IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No: 2474/20

In the matter between:

LLP INVESTMENTS (PTY) Ltd T/A MICROCARE APPLICANT

and

CORNELIUS FREDERICK DE LANGE RESPONDENT

JUDGMENT

MULLINS AJ:

[1] On 16 October 2020 the Applicant launched an application on an urgent basis to compel the Respondent to comply with the terms of an agreement concluded between the parties ("the Settlement Agreement"). The Respondent opposes the application.

[2] The background to the dispute, as set out in the Applicant's founding affidavit, may be summarised as follows:

(a) During 2006 the Respondent commenced employment with an entity known as Microcare. During 2019 the Applicant purchased Microcare and the Respondent's employment continued as before, subject to the fact that he also became a shareholder of the Applicant;

(b) The Applicant designs, develops and manufactures products such as inverters, solar regulators, solar pump controllers and a range of solar monitoring devices and accessories;

(c) the Respondent was in charge of the Applicant's research and development division and, inter alia, was responsible for the development of what is described as a Mini Grid ("the MG"), a Geyser Controller ("the GC") and an Electric Vehicle Charger ("the EV"). (Unless it is necessary to specify one or other of the above products they will be referred to collectively as "the Products");

(d) The Applicant says that it purchased Microcare on the basis of the development of the Products, which are central to the financial sustainability of the Applicant;

(e) The relationship between the Respondent and the Applicant, in particular one of the Applicant's directors, Mark Stemmett, was clearly an unhappy one from the start. The on-going friction eventually resulted in the conclusion of the Settlement Agreement, dated 22 May 2020, which is described in the preamble thereto in the following terms:

> *"**WHEREAS** the parties have reached consensus in order to fully and finally settle the termination of employment and any alleged dispute on the following terms and conditions contained herein:…";*

(f) The relevant portion of clause 6 of the Settlement Agreement records that:

"The Employee shall be paid remuneration ordinarily due to him (for days worked) up to and including date of signature. The Employee shall render a notice period of one month after which his services shall terminate due to operational requirements. <u>During the notice period the Employee shall complete the Geyser Controller, Mini Grid and shall proceed to complete the EV Charger…</u>" (My underlining);

(g) The Respondent duly gave notice, his employment with the Applicant terminating on 22 June 2020, having failed to complete the Products and to provide the Applicant with the software related thereto;

(h) Despite being approached on numerous occasions and, despite negotiations, the Respondent refused to settle the dispute by completing the Products.

[3] The Applicant goes on to allege that its shareholders have invested in excess of R12 million in the Applicant, which they would not have done but for the expectation that the Products would be completed by the Respondent.

[4] According to the Applicant the Products are incomplete in that the Respondent:

(a) In respect of the MG he has failed to provide the Applicant with the completed software required to make it functional and operable;

(b) In respect of the GC he has failed to provide a fully functional unit together with the user interface, user manual and technical drawings;

(c) In respect of the EV he has failed to complete the final submission for the project to be presented to the local university.

[5] It is the Applicant's case that only the Respondent is capable of doing the above.

[6] Finally, the Applicant submits that as a direct result of the Respondent's breach of the Settlement Agreement the Applicant is suffering severe financial hardship, which may result in it having to close its doors, hence the urgency.

[7] In the notice of motion the Applicant prays final relief relief as follows:

> *"2. That the Respondent is ordered to comply fully with the terms of clause 6 of the Settlement Agreement, attached hereto as annexure "NoM1", and, particularly, that the Respondent shall, within ten days, of the date of this Order, ensure that the Applicant is furnished with the following:*
>
> *2.1. a completed, fully functioning and fit for purpose Mini Grid, together with all software, technical drawings, user documentation and related documentation associated therewith;*
>
> *2.2. a completed, fully functioning and fit for purpose Geyser Controller, together with all software, technical drawings, user documentation and related documentation associated therewith;*
>
> *2.3. all software, technical drawings, user documentation and related documentation associated with the Electric Vehicle Charger project."*

[8] In his answering affidavit the Respondent takes issue with urgency largely on the basis that it is self-created. In respect of the merits the Respondent alleges:

(a) He and one of the Applicant's directors, Mark Stemmett, had what can only be described as a toxic relationship, as a result of which the two clashed on numerous occasions, which eventually resulted in the conclusion of the Settlement Agreement;

(b) He was pressurised by the Applicant's legal advisers to sign the Settlement Agreement which, in hindsight he should not have done without legal advice and it should be set aside;

(c) He admits that he was head of the Applicant's research and development division and that as such he was tasked with developing and completing the Products, but gave no warranties concerning their performance;

(d) He goes in to great detail as to the steps taken to complete the Products and attaches numerous emails back and forth, which did not get the desired results, nor co-operation from the individuals concerned;

(e) Insofar as the allegation is concerned that the Products are unique and that only he can finalise them, he alleges that he has never been advised as to what is outstanding and in any event:

(i) with regard to the GC, it is functional and he demonstrated this to one Fourie and others, but that Stemmett was reluctant to go ahead with this product for some reason;

(ii) with regard to the MG, the Applicant has been provided with the software pertaining thereto, although on completion of his notice period "*…there were still conceivable difficulties with production relating to the MG's"*, which he had tried to resolve;

(iii) with regard to the EV, he states that it was not possible to complete this product within his notice period and that he had advised Stemmett and the Applicant's legal advisers of this fact, which is reflected in the wording of the Settlement Agreement. In this regard he points out that the EV was treated differently to the other two products, the word "*proceed"* being inserted in clause 6 of the Settlement Agreement at his specific request;

(iv) Furthermore, there was a change of supplier, which resulted in numerous significant delays;

(f) The Respondent alleges that the MG and GC had been completed, as had the EV, insofar as his involvement was concerned;

(g) In the result the Respondent alleges that he has complied with clause 6 of the Settlement Agreement.

[9] The Respondent also refers to a CCMA complaint which he laid, in which he alleged that the Applicant had failed to comply with certain financial obligations in the Settlement Agreement.

[10] The Applicant's reply to the Respondent's answering affidavit is voluminous, consisting of 188 pages, much of it comprising annexures of a highly technical nature. For example, the Mini-Grid User Manual is attached. It comprises 30 pages of technical data and specifications which the Applicant alleges was the Respondent's responsibility to deal with. That may be so, but it is not possible for me (or any court) to make sense of this document without oral evidence of an expert nature.

[11] The Respondent's complaint that he was pressured into signing the Settlement Agreement is not borne out by the objective facts. It is clear that it was the result of negotiations between the parties, aided by an advocate, one Oliver Smith. The Settlement Agreement was discussed with Smith and at his request (i.e., the Respondent's) it was amended in a certain respect. The Respondent even referred the matter to the CCMA. Furthermore, the Settlement Agreement contains, *inter alia*, the following provisions:

> *"19. The Employee is familiar with the consequences of this agreement and was offered the right to seek legal advice and assistance before entering into this agreement.*
>
> *…*
>
> *22. This agreement was well considered and not done in the heat of the moment."*

[12] Despite alleging that the Settlement Agreement should be set aside, there is no counter-application in this regard.

[13] I therefore find that the Respondent's allegations of pressure can safely be rejected as false.

[14] The question is therefore: is he, the Respondent, in breach thereof.

[15] Before considering that issue it is necessary to deal with the challenge to urgency. Not only was there a long delay in launching the application, it is a commercial dispute, the Applicant's case being that its very survival is dependant on a speedy resolution thereof.

[16] The Respondent's last day of work was 22 June 2020. The application was launched on 16 October 2020, some four months later. It is so that the Applicant made demand of the Respondent to perform, failing which it would approach court for *"appropriate relief".* The demands are dated on 22 September 2020 and 30 September 2020. Yet the Applicant waited another two weeks after the second demand before launching the application.

[17] In the circumstances there is merit in the Respondent's argument that urgency was self-created (if it ever existed) and was, due to the passage of time, lost.

[18] A further problem is that the dispute is, in effect, a commercial one: the Respondent's alleged failure to complete the Products is causing the Applicant to suffer financial hardship. That may be so, but the authorities on the point are clear. There must be a marked degree of urgency and/or special circumstances to justify "commercial urgency". See **IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd & Another; Aroma Inn (Pty) Ltd v**

<u>Hypermarkets (Pty) Ltd & Another</u> 1981 (4) SA 108 (WLD) and the unreported judgment of **<u>Caledon Street Restaurants CC v D'Aviera</u> 1998 JDR 0116 (SE)**.

[19] I therefore find that the matter was not such as to have been brought on an urgent basis.

[20] Even if I am wrong on the question of urgency, there are two further problems facing the Applicant.

[21] The first is the material disputes of fact on the papers. The Applicant alleges that the Respondent has not complied with his obligations in terms of the Settlement Agreement. The Respondent says that he has. Applying the Plascon-Evans rule, unless I find that the Respondent's denial is without foundation and/or a mere bald denial it is not possible to determine the dispute on paper. The Applicant's problem is exacerbated by the fact that the dispute is of a highly technical nature. What the Respondent was supposed of done and what it is alleged he failed to do will require evidence of an expert nature. There is no such evidence on the papers, nor would such evidence be appropriate in application proceedings.

[22] The second difficulty is that the Applicant is seeking specific performance. A court has a discretion, to be judicially exercised, whether or not to order specific performance. The *locus classicus* in this regard is **<u>Haynes v Kingwilliamstown Municipality</u> 1951 (2) SA 371 (AD)**, which decision has been followed countless times. The issue arises in particular in relation to contracts of employment, or where a service has to be rendered. See **<u>National Union of Textile Workers & Others v Stag Packaging (Pty) Ltd</u> 1982 (4) SA 151 (T)**. While all the authorities on the point are at pains to emphasize that there is no general rule that a contract of employment will not be enforced, there is not doubt the courts take a long hard

look at the surrounding circumstances before ordering specific performance in an employment environment. In **<u>National Airlines (Pty) Ltd v Roediger & Another</u>** 2008 (1) SA 293 a pilot in the employ of an airline was obliged to give three months' notice of termination of his employment. He gave one month. The Court held (at para [20]) that the following factors must be taken into account:

> *"[20] Such factors may, for example, be:*
>
> *1. The particular relationship between the employer and the employee.*
>
> *2. The nature of the employment contract.*
>
> *3. The nature of the service or work which is to be performed in terms of the contract .*
>
> *4. The prejudice or hardship to be suffered by the innocent party should specific performance not be ordered, compared to the prejudice that will be suffered by the employee, should it be granted.*
>
> *[21] The general rule should still be that where a party wrongfully breaches a contract it should entitle the innocent party to enforce the contract, and that should no less be so even in employment contracts. After all as the authorities have laid down, each case must be decided on its own facts."*

[23] In **<u>Roediger</u>** the Court ordered the pilot to work the three month notice period. It is relevant that there was no suggestion that the parties were in a conflict situation.

[24] To return to the present matter. The relationship between the Applicant and the Respondent is exceedingly poor on anyone's version. The parties were determined to see the back of each other as soon as possible. Despite the Settlement Agreement, which can best be described as a stop-gap measure, within weeks of the termination of his employment

the Respondent referred the matter to the CCMA, alleging a breach thereof by the Applicant on the basis that his severance pay was being withheld. That matter is opposed by the Applicant and the Commissioner ordered the parties to file papers. As far as I am aware that dispute has yet to be resolved. (I was not advised to the contrary at the hearing).

[25] In these circumstances I am of the view that enforcing specific performance is not appropriate. Even if I were to order the Respondent to comply with prayer 2 of the notice of motion, how would compliance therewith be policed? If the Respondent was intent on not completing the Products no amount of threats would force him to do so. In addition, a dispute as to whether he has completed the products or not would inevitably arise again.

[26] In the circumstances, and for all the reasons stated above, I am of the view that the application must fail.

[27] Insofar as costs are concerned, although the Respondent has successfully opposed the Applicant, he has done so on essentially technical grounds. It cannot be said that the exceedingly poor relationship between him and Stemmett was one-sided, which relationship is at the root of the whole matter. He was also less than frank when it came to the circumstances surrounding the conclusion of the Settlement Agreement. Accordingly, I intend to make no order as to costs.

[28] I make the following order:

1. The application is dismissed.

2. There will be no order as to costs.

N.J. MULLINS

ACTING JUDGE OF THE HIGH COURT

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