

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE LOCAL DIVISION, GQEBERHA**

Case No.: 2708/2016

Date Heard: 23 May 2022

Date Delivered: 30 August 2022

In the matter between:

NCS RESINS (PTY) LTD

Plaintiff

and

ELMARIE HAZEL ALLAN (nee VAN DER MERWE)

First Defendant

ATLIN CHEMICALS CC

Second Defendant

DEAN HAYDEN

Third Defendant

PAUL HEUNIS

Fourth Defendant

GLEN BLOM

Fifth Defendant

NAAS FERREIRA

Sixth Defendant

ATLIN CHEMICALS (NATAL) (PTY) LTD

Seventh Defendant

JUDGMENT

RONAASEN AJ:

Introduction

[1] In this action, instituted in March 2017, the plaintiff seeks payment of substantial damages from the defendants, jointly and severally.

[2] In summary, the claim for damages proceeds against the background of the following alleged circumstances:

- 2.1. the first defendant, as from 1 September 2005 was employed by the plaintiff at its Gqeberha branch as a sales and administrative assistant and internal salesperson;
- 2.2. the first defendant's terms of employment were governed by three agreements, namely a contract of employment, a secrecy and restraint agreement and an intellectual property agreement;
- 2.3. the first defendant's employment relationship with the plaintiff terminated in May 2016;
- 2.4. in breach of the agreements the first defendant misappropriated certain proprietary and confidential information belonging to the plaintiff;
- 2.5. the first defendant disseminated the proprietary and confidential information to the remaining defendants who, despite knowing that the information belonged to the plaintiff, utilised it and continue to utilise it to compete unfairly and/or unlawfully with the plaintiff;
- 2.6. as a result of the first defendant's breaches of the agreements and the remaining defendants' unlawful conduct the plaintiff suffered the damages it seeks to recover from the defendants.

[3] The pleadings have closed and the matter is trial-ready.

The separation order

[4] On 10 April 2018 *Mageza AJ* granted an order (“the separation order”) directing that certain issues of law and fact be determined separately from and before the determination of the other issues in dispute between the parties, in accordance with the provisions of Uniform Rule 33(4). The order was granted pursuant to an application brought by the plaintiff, which was opposed by the defendants.

The trial and the defendants’ application to rescind the separation order

[5] I am charged with adjudicating this action and, to that end, the matter was set down for trial before me on 23 May 2022.

[6] At the commencement of the trial, I was asked to hear and determine an application brought by the defendants for a reconsideration and rescission of the separation order.

[7] It was agreed by the parties that I would determine the defendants’ application and that, after such determination, the trial would proceed before me in accordance with my determination.

The defendants’ application

[8] The defendants’ application proceeded before me on the basis of the contention that I was entitled to revisit the separation order as it was interlocutory in nature and

therefore did not have final effect. This was not seriously disputed in argument before me. I am satisfied that this is the case and that I may revisit the separation order.

[9] The principal argument advanced by the defendants was that it would not be convenient for the issues identified in the separation order to be determined separately from and before the other issues in dispute between the parties.

[10] The separation order envisages that I would first have to determine:

- 10.1. which documents were allegedly misappropriated by the first defendant from the plaintiff;
- 10.2. what information and to whom the first defendant disseminated the information she allegedly misappropriated;
- 10.3. whether the first defendant, in taking the information concerned, breached her contractual obligations to the plaintiff, alternatively, acted unlawfully;
- 10.4. to what extent the remaining defendants induced, procured and/or facilitated the breaches of the first defendant's contractual arrangements with the plaintiff;
- 10.5. the fate of and the liability for the costs of various other interlocutory proceedings.

[11] Apart from the question of the alleged damages (which are equated to the value of the allegedly confidential information) suffered by the plaintiff, standing over for determination would be the questions as to whether the information allegedly misappropriated by the first defendant from the plaintiff was:

11.1. in fact, confidential information;

11.2. used by the defendants unlawfully to the prejudice of the plaintiff, causing it to suffer damages.

[12] In my view the issues identified in the two preceding paragraphs cannot conveniently be determined separately. This is so particularly with reference to paragraph 13 of the particulars of claim, which illustrates how closely the question of the confidentiality of the information is linked to the issues summarised in paragraph 10, above. The information concerned could only be regarded as having been misappropriated if it was confidential information. Put differently – if the information was in the public domain, it could not have been misappropriated. Similarly, the defendants could only have acted unlawfully if the information appropriated by the first defendant and disseminated to and used by the remaining defendants was confidential in nature.

[13] It is difficult to conceive that the witnesses, who will be called to identify the information allegedly misappropriated and the alleged unlawful conduct of the defendants, will not also be called to establish the confidential nature of the information and the value of the information. It is not convenient in such circumstances to have the issues

determined separately, particularly where, in the first round, credibility findings might have to be made in respect of the witnesses concerned.

Conclusion

[14] In the circumstances it would not be convenient for the issues identified in the separation order to be determined separately.

Order

[15] I therefore make the following order:

- 1. The order made on 10 April 2018, as set out in paragraph 26 of the judgment of Mageza AJ of the same date, is hereby rescinded in its entirety.*
- 2. The costs of this application are to be costs in the action.*
- 3. The action will proceed to trial before me on all the issues in dispute between the parties on the pleadings on a date to be arranged with the Registrar.*

O H RONAASEN

ACTING JUDGE OF THE HIGH COURT

Appearances:

For plaintiff: Adv WN Shapiro SC instructed by Macgregor Erasmus Attorneys Inc, Duran (Tel: 031 201-8955) c/o Kaplan Blumberg Attorneys, Gqeberha (Tel: 041 363-6044)

For Defendant: Adv A Beylevend SC instructed by Friedman Scheckter Attorneys, Gqeberha (Tel: 041 395-8400)