NOT REPORTABLE

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

Case No. 542/2018

In the matter between

NATIONAL SHIP CHANDLERS (NATAL) 1989 (PTY) LTD	**Applicant**
and	
WAYNE ERIC ELLIS	**First Respondent**
ALBATROSS PROVISIONING CC T/A LINK SHIP CHANDLERS	**Second Respondent**

REASONS FOR ORDER

HARTLE J

[1] I granted an order on 29 March 2018 dismissing the applicant's application with costs.

[2] These are my reasons for doing so.

[3] The applicant sought on an urgent basis to restrain and interdict the first respondent, for a period of 12 months commencing on 31 August 2017 within the area known as the Nelson Mandela Bay Municipality, from being engaged as an employee, agent, member, representative or in any other capacity, be it directly or indirectly, with the second respondent, or with any client of the applicant; or from soliciting clients and customers of the applicant which he may have dealt with during his erstwhile employ with it; or from divulging or disclosing to any party including the second respondent its customer lists, supplier lists, price lists, trade secrets and/or confidential information obtained whilst in the service of the applicant. It also sought self-standing relief against the second respondent interdicting it from receiving or from indirectly using these trade secrets or confidential information such as may have been divulged to it by the first respondent. Costs were sought against both respondents as well.

[4] The respondent was in the employ of the applicant as a procurer, but resigned on 31 August 2017. The applicant put up a copy of its written contract of employment concluded with him, which became effective on 1 July 2017. Although the applicant referred to this as the "new employment contract", it contended that the first respondent had been in its employ since 20 April 2015 already, albeit under the guise of a different corporate entity.

[5] Clause 20 of the contract provided as follows:

"RESTRAINT OF TRADE

20.1 After termination of this agreement the employee undertakes and agrees not to:

20.1.1 be engaged in any other business be it in direct or indirect competition with the employer or as a shareholder, partner, member of a close corporation, director of a company or in any other capacity;

20.1.2 be engaged independently of the employer by any client by the employer in any capacity;

20.1.3 directly or indirectly, on his/her own behalf or on behalf of others, undertake or assist in the solicitation of customer with whom the employee dealt during the course of his/her employment with the employer. Within a period of 12 (twelve) months after termination in the area known as Port Elizabeth/Nelson Mandela Bay Municipality.

20.2 After termination, the employee will in addition not divulge information obtained while in service of the employer, to any competitor of the employer or any competitor of clients.

20.3 The employee acknowledges and agrees that the restraint is fair, reasonable and necessary for the protection of the employer, the employer's trade name and the goodwill attached thereto."

[6] The applicant alleged that it had coincidentally come to its attention on 9 February 2018 from a trailing email sent to it by a client that the first respondent was doing business on behalf of the second respondent to which he had "moved over" and had offered to the client a price list and a tender to do business with it on a discounted basis to provide certain supplies.

[7] The applicant related that immediately it became aware of the first respondent's treachery (this is because he had in fact informed its operations manager that he was resigning to pursue a "new venture", which involved starting his own business unrelated to its own), it sent a demand to him that he should

adhere to the restraint provision in his contract that he not be employed with a competitor within the period of restraint. This was followed by a formal demand from its attorneys to both respondents a few days later pointing out the infraction by the fact of the first respondent's employ with the second respondent. This solicited a reply from the respondents' attorneys advising that they would reply by close of business on Monday, 19 February 2018.

[8] Even before the reply came the present application was issued, this because, so says the applicant in its founding affidavit, the first respondent had "already attempted to solicit the business of one of (its) customers, and may have succeeded in doing so in respect of other customers" and that it therefore had "no option but to institute these proceedings to protect its proprietary interests".

[9] Further since in its view the first respondent had (as appeared from the email) thereby taken steps to contact and solicit its customers and business applying his knowledge of its network in Port Elizabeth, it claimed that he was also in breach of the confidentiality undertakings given by him in clause 19.1 of his employment contract. Clause 19.1 forbids him from "disclosing any confidential information to any third party or entity … after (the agreement's) termination, unless the employer specifically agrees so in writing".

[10] Other than to state that because of the conclusions referred to in paragraph [8] above as to why it had to institute the proceedings, no further facts were averred as is required by the provisions of Rule 6(12)(b), let alone explicitly, as to why the applicant believed it could not be afforded substantial redress at a hearing in due course unless the matter was entertained on an urgent basis.

[11] These were the two averments on which the applicant relied to make out a case for urgency, the first being that the first respondent is employed by the second respondent, and the second that he had already attempted to solicit the business of one of its customers by sending it the second respondent's price list. It further speculated (which falls to be left out of account for want of any factual foundation) that he may have done so in respect of other customers as well.

[12] A certificate of urgency was put up in which the assertion is made by Mr. Pillay, who appeared on the applicant's behalf, that the application is "inherently urgent". The same mantra appears in the founding affidavit, namely that matters of this nature are inherently urgent and demand the attention of the courts.

[13] It was unnecessary for the duty judge to issue a directive, such as envisaged in paragraph 12(d)(iii) of the Joint Rules of Practice of this court, because the matter was first enrolled for hearing on a day normally enrolled for motion court matters.

[14] The notice of motion as originally framed sought the issue of a rule *nisi* on 27 February 2018, returnable on the same date. I expect this was an error, but one which was never corrected. The impression given is that final relief, moreover retrospectively to 31 August 2017, was being sought.

[15] The notice of motion was also not amended to reflect the abridged time periods by when the respondents should oppose and file their answering affidavits, albeit it did exhort any of the respondents wishing to oppose the urgent interim relief being sought, to "deliver any documents in support of such opposition" to two email addresses provided therein.

[16] The application was served on the respondents' attorneys at 10h26 on 21 February 2018 on only three clear court days' notice to them.

[17] I was informed from the bar that when the matter was called on 27 February 2018 it was not argued, albeit the respondents had managed to depose to their replying affidavits at short notice. The application was instead postponed to 8 March 2018 at the applicant's request to enable it to file an answering affidavit. As an aside I mention that the papers had burgeoned to over 300 pages by the time it came before me and had grown all sorts of tangents, belying its character as a *bona fide* critically urgent matter. It is perhaps no wonder that when the matter came before the court on 8 March 2018 the duty judge was not prepared to hear it for want of compliance with the provisions of rule 15A of the Joint Rules of Practice, treating it as an ordinary opposed application. The same fate befell the matter when on 15 March 2018 it was "crowded out" on the opposed roll and postponed for hearing before me on 22 March 2018. On 19 March 2018 the applicant's attorneys addressed me and the Judge President requesting clarification that the matter would be disposed of, whatever the status of the roll, on 22 March 2018, because it was an urgent matter.

[18] I highlight some of the tangential developments that happened along the way. The applicant filed an extremely lengthy replying affidavit in which it raised entirely new matter, in a bid in my view to prove that the first respondent was not being truthful or had sought to downplay his involvement in its business and with its customers as well as his supposed knowledge of a customer list and confidential information. Determined to enlarge upon the allegation in the founding affidavit that the applicant had established a protectable interest in its supply information

and price and that a threat was posed by what he knew, and to minimize his refutation that he did not have a grasp of the company's IT system, the applicant put up a spreadsheet reflecting his purported "activity" on the system to identify transactions he was involved with and instances where he quoted. Emails he had sent during his tenure with the applicant were also collected and added to the fray to show that he had indeed developed relationships with its customers.

[19] Then the applicant purported to file a supplementary affidavit *sans* any application for condonation for it to be admitted in which it sought to clear its own conscience (following hot on the heels of its exposure of the first respondent for the charlatan that he is on its version) by admitting firstly that its reliance on documentation reflecting the first respondent's earlier employ with it under the guise of a close corporation as it had traded before was strictly speaking not relevant, but then went on to explain and justify the relevance of this anyway to the threat that was posed to it by what the first respondent had taken away with him from this prior period of employment with the close corporation. What is remarkable is that in this affidavit the applicant conceded that this information should strictly speaking have been put up earlier in its replying affidavit, but it defended its absence of the information on account of the "severe time constraints and the urgency involved in timeously preparing the replying affidavit"!

[20] Of course there followed an objection to the admission of the supplementary affidavit, and a formal application by the first respondent to file a further affidavit to defend his integrity (in which he objected to the introduction of hearsay evidence and the applicant's failure to have complied with the relevant provisions of the Electronic Communications and Transactions Act, no 25 of 2002 relating to the data and emails sought to be relied upon by the applicant in the replying

affidavit), the delivery of that further affidavit and then, thereupon, the filing of a very lengthy "answering affidavit in response to the first respondent's application for leave to file a further affidavit" which was handed up to me from the bar at the hearing of the matter.

[21] In his answering affidavit the first respondent, with whom the second respondents joined issue, raised as an *in limine* argument the applicant's noncompliance with the peremptory requirements of rules 6(12)(b) (I have already dealt with this above) and 6(12)(a) read with rule 6 generally, in the latter respect because it had failed to indicate in its notice of motion by when the respondents were to give notice of their intention to oppose or to stipulate by when they had to file their answering affidavits.[1] They averred that the procedure adopted by the applicant in its notice of motion was a "misuse and an abuse of the process of court" and that as a result, the application should be dismissed with costs.

[22] On the substantive issue of urgency the first respondent alleged that the applicant had known from the time he gave notice to resign already, on 28 August 2017, that he intended to conduct business for his own account as a ship chandler and that he in fact did exactly that. After his resignation he continued to work for the applicant for two months and later (up until mid-January 2018) conducted business for his own account t/a Quayside Marine Services with the applicant's knowledge. In fact, he claims that on 15 January 2018 he took delivery from the applicant of a significant order of 100 kg of coloured rags as a sub-contractor to the second respondent, which rags were supplied by the latter to a ship "A S Virginia". When taking delivery of the order, he claims that the applicant's employees even

[1] Rule 6(12)(a) enjoins the court to dispose of urgent matters by procedures "which shall as far as practicable be in terms of these rules". Rule 6 sets out the normal procedure which applies.

assisted him to load the goods onto his bakkie. For this reason, he denied that the applicant only became aware of his employment by the second respondent on 9 February 2018, or that this purported realization warranted the cry of urgency. These critical events, which I must accept on the first respondent's version – certainly detract from the applicant's claim that it was blindsided and faced with an emergency when it discovered his double dealings so to speak. To the contrary, this defence suggested a waiver of the applicant's entitlement to rely on the restraint in all the circumstances.

[23] The applicant in its replying affidavit appeared to miss the sting of the respondent's formal criticism of it levelled at the form of the notice of motion and the question of urgency. It simply asserted that these points "become academic" in the light of the court order which directed the further conduct of the proceedings.

[24] These shortcomings are however by no means inconsequential neither does it matter that the matter had probably become ripe for hearing by the time it came before me. The provisions of rule 6(12)(b) in peremptory language requires the applicant to set forth explicitly the circumstances which he avers renders the matter urgent and the reasons why he claims that he cannot be afforded substantial redress at the hearing in due course.

[25] It is not sufficient to contend in my view that these matters are "inherently urgent" even assuming that the first respondent had ostensibly become employed by the second respondent in breach of the restraint of trade agreement in contravention of clause 20 of his employment contract.

[26] It was obvious that at the time the respondents were placed on terms by the applicant's direct letter to him and those of its attorneys addressed to both of them, the only cause of complaint was the applicant's knowledge that the first respondent had taken up employment by a competitor. By the time of the issue of the application this had morphed into an attempt to solicit customers of the applicant and a purported breach of the confidentiality undertaking in paragraph 19 of the employment contract on the assumption that he had accessed the applicant's Port Elizabeth network.[2] The attorneys' letter addressed to the second respondent had only tentatively suggested that the applicant's confidential information "may have" been disclosed to the second respondent.

[27] But even assuming an infraction by a breach of the first respondent's undertaking given in paragraph 20 of the employment contract, this did not *per se* establish any objective urgency, neither did it fall to this court to make the default assumption the applicant seemed to suggest should follow logically by the mere fact of the first respondent's employment with a competitor during the period of restraint.

[28] On the issue of why the applicant believed the first respondent's entitlement to expect compliance with the peremptory provisions of rule 6 should be compromised by short service on the respondents' attorneys and the unacceptable format of the notice of motion, the applicant offered no excuse, apology or justification as to why the respondents should be rushed through the portals of the court to answer to the applicant's claim on an urgent basis.

[2] Although the first respondent conceded that he had sent the price list in contention, he claims that he did so in response to an unsolicited request therefor. The respondents further denied that the customer was exclusive to the applicant.

[29] It is a misconception in my view that applications of this nature, which in practice and in effect involve putting an abrupt end to the covenanter's freedom to trade and work by the granting usually of interim relief to enforce a restraint (which might in the long run turn out to be an unreasonable one at that), should be elevated to a category of cases requiring urgent attention. To the contrary, given the harsh effect of a restraint in trade and the burden that a party who challenges the enforceability of the agreement bears to allege and prove that it is unreasonable and therefore against public policy, a respondent in such matters should in my view be afforded a reasonable opportunity to meet that burden without the threat of an urgent interim interdict hanging over his head especially where the barest of allegations have been made in support of the allegation that the matter is so urgent and without saying why the respondents should not be afforded the usual time periods to respond formally.

[30] The applicant itself acknowledged this burden confronting the respondents in asserting the so-called inherent urgency demanding the attention of the courts in the following averment:

> "the onus rests (on) the respondents to demonstrate on clear evidence why the restraint is not enforceable. ...
> The balance of convenience clearly favours the grant of interim relief pending any resolution of disputes of fact." (Emphasis added.)

[31] This recognition that there would likely be disputes of fact notwithstanding, the applicant in effect sought final relief, well at least this is the case the respondents had to meet on the face of the notice of motion.

[32] In Caledon Street Restaurants CC v D'Aviera[3] this court noted what was expected of a litigant to contend with when relief is sought on an urgent basis:

> "In the assessment of the validity of a respondent's objection to the procedure adopted by the applicant the following principles are applicable. It is incumbent on the applicant to persuade the court that the non-compliance with the rules and the extent thereof were justified on the grounds of urgency. 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 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". That obligation must of necessity be discharged by way of the exercise of a judicial discretion as to the attitude of the court concerning which deviations it will tolerate in a specific case. Practitioners must accordingly again be reminded that the phrase " which shall as far as practicable be in terms of these rules" must not be treated as **pro non scripto.** The mere existence of some urgency cannot therefore necessarily justify an applicant not using Form 2 (a) of the First Schedule to the rules. If a deviation is to be permitted, the extent thereof will depend on the circumstances of the case. The principle remains operative even if what the applicant is seeking in the first instance, is merely a rule nisi without interim relief. A respondent is entitled to resist even the grant of such relief. The applicant, or more accurately, his legal advisors must carefully analyse the facts of each case to determine whether a greater or lesser degree of relaxation of the rules and the ordinary practice of the court is merited and must in all respects responsibly strike a balance between the duty to obey rule 6(5)(a) and the entitlement to deviate therefrom, bearing in mind that that entitlement and the extent thereof, are dependent upon, and are thus limited by the urgency which prevails. The degree of relaxation of the rules should not be greater than the exigencies of the case demand (and it need hardly be added these exigencies must appear from the papers). On the practical level it will follow that there must be a marked degree of urgency before it is

[3] [1998] JOL 1832 (SE) at pages 7 – 9.

> justifiable not to use Form 2(a). It may be that the time elements involved or other circumstances justify dispensing with all prior notice to the respondent. In such a case Form 2 will suffice. Subject to that exception it appears that all requirements of urgency can be met by using Form 2(a) with shortened time periods or by another adaptation of the form, e.g. advanced nomination of a date for the hearing of the matter, or omitting notice to the registrar accompanied by changed wording where necessary. Adjustment, not abandonment of Form 2(a) is the method."

[33] Even assuming the applicant was only intent upon applying for interim relief, I was not satisfied that it had established a proper basis for a departure from the peremptory provisions of the rules or sufficient reasons why I should condone its failure. The real loss or damage were the applicant to be compelled to rely solely or substantially on the normal procedure simply did not appear from the papers. Worst case scenario the first respondent's services would be engaged by a competitor while the normal time periods ran their course and so what of that? On the respondents' version which I am constrained to accept, there would be no threat to the applicant thereby that warranted the treatment of the matter as an urgent one. In its founding affidavit it had simply speculated regarding the supposed harm to it.

[34] Mr. Pillay urgent upon me to find that the facts of this matter were distinguishable from Caledon Street Restaurants CC v D'Aviera[4] because here the respondents had been given fair warning that the application was to come and some attempt had been made to adjust the notice of motion, but I was not so convinced that it was an issue of form over substance. The applicant simply did not make out a case on urgency.

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[4] *Supra*.

[35] When an applicant insists on dealing with a matter on an urgent basis there is not only inconvenience to the respondent, but to the court as well as litigants and practitioners making demands on its time and resources. Other litigants (and their representatives) waiting for their matters to receive attention are also compromised by the queue being jumped as it were by a litigant making their subjective emergency everyone else’s concern.

[36] Absent any objective urgency established on the papers or reason why the applicant could not be afforded substantial redress in due course, I was not inclined to deal with the merits of the supposed infraction.

[37] In Vena and Another v Vena and Others,[5] Jones J explained why an order dismissing an urgent application, for want of compliance with rule 6(12)(b), rather than simply striking the matter from the roll, was not inappropriate in circumstances similar to the present situation:

> “My finding was that the applicant’s allegations did not comply with rule 6(12)(b) which requires him to set out explicitly the circumstances rendering the matter urgent and also the reasons why he will not be afforded substantial redress at a hearing in the ordinary course. He gave no reasons at all why he could not get substantial redress at a hearing in due course. The circumstances allegedly giving rise to the commercial urgency upon which he relied were the reverse of being explicit. Instead, they were set out in vague, incomplete, and insubstantial terms and did not seem to me to have bearing on the relief sought in the notice of motion or the issues in dispute, other than that the divorce between the parties was disruptive of the business of the service station. The grounds of urgency alleged certainly did not justify giving the respondents two court days within which to give notice of an intention to oppose and to file opposing affidavits. A postponement was inevitable and was granted. The 1st respondent filed her opposition as soon as reasonably

[5] 2010 (2) SA 248 (ECP) at par [5].

> possible, on 12 December 2008. The applicant's replying affidavit was not filed until 8 January 2009. He gave no explanation for his delay and one is therefore left in doubt about the *bona fides* of his case for urgency. The urgency appears to have completely disappeared. In consequence, I find myself echoing the remarks of Kroon J at page 21 of the judgment in *Caledon Street Restaurants CC* that 'in my judgment, therefore, the use that the applicant made of the procedure relating to matters of urgency was a misuse, indeed an abuse, of the process of the court. On that ground alone I find that the applicant should be non-suited'.

[38] He went on to note that a dismissal for want of urgency on the basis found by him was tantamount to an order for absolution from the instance, in which event it is open for an applicant to set the matter down again, because the urgency point is procedural and the merits would have not been determined. In other words, the applicant will not be permanently non-suited. [6]

[39] In my view the applicant abused the process of court by issuing out the application on an urgent basis, warranting the order of dismissal which I ultimately granted. I was incidentally not inclined to isolate the wasted costs of the day incurred when the matter was "crowded out" due to "no fault" of either party. To the contrary, the matter would not have been superfluous on the roll except for the applicant's insistence that it was urgent and should be heard

[40] In the result I issued the order which I did.

[6] Vena and Another v Vena and Others *supra* at paras [6] – [8].

B HARTLE

JUDGE OF THE HIGH COURT

DATE OF HEARING : 22 March 2018

DATE OF ORDER : 29 March 2018

DATE OF REASONS : 6 April 2018

APPEARANCES:

For the applicant : Mr. Pillay instructed by Stauss Daly Incorporated c/o Stauss Daly Incorporated, Port Elizabeth (ref. Mr. J Senekal/LGC/NAT222/0003).

For the respondents : Ms I Bands instructed by Mc Williams & Elliot Attorneys, Port Elizabeth (ref. Mr. Ed Murray).