

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

Case No: 1729/2020

In the matter between:

SHARL JOHNSON

First Applicant

(In his capacity as the Director and Chief Executive Officer of the Second Applicant)

EXPERT-TECH ENGINEERING (PTY) LTD

Second Applicant

And

MARK JAMES SIVEWRIGHT

First Respondent

SOLOMON BRENDON KIEWIETS

Second Respondent

JOHANNES CORNELIUS BOTHA

Third Respondent

JUSTIN EUGENE KIEWIETS

Fourth Respondent

BALEGA ENGINEERING (PTY) LTD

Fifth Respondent

JUDGMENT

BESHE J:

[1] This is an application for an order to interdict and restrain the respondents from approaching business concerns listed in an annexure¹ to applicants' founding affidavits, with a view to persuade them to stop dealing with the applicant. Further, to restrain the respondents for a period of 24 months from 1 August 2020 to 1 August 2022 or such period as this court may deem fit, from conducting or being employed by any engineering and maintenance repair company or any business which renders engineering and maintenance repair services within the Eastern Cape.

¹ Annexure EEM1 page 27 of the indexed papers.

The parties

[2] First applicant is an adult male Director and Chief Executive Officer of second applicant, a personal liability company duly incorporated in terms of the Laws of the Republic of South Africa. The applicants conduct engineering, maintenance repair services and sales contract work for various companies within Port Elizabeth as well as in other provinces according to the first applicant. The respondents are described as follows:

First to fourth respondents are adult male persons. First respondent is said to be marketing and sales manager. Second respondent is a technical sales technician. Third respondent, a maintenance fitter. Fourth respondent is a personal liability company, duly incorporated in terms of the Laws of the Republic of South Africa.

Facts

[3] The background facts that gave rise to this dispute can be summarised as follows:

[4] First to fourth respondents were previously in the employ of the second applicant. Their employment relationship with the second applicant was governed by employment contracts each one of them concluded with the second applicant. A covenant in restraint of trade formed part of these employment contracts which is housed in *Clause 27* of each of the contracts. *Clause 27.1* of the respective contracts records the following:

“27.1 The employee undertakes not to be engaged in any other business, in competition with the employer’s business, be it direct or indirect, or as a shareholder, partner, member of a Close Corporation, director of a company or in any other capacity, within 2 (two) year(s) after termination of this agreement, in the area known as Eastern Cape / Republic of South Africa.”

According to the applicants, during the course of their employment with second applicant, the respondents became well known as such. Most of the times they were required to work and deal with applicants' trade connections, clients and businesses without supervision. Applicants' complaint is captured in paragraph 29 of the founding affidavit deposed to by the first applicant as follows:²

"29. My relationship with trade connections, clients and businesses have suffered severely because of the Respondents approaching them and offering to do work for them, which work they did whilst in my employment. In addition, the Respondents have also approached some of my current employees to join them and work for Balega Engineering (Pty) Ltd (the Fifth Respondent)."

[5] He concludes that, not having the trade connections, clients and business referrals will have a devastating impact upon second applicant and the lives of their employees. Further that by approaching current employees of the applicants' trade connections, clients and business that applicants deal and trade with, the respondents are acting in direct conflict with *Clause 27* of their employment contract as aforementioned. That by continuing work for, operate and trade as fifth respondent, they are acting unlawfully and in breach of the contract.

[6] In a confirmatory affidavit, one **Mark Redcliffe** who is employed by the second applicant states that during 2020 he received a "friend request" from second respondent on the Facebook platform which he declined. He was also telephonically contacted by a former colleague by the name of **Roderick Birman** who told him he wanted to talk to him about fifth respondent. He told him he was not interested. Another employee of the second applicant, **Deon Marcus Stuurman** was approached by first respondent during 2018 who spoke negatively about second applicant. During 2019, second respondent asked if he did not do projects and drawings on the side-line as they were

² Page 10 of the indexed papers.

starting their own business. He did not take up the offer. This was apparently whilst second respondent was still in the employ of the applicants.

[7] According to **Mr Nicol Stegmann Coetzee** who is employed by the applicants as an Occupational Health and Safety Officer, he was approached by the first respondent at the time when the latter was still employed by the applicants, with a request that he assists him in his private time to create an Occupational Health and Safety file. But he never contacted him again to follow up on the request. **Mr Themba Mthwezi** states that during 2018 he was approached by first and second respondents who asked him to leave his job and come work for them. He declined. According to the respondents, **Mr Mthwezi** is employed as a general cleaner by the applicants.

[8] The opposing affidavit is deposed to by the first respondent who is also the shareholder and director of the fifth respondent **Mr Sivewright**. He confirms that he was employed by second applicant as a marketing and sales manager during the period January 2016 to February 2019. Second respondent who is also a shareholder in fifth respondent worked for the second applicant for a period 2010 until 2019. At the time of his resignation he was a technical sales technician. Third respondent was employed by the applicants from 2008 / 2009 to June 2020 as a maintenance fitter. He denies that third respondent is employed by fifth respondent. Alleging that he is self-employed. Fourth respondent was an employee of the applicants as a technical assistant from 2016 until 2019. He is currently employed by fifth respondent as a general employee. He further states that fifth respondent was registered on the 5th of February 2019 after his resignation from second applicant. This was to allow him to pursue new employment opportunities. He had originally anticipated that fifth respondent's field of work would be to buy, refurbish and resell wood working equipment. He goes on to outline the circumstances under which he together with second and third respondents felt constrained to leave their jobs with the second applicant due to unfavourable

working conditions. He denies that he recruited or sought the third respondent or caused him to resign from second applicant. Fourth respondent also resigned from second applicant due to certain frustrations relating to his working conditions. It is admitted that the employment contract in question governed the employment relationship between the second applicant and first to fourth respondents. **Mr Sivewright** denies that the applicants are entitled to the relief sought, based *inter alia* on the following factors:

The work that is performed by second applicant is general engineering and general maintenance work. It was not specialized or unique in any way. Second applicant conducted work for clients on an *ad hoc* basis. He is not aware of any good will or special relationship of trust that second applicant developed with those he carried work for. That applicants therefore do not have an interest that requires protection. First to fourth respondents are not aware or privy to list of applicants' clients.

[9] In the notice of motion as regards the first prayer, applicants refer to a list marked EEM1. This list is simply entitled Customer Listing. It runs into 4 pages of what appears to be business names from A-Z. There is however no allegation / evidence that the respondents have approached any of the concerns or persons associated therewith with a view to cause them to cease dealing with the applicants. First respondent denied that he dealt directly with applicants' clients, adding that he conducted his work mostly from second applicant's offices. In respect of second to fourth respondents, even though the conducted work at client's sites from time to time, the nature of work conducted did not result in any relationship being created with the said clients. They had little direct dealings with second applicant's clients. They simply conducted work as directed by the second applicant. And that all work obtained by the fifth respondent came about through clients phoning fifth respondent to enquire about its services. **Mr Sivewright** asserts that none of

the respondents have contacted the employees of the second applicant for purposes of persuading them to take up employment with the fifth respondent.

[10] Whilst not denying that first to fourth respondents signed the restraint of trade in question, respondents suggest that they signed it without the exact wording, ambit and consequences thereof being properly and adequately explained to them. However, this was not pursued with any vigour or at all during argument, correctly so in my view. Respondents deny therefore that they acted in breach of *Clause 27* of their respective contracts. They do however acknowledge that fifth respondent has issued business cards to the first and second respondents who in turn have from time to time distributed to persons they have come into contact with. Furthermore, the respondents take issue with the insistence by the applicants that the restraint of trade should span the period from 1 August 2020 to 1 August 2022 when in fact at worst the restraint(s) should apply as follows:

First respondent 28 January 2021.

Second respondent 10 April 2021.

Third respondent 16 June 2022.

Fourth respondent 10 April 2021.

[11] This assertion is clearly based on the fact that first to fourth respondents left the employ of the second applicant at different times. The two year period for the restraint of trade on question would have commenced at different times for each of the four respondents. 28 January 2019 in respect of first respondent. 16 June 2020 in respect of third respondent. According to the applicants, second respondent absconded. But second respondent annexes a letter of resignation from 10 April 2019. 10 April 2019 in respect of fourth respondent.

Discussion

[12] There is no evidence to support the relief sought in paragraph 1 of the Notice of Motion whatsoever. Even if prayer 1 were to be read to include persons in the employ of the second applicant (which I do not think it does because second applicant is not one of those businesses that are listed in EEM1) there is no evidence that the respondents approached the second applicant's employees or clients with a view to cause them to cease dealing with the applicants. **Mr Roderick Bierman** who is alleged to have told one of applicant's employee **Mr Redcliffe** over the phone that he also wanted to speak to him about fifth respondent, is not one of the respondents. This in my view does not shown that the respondents approached **Redcliffe** with a view to cause him to cease dealing / working for the applicants. According to the respondents, **Bierman** was not connected to the respondents in any manner. The friend request on Facebook to **Redcliffe** by second respondent means nothing. First respondent is alleged to have spoken negatively about second applicant way back in 2018. During 2019, first respondent is alleged to have asked him if he did not want to do projects on the side as they were starting their own business. This does not amount "to the respondents having approached applicants' employees to join them and work for fifth respondent" as first applicant asserts.³ In the same paragraph, it is suggested that respondents approached applicants' trade connections, clients and business offering to do work for them, which work they did whilst in second applicant's employment. This is just a bald allegation without any facts to support it. In a confirmatory affidavit deposed to by applicant's Occupational Health and Safety officer in July of 2020, the following is recorded:

"4. Around November 2018, I was approached by **MARK SIVEWRIGHT** whilst he was still employed at Expert-Tech Engineering. He asked if I could assist him in my private time to create an Occupational Health and Safety File. He said that he will contact me in due course with details for the file that he asked me to compile.

³ Paragraph 29 page 10 of the indexed papers.

6. He never contacted me with the details of the file he asked me to create and I also never created one for him. I rather brought this information and request to the attention of **SHARL JOHNSON.**"

This does not advance applicants' case at all in my view.

Prayer 2 of the Notice of Motion

[13] It appears to be common cause that respondent Balega Engineering carries on business in engineering and maintenance work, having commenced operations on 1 March 2019. It is also common cause that first to fourth respondents are part of the fifth respondent in their capacities as directors / shareholders and employees respectively. This has been the case after first to fourth respondents resigned from the employ of the second applicant and before the expiry of two years after such resignation as envisaged in *Clause 27.1* of their contract of employment with the second applicant.

[14] In terms of *Clause 27.1*, the area of operation of the restraint of trade in question is the Eastern Cape in respect of first respondent, Republic of South Africa in respect of second and third respondent and Eastern Cape in respect of fourth respondent.

[15] In paragraphs 1 and 6 of the founding affidavit the following assertion is made:

"1. I am an adult male Director and Chief Executive Officer of Expert-Tech (Pty) Ltd (the Second Applicant). The Applicants carries on business as an engineering, maintenance repair and sales company at various locations in Port Elizabeth, Uitenhage, East London as well as the broader Eastern Cape, one of which is situated at no. 1 Fearick Street, Sidwell, Port Elizabeth, named Expert-Tech Engineering and Maintenance Repair Services and Sales.

6. The Applicants have been conducting engineering, maintenance repair services and sales contract work for various businesses in Port Elizabeth mentioned in paragraph 1 *supra*, as well as businesses in other provinces.”

[16] Respondents deny that second applicant conducts work in the broader Eastern Cape. They admit that certain work is conducted by the second applicant in Port Elizabeth, Uitenhage, East London and Kirkwood on occasion. There is no evidence that shows which businesses are applicants’ clients. In respect of which fifth respondent is engaged in business in competition with the applicants. Respondents make the point that both second applicant and fifth respondent companies’ conduct work of general engineering and maintenance nature. That there is nothing specialized or unique in respect of work second applicant carries out. It is trite that it is not necessary for the applicants to show actual harm having been suffered, it suffices if the applicant is able to show that the respondents have the potential to exploit trade secrets and business connections.⁴ But that is not the applicants’ case *in casu*. There is no complaint that the respondents are likely to disclose applicants’ confidential information and trade secrets. In any event, according to the respondents, they know of no such trade secrets or clientele list or data, because work performed by the applicants is of general engineering and maintenance nature and is done on an *ad hoc* basis.

[17] It is trite that a clause in restraint of trade is enforceable, unless it is shown to be unreasonable⁵ or against public policy. Trite also is the principle that public policy requires that agreements freely entered to should be honoured. At the same time, public policy also requires that everyone should be free to take part in economic activities in order to earn a living. This is a right that is also enshrined in *Section 22 of the Constitution*. The right to choose a trade, occupation or profession freely. This requires a court faced

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

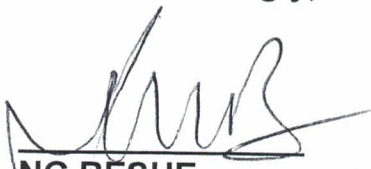
⁵ See Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 A.

with these contending rights or interests to make a value judgment in balancing them in order to give effect to spirit of *Section 36 of the Constitution*.⁶

[18] A feature of this case is that in terms of *Clause 27.1* of the employment contract with their former employer, first to fourth respondents are precluded from being engaged in any business in competition with employers' business for two years after the termination of the agreement, in respect of some of them in the whole of South Africa and others in the Eastern Cape Province. I do not see how that can be said to be reasonable. But most importantly and contrary to the submission made in paragraph 15 of applicants' heads of argument the applicants have not shown that the respondents are competing with them or are engaged in business in competition with applicants' business. This submission that the papers illustrate that the respondents "continue to do engineering and maintenance work at sites where the applicants first conducted engineering and maintenance work" is misplaced. There is no such evidence. But most importantly *Clause 27.1* of the employment contract in question does not envisage the restraint of the employee "from conducting or being employed by any engineering and maintenance company or any business which renders engineering and maintenance repair services within the Eastern Cape. This is the relief sought in prayer 2

[19] For the reasons stated above, I am of the view that the applicants have not made a case for the relief sought.

[20] Accordingly, the application is dismissed with costs.


NG BESHE
JUDGE OF THE HIGH COURT

⁶ Reddy v Siemens Telecommunications (Pty) Ltd 2007 (2) 486 SCA at 497.

APPEARANCES

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Date Heard : 5 November 2020
 Date Reserved : 5 November 2020
 Date Delivered : 26 January 2021