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IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO.: 14162/2011

In the matter between

CIM CHEMICALS (PTY) LTD

APPLICANT

And

MIKE ROODT

FIRST RESPONDENT

BRAGAN CHEMICALS (PTY) LTD

SECOND RESPONDENT

JUDGMENT

MOKGOHLOA J

[1] The first respondent was employed by the applicant since 2005. During May 2009 a formal contract of employment was concluded between the applicant and the first respondent. The relevant clause in this application is clause 23 which reads:

"23 RESTRAINT OF TRADE

23.1 The employee undertakes not to be engaged in the establishing of a new business be it direct or indirect or as a shareholder, partner, member of a close cooperation, director of a company or in any other capacity within one year after termination of this agreement in the area known as KwaZulu-Natal.

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

[2] On 30 November 2011 the first respondent resigned from his employment with the applicant. The applicant brought an urgent application seeking to enforce the restraint of trade. The first respondent opposed the enforcement of the restraint of trade clause on the basis that the applicant's representative, a Mr Glenn Pierre Mulder (Mulder) waived compliance with the restraint clause. The first respondent alleged that during October 2011 he was approached by the second respondent with regard to an employment opportunity. He discussed this matter with Mulder, a director of the applicant. Mulder informed him "in no uncertain terms that the restraint of trade provisions would be held against me." Based on this undertaking by Mulder, he proceeded in good faith to have discussions with the second respondent. However, during November 2011, Mulder informed him that the applicant would enforce the restraint clause.

[3] The applicant disputed the first respondent's version. According to Mulder, he advised the first respondent of the restraint clause. Thereafter he informed his co-director, a Mr John Edwin Thompson (Thompson), of the first respondent's intentions to resign from the company. Thompson advised Mulder to immediately inform the first respondent that the restraint would be enforced.

[4] The applicant further disputed the first respondent's version and relied on the provisions of Clause 2.3 of the employment contract which precludes the first respondent from relying upon the alleged waiver by Mulder.

[5] The matter came before **Kruger J** who referred the matter for oral evidence in respect of the alleged representation by Mulder to the first respondent.

[6] The first respondent adduced evidence first followed by Mr Harry Fuller (Fuller) on behalf of the first respondent, and thereafter Mulder followed. The first respondent stated that he was employed by the applicant as a sales representative or account manager. During 2011 he received a telephone call from the second respondent offering him employment. The offer was

more than what he was receiving with the applicant. The first respondent approached Mulder and informed him of the offer made by the second respondent. Mulder's response was that the offer represented a good opportunity to the first respondent and further that they (the applicant) will not hold anything against him. The respondent stated that he knew that Mulder was referring to the restraint of trade.

[7] Based on Mulder's response, the first respondent proceeded and discussed the offer with the second respondent. He waited until November 2011 (to receive his annual profit) before he could inform Mulder that he had accepted the second respondent's offer. He only informed Mulder that he was going to accept the offer. Mulder called him that same day and advised him that he had discussed it with Thompson and that the applicant intends to enforce the restraint provision. The first respondent stated that had Mulder stated earlier that the applicant would enforce the restraint provision, he would not have negotiated the offer with the second respondent.

[8] Harry Fuller, (Fuller) a customer and friend of the first respondent confirmed that the first respondent informed him of an offer from the second respondent. Mulder also informed him of this offer and stated that he will not stand in the first respondent's way. Fuller stated that the word 'restraint' was never mentioned to him. In fact, he did not know that there was a restraint clause in the agreement between the applicant and the first respondent.

[9] Mulder on the other hand confirmed what is stated in the founding affidavit of Thompson on behalf of the applicant. He continued and stated that initially, when the first respondent informed him of the offer, he expressed the view that the first respondent would be making a mistake if he accepted the offer due to the past history between the first respondent and second respondent. Later during November 2011, the first respondent came to his office and informed him that he had considered the offer and will resign at the end of the month. Mulder advised the first respondent that he (Mulder) did not think that it was wise for the first respondent to take the offer but he will not stand on his way.

[10] Mulder proceeded to Thompson and informed him of the first respondent's intention to resign month end. Thompson advised him to remind the first respondent of the restraint provision which Mulder did. The second respondent's response was that his attorney advised him that no one will restrain him.

[11] It is necessary to refer to the basis of the first respondent's challenge to the enforcement of the restraint clause which is that Mulder waived compliance with the restraint clause. He alleged that Mulder informed him that **'in no uncertain terms, that the restraint provision would be used against him.'** (My emphasis) Kruger J considered the provisions of Clause 2.3 of the non-variation clause and stated the following in [12], [13] and [14] of his judgment:

"[12] In disputing the First Respondent's version, the Applicant has also relied upon the provisions of Clause 2.3 of the employment contract which precludes the First Respondent from relying upon the alleged waiver by Mulder.

[13] In considering a clause of a similar nature, Schock J, in ***Minnitt v Stewart Wrightson (Pty) Ltd and Another* 1979 (4) SA 151 (CPD)**, held that the clause is:

"Irrelevant to an averment that there has been an express consent inducing Appellant to act to his prejudice" (at154 e-F)

[14] I hold a similar view *in casu*. There is clearly a dispute which can only be determined by the hearing of oral evidence from the parties."

[12] The evidence of the first respondent and Fuller do not refer to the express waiver. In fact his evidence was that Mulder told him that 'we won't stand in your way' The first respondent stated that the word 'restraint' was never used but that he and Mulder understood what was meant by 'we won't stand in your way'. This is in direct contradiction to what is contained in his

affidavit which led **Kruger J** to refer the matter for the hearing of oral evidence.

[13] I agree with Mr Boulle for the applicant, that the first respondent's evidence is one of tacit waiver as opposed to express waiver. The respondent stated that Mulder said he would not stand in his way. Mulder admitted that he said that he would not stand in the first respondent's way. However, Mulder stated that when the first respondent told him that he has considered the second respondent's offer and will be resigning end of month, Mulder told him it was not wise for him to do so, because of the past history between the first and second respondent but, he would not stand in his way.

[14] It should be noted that the first respondent's contract of employment contained a non-variation and non-waiver clause. This is clause 2.3 and reads:

"2.3 No indulgence or condonation by the employer of any breach of any term of this contract by the employee shall constitute a waiver of any of the employer's rights in terms of this agreement. No amendment of this contract shall be valid unless reduced to writing and signed by both parties."

[15] Mr Rorick, on behalf of the respondents argued that although the first respondent conceded that the word 'restraint' was never uttered when he informed Mulder of the employment prospects with the second respondent, both he and Mulder knew what they were talking about.

[16] In *Minnitt's* case above, **Schock J** referring to the non-variation clause contained in clause 15 of the agreement stated:

"In my view clause 15 (i) goes no further than ensuring that conduct which might otherwise be construed as a waiver of respondents' rights shall not be so construed. " (at 154E)

[17] Centlivres JA in ***Collen v Rietfontein Engineering Works 1948 (1) SA 413 (A)*** referred to what was stated by Innes CJ in *Laws v*

Rutherford 1924 AD 261 at p263 and stated at 436: "[T]he onus of proving waiver is strictly on the party alleging it and he must show that the other party with full knowledge of his right decided to abandon it, whether expressly or by conduct plainly inconsistent with an intention to enforce it."

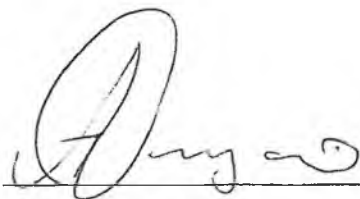
[18] The Appellate Division continued in ***Hepner v Roodepoort – Maraisburg Town Council* 1962 (4) SA 772 (A)**, and held that "in the case of a waiver by conduct, the conduct must leave no reasonable doubt as to the intention of surrendering the right in issue."

[19] In *casu*, the first respondent's evidence is that Mulder stated to him that he would not stand in his way. Mulder on the other hand, admitted having stated that to the first respondent but gave an explanation that he referred to the past history that existed between the first and second respondent. This was never disputed by the first respondent. I find Mulder's explanation reasonable and further that creates doubt as to the intention of Mulder to surrender the restraint clause.

[20] Having stated the above, I am of the view that the first respondent failed to establish that the applicant had in fact waived its right to rely on the restraint clause.

Order

1. The rule is confirmed with costs.
2. Such costs to include all costs previously reserved.



MOKGOHLOA J

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 Date of hearing	 :	
Date of Judgment	:	

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