



**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: GQEBERHA]**

CASE NO. 3041/2023

In the matter between:

ZENITH CAR RENTAL (PTY) LIMITED

Applicant

and

VALULINE FOUR (PTY) LIMITED

1st Respondent

K2015/024023/07 (SOUTH AFRICA) (PTY) LIMITED

2nd Respondent

K2016/399064/07 (SOUTH AFRICA) (PTY) LIMITED

3rd Respondent

APEX VEHICLE RENTAL (PTY) LIMITED

4th Respondent

JUDGMENT

JOLWANA J:

Introduction.

[1] This application concerns the enforcement of restraint of trade agreements contained in a trademark and systems sub-licence agreement (the sub-licence agreement) and

agency agreements. The restraint of trade provisions are sought to be enforced by way of an urgent permanent interdict. The papers were issued on an urgent basis on the 08 September 2023 with acutely truncated time frames, the intended date of hearing being set out as the 3 October 2023. However, the application was ultimately heard on 26 October 2023, almost two months later. Not only is the application opposed but also the issue of urgency is being strenuously contested.

The parties.

[2] The applicant is a well-known player in the vehicle rental business which it conducts through the vehicle rental trade name commonly known as Avis. It acquired the rights to use trademarks and systems of Avis International as a sub-licensor for Africa. Its vehicle rental business includes inter alia, Van Rentals, Avis Rent A Car and Budget Rent A Car. It conducts its business as such throughout the Republic of South Africa by concluding sub-licensing agreements and agency agreements with sub-licencees and agents. These agreements, *inter alia*, provide for the applicant providing logistical, administrative and financial support to its sub-licencees and agents. In turn, the sub-licencees and agents pay the applicant a portion of the revenue they generate under the banner of Avis.

[3] The first respondent conducted its business under the banner of Avis Van Rental, Eastern Cape with its principal place of business at no.125 Albert Road, Walmer, Gqeberha in the Eastern Cape. It was a sub-licencee and agent of the applicant and carried on its vehicle rental business as Avis, East London, Eastern Cape.

[4] The second respondent traded as Avis Van Rental, Southern Cape with its principal place of business also at 125 Albert Road, Walmer, Gqeberha, Eastern Cape. It was an

agent of the applicant and carried on business as a vehicle rental company as Avis, George, Western Cape (Southern Cape).

[5] The third respondent conducted its business as Avis Van Rentals, Winelands and had its principal place of business at the same physical address as the first and second respondents. The third respondent was also an agent of the applicant. It carried on its vehicle rental business as Avis, Paarl, Western Cape.

[6] The fourth respondent has its principal place of business at Unit 24 Milnerton Business Park, Corner of Koeberg and Racecourse Road, Milnerton, Cape Town. There is no restraint of trade agreement or agency agreement between the applicant and the fourth respondent. It therefore has no restraint of trade agreement with the applicant or any binding restraint provision.

[7] The applicant shall continue being referred to as the applicant whereas the first to third respondents shall be referred to simply as the respondents. Where and if it becomes necessary, a specific respondent shall be referred to individually as either, the first, second or third respondent. The fourth respondent shall be referred to simply as Apex. This will hopefully make it easy to follow the factual matrix pertaining to each one of the parties cited in this application.

The facts.

[8] Some of the facts as far as could be gleaned from the applicant's papers are more as less the following. In April 2018 the applicant concluded a sub-licence agreement with the first respondent and agency agreements with the second and third respondents. The said agreements were to endure for a period of seven years expiring at the end of April 2025.

These agreements also provided for a cooling off period of 12 months from the date of termination or expiry during which the relevant clauses provided for a non-compete, non-circumvention, non-association and restraint against the respondents for the duration of the agreements and for a further 12 months period after termination thereof.

[9] The applicant says that the restraint clauses were intended to protect its confidential information, trade secrets and customer connections which would be created by the respondents pursuant to the agreements. This is because the respondents would acquire knowledge and insight into its business and gain influence over its customers.

[10] In January 2023 the applicant advised all its sub-licencees and agents including the respondents of its intention to implement a new model and business structure from March 2025. That meant that at the termination of the existing agreements by effluxion of time, the sub-licencees and agents would be given an election to either renew the agreements in accordance with the new business model or terminate the existing agreements. On 17 April 2023 the respondents gave notice of termination of the existing sub-licence and agency agreements. The applicant accepted the respondents' termination notice.

The alleged breach.

[11] In March 2023 the applicant was informed by one of its customers referred to as Ericsson that the respondents, acting through Apex, had approached it for purposes of securing Ericsson as Apex's client. In this regard the applicant refers to an email it received from Ericsson which it understood to be Apex soliciting Ericsson by saying that the applicant was no longer operating a van rental business and that Apex was operating a van rental business.

[12] As a result, the applicant sent a letter to the respondents confronting them with this information. The respondents, represented by Mr Du Toit, denied in writing that they solicited or enticed Ericsson to be the customer of Apex. In that correspondence Mr Du Toit also confirmed his directorship of Apex but denied that Apex conducts the same or similar business to that of the applicant. He further indicated that he was not aware of the conduct of Kim Lockem, an employee of Apex whom it was alleged, ostensibly utilized Apex to compete with the applicant.

[13] The applicant further alleges that it became apparent to it that when the respondents gave their notice of termination of the agreements, it was after they had been confronted with the evidence of the breach of the restraint clauses in respect of Ericsson. Consequent upon being confronted with the aforesaid breach, Mr Du Toit resigned as a director of Apex. Ms Lundy who had worked for the applicant before was appointed as director of Apex.

[14] The applicant further alleges that Apex approached its sub-licencees and agents in the province of Limpopo in Polokwane soliciting them to Apex's vehicle rental business. With all of this information the inference drawn by it was that Mr Du Toit engineered the incorporation of Apex and is working with other sub-licencees and agents of the applicant to compete, unlawfully with it in breach of the restraint provisions. On this basis, alleges the applicant, the respondents, acting through Apex are unlawfully competing with it in breach of their respective restraint provisions contained in their agreements with it.

[15] The applicant further alleges that the respondents and Apex all share the same business and/or registered address. In further substantiation of its contentions the applicant alleges that Apex's business brochure lists the first respondent's current

business vehicles and branches. Apex further uses the respondents' telephone numbers for its vehicle rental business which are the same telephone numbers the respondents utilized when they were operating its vehicle rental business. In terms of the agreements, those telephone numbers were required to have been handed over to the applicant.

[16] On the basis of all these allegations the applicant contends that Apex is being used by the respondents as a conduit to circumvent their respective restraint of trade provisions. Its protectable interests including its operating manual, copies and records of its customer lists are in the process, being transferred to Apex. Therefore, Apex is complicit in the respondents' breach of their restraint provisions. Apex is also being used by the respondents as a springboard to circumvent the said restraint provisions and in that way is unlawfully competing with the applicant.

[17] Mr Du Toit deposed to an answering affidavit on behalf of the respondents indicating therein that he is the sole director of all the three respondents. His exposition of the factual matrix on the basis of which the respondents opposed the relief sought by the applicant paints a completely different picture which is more or less the following. The respondents were previously sub-licencee and agents of the applicant. The first respondent traded out of Gqeberha and East London. The second respondent traded out of George in the Western Cape and the third respondent out of Paarl also in the Western Cape.

[18] The third respondent's agency agreement terminated in March 2022. The first and second respondents' agency agreements terminated at the end of May 2023. In terms of the agreements the applicant had with them, the respondents were entitled to contract directly with customers under the umbrella of the Avis brand in respect of van rentals. As

a result, the first respondent owns a fleet of approximately 286 vehicles, the second respondent 104 vehicles and the third respondent owns 64 vehicles.

[19] With regards to the decision of the respondents to exit the agency and sub-licence agreements with the applicant he makes the following averments. There was a van rental conference held on 24 to 26 August 2022. In that conference the applicant informed all its licencees that it would be discontinuing the agreements when they expired and indicated a number of options that were open to it. A restructuring proposal was later made to the respondents. They were advised that if they were not happy with it the applicant would be willing to discuss an early termination of the sub-licence agreement with the first respondent and the agency agreements with the first to third respondents. However, no goodwill would be paid to the respondents.

[20] The respondents elected to exit the agreements early which resulted in their termination as at the 31 May 2023. The applicant took over the second respondent's staff and premises. The third respondent's lease agreement was terminating as at the 31 May 2023, and it therefore did not renew it. As a result, the second and third respondents effectively no longer trade other than the historical vehicles which are currently on lease to the first respondent. The first respondent sublet its East London premises to the applicant. The applicant chose not to take over the first respondent's Gqeberha premises which were then taken over by another entity. Currently the first respondent trades from 4 Reitz Road, Millpark, Gqeberha and is busy winding up its business consequent upon the termination of the agreements.

[21] The first respondent's remaining fleet of vehicles are leased to the applicant, two of the applicant's sub-licencees and three of Apex's franchisees. Mr Du Toit is not only the

director of the respondents but also an indirect shareholder through a family trust and an entity known as Peachey Holdings in which his family trust is a 100% shareholder. Peachey Holdings is a 50% shareholder in Apex and the other 50% is held by Katsea Trust.

[22] Apex's principal place of business is Unit 24 Milnerton Business Park, Corner Koeberg and Racecourse Road, Milnerton, Cape Town. The address reflected in the brochure referred to in the founding affidavit is not that of Apex but that of its franchisees including the one that trades at 125 Albert Road, Walmer, Gqeberha.

[23] The respondents deny acting in breach of the restraint of trade and further deny that the applicant, in any event, has any protectable interest. This is because the respondents were merely a conduit for customers wishing to collect and drop off vehicles rented from the applicant and the respondents had no relationship with those customers. The respondents have no knowledge of the business of the applicant, its information, trade secrets and had no customer connections. Apex is a franchisor and as such does not carry on the same business as the respondents. In any event it is not subject to any restraint of trade agreement. Mr Du Toit further denies that Apex approached the applicant's sub-licencees or agents. In any event the email marked as annexure CZR10 was from an employee of a franchisee of Apex. Furthermore, and in any event, Limpopo and Polokwane are not areas in which the respondents are restrained at all from operating. The respondents deny that Apex utilises their telephone numbers.

[24] At the termination of the agreements with the applicant, the lease agreements of the second and third respondents were expiring, and the applicant was advised of the contact details of the relevant landlords so that it may enter into agreements with them. As a

result, the applicant took over the premises in George but not the ones in Paarl. In respect of the East London premises the applicant has taken over those premises through a sub-lease with the first respondent. The applicant has therefore taken over those telephone lines. It was offered the Gqeberha premises but declined to take them. Therefore, the applicant had an opportunity to take over all four premises. The telephone numbers in the brochure are those of the franchisees of Apex.

The sub-licence agreement.

[25] It is common cause that only the first respondent concluded a sub-licence agreement with the applicant while the second and third respondents concluded agency agreements. As earlier indicated, there was no restraint of trade agreement at all concluded with Apex which is cited herein not as a party to any such agreement but for allegedly engaging in what is said to be an unlawful competition. I will deal with Apex later in this judgment.

The terms of the sub-licence agreement.

[26] The restraints provisions contained in the sub-licence agreement concluded with the first respondent read:

“14.3 Upon termination or expiration of this Agreement neither the Sub-Licencee, nor its shareholders or its and their Related Entities may for a period of 12 months from the date of termination or expiry of this Agreement, directly or indirectly solicit business from any Location within the Territory from any person who was, during the 12-month period prior to such termination or expiry a regular customer of or in the habit of dealing with the Business. The foregoing restrictions shall not apply where the Agreement is terminated by the Sub-Licencee for reasons related to material breach of this agreement by the Sub-Licensor.

14.4 The restrictions imposed on the Sub-Licencee, its shareholders or its and their Related Entities apply to them acting (i) directly or indirectly, or (ii) on their own behalf or on behalf of or in conjunction with, any firm, company or person.

14.5 Each of the restrictions in this clause is intended to be separate and severable. If any of the restrictions are held to be void but would be valid if part of the wording were deleted, such restrictions shall apply with such deletion as may be necessary to make it valid or effective.”

[27] As indicated earlier, the applicant also concluded agency agreements with the respondents. However, it is common cause that the agency agreement concluded with the third respondent expired in March 2022. Counsel for the applicant pointed out during the hearing of this matter that in those circumstances, no relief was sought against the third respondent which was in fact being abandoned. The applicant only persisted with the relief sought against the first and second respondents regarding the sub-licence and agency agreements and against Apex regarding the alleged unlawful competition.

The agency agreements.

[28] The restraint provisions in the agency agreements which were similarly worded in respect of all the relevant respondents read as follows.

“17. Restraint

17.1 During the currency of this Agreement and for a period of 12(twelve) months after the termination of this Agreement by either party and for any reason whatsoever the Operator and his/her immediate family members shall not:

17.1.1 rent out any Vehicle in the Area or permit or assist any third party to advertise promote or carry on a vehicle rental or any similar business in the Area;

- 17.1.2 be or become directly or indirectly engaged or be concerned or interested in any other transient rent a car operation, van rental or truck rental business;
- 17.1.3 undertake or assist in the solicitation of customers for vehicle rental, van rental or truck rental, with whom it dealt with during this agreement;
- 17.1.4 in any way say anything adverse about the Avis Budget brand and/or the company.”

[29] The applicable legal principles in restraint of trade agreements have been stated and restated by our courts for some time now. Amongst other cases, those principles were restated in *Reddy*¹ about sixteen years or so ago.

The analysis.

[30] The applicant's case is that it entered into restraint agreements with the respondents to prevent them from communicating its trade secrets to or utilising its customer connections on behalf of its rival, Apex. It contends that all it needs to show is that there is confidential information which the respondents could transmit to Apex should they desire to do so. It does not have to show that they have in fact utilised the information confidential to it. It merely has to show that they could do so. On this point the applicant

¹ *Reddy v Siemens Telecommunications* 2007 (2) SA 486 (SCA) at 497 c-f in which Malan AJA stated the legal principles as follows. A restraint would be unenforceable if it prevents a party after termination of his or her employment from partaking in trade or commerce without a corresponding interest of the other party deserving of protection. Such a restraint is not in the public interest. Moreover, a restraint which is reasonable as between the parties may for some other reason be contrary to the public interest. In *Basson v Chilwan and Others*, Nienaber JA identified four questions that should be asked when considering the reasonableness of a restraint: (a) Does the one party have an interest that deserves protection after termination of the agreement? (b) If so, is that interest threatened by the other party? (c) In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive? (d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be mentioned or rejected? Where the interest of the party sought to be restrained weighs more than the interest to be protected, the restraint is unreasonable and consequently unenforceable. The enquiry which is undertaken at the time of enforcement covers a wide field and includes the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests.

relies on, *inter alia*, the case of *New Justfun Group*². In that case Van Niekerk J, in part, had this to say:

“The enforcement of a restraint the purpose of which is to protect confidential information, cannot be defeated by an undertaking that the employee will not divulge the information if he or she is permitted, contrary to the restraint, from entering into employment with a competitor. *BHT Water Treatment (Pty) Ltd v Leslie* 1993 (1) SA 47 (W), at 57-58 B. This approach was recently affirmed in *Experian SA (Pty) Ltd v Hayes & Another* (2013) 34 ILJ 529 (GSJ) and by the Labour Appeal Court in *Ball v Bambela Bolts (Pty) Ltd & Another* (2013) 34 ILJ 2021 (LAC) where Coppin AJA noted that the fact that an employee had stated that she did not intend and did not use confidential information for the benefit of her new employer is irrelevant in determining whether a restraint is reasonable, or whether it has been breached. The purpose of a restraint agreement as the court observed in *Reddy v Siemens Telecommunications (Pty) Ltd* (2007) 28 ILJ 317 (SCA) is to relieve the applicant of having to rely on Turner’s bona fides.”

[31] It is indeed so, as the authorities indicate, that the applicant should not have to rely on the respondents’ bona fides and as the applicant put it, cross its fingers hoping that they would act honourably or abide by their undertaking. However, since the Ericsson incident which is the closest that the applicant has come up with any evidence of an alleged breach, which remains disputed, there is no evidence of the respondents having committed any breach anywhere in the territory as defined. In the founding affidavit the applicant indicates that Mr Du Toit, on behalf of the respondents and Apex denied that those respondents acted in breach of the agreements. The correspondence that the applicant is referring to is dated 7 April 2023. This is in respect of the alleged Ericsson solicitation that took place in March 2023. Since then, until September 2023 when these proceedings were instituted nothing seems to have happened or been done by the

² *New Justfun Group (Pty) Ltd v Turner and Other* (2018) 39 ILJ 2721 (LC) para 20

applicant about that alleged solicitation of Ericsson. I take the view that the applicant must have chosen to rely on Mr Du Toit's undertaking in his correspondence mentioned earlier in which he, inter alia, said *"[a]t the outset, I must record that, subject to what I stated hereunder, I have and will continue to fulfil all of my obligations in terms of the sub-licence agreement"*.

[32] There is a surprisingly paucity of information or details about the Ericsson incident. Just at the most elementary level, there is not even an affidavit from the applicant's or its sub-licencee's employee to whom the attempted solicitation was directed. There is no evidence of any form of direct communication or even conversations that that employee had with Kim Lockem who is alleged to have utilized Apex to compete with the applicant. This is important because the onus is squarely on the applicant to prove the alleged breach of the restraint provisions, or at the very least, the attempt to do so. Even the applicant's own affidavit is sketchy and annexes email chains with no specific direct reference to the offending part of the email chain.

[33] There are many other points raised by the respondent. However, the approach I have adopted is the one that assumes, without concluding, that even if there may have been confidential information that the applicant needed to protect hence the invocation of the restraint provisions, the fundamentals of that evidence are sorely lacking. The approach adopted by the applicant seems to be that of not doing much to give evidence of the nature of this information, trade secrets or customer connections and how it came to be that the respondents received it and how they attempted to use it or how they in fact used it. In those circumstances it is difficult to understand how the respondents used the said information assuming that they have it. The applicant sought to rely largely on the restraint

clauses as if in and of themselves are a proof of anything alleged just by their sheer existence.

[34] In any event other than the Ericsson incident, there is no evidence of any conduct on the part of any of the respondents after that incident which suggests, even remotely, that the respondents could breach the restraint provisions. The Ericsson incident having been dealt with in April 2023 through written correspondence between the applicant and Mr Du Toit and appearing to have been resolved from the applicant's own conduct thereafter, I have serious reservations about the manner it is now being used in these proceedings.

[35] The only other incident after Ericsson's is the so called Landbank incident which happened in August 2023. In respect of the Landbank incident, the respondents and Apex say that a franchisee of Apex called Apex Vehicle Rental Coastal (Pty) Ltd whose existence the applicant was always aware of, did what is alleged to be solicitation by Apex Vehicle Rental (Pty) Ltd which is the fourth respondent herein. I do not think that I need to make a finding on whether or not what the said franchisee did was in fact solicitation as it is not cited. I do not even think that on the facts of this matter by the conduct that it engaged in, Apex would have been involved in unlawful competition with the applicant even if it were to be true that it was Apex and not its franchisee who conducted themselves as alleged. The reason why none of that matters is because there is no restraint agreement between the applicant and Apex. Therefore, Apex is generally entitled to compete openly with the applicant as are its franchisees. Furthermore, the respondents would ordinarily also themselves have been entitled to compete openly with the applicant in Limpopo Province if regard is had to the fact that, that province is outside the territory as defined in the agreements.

[36] To understand this, one needs look no further than the sublicense and agency agreements themselves. The sub-licence agreement entered into between the applicant and the first respondent reflects the territory as the Eastern Cape & Winelands. In the founding affidavit, no case is made that any of the respondents was not entitled to operate outside the territory as defined. The Landbank issue in another province and outside of the territory is raised without any basis being laid as to why such an approach was either in some way in breach of the agreements by the respondents or Apex or is somehow tainted by unlawfulness in any way whatsoever. This creates a huge disconnect between the Ericsson incident which was dealt with by Mr Du Toit and the Landbank incident in another area outside the territory as defined.

Some of the evidence in the founding affidavit.

[37] With regard to the respondents, the applicant refers to the clauses it relies on for the relief sought. It specifically states the prohibited conduct in the agreements. Thereafter the purpose of the restraint clauses is stated as being to protect the applicant's confidential information, trade secrets and the customer connections which would be created by the respondents pursuant to the agreements. It is alleged that the respondents would acquire knowledge and insight into the applicant's business and gain influence over its customers. However, the nature of the alleged confidential information, the knowledge that would be acquired, the trade secrets and the customer connections are almost not mentioned at all save for the passing reference here and there.

[38] There is no serious attempt to indicate in the affidavit what is this confidential information, what are the trade secrets and customer connections the respondents in fact acquired, as a result of their business with the applicant or evidence of the actual

acquisition. The significance of this evidence is that the respondents surely are entitled to know which case they are required to meet and to deal with it, a point they raised forth rightly. Insipid allegations with no evidence whatsoever and in particular where there is no allegation in the founding affidavit that the respondents, in conducting themselves in a specific and particular way, acted in breach of the restraint clauses in the agreements makes the applicant's case lacking in material respects which inevitably leads to its failure to discharge the onus resting upon it.

[39] The affidavit thereafter moves to deal with Apex. Some allegations are made about Mr Du Toit and his shareholding in the respondents and his alleged involvement in the incorporation of Apex. However, he is, for some reason, not cited and yet he is alleged to be the mastermind or the brains behind the alleged breaches presumably because of his alleged active involvement in Apex. No attempt is made to distinguish between Apex Vehicle Rental (Pty) Ltd, the fourth respondent and Apex Vehicle Rental Coastal (Pty) Ltd which is the fourth respondent's franchisee, a separate entity which is also not before court. It appears that the applicant was under the impression that the two entities are the same. The Ericsson incident is dealt with and how Mr Du Toit dealt with it. What is not dealt with is in what manner after his undertaking did any of the respondents act or attempt or somehow behave in a manner that indicated an indiscretion or transgression. Thereafter the allegations haphazardly hop into Mr Du Toit's resignation from Apex and the appointment of Ms Lundy. After that Mr Du Toit is alleged to have been the brains behind the incorporation of Apex and is alleged to be working with the respondents to unlawfully compete with the applicant and in breach of their restraint provisions. Again, I

must mention that he is not cited, and these allegations are made with no attempt to substantiate them.

[40] Allegations are then made about the respondents and Apex sharing the same business and/or registered address and the alleged use by Apex of the respondents' telephone numbers and other allegations are thrown into the mix with no attempt at providing proper evidence to sustain the said allegations. Finally, Apex is alleged to be not only complicit in assisting the respondents' breach of their respective restraint provisions. It is further alleged that the respondents are springboarding Apex to circumvent the said restraint provisions. Therefore, Apex is alleged to be, in so doing, competing unlawfully with the applicant. How Apex acted as alleged without a clear nexus and some form of collusion between it and its franchisee at the behest of the respondents and/or Mr Du Toit is difficult to understand.

[41] In explaining the correct approach to restraint provisions the court said in *Rawlins*³.

... "[T]he 'customer contact' doctrine depends on the notion that

'the employee, by contact with the customer, gets the customer so strongly attached to him that when the employee quits and joins a rival, he automatically carries the customer with him in his pocket'.

In *Morris (Herbet) Ltd v Saxelby* [1916] 1 AC 688 (HL) at 709 it was said that the relationship must be such that the employee acquires

'such personal knowledge of and influence over the customers of his employer ... as would enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer's trade connection ...'

³ *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 at 541 D-H.

This statement has been applied in our Courts (for example, by Eksteen J in *Recycling Industries (Pty) Ltd v Mohammed and Another* 1981 (3) SA 250 (E) at 256 C-F. Whether the criteria referred to are satisfied is essentially a question of fact in each case, and in many, one of degree. Much will depend on the duties of the employee; his personality; the frequency and duration of contact between him and the customers; where such contact takes place; what knowledge he gains of their requirements and business; the general nature of their relationship (including whether an attachment is formed between them, the extent to which customers rely on the employee and how personal their association is); how competitive the rival businesses are; in the case of a salesman, the type of product being sold; and whether there is evidence that customers were lost after the employee left...”

[42] There is another matter of concern which is deserving of some comment. This relates to the applicant’s condonation application for its late filing of the supplementary affidavit. The supporting affidavit is supposedly deposed to by Mr Sibuyi. However, there is a glaring overwriting that appears to have been done to what would have been Mr Sibuyi’s ordinary signature which can be seen in other affidavits. That affidavit starts at page 352 and ends at page 356 of the paginated court documents. His signature with disconcerting overwriting is at page 355. Mr Sibuyi’s initials and the signature itself were clearly written over by someone. That overwriting casts some doubt as to whether that document was in fact initialled and signed by Mr Sibuyi. Whilst I am not in a position to make any conclusion one way or the other, I do think that it would be remiss of me not to express some unease about a document supposedly signed under oath and supposedly by the person who takes the oath being tempered with presumably before the document is served and filed. The integrity of affidavits in the functioning of the courts should never be

compromised which is what seems to have happened in that affidavit, assuming that nothing worse than overwriting an authentic signature happened.

[43] As regards Apex, the irrefutable evidence is that it was its franchisee that made the approach in Limpopo, an independent entity, through an erstwhile employee of the first respondent. No case was sought to be made that Apex used its franchisees to assist the respondents in breaching their restraint agreements. That entity was not cited and there is no evidence at all about the alleged contact, at the very least, a confirmatory affidavit by the person to whom contact was made, assuming it was a matter that needed consideration and determination of this Court. In all these circumstances it becomes difficult to resist the conclusion that the Landbank incident seems to have been used as a springboard for launching these proceedings on an urgent basis in this Court, an issue I turn to now.

The urgency.

[44] On urgency the applicant deals with the letter it wrote on 5 April 2023 confronting the respondents regarding what it calls the attempted solicitation and/or enticement of its customer, Ericsson to which Mr Du Toit responded in writing on 7 April 2023. In his response he denied it but undertook to make sure that the respondents complied with their obligations about the restraint provisions. Thereafter, nothing seems to have happened. The applicant goes on to talk about negotiations between May and August 2023 regarding the conclusion of an exit agreement consequent upon the termination of the sublicence and agency agreements. Then the applicant talks about an attempt at soliciting Landbank which is its client by Apex “*in breach of the Polokwane and Mpumalanga restraints provisions.*” In this regard, Apex is alleged to have done the

approach to Landbank “*through the applicant’s Polokwane and Mpumalanga agents*”. As I understand this allegation, Apex used applicant’s own agents to approach Landbank. Therefore, it did not use the respondents but applicant’s unnamed agents. This is also not explained and is therefore difficult to understand the case sought to me made on these facts.

[45] Over and above all of this, there is no allegation that the applicant had entered into a restraint of trade agreement with Apex relating to the areas of Polokwane and Mpumalanga or the basis on which Apex was in any event not entitled to approach the applicant’s customers in that area. There are further no allegations that the respondents did in fact enter into such an agreement which is in any event not referred to or annexed concerning that area. The basis on which any of the respondents would have acted in breach of their restraint provisions in Polokwane and Mpumalanga is conspicuous by its absence. It is unclear why this Court should in any event have jurisdiction to deal with a matter or issue or breach that was committed, allegedly, in an area outside its jurisdiction.

[46] Averments are then made about the applicant not launching this application earlier believing that the respondents would comply with their respective restraint provisions presumably based on Mr Du Toit’s undertaking in his letter dated 7 April 2023. Again, it is unclear what these restraint provisions are as they relate to that area. As I said before, the applicant appears to have accepted Mr Du Toit’s undertaking after the Ericsson incident as a result of which it did not take any further action since April 2023 until the issue of Landbank arose outside the territory as defined.

[47] There was a long period of inaction of more than four months on the Ericsson incident. Thereafter, the Landbank incident in another jurisdiction happened. It appears

to have been used to create a veneer of urgency to launch these proceedings in this Court seeking to rely on urgency rules with no justification or appropriate factual basis. Even worse, this urgent application was launched with no certificate of urgency being filed at all. When it was subsequently filed it was in the form of an affidavit, not a certificate as we have come to understand it. In that affidavit a specific allegation is made that the solicitation of Landbank was “*in breach of the Polokwane and Mpumalanga agency restraint provisions*”. This is patently incorrect as such agency agreement with Apex simply does not exist. The non-filing of a certificate of urgency was a shocking flagrant violation of this Court’s rules and practice directives. Those involved in the drawing of the applicant’s papers seem to have done very little to acquaint themselves with this Court’s procedural rules, practices, and directives.

[48] In the circumstances I consider it necessary to deal with the urgency procedures in this Court. In doing so, I can do no better than refer copiously to the judgment of Mbenenge JP in *Bobotyana*⁴: I consider the following paragraphs instructive.

“[8] Ms Stretch submitted that a directive by a Judge permitting a litigant to set down an urgent application on a Thursday was, upon a proper interpretation of rule 12(d) of the Eastern Cape Practice Directions, not a requirement. The relevant portion of the rule reads:

‘(d) In all urgent applications in which it is sought to enrol the matter other than on a day normally reserved for the hearing of motion court matters:

(i) The practitioner who appears for the applicant must sign the certificate of urgency which is to be filed of record before the application papers are placed before the judge and in which the reasons for urgency are fully set out. In this regard, sufficient particularity is to be set out in the certificate for the question of

⁴ *Bobotyana and Others v Dyantyi and Others* 2021 (1) SA 386 (ECG)

urgency to be determined solely therefrom and without perusing the application papers.

- (ii) The certificate of urgency will be placed before the judge who will make a determination solely from that certificate as to whether or not the matter is sufficiently urgent to be heard at any time other than the normal motion court hours.'

[9] Reliance for the submission was further placed on *Madlongolwana v Walter Sisulu University*, where it was stated:

"[3] The applicants approached the duty judge in chambers on 12 February 2016, presenting a certificate of urgency in which were set out reasons why the matter should be permitted to proceed as an urgent application and seeking a directive in terms of rule 12 of the Joint Rules of Practice for the High Courts of the Eastern Cape Province regarding the hearing and further conduct of the matter. A directive was issued to the fact that the matter may be set down for hearing on 18 February 2016 at 09h30 and requiring service of the application papers on or before 15 February 2016.

[4] The first observation which must be made is that it was not necessary for the applicant to approach the duty judge for a directive regarding the hearing and further conduct of the matter. The reason is that the targeted date, 18 February 2016 [a Thursday], was a motion court date. A careful reading of rule 12(d) of the Joint Rules of Practice ... reveals that the purpose of that rule is to provide a mechanism whereby an applicant can approach a judge in chambers for a directive in circumstances in which the applicant wishes to move the court for relief on a day which is not ordinarily a day on which a motion court sits. Given that the applicants wished to move for relief on a motion court day, they were at liberty to do so by an issue of a notice of motion accompanied by a certificate of urgency and supported by a founding affidavit in accordance with the provisions of rule 6 (12) of the Uniform Rules of Court. It was not necessary for the applicants obtain a directive before issuing and serving their application."

[49] With no certificate of urgency, the applicant issued its papers on 08 September 2023 indicating that the matter was to be heard on 3 October 2023. Inexplicably, it indicated in

the notice of motion that the respondents should file their notice to oppose by 17h00 on 8 September 2023, the same day papers were issued. It then proceeded to give the respondents three days from Monday the 11 September 2023 unless they were expected to attend to this matter even over the weekend in which case it gave them five days to file their answering affidavit by 17h00 on 13 September 2023. This, in circumstances in which the matter was only going to be heard on 3 October 2023. The applicant gave itself, generously I must say, more than enough time to file a replying affidavit on any day after the 13 September 2023, that is, if it determined that it needed to file one. I can only surmise that the issues I raise above as they relate to urgency and even the manner in which the evidence in general is presented have as their root causes, the failure to diligently examine the facts to ensure that the case sought to be made is correctly grounded on the alleged particular factual matrix.

[50] In this regard and especially relating to urgency, our *locus classicus* is *Luna Meubel*⁵.

In that case Kroon J had this to say:

“Practitioners should carefully analyse the facts of each case to determine, for the purpose of setting the case down for hearing, whether a greater or lesser degree of relaxation of the rules and the ordinary practice of the court is required. The degree of the relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. ... [A]n applicant must make out a case in the founding affidavit to justify the particular extent of the departure from the norm, which is involved in the time and day for which the matter be set down.”

[51] The failure to appreciate and apply the urgency rules and practice directions and in the process, unnecessarily give the respondents insufficient time for them to instruct their

⁵ *Luna Meubelvervaardigers (Edms) vs Makin and Another t/a Makin's Furniture Manufactures* 1977 (4) SA 135(W) at pg. 137 E-G.

legal representatives and consult for purposes of filing opposing papers is, in my view, an abuse of court process. The assertion that in the end they were afforded more time as they were granted an extension as the applicant suggested is cold solace and it certainly is not how the urgency rules were intended to be used. The issue of a possible relaxation of the timetable has no role to play in setting out the required timetable depending on the exigencies of the matter.

[52] While the fact that the applicant's legal representatives were from a different jurisdiction and therefore were clearly not adept about this Court's practice directions played a role, there is no excuse for not familiarizing themselves sufficiently with this Court's rules and practice directions. The applicant's attorneys had a responsibility to ensure that they were in possession of the practice directions and the Joint Rules of this Division which are to be read in conjunction with Rule 6(12) of the Uniform Rules of Court. They cannot and could not have safely relied on correspondent attorneys when in fact the rules and practice directions of this Court are published and easily accessible.

[53] In all the circumstances, the applicants have failed to make out a case for the relief sought as earlier indicated. It follows therefore that this application must fail.

[54] In the result the following order shall issue:

1. The application is dismissed.
2. The applicant shall pay costs of this application including costs occasioned by the employment of two counsel.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Counsel for the applicant : H.J. Fischer

Instructed by : DMS Attorneys

Sandton

Counsel for the 1st, 2nd, 3rd : A. Beyleveld SC with K. Morris

and 4th respondent

Instructed by : Greyvensteins and Joubert Galpin Searle respectively.

Gqeberha

Date heard : 26 October 2023

Date delivered : 20 December 2023