IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JA 44/2020

In the matter between:

ARTHUR OWEN CAROLIN **Appellant**

and

WORLD POWER PRODUCTS (PTY) LTD **Respondent**

Heard: **20 May 2021**

Delivered: **14 June 2021**

Coram: Waglay JP, Davis JA and Molefe AJA

JUDGMENT

DAVIS JA

Introduction

[1] This case concerns the question whether the appellant breached a termination agreement entered into with his erstwhile employer by disclosing a list of customers to third parties. In turn, this raises the issue as to whether the respondent was legally entitled to treat the agreement as having been terminated.

[2] The facts are essentially common cause. The appellant commenced employment with the respondent in 1990. In June 2016, it appeared that an extremely strained relationship had developed between the appellant and Mr Janus Gortzen, the managing director of the respondent. This resulted in the appellant's approach to the respondent's human resources manager, Mr Peet van Rooyen, to discuss a possible exit plan. This discussion prompted Mr Gortzen to approach the appellant on 10 June 2016 with a view to ending the employment relationship between the appellant and the respondent by way of the conclusion of a termination agreement. This initiative proved to be acceptable to the appellant and the agreement was concluded on 10 June 2016. The appellant left the employ of the respondent on that date and surrendered his cell phone and company laptop to Mr van Rooyen. On 20 June 2016, the appellant commenced employment at Remcor (Pty) Ltd, a competitor of the respondent.

[3] On 22 June 2016, the appellant generated an email to a number of people in which he wrote; 'please see my new contact details below'. Underneath this message appeared 'Arthur Carolin Remkor Technologies. It is common cause that the list of addressees, constituted a range of clients of the respondent to whom the appellant had now communicated.

[4] On 24 June 2016, the respondent's attorney addressed a letter to the appellant advising the appellant that he had repudiated the termination agreement by sending this email to customers of the respondent. Accordingly, the respondent had accepted such repudiation. This contention was predicated on clause 2.3 of the agreement which reads thus:

> 'The Employee undertakes not to disclose information, of any nature regarding the Company or this agreement, to any person or organisation. Such information shall include methods, processes, computer software, documentation, client lists, programmes, trade secrets, technical information, intellectual property, drawings, financial information, or any other information which could be damaging to the Company's operations or which could benefit other parties to the detriment of the Company.'

[5] The agreement further provided that the respondent pay the appellant an amount of R 400 000 in full and final settlement before 26 June 2016. However, on the basis of the conduct of the appellant in generating the email, the respondent had adopted the view that the agreement had been repudiated which entitled it to refuse to pay the agreed sum of R 400 000.

[6] On 28 June 2016, the appellant's attorney wrote to the respondent's attorney denying that the appellant repudiated the agreement by way of the email but undertook to delete and destroy all of the respondent's property in the appellant's possession, including business cards which he had accumulated while in the employ of the respondent.

[7] The respondent was unimpressed with this offer and persisted with the view that the conduct of the appellant constituted a repudiation of the settlement agreement which it had accepted. Thereafter the appellant sought relief in the court *a quo*.

<u>The court *a quo*</u>

[8] Sitting in the court *a quo*, Moshoana J found that contrary to the clear terms of the termination agreement that the appellant 'disclosed information emanating from the business cards amassed during his employment, that information is clearly customer connections. Customer lists have been held by our Courts to be worthy of protection and need not necessarily be embodied in the document to be construed as confidential information.' The learned judge concluded that the appellant had repudiated the termination agreement which thus entitled the respondent to accepted this decision and thus regard the agreement as having been cancelled. It was on this basis that the appellant approached this court on appeal.

<u>Appellant's argument</u>

[9] The core argument advanced by Mr van As, on behalf of the appellant, was that the court *a quo* should have concluded that the appellant had sent the relevant email to those addresses he had taken from business cards as opposed to

customer lists. This source of information did not fall within the scope of confidential information and thus there had been no breach of clause 2.3 of the termination agreement through the generation of the relevant email. For this reason, Mr Van As submitted that the court *a quo* should not have concluded that the respondent was entitled to withhold the payment of the contractual amount because there was no forfeiture clause in the termination agreement. In addition, Mr van As sought reliance on the following passage from the judgment in *Micaren Exel Petroleum Wholesaler (Pty) Ltd v Stella Quick Shop (Pty) Ltd and another* [2020] ZASCA 61 at para 11:

> 'The traditional approach to an enquiry into an allegation of repudiation is to examine the objective intention of the repudiator and the response or acceptance thereof by the aggrieved party. The question is whether the conduct of the repudiator or non- performing party, when fairly considered by a reasonable person in the place of the aggrieved or innocent party, demonstrates an intention no longer to be bound by the contract. Needless to say, such conduct must be viewed comprehensively. All material aspects thereof must be taken into account.

[10] In Mr van As' view, on the strength of this dictum, the court *a quo* had erred in concluding that the appellant had demonstrated an intention to repudiate the agreement, particularly because the agreement did not contain a *lex commissoria* which allowed the respondent to cancel the agreement in the event that the appellant breached clause 2.3.

<u>Evaluation</u>

[11] The wording of clause 2.3 clearly unlocks this dispute. It provides, *inter alia*, that the appellant undertook not to disclose any information of any nature. Such information shall include methods, processes, computers, software, documentation, client lists, programs, trade secrets.

[12] There is no suggestion from the wording that a disclosure had to be regarded as confidential information. The wording of the agreement is clear. It embraces the prohibition of the disclosure of information including client lists. Pressed by the

Court to answer whether, in the event that the appellant had disclosed trade secrets or technical information or intellectual property which are also contained in clause 2.3 would the respondent have been entitled to repudiate the agreement, Mr van As was forced to concede that this would have been a justification for regarding the appellant's conduct as a repudiation of the agreement. No distinction can plausibly be drawn between this concession and the appellant's disclosure of client lists. The fact that the appellant generated an email which was captured on the system of Remcor, his new employer, and which contained the email contacts of a range of the respondent's customers manifestly constituted a disclosure of the respondent's client lists.

[13] To the argument that all the email said was 'Hi, here is my new address', this act surely sufficed to provide Remcor with a list of the respondent's clients. At best, it can be regarded as a subterfuge by the appellant to circumvent the scope of clause 2.3. However, the generation of this email held the clear consequence that a list of customers of the respondent were now captured on Remcor's computer system.

[14] The law on repudiation is neatly captured in *Nash v Golden Dumps (Pty) Ltd* 1985 (3) SA 1 (A) where at p 22 Corbett JA (as he then was):

> 'Where one party to a contract, without lawful grounds, indicates to the other party in words or by conduct a deliberate and unequivocal intention no longer to be bound by the contract, he is said to "repudiate" the contract... Where that happens the other party to the contract may elect to accept the repudiation and rescind the contract. If he does so, the contract comes to an end upon communication of his acceptance of repudiation and rescission to the party who has repudiated.'

[15] It is clear from the facts of this case that the conduct of the appellant in this case fell within the scope of this dictum. By his conduct, the appellant had exhibited a clear and unequivocal intention not to be bound by the terms of the termination agreement by ensuring that a list of the clients of the respondent had been disclosed through the email of 2 June 2016 and hence he was no longer prepared

to abide by the terms of the termination agreement entered into with the respondent on 10 June 2016.

Costs

[16] Mr Van As submitted that, given that the appellant was now out of pocket in the amount of R 400 000, he should not be mulcted with costs of this appeal. There is no justification in this argument. The appellant sought to pursue an appeal which is clearly without any merit and accordingly ran the risk that an adverse finding would be accompanied by a costs order. The risk has now passed into a reality.

[17] For all of these reasons, the appeal is dismissed with costs.

Davis JA

Waglay JP and Molefe AJA concur.

APPEARANCES:

FOR THE APPELLANT: Adv M J VAN AS

Instructed by Fluxmans Attorneys

FOR THE RESPONDENT: Adv R Pottas

Instructed by Leach JW Attorneys