THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J298/24

In the matter between:

AON SOUTH AFRICA (PTY) LTD	**Applicant**
and	
MARTHINUS HERMANUS WILHELM SMITH	**First Respondent**
CAPITAUX FINANCIAL SERVICES TRUST	**Second Respondent**
HOSKI LINDE *N.O.*	**Third Respondent**
JOHANNES WERNER SCHEEPERS *N.O.*	**Fourth Respondent**
DESMOND VAN VIEGEN *N.O.*	**Fifth Respondent**
WILLEM JOHANNES VAN ZYL *N.O.*	**Sixth Respondent**
MATTHEUS JOHANNES DE BRUYN *N.O.*	**Seventh Respondent**

Heard: **3 May 2024**

Delivered: **8 May 2024**

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date for handing down judgment is deemed to be 8 May 2024.

JUDGMENT

MAKHURA, J

Introduction

[1] AON South Africa (Pty) Ltd (applicant) launched these proceedings on an urgent basis seeking a final order to enforce a restraint of trade undertaking against the first respondent, Marthinus Hermanus Wilhelm Smith (Smith). The restraint agreement sought to be enforced was concluded on 27 June 2022, less than 2 years before Smith's retirement age.

[2] The application is opposed by Smith. He advanced two primary grounds of opposition. First, he raised the defence of *exceptio non adimpleti contractus* (*exceptio*) and second, that it would be unreasonable to enforce the restraint agreement *inter alia* because the restraint agreement is vague and unenforceable and that the applicant failed to show that it has protectable interest – customer connection and confidential information.

Material facts

[3] On 27 June 2022, the applicant and Smith concluded a contract of employment, which contained a restraint undertaking. The restraint undertaking is set out under clause 34 of the employment contract. The relevant part of clause 34 provides that:

> 'In terms of this restraint of trade, the Employee specifically undertakes and agrees that for the duration of the restraint period referred to in the Offer Letter s/he shall:
>
> - not be interested in any business in the territory which carries on business, brokers who supplies [sic] insurance intermediary services or performs or render service, in competition with or identical or similar or comparative to that

carried on, brokered or performed by the Company during the period of employment of the Employee up to and including the last day of the employment of the Employee. For the avoidance of doubt, this restraint does not preclude the Employee from being interested in such business in the capacity of an employee;

- not solicit the custom of or deal with or in any way transact with, in competition to the Company, any business, company, firm, undertaking, association or person which during the period of 2 (two) years preceding the date of termination of the employment of the Employee has been a client of the Company in the territory; and
- not directly or indirectly offer employment to or in any way cause to be employed any person who was employed by the Company as at the termination of the employment of the Employee with the Company or at any time within a period of 2 (two) years immediately preceding such termination.'

[4] The definition of "interest" or "interested" expressly excludes Smith's interest or concern, directly or indirectly, in a business, company, firm, undertaking, association or person in his capacity as an employee. Smith has expressly recorded as part of the restraint undertaking that he agreed to the restraint undertaking "*in consideration of*" "*all benefits which s/he has or will accrue to him/her for the Company*".

[5] On 5 February 2024, Smith submitted a retirement notice to the applicant. On 9 February 2024, the applicant placed him on garden leave, with immediate effect, until 29 February 2024, his last day of work before going on retirement.

[6] Whilst on garden leave, the applicant learnt that Smith was allegedly soliciting and diverting its clients and business away from the applicant to Capitaux Financial Services Trust (Capitaux) in breach of the restraint undertaking. On 27 February 2024, the applicant's attorneys addressed a letter to Smith demanding compliance with the restraint undertaking. Paragraphs 9 and 10 of the letter stated:

'Our Client is also investigating the circumstances under which its clients cancelled their policies and appointed Capitaux as their broker and reserves the right to take legal action against you and Capitaux, including seeking an order for damages for the loss suffered, as a result of any unlawful conduct.

In addition, our Client wishes to advise that it will not be paying you your discretionary bonus until such time that it has completed the investigation into the cancellation of the policies in respect of approximately 24 clients. Depending on the outcome of the investigation, our Client reserves the right to exercise its discretion and not pay you a bonus and/or set off any discretionary bonus amount against the damages suffered by it as a result of the breach of your undertakings. Should you wish to object to this then please make representations in writing.' (Emphasis added)

[7] On 8 March 2024, Smith's attorneys responded to the applicant's attorneys' letter. In it, Smith recorded that he has no employment relationship with Capitaux. The letter continued:

'It is further our specific instructions that our client is entitled to his bonus your client is owing to [him], as he has acted in terms of the requirements as requested by AON.

We therefore hereby demand payment of our client's bonus which he is entitled to and furthermore confirm that it is our client's instructions to oppose any application your client intends to issue relating to our client's restraint clause.'

[8] Smith refused to give the undertaking and the applicant launched these proceedings.

The *exceptio* defence

[9] In his answering affidavit, Smith alleged that:

'AON owes me in excess of R300 000.00 as the bonus to which I am entitled because of the services I had rendered to it up until my retirement. I have made several enquiries in this regard and to this date I have simply been told that AON is investigating this entitlement and payment because *inter alia* its allegation that I am in breach of the restraint of trade covenant. It [refuses] to pay me this amount, which became due on 1 March 2024.'

[10] In reply, the applicant stated:
'It is admitted that there is an ongoing dispute relating to a bonus payment, however, it has no bearing on the fact that Smith has breached his RTCU and that the RTCU is enforceable.'

[11] In his heads of argument, Mr Grobler, who appeared as counsel for Smith, argued that the restraint undertaking connotes and denotes that Smith agreed to the restraint of trade because of all the benefits that had or would accrue to him during his employment with the applicant and therefore the restraint undertaking poses upon the applicant and Smith reciprocal obligations. For this contention, Mr Grobler relied on the judgment of this Court in *Megafreight Services (Pty) Ltd v Bezuidenhout and another*[1] (*Megafreigh*t).

[12] Ms Swarts, appearing for the applicant, argued that the *exceptio* must fail for two reasons – first, the defence has not been properly pleaded or raised in the papers and second, a claim for payment of discretionary bonus is not based on statute or contract and therefore the contract did not impose reciprocal obligations. Ms Swartz relied on the judgment of this Court in *Adviceworx (Pty) Ltd and another v Roux and others*[2] (*Adviceworx*) for the contention that Smith failed to plead the defence of *exceptio*.

[13] In *Adviceworx*, this Court found that to rely on *exceptio*, the respondent must specifically state that he was not required to perform his side of the bargain under the restraint agreement due to the applicant's breach. The learned acting Judge referred to

[1] [2019] ZALCJHB 218 (28 August 2019).

[2] [2024] ZALCJHB 52 (23 February 2024).

Telcordia Technologies Inc v Telkom SA Ltd,[3] where the Supreme Court of Appeal (SCA) stated that:

'A defendant who wishes to raise the defence of *exceptio non adimpleti contractus* on the basis of an incomplete tender must particularise in the plea in what respects performance was defective and will ordinarily have to give evidence on this aspect first (although the overall *onus* to disprove the existence of the defects will remain on the plaintiff). The reason is obvious: a plaintiff cannot be expected to prove a negative where the complaints of the defendant are unknown...'

[14] The above *dictum* simply reiterated the trite legal principle for parties to plead a case with sufficient particularity to enable the other party to respond thereto.

[15] The current proceedings were brought on application. It is trite that in application proceedings, affidavits constitute both the pleadings and the evidence, where parties set out and define the nature of their dispute and the Court is called upon to adjudicate on those issues.[4] The enquiry therefore is whether the facts pleaded and/or the evidence (not the law) put forward by Smith in his answering affidavit establish the legal basis for the defence of *exceptio*.

[16] Smith specifically averred that he is entitled to payment of a bonus in excess of R300 000.00 and that this payment was due on 1 March 2024. Further, he stated that he is entitled to this bonus payment because of the services he rendered until his retirement. In reply, the applicant did not dispute that Smith is owed a bonus payment nor did it dispute that this payment was due on 1 March 2024. Smith made his complaints known to the applicant. In my view, he has made the necessary, adequate and particular averments to support his defence of *exceptio*. The fact that he did not specifically state that he was relying on the *exceptio* defence, as suggested by *Adviceworx* that this must be specifically pleaded, does not, in my view, detract from the facts pleaded and evidence put forward that the applicant owes him money and has

[3] [2006] ZASCA 112; 2007 (3) SA 266 (SCA) at para 163.

[4] See: *Fischer and another v Ramahlele and others* [2014] ZASCA 88; 2014 (4) SA 614 (SCA) at para 13.

refused to pay him. The applicant is not prejudiced in any way because Smith made the necessary allegations that he is due a bonus payment, the date when this payment was due and that the applicant failed to pay him. Accordingly, there is no merit in the applicant's argument that the defence has not been pleaded and its argument is rejected.

[17] Regarding the merit of the *exceptio* defence, Smith relied on *Megafreight*. There, Van Niekerk J (as he then was), referring to *Universal Storage Systems (Pty) Ltd v Crafford and others*[5] (*Universal Storage Systems*), summarised the legal position as follows:

'The court held that where in a covenant in restraint of trade certain consideration has been promised to the party restrained (the respondent), the obligation to abide by the restraint is reciprocal to the obligation of the party in whose favour the restraint operates (the applicant) to render the promised consideration, and the latter obligation has to be performed first. As long as something remains which has to be performed by the applicant, the respondent may raise the *exceptio non adempleti contractus* as a defence to any attempt by the applicant to enforce the restraint.'[6]

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[5] 2001 (4) SA 249 (W) at para 8. The Court there said that: "The first respondent raised the *exceptio non adimpleti contractus* as a defence to the relief sought on the second restraint and referred to *International Executive Communications Ltd t/a Institute for International Research v Turnley and Another* 1996 (3) SA 1043 (W) at 1047F - I where the following was said:

'So far as final relief is concerned, the applicant's performance of its obligation (payment of a percentage of its net profit) is obviously reciprocal to the first respondent's obligation to abide by the restraint after leaving the employ of the applicant, and would have had to have been performed first. The onus of proving that there was performance of that obligation or that such performance was excused, is on the applicant: *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at 491H; and

''Solank as iets nog oorbly wat gepresteer moet word, kan die eksepsie dat vervulling nie gevolg het nie, teen beide die eiser self en sy erfgenaam geopper word - selfs as die kleinste deel van die kontrak nie vervul is nie of die nie-vervulling slegs op *accidentalia* betrekking het."

[6] *Megafreight supra* at para 4.

[18] Smith agreed to the restraint in consideration of all benefits that would accrue to him during his employment. That a benefit is due to Smith and payable by 1 March 2024 is not in dispute. The alleged dispute about the bonus payment as articulated by the applicant is a reference to the investigation, which, depending on its outcome, the applicant may or may not pay Smith the discretionary bonus. On facts of the matter, the alleged dispute about the payment of the bonus is irrelevant and does not disentitle Smith from the *exceptio* defence. The dispute has nothing to do with Smith's entitlement to the bonus. In my view, the letter dated 8 March 2024 from the applicant's attorneys acknowledges that Smith is due his bonus payment.

[19] The consideration of benefits was agreed to and embodied in the contract of employment. It has been found that a contract of employment is a reciprocal contract.[7] The applicant refused to pay Smith pending finalisation of its investigation. The consequence of the applicant's decision is that Smith's performance of his obligation is not triggered until the applicant performs its obligation first.

[20] In *Universal Storage Systems*, the Court dealt with a restraint undertaking which was entered into in "consideration" to the employee as compensation for his willingness to enter into the restraint undertaking. The restraint undertaking then set out the two considerations, which included the right to participate in the company's commission structure which was still to be formed or finalised. Addressing the company's contention that the "consideration" did not avail the employee of *exceptio*, the Court held that:

'The right to participate in the commission structure of the company to be formed, as expressed in the restraint, does not cease to be a consideration in exchange for the restraint merely because the amount of the remuneration has not been, or even cannot be, quantified; nor does the possibility that nothing may have become payable, deprive the consideration of its character as a reciprocal obligation for the restraint - because the consideration is the right to participate, not the value of that right. For the same reason the argument that because there was no allegation that a particular sum of

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[7] *3M SA (Pty) Ltd v SA Commercial Catering and Allied Workers Union and others* (2001) 22 ILJ 1092 (LAC) at para 9; *Adviceworx supra* at para 152.

money, or any money at all, would have become owing, the consideration cannot be said to be due, is without merit.'[8]

[21] The consideration in the present case is the benefit (bonus) and it has, in this case, become due and payable on 1 March 2024. In a contract where performance of an obligation by the respondent is conditional upon performance by the applicant of a reciprocal obligation, the applicant's performance of its obligation is a necessary prerequisite of its right to sue the respondent and the applicant must show that it has performed its part or tender performance of its obligation.[9]

[22] The applicant has made an intentional decision not to perform its obligation in terms of the restraint undertaking. It has also not tendered payment of Smith's bonus. The defence of *exceptio* must succeed and the application stands to be dismissed. This Court therefore need not consider whether Smith breached the restraint undertaking and whether it must be enforced or not.

Costs

[23] This is a contractual claim where costs ordinarily follow the result, although the Court retains the discretion to award costs. Both parties sought costs and there is no reason not to grant their wish.

[24] In the premises, the following order is made:

Order

1. The application is dismissed with costs.

M. Makhura

[8] *Universal Storage Systems supra* at para 10.

[9] See: *Ese Financial Services (Pty) Ltd v Cramer* 1973 (2) SA 805 (C) at 809E – H.

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv. S. Swartz
Instructed by:	DLA Piper South Africa (RF) Incorporated.
For the First Respondent:	Adv. S. Grobler SC
Instructed by:	Kramer Weihmann Incorporated.