

Not reportable
Delivered 11 July 2010

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT BRAAMFONTEIN**

CASE NO: J 1403/10

In the matter between:

GAMMATEK (PTY) LTD

APPLICANT

and

LYTTLE, PATRICK

RESPONDENT

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an application to interdict the respondent from competing with the business of the applicant for a period of two years, calculated from 31 May 2010, in terms of a confidentiality and restraint of trade agreement. In terms of a revised notice of motion, the interdict is sought only in respect the business of the generic aftermarket cellular telephone accessories product range in the cellular industry.

Factual background

[2] The relevant facts are largely common cause. While this was not disclosed in the founding affidavit, on 26 February 2008, the respondent signed a fixed term contract in terms of which he was employed by the applicant from 1

March 2008 to 31 August 2008, as a sales manager. In terms of the agreement, the respondent was to be employed only for the fixed term, on termination of which the respondent's employment would be considered to have terminated by mutual consent. The deponent to the founding affidavit avers that in at some time subsequent to 31 August 2008, the respondent signed a confidentiality and restraint agreement. In the replying affidavit, the deponent concedes that the use of the word "subsequently" was a typographical error, and acknowledges the existence of the fixed term contract and that the restraint agreement was signed on 28 February 2008. Be that as it may, in terms of the agreement, the respondent agreed *inter alia* not to be interested in any business within South Africa and its neighbouring states that was in any way in competition with the applicant, or that comprised a business similar to that of the applicant. The period of the restraint was two years, to be calculated from "the date of termination of this agreement for any cause or reason whatsoever".

[3] On 31 August 2008, the respondent signed a letter of appointment in terms of which he was appointed as a sales manager, on an indefinite basis. Clause 6 of the latter reads as follows:

"Restraint of Trade & Confidentiality

Due to your position within the company, you are required to sign the restraint of trade contract that is presented to you with your letter of appointment".

It is common cause that no restraint of trade agreement was presented to the respondent when he signed the letter of appointment. The respondent resigned on 6 May 2010, giving notice to expire on 31 May 2010.

[4] On 21 June 2010, Vodacom held a supplier's day conference, attended by the general manager of the applicant, one Van der Merwe, and the respondent.

The applicant contends that in a conversation with the respondent, Van der Merwe was told that the respondent was attending the conference on behalf of a friend, who had bought an interest in European Telecom Africa (ETA). After further investigation, the applicant confirmed that the respondent had an interest in ETA within the definition contained in the restraint agreement, and considered that the respondent was in breach of the agreement. On 14 July 2010, it filed this application.

The issues

[5] The applicant contends that the agreement signed on 28 February 2008 was not linked to the fixed term contract, that it was in fact the agreement contemplated by clause 6 of the contract signed on 31 August 2008, and that it remains enforceable. The respondent admits that the restraint agreement relates to the fixed term period of employment, but contends that it has no application to the offer of employment accepted on 31 August 2008. The parties' respective positions beg the question of whether the restraint agreement is capable of application at all, and whether in these circumstances, the applicant has established a clear right to the relief that it seeks. Clause 2.4 of the restraint agreement (which on the face of it stands independently of any contract of employment signed by the respondent) reads as follows:

*Each and every restraint in this entire clause shall operate and be valid and binding for a period of 2 (two) years calculated from the date of termination **of this agreement** for any cause or reason whatsoever (my emphasis)."*

[6] The observation that immediately springs to mind is that the restraints established by clause 2 are to be triggered by the termination of the restraint agreement and not by the termination of the respondent's employment by the applicant. The phrase was presumably intended to refer to the termination of any

underlying contract of employment. Indeed, in these proceedings, the applicant seeks to enforce the restraint agreement for the period of two years following the respondent's resignation, and contends that the restraint remains operative and binding from that date. The distinct impression to be gleaned from the wording of the agreement and clause 2.4 in particular is that the 'cut and paste' function on the word processing package was liberally used by the drafter, and that the clause was drawn from an employment contract. But the applicant must live with the ordinary grammatical meaning of the wording in the clause, even it is the result of a 'cut and paste' command too far. The applicant has certainly not established, as it contends in its heads of argument, that clause 2.4 refers to any of the respondent's employment contracts and that it is triggered by their termination; there is simply nothing on the papers before me on which such an intention by the parties can be fathomed. In short, the restraint agreement, divorced as it is from any termination of the respondent's employment, is meaningless.

[7] Even if clause 2.4 of the restraint agreement were to be capable of rescue on the basis that it was triggered on a termination of one or another of the respondent's employment contracts, there is no evidence before me to suggest that the clause survived the termination of the fixed term contract on 31 August 2008. The terms of the fixed term contract are such that the applicant clearly wished to ensure that the contract would come to an end on 31 August, without there being any prospect of any renewal on the same terms. In these circumstances, the contract of employment entered into on 31 August 2008, and effective from 1 September 2008, established an entirely new contractual regime between the parties. In my view, to the extent that the restraint agreement may have been incorporated into the fixed term contract, the former terminated with the latter. This interpretation is supported by the terms of the offer of employment signed by the respondent on 31 August 2008. Paragraph 6 of the offer, it will be recalled, refers to a restraint to be presented for signature. None was ever presented, and there is no indication from the wording of any of the agreements

between the parties that the restraint was applicable for so long as the respondent was employed by the applicant, on whatever basis. On this reading of the restraint agreement, the restraints were triggered on the termination of the fixed term contract on 31 August 2008, and would expire on 31 August 2010. Given that this is an urgent application to enforce the restraint, the fact that it has a month to run militates against the granting of the urgent relief sought by the applicant. Even if this is not so, in my view, a two-year restraint imposed on an employee whom both parties anticipated on the date that the restraint was signed would be employed only for six months, is manifestly unreasonable. Given my conclusions, it is not necessary for me to consider the parties' submissions on whether the respondent is in breach of the restraint.

[8] For these reasons, in my view, the applicant has failed to make out a case for the relief that it seeks. Finally, there is no reason why costs should not follow the result.

I accordingly make the following order:

1. The application is dismissed, with costs.

ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of application: 29 July 2010

Date of judgment: 11 August 2010

Appearances:

For the applicant: Mr. S Snyman Snyman & Associates

For the respondent Adv Lennox, instructed by Simpson Masenamela Attorneys