

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, MAKHANDA**

NOT REPORTABLE

Case No.: CA61/2023

In the matter between:

BRADDON Mc CLELAND (PTY) LTD

t/a NETWORK ASSOCIATES

Appellant

and

CALVIN LE ROUX

Respondent

JUDGMENT

EKSTEEN J:

[1] The appellant (Network Associates) sought to enforce a contractual penalty for breach of contract against the respondent, Mr le Roux, in the Magistrate's Court of Gqeberha. The presiding magistrate absolved the respondent from the instance and ordered each party to pay their own costs, hence the appeal.

[2] Network Associates trades in information technology support services in Gqeberha. In January 2019 they appointed Mr le Roux as their customer relations manager and concluded a written contract of employment (the agreement) with him. Before he took up employment Network Associates provided him with training to equip him for his new position. Clause 11 of the agreement provided for the confidentiality and non-disclosure of information. The material provisions of clause 11 provided:

'11.1 The employee is required to keep confidential and not to disclose any of the company's ... client lists, programs, marketing and/or financial information to any person other than to persons employed and/or authorized by the company or associated company (where applicable) ...

11.2 The company and the employee hereby acknowledge that the confidential information represents a substantial monetary value to the company.

...

11.5 The employee shall not, during the employment period, or at any time thereafter, use for his own benefit, or for the benefit of any other person ..., any of the Company's ... confidential information which he/she may receive or obtain in relation to the Company's affairs and/or clients/customers, goods and/or services ... or to any marketing or business technique which is carried on or used by the Company.

...'

[3] Pursuant to the confidentiality stipulated in clause 11 of the agreement, clause 12 provided for restrictions to be placed on employees and former employees. The material portion of clause 12.1 provides:

'12.1 After the Employee's employment terminated with the Company, for whatever reason, the Employee may not, subject to clause 12 below:

12.1.1 contact any customer ... listed in the Employer's customer/client listings ... for whatever reason and in particular with the view of securing/attempting to secure such customer/client's business;

...

12.1.3 directly or indirectly contact, approach, solicit, be interested in ... any of the customers/clients of the Company, including individuals or businesses, either alone or jointly or together with or as agent or employee for anyone else;

12.1.4 be engaged, interested or concerned, whether financially or in any other way or whether directly or indirectly with any customer/client of the Company;

12.1.5 act as a consultant, adviser or provide management services to any customer/client of the Company;

... .’

[4] The agreement proceeded to provide that he would pay to the company an amount equivalent to 12 months’ salary, calculated with reference to the salary that the employee earned from the company at the time of the termination of his employment, in the event of him breaching any of the provisions of clause 12.1.

[5] In February 2021, Mr le Roux terminated his employment with Network Associates and took up employment with TenacIT as a sales development consultant. At the time of his resignation Mr le Roux earned R122 100,00 per annum. TenacIT, like Network Associates, trades in information technology support services in Gqeberha. They are competitors in the same market. On 7 April 2021, shortly after taking up employment with TenacIT, Mr le Roux dispatched an email to Mr Gary Sim, the managing director of RC Green and Co., a long-standing customer of Network Associates, in an attempt to secure business with RC Green. The body of the email records:

'Good Day Gary

I hope you are doing well?

I thought that I would just mention that we offer a comprehensive VoIP service which (is) as seamless as it is affordable.

We implement and factor Qos-Quality of Service to ensure that our clients are receiving the best quality with the added benefit of low call costs & service fees.

A powerful and scalable solution which is hosted entirely in the cloud and managed by our highly qualified engineers to call quality service.

I am here to resolve any pain points or gripes you might be experiencing or simply want to move away from Telkom. ...'

[6] Mr le Roux followed up on the email with a subsequent telephone call to Mr Sim, and a further email, in order to persuade him to invest in the VoIP (voice over internet protocol) service on behalf of TenacIT. Network Associates contended that the original email constituted a breach of the agreement and accordingly that they were entitled to enforce the penalty set out earlier. While Mr le Roux initially denied that his conduct constituted a breach of the agreement, before the commencement of the trial he conceded that he had breached the agreement. However, he pleaded that the provisions of clause 12.1 of the agreement, to pay an amount equivalent to 12 months' salary, constituted a penalty stipulation in terms of s 3 of the Conventional Penalties Act, 15 of 1962 (the Act). He contended that the penalty stipulation, being an amount of R122 100,00, was out of proportion to the prejudice that Network Associates would suffer. He argued that they did not suffer any damages, because Mr Sim did not purchase the VoIP service.

[7] The agreement is admitted and it is common ground between the parties that Mr le Roux breached the agreement. It was further common cause that clause 12.2 constituted a penalty clause as envisaged in s 3 of the Act. A penalty clause, as

envisaged in the Act, is an alternative to a claim for damages for breach of contract, and, accordingly, a contractant is not entitled to claim both the penalty and damages in respect of an act or omission which is the subject of a penalty clause.¹ He may also not claim damages instead of a penalty, unless the contract expressly provides otherwise.²

[8] The purpose of a penalty clause is to enable the penalty creditor to claim the penalty without the need to prove that he has suffered damage, or what the extent of his damage is, particularly in circumstances where proof of the extent of damage may be difficult.³ It is intended to deter the penalty debtor from breaching the contract and is said to operate, *in terrorem*.⁴ A penalty stipulation arising from a contractual obligation is sanctioned by the Act and is enforceable in law.⁵ Once it is established that the penalty debtor has breached the undertaking, the penalty creditor is entitled to the full amount thereof, unless it is reduced by a court, in terms of s 3 of the Conventional Penalties Act.⁶

[9] The section confers on the court an equitable jurisdiction, not merely in the form of a discretion, but in the form of a power coupled with a duty.⁷ Thus, the penalty debtor bears the onus of proving, not only that the penalty is disproportionate to the prejudice suffered by the penalty creditor, but the extent to which it is disproportionate.⁸ Where the penalty debtor has established a *prima facie* case in respect of these requirements there is a burden upon the penalty creditor to rebut the case made. This would be particularly important where the creditor relies on prejudice other than financial prejudice. If, at the conclusion of the evidence, the court is left in

¹ Section 2 of the Conventional Penalties Act.

² *De Lange v Deeb* 1970 (1) SA 561 (O), confirmed in *Botha (now Griessel) v Finanscredit (Pty) Ltd* 1989 (3) SA 773 (A) at 796.

³ See *Van der Merwe, Van Huyssteen, Reinecke and Lubbe: Contract: General Principles* (4th ed) at 379.

⁴ *Christie's Law of Contract in South Africa* (8th ed) at 700.

⁵ *Van Staden v Central South African Land and Mines* 1969 (4) SA 349 (W) at 351.

⁶ Section 3 provides: 'If upon the hearing of a claim for a penalty, it appears to the court that such penalty is out of proportion to the prejudice suffered by the creditor by reason of the act or omission in respect of which the penalty was stipulated, the court may reduce the penalty to such extent as it may consider equitable in the circumstances: provided that in determining the extent of such prejudice the court shall take into consideration not only the creditors proprietary interests, but every other rightful interest which may be affected by the act or omission in question.'

⁷ *Christie* at 701 and *Van der Merwe, Van Huyssteen et al* at 383.

⁸ *Steinberg v Lazard* 2006 (5) SA 42 (SCA) at para 7.

doubt as to whether or not the penalty is out of proportion to the prejudice, then the penalty falls to be enforced as agreed.⁹ Section 3 of the Act enjoins the court considering the prejudice to the penalty creditor to have regard not only to his proprietary interests, but to every other rightful interest that would be affected by the act or omission in question.¹⁰

The evidence

[10] As I have said, Mr le Roux was appointed by Network Associates as its customer relationship manager. He said that one of his main functions was managing relationships with customers and that he was actively involved in these relationships, amongst others, with Mr Gary Sim, of RC Green and Co. He had been in contact with Mr Sim from the beginning of his employment, in 2019, building a customer relationship with him.

[11] Mr le Roux acknowledged that in his capacity as customer relationship manager he gained firsthand experience and knowledge of the specific needs and requirements, from a technology information perspective, of each client. He explained that the purpose of gaining such detailed knowledge was to find opportunity to follow-up and ensure that those needs and requirements were met. He said that often a service sold to a customer would entail the provision of a package of services across a broad spectrum of services. Thus, it was a sales method to show to clients that it would be more beneficial for them to buy a package of services than an individual service that might not be as effective in conjunction with other services which the client already has.

[12] As adumbrated earlier, shortly after Mr le Roux terminated his services with Network Associates he approached Mr Sim by way of an email. The familiarity with Mr Sim is evident from the address on first name terms. Mr le Roux said that he knew that Mr Sim was under a service level agreement with Network Associates at the time and that the VoIP service did not form part of his service level agreement. He contended that Network Associates did not provide the VoIP service to their clients.

⁹ *Maiden v David Jones (Pty) Ltd* 1969 (1) SA 59 (N) at 64E-F.

¹⁰ Also, *Van Staden* at 352H.

He explained that Mr Sim declined the VoIP service and that the sale did not materialise, hence his contention that Network Associates suffered no damage.

[13] In respect of the penalty clause, Mr le Roux acknowledged that Network Associates' client base constitutes a valuable asset and he admitted that customer relationships represent a substantial monetary value to a business. He conceded, too, that customer relationships constitute an interest worthy of protection and that the disruption thereof was prejudicial, and he confirmed that this appreciation led to the conclusion of the penalty clause.

[14] On behalf of Network Associates, Mr Mc Cleland testified. He said that Network Associates provide cloud services, VoIP service, anti-virus products, software licensing and hardware. In this respect he disagreed with the contention advanced by Mr le Roux in respect of the VoIP service. The magistrate perceived this dispute to lie at the heart of the matter. He concluded:

'The Plaintiff and the Defendant contradict(s) one another and I am not in a position to decide that anyone's version is (nor) probable (then) than the others. The whole issue hinges on this and therefore I am going to grant absolution from the instance.' (*Sic*)

[15] The magistrate misconstrued the issue. As I have said, Mr le Roux bore the onus to prove that the penalty provided for in the contract was out of proportion to the prejudice suffered by Network Associates in consequence of his breach, and to establish the extent to which it should be reduced. Where a defendant bears the onus of proof there can be no question of absolution from the instance being granted. If the defendant fails to discharge the onus of proof resting upon him the proper order would be judgment for the plaintiff.¹¹

[16] As I have explained, Network Associates and TenacIT were competitors in the market for IT support services. Customer goodwill is an asset of an employer which

¹¹ *Ah mun v Ah Pak* 1974 (4) SA 317 (E) and *Jones & Buckle: The Civil Practice of the Magistrate's Court in South Africa* (10th ed) vol 1 at 329.

becomes a trade connection of the employer capable of protection by way of a restraint of trade.¹² In *Rawlins Nestadt JA* explained the ratio for this protection as follows:

'The need of an employer to protect his trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he leaves the employer's service he could easily induce the customers to follow him to a new business (Joubert: General Principles of the Law of Contract 149). Heydon: The Restraint of Trade Doctrine (1971) 108, quoting an American case, says that the "customer contact" doctrine depends on the notion that "the employee, by contact with the customer, gets the customer so strongly attached to him that when the employee quits and joins a rival he automatically carries the customer with him in his pocket".'

[17] The evidence in this matter established that Mr le Roux was trained in the art of fostering customer relationships, at the expense of Network Associates, before the commencement of his employment. He was employed as the customer relationship manager with the specific task of developing and fostering relationships with clients. He was actively associated with Mr Sim throughout his period of employment and gained an intimate knowledge of the needs and requirements of RC Green and Co. As I have said, the familiarity with Mr Sim is apparent from the first email addressed to Mr Sim.

[18] It emerged from his own evidence that he knew that Mr Sim did not subscribe to the VoIP service and that he could offer the VoIP service to Mr Sim, that would have been an alternative to that what he then had. As he, himself, explained, services are often sold in packages. He was well placed to advise Mr Sim of other services more compatible to the VoIP service, that might be more efficient than that which he was subscribed to with Network Associates. He had developed the kind of relationship envisaged by Nestadt JA in *Rawlins*.

¹² *Recycling Industries (Pty) Ltd v Mohamed and Another* 1981 (3) SA 250 (SE) at 258; *Rawlins and Another v Caravan Truck (Pty) Ltd* 1990 (3) SA 537 (A); *Paragone Business Forms (Pty) Ltd v Du Preez* 1994 (1) SA 434 (SE) at 44; and *Bridgestone Firestone Maxiprest Ltd v Taylor* [2003] 1 All SA 299 (N) 303i-304a.

[19] Contrary to the view of the magistrate, I consider that it is entirely irrelevant to the enquiry whether Network Associates offered the VoIP system to customers. His understanding of the needs of RC Green and Co. and the fact that his new employer offered a service, which Network Associates did not, had placed him in an ideal position to solicit customers of Network Associates to follow him to the new employment by offering an alternative to them, that he knew they did not have. This constitutes a serious intrusion into the customer relations which Network Associates had with RC Green and Co.

[20] After Mr Mc Cleland had discovered the approach by Mr le Roux to RC Green and Co. a letter was addressed to him reminding him of his contractual obligations to Network Associates, and enquiring whether he had approached any customers of Network Associates after terminating his employment. Mr le Roux was not frank in his response, and he denied that he had done so. Not only was the response not true, but, in evidence, Mr le Roux did not testify that he had not approached any other customer of Network Associates.

[21] In all the circumstances, Mr le Roux did not discharge the onus of establishing, prima facie, that the penalty stipulated was out of proportion to the prejudice suffered, and the appeal must succeed.

[22] Accordingly, the following order is made:

1. The appeal succeeds and the order of the magistrate is set aside and substituted by the following:

“The Defendant is ordered to pay to the Plaintiff:

- (a) R122 100,00, together with interest thereon, calculated at the legal rate, *a tempore morae* to the date of payment; and
- (b) The Plaintiff’s costs of suit.”

2. The respondent is ordered to pay the costs of the appeal, with the costs of counsel to be taxed in accordance with Scale B, set out in rule 69(7) of the Uniform Rules of Court.

J W EKSTEEN
JUDGE OF THE HIGH COURT

POTGIETER J:

I agree.

D O POTGIETER
JUDGE OF THE HIGH COURT

Appearances:

For Appellant: Adv J Ramsay

Instructed by: Joubert Galpin Searle
c/o Huxtable Attorneys
MAKHANDA

For Respondent: No appearance

Instructed by: Kaplan Blumberg Attorneys
GQEBERHA

Date Heard: 26 April 2024

Date Delivered: 7 May 2024