

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA)

(1) REPORTABLE:NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: YES

09/09/2024

SIGNATURE

DATE

CASE NO: 4113/2023

In the matter between:

BEARING INTERNATIONAL, A DIVISION OF HUDACO
TRADING (PTY) LTD

APPLICANT

and

DAVID MARK TREHERNE

FIRST RESPONDENT

14 TWENTY-ONE (PTY) LTD

SECOND RESPONDENT

This judgment was handed down electronically by circulation to the parties and/or parties' representatives by email. The date and time for hand-down is deemed to be 09 September 2024 at 10:00.

JUDGMENT

MASHILE J

INTRODUCTION

[1] Central to this application is whether the First Respondent ("Treherne") was ever a party to the agency agreement and/or restraint of trade ("restraint") concluded between Easy Hire Events and Tents (Pty) Ltd which is now known as 14 Twenty-One (Pty) Ltd ("14 Twenty-One"), and the Applicant ("Bearings International"). Bearings International seeks to hold Treherne to the restraint of trade agreement, which is an integral part of the agency agreement. The substance of Treherne's defence is that the parties never intended the restraint of trade to apply to him in his personal capacity. The objective of the restraint, he says, has always been directed at 14 Twenty-One. If the restraint is applicable to Treherne, this Court will be obliged to consider the merits of the application.

FACTUAL MATRIX

[2] On 25 May 2019, Bearings International concluded the agency agreement with 14 Twenty-One. The agency agreement became effective on 1 June 2019. 14 Twenty-One was still called Easy Hire Events and Tents (Pty) Ltd. The Agency Agreement had an initial duration of three years whereafter it would automatically renew for another three-year period unless either party gave six months written notice of its intention to terminate the agreement. Treherne signed the Agency Agreement on behalf of 14 Twenty-One as its duly authorized agent.

[3] In terms of the Agency Agreement, 14 Twenty-One was required to attend to the marketing, distribution, sale and management of the engineering products of Bearings International within the territorial areas of Machadadorp (West), Lydenburg (North West – excluding Glencore), the Southern border of Hoedspruit (North), Mozambique (East) and Swaziland (South East) (“the territory”). The engineering products include electric motors, gearboxes, v-belts, pulleys, bushes, chains, bearings, sprockets, couplings, motor mounts, and related products (including oil seals, adhesives, and lubricants).

[4] The parties agreed that when Bearings International and 14 Twenty-One entered into the Agency Agreement, Treherne had years of experience in the bearing industry. He had also completed a three-year training program with particular interest in the engineering products included in the scope of the Agency Agreement and training modules. Through this, he gained detailed technical knowledge of the engineering products and the bearings industry.

[5] Additionally, it is common cause that considering the obligations and opportunities of 14 Twenty-One under the Agency Agreement, Treherne was ideally placed to discharge his duties as its sole director. As an experienced and astute businessperson, he was toe-to-toe with Bearings International when he bargained. Bearings International alleges that Treherne’s experience and expertise could present a significant risk to its proprietary rights, goodwill and confidential information.

[6] The bearings industry, claims Bearings International, is typified by various technical and commercial trade secrets that give businesses a competitive edge. An agent is likely to have access to these trade secrets, which, if appropriated or abused, can result in substantial losses for a business. An agent with harmful intentions can also misuse confidential information to ruin the brand of a company bearing upon the goodwill developed and built over years. Protecting the innovations, knowledge and goodwill developed by Bearings International was as such, critical for maintaining its competitive advantage.

[7] Bearings International further claims that over the decades, it has invested substantial resources in innovation, supply chain management, marketing and client management to develop a robust and distinctive brand in the bearings industry and nurture relationships with clients, suppliers and other stakeholders. It has historically enjoyed customer loyalty and an excellent reputation. Given that agents who act as business representatives play a pivotal role in developing and maintaining these relationships, it thought it wise to protect its goodwill from potential mishandling or misuse by its agents.

[8] With the above in mind, the parties sought to secure the proprietary interests and rights of Bearings International when the agency agreement terminated in whatever manner. This is how the idea of a restraint was conceived. Thus, they added to the agency agreement an annexure, which fundamentally restrains the agent in the event of the agency agreement coming to an end. The restraint prescribes that:

"In order to protect the proprietary interests of the Company and its successors-in-title and assign, David Mark Treherne:

FULL NAME OF AUTHORISED AGENT irrevocably and unconditionally undertakes in favour of the Company that he shall not –

- a. During the period of this agency agreement or any extensions thereof and for a period of thirty-six months calculated from the termination of this agreement for whatever reason whatsoever;*
- b. anywhere in the Agent's Territory;*
- c. whether as a proprietor, principal, member, agent, partner, trustee, representative, shareholder, director, manager, executive, employee, consultant, adviser, financier, administrator and/or In any other like capacity, and whether for reward or otherwise be directly or indirectly associated and/or concerned with, Interested and/or engaged In and/or Interest himself In any sole proprietorship, firm, partnership, business, company, trust, close corporation or other association or entity which directly or Indirectly carries on a business which Is competing with the businesses conducted by the Company as at the signature date."*

[9] The restraint continues to stipulate that Treherne, as the *AUTHORISED AGENT*, acknowledges and agrees that the restraints imposed upon him in terms of this agreement are reasonable as to the subject matter, area and duration, and are reasonably necessary to protect the proprietary interests of the Company and its successors-in-title and assigns.

[10] On 18 November 2022, 14 Twenty-One gave written notice of its intention to terminate the Agency Agreement, which became effective on 31 May 2023. In a letter dated 13 March 2023 to Treherne and 14 Twenty-One, Bearings International stated that it was prepared to release 14 Twenty-One but that the restraints imposed against Treherne in terms of the restraint, would endure for the full term of thirty-six months. At the same time 14 Twenty-One changed its name from Easy Hire Events and Tents (Pty) Ltd. Following its release from the restraints, 14 Twenty-One has been carrying on business as a competitor of Bearings International in the territory. Treherne resigned as a director of 14 Twenty-One.

[11] Subsequently, Treherne, however, took up employment and continued to be associated with and interested in 14 Twenty-One. Treherne is lobbying business in the territory from companies that he worked with while in the employ of 14 Twenty-One, when it was thought to be held by the restraints. Bearings International claims that the consequence of Treherne's engagement in 14 Twenty-One, while it is in direct competition with it, has caused its business to nose-dive to unprecedented levels. It is against the aforesaid context that Bearings International, following Treherne's persistent refusal to accept that he is in violation of the restraints, that it launched this application seeking a final interdict.

ASSERTIONS

[12] Bearings International contends that an interpretation of the agency agreement and restraint that seeks to ascribe the meaning that the restraint binds 14 Twenty-One

only, is absurd and not businesslike. Accordingly, this Court should reject it as contrived. It further asserts that it has made a proper case for the Court to uphold its case for a final interdict against Treherne in the event that it overcomes the hurdle.

[13] Conversely, Treherne is adamant that he signed both the agency agreement and restraint in his representative capacity of 14 Twenty-One. As such, both the agency agreement and restraint do not affect him especially in circumstances where 14 Twenty-One has been released. This, he maintains, accords with the rules of interpretations of agreements, documents and statutes, which this Court is obliged to observe.

LEGAL FRAMEWORK

[14] While this matter concerns a restraint of trade agreement, it is very clear that the parties are at variance on whether Treherne signed in his representative or personal capacity. I consider this issue to be dispositive of this whole matter. For that reason, I choose to traverse it first. The answer to this issue depends on the interpretation that this Court will ascribe to the agency agreement and restraint. Paragraphs 25 and 26 of *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*,¹ should set the tone with which this Court will approach the issue whether Treherne was intended to be a party to the restraint. I proceed to cite the paragraphs below:

“[25] Our analysis must commence with the provisions of the subscription agreement that have relevance for deciding whether Capitec Holdings’ consent was indeed required. The much-cited passages from Natal Joint Municipal Pension Fund v Endumeni Municipality (Endumeni) offer guidance as to how to approach the interpretation of the words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used,

¹ [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA).

the concepts expressed by those words and the place of the contested provision within the scheme of the agreement (or instrument) as a whole that constitutes the enterprise by recourse to which a coherent and salient interpretation is determined. As Endumeni emphasised, citing well-known cases, '[t]he inevitable point of departure is the language of the provision itself.

[26] *None of this would require repetition but for the fact that the judgment of the high court failed to make its point of departure the relevant provisions of the subscription agreement. Endumeni is not a charter for judicial constructs premised upon what a contract should be taken to mean from a vantage point that is not located in the text of what the parties in fact agreed. Nor does Endumeni license judicial interpretation that imports meanings into a contract so as to make it a better contract, or one that is ethically preferable."*

[15] The relevant clauses in both the agency agreement and restraint are 2.1, 12.8 and 12.9. Additionally, the parties' signatures are an important consideration when seeking to assign proper meaning to the agreement. Against that backdrop, Clause 2.1 defines the word "agent" as Easy Hire Events and Tents (Pty) Ltd. As stated earlier, this company changed its name to the present 14 Twenty-One. Clause 12.8 read:

"The agent, or any member/shareholder of the agent, and in particular Easy Hire Events and Tents (Pty) Ltd (FULL NAME OF AUTHORISED AGENT), are prohibited from trading, directly or indirectly, in any products of similar type or function to those which could be supplied by the Company, except where such trading is done in terms of this agreement. In the event that the agent, or any member/shareholder of the agent breaches this undertaking, the Company has the right but is not obliged to immediately terminate this agreement and recover damages from the agent or Easy Hire Events and Tents (Pty) Ltd (FULL NAME OF AUTHORISED AGENT)."

[16] Clause 12.9 provides as follows:

"The Agent and Easy Hire Events and Tents (Pty) Ltd (FULL NAME OF AUTHORISED AGENT) undertake to enter into a restraint of trade agreement of the Company, for the

duration of this agreement and any extension thereof and for a period of three (3) years after termination of this agreement, howsoever such termination occurs (Annexure E)."

ANALYSIS

[17] The definition of "agent" in the agreement is significant to arrive at a proper understanding of what the parties sought to achieve by concluding this agency agreement and the restraint. There is no other meaning that this Court can attach to the definition other than what the parties themselves intended it to mean, and that is that it means Easy Hire Events and Tents (Pty) Ltd, the current 14 Twenty-One. The attempt of Bearing International to have this Court believe that "agent" is similar to 14 Twenty-One must be rejected. Such a change of the meaning of the word cannot be accomplished without showing that both parties laboured under the impression that it meant 14 Twenty-One. Accordingly, there exists no issue of rectification and the parties did not choose that route anyway. If the first step in the interpretation of a provision in an agreement is the language used, then surely, the fact that "agent" is defined as aforesaid does not permit any meaning than that which the parties gave to it.

[18] To interfere with the ordinary meaning of the word "agent", would be to do the opposite of what the Supreme Court of Appeal in the *Capitec Holdings* case *supra* cautions us about – "*Endumeni* is not a charter for judicial constructs premised upon what a contract should be taken to mean from a vantage point that is not located in the text of what the parties in fact agreed. Nor does *Endumeni* license judicial interpretation that imports meanings into a contract so as to make it a better contract, or one that is ethically preferable."

[19] Bearing International has pointed out that it would be absurd and unbusinesslike to interpret the first sentence of Clause 12.8 of the agency agreement, which reads that "The agent, or any member/shareholder of the agent, and in particular Easy Hire Events and Tents (Pty) Ltd (FULL NAME OF AUTHORISED AGENT), are prohibited ...". What is conspicuous about the clause is the repetition of the name of the agent. In other words,

there was no need to repeat the name of the agent because the parties have already defined what an agent is. Insofar as this Court is concerned, this is the upshot of a party who completed the proforma agreement without paying attention to detail and meaning. A proper manner of dealing with such a mistake would have been to allege and show common error. In the absence of rectification, this Court cannot assign any other meaning to the word "agent", other than to state that it is tautologous.

[20] The intention of Bearing International might have been to release 14 Twenty-One and to hold Treherne to the restraint but the effect of what they did had other ramifications. There is nothing unbusinesslike or absurd about the parties wanting to restrain 14 Twenty-One alone. Bearing International simply made the mistake of releasing 14 Twenty-One in circumstances where it would have been prudent to first verify that Treherne would be bound by the restraint. Treherne, not being a member or shareholder, as the agency agreement and restraint require, is not bound by the restraint, the mistake in the completion of the proforma agreement of agency and restraint notwithstanding. It is so that the grammar in both Clauses 12.8 and 12.9 suggests that the intention was to bind Treherne and 14 Twenty-One. However, that interpretation cannot be countenanced to trump the definition of "agent" described in the agency agreement.

[21] Clause 12.9 is not different from 12.8 insofar as the tautology of the word, agent, is concerned. Perhaps it is worth accentuating that on examination of the agency agreement and restraint, Treherne consistently signed both documents in his representative capacity as the approved signatory of the agent. If Treherne meant to sign the documents in his personal capacity, it is difficult to fathom the necessity to add that his signature was authorised because he would have known that he is permitted to do so on his own behalf. Treherne's signature in his representative capacity plus the definition of the word, agent, constitute cogent indication that from the onset he was not intended to be party to either agreement. Bearings International only realised afterwards that Treherne should have been part of the restraint and began desperately seeking to hold him liable.

[22] The conclusion that Treherne was never intended to be a party to both agreements other than in his representative capacity renders that it unproductive to consider the restraint at all. It follows as a matter of course that he cannot be bound by the restraint if the agreements never contemplated him as a party. It is against a consideration of the foregoing that I make the following order:

The application is dismissed with costs, including those of two Counsel where so applicable.



B A MASHILE
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA

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Date of Judgment:

09 September 2024