



FREE STATE COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case No.: 4164/2016

In the matter between:

RAND BUILDING HYDRAULICS (PTY) LTD

Applicant

and

BASIL CHARLES GILFILLAN

Respondent

CORAM: HEFER, AJ

JUDGMENT: HEFER, AJ

HEARD ON: 24 AUGUST 2017

DELIVERED ON: 26 OCTOBER 2017

[1] During October 2016, Applicant obtained an order in the following terms:

- (i) Respondent is interdicted, prohibited and restrained from encouraging enticing, persuading or inducing any employee of the Applicant directly or indirectly, to terminate his/her employment with the Applicant;
- (ii) Respondent is interdicted, prohibited and restrained from, directly or indirectly, advising clients and/or customers of the Applicant that he intends to or will compete directly or indirectly with the Applicant;
- (iii) Respondent is interdicted, prohibited and restrained from, directly or indirectly soliciting, canvassing and dealing with clients and/or customers of the Applicant or rendering any competitive services to such clients and/or customers;
- (iv) Respondent is interdicted, prohibited and restrained from, directly or indirectly carrying on or engaging in any business of which is similar to and/or competing with and/or endeavouring to compete with the Applicant's business; and
- (v) Respondent is interdicted, prohibited and restrained from, directly or indirectly associating and/or concerning him with, engaging in any firm, business, company, close corporation or other association which carries on business in competition with the business of the Applicant:

- (a) Any time during the period of five years from 1 August 2014;
- (b) Anywhere within a 100 kilometre radius of the premises of the Applicant and/or any other branch of the Applicant or office of the Applicant;
- (c) Whether as proprietor, principal, member, agent, partner, representative, shareholder, director, manager, employee, consultant, advisor, financier, administrator and/or in any like capacity.

[2] The Applicant now alleges that the Respondent has been acting in breach of such order of Court and therefore launched the present contempt of Court proceedings against the Respondent.

[3] **BACKGROUND FACTS:**

During August 2014 an entity known as Bagill Services, duly represented by the Respondent, sold, transferred and ceded to the Applicant as an indivisible whole and going concern, the risk in and benefit of business involving the designing, manufacturing, installing, repairing and maintaining of hydraulic services the business, *inter alia*, comprising of:

- (a) the goodwill thereof;
- (b) the designated assets;

- (c) the stock; and
- (d) all contacts thereof.

[4] Subsequent to such sale agreement, Respondent was further employed by the Applicant in terms of a written agreement of employment as Branch Manager at the Free State Branch for the period 1 August 2014 until 13 August 2019. In terms of this agreement the Respondent was to be paid the monthly salary of R50 000,00. According to the Respondent, the selling point to him was indeed that he was to be employed as described.

[5] At the time of the conclusion of the employment agreement, Applicant and Respondent also concluded a written restraint of trade agreement, the material expressed terms of which being as follows:

- (a) The restraint would become enforceable on termination of the employment agreement;
- (b) The Respondent would for a period of five years from the date of commencement of the employment agreement be restrained from either directly or indirectly:
 - (i) encouraging, enticing, persuading or inducing any employee of the Applicant to terminate his/her employment with the Applicant;

- (ii) advising clients and/or customers of the Applicant that he intends to or will compete directly or indirectly with the Applicant; or
 - (iii) soliciting or canvassing clients of the Applicant or rendering any competitive service to such client.
- (c) Respondent would not within the restrained period, whether as employee, manager or agent for any person, firm, company or body, corporate or incorporate, directly or indirectly:
 - (i) carry on assist, financially or otherwise engage or concerned or interested in;
 - (ii) be a director of or shareholder or member or partner, directly or indirectly in; or
 - (iii) act as a consultant or advisor

to any firm, company or body which carries on business in the territory which is similar to or competing with or endeavouring to compete with the Applicant's business.
- (d) The restraints would be deemed to be in respect of each part thereof, entirely separate, severable and separately enforceable and to protect the financial interest of the Applicant; and
- (e) The restraints imposed would be deemed to be additional to and will not in any way affect the validity of any other restraint imposed upon the Respondent in any other

capacity, or under any other agreement entered into between the Respondent and other parties.

- [6] It is common cause that during February 2016, the parties further signed a so-called "*separation agreement*". There appears to be a dispute regarding the circumstances which led to the conclusion of such separation agreement. According to the Applicant, the Respondent resigned from his employment with the Applicant. The Respondent, however, alleges that on that particular day, the Applicant's human resources manager walked into his office unannounced and in so many words made it clear to him that the Applicant no longer wanted him in their employment. According to the Respondent it was further made clear to him that termination of his services was inevitable and would be unceremonious and that the path of least resistance would be to retire. The termination of the Respondent's employment on 4 February 2016, is however common cause.
- [7] Applicant's application for an interdict during October 2016 was based on Respondent allegedly enticing employees of the Applicant and attempts to persuade an employee of the Applicant to terminate his employment with the Applicant; Respondent's alleged intention to compete with the business of the Applicant; Respondent's contacting some of Applicant's customers; Respondent publishing false and malicious statements and Respondent allegedly competing with the Applicant's business. On that basis the interdict was therefore also granted in favour of the Applicant during October 2016.

- [8] In the present application for contempt of Court, the Applicant relies on certain actions of the Respondent after the interdict have been obtained. Such actions will be dealt with individually hereunder.

SOLICITING AND DEALING WITH APPLICANT'S CLIENTELE:

- [9] According to the Applicant during January 2017 a regular customer of the Applicant returned to Mrs. Bester, an employee of the Applicant, a tax invoice rendered to such client. The tax invoice was apparently defaced with handwritten notes. According to the Applicant having previously been employed by and having worked with the Respondent for a total period of approximately eight years, Mrs. Bester immediately recognised the handwriting contained in the tax invoice as that of the Respondent. Applicant also refers to a further letter containing a list of equipment and fittings provided by another regular customer of the Applicant, being Mr. Gert Eksteen. Mrs. Bester allegedly once more recognised the handwriting contained on the letter provided by Me. Eksteen as that of the Respondent.
- [10] As a result of the aforesaid the services of a forensic handwriting examiner, namely Me. Buckley were obtained in order to determine whether the Respondent was acting in breach of the interdictory Court order by *inter alia* dealing with the Applicant's clientele. According to a report by Me. Buckley, it was confirmed that the handwriting on the tax invoice was that of the Respondent.

- [11] In his opposing affidavit the Respondent deals specifically with these allegations pertaining to the handwritings contained on the documentation referred to. According to the Respondent, he has no personal knowledge of the circumstances in which the first tax invoice was generated, why handwritten notes were made on it, etc. Respondent denies in particular that the handwriting contained on the first tax invoice referred to, is his. Respondent not only denies that such handwriting is his, but he took the impetus of clarifying the matter with the particular client. The Respondent then append a written explanation provided by the sole member of the client, being Craft Hydraulics from which it is evident that the handwriting that appears on the invoice is in fact that of Craft Hydraulics' store supervisor. Not only this member, but also the store manager then states in confirmatory affidavits that it is indeed not the Respondent's handwriting which appears on the said invoice.
- [12] We therefore have the situation that on the one hand we have the report of an expert who states that in her opinion the handwriting which appears on the two invoices referred to, is indeed that of the Respondent if it is compared, amongst others with the Respondent's signature on the employment agreement between the parties. On the other hand, we have the direct evidence, not only of the sole member of Craft Hydraulics from which it is evident that the handwriting that appears on the invoice is in fact that of the store supervisor, Mr. Allan Ninneman but also of Mr. Ninneman himself which confirms that it is his handwriting.

[13] In S v Gouws 1967 (4) SA 527 E at 528D it was confirmed that the prime function of an expert is to guide the Court to a correct decision on questions falling within the expert's specialised field. Such an expert's decision should not, however, displace that of the tribunal which has a right to determine the issue to be tried.

[14] In ANNAMA v CHETTY AND OTHERS 1946 AD 142 the Court was also faced with direct evidence which was contradicted by expert evidence. On appeal Greenburg JA said as follows:

"But I find it difficult to imagine a case where direct evidence can be so conclusive as to render it permissible to disregard expert evidence the conclusions of which are in conflict with the direct evidence."

at 150.

[15] In regards to a handwriting expert, Greenburg JA further said as follows at 155:

"His function is to point out similarities or differences in two or more specimens of handwriting and the Court is not entitled to accept his opinion that these similarities or differences exist, but once it has seen for itself the factors to which the expert draws attention, it may accept his opinion in regard to the significance of these factors. Thus, to take an instance relevant to the present case, where the Court sees an absolute identity between two signatures, an expert's opinion as to unlikelihood of such an identity in two genuine signatures is an opinion from which the Court may be guided. If he is an honest witness and has devoted many years to the study of handwriting then his opinion on such a point may well be of assistance to the Court."

[16] As far as the present expert's "*devotion to the study of handwriting*" is concerned, she refers to her qualifications as being attached to her report dated 7 February 2017 which, however, does not form part of her report. I therefore do not know anything about her qualifications and the time she has studied and "*devoted to the study of handwriting*". Furthermore, whereas this is application proceedings, the expert's opinion was not submitted to cross-examination. Most importantly I do not see an absolute identity between the different signatures as contended by the handwriting expert. For instance, the "s" in the word "*personal*" referred to in the second charge differs according to me from the "s" as contained in the word "*trainers*", the "j" as contained in "Q1" and "Q3" does not appear to be the same one as contained in both charge 1 and 2 with reference to "ST". It is not necessary for me to deal with each and every comparison. As stated I am not convinced that from what I can see myself, that it is indeed two identical handwritings.

[17] The direct evidence of the relevant deponents referred to, is therefore to be preferred to the effect that the handwriting referred to is indeed not that of the Respondent. As far as this point is concerned, it is also significant that in his letter dated 6 May 2017, Mr. Geyser, being the sole member of Craft Hydraulics, he actually invites anyone, and by implication in particular the Applicant, to speak to the store supervisor, Mr. Ninneman regarding the incident where Mr. Ninneman wrote on the particular sales order. Evidently the Applicant has chosen not to take up Mr. Geyser's invitation whereas Applicant fails in totality to deal with this aspect in reply.

- [18] As far as soliciting and dealing with Applicant's clientele is concerned, the Applicant refers to a further incident during which a certain Mr. Pieter du Plessis of "*AMS Engineers*" informed an employee of the Applicant that it was not possible to collect a pump as the owner of AMS Engineers had given it to the Respondent during March 2017. In answer to these allegations, the Respondent provides a comprehensive plausible explanation for the circumstances of such pump being handed to him which is again confirmed in a confirmatory affidavit by a third person. As far as this contention by the Applicant is concerned, in reply the Applicant fails to take it any further.

COMPETING WITH THE APPLICANT'S BUSINESS:

- [19] As far as competing with the Applicant's business is concerned, the Applicant employed the services of a private investigator in order to have the movements of the Respondent monitored during the period January 2017 to 9 February 2017, therefore for a period of approximately one week. Such findings as contained in the report by the private investigator, which will be dealt with individually herein under, need to be considered:

19.1 Respondent's swimming pool services:

- 19.1.1 According to the investigations, despite the trade signage displayed on the Respondent's motor vehicle, advertising swimming pool services, the Respondent at no stage attended at properties with swimming pool facilities. It needs to be

mentioned that the Applicant's reference to the report of the private investigator, also refers to the 2016 period, which apparently was also at some stage investigated by the same investigator. However, for purposes of the present application, I can only have regard to the period January/February 2017 referred to.

- 19.1.2 To this allegation the Applicant draws attention to the fact that the report spans a mere 11 days over the peak of the festive season. The Respondent explains that it may be that he did indeed not visit any of the swimming pool clients within the period and that he dropped-off certain swimming pool products at the work places of his clients. The Respondent then further attaches certain documentation which confirms the purchase of certain swimming pool products.

19.2 Genflex Hydraulic Equipment:

In regards to the alleged visit to Genflex Hydraulic Equipment, the Respondent alleges that he did not visit Genflex to do business, save for purchasing fittings and hoses to repair the hydraulic car lift in his workshop.

19.3 OFS Bodies, Virginia:

In regards to the visit to OFS Bodies, Virginia, the Respondent again does not dispute such visit, but provides the explanation that he went there to have his trailer fixed. According to the Respondent he did not go there to do business with OFS Bodies.

19.4 Craft Engineering Works:

In regards to Respondent's visit to Craft Engineering Works, the Respondent explains that it is his building where he has his little workshop.

19.5 Top Gear Engineering:

The Respondent explains that Top Gear Engineering manufactured a steering shaft for him for a tractor that was converted into a go-cart for his grandchild by the Respondent himself. Top Gear Engineering also manufactured two rollers for his car lift.

- [20] In general, the Respondent further alleges that he has known the owners of the relevant businesses for years and it may well be that he was popping in to make conversation or drink coffee as "*senior citizens*" like himself often does. Respondent again disputes that he has been doing business either directly or indirectly with the entities referred to, nor did he compete or seek to compete in any

way with the Applicant's business or seek to solicit business from the Applicant's clientele.

[21] There are two further allegations pertaining to Respondent's alleged soliciting and dealing with Applicant's clientele which needs to be considered. The first is the one regarding Mr. Eksteen's visit to his premises. According to the Respondent, Mr. Eksteen visited him unannounced as his personal workshop at the Craft Engineering Building to seek advice on hydraulic remotes for certain tractors. Respondent then gave him a list of items that he needed to purchase from the Applicant and explained to him how it should be installed. What is important of this conversation is that it appears to be uncontested that the Respondent indeed provided this list in regards to items which was to be purchased from the Applicant. Surely providing Mr. Eksteen with a list to be obtained from the Applicant illustrates Respondent's intention not to compete in business with the Applicant.

[22] The last fact which needs to be considered is Respondent's admission that he met with Mr. Farinah who has his own hydraulics business in Welkom, called DC Hydraulics, during January 2017. According to the Respondent, the reason for this meeting was because Mr. Farinah apparently wanted to buy old stock from the Respondent.

[23] At this stage it needs to be mentioned that all the allegations pertaining to Respondent's alleged contravention of the Court order, were met head-on, by the Respondent in his opposing affidavit, as correctly pointed out by *Mr. Van Aswegen*, appearing

on behalf of the Respondent. First of all the allegations contained in Applicant's founding affidavit is indeed as put by the Respondent himself "... *little more than pure speculation and barren of cogent facts and evidence*". The Applicant made certain deductions from handwriting which appeared on certain invoices. The Applicant made certain deductions from the presence of certain people at the premises of the Respondent and the presence of the Respondent at certain entities. However, the Applicant does not provide any affidavit and therefore any evidence that Respondent contravened the terms of the Court order. Even after the Respondent provided explanations in regards to visits to and from certain people, the Applicant failed in totality to obtain affidavits from such persons in an attempt to contradict the allegations by the Respondent. This, of course, will be only in regards to the deponents who have not made confirmatory affidavits in regards to the allegations by the Respondent in his opposing affidavit. The Applicant merely wished to rely on the speculations and deductions referred to.

- [24] Another aspect which need to be mentioned at this stage, is an aspect which I raised with *Me. De la Hunt* at the hearing of the matter. In the first application which was launched during October 2016, the Applicant referred to a letter dated 18 March 2016 by Mr. Adriaan du Plessis, the attorney acting on behalf of the Applicant, addressed to the Respondent. In this letter the Respondent is urged to sign an undertaking in respect of the restraint of trade. In the founding affidavit the Applicant in that application. The Respondent failed to respond thereto. However, as part of the present application, the Applicant attaches the same letter as well

as another letter dated 14 March 2016 in which the Respondent is brought to terms. Apparently the letter relating to the signing of an undertaking was indeed supposed to be dated 18 March 2016. However, the Respondent, through his attorneys, Messrs Maree Gouws, now attaches a letter in his opposing affidavit dated 18 April 2016 in which the allegations pertaining to the alleged breach of the terms of the letter of appointment and restraint of trade. However, as stated, this letter has never formed part of the Applicant's founding affidavits and has only been produced by the Respondent.

- [25] This omission in the present as well as the previous application by the Applicant casts grave doubt about the Applicant's good faith which is expected in application proceedings.
- [26] Both parties referred me to the matter **Fakie N.O. v CCII Systems (Pty) Ltd** 2006 (4) SA 326 SCA where the current position in regards to contempt proceedings was summarised by Cameron JA (as he then was). In particular it was stated that an Applicant must prove the requisites of contempt (the order; service of notice; non-compliance; wilfulness and *mala fides* (beyond reasonable doubt)). *Me. De la Hunt* on behalf of the Applicant argued that through the actions as alleged by the Applicant, the Respondent has contravened, in particular paragraph 3 of the order of restraint, which reads as follows:

"Respondent is interdicted, prohibited and restrained from directly or indirectly soliciting, canvassing and dealing with clients and/or

customers of the Applicant or rendering any competitive service to such clients and/or customers."

- [27] In this regard she referred me, first of all, to the matter of **State v Mhlungu and Others** 1995 (3) SA 827 CC. According to her, the Constitutional Court in this matter had the opportunity to consider what is meant by the term "*deal with*". After referring to the meaning which the new shorter Oxford English Dictionary attributes to the term "*deal with*", the Constitutional Court, however, did not go any further apart from stating that the phrase has different nuances. The meaning which the new shorter Oxford English Dictionary, Volume 1 deals with is described as "*be concerned with (a thing) in any way; busy of occupying oneself with, esp with a view to discussion or refutation*".
- [28] The Readers Digest Oxford "*Complete Word Finder*" sets out "*deal with*" as "*do business with*". The **Mhlungu-** decision does not assist the Applicant at all.
- [29] It is necessary to interpret the order granted during October 2016. In **Firestone South Africa (Pty) Ltd v Gentucuroaq** 1977 (4) SA AD it was held that the basic principles applicable to constringed documents also applied to the construction of the Court's judgment or order. The Court's intention is to ascertain by preliminary from the language of the judgment or order as construed according to the usual, well-known rules. Furthermore, as in the case of a document, the judgment or order and the Court's reason for giving it must be read as a whole in order to ascertain its intention.

- [30] In Simond N.O. and Others v Mitsui and Company Ltd and Others 1970 (2) SA 475 WLD Wunsh J said the following:

"The first task is to determine the content of the Court order. A Court order defines what the Court requires to be done or not done, so that the defendant or respondent, or in some cases the world, may know it... The Court's intention must be ascertained preliminary from the language of the order as construed according to the usual rules for interpreting documents."

- [31] In the present matter it is clear that the Applicant approached the Court for the relief as granted, for the purpose of protecting its interests, and in particular its pecuniary interest. It is common cause that before the sale of the business by the Respondent to the Applicant, the Respondent was well-known in that particular field of business. The restraint of trade agreement which was concluded simultaneously with the agreement of employment was indeed also concluded with the object to prohibit the Respondent from dealing with and in particular doing business with clientele of the Applicant in competition with the Applicant. It was also on that basis that the order of Court was granted during October 2016 which cannot be read in any different manner.

- [32] Returning to the facts of the present application, as stated, the allegations by the Applicant in regards to the actions of the Respondent with the exception of one, is based on mere speculation. I cannot find as the Applicant wishes me to do to deduct from the facts as set out by the Applicant that the Respondent indeed "*dealt with*" clientele of the Applicant, especially whereas stated, the Respondent meets the allegations

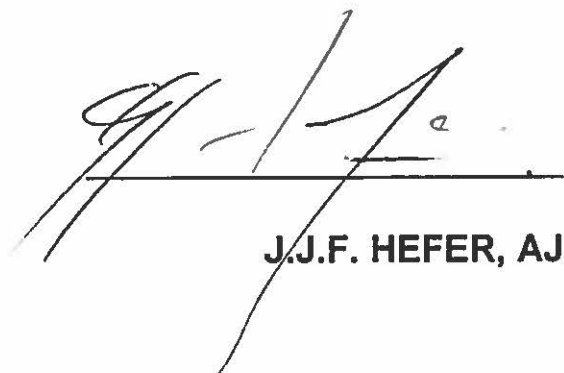
by the Applicant head-on, again with the exception of one incident. As stated, the Respondent admits that he met with Mr. Farinah because Mr. Farinah wanted to buy old stock from him. In my mind, with reference to the various meanings of "*doing business with*" and "*dealing with*", referred to above, a person does business with the purpose of making a living and securing an income. If, for instance a person sells some of his old furniture which he stored at home, that is merely to get rid of the furniture and at least receiving some form of compensation therefore. When the Respondent met with Mr. Farinah to get rid of his old stock, it was the same. Even if that stock was part of the "*competition business*" of the Respondent by negotiating and selling the stock to the other person, this was actually not "*doing business*" with Mr. Farinah as contemplated in the order of Court granted during October 2016. Therefore there have been no contravention of the terms of such order and the application should therefore fail.

- [33] As far as the costs is concerned, it was argued on behalf of the Respondent that whereas the application is a "*prototype of a frivolous and vexatious application*". The basic fact is that the Applicant approached this Court without proper concrete evidence. It was based on mere speculations and deductions made by the Applicant itself. No attempts were made after the opposing affidavit had been filed to collect further concrete evidence from the deponents referred to by the Respondent in his opposing affidavit. In those circumstances a punitive cost order should be granted.

Therefore the following order is made:

ORDER:

The application is dismissed with costs, which costs is to be paid on an attorney-client scale.



J.J.F. HEFER, AJ

On behalf of the applicant:
Instructed by:

Adv. C de la Hunt
Adriaan du Plessis Inc.
PRETORIA

On behalf of the Respondent:
Instructed by:

Adv. W. A van Aswegen
Hill, McHardy & Herbst Inc.
BLOEMFONTEIN