

**IN THE HIGH COURT OF SOUTH AFRICA**  
**(ORANGE FREE STATE PROVINCIAL DIVISION)**

Case No.: 2912/2005

In the case between:

**MARLIM (PTY) LTD**

Applicant

and

**MICHAEL LONGHURST**

Respondent

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**JUDGEMENT:** H.M. MUSI J

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**HEARD ON:** 8 SEPTEMBER 2005

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**DELIVERED ON:** 29 SEPTEMBER 2005

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[1] This is an application to enforce a restraint of trade contract. The applicant is a duly incorporated company conducting business at Welkom, in the Free State. Its core business is the sale, installation and repair of airbrake systems, coolers, hydraulic and related components.

[2] The respondent is a former employee of the applicant. He is a businessman and technician involved in the repair of

air – and hydraulic brake systems. He resides and conducts business in Bloemfontein.

- [3] It is common cause that the respondent was employed by the applicant from April 2003 to September 2003 as a technician in the field of installation and repair of airbrakes and related components. The applicant alleges that some relatives of the respondent had previously work for it but that after they had left its employ they went on to establish rival businesses operating in the same line of trade as it, and thus became its trade competitors. The applicant wanted to ensure that the respondent does not follow the same route and for that reason entered into a restraint of trade contract with him. The contract was allegedly entered into and signed on 30 April 2003. It is annexed to the founding affidavit, marked “A” (hereinafter referred to as annexure “A”). The material terms of this contract which are relevant to the instant dispute are as follows:

2.3 The EMPLOYEE will not, after termination of his service with the EMPLOYER, for whatever reason, accept any similar employment with a similar business/undertaking as that of the EMPLOYER, for a period of 2 (two) years in any place/area situated within a 200 (two hundred) kilometre radius, of the Welkom City Hall;

2.4 The EMPLOYEE will not, after termination of his service of the EMPLOYER, for whatever reason, have or obtain any share/interest, being direct or indirect, in a similar business/undertaking as that of the EMPLOYER for a period of 2 (two) years, in any place/area situated within a 200 (two hundred) kilometre radius, of the Welkom City Hall;

2.5 The EMPLOYEE will not after termination of his service with the EMPLOYER, for whatever reason, have or make any contact, directly or indirectly, with the EMPLOYER'S:

- (a) Clients;
- (b) Suppliers;
- (c) Debtors or;
- (d) Creditors."

[4] It is alleged that the respondent has breached the above terms in that he has set up a rival business in Bloemfontein which is within 200 kilometre radius of the Welkom City Hall and competes with the applicant.

[5] The applicant brought this application on the basis urgency and on 14 July 2005 Rampai J granted it a rule *nisi* returnable on 4 August 2005, in the following terms:

2. 'n *Bevel nisi* uitgereik word wat respondent oproep om op 4 Augustus 2005 om 9h30 of so spoedig moontlik daarna, redes aan te voer, indien enige, waarom 'n bevel in die volgende terme nie finaal gemaak moet word nie:

- (a) dat respondent verbied word om vir die tydperk vanaf verlening van die bevel tot 1 September 2006 in diens te wees van 'n persoon of instelling soortgelyk aan die van applikant in enige plekarea geleë binne 'n radius van 200 (twee honderd) kilometer vanaf die Welkom Stadsaal.
- (b) dat respondent verbied word om tot 1 September 2006 enige belang te verkry of aandeel te verkry, hetsy direk of indirek, in 'n onderneming of besigheid soortgelyk as die van die applikant in enige plek of area geleë binne 'n radius van 200 (twee honderd) kilometer vanaf die Welkom Stadsaal.
- (c) dat respondent verbied word om direk of indirek met die volgende persone kontak te maak en te intimideer.
  - (i) kliënte van applikant
  - (ii) verskaffers van applikant
  - iii) debiteure van applikant

iv) krediteure van applikant

d) dat respondent die  
koste van die aansoek  
sal betaal.

3. Die bevel in interme van paragrawe 2(a), (b) en (c)  
hierbo sal geld as 'n tussentydse bevel met  
onmiddellike werking.”

The rule *nisi* was extended further to the date of hearing on  
8 September 2005 and I extended it further to 29  
September 2005 pending judgment.

[6] The respondent opposes the application on various  
grounds. The first ground is an attack on the validity of the  
contract. He denies that annexure “A” represents a valid  
and binding contract between him and the applicant. He  
says, firstly, that he was merely given a document and told  
to sign, which he did without reading it. Nor were the terms  
thereof discussed with and explained to him. Secondly he  
disputes that annexure “A” is the document that he signed  
and says that the document that he signed had more

pages. The respondent also points out that annexure “A” has not been signed by the applicant, and contends that as such it could not be a binding contract.

[7] I intend dealing with this ground right away because if the contract is found not to be valid, then that would be end of the matter. This is so because it is trite law that in a claim based on a contract the onus is on the party relying on it to prove its existence and the material terms thereof. See **DA SILVA v JANOWSKI** 1982 (3) SA 205 (AD) at 219 B – C.

[8] It should be noted at the outset that these are motion proceedings and the rule enunciated in **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** 1984 (3) SA 628 A applies. That means that where there are *bona fide* disputes of fact the order sought can only be granted if the facts averred by the respondent taken together with the admitted facts in the applicant’s affidavit justify it. However, sometimes a respondent’s denial of a fact averred by an applicant may be so poor or improbable

that the court would be entitled to reject it. To that extent, there is no *bona fida* dispute of fact.

- [9] The averment made by the respondent that annexure “A” is not the document that he signed does not, in my view, raise a *bona fida* dispute of fact and can summarily be dismissed. Firstly it is a bald statement made without conviction. The respondent does not even attempt to substantiate it, by giving an indication of what other pages are missing. He apparently refers to an annexure. But then again he does not deny that the signature appearing on annexure “A” is his. Most importantly the applicant relies not on any annexure but exclusively on the terms as fully set out in annexure “A”.

I would have no difficulty holding that annexure “A” is the document that respondent signed and which purports to be the contract in issue.

- [10] The other averments made by the respondent stand on a

different footing and raise serious disputes of fact which cannot be resolved on the papers. The applicant's case is complicated by the fact that contract has not been signed on its behalf.

- [11] In its replying affidavit, the applicant seeks to cure the obvious defect with the averment that René Taljaard was the person authorised to conclude and sign the contract on its behalf. This is a disingenuous explanation. The first page of the document makes it clear that Mr. Johan van der Merwe is the person who represented the applicant. He is clearly the person who should have signed but failed to do so for unknown reasons. René Taljaard only signed as a witness. Significantly she signed not only as a witness for the applicant, but also for the respondent as well. Surely she could not sign as a witness and a party at the same time. These discrepancies raise the question of whether the parties to the contract were ever together and discussed its terms before it was signed.



[12] In support of his submission that the applicant has failed to discharge the onus of proving the validity of the contract and the material terms thereof, Mr. Fischer relied heavily on the case of **DA SILVA v JANOWSKI** *supra*. That case supports the respondent's case insofar as it confirms that the onus is on the applicant to prove not only the existence of a valid and binding contract but also the material terms thereof. It was further held that it is not enough to show that the other party has appended his/her signature to the document. The crux of the matter is the intention to be bound and it must be clear that in appending his/her signature the other party was signifying an acceptance of the terms of the contract. In *casu* there is a dispute of fact whether the respondent's signature signified acceptance of liability. However, this issue is immaterial in view of what follows *infra*.

[13] Mr. Hefer submitted that the written contract, annexure "A", is not of paramount importance as it is only a recordal of an oral agreement that had earlier been entered into by and

between the parties. He referred to **SCHLINKMAN v VAN DER WALT AND OTHERS** 1947 (2) SA 900 EDLD.

However, the instant case is clearly distinguishable from the latter judgment. In the Schlinkman-case there had been a definite earlier agreement which had been made an order of court. Although the agreement had stipulated that a formal lease agreement would be drawn, which had not been done, the court held that such provision did not mean that the settlement was not binding and unenforceable.

- [14] The biggest hurdle in the applicant's way is that its case is not based on an earlier verbal agreement, of which annexure "A" would be a mere recordal. The founding affidavit makes it clear that annexure "A" is the sole and complete agreement. Paragraphs 4.3 and 4.5 state as follows:

¶4.3 Om hierdie rede het ek gedurende April 2003, toe Respondent sy dienste by Applikant hervat het, daarop aangedring dat 'n ooreenkoms deur Respondent onderteken word. (my own underlining)

4.4 Die relevante terme van hierdie ooreenkoms vir doeleindes van hierdie aansoek lees as volg:”

The material terms of the agreement are then set out. Mr. Van der Merwe, the deponent to the founding affidavit proceeds as follows:

“4.5 Hierdie ooreenkoms is dan inderdaad deur Applikant en Respondent onderteken op 30 April 2003, ‘n afskrif waarvan hierby aangeheg word as aanhangsel “A”.”

[15] The applicant must stand or fall by its founding affidavit. What appears in paragraph 10 of the replying affidavit does not take the matter any further. Besides, René Taljaard confirms that annexure “A” is the sole and complete agreement between the parties. She states in paragraph 3:

“Ek bevestig voorts dat vir sover dit die onderhawige ooreenkoms aanbetref, die ooreenkoms soos per aanhangsel “A” tot die funderende verklaring, die algehele ooreenkoms is wat deur Respondent onderteken moes word en uiteindelik deur Respondent onderteken is.” (my own underlining)

- [16] R.H. Christie, the Law of Contract in South Africa, 4<sup>th</sup> Edition at page 122 correctly states the legal position as follows:

“Once the parties have decided that they will reduce their contract to writing and that they will be bound by their written contract but not by any earlier informal contract, then the contract comes into existence when, and only when, the written document containing it has been signed by both parties”.

The contract herein was not signed by both parties and has accordingly not been fully executed. It is null and void.

- [17] In the circumstances, it is unnecessary to deal with the rest of the issues raised in this matter. Nor is it necessary to express any view on the correctness or not of the judgment in **CANON KZN (PTY) LTD t/a CANNON OFFICE AUTOMATION v BOOTH** 2005 (3) SA 205 NPD, wherein Kondile J departed from the well-established authority of **MAGNA ALLOYS & RESEARCH (SA) (PTY) LTD v ELLIS** 1984 (4) SA 874 A and decided that in view of the

fact that the right to freedom of trade is now entrenched in our constitution and that a restraint of trade covenant impinges on such right, the onus to prove that enforcing the restraint would not be contrary to public policy or unreasonable now shifts onto the party seeking to enforce it.

[18] In the result, the rule *nisi* is discharged with costs. \_

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**H. M. MUSI, J**

On behalf of applicant: Adv. J.J.F. Hefer  
Instructed by:  
Hill, McHardy & Herbst  
BLOEMFONTEIN

On behalf of respondent: Adv. P.U. Fischer  
Instructed by:  
Krohn Incorporated  
BLOEMFONTEIN

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