



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case No: 1620/2017

Heard on 01/12/2017

Delivered on: 18/05/2018

In the matter between

**K2015300118 (SOUTH AFRICA) (PTY) LTD T/A
PAW INTERNATIONAL SECURITY SERVICES
AND SOLUTIONS**

Applicant

And

**MYNHARDT KOEN
THE PRIVATE SECURITY INDUSTRY
REGULATORY AUTHORITY**

First Respondent

Second Respondent

JUDGMENT

PAKATI J

- [1] The applicant, K2015300118 (South Africa) (Pty) Ltd t/a PAW International Security Services and Solutions (“PAW ISS”), a private company with limited liability, with its registered address and principal place of business at No. 4 Kariba Street, Rhodesdene, Kimberley, approached this Court initially on urgent basis seeking an interim order returnable on 25 July 2017 based on an oral restraint of trade agreement allegedly concluded between PAW ISS and the first respondent, Mr Mynhardt Koen, to be enforced against him.

- [2] The second respondent is a Private Security Industry Regulatory Authority (PSIRA’), the regulating authority for the private security industry, established in terms of s 2 of the Private Security Regulations Act, 56 of 2001 (“the Act”). No relief is sought against it and is only cited for any interest it may have in the outcome of this application.
- [3] On 11 August 2017 the applicant filed an application to amend the notice of motion in terms of Rule 28 (4) seeking a final order to be heard on 08 September 2017. Koen filed a notice to object on 24 August 2017. On 07 September 2017 PAW ISS filed another application thereby seeking firstly, a final order prohibiting the respondent from establishing a business directly or indirectly in competition with the applicant, as a shareholder, partner, member of a close corporation, director of a company or in any other capacity and secondly, prohibiting the respondent from disclosing to a third party any of its information regarding strategic, sensitive and confidential information. This main application was scheduled to be heard on 01 December 2017. Urgency was therefore abandoned.
- [4] Ms Stanton, on behalf of the applicant, urges the Court to grant the amendment considering the fact that all the papers had been exchanged and the hearing of the main application was scheduled for 01 December 2017.
- [5] Koen on the other hand argues that the application to amend is *mala fide* and causes injustice that cannot even be compensated by an appropriate costs order. He again filed and served an objection on 12 September 2017 on the basis of non-compliance with Rule 6 (5) (a) and (b) of the Uniform Rules of Court.
- [6] Rule 28 (4) of the Uniform Rules of Court provides that if an objection which complies with subrule (3) is delivered within the period referred to in subrule (2) (ten days), the party wishing to amend may, within 10 days, lodge an application for leave to amend. The primary object of allowing an amendment is ‘to obtain a proper ventilation of the dispute between the parties, to determine the real issues between them, so that justice may be done’.¹ The application to amend seeks a final interdict. Koen’s objection complies with subrule (2) and (3) but the applicant failed to apply for leave to amend in compliance with Rule 28 (4). The applicant cannot be allowed

¹ Superior Court Practice at B1-178

to approach court on urgent basis and later proceed in the ordinary course as it pleases. In my view the application is an abuse of process.

[7] Koen opposes the main application and raises the following points *in limine*;

7.1 That the application lacks urgency and constitutes abuse of process;

7.2 That no application is filed for condonation of the late filing of the replying affidavit; and

7.3 That the founding and confirmatory affidavits filed by PAW ISS in support of its case are defective for want of compliance with the Regulations Governing the Administration of Oaths².

[8] Koen denies that he was a party to an oral restraint of trade agreement as alleged by PAW ISS. However, if the court finds that there is a restraint of trade agreement concluded by the parties, such agreement is unreasonable and unenforceable, so he argues. He states that the applicant has failed to show that it has any interests that require protection. He alleges further that the application has become moot as only a few months are left for the restraint period.

LACK OF URGENCY

[9] Koen argues that PAW ISS failed to show reasons why it could not be afforded substantial relief at a hearing in due course. According to him the applicant proffers no explanation for the delay from 23 May 2017 to 18 July 2017 when the application was issued and served upon him. Koen states that PAW ISS's clients deposed to confirmatory affidavits during the week of 19 to 23 June 2017, 25 days later and 20 days after the founding affidavit was signed.

[10] PAW ISS confirms that it knew about Koen's business as a security company from on 18 May 2017. Annexure "PAW7", a letter dated 22 May 2017 forwarded to Koen concerning PAW ISS' lends credence to this. The applicant gives two reasons why it brought the application on semi-urgent basis. Firstly, that the restraint of trade applications are in their nature urgent and secondly, that in this Division if a matter is opposed and not brought on urgent basis it gets postponed to the opposed roll and

² Regulation 7 (1) (Published in the GN R1258 in GG 3619 of 21 July 1972 as amended by GN 1648 in GG 5716 of 19 August 1977 GN R1428 in GGG 7119 of 11 July 1980 GN R774 in GG 8169 of 23 April 1982

probably be heard in six months' time (November 2017). This, according to the application, render ineffective the relief it seeks.

[11] The applicant argues further that on 19 July 2017 Koen requested for security for costs which prompted it to unilaterally remove the application from the roll of 28 July 2017 thereby abandoning the prayer relating to urgency. Koen submits that he had oppose the application as the urgency alleged by PAW ISS is self-created.

[12] Although the applicant abandons urgency it is worth dealing with Rule 6 (12) (a) & (b) of the Uniform Rules of Court taking into account the Rule 28 (4) application to amend the notice of motion. Rule (12) (6) (a) & (b) provides:

“(12) (a) In urgent applications the court or a judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to it seems meet.

(b) In every affidavit or petition filed in support of any application under paragraph (a) of this subrule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at a hearing in due course.” (My underlining)

[13] In LUNA MEUBEL VERVAARDIGERS (EDMS) BPK v MAKIN & ANOTHER t/a MAKIN FURNITURE³ Coetzee J held:

“Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the Court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirements of Rule 6 (12) (b) will not do and an 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.”

[14] In CALEDON STREET RESTAURANTS CC v MONICA DE' AVIERA⁴ Kroon J stated:

“The intent of the rules is that a modification thereof by the applicant is permissible only in the respects and to the extent that is necessary in the circumstances. The applicant will have to demonstrate sufficient real loss or damage were he to be

³ 1977 (4) SA 135 (W) at 137E-F

⁴ [1998] JOL 1832 (SE) at page 7-8

compelled to rely solely or substantially on the normal procedure. The court is enjoined by rule 6 (12) to dispose of an urgent matter by procedures “which shall as far as practicable be in terms of these rules”. ...The mere existence of some urgency cannot therefore necessarily justify an applicant not using Form 2 (a) of the first schedule to the rules.”

- [15] It is apposite to note that the original notice of motion that sought an interim relief was returnable on 25 August 2017. The first respondent had to file his notice of intention to oppose and his answering affidavit on or before 16h00 on 25 July 2017. On 19 July 2017 he requested the applicant to file security for costs to the amount of R80 000-00 to be provided on or before 24 July 2017. The applicant unilaterally filed a notice withdrawing the matter from the roll of 28 July 2017 on 26 July 2017. Duncan & Rothman, the attorneys of record of the first respondent, sent a letter dated 03 August 2017 to Engelsman Magabane, the attorneys of record of the applicant. Paras 6 to 13 of same record that:

“6. On Tuesday, 25 July 2017, writer hereof was informed by the Registrar that the Honourable Acting Judge Erasmus is available to hear the matter;

7. [The] writer was then notified that the Honourable Acting Judge Erasmus might be related to one of the deponents of a confirmatory affidavit to the founding affidavit and might not be able to hear the matter;

8. [The] writer conveyed this to the client who instructed the writer that should the Honourable Judge confirm the above he will not object to her hearing the matter;

9. On Wednesday, 26 July 2017 [the] writer was informed that the above mentioned Judge will not hear the matter for reasons so stated;

10. Without so much as a telephone call to [the] writer hereof the matter was unilaterally removed from the roll, costs to be reserved. No option and/or discussion of a possible postponement to a date in the following week were afforded to our client. This, after our client was dragged to Court on an extremely urgent basis and only afforded four days to file an answer.

11. On the morning of 27 July 2017, [the] writer received an email from your Ms Henn’s secretary with an attached and unsigned replying affidavit, accompanied by an undertaking that a signed copy will be served on our offices on or before 01 August 2017. Till date no such signed affidavit was received.

12. What is more, the “unsigned” affidavit contained a notice of intention to amend, which also has not been formally served on our offices;

13. We do not accept the unsigned replying affidavit. As your email does not contain an undertaking that the signed affidavit will not differ from the one which was sent to [the] writer, we were deprived of the opportunity to properly advise our client and is the prejudice suffered by our client in this regard not clear (sic).

Since the application was served on our client he was afforded 4 days to consult, draft an answering affidavit and obtain the necessary confirmatory affidavits, which, as you will surely agree severely prejudiced our client.

Your client after reprimanding our client to file his answering affidavit within 4 days, now, and after a unilateral notice to remove was filed, gives a written undertaking that a formal reply will be filed on or before the 1st of August 2017, allowing himself a convenient extra 5 days to prepare a formal reply. Which is more, he then fails to perform in terms of the undertaking.”

[16] In my view PAW ISS failed to comply with the provisions of Rule 6 (12) (b) thereby setting forth explicitly the circumstances which it says renders the matter urgent or semi-urgent for that matter.

[17] Notably, the signed replying affidavit was filed on 10 August 2017 outside the time period provided for by the Rules of Court. The first respondent complied with the timeframes set by the applicant. It is unacceptable for the first respondent for initially bringing the matter on urgent or semi-urgent basis but continue with the matter in the normal course. No explanation was proffered as to why the applicant delayed in bringing the matter to court from 28 June 2017 when the founding affidavit was signed to 18 July 2017 when it was served upon the first respondent. It is absurd and constitutes an abuse of process. In my view, the urgency alleged by the applicant is self-created and cannot be sustained.

CONDONATION

[18] It is undisputed that the applicant filed its replying affidavit out of time. However, it explains that the signed version was served on 10 August 2017 due to the fact that the confirmatory affidavits had to be signed by various deponents. It states further that the delay of two days is not inordinate and requests the Court to condone its late filing. Koen did not oppose the said application.

[19] In my view, no prejudice would be suffered by Koen if condonation of the late filing of the replying affidavit is granted. I therefore grant condonation.

DEFECTIVE AFFIDAVITS

[20] It is undisputed that there were some problems with the founding and some of the confirmatory affidavits. This is confirmed by the applicant in paras 3.1 to 3.7 of its replying affidavit thus:

- “3.1 I misunderstood my attorney of record’s instruction regarding the signing and commissioning of the founding affidavits.
- 3.2 Save for Mr C Smith’s confirmatory affidavit, the founding affidavit and the other confirmatory affidavits were signed before and in the presence of Captain L Vertue, a commissioner of oaths on 5 July 2017.
- 3.3 I inadvertently inserted the date of 28 June 2017 in the founding affidavit. The affidavits were however all signed on 5 July 2017.
- 3.4 I was not aware that the affidavits could not be commissioned before Captain Leon Vertue as he is a family member of the Mr C and A Vertue.
- 3.5 I also confirm that I was unaware of the fact that the deponents of the confirmatory affidavits had to sign their respective confirmatory affidavits in the presence of a commissioner of oaths.
- 3.6 I attach hereto a complete set of affidavits, the contents of which are identical to the founding and confirmatory affidavits attached to the notice of motion dated 18 July 2017, now correctly signed and commissioned before an independent commissioner of oaths.
- 3.7 I submit that my failure to properly commission the affidavits were not mala fide or deliberate, but merely a bona fide error. I was advised that the affidavits must be signed as a matter of urgency and in my haste to have same signed, I forgot the advice of my attorney regarding the signature of same.”

[21] It is trite that a Commissioner of Oaths shall not administer an oath or affirmation relating to a matter in which he/she has an interest.⁵ In paras 28 (2), 29 and 30 of **RUMARCH INVESTMENT HOLDINGS (PTY) LTD v OLD FASHIONED FISH AND CHIPS**⁶ Msimeki J dealt with the formalities not complied with and resolved that it would be prudent and in the interests of justice that no evidence is disregarded. I share the same sentiments. *In casu* properly commissioned founding and confirmatory affidavits were filed.

⁵ Regulations Governing the Administering of an Oath ss 7 (1) *supra*

⁶ Unreported judgment by Msimeki J in the North Gauteng Division, Pretoria: Case No. 21168/2014 delivered on 25 March 2015

FACTUAL BACKGROUND

- [22] Mr Julian Wayne Hendry Van der Watt, the deponent to the founding affidavit, is the director of PAW ISS, a security business company in Kimberley, Schmidtsdrif and Windsorton since 2015 having eighteen clients. It is a registered service provider in terms of s 21 of the Act with its registration certificates issued on 30 July 2015.
- [23] The applicant fears that Koen would use its business' confidential information, operating, pricing and costing structures to his advantage as a result of his employment and involvement with the applicant. He, according to the applicant, is not only in breach of the alleged restraint agreement but also acts in contravention of the Act, hence the restraining order from operating a similar business in Kimberley, Windsorton and Schmidtsdrif to a maximum of 12 months. Otherwise the applicant's 47 employees would have to be retrenched due to economic decline in the said business in Kimberley.
- [24] During November 2016 PAW ISS and Koen reached an agreement that Koen would be appointed as director of marketing and operational services and a shareholder of the shares in the applicant on payment of R200 000-00 to expand its business. The purchase price would be calculated at 25% of the value of the business to be determined by the applicant's auditors and that a deposit of R100 000-00 would be payable on the date of signature of the agreement. This, according to Koen, did not materialise. He disputes that he is an employee of the applicant. He contends that no restraint of trade clause was incorporated in the agreement. On 28 November 2016 he paid the required deposit into Van Aardt's bank account.
- [25] On 11 February 2017 PAW ISS held a meeting with its managing employees, Messrs P van Aardt, C and A Vertue, Koen and JWH Van der Watt. During the meeting it was suggested that a restraint of trade agreement should be finalised as a matter of urgency. The minutes of the meeting (Annexure "PAW5") confirm this. Notably, the alleged agreement does not form part of the minutes of the meeting but according to PAW ISS the parties agreed in the terms as contained in paras 5.4.1 and 5.4.2.1 of the founding affidavit thus:

"5.4.1 Any employee or director shall for a period of 1 year from date of resignation for whatsoever reason and in Kimberley, Schmidtsdrif and Windsorton be prohibited from engaging in the establishment of a business, directly or indirectly in competition

with the applicant, as a shareholder, partner, member of a close corporation, director of a company or in any other capacity;

5.4.2.1 Any employee or director shall for a period of 1 year from date of resignation for whatsoever reason and in Kimberley, Schmidtdrif and Windsorton, be prohibited from engaging with any clients and employees of the applicant. ”

- [26] It is common cause that Ms Yolande Koen, Koen’s wife who practises as an attorney, was mandated to draft the said restraint of trade agreement. PAW ISS states that prior to finalisation of the restraint of trade agreement the relationship between the applicant and Koen went sour and on 04 May 2017 Koen left PAW ISS’ employ without notice. On 18 May 2017 Van der Watt learned that Koen had started a security company business called Anandis Services, trading as MK8 as alluded to earlier. He alleges that he received information that Koen offered to provide Mr C Smith, an employee of the applicant’s client, security services at a lesser rate thereby undercutting its tariffs by one of its employees, Mr Andreas Fundu, a specialised guard in its employ left and joined Koen’s security company R20-00 per guard per shift.
- [27] On 21 May 2017 Smith told Van der Watt that Koen informed him of one of PAW ISS’ guards was under the influence of alcohol whilst on duty which he alleges was untrue. PAW ISS alleges that Koen continues to entice his employees to join his business. Mr Andreas Fundu, a specialised guard in its employ and one of its employees, joined Koen’s security company. This conduct, it argues, adversely affects its business. According to Van der Watt, Koen also offered Messrs Andrew Letholo and C Makoti, other employees of PAW ISS and promised them improved salaries. Indeed on 26 May 2017 they left the applicant’s employ.
- [28] On 22 May 2017 PAW ISS’ attorneys of record addressed a letter to Koen warning him to desist from interfering with its clients and employees threatening him to sue him if he persisted with this conduct. On 23 May 2017 Koen’s attorney of record responded giving the applicant three weeks from the date of notice in terms of s 345 of the Companies Act⁷ to settle an amount of R123 356-44 due to Koen by the applicant failing which an application for the liquidation of its company would be initiated.

⁷ Act 61 of 1973

- [29] On 15 June 2017 Mr Henk Van der Westhuizen, the area manager of BKB and a client of the applicant, informed Van der Watt that he was contacted by Koen requesting that BKB transfer its business to his thereby resulting in a loss of R17 000-00 per month. Van der Watt alleges further that he was again contacted by Mr L Karrenmaker, the sport co-ordinator at Diamantveld High School, that Koen contacted him asking him to also transfer his business thereby withdrawing it from the applicant alleging that its service is of poor quality. On 15 June 2017 Van Der Watt says he telephonically contacted Koen and reprimanded him to refrain from contacting his clients thereby damaging his company's reputation. However, Koen did not take heed of the warning, the argument goes.
- [30] The applicant asserts that Koen could conduct his security company business anywhere in the country save for Kimberley, Schmidtsdrif and Windsorton. It argues that Koen is not registered with the private security service provider which is denied by Koen.
- [31] In response to the allegations Koen submits that Van Aardt represented to him that the applicant's company projected turn over for 2017 was R6 000 000-00 and Koen showed interest in the business which appeared lucrative. The applicant proposed that Koen becomes a director and shareholder of its business as opposed to being a shareholder in the applicant's K9 division, a part of the security services rendered by the applicant. His experience in the diamond mining industry and his business connections within the industry attracted the applicant. In the meantime Koen left his employ at Mentor Investments and waited for his appointment as director with PAW ISS. He disputes that the terms of the restraint of trade agreement were discussed at the meeting as alleged by the applicant. He also disputes that he was employed by the applicant.
- [32] Koen alleged that he later discovered that the applicant's business was not as lucrative as Van Aardt made him to believe. He also learned that the Vertues and Van Aardt resigned from the applicant's employ on 23 August 2016 whilst they represented to him that they were directors of the applicant. This remains undisputed. Koen refers to the applicant's business as '*amateurish*'. With this discovery, he decided to have nothing to do with PAW ISS. He states that he has been rendering services to Anandis Security Services and Cleaning CC. He denies enticing any of the applicant's

employees. He also denies that he was given formal training by the applicant. He contends that he cultivated his existing contacts that he had prior to his involvement with the applicant and represent no threat to any proprietary interests of the applicant. He concludes that the applicant's allegations are aimed at preventing him from being economically active as no restraint of trade agreement exists between them.

- [33] The issue for determination is whether Koen is in breach of a verbal restraint of trade agreement as alleged by the applicant which it insists is reasonable and does not unreasonably interfere with Koen's constitutional rights. On the other hand Koen persists that he is not party to a restraint of trade agreement. He urged me to dismiss the application with costs.

- [34] Ms Stanton concedes that the first respondent was neither employed nor trained by the applicant thereby confirming the version of the first respondent. She further conceded that the minutes of the meeting held on 11 February 2017 do not have reference or details of the alleged restraint of trade agreement. This reinforces the case of the first respondent. Ms Stanton confirmed that the agreement was in the process of being drafted but contends that the terms would have been agreed upon. This is in my view mere conjecture. She further submits that there is no dispute of fact in this matter.

- [35] Koen's case has been that his wife was mandated to draft and finalise a restraint of trade agreement and prior to its finalisation his relationship with the applicant soured. This is also confirmed by the applicant. From the minutes it clearly shows that the intention of the parties was to have the agreement in writing. This was confirmed by his wife in her confirmatory affidavit dated 28 July 2017. Mr Aswegen, on behalf of Koen, argues that there are disputes of fact that cannot be resolved on paper. I agree. He submits that substantial non-compliance with the Regulations Governing the Administering of an Oath or Affirmation (*supra*) is sufficient ground for the Court to dismiss the application.

- [36] On the applicant's version it was the intention of the parties that a written document would contain the contract/agreement. The first respondent on the other hand contends that such contract/agreement would not be said to be fully executed until the consent of the parties had been expressed by the signature on the document constituting the written agreement.

- [37] Notably, there is no explanation why the most important part, *'the conclusion of an oral restraint of trade agreement'* is omitted from the minutes. What appears from the minutes is that Pierre Van Aardt asked Koen if he knew when he would have money ready to buy in and whether the restraint of trade agreement had been put in place. Charl Vertue requested that the agreement be put in place with immediate effect.
- [38] In **BASSON V CHILWAN AND OTHERS**⁸ Eksteen JA held:

"The paramount importance of upholding the sanctity of contracts, without which all trade would be impossible, was again stressed by this Court in Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) at 9B-C, where Smalberger JA remarked inter alia that:

'The power to declare contracts contrary to public policy should be ... exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of power. ''

- [39] It is generally accepted that the restraint will be considered to be unreasonable, and thus contrary to public policy, and therefore unenforceable, if it does not protect some legally recognisable interest of the employer but merely seeks to exclude in order to eliminate competition.⁹
- [40] In determining reasonableness or otherwise of the provision of the restraint of trade Nienaber JA in Basson *supra* set out four questions that should be asked when considering reasonableness of a restraint at 767G-H thus:

"(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 maintained or objected? 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"

⁸ 1993 (3) SA 742 (A) at 762H-I

⁹ Automotive Tooling Systems (Pty) Ltd v Wilkens & Others 2007 (2) SA 271 (SCA) at 277G-278A

- [41] In **SIBEX ENGINEERING SERVICES (PTY) LTD V VAN WYK 7 & ANOTHER**¹⁰ Stegmann J held that:

“The proprietary interests that can be protected by such a restraint were essentially of two kinds. The first kind consisted of the relationships with customers, potential customers, suppliers and others that go to make up what is compendiously referred to as the trade connection of the business, being an important aspect of its incorporeal property known as goodwill. The second kind consisted of all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him, to gain a relative competitive advantage. Such confidential material is sometimes compendiously referred to as “trade secrets”.

- [42] In **TOWNSEND PRODUCTIONS (PTY) LTD v LEACH**¹¹ Erasmus AJ held that for information to be confidential it must comply with the following requirements:

“First of all...the information must not only relate to, but also be capable of application in, trade or industry. Secondly, the information must be secret or confidential. The information must accordingly – objectively determined – only be available, and thus known, to a restricted number of people or a closed circle; or, as it is usually expressed by the Courts, the information “must be something which is not public property or public knowledge”. Thirdly, the information must, likewise objectively viewed, be of economic (business) value to the plaintiff.”

- [43] *In casu* it is not clear what confidential information was of economic value to the applicant that was disclosed to Koen that he allegedly gained by his involvement with the applicant. No factual evidence regarding customer or potential customer lists were provided and no detail of what methods of operating, pricing and costing structures were referred to. The applicant claims to have a list of customers which it did not attach to its papers. There is no allegation that while Koen was involved with the applicant he had access to customers so as to establish some kind of relationship with them. It is conceded that he did not receive any formal training or induction courses from the applicant. It is also not disputed that he came with experience in the security business, had contacts and skills from the mining industry for example, GDB Consulting Engineers, Breeze Court Investments encompassing a number of diamond mining work sites under Wederberg and Oryx Plant and Graven Mining. The following facts are also undisputed:

43.1 That Koen was involved with the applicant for a brief period of time;

¹⁰ 1991 (2) SA 482 (T) at 502D-E

¹¹ 2001 (4) SA 33 (C) at 53J-54B

43.2 That he came and left with his experience in the security services; and

43.3 That there is neither speciality nor exclusivity about the applicant's business.

Mr Aswegen argues that taking into account the applicant's concession that there was no employment relationship between the applicant and the first respondent shows that there is no recognisable interest of the employer (the applicant *in casu*) but it seeks to exclude competition because of the skills and connectivity that the first respondent has with the mining industry.

- [44] For PAW ISS to now say that '*it was agreed between all the people present at the meeting that the restraint of trade would be drafted*' in the terms specified in *para 25 supra*, cannot stand. This is, in my view, just an indication that the parties intended to have a restraint of trade agreement in writing but none was concluded. It is also unclear who of the people present in the meeting took the minutes. There is also no argument that the minutes do not convey accurately what took place in the meeting. In my view there was no agreement in place, hence Ms Koen had to prepare a written agreement. The recording of the conversation between Koen and an unnamed employee of the applicant was not disclosed.
- [45] PAW ISS stated that it had eighteen clients but did not mention who they were. It alleged that it commenced its business in 2015 but if one has regard to Annexure "MK12" it clearly shows in a facsimile dated 06 March 2017 that its first financial year ended on 28 February 2017.
- [46] Koen admits that he provided GDB Mining Services with a quote on behalf of Anandis which he procured from PAW ISS during May 2017. He disputes undercutting the applicant's tariffs and states that Anandis' quote was R39 000-00 more than the applicant's. He admits that he sought to procure Diamantveld High School but denies that Diamantveld High School is the applicant's client. The invoice attached by the applicant is over a year old and shows that it rendered services to the school for only two hours. He confirms that he informed Mr Smith that one of the applicant's security guards was under the influence of alcohol on duty on invitation of Mr Smith, an employee of GDB Mining/Consulting. He nevertheless denies that on 15 June 2017 Van der Watt contacted him telephonically warning him to refrain from damaging the reputation of the applicant's business. Van Aardt did. He also denies

enticing any of the applicant's employees but that those that left did so on their own accord because they were not content with their work conditions.

- [47] **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD**¹² finds application wherein Corbett JA stated that:

"It is correct that, where in proceedings on notice of motion dispute of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order."

- [48] In **REDDY v SIEMENS TELECOMMUNICATIONS (PTY) LTD**¹³ Malan AJA stated:

"[10] Magna Alloys and Research (SA) (Pty) Ltd v Ellis [1984 (4) SA 874 (A)] , described as a landmark decision, introduced a significant change to the approach of the courts to agreements in restraint of trade by declining to follow earlier decisions based on English precedent that an agreement in restraint of trade is prima facie invalid and unenforceable. In English law, a party seeking to enforce such agreement has to show that the restraint is reasonable as between the parties while the burden of proving that it is contrary to public policy is incumbent on the party alleging it. Magna Alloys reversed this approach and held that agreements in restraint of trade were valid and enforceable unless they are unreasonable and thus contrary to public policy, which necessarily as a consequence of their common-law validity has the effect that a party challenging the enforceability of the agreement bears the burden of alleging and proving that it is unreasonable."

- [49] I find it difficult to agree with the applicant that the interests that it seeks to protect could be regarded as qualitative and deserving of protection. In my view, it seeks to prevent the first respondent from competing with him in the security business. I therefore cannot find that the restraint is reasonable in the circumstances. The applicant has, in my view, not managed to convince me that an oral restraint of trade agreement exists between the parties. Therefore its application falls to be dismissed.

COSTS

- [50] What remains is the issue of costs. Ms Stanton argues that I should order costs against the first respondent thereby showing displeasure for objecting the application for the

¹² 1984 (3) SA 623 (A) at 634

¹³ 2007 (2) SA 486 (SCA) at 493E-F (para 10)

amendment of the notice of motion. She stated that the applicant should be ordered to pay the costs that were reserved previously when it withdrew the Rule 28 (1) notice dated 06 September 2017. In this instance the applicant tendered the costs. As far as costs of this application are concerned she argues that the applicant served the replying affidavit before the matter was heard and so no inconvenience was caused to the first respondent.

- [51] Mr Aswegen in response submitted that the applicant should be ordered to pay the costs on a scale as between attorney and client due to the flagrant abuse of the court process and the fact that the applicant did not take the court into its confidence by selectively placing the facts.
- [52] The purpose of an award of costs to a successful litigant is to indemnify him/her for the expense to which he/she has been put through having been unjustly compelled to initiate or defend litigation.¹⁴ The matter of costs is a matter wholly within the discretion of the court but this is a judicial discretion and must be exercised on the grounds upon which a reasonable person could have come to the conclusion arrived at.¹⁵ Costs on attorney and client scale are punitive in nature.
- [53] The applicant initially approached this court on an urgent basis thereby requesting it to condone its non-compliance with the Rules. It failed to show that the matter was urgent and why it could not be granted the relief sought in the ordinary course. It later abandoned urgency and failed to comply with the Uniform Rules of Court. In my view, an award of costs on attorney and client scale is justified in the circumstances.

In the circumstances I grant the following order:

The application is dismissed with costs on a scale as between attorney and client.

¹⁴ Texas Co (SA) Ltd v Cape Town Municipality 1926 AD 467 at 488

¹⁵ Merber v Merber 1948 (1) SA 446 (A) at 453



BM PAKATI

JUDGE

<i>On Behalf of the Applicant:</i>	<i>ADV STANTON</i>
<i>Instructed by:</i>	<i>Engelsman-Magabane</i>

<i>On Behalf of the Respondent:</i>	<i>ADV VAN ASWEGEN</i>
<i>Instructed by:</i>	<i>Duncan & Rothman</i>