THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: DA20/2023
DA11/2024

In the matter between:

ROWAN JONES **Appellant**

and

COMPENDIUM GROUP INVESTMENT HOLDINGS (PTY) LTD **First Respondent**

COMPENDIUM INSURANCE BROKERS (PTY) LTD **Second Respondent**

Heard: **26 September 2024**
Delivered: **11 October 2024**
Coram: **Savage ADJP, Van Niekerk *et* Nkutha-Nkontwana JJA**
Summary: **Restraint of trade – interpretation - context and purpose may be used to elucidate the text and not make a better contract – definite intentions of the parties must prevail.**

JUDGMENT

NKUTHA-NKONTWANA, JA

Introduction

[1] This appeal, which is by leave of this Court, pertains to the confidentiality and restraint agreement concluded between the appellant (Mr Jones) and the first respondent (Compendium Group) on 20 February 2015 (2015 restraint agreement). Mr Jones was employed as the Chief Executive Officer (CEO) of Compendium Group and the second respondent (Compendium Insurance), collectively referred to hereafter as Compendium. He was involved in the business of Compendium for about 29 years as the founder and majority shareholder.

[2] In 2014, Mr Jones sold his shares in Compendium to Bidvest Insurance Group (Pty) Ltd (Bidvest) for R120 million and was paid R60 million in October 2019. He continued in his capacity as the CEO and signed the 2015 restraint agreement with Compendium wherein he undertook, *inter alia*, that:

> '4.1 he shall not during the period of his employment with the Company or at any time thereafter utilise for himself or for any other person, or disclose to any other person, any information or trade secrets relating to the business of the Company.
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> 4.2 he shall surrender to the company on demand, and in any event on termination of his employment with the Company, any documents or records (Including written instructions, notes or memoranda) and any copies thereof which relate to the business of the Company, irrespective of who the author was of any such document or record.
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> 4.3 he shall not during the currency of his employment with the Company and for a period of 36 (thirty-six) months after the termination of his employment with

the Company for any reason whatsoever (including summary dismissal or notice duly given to the Company) be:

4.3.1 directly or indirectly engaged or employed in or associated in any way with any business which is similar to any of the various businesses of the Company in which he was engaged either at the date of termination of his employment with the Company or at any time during the twelve-month period preceding the termination of his employment ("the competitive business").

4.3.2 he shall not solicit orders from or do business with any customers or suppliers of the Company where such orders or business are in competition with any of the Company's activities as at the date of termination of this agreement; and or.

4.3.3 he shall not encourage or entice to (sic) incite or persuade or induce any employee of the Company to terminate his or her employment whether or not in breach of any agreement.

4.4 The area to which the restraint referred to in this agreement is applicable shall be each of the provinces of the Republic of South Africa as constituted in terms of the relevant Act as amended from time to time and in which he has rendered services to the Company at the date of termination of his employment and at any time during the twelve-month period preceding the termination of his employment.'

[3] In 2021, Mr Jones suffered ill health which led to the termination of his employment with Compendium. Following protracted negotiations on the terms of future engagement, the parties agreed that Mr Jones would continue to render services on a consultancy basis. The initial draft of the consultancy agreement cited Mr Jones as a contracting party and service provider in his personal capacity. That did not go well with Mr Jones. He was insistent that he would rather be contracted through a company called iRisk Underwriting Managers (Pty) Ltd (iRisk) because of tax benefits. Several drafts of the consultancy agreement were exchanged between the parties. Pertinently, Mr Jones was removed as a party to the agreement and replaced by iRisk, the service

provider. He was cited as the service provider representative. The following clause was consequently deleted:

> '3.5 The Parties agree that this Agreement serves as revocation or cancellation or substitution of all previous agreements and/or mandates concluded between the parties, including any previous agreements concluded by Mr Jones in his personal capacity.'

[4] Pertinently, clause 3.5 was replaced by clause 3.4 which states that:

> '3.4 The agreement served as revocation or cancellation, or substitution of all previous agreements and/or mandates concluded between the parties.'

[5] The final draft of the consultancy agreement, dated 2 November 2022, was ultimately signed by Mr Jones on behalf of iRisk and Ms Hannah Sidiki (Ms Sidiki), Sidiki, the CEO of Bidvest Financial Services, on behalf of Compendium. Having been through some major revisions, it contains the following restraint clauses:

> 'Restraint and non-Solicitation
>
> 13.1 The Service Provider agrees that for the duration of this agreement and for a period of three months after termination, the Service Provider and Mr Rowan Andrew Jones in his personal capacity will not, within the geographical area of the RSA, directly or indirectly:
>
> 13.1.1 entice or solicit, or attempt to entice or solicit, any employee of the Company to terminate his or her employment with the Company, or any subsidiary or associate entity of the Company unless agreed in writing by the Company. (SEE ANNEXURE A[1])
>
> 13.1.2 entice or solicit, or attempt to entice or solicit, any existing client or the Company, or any subsidiary or associate entity of the Company away from it, unless agreed in writing by the Company.

[1] This is an annotation by Mr Jones which refers to two Compendium employees, Messes Debbie Crafts and Corlana Cooper, who would be allowed to join iRisk to assist Mr Jones with some more difficult customers without offending this clause (anti-soliciting clause).

13.1. 3 use any confidential information pertaining to the Company, or any subsidiary or associate entity of the Company to generate rewards for the Service Provider or any other person.'

[6] Mr Jones by way of the manuscript, deleted clause 13.1.4 which prevented him and iRisk from participating or being involved in any business activity which directly or indirectly competes with Compendium or its subsidiary or associate entity (the non-competition clause). The duration of the consultancy agreement was two years, due to terminate in September 2024.

[7] In April 2023, Mr Jones gave notice to terminate the consultancy agreement. In June 2023, Compendium discovered that Mr Jones was registered as the representative of a company called Tuttle Insurance Brokers (Pty) Ltd (now called TIB Insurance Brokers Dbn (Pty) Ltd) (TIB). It is common cause that TIB is a direct competitor of Compendium.

In the *court a quo*

[8] Compendium approached the court *a quo* to enforce the 2015 restraint agreement. Mr Jones did not seriously refute that, having founded and reigned over Compendium for almost three decades, he developed strong customer connections and had access to confidential information. Yet, Mr Jones' main defence was that the consultancy agreement novated or superseded the 2015 restraint agreement.

[9] In a detailed and well-reasoned judgment, the court *a quo*, per Allen-Yaman AJ, as she then was, rejected Mr Jones' novation defence, stating, *inter alia*, that:

'[53] As has been mentioned, a party alleging novation is required to establish that the parties to the contract unequivocally intended by the conclusion thereof to replace a prior contract. For the reasons which follow, Mr Jones has been unable to discharge such an onus.

[54] Mr Jones first placed reliance on the statement made by Ms Sadiki to him in her email of 29 June 2022, in which she expressed her view that the parties' future obligations could be reduced to a single agreement, to which proposition he had readily agreed. That statement, however, was made at a time when it had been Compendium's intention to contract with Mr Jones in his personal capacity as a consultant, and not through the mechanism of a juristic person, iRisk. By removing himself from the contract in his personal capacity, no statements made by Ms Sadiki which were made in contemplation of Compendium contracting with him in his personal capacity, can be found to have reflected her continued, unchanging intention when the circumstances were materially altered by the subsequent substitution of iRisk for himself as the Service Provider.

…

[57] It is also difficult to find, on Mr Jones' own expressed version and the undisputed facts relating to his own actions, that both parties intended to novate the Restraint Agreement.

[58] On his version, he was of the view that the conduct of both Ms Sadiki and Ms Jones demonstrated that neither thought there had been a restraint in place. If Mr Jones' assumption was indeed correct then this in and of itself negated any possibility that either one, or both of them, by concluding the Consultancy Agreement, intended to novate the Restraint Agreement, as such intent could not possibly have been formed in ignorance of the existence of the prior agreement.

[59] The same may be said of Mr Jones himself. At all times during the course of the negotiations which preceded the signing of the Consultancy Agreement, Mr Jones appeared to have been labouring under the impression that he was not bound by any restraint at all.'

[10] The court *a quo* further upheld Compendium's contention that the consultancy agreement could not have novated the restraint covenant based on the *Shifren* principle. That is so, it was further opined, because:

'Although the Consultancy Agreement was one in writing, and was in fact signed by Mr Jones, it was signed by him only in his capacity as the representative of

iRisk and accordingly could not have met the requirement of signature which had previously been agreed between Compendium and Mr Jones at the time when the Restraint Agreement was entered into.'

On appeal

[11] The argument on behalf of Mr Jones in this Court is similar to that advanced in the court *a quo* and is quintessentially that the consultancy agreement superseded or novated the 2015 restraint agreement. Mr Shapiro SC, for Mr Jones, decried the interpretative frame espoused by the court *a quo* which, it is contended, showed undue allegiance to terminology instead of probing the context and the intent of the parties when they concluded the consultancy agreement.[2]

[12] The proper construction of the consultancy agreement, so it is further contended, should have been that Mr Jones' signature to the consultancy agreement constitutes a dual signature, binding him in his personal capacity and as the representative of iRisk. To the extent that it contains restraint obligations that apply to Mr Jones personally, it effectively replaced the 2015 restraint agreement.

[13] Compendium, conversely, contends that the construction mooted by Mr Jones is untenable as it is oblivious to two important facts. First, the separate juristic personality of iRisk, being the party to the consultancy agreement. Second, Mr Jones' stated intention, as pleaded in his answering affidavit, that he did not wish to be a party to the consultancy agreement and that he specifically asked to be removed as a party to the agreement and for it to be concluded in the name of iRisk.

[14] Mr Whitcutt SC, for Compendium, is correct in his submission that the interpretation contended for by Mr Jones, namely that the consultancy agreement must

[2] See: *Natal Joint Municipal Pension Fund v Endumeni Municipality* (*Endumeni*) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) at para 18*; Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA) (*Capitec*) at paras 25 and 26.

be interpreted to be in substance between himself and Compendium, is one which is wholly divorced from the gravitational pull of the text of the consultancy agreement itself. Moreover, this interpretation of the consultancy agreement is contrary to Mr Jones' intention at the time that he concluded the consultancy agreement as he insisted on removing himself as a party from it largely so that he could gain tax benefits.

[15] The tenets of statutory interpretation have crystalised and need not be regurgitated. In *Capitec Bank Holdings Limited and another v Coral Lagoon Investments*[3] (*Capitec*), the unanimous judgment of the Supreme Court of Appeal penned by Unterhalter AJA, endorsed the principles articulated in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[4] and added that:

> '[25] …the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, 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] …*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.' [Own emphasis]

[16] The court further stated that:

> 'Most contracts, and particularly commercial contracts, are constructed with a design in mind, and their architects choose words and concepts to give effect to that design. For this reason, interpretation begins with the text and its structure. They have a gravitational pull that is important. The proposition that context is

[3] *Capitec supra* fn 2.
[4] *Endumeni supra* fn 2.

everything is not a licence to contend for meanings unmoored in the text and its structure. Rather, context and purpose may be used to elucidate the text.' [5]

[17] What is clear from *Capitec* is that the text used in a contract is central to the analysis because this is how the parties chose to capture and convey their contractual intentions. The meaning of the words of a contract can be derived from reference to various contextual factors, which include the purpose of the agreement and the nature of the relationship created by the agreement. Still, context and purpose may be used only to elucidate the text and not to make a better contract.

[18] I accordingly commence the probe with clause 1.1.9 of the consultancy agreement which defines a "*party*" as the "C*ompany, or "Service Provider" and "Parties"* to mean both of them. Looking at the words the parties chose to define themselves by in the consultancy agreement, there are only two parties, "*Company*" referring to Compendium and "*Service Provider*" referring to iRisk. Therefore, Mr Jones' contention that the consultancy agreement is a tripartite document is untenable. It follows that the term "*parties*" referred to in clause 3.4.4 of the consultancy agreement, which states that "*the agreement served as a revocation or cancellation, or substitution of all previous agreements concluded between the parties*", must be understood to refer to Compendium and iRisk.

[19] This construction is also consistent with the surrounding circumstances which were known to the parties at the time when the consultancy agreement was concluded. It is common cause that clause 3.5, which appeared in the first draft of the consultancy Agreement, specifically mentioned that all previous agreements Mr Jones had concluded in his personal capacity would be revoked. However, that clause was deleted consequent to Mr Jones' insistence that he be removed as a party to the consultancy agreement because he preferred to trade through iRisk, which provided him operational and taxation benefits. Clause 3.4.5 was replaced by clause 3.4.

[5] *Capitec supra* at para 51.

[20] Notwithstanding Mr Jones' declared intention that he did not want to be cited as a party to the consultancy agreement, on the strength of *Steenkamp v Webster*[6] (*Steenkamp*), the high-water mark of his contention before us is that his dual signature bound him personally as a party. Consequently, the 3-month restraint (contained in the consultancy agreement) replaced the 36-month restraint in the restraint covenant, so it was contended.

[21] The consultancy agreement is not the model of clarity, a fact conceded by counsel for both parties. For example, the restraint provision contained in clause 13.1 expressly binds Mr Jones in his personal capacity; clause 5.6 imposed a personal financial penalty on him for terminating the agreement before the agreed termination date; and had conferred personal benefits such as medical aid. Hence Mr Shapiro beguilingly implored us not to be hoodwinked by the form of the commercial transaction at stake because, to all intents and purposes and in truth, Mr Jones was intended to be a party to the consultancy agreement and as such, it constitutes a written agreement that varied the 2015 restraint agreement.

[22] As put by Mr Whitcutt, which I accept, these discrepancies are the "scars" that could only be attributed to the negotiation process and resulting amendments in various drafts that birthed the consultancy agreement. Even so, the parties' stated intention and the context leading to the conclusion of the consultancy agreement strongly support the conclusion that Mr Jones' role was limited to being a representative of iRisk in line with his wishes not to be a party in his personal capacity. The meaning of the word "parties" cannot be expanded to include Mr Jones. So, his insistence that he was a party to the consultancy agreement is untenable. Likewise, his reliance on *Steenkamp* is misplaced. Mr Jones has made his bed and must now lie in it.

[6] 1955 (1) SA 524 (A) (*Steenkamp*) at 530C-534A. See also: *Glen Comeragh (Pty) Ltd v Colibri (Pty) Ltd and another* 1979 (3) SA 210 (T) at 214H-I; *Fourlamel (Pty) Ltd v Maddison* 1977 (1) SA 333 (AD) at 345E.

[23] The court *a quo* exhaustively considered the clauses of the consulting agreement in light of its purposes, the intention of the parties and the historical and commercial context and correctly observed that:

> '… the Consultancy Agreement, Compendium and iRisk did so for no purpose other than to enable Mr Jones to continue to render services to Compendium as an independent contractor rather than an employee. When he caused iRisk to be substituted as the Service Provider, exclusively represented by himself, the restraint in relation to Mr Jones contained in the Consultancy Agreement was not intended to supplant the [2015] Restraint Agreement, which remained wholly unaffected by the Consultancy Agreement.'

[24] If follows that the decision of the court *a quo* to enforce the 2015 restraint agreement is unassailable and must stand.

Section 18 appeal

[25] Mr Jones brought an urgent appeal in terms of section 18(4)(ii) of the Superior Courts Act[7] (SCA) against an order granted by Whitcher J on 12 April 2024 in terms of section 18(3) of the SCA enforcing the judgment and order of Allen-Yaman J granted on 10 October 2023 pending appeal.[8]

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[7] Act 10 of 2013.

[8] Section 18 of the SCA reads as follows:

'(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2) if the party who applied to the court to order otherwise, in addition, proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

(4) If a court order otherwise, as contemplated in subsection (1) –

(i) the court must immediately record its reasons for doing so;

(ii) the aggrieved party has an automatic right of appeal to the next highest court;

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal.' [own emphasis]

[26] Given the turn of events in the main appeal, much need not be said in this appeal other than to make a few observations. The judgment of Whitcher J is well-reasoned and beyond reproach. The impugned restraint order is due to expire on 31 December 2024, less than two months from now. The enforcement order was aimed at obviating the evaporation of the restraint order and in turn, insulating Compendium from irreparable harm.[9] It was cold comfort to Compendium that Mr Jones is not a man of straw and could be sued for damages. It is well accepted that the success in enforcing the restraint agreement is predicated on the impracticability of damages as an adequate remedy.[10] While Mr Jones, a self-proclaimed man of means, would not have suffered irreparable harm as a result of the enforcement order.

Conclusion

[27] In all the circumstances, both appeals stand to be dismissed with costs, including the costs of two counsel.

[28] In the result, the following order is made:

Order

1. The main appeal against the order of Allen-Yaman J under DA20/2023 is dismissed.
2. The appeal in terms of section 18(4)(ii) of the Superior Courts Act against the order of Whitcher J under DA11/2024 is dismissed.
3. The appellant, Mr Jones, is also ordered to pay the costs incurred by the respondents, Compendium, in respect of both appeals, including the costs of two counsel.

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[9] See: *Incubeta Holdings (Pty) Ltd and another v Ellis and another* [2013] ZAGPJHC 274; [2014] 3 SA 189 (GSJ) at para 24; *L'Oréal South Africa (Pty) Ltd v Kilpatrick and Another* [2014] ZALCJHB 365; (2015) 36 ILJ 2617 (LC) at 50.
[10] Id.

Nkutha-Nkontwana JA

Savage ADJP *et* Van Niekerk JA concur

Appearances:

For the Applicant:	Adv W N Shapiro SC
Instructed by	Macgregor Erasmus Attorneys Inc
For the Respondent:	Adv C Whitcutt SC
Instructed by	Edward Nathan Sonnenbergs Inc