

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA

Case Number: 58409/14

|                                    |                                                                                   |
|------------------------------------|-----------------------------------------------------------------------------------|
| DELETE WHICHEVER IS NOT APPLICABLE |                                                                                   |
| (1)                                | REPORTABLE: NO.                                                                   |
| (2)                                | OF INTEREST TO OTHER JUDGES: NO.                                                  |
| (3)                                | REVISED.                                                                          |
| 11/05/2015                         |  |
| DATE                               | SIGNATURE                                                                         |

|                                                                           |
|---------------------------------------------------------------------------|
| REGISTRAR OF THE HIGH COURT OF<br>SOUTH AFRICA GAUTENG DIVISION, PRETORIA |
| PRIVATE BAG/PRIVAATSAK X67<br>PRETORIA 0001                               |
| 2015 -05- 0 8                                                             |
| JUDGE'S SECRETARY<br>REGTERS KLERK                                        |
| GRIFFIER VAN DIE HOË HOF VAN<br>SUID AFRIKA GAUTENG AFDELING, PRETORIA    |

In the matter between:

CHRISTO BURGER DIENSLEWERING CC t/a MC  
BURGER SHOPFITTERS

APPLICANT

and

THEUNIS DANIEL NORTJE

1<sup>ST</sup> RESPONDENT

CARL BENJAMIN VISAGE

2<sup>ND</sup> RESPONDENT

TORNOLOG (PTY) LTD

3<sup>RD</sup> RESPONDENT

*Coram:* HUGHES J

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JUDGMENT

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Heard on: 11 February 2015

Delivered on: 8 May 2015

HUGHES J

[1] On 2 October 2014 an order was made by this court that the relief sought in terms of a restraint of trade against the respondents was to be postponed *sine die* the matter having become opposed. A cost order was made against the first respondent on an unopposed basis, however, on an attorney and client scale. These costs were to be paid jointly and severally the one paying the other to be absolved, with any cost order granted against the second and third respondent. That was the order.

[2] This matter came before me on the opposed motion roll.

[3] The applicant as is cited in these papers submits that it commenced business in 1998. The principal service which it provided was the installation, maintenance of store-front and operating areas of huge franchises and businesses. Essentially the applicant is in the business of shop fitting. One of the applicant's clients' which it services is Kentucky Fried Chicken ("KFC").

[4] According to the applicant, the first and second respondents were employed as an Artisan and Assisted Manager, respectively. Their duties entailed shop fitting and related activities in the greater Gauteng, Limpopo, North West and Mpumalanga Provinces.

[5] In the answering affidavit of the second respondent he denies that he and the first respondent were employed by the applicant as is cited in these papers. He avers that he and the first respondent were employed by an entity known as CHRISTO BURGER DIENSLEWERING BK with registration number 98/72322/23 ("CBD").

[6] The first respondent concluded his letter of appointment with CBD on 4 February 2013 as an Artisan. While the second respondent on 6 April 2009 concluded his letter of appointment with CBD as an Assistant Manager. These appointment letters are annexed to the applicant's founding affidavit as annexures "MCB3" and "MCB4"

[7] On 16 May 2014 the first respondent left the employ of the applicant seeking greener pastures and likewise did the second respondent on 31 March 2014.

[8] The letters of appointment concluded by the first and second respondents provided for a contractual restraint of trade. This appears at Clause 9 of the appointment letter and the relevant extract appears below:

*“2.9 Restraint of trade: It is the company policy that you will not, on leaving the Company have any contact with any of our clients for a period of 2 (two) years. You will also be expected not to reveal any secrets of the trade or how the Company operates or any financial details.*

*2.9.1 The employee undertakes not to be engaged in any other business, in competition with the Employer’s business, be it indirect, or as a shareholder, partner, member of a Close Corporation, director of a company or in any other capacity within 1 (one) year of termination of this contract.*

*2.9.2 The employee acknowledges and agrees that the aforesaid restraint is fair, reasonable and necessary for the protection of the employer’s trade name and the goodwill attached thereto.*

*2.9.3 The employee acknowledges that the employer shall be entitled to recover damages and associated recovery costs from the employee in respect of any breach of the aforesaid restraint of trade”*

[9] In the answering affidavit of the second respondent he states that he and the first respondent were not employed by the applicant as cited in this application. I propose to deal with this issue first as it has an impact on the *locus standi* of the applicant to exercise the restraint of trade which appears in the letters of appointment of the first and second respondents.

[10] From the letters of appointment, annexures MCB3 and MCB4, the first and second respondents signed with the entity CBD.

[11] Mr De Bruyn, representing the respondents, argued that CHRISTO BURGER DIENSLEWERING CC t/a MC BURGER SHOPFITTERS registration number 1998/072322/23 is not whom the respondents contracted with and that the first and second respondent, as is evident from the letters of appointment, contracted with CHRISTO BURGER DIENSLEWERING BK with registration number 98/072322/23 ("CBD"). He further argued that CBD and MC BURGER SHOPFITTERS ("MCBS") are two separate entities. They were registered as such with separate industrial, service or business classifications, which differed.

[12] Mr De Bruyn pointed out that CBD as an entity having the following registration number 1998/072322/23, are "*Scaffolding Manufactures, largest scaffolding manufactures and suppliers in South Africa*". Their standard industrial classification and activity registration is noted as "*versaffing van handvaardigheids georiënteerde dienste*". This appears at annexure "CBV4" which is attached to the second respondent's answering affidavit.

[13] In addition, Mr De Bruyn referred to annexure "MCB2" which is attached to the applicants founding affidavit, headed the CIPC company report, which records the industry of CBD as "*Manufacturing*" with no reference to CBD trading as MC BURGER SHOPFITTERS.

[14] In contrast, MCBS as an entity has the registration number 1998/066614/23 and the business recorded for this entity was "*shop and office fitters*". Mr De Bruyn pointed this out on annexure "CBV3" attached to the second respondents answering affidavit.

[15] There is also a record of an entity with a similar name, M C B SHOPFITTERS registration number 1998/066836/23. Now all the entities referred to thus far have Marthinus Christoffel Burger recorded as their sole member, evident from annexure "CBV2". Marthinus Christoffel Burger is the member who was duly authorised to depose to the founding affidavit on behalf of the applicant as cited in the papers and he is duly authorised to represent CBD as per annexure "MCB1" attached to the applicants papers.

[16] The second respondent contends that the restraint of trade that appears in their contracts pertains to CBD and not the entity that is the applicant in this matter. Further, from annexure "CBV3" the entity that they were employed by was never CHRISTO BURGER DIENSLEWERING CC t/a MC BURGER SHOPFITTERS.

[17] The applicant addresses this issue in its replying affidavit and states that the second respondent was employed by CBD as is evident from "MCB4" and that *"The applicant's trade name was irrelevant for purposes of the Second Respondent's interview and subsequent appointment"*. Further that indeed the deponent to the founding affidavit was a member of MCBS with the registration number as listed above.

[18] Of interest is that submitted by the applicant in its papers, which in a way confirms who exactly the applicant is in this matter:

*"The Applicant is not relying on the business interests, clientèle and trade secrets of MC Burger Shopfitters CC, with registration number 1998/066614/23, but on the business interests, clientèle and trade secrets of Christo Burger Dienslewering CC, trading as M C Burger Shopfitters, with registration number 1998/072322/23, It is separate entity, and the Applicant in this matter. It is also the entity which employed the Second Respondent on the 6<sup>th</sup> April 2009."*

[19] It was further argued by the applicant that the standard industrial classification and activity registration *"versaffing van handvaardigheids georiënteerde dienste"* which appears at annexure "CBV4", with reference to CBD, encompasses the activity for which the second and first respondent were employed. Thus the restraint of trade is applicable in the circumstances.

[20] Section 2 of Close Corporation Act 69 of 1984 reads as follows:

**"2 Formation and juristic personality of close corporation**

(1) At any time before section 13 of the Companies Act comes into operation, any one or more persons, not exceeding ten, who qualify for membership of a close corporation in terms of this Act, may form a close corporation and secure its incorporation by complying with the requirements of this Act in respect of the registration of its founding statement referred to in section 12.

[21] [Sub-s. (1) substituted by s. 224 (2) of Act 71 of 2008.]

[22]

(2) A corporation formed in accordance with the provisions of this Act is on registration in terms of those provisions a juristic person and continues, subject to the provisions of this Act, to exist as a juristic person notwithstanding changes in its membership, or its conversion to a company in terms of Schedule 2 of the Companies Act, until it is deregistered or dissolved-

(a) in terms of this Act; or

(b) in terms of the Companies Act, in the case of a juristic person that has been converted to a company.

[23] [Sub-s. (2) substituted by s. 224 (2) of Act 71 of 2008.]

(3) Subject to the provisions of this Act, the members of a corporation shall not merely by reason of their membership be liable for the liabilities or obligations of the corporation.

(4) A corporation shall have the capacity and powers of a natural person of full capacity in so far as a juristic person is capable of having such capacity or of exercising such powers."

[24] It is trite, having regard to the above, that a close corporation has its own juristic personality, separate from its members and can sue and be sued. The version advanced by the applicant is to the effect that CBD the entity which concluded the restraint of trade with the first and second respondent trades as CHRISTO BURGER DIENSLEWERING CC t/a MC BURGER SHOPFITTERS.

[25] This submission is persisted even though no documentation is produced either in the form of a CIPRO report or at the least a letterhead indicating CHRISTO BURGER DIENSLEWERING CC t/a MC BURGER SHOPFITTERS. In fact as stated above the opposite is indicted. In my view it illustrates that CBD and MCBS were individual close corporations and were independent entities with their own individual registration numbers, descriptions of the service and/or business provided.

[26] The 'trading as' entity has the exact same registration number and exact same prescription of service or business as CBD. The latter's business or services to my mind does not fall within the ambit wherein the respondents were employed and restrained from embarking upon.

[27] In fact the service and business description of MCBS as an registered entity was the service that the first and second respondent were providing the applicant, and it would appear that the entity CBD, to whom the first and second respondents were contracted cannot restrain them and now seeks to do so via the backdoor because of the main member of all the entities being Marthinus Christoffel Burger.

[28] Further, on an examination of the contract which encapsulates the restraint of trade the following is noted:

- (a) the document is a letter of appointment;
- (b) the company who appointed the first and second respondent's is recorded as *Christo Burger Dienslewerings (CC) Bk*;
- (c) the letter of appointment is on the letterhead of *Christo Burger Dienslewerings BK 98/72322/23*;
- (d) as part of the restraint at paragraph 2.9.2 the first and second respondent's acknowledged that the restraint was "*fair, reasonable and necessary for the protection of the employer's trade name and goodwill*".

[29] I cannot agree with the applicant that the entity which the first and second respondent's contracted their service of employment, who may exercise the restraint, is the same entity cited as the applicant in these proceedings. I am not convinced that the entity which the applicant cites, as an applicant, was the entity that the respondents contracted with. In my view the first and second respondents contracted with CBD, evident from their letter of appointment.

[30] On the facts before me at no stage was there an application to change the name of CBD close corporation to CHRISTO BURGER DIENSLEWERING CC t/a MC BURGER SHOPFITTERS. Therefore first and second respondent's acknowledgment of the restraint of it being "*fair, reasonable and necessary for the protection of the employer's trade name and goodwill*" pertains to their employer being CBD (Christo Burger Dienslewerings (CC) Bk) as appears on their letter of appointment.

[31] In **Christie's The Law of Contract in South Africa, 6<sup>th</sup> edition** at page 269 the doctrine of privity of contract is explain:

*"The basic idea of contract being that people must be bound by the contracts they make with each other it would obviously be ridiculous if total strangers could sue or be sued on contracts with which they were in no way connected. The doctrine which*

*prevents this ridiculous situation arising is usually known as the doctrine of privity of contract: parties who are not privy to a contract cannot sue or be sued on it."*

[32] In essence even though the main member of all the entities is one and the same person the entities are distinct with their own independent juristic personality and as such one cannot substitute one entity for another when that entity was not even a party to the contract.

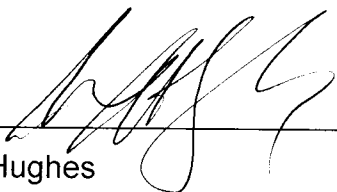
[33] From the above I conclude that the intention of the parties when they contracted within the bounds of the restraint of trade was to protect the interest of Christo Burger Dienslewering (CC) Bk and not CHRISTO BURGER DIENSLEWERING CC t/a MC BURGER SHOPFITTERS.

[34] The problem that the applicant encounters is that the entity which the first and second respondents contracted their services to was not and is not registered as a shop fitter establishment. Thus, the interest, the parties contracted to protect, in terms of trade secrets, confidential information and clients does not pertain to the entity that the first and second respondents contracted with. In addition the applicant cited in these proceedings was not a party to the aforesaid contract.

[35] In the circumstances the applicant as cited in these proceedings, not being a party to the contract containing the restraint of trade which is enforceable against the first and second respondent, cannot have *locus standi* to sue the first and second respondent on the restraint of trade. In this regard I refer to the *locus classicus* on the *locus standi* **FERREIRA v LEVIN NO AND OTHERS; VRYENHOEK AND OTHERS v POWELL NO AND OTHERS** 1996 (1) SA 984 (CC) at paragraphs [162] to [164].

[36] Having concluded that the applicant has no *locus standi* I do not deem it necessary to deal with the restraint of trade clause as the applicant cannot exercise the restraint against the respondents.

[37] In the result the application is dismissed with costs.

  
W. Hughes

Judge of the High Court

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