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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No.: **17997/24**

In the matter between:

COOLAG (PTY) LTD

(Registration Number: 2019/626722/07)

Applicant

and

JACOBUS JOHANNES PIENAAR STEENKAMP

(Identity Number: 7[...])

First Respondent

SMTI PROJECTS (PTY) LTD

(Registration Number: 2024/267881/07)

Second Respondent

Date of hearing: 17 September 2024

JUDGMENT DELIVERED ON 19 SEPTEMBER 2024

GORDON-TURNER, AJ:

Introduction

1. The applicant in this matter applied to the Court for certain interdictory relief against the respondents predicated upon an agreement of employment between the applicant and the first respondent, its former employee.

2. On 27 August 2024, the application was struck off the roll for lack of urgency. It was re-enrolled for hearing on the date allocated by the registrar. Counsel for the applicant and for the first respondent agreed during argument that an order should be granted as soon as possible with reasons to follow later. I consider it more convenient to provide reasons simultaneously with the Order.

Issues for determination

3. During the course of the hearing, both counsel for the applicant and the first respondent fairly and wisely made concessions which have had the effect of narrowing the issues. There was no appearance for the second respondent, despite the attorney for the first respondent also being on record for the second respondent.

4. The issues to be determined were:

4.1. Whether there was a misjoinder of the entity SMTI Services (Pty) Ltd as the second respondent, and a non-joinder of the first respondent's trading entity called SMTI Projects (Pty) Ltd;

4.2. Whether the applicant had discharged the *onus* upon it of proving that there is a valid and binding covenant in restraint of trade and that there had been a breach thereof by the first respondent;

4.3. Whether the agreement of employment between the applicant and the first respondent (**the agreement**) can be interpreted as including a covenant in restraint of trade;

4.4. Whether an ellipsis in the contractual provision purporting to create the covenant in restraint of trade can be rectified by way of a belated application brought by the applicant, out of caution, in its replying affidavit; and

4.5. If it is held that a restraint of trade covenant came into existence between the applicant and the first respondent, whether it is enforceable, in respect of which the first respondent bears the *onus*.¹

Points *in limine* on alleged misjoinder and non-joinder

5. Points *in limine* had been raised in the first respondent's answering affidavit and written submissions concerning the alleged misjoinder of SMTI Services (Pty) Ltd (which turns out to be a non-existent entity) and the alleged non-joinder of SMTI Projects (Pty) Ltd.

6. The second respondent has been misdescribed in the notice of motion as SMTI Services (Pty) Ltd whereas its correct name is SMTI Projects (Pty) Ltd. The applicant had, however, correctly identified it in the Notice of Motion and founding affidavit by its registration number at the Companies and Intellectual Property Commission (**CIPC**).

7. It is common cause that no entity by the name of SMTI Services (Pty) Ltd is registered with CIPC. The first respondent had occasioned confusion by issuing quotations under that name which came to the attention of the applicant, hence the error in citation. Correcting the applicant's citation error would not create the peril of substituting one legal entity for another, nor would it occasion any prejudice to any party. It would serve only to emend a misnomer.² Counsel for the first respondent conceded as much during argument.

¹ *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 891B-C, 893C - G and 897H - 898D in which it was held that agreements in restraint of trade were valid and enforceable unless they are unreasonable and thus contrary to public policy, which necessarily as a consequence of their common-law validity has the effect that a party who challenges the enforceability of the agreement bears the burden of alleging and proving that it is unreasonable.

² See in this regard *Anglo Dutch Meats (Exports) (Pty) Ltd v Blaauwberg Meat Wholesalers CC* 2002 JDR 0520 (CC) (full bench) at paragraphs [42], and [45] to [47].

8. Accordingly, I granted an amendment moved from the Bar by the applicant's counsel to change the citation of the second respondent by the deletion of the word "Services", and substitution with the word "*Projects*" wherever the former word occurred, in order to reflect the second respondent's citation and any reference thereto as that of SMTI Projects (Pty) Ltd.

9. This amendment disposed of the points of misjoinder and non-joinder.

The ambit of the restraint of trade covenant (if any)

10. Counsel for the applicant abandoned one of the interdicts sought in the notice of motion, and instead pursued alternative relief framed on a narrower basis. He motivated this decision as the applicant's means to meet the first respondent's criticism that the purported restraint of trade provision had unlimited geographical scope. The prayer that was jettisoned, to my mind, went far beyond the enforcement of the contractual provisions, as if the applicant enjoyed the right to claim relief on the alternative delictual ground of unlawful competition, which was not the case made out. I revert to this aspect in considering the question of costs.

11. Nonetheless, by foregoing that particular interdict, the applicant facilitated limiting of the argument regarding the reasonableness of the alleged restraint of trade, in the event that the Court holds that the first respondent was so bound in terms of his contract of employment.

The factual matrix

12. The applicant commenced trading as a close corporation in 2002, and was incorporated as a private company in 2019. It specialises in hot and cold thermal insulation application (specifically to mechanical systems), as well as sheet metal work, and the fabrication and installation of chill water and hot water piping for HVAC systems. It also undertakes duct manufacture and erection. The deponent to the founding affidavit attested that the business of the applicant was built up at considerable expense and effort over many years (which was not disputed). The

applicant contends that the market in which it operates is highly competitive (which the first respondent disputes, yet contends to be irrelevant). The applicant further contends that its trade connections are a key facet of its business, which is ultimately dependent on its continued client satisfaction.

13. The first respondent undertook but did not complete his tertiary education in mechanical engineering at the Cape Peninsula University of Technology. The subjects that he studied (including fluid mechanics, strength of materials, thermodynamics, mechanical design and computer aided drawing) created a foundation for his subsequent employment by various enterprises (including his own earlier company called HVAC Solutions) that undertook air conditioning installations, HVAC, thermal insulation and sheet metal work. His curriculum vitae, attached to his answering affidavit, showed his experience as a project manager in these various enterprises dating back to March 2008.

14. On 13 November 2015, the applicant and the first respondent executed a written contract of employment. The copy attached to the founding affidavit refers to “*part A and part B*” and to an appendix with job specification / description, but these were not attached. However, the parties agreed that nothing turns on these omissions. It is common cause that the first respondent was employed by the applicant as a project manager. He held a senior management position which required him to report to the managing director of the applicant.

15. The first respondent’s role when so employed as project manager entailed organising labour, procuring materials, adhering to their clients’ timeframes, ensuring quality control for the applicant’s procured contracts, providing quotations to the applicant’s clients, and overseeing and coordinating all aspects of various maintenance and construction projects for the applicant. He was responsible for developing and managing project plans, budgets and schedules, for ensuring effective resource allocation and adherence to quality standards, for maintaining client communication, for addressing risk management and compliance issues, and for managing contracts with subcontractors and suppliers. He had to ensure compliance with safety regulations. He was tasked with building and sustaining relationships with clients in his ‘portfolio’. He was the point of call between the

applicant and its clients, and was involved in every aspect of the applicant's business.

16. The description above of the first respondent's role was provided by the applicant, and was admitted by the first respondent. To my mind, it is manifest that his duties and responsibilities would have exposed the first respondent to the applicant's trade connections. His attempts to suggest that the applicant does not enjoy trade connections, and, somewhat contradictorily, to deny that he has made inroads into or actively solicited those trade connections, are unconvincing.

17. The applicant contends, and it was not disputed, that during his period of employment as project manager the first respondent would have been privy to applicant's confidential information, including detailed project financials such as budgets, cost estimates and expenditure reports, and confidential contractual terms with clients, subcontractors and suppliers. He had access to compliance data related to regulatory adherence and internal operational processes, as well as pricing and performance evaluations regarding subcontractors and suppliers. The first respondent's counsel conceded that the first respondent's exposure to sensitive client information including business operations and proprietary data enabled the first respondent to attain a firm grasp upon the applicant's trade connections.

18. To my mind, the applicant satisfactorily demonstrated that it has proprietary interests susceptible of protection by a restraint of trade covenant, should such be found to exist.

19. It transpires that on 10 May 2024, eight days after submitting his letter of resignation to the applicant, the first respondent had incorporated the second respondent. He is its sole director. The second respondent, according to its letterhead, specialises in HVAC piping fabrication, thermal insulation, and sheet metal contracting. These are similar services to those provided by the applicant. As such, the second respondent is a direct competitor of the applicant.

The applicant's discovery of alleged breaches of the agreement

20. On or about 2 May 2024, the first respondent tendered his resignation to the applicant, which was immediately accepted. Although he gave a month's notice as required in terms of his contract of employment, the applicant did not require him to work out the notice period, and paid him in *lieu* thereof. This was decided upon, so the applicant contends, to avoid misconduct by the first respondent being perpetrated as witnessed on 24 April 2024, while he was still employed by the applicant.

20.1. At that time, he had commenced the solicitation of at least one existing client of the applicant, presumably in preparation for his resignation, by rendering a quotation to the SFI Group (Pty) Ltd (**SFI**), but he did so on behalf of the second respondent rather than the applicant. The first respondent endeavoured to justify this conduct on the basis that his employment relationship with the applicant had deteriorated, that he was approached by SFI, that he had not yet resigned, that he had agreed with SFI that any work to be conducted would be done only after his resignation from the applicant's employ, that the quoted work was never done, and that although the rendering of the quotation "*may be considered to have been a breach of clause 17.1 of the agreement*",³ it is not continuous breach as he is no longer employed by the applicant. To my mind, this self-serving rationalisation is entirely inconsistent with the good faith required of contracting parties. It is also not an answer to the purported prohibition against obtaining the custom of an existing client of the applicant.

20.2. On 24 April 2024 the first respondent also rendered a quotation to a prospective client of the applicant, Van Loveren Cellars, after requesting and obtaining requisite measurements for that quotation from the applicant's foreman. Once again, in his answering affidavit he sought to rationalise his conduct on the basis that he was "*expressly requested*" by Van Loveren to render a quotation. Even if it is accepted that the initiative as that of Van

³ Quoted below.

Loveren, this does not explain why he, the first respondent, provided a quotation in the name of the second respondent rather than that of his then employer, the applicant, in breach of clause 17.1 of the agreement.

21. It transpires that on 10 May 2024, eight days after submitting his letter of resignation, the first respondent had incorporated the second respondent. He is its sole director. The second respondent, according to its letterhead, specialises in HVAC piping fabrication, thermal insulation, and sheet metal contracting. These are similar services to those provided by the applicant. As such, the second respondent is a direct competitor of the applicant.

22. After obtaining the assistance of a professional computer technician who inspected the laptop that had been issued to the first respondent, the applicant discovered that the first respondent had misused its confidential information and intellectual property by, among other things, copying and pasting the contents of the applicant's quotes and inserting them under the name of the second respondent, in order, so it seems, to intercept work from the applicant and obtain the work for the benefit of the second respondent.

23. The inspection performed by the computer technician revealed that the first respondent had used the applicant's email server to send emails to his new entity to be incorporated (the second respondent).

24. The applicant discovered, only after the first respondent's resignation, that he had encroached upon the client relations of the applicant to promote the commercial interests of the second respondent by utilising the applicant's trade connections, and he had wilfully diverted the resources of the applicant for his own benefit and for the benefit of the second respondent. This, so the applicant contends, amounted to a breach of the restraint obligations and undertakings quoted below.

The agreement

25. The agreement contains conventional provisions to be expected in a contract of employment, including date of appointment, job title, remuneration, hours of work

and leave from work, and termination.

26. The salient portions of the agreement for purposes of this application are clauses 16 and 17 which provide as follows:

“16. CONFIDENTIALITY

16.1 All information of a confidential nature acquired by the EMPLOYEE during the course of his employment with the EMPLOYER shall not be disclosed to any person during his employment with the EMPLOYER or after termination of such employment.

16.2 For purposes of this agreement ‘confidential information’ shall be deemed to include but shall not be limited to:

16.2.1 the EMPLOYER’S trade secrets, products, new developments, business methods and techniques;

16.2.2 the identity of the EMPLOYER’S clients and/or customers.

17. RESTRAINTS

17.1 The EMPLOYEE acknowledges that he is employed for the benefit of the EMPLOYER and further undertakes during his employment to preserve the interests of the EMPLOYER at all times and not to involve himself directly or indirectly in any other position offering the same services.

17.2 The EMPLOYEE will for a period of 1 (one) year from the date of termination of Employment, either on his own behalf or on behalf of any person, firm or company competing or endeavouring to compete with the EMPLOYER, directly or indirectly solicit or endeavour to solicit or obtain the custom of any person, firm or company presently a client or supporter (whether financial or otherwise) of the EMPLOYER or which at any time during the 1 (one) year preceding the date of such termination has been a

client of the EMPLOYER, or use his personal knowledge of or influence over any such client or person, firm or company known to him as contracting with or having dealings with the EMPLOYER, to or for his own benefit or that of any other person, firm or company in competition with the EMPLOYER."

Events subsequent to the first respondent's resignation

27. On 16 May 2024, the applicant's attorneys addressed a letter to the first respondent referring to the events of 24 April 2024 and the results of the investigation by the computer technician referred to above, advising that he had breached his contract of employment, and demanding that he immediately refrain from acting in a manner that was prejudicial to the proprietary interests of the applicant. He was required to provide the applicant with a written undertaking to:

27.1. Immediately desist all business operations conducted under the second respondent's name, and that of any other entity which is in competition with the applicant;

27.2. Immediately return the applicant's confidential information;

27.3. Immediately desist from using any of the applicant's resources for the purposes of promoting the interests of the second respondent, or any other related entity in competition with the applicant;

27.4. Refrain from utilising any and all intellectual property of the applicant; and

27.5. Refrain from making contact with any of the applicant's clients or prospective clients.

28. The first respondent replied to that letter by email the same evening. His letter canvasses the circumstances under which he resigned and the applicant's reaction thereto. He described a discussion on 3 May 2024 with the managing director and another employee of the applicant as follows:

“... Keith bevestig het dat beide hy en Ilan weet waarheen ek gaan wanneer ek klaarmaak by Coolag / Spear Contractors, Keith het ook dit baie duidelik gemaak in sy stelling dat hy geen slegte gevoelens teenoor my koester nie and dat hy my nie sal weerhou om enige besigheid te doen soos wat ek die voorige 9½ jaar by Coolag / Spear Contractors gedoen het nie omdat hy weet dit is my ‘brood en botter’ en dat ek ‘n familie and gesin het om voor te sorg.”

29. The first respondent referred to this discussion in support of his assertion that he had been released from contractual restraints arising from his contract of employment. The applicant submits that the first respondent’s very reliance on alleged discussions exposes the fallacy that he was never under any restraint, because in such circumstances there would then be nothing from which he needed to be released.

30. The quoted passage, and indeed the letter as a whole, does not expressly refer to the agreement. It does not assist the first respondent’s contentions regarding the agreement which are summarised above. To my mind it neither supports nor undermines the applicant’s position either.

31. At best for the first respondent, the quoted passage (if assumed for the first respondent’s benefit to be a faithful recordal of what happened during the 3 May 2024 meeting) records the applicant’s recognition that the first respondent was and is entitled to ply his trade in order to support himself, just as he did before his period of employment by the applicant. However, the applicant did not thereby afford him licence to do so in conflict with the restraint undertakings in favour of the applicant.

32. On 20 May 2024, the applicant’s attorneys sent a further letter of demand to the first respondent denying the contents of the first respondent’s letter of 16 May 2024, and affording him an opportunity until 22 May 2024 to furnish certain undertakings, failing which an urgent application would be launched. The first respondent did not comply with this demand for undertakings.

33. Prompted by further information from an existing (unnamed) client of the applicant about an alleged breach of the purported restraint of trade, the applicant's attorneys addressed a further letter to the first respondent on 27 May 2024 advising that preparation had commenced for an urgent application "to enforce the restraint of trade and the provisions of [the agreement]" (the underlining is mine). In a final attempt to avoid the incurrence of further legal costs, the applicant requested undertakings to be furnished by 28 May 2024:

33.1. That the first respondent would not, for a period of 1 (one) year from the date of termination of his employment, directly or indirectly solicit or endeavour to solicit or obtain the customer of any person, firm or company presently (or has been (*sic*) in the preceding 1 year) a client of the applicant, or use his knowledge of or influence over such client for the first respondent's own benefit or the benefit of STMI Services (Pty) Ltd;

33.2. That he would immediately return the applicant's confidential information;

33.3. That he would immediately desist from using any of the applicant's resources for purposes of promoting the interests of STMI Services (Pty) Ltd, or any other related entity in competition with the applicant; and

33.4. That he provide the applicant with an undertaking that he would refrain from utilising the applicant's intellectual property.

34. The applicant's attorney's letter of 20 May 2024, and that of 16 May 2024, were answered by the first respondent's attorneys on 28 May 2024. The following undertakings were provided:

34.1. That the first respondent would immediately cease⁴ conducting business under the name of STMI Services (Pty) Ltd (my underlining);

⁴ The word 'seize' used in the letter in place of the word 'cease' is patently a typographical error.

34.2. That the first respondent would not use any of the applicant's resources to promote his own interests;

34.3. That the first respondent would not utilise the applicant's intellectual property;

34.4. That the first respondent would not actively solicit the applicant's customers "*that was known (sic) to him at the time of his resignation.*" (my underlining)

35. The first respondent's attorneys recorded that he was not in possession of any of the applicant's confidential information.

36. Notably, while the letter canvassed other issues such as alleged debts owed by each of the parties to the other, the first respondent does not refute therein that he was under a restraint of trade as referred to by the applicant's attorneys.

37. A number of other features stand out from this letter from the attorney for the first respondent:

37.1. First, he did not reveal that the entity in which the first respondent had commenced trading is called STMI Projects (Pty) Ltd, and that there is no such entity as STMI Services (Pty) Ltd. The undertaking to desist from conducting business under the name of STMI Services was meaningless, and the respondent knew this to be so.⁵ He kept his powder dry until delivery of his answering affidavit.

37.2. Second, his undertaking not to solicit the applicant's customers was qualified:

⁵ A Lexis Windeed search report on CIPC records attached to the founding affidavit records that SMTI Projects (Pty) Ltd was in business from 10 May 2024. The first respondent attested that '*during May 2024*' CIPC advised him that this company name was available and accordingly he decided to incorporate his company as SMTI projects (Pty) Ltd instead of SMTI Services (Pty) Ltd. It follows from his version that he knew the pertinent facts before his attorney addressed the 28 May 2024 letter.

37.2.1.by the word “*actively*”:⁶ this adumbrated the rationalisations advanced in his answering affidavit for engaging with the applicant’s clients, to which reference is made above;

37.2.2.by limiting the class of clients he would refrain from soliciting to those that were known to him at the time of his resignation: this served to narrow the restrictions of the restraint of trade provisions as set out in the correspondence addressed on behalf of the applicant.

38. The undertakings provided by the first respondent fall short of those that were requested. Nonetheless, the undertakings appear to have lulled the applicant into complacency, as the urgent application then being prepared was not launched until two months later. This enabled the first respondent to successfully argue that urgency was self-created, so that the application was struck off at the first hearing.

39. In the interim, on 5 and 19 June 2024, Mr Dominic Schlosz, an employee of the applicant, encountered the first respondent on site at one of the applicant’s clients. Later it became apparent that the first respondent had directly supplied materials such as sheet metal drip-trays to that client.

40. On 29 July 2024, the applicant received correspondence from an existing client, Mr Tom Zwar (**Zwar**) of Thomo Therm, in a chain of emails commencing with an enquiry from Zwar to the applicant about work Thomo Therm wanted done. Zwar stated “[The first respondent] *phoned me and says that he will do insulation much better on his own. What is your comment on that.*” Evidently an approach had been made by the first respondent to Zwar, seeking to exclude the applicant from doing business with him. Zwar is one of the applicant’s ‘anchor clients’ with whom the applicant has done business for approximately twenty years. The first respondent denied that he had advised Zwar that he would provide a better service to Thovo Therm than the applicant, and brushed off this evidence as hearsay. However, he

⁶ Counsel for the first respondent correctly conceded that if a restraint indeed existed, “*passive*” custom would not operate as a defence. If approached by one of the first respondent’s customers in existence for the year preceding the termination of his employment, the first respondent would have had to turn away the enquiry by reason of his being bound by the restraint of trade.

did not dispute that he had approached Zwar, nor that Zwar is a longstanding client of the applicant to whom the first respondent was introduced by virtue of his employment by the applicant, i.e., one of the applicant's trade connections. The first respondent defiantly asserted that "*nothing precludes me in any event from providing services to the customers of the applicant.*"

41. The communication from Zwar moved the applicant to proceed with this application.

The first respondent's grounds of opposition

42. The first respondent contended in his answering affidavit, and it was so submitted in argument, that clause 17.2 of the agreement does not preclude him or any person or entity he is involved with from being involved in any competing entity including the second respondent. He asserts that, in fact, clause 17.2 places a positive obligation upon him instead of a negative obligation, as is required under restraint of trade clauses. He avers that it does not contain any restraint covenants.

43. The basis for the first respondent's contention is that the word "*not*" does not appear after the first three words in clause 17.2, namely, "*The EMPLOYEE will*". He submitted that this could not be 'read into' clause 17.2, as this would amount to the Court impermissibly making a new contract⁷ for the parties.

44. The first respondent further insisted in his answering affidavit that there was no mistake in the drafting of the agreement, and that the applicant would not be entitled to rectification of the agreement, if sought.

45. He contends that there is simply no restraint of trade covenant or undertaking to be enforced, and therefore the application is doomed to failure. He further contends that, even if clause 17.2 is prohibitory in substance and effect, the restraint undertakings are not limited in the area of application. This, he submits, is unjustifiable, unreasonable and against public policy, and therefore the undertakings

⁷ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 594 (A) at paragraph [18].

are unenforceable as far as area is concerned and the application should be dismissed with punitive costs.⁸

46. The first respondent further contends that because the applicant seeks final relief, the test in *Plascon-Evans* as summarised in *National Director of Public Prosecutions v J G Zuma*⁹ applies: where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant's affidavits, which have been admitted by the respondent, together with the facts alleged by the latter, justify such order. This is qualified by the following:

"It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so untenable that the court is justified in rejecting them merely on the papers."

47. As there is a "clear dispute of fact as to the interpretation of the agreement", so the first respondent contends - that there was no mistake common to the parties and no oral variation of the agreement – his version must be accepted.

48. In regard to rectification, he asserted that the applicant bears the *onus* to prove rectification and/or an oral variation by way of action proceedings under circumstances where it should have foreseen a dispute of facts.

Is there a restraint of trade covenant?

49. Counsel for the first respondent, Mr Le Roux, urged me to find that the applicant had not discharged the *onus* of proving the existence of a restraint of trade covenant, and submitted that I could not interpret the agreement so as to make a contrary finding.

50. These submissions confuse issues of evidence with those of interpretation.

⁸ This was moderated in argument to a claim for party and party costs.

⁹ 2009 (2) SA 277 (SCA) at paragraph [26].

51. It is common cause that the applicant and the first respondent executed the agreement. The agreement includes a clause that the applicant relies upon as a restraint of trade covenant, and which the first respondent contends has a different import mandating him to divert the applicant's business from it. That is the evidence of the parties.

52. It is for the Court to determine the meaning of the agreement that has been proven to exist. Interpretation is a matter of law and not of fact.¹⁰

53. The interpretation of the text of clause 17.2 is not confounded by disputes of fact, as contended by the first respondent. That he disputes that there is a common mistake – to which I give attention below - affects a claim for rectification; it does not impede the Court from interpreting the words of the agreement with due regard to the well-established principles where the words of the document are the starting point, as well as the ordinary rules of grammar and syntax, the context of the provision, its apparent purpose, the circumstance in which it came into being, and the parties' subsequent conduct.¹¹

53.1. Clause 17.2 appears in the agreement under the heading "*Restraints*".

53.2. It follows after:

53.2.1.a prohibition against disclosing the applicant's confidential information both during the first respondent's period of employment by the applicant and after termination thereof; and

53.2.2.an imperative, during his period of employment, to preserve the interests of the applicant, and a prohibition against involving himself directly and indirectly in any other position offering the same services. This is reasonably understood as a prohibition against

¹⁰ *KPMG Chartered Accountants (SA) v Securefin Ltd and Another* 2009 (4) SA 399 (SCA) at paragraph [39].

¹¹ *Natal Joint Municipal Pension Fund v Endumeni Municipality supra* at paragraphs [18] to [22].

diverting trade from the applicant.

53.3. The clause comprises a series of phrases describing actions, all qualified by the words '*directly or indirectly*' and separated from each other by the conjunction '**or**': the use of that particular conjunction is consistent with prohibitory rather than mandatory language.

54. These are the **actions** which the first respondent contends the agreement required him to do for a period of one year from date of termination of his employment by the applicant:

54.1. '**solicit** any person, firm or company presently a client or supporter (whether financial or otherwise) of the [applicant]';

54.2. '**endeavour to solicit** any person, firm or company presently a client or supporter (whether financial or otherwise) of the [applicant]';

54.3. '**obtain the custom of** any person, firm or company presently a client or supporter (whether financial or otherwise) of the [applicant]';

54.4. '**obtain the custom of** any person, firm or company which at any time during the 1 (one) year preceding the date of such termination has been a client of the [applicant];

54.5. '**use his personal knowledge of** ... any such client or person, firm or company known to him as contracting with or having dealings with the [applicant], to or for his own benefit or that of any other person, firm or company in competition with the [applicant]';

54.6. '**use his influence over any** such client or person, firm or company known to him as contracting with or having dealings with the [applicant], to or for his own benefit or that of any other person, firm or company in competition with the [applicant].

55. Positioned as it is under a heading “*Restraints*” and after two contractual provisions (clause 16.1 and clause 17.1) directed at protecting the applicant’s proprietary interests during the period of employment, it is improbable that the parties intended that clause 17.2 create a permissive regime mandating the first respondent after termination of his employment to actively compete and/or assist other persons to compete with the applicant by deploying the very proprietary interests the first respondent was enjoined to protect while still employed.

56. Attributing such a meaning leads to an absurd and unbusinesslike outcome, which is to be eschewed.¹² It requires one to believe that the underlying oral agreement between the employer and employee was the very converse of a restraint of trade. It is inconceivable that an employer would employ a person on the basis that, after termination of his employment, he has express licence to use the (former) employer’s proprietary interests to compete with and to the detriment of the employer.

57. Such a meaning, in any event, is not supported by the conduct of the parties subsequent to the termination of the first respondent’s period of employment: the applicant sought undertakings congruent with its sensible interpretation of clause 17.2 as a restraint of trade covenant, and the first respondent furnished undertakings, albeit somewhat diluted from the extent predicated in clause 17.2. This conduct is not congruent with the permissive and mandatory regimen directed at diverting the applicant’s business, as contended by the first respondent. This regimen, which he contends was agreed, is implausible, far-fetched and so untenable as to warrant its rejection.

58. For these reasons, I do not consider a so-called ‘reading in’ of the word ‘*not*’ as the fourth word of clause 17.2 to be creating a new agreement for the parties. To do so renders the clause sensible, businesslike and consistent with the remainder of the agreement.

59. However, if my view is incorrect, the issue of rectification affords another path

¹² *Ibid*: “A sensible meaning is to be preferred to one that leads to an insensible or unbusinesslike results ...”.

to a similar result viz, to establish a restraint of trade covenant in clause 17.2.

60. To meet the first respondent's contentions that it was too late for the applicant to seek rectification, that this has to be pursued by way of action and that there are disputes of fact about any alleged common mistake, counsel for the applicant, Mr Aggenbach referred to the full bench decision of this division in *Kidrogen RF (Pty) Ltd v Nordien and others 2023 JDR 0260 (WCC)*.¹³ That judgment is on all fours with the facts of this case.

60.1. The lessees under a lease agreement sought to non-suit the applicant, applying for their eviction on the basis that the lease mistakenly omitted the name of the applicant (property owner) and listed the applicant's directors as landlord, which so it was argued, deprived that applicant of *locus standi*. In this matter, the first respondent relies on the omission of the word 'not' from the agreement to non-suit the applicant from enforcing what would otherwise plainly be a restraint of trade covenant.

60.2. The respondents in *Kidrogen* did not raise the alleged absence of *locus standi* initially. At the time when the main application was launched they had never even hinted that the lease was not one between the parties. At all material times up to the delivery of the answering affidavit they clearly considered the applicant / appellant to be the lessor, despite the obvious mistaken reference in the written version of the lease to its directors in their personal capacities as lessors. Likewise, in this matter, the first respondent remained silent about the omission in clause 17.2 and the allegedly absent restraint of trade; as stated above, by his conduct, including the furnishing of diluted undertakings, he acknowledged the existence of a restraint of trade.

60.3. Although the applicant in *Kidrogen* (as in the present matter) was obliged to make out a case for rectification in its founding papers, it only applied for rectification shortly before the hearing by way of notice and after

¹³ 2023 JDR 0260 (WCC).

all affidavits had been filed.¹⁴ The applicant in this matter has done somewhat better, as notice of the application for rectification of clause 17.2 was given in the replying affidavit, as being brought out of caution. The first respondent, had he so wished, could have applied for leave (which would have been granted) to file an affidavit in opposition thereto to set out any prejudice occasioned by the belated application. He did not do so. There were no submissions made that prejudice would be occasioned by the applicant's attempt to rectify clause 17.2. There is no such prejudice.

60.4. In *Kidrogen*, until delivery of the answering affidavit the first respondent neither seriously nor unambiguously took issue with the written recordal of the lease by contending that it did not in fact reflect the parties' true intention. Nor did he even positively assert in the answering affidavit that he had in fact concluded a lease with the directors in their personal capacities.¹⁵ Similarly, in the present matter, until he filed his answering affidavit the first respondent did not contend that clause 17.2 does not reflect the parties' true intention. For reasons already set out, his version is far-fetched and untenable, and is rejected.

61. Just as the appeal court found in *Kidrogen*,¹⁶ I find that the applicant cannot fairly be criticised for failing to specifically advance a case for rectification in the founding papers. The appeal court continued as follows (the underlining is mine):

"[27] However, should I be wrong, it is my view that assistance for the appellant may also be found in Shoprite Checkers¹⁷ and Van der Merwe NO. In Shoprite Checkers the Court stated:

'... the crisp question turns on the nature of that which was agreed between the parties. An examination of the content of the consensus prompts a consideration of the concept of bona fides which underpins contractual relationships. The concept of bona fides has proved to be somewhat elusive

¹⁴ At paragraph [23].

¹⁵ At paragraph [24].

¹⁶ At paragraph [26].

¹⁷ *Shoprite Checkers (Pty) Ltd v Bumpers Schwarmas CC and Others* 2002(6) SA 202 (C).

with regard to its definition and scope. Whatever the uncertainty, the principle of good faith must require that the parties act honestly in their commercial dealings. Where one party promotes its own interests at the expense of another in so unreasonable a manner as to destroy the very basis of consensus between the two parties, the principle of good faith can be employed to trump the public interest inherent in the principle of the enforcement of a contract.

This concept of good faith is congruent with the underlying vision of our Constitution. To rely on the strict written words of a contract and to ignore an underlying oral agreement which not only shaped the written agreement but which forms part of the essential consensus would be to enforce the very antithesis of integrity and good faith in contractual arrangements.

[28] In Van der Merwe NO it was stated:

[9] As far as is known, no trust by the name of the Clarke Bosman Trust existed. In context it is obvious that Clarke and Bosman were intending to represent the Hydraberg Property Trust. After all, it was only in that capacity that they must have expected to take transfer of the fixed property from the registered owners and thus be placed in a position to fulfil the obligation under the contract to give transfer of the property to the option grantee/purchaser. There is no other sensible explanation for their action in playing the role they did in the execution of the deed of contract.

[10] In the applicants' replying affidavit it was averred in response that rectification was not required, but that "a notice of intention to amend the notice of motion [would] nevertheless, insofar and if this [might] be necessary, be filed in due course to provide for the rectification of the name of the seller trust". A notice of intention to amend was not filed. Instead, application was made from the bar at the commencement of the hearing to amend the notice of motion by introducing a prayer for the appropriate rectification of the deed.

[11] *The respondents' counsel was somewhat equivocal in his attitude to the application to amend the notice of motion. He certainly did not consent to it. In my view there was no cogent basis to oppose the amendment sought. It was foreshadowed in the papers and, as mentioned, the mistake regarding the description of the Trust is essentially conceded in the respondents' answering papers. The application for the amendment of the notice of motion will accordingly be granted.*”

62. I find that this is similarly a proper case for rectification, and that the first respondent was bound by the restraint of trade covenant in clause 17.2 as rectified by the insertion of the word “*not*” as the fourth word thereof.

63. Regarding the enforceability of the restraint, the first respondent’s critique of the unlimited area of restraint has been met in my view by the applicant’s pursuit of the alternative relief set out in prayer 2.2 of the notice of motion which confines the restraint to a list on annexure “**A**” to the notice of motion, comprised of fifteen customers, of which all but three are in the Western Cape. The restraint of trade does not preclude the first respondent from using his skills, knowledge and experience in a similar industry or even as a project manager in a different industry, and, limited as proposed it is reasonable.¹⁸

64. Mr Aggenbach urged me to order that the one year period of the restraint operate from the date of the order rather than from the date of the first respondent. I am not inclined to do so. This request appears to be directed at compensating the applicant for the loss of several months of operation of the restraint between the date of the first respondent’s resignation on 2 May 2024 and the date of the Order. However, it would have the effect of undermining this Court’s earlier finding that the applicant did not make out a case for urgency, which I cannot do. I am however satisfied that the applicant has proved that it enjoys a clear right, that actual injury

¹⁸ As was held in *BHT Water Treatment (Pty) Ltd and Another* 1993 (1) SA 47 (W) at 58A: “The very purpose of the restraint agreement is that the applicant did not wish to have to rely upon the bona fides or lack of retained knowledge on the part of the first respondent. In my view, it cannot be unreasonable for the applicant in these circumstances to enforce the bargain it has exacted to protect itself. Indeed, the very ratio underlying the bargain was that the applicant should not have to content itself with crossing its fingers and hoping that the first respondent would act honourably or abide by the undertakings he has given.”

has been committed and is reasonably apprehended, and there is no other satisfactory remedy.¹⁹

65. The second respondent was not party to the agreement. The interdicts sought in prayers 2.2 to 2.4 of the notice of motion were included in a draft order prepared by the applicant's counsel, but they seek to include the second respondent. The cause of action for the interdicts was contractual, and must per definition be limited to the contracting party. The applicant's protection against the second respondent lies in the fact that the first respondent is prohibited both "*directly and indirectly*", so to the extent that the second respondent may again be used as a vehicle to divert the applicant's custom, the first respondent would be in breach of the interdict, for which the applicant enjoys remedies including recourse to contempt of court proceedings. Accordingly, I have omitted the reference to the second respondent from the wording of the interdicts.

66. Counsel for both parties agreed that costs should follow the result, with counsel's fees to be awarded on scale B due to the complexity of the issues and matters of law. The applicant has been substantially successful and is entitled to its costs.

67. The applicant seeks an award of attorney and client costs. By reason of special considerations arising either from the circumstances which gave rise to the proceedings or from the conduct of the losing party, the Court in a particular case may consider it just, by means of such Order to ensure more effectually than it can do by means of a judgment for party and party costs that a successful party will not be out of pocket in respect of the expense caused by the litigation.²⁰ No exhaustive list exists.²¹ An award of attorney and client costs will not be granted lightly. The Court's discretion to order the payment of attorney and client costs includes all cases in which special circumstances or considerations justify the granting of such an order.

¹⁹ *Setlogelo v Setlogelo* 1914 AD 221 at 227.

²⁰ *Nel v Waterberg Landbouwers Ko-Operatiewe Vereeniging* 1946 AD 597 at 607.

²¹ *Rautenbach v Symington* 1995 (4) SA 583 (O) at 588A-B.

68. I have considered the factors which might favour such a punitive award: the first respondent's deceitful conduct to which I alluded above, his breach of his own undertakings, his calculated plans to divert business to his entity even while employed by the applicant, and the effort that had to be directed by the applicant and the Court at dealing with unworthy technical defences at odds with what the first respondent knew to be the truth regarding his employment agreement and his trading entity; against this, I weighed up that the applicant was to some extent the author of its own misfortune – the omission from clause 17.2 was the result of its own drafting – that the applicant attempted, unsuccessfully to extend the ambit of the relief contemplated in the agreement, and that the applicant has already borne the consequences of its dilatory launching of this application from the time it perceived that the first respondent had breached the undertakings given in late May 2024.

69. The most compelling factor, to my mind, was the lack of good faith shown by the first respondent – both by breaching the restraint of trade, and by devising the defences he mounted to justify such breaches, protesting to the end that no restraint existed. I can put it no better than Van Zyl J in the *Anglo-Dutch Meats* judgment:²²

“Peace-loving and justice-seeking members of the community do not take kindly to what they perceive as ‘technical’ defences that allow debtors to escape liability and accountability.”

70. An award of attorney and client costs is merited.

71. The following order is granted:

71.1. The second respondent's citation is amended by deletion of the word “Services”, and substitution thereof with the word “Projects”, wherever the former occurs, in order to reflect the second respondent's citation and any reference thereto as that of SMTI Projects (Pty) Ltd.

71.2. The written employment agreement, annexure “**KS2**” to the founding

²² *Supra* at paragraph [47].

affidavit, is rectified by insertion of the word “**not**” in clause 17.2 between the words “*The EMPLOYEE will*” and the words “*for a period of 1 (one) year*”.

71.3. The first respondent is interdicted and restrained for a period of one year dated from 3 May 2024, either on his own behalf or on behalf of any person, firm or company competing or endeavouring to compete with the applicant, from:

71.3.1. directly or indirectly soliciting or endeavouring to solicit or obtaining custom from any person, firm or company which is presently a client or supporter (whether financial or otherwise) of the applicant, or who has been a client of the applicant within the one year period preceding 3 May 2024, specifically including the persons and entities listed on the annexure to the notice of motion marked “**A**”;

71.3.2. using the first respondent’s personal knowledge of or influence over any such client, or person, firm or company as defined in the preceding paragraph 70.3.1; and

71.3.3. directly or indirectly using, revealing, disclosing or in any way utilising any of the applicant’s confidential information.

71.4. The first respondent is directed to pay the applicant’s costs of this application jointly and severally, on a scale as between attorney and client, counsel’s fees to be on Scale B.

F J GORDON-TURNER
ACTING JUSTICE OF THE HIGH COURT

Appearances

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Instructed by

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