

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

Case No: 3603/2019

Date heard: 23 January 2020

Date delivered: 30 January 2020

NOT REPORTABLE

In the matter between:

GIZA TECHNOLOGIES (PTY) LTD

Applicant

And

JEFFREY PETER SHARPE

First Respondent

AMOGELONG PETRONELLA MATJEKE

Second Respondent

DURR AFRICA (PTY) LTD

Third Respondent

LUHLAZA INDUSTRIAL SERVICES (PTY) LTD

Fourth Respondent

JUDGMENT

Goosen J:

[1] In this application the applicant seeks orders restraining the first and second respondents from acting in breach of certain restraints of trade pending proceedings to enforce same. The application was brought as one of urgency. The urgency was confined to securing an expedited date for the hearing of the application for interim relief. The third and fourth respondents initially filed notices of opposition. These were later withdrawn and they now abide the decision of this court.

[2] The applicant (hereafter Giza Technologies) is a company specializing in mechanical and electrical engineering and turnkey projects. It is presently in business rescue. The applicant was placed under business rescue in September 2018. The application, which is prosecuted by the sole director of Giza Technologies, is brought with the consent of the business rescue practitioner.

[3] The first respondent (hereafter Sharpe) entered into a contract of employment with Giza Technologies on 2 January 2018. He took up employment as Projects and New Business Development manager. Sharpe resigned with effect 1 July 2019. He thereafter took up employment with the fourth respondent.

[4] The second respondent (hereafter Matjeke) entered into a contract of employment with Giza Technologies on 23 May 2017. She was employed as a Project Administrator and Quality Controller. She resigned with effect 4 November 2019. She has since taken up employment with the third respondent.

[5] In the case of Sharpe Giza Technologies relies upon a restraint of trade agreement which is incorporated in Sharpe's contract of employment. It also relies upon a Non-Circumvention, Confidentiality Agreement and Restraint of Trade (hereafter the Non Circumvention Agreement). In the case of Matjeke reliance is placed only on her contract of employment. Although she also concluded a Non Circumvention and Confidentiality Agreement said agreement does not include terms which constitute a restraint of trade. The latter agreement is relied on only insofar as it imposes certain confidentiality obligations.

[6] Clause 30 of Sharpe's Contract of Employment provides as follows:

"30. Confidentiality and Restraint of Trade

30.1. In accepting employment with the employer, it is acknowledged that during the course of his/her employment or other association with the employer, the employee will develop a close and personal relationship with the clients of the employer, and that the employee may, in the course of his/her duties, have access to all confidential information of the employer.

30.2 Such access may include, but is not limited to, information in relation to financial and marketing operations, customer data base, technical information and the employer's terms conditions

and methods of conducting its business, and/or any other information, confidential and otherwise.

30.3 The employee is prohibited, both during the tenure of the existing employment contract, and for a period of 24 months after termination of the existing employment contract, in any capacity whatsoever, from disclosing or discussing any information of whatsoever nature, including but not limited to, trade secrets, names of clients or other client information, methods of operation, information regarding systems, technical know-how, financial information, or any other information of whatsoever nature to, by or with any person other than the employer.

30.4 This restriction is applicable during the tenure of the employment contract with the employer and continues to be of full force and effect after the termination of the employment contract with the employer, for a period of 24 months.

30.5 The employee shall undertake to bind himself/herself to the non-circumvention, confidentiality and restraint of trade agreement hereto attached marked annexure "A".

30.6 The employee further undertakes not to be directly or indirectly interested in, or carry on, or to be engaged in or concerned with, any business or to be interested in or concerned with any company, firm, partnership, a close corporation, trust, undertaking or concern, either as an employee or in any other capacity of whatsoever nature, which carries on any business which competes in any way, either directly or indirectly, with the

business carried on by the employer for a period of 24 months after termination of this agreement.

30.7 The employee undertakes further not to persuade or attempt to persuade in any way, or to solicit, encourage or procure or attempt to solicit, encourage or procure the services of any employee of the employer, or approach in any manner whatsoever any employee of the employee to terminate that employee's employment contract with the employer.

30.8 The area of the confidentiality shall be throughout the Republic of South Africa. The area of restraint and conditions shall be applicable within 150 kilometres of any area where the company conducts business as well as area where the employer has established projects in, inclusive of a subsidiary of the employer and/or a client who a project has been seconded to.

30.9 The employee acknowledges that the restraints and restrictions placed upon him/her are reasonable as to subject matter, geographical area, and duration.

30.10 The employee acknowledges further that his/her experience, qualifications, knowledge and capabilities are such that he/she will be able to obtain employment after termination of his/her employment contract with the employer, and that such employment will not impinge upon or contravene any of the conditions of Clause 30 to this agreement, and that enforcement of the restraint will not prevent him/her from earning a livelihood."

[7] Clause 4 of the Non-Circumvention Agreement incorporates a restraint of trade in the following terms:

"4. Job Description , Duties and Responsibilities

4.1 The employee shall be expected to satisfactorily carry out all the tasks and duties normally associated with the position.

4.2 The employee agrees and undertakes to obey all treasonable and lawful instructions, which may be given by the employer.

4.3 The employee confirms that the employee is capable and competent to perform the duties for which the employee has been employed, and that he has the necessary skills and knowledge to perform competently and to the satisfaction of the employer.

4.4. The employee agrees that the employer may, whenever it is deemed necessary or desirable transfer the employee from one department to another. In this regards, the employee confirms that he/she is fully aware of the inherent requirement that the job requires travelling and/or may require him or her to be seconded.

[8] Clause 29 of Matjeke's contract of employment is in identical terms to Clause 30 of Sharpe's contract quoted above. It is these restraints that Giza Technologies seeks to enforce. Although nothing turns upon the nature of the enforcement proceedings envisaged it should be noted that in the case of Sharpe provision is made for arbitration proceedings whereas no such provision is made in the case of

Matjeke. Enforcement of the latter's agreement will accordingly be by way of action or application proceedings in the absence of agreement to the contrary.

[9] Giza Technologies alleges that both Sharpe and Matjeke have breached their respective restraints of trade. The breaches are constituted by the fact that Sharpe and Matjeke have taken up employment with what are alleged to be competitors. In the case of both Sharpe and Matjeke it is alleged in broad and encompassing terms, that they have misappropriated confidential information which they may have made available to their respective employers. Based on this the applicant alleges that it has established the requisite right which it is entitled to enforce by way of an interdict *pendente lite*

[10] I shall return hereunder to the facts upon which this application must be decided and the requirements for interim relief. Before doing so reference should be made to the basis upon which the applicant has formulated its case.

[11] The deponent to the founding affidavit is Daniel Tenner who is the sole director of the applicant. He states in the affidavit that he acts with the consent of the Business Rescue Practitioner. The consent is qualified to the extent that such legal costs as may be incurred by or be awarded against the applicant "*are to be divided amongst Chemchamp, Nautilus Projects & Design and Giza Technologies*". Tenner has also agreed that the costs against Giza Technologies "*shall be treated as my personal liability*". Tenner goes on to identify these other corporate entities. He is a co-director of Nautilus Projects (Pty) Ltd (hereafter Nautilus Projects) which is a broad based black economic empowerment firm "*that operates in tandem with Giza Technologies*". He is the sole director of Akula Trading 277 (Pty) Ltd t/a Chemchamp

Africa which is a company specialising in solvent recovery, solvent recycling systems and safe environmental practices. Finally, he is the sole director of Clean Planet Chemical Africa (Pty) Ltd “a company similar to Chemchamp”. Tenner designates these companies as “*the Corporate Group*”.

[12] The founding affidavit does not, however, set out the structure, if any, of this “*corporate group*”. These separate entities are not parties to the application. The founding affidavit does not set out in what respects, if at all, Giza Technologies is authorized to act on behalf of these other entities within the “*corporate group*”.

[13] The contracts of employment incorporating a confidentiality agreement upon which the applicant places reliance were entered into between Nautilus Projects & Design and Sharpe and Matjeke respectively. Nautilus Projects is described as a division of Giza Technologies (Pty) Ltd. It is not apparent from the contracts whether Nautilus Projects & Design is in fact Nautilus Projects (Pty) Ltd.

[14] The Non-Circumvention agreement (which incorporates a restraint of trade) entered into by Sharpe was concluded with four separate entities, namely Akula Trading 277 (Chemchamp); Giza Technologies; Nautilus Projects and Clean Planet Chemical Africa. They are referred to therein as “*the Companies*”. Tenner refers to them as the “*corporate group*” in his affidavit.

[15] In the case of Matjeke the Non-Circumvention agreement (which does not incorporate a restraint of trade) was concluded with six corporate entities, namely the four referred to above and two additional companies. The additional companies are 1Oner Projects and Design (Pty) Ltd and 1oner Mining Solutions (Pty) Ltd. Apart

from this reference the founding affidavit contains no averments which explain the relationship, if any, that these entities have to the applicant or the “*corporate group*”.

[16] What the applicant seeks to protect by way of an interim interdict is its right to enforce agreements which restrain Sharpe and Matjeke from disclosing information gained by them in consequence of their employment to competitors. It seeks also to protect its intellectual property, disclosure of which is likely to harm its business interests. It must accordingly satisfy the requirements for the granting of an interim interdict. Those requirements are that the applicant has a *prima facie* right; that it has a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is granted; that the balance of convenience favours the granting of the interim interdict; and that no other satisfactory remedy is available to protect the applicant’s rights or interests.

[17] It is appropriate for the purpose of this matter to reiterate the proper approach to deciding matters such as this as articulated in ***Spur Steak Ranches Ltd and Others v Saddles Steak Ranch, Claremont and Another***¹ where it was said:

“Save that the requirement of a *prima facie* right established though open to some doubt, is the threshold test, the factors are not considered separately or in isolation, but in conjunction with one another in the determination of whether the Court should exercise its overriding discretion in favour of the grant of interim relief. I refer here to Olympic Passenger Services (Pty) Ltd v Ramlagan 1957 (2) SA 382 (D); Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton and

¹ 1996 (3) SA 706 (C) at 714C-G

Another 1973 (3) SA 685 (A) and Beecham Group Ltd v B-M Group (Pty) Ltd 1977 (1) SA 50 (T).

In determining whether or not the applicants crossed the threshold, the right relied upon for a temporary interdict need not be shown by a balance of probabilities, it is enough if it is *prima facie* established though open to some doubt.

The proper approach is to take the facts set out by the applicants together with any facts set out by the respondents, which the applicants cannot dispute, and to consider whether having regard to the inherent probabilities the applicants should, not could, on those facts obtain final relief at the trial.

It is also necessary to repeat that although normally stated as a single requirement, the requirement for a right *prima facie* established, though open to some doubt, involves two stages. Once the *prima facie* right has been assessed, that part of the requirement which refers to the doubt involves a further enquiry in terms whereof the Court looks at the facts set up by the respondent in contradiction of the applicant's case in order to see whether serious doubt is thrown on the applicant's case and if there is a mere contradiction or unconvincing explanation, then the right will be protected. Where, however, there is serious doubt then the applicant cannot succeed."

[18] "A contract in restraint of trade must protect some proprietary interest of the person who seeks to enforce it before it will be enforced. Such interest may take the form of trade secrets or confidential information or goodwill or trade connections."²

² Townsend Productions (Pty) Ltd v Leech and Others 2001 (4) SA 33 (C) at 48B-E; (Sibex Engineering Services (Pty) Ltd v Van Wyk and Another 1991 (2) SA 482 (T) at 486I - 488D; Basson v

[19] In the context of this application what is required of the applicant is to establish, *prima facie*, that it has a valid agreement in restraint capable of enforcement; that it has a protectable or proprietary interest and that said agreement has been breached. The question as to the reasonableness or scope of the protection of the agreement in restraint is a matter to be dealt with in the enforcement proceedings in due course. Stated differently, in order to meet the threshold requirement for an interim interdict the applicant must show that it holds a proprietary interest of the sort described in ***Townsend Productions***³.

[20] There is no dispute regarding the fact that Sharpe and Matjeke entered into contracts of employment which contain restraints in respect of the disclosure of confidential information relating to the business practices of their erstwhile employer. There is some dispute as to the existence of some variation thereof in the case of Sharpe. For present purposes that is of no moment. The central question regarding the threshold requirement is whether the applicant has established some propriety or protectable interest which it can enforce.

[21] To answer this question it is necessary to consider the allegations to found such protectable interest in the founding affidavit and to do so against the background of the several parties outlined above.

Chilwan and Others 1993 (3) SA 742 (A) at 769C - I; Aranda Textile Mills (Pty) Ltd v Hurn and C Another [2000] 4 B All SA 183 (E) at 192f).

³ *Supra*

[22] It is not in dispute that Sharpe is employed by the fourth respondent. The third respondent has 26% shareholding in the fourth respondent. It is alleged that during his employment with Giza Technologies Sharpe gained access to:

- *“confidential designs and patented technology of the corporate group”;*
- *The “corporate group’s business plans and pricing methodology in the market”;*
- *The “corporate group’s marketing strategies in the area with reference to the designs, the IP/patents and the pricing structures”;* and
- *The “corporate group’s client base and potential client base as well as marketing strategies to infiltrate that client base”.*

[23] In describing the access to confidential information Tenner employs in his affidavit the terms forming part of the definition of such information in the Non-Circumvention agreement without specifying the information and the particular proprietary interest it has or holds in such information. The information to which Sharpe (and for that matter Matjeke) is alleged to have access is that of the *“corporate group”*. I have already indicated that this group structure is not set out. It is accordingly not possible to determine what proprietary interest or protectable right any one of the entities might hold in, for example, the intellectual property or patented designs held by another entity in the group.

[24] This difficulty is apparent when dealing with the allegations concerning the business of solvent recovery systems. This part of the group's business is conducted by Chemchamp (and possibly Clean Planet Chemical Africa). It is not asserted that Nautilus Projects (Sharpe and Matjeke's employer) was involved in this aspect of the business. What is stated is the following:

"Solvent Recovery and Systems are public knowledge and is known to the Fourth Respondent. The Applicants (sic) and Third Respondent have competed in this field with original manufacturers. The Applicant has developed and optimised their systems. This intellectual property has become known and was accessible to both the First and Second respondents whilst in the Applicant's employ."

[25] This allegation does not suggest that the intellectual property and know-how is confidential. To the contrary it appears to be public knowledge in the industry.

[26] In regard to Matjeke the case is asserted in the broadest of terms. It is alleged that she had access to very sensitive and confidential information which is categorised in terms of the definition referred to above. It is then stated that by working for a direct competitor and if she were to disclose such information Giza Technologies will suffer irreparable harm. No more is asserted than this.

[27] The existence of a protectable interest, *prima facie* established, is to be determined on the basis of the factual averments made by the applicant and those made by the respondent which cannot be gainsaid by the applicant.

[28] The first respondent states that when he was employed by Giza Technologies he was required to work in the stainless steel division. At that time it had no active contracts or clients. This it seems accords with the averment by Tenner that Sharpe was required to focus on dormant clients. Sharpe also states that he was not involved in other aspects and/or discussions of Giza Technologies' business. In particular he states that the stainless steel workshop did not do any work for or obtain contracts from Parmalat, Distell, MSSL Global and Mercedes Benz, businesses named by Tenner as clients. He also states that he was not involved in the solvent recovery business and that this was conducted by Chemchamp.

[29] In regard to the applicant's relationship with SAB and Aspen Sharpe alleges that he had a prior relationship through his business before joining Giza. He further states that such work as was done for SAB and Aspen was done by Nautilus and was completed in 2018.

[30] In relation to confidential information Sharpe concedes that he had access to pricing and marketing information. He denies, however, that there are unique designs utilized by the stainless steel workshop. These he states are generally utilized in the industry and there is no confidential or protectable interest in such designs. In any event he was responsible for these designs.

[31] Sharpe denies that he has retained any confidential information or that he has disclosed such information to the fourth respondent. He is not employed by the third respondent. He states that he is presently engaged by the fourth respondent in a

project at Nissan SA, and that his employment by the fourth respondent has no bearing on the business of Giza Technologies.

[32] Matjeke denies that she has acted in breach of the confidentiality agreement. She denies that Sharpe enticed her to leave the employ of Giza Technologies. She is employed by the third respondent which she states is not a competitor of Giza Technologies and does not perform any work in the field of solvent recovery, nor does it intend to do such work. Its field of work comprises painting systems, robotics and automation. This is not a field in which Giza Technologies conducts business. The nature of the third respondent's business is confirmed by the managing director of the third respondent.

[33] The averments made by Tenner on behalf of Giza Technologies, do not, in my view, set out with sufficient particularity the existence of a protectable interest in the hands of Giza Technologies. Even if a generous construction were to be placed upon the collective proprietary interests which vest in entities which make up the "*corporate group*" and I were to accept that Giza Technologies may properly enforce same, the allegations made by the respondents (Sharpe and Matjeke) that Giza enjoys protectable interest cast serious doubt upon those averments. Their answer is not, in my view, a mere contradiction of the applicant's case.

[34] It follows from this that the applicant has not met the threshold test. However, even if I were to accept that the threshold hurdle was overcome, I do not consider that the applicant has demonstrated an apprehension of irreparable harm should the relief not be granted or that the balance of convenience favours the granting of the interim relief.

[35] I shall deal briefly with my reasons for coming to that conclusion below.

[36] The contention that the applicant will suffer irreparable harm is dealt with fairly tersely in the founding affidavit. In relation to the first respondent it is alleged that irreparable harm will be suffered if the confidential information is disclosed and if he is allowed to make contact with clients he “*has a realistic prospect of taking (them) away from the Applicant*”. A similarly general statement is made in respect of the second respondent.

[37] No information is provided in respect of the status of contracts the applicant has with clients, whether these are open for renewal, whether the complained of conduct by the first and second respondents would impact these contracts and/or client relations other than the broad sweeping averments. Mr Dyke SC, for the applicant sought to meet the argument regarding a paucity of evidence as to harm by arguing that an applicant is not required to await harm or suffer it. It is enough to point to the prospect of such harm eventuating. It is so that a party may act in anticipation but it is nevertheless required to show that harm is likely to be suffered and that it will be irreparable. The assertion that a loss of clients is likely to impact business reputation and that this will be irreparable is, in my view, insufficient in the circumstances.

[38] That brings me to the balance of convenience. In considering the balance of convenience a broad range of factors are considered. Principally, however, the balancing is between the entitlement of an applicant to enforce its rights by due process in the to-be instituted proceedings without suffering the consequences of the

breach and the prejudice suffered by the respondents. The clearer the applicant's right and therefore the more likely it will obtain final redress the less significant the balance of convenience plays in the determination of the entitlement to relief.

[39] In this instance, for the reasons already indicated, I consider the applicant's asserted right to obtain final redress is weak. Against this must be weighed the fact that the order sought will in effect preclude the first and second respondents from being employed. The applicant persisted in said relief. As for the balance of the relief it was framed in very broad terms without, for instance, any attempt to limit it with reference to specified customers or clientele. In my view, the balance of convenience does not weigh in favour of granting such interdictory relief.

[40] Finally, there is the question of an alternative remedy. Although Mr Moorhouse, for the respondents, argued that on this ground also the applicant should fail, it is not necessary to decide the point.

[41] In the circumstances I find that the applicant has not made out a case for the relief it seeks. When the matter came before me on 14 January 2020 a *rule nisi* was issued and the costs were reserved. There was at the time considerable debate about whether the applicant was entitled then to seek an order against the first and second respondents by default. That was so because the first and second respondents had not filed their notice of opposition timeously in accordance with the time period stipulated in the notice of motion. The notice of motion provided that in the event that no notice of opposition was filed an order would be sought on 14 January 2020. Mr Moorhouse argued that since no order was to be sought the matter ought to be removed and enrolled for hearing in due course.

[42] In an effort to facilitate the hearing of the matter on an expedited date (as was sought by the applicant) I agreed that I would hear the matter on 23 January 2020. For this reason a *rule nisi* was formulated to protect the applicant's interests until the hearing date. The first and second respondents were placed on terms to file their papers. In my view, that was the proper way to address the fact that the respondents intended to oppose the application.

[43] In the light of this the postponement of the matter on 14 January 2020 flowed from the filing of the notice of opposition. Had the notice of opposition been filed timeously some costs may have been saved. They could equally have been saved if the applicant did not seek a default order notwithstanding the filing of the notice of opposition. In the light of this it will be fair, in my view, to make no order as to costs in respect of 14 January 2020. The effect is that each party will bear its own costs for that day. This will, in my view, ameliorate the effect of the ordinary rule which otherwise applies in respect of the costs following the result.

[44] I make the following order:

1. That the *Rule Nisi* is discharged.
 2. That the applicant is ordered to pay the costs of the application.
 3. There will be no order in respect of the costs incurred on 14 January 2020.
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G. G. GOOSEN

JUDGE OF THE HIGH COURT

Appearances:

Obo the Plaintiff:

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