he received correspondence from one of applicant's clients, Brooks on the Bay, notifying applicant of the termination of its contract with applicant.

[9] Two days thereafter on the 28 April, a further notice of termination was received from another client Kinghurst. Applicant alleges that the respondents have made use of confidential information pertaining to the business of the applicant, which first respondent acquired during the course of his employment with the applicant, to springboard second respondent's business. Applicant alleges further that first respondent asked its operations manager, **Ms Lorraine Loggenberg** to assist him with the rostering of his guards using the rostering system of the applicant. This is confirmed by **Ms Loggenberg**.

[10] It is applicant's further allegation that first respondent tried to entice **Mr John Loggenberg** to resign from applicant and work for second respondent. He also told **Mr Loggenberg** he will be taking clients Bluekap, Brooks on Bay, Kingshurst, Summerstrand and Walmer. Also that he has approached guards at Brooks on Bay and Kingshurst to come and work for second respondent. That indeed, from the 1st of May 2017 a number of guards from Summerstrand complex who had been under applicant's management, started working for the second respondent.

[11] **Mr Loggenberg** confirms having been approached by second respondent as stated above.

[12] Applicant contends that the actions of the respondents amount to unlawful competition.

[13] **Mr Barnett** states that he met with second respondent on the 25 April 2017 whereupon he requested that the latter return the company cell phone, laptop, petrol and credit cards and that he should not return to applicant's office. The said items were returned the following morning.

[14] Further notices of resignation / termination have since been received by the applicant, being from Kinghurst security guards (8 May 2017) and from Bluekap (22 May 2017).

[15] Applicant contends that first and or second respondent are unlawfully interfering with applicant's right to fair and honest trade by soliciting business from applicant's existing clients and by enticing its employees to resign. Further that respondents utilize confidential information first respondent amassed whilst working for the applicant, to spring board the second respondent, and that this is to the detriment of the applicant.

[16] From as early as April when applicant received notification from two of its clients that they will be terminating their contracts with applicant, applicant queried the said decision from such clients. In addition thereto it was indicated to the two clients that applicant will be approaching the court for the necessary relief. The same threat was conveyed in a letter from applicant to the first respondent in April. Later during May applicant called on the respondents to give an undertaking to desist with the wrongful acts of unlawful competition. Respondents furnished such undertaking – not to compete unlawfully. They however denied that their actions constituted unlawful competition. Respondents also pointed out that they were not under any restraint of trade.

[17] It is common cause that this application was launched on the 1 June 2017.

[18] In opposing the granting of the relief sought, respondents raise, *in limine*, lack of urgency. This on the basis that applicant was aware months before the application was launched that:

When first respondent resigned early in April the intention was to go into business as his opponent or competition. This, according to first respondent came through during his discussion with **Barnett** in January 2017. The latter was also aware that some of applicant's clients would follow second respondent. Applicant's knowledge in regard also stems from the notices of termination and resignation from applicant's clients and staff (guards) respectively that were received during April.

[19] Respondents contend that all the facts upon which this application is based were known to the applicant since January alternatively April 2017. Applicant denies he was aware of second respondent's intentions when he resigned from applicant. It is also denied on behalf of applicant that there was delay in launching these proceedings. That attempts were made to avoid having to go to court. And that based on respondents' undertaking that there will be no unlawful competition coupled with the fact that no other notices of termination were received until May 22, applicant relaxed or put his guard down.

[20] In my view, this is a reasonable explanation on the part of the applicant for the delay in launching these proceedings.

[21] As far as the merits are concerned, first respondent states that he has been employed in the security business for thirteen (13) years. During that period he has developed skills in the management of the security business, developing skills in risk assessment and management to applicant's clients' satisfaction. First respondent further alleges that he did not receive any training from applicant. Through his interaction with representatives of their customers, or based on such interactions he improved their security requirements. His reputation in this regard gave him the ability to compete and acquire new business without soliciting applicant's clients.

[22] First respondent denies using any confidential information of applicant's business stating that he does not have any such confidential information. Further that applicant does not have any client files and he did not have access to any client files. He has dealt with applicant's clients in Port Elizabeth for over a decade, he knows their managers or supervisors by name and has been dealing with them for a long time. First respondent retorts that there were no files to speak of. The folders he had in his work laptop were compiled by him and contained clients' folders of procedures and protocols. The information is of no use to him and in any event the company laptop and cellular phone which had clients' cell phone numbers were returned to the applicant. According to him telephone numbers and contact details of applicant's clients are public knowledge or in the public domain. They appear from the signage in most of the businesses concerned. He denies that he approached contact persons in applicant's clients' companies, but alleges that as soon as they heard he was leaving applicant's business, the customers approached him proposing to migrate their business to the second respondent. That this is

due the fact that he is known to be highly skilled in the security industry. First respondent denies being privy to applicant's clients' budgets. That PRISA has a pricing structure that is recommended to its members. These costs are therefore public knowledge. The same applies to salaries and benefits – guards being paid according to the sectorial determination.

[23] In an bid to show that he did not solicit applicant's clients, first respondent states that he prepared a quote for **Lindi Domoney**, the centre manageress of Brooks on the Bay at her request. So was the case with Kingshurst. A quote was requested by **Sister Debora Ferrant** who is in charge of the property and security on the premises. This was upon her learning that first respondent was leaving applicant to open his security company. Further, that Kinghurst terminated their contract with applicant because they were dissatisfied with **Mr Loggenberg's** service which complaints include his attitude towards security guards. That is also for this reason that he would not consider employing him. He denies communicating with him about his future plans or telling him that he will take applicant's clients with him. **Loggenberg's** attitude towards guards is confirmed by one of the guards **Mr Mandla Takane**.

[24] The awarding by Bluekap of their security work to the second respondent resulted from a request from their representative, **Melanie Bird** for a quote on the 12 May 2017. Further that upon being asked by applicant why Bluekap was terminating the contract with applicant, **Ms Bird**, gave the reason as *inter alia*, that the service they received from applicant has always been very professional, that she valued the personal attention they received. But that is currently lacking at the time of the response to the applicants. He has always met and dealt with first

respondent from applicant's management. However there was no communication from applicant about what the arrangements would be after first respondent's resignation.

[25] First respondent accuses **Mr Barnett** of failing to disclose that a representative of Bluekap informed applicant why they decided to terminate their contact with applicant, showing that Bluekap and other customers left in their own volition and for reasons as cited by **Ms Bird**. First respondent denies that he is competing unlawfully with the applicant. He points out that he is not under a restraint of trade. He states he will however attempt to solicit business from any potential customer. Denies his conduct is unlawful.

[26] In his reply **Barnett** seems to confirm that certain functions and, I would imagine and documents, pertaining to quoting and costing of new business were retained at applicant's head office in Durban and that all costings and quotes took place from Durban. This, **Barnett** attributes to incompetence on the part of first respondent in this regard. He denies that first respondent did not receive any training from applicant. He retorts that first respondent attended many meetings with him where he told him how the company is run and what make applicant different from the rest. He contends that first respondent is using inside knowledge gained from his employment with the applicant to his advantage to the detriment of the applicant. Hence applicant submits it is entitled to the protection of this court.

[27] The issue to be determined in this matter is whether the actions of the first respondent, acting on behalf of or as a representative of second respondent amount to unlawful competition or not.

[28] What amounts to unlawful competition? Invariably, a determination of what constitutes unlawful competition, will involve the balancing of the interests of former employer (the complainant who cries unlawful competition) and the interest of the competitor and ex-employee of the complainant. This is so precisely in the environment of a free market economy in which free competition amongst those participating in the market is expected or is supposed to prevail. This is also in keeping with *Section 22 of the Constitution* which provides:

“22. Freedom of trade, occupation and profession.–

Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”

In the publication *Van Heerden – Neethling: Unlawful Competition, Second Edition*, the author states that “At first glance the concept of unlawful competition is self-explanatory: it encompasses any act which is directed at gaining an advantage over and / or prejudicing a competitor(s) in the competitive struggle and which is censured by law”.¹ It is trite that what the law censures or what is restrainable is unlawful competition. It is also trite that the unlawfulness concerns the use of the former employer’s confidential information or documents to compete with the former employer. The author of the publication *Van Heerden – Neethling “Unlawful Competition”*² seems to suggest that confidential information is worthy of protection by courts if such information amounts to trade secrets. In addition to qualify as such (trade secret) the information must be secret or confidential, or in other words, only be available and known to a restricted number of people, and

¹ Page 4.

² Page 227.

not be public knowledge. It must also be of economic value to the former employer. I have already indicated that first respondent denies having applicant's confidential information. He denies receiving any training from applicant. He alleges he honed his skills over the years (period of some thirteen (13) years) during which he interacted with representatives of applicant's clients. As a result of which interactions he incrementally made improvements on their security requirements. He denies having any client files or having had access thereto. That information / contact details pertaining to applicant's clients is in the public domain, so is industry pricing structure as well as salaries and benefits for guards.

[29] If the matter is decided on respondents' version as it should be, this being an application for a final interdict, it occurs to me that first respondent does not have any confidential information or trade secrets that belong to the applicant.

[30] In *Motion Transfer & precision Roll Grinding CC v Carsten*³ the following was stated:

“The types of information which are capable of qualifying as confidential in terms of these requirements are unlimited but undoubtedly include technical, business or marketing information. The categories of such information which the courts have held to be trade secrets are once again conveniently listed by Van Heerden and Neethling *op cit* at 227 as follows:

“A technical process, computer software, the know-how of an undertaking, an unpublished trademark, customer lists, customer connections, business conversations, credit records, price lists and tender prices.””

³ [1998] 4 All SA 168 N at 175.

There are similarities between the facts in *Motion Transfer supra* and the present matter. At page 177, the following was stated:

“In the present case there is no proof whatsoever that the respondents stole the applicant's customer list or even memorised it without purloining the actual document. The most that can be said is that the first respondent in particular, on his own admissions, learned in the course of his employment the identity of a number of the applicant's clients and that respondents have, since they commenced trading in competition with the applicant, solicited work from some of those clients. In my view, it has not been shown in the first place that their approach to those clients was because those clients featured on the applicant's customer list; and, secondly, even if the first respondent originally learned of their identity because they were on the list, there is nothing to show that his subsequent dealings with them were not of such a nature as to render it inevitable that he would remember them and carry away their identity in his head as potential customers when he left the applicant's employ. I accordingly do not think that the applicant has proved, even *prima facie*, that his conduct in approaching them was unlawful; and it was, in my view, no more than a legitimate exercise of his right freely to compete with the applicant after he left its employ. To hold that under those circumstances he should be precluded from approaching any potential customer who happened to have features on the applicant's customer list would be unduly to stultify that right and against public interest.”

Later in the judgment *Page J* had this to say:⁴

“As regards the alleged unlawful misappropriation of the applicant's goodwill, flowing from the first respondent's relationship with the applicant's clients built up during the course of his employment, it is obvious that every employee occupied in the field of customer relations must become acquainted with and build up a relationship with his employer's customers. It would be totally unrealistic to expect him after termination of his employment to shun all such customers.”

In my view these remarks apply with equal force *in casu*. This appears to be the case with first respondent, there is no evidence that he has applicant's trade secrets. The information he has is either in the public domain or of general application in the industry. He does not have client

⁴ Page 177.

lists or files. He knows their representatives' personally through his longstanding interaction with them, through which he honed his skills in the security industry and managed to improve on their requirements. There is no reason not to accept that it is the representatives of applicant's clients who approached the first respondent with a view to migrating to his newly formed company – the second respondent. Respondents attached correspondence to prove this. In my view, first respondent can hardly be said to be riding on the crest of applicant's good will. If anything his reputation, *albeit* gained during his employment with the applicant, preceded him or placed him in good stead.

[31] Applicant complains about all the steps first respondent took whilst still in the employ of the applicant to set up his company. I do not think he can be faulted for doing that if his intention was to resign and set up a rival company, he did what any wise person would do – prepare for such move.

[32] It must also be noted that the first respondent is not under any restraint of trade by the applicant. There is no agreement of restraint of trade between them.

[33] I am not persuaded that applicant has made out a case for relief that it seeks.

[34] Accordingly the application is dismissed with costs.

NG BESHE
JUDGE OF THE HIGH COURT

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