



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case No: J1333/12

In the matter between:

Staar Surgical (Pty) Ltd

Applicant

and

Julia Lodder

Respondent

Heard: 7 June 2012

Decided: 13 June 2012

Summary: Practice and Procedure – Authority to litigate and urgency

JUDGMENT

GAIBIE AJ:

Introduction

[1] The applicant launched an application seeking a rule nisi with interim relief on an urgent basis. The application was precipitated by the applicant's contention that the respondent, an erstwhile employee of the applicant, is acting contrary to a restraint of trade agreement ('the restraint agreement') entered into between the parties.

[2] A rule nisi was accordingly sought, inter alia, on the following basis:

'The respondent is interdicted for a period of 12 (twelve) months, calculated from 1 May 2012, from soliciting, interfering with or enticing or endeavouring to entice away from the applicant – any person, firm, principal, undertaking or company, who or which during the period of 2 (two) years prior to 1 May 2012, is or was accustomed to dealing with the applicant'.

[3] The respondent opposes the application and raises two challenges: the first challenge is in relation to the authority of the deponent to the founding affidavit ('Le Roux'), and the second challenge is that of 'urgency'.

[4] Both of these challenges are dealt with below.

Challenge to the deponent's authority

The relevant averments relating to the deponent's authority

[5] Le Roux, a director of the applicant, averred in the founding affidavit that he was 'duly authorized to depose to this affidavit on behalf of the applicant'. In the answering affidavit, the respondent challenged his authority to do so in the following terms:

'It is denied that Le Roux is duly authorised to depose to this affidavit as no resolution to that effect has been attached to the founding affidavit.'

[6] This attack prompted a sedate reply. In it, Le Roux simply confirmed once

again that he was duly authorised to attest to the replying affidavit on behalf of the applicant and stated that 'a resolution will be made available if necessary to confirm [his] authority in this matter'. It was common cause that the resolution was not made available either prior to or at the date of the hearing of this matter.

- [7] The respondent's counsel, Mr Riaan Venter, relying on the authority of *Tattersall and Another v Nedcor Bank Ltd*,¹ contended that in the absence of appropriate objective proof of Le Roux's authority to institute these proceedings, the proceedings are a nullity and the application must, in consequence thereof be dismissed.
- [8] Mr Rudolph Kuhn ('Mr Kuhn'), on behalf of the applicant, essentially raised two arguments in opposition to the challenge on Le Roux's authority. In the first place, he argued that whilst the respondent challenged the authority of the deponent, she did not challenge his status as a director, and by implication she had conceded to his authority to launch these proceedings. Secondly, he contended in broad and general terms that there were sufficient averments in the founding papers to establish Le Roux's authority to act on behalf of the applicant in this matter. Mr Kuhn did not however point to anything specific in the founding affidavit in this regard.
- [9] It is my view, that the respondent's challenge to Le Roux's authority is misplaced, and the applicant's response thereto is inappropriate for the reasons indicated below.

The nature of the challenge

- [10] The respondent's challenge is directed to Le Roux's authority to depose to the founding affidavit. She denied that 'Le Roux is duly authorised to depose to this affidavit as no resolution to that effect has been attached to the founding affidavit'. The challenge is in respect of his authority to depose to the affidavit and not to the institution of these proceedings.

¹ 1995 (3) SA 222 (A).

[11] In *Ganes and Another v Telecom Namibia Ltd*,² Streicher JA in similar circumstances stated that:

‘In my view, it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged... It must, therefore be accepted that the institution of proceedings was duly authorised. In any event, Rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided.’

[12] In these proceedings, Le Roux indicated in his founding affidavit that the other directors had deliberated on the appropriate course of action to take in light of the respondent’s conduct. In consequence of those deliberations, Le Roux stated that the ‘applicant’ took advice from their current attorneys of record, and a letter dated 16 May 2012 was sent to the respondent’s attorneys threatening urgent proceedings in the event that she did not comply with the terms of the restraint agreement. Le Roux also referred to numerous other correspondences that were sent and received by the applicant’s attorneys in this matter, including a letter dated 24 May 2012 in which the respondent’s attorneys were informed that the applicant intended to ‘proceed with an urgent application against your client in order to interdict her from interfering with our client’s business and from causing harm to its business’.

[13] In addition to these averments, an affidavit was filed by the applicant’s attorney, Mr Kuhn, in which he stated that he was a practising attorney and

² 2004 (3) SA 615 (SCA) at para 19.

that he was the applicant's attorney in this matter. He also confirmed the averments made by Le Roux in his founding affidavit. In the circumstances, it was Mr Kuhn who instituted motion proceedings on behalf of the applicant, and it was his authority to do so that was not challenged by the respondent.

- [14] It is my view that the principle established in *Ganes*, that such challenges to authority in general must be processed through the mechanism of Rule 7 of the Uniform Rules of Court is correct, and constitutes a salutary approach to matters of this nature. In *Unlawful Occupiers, School Site v City of Johannesburg*,³ Brand JA cited the dicta in *Eskom v Soweto City Council* 1992 (2) SA 703 (W) and *Ganes* with approval including the *ratio decidendi* for such an approach which appears at 705D-G of the *Eskom* judgment (*supra*):

'The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was party to litigation carried on in his name. His signature to the process, or when that does not eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney....

The developed view, adopted in Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to bring the application on behalf of the applicant, the application is necessarily that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority.'

- [15] In referring to the judgement of Fleming DJP in *Eskom*, Brand JA in *Unlawful Occupiers* held that a party who wishes to raise the issue of authority in motion proceedings, as well as in action proceedings, should use the Rule 7 procedure, and should not do so 'by way of argument based on no more than a textual analysis of the words used by a deponent in an attempt to prove his authority'.⁴

³ 2005 (4) SA 199 (SCA) at para 14.
⁴ *Id* at para 16.

[16] In light of the above jurisprudence, the dictum in *Tattersall* is not applicable to the facts of this matter, and has in any event been replaced by the *dicta* in *Eskom, Ganes and Unlawful Occupiers*.

[17] Whilst there is no such corresponding Rule 7 (of the Uniform Rules of Court) in the Rules of the Labour Court, this Court may in such circumstances and in terms of Rule 11(3) 'adopt any procedure that it deems appropriate in the circumstances'. It seems to me that this would be an appropriate rule to adopt in circumstances where the issue of authority is raised⁵.

[18] This challenge must, for the reasons indicated above, fail.

Urgency

[19] It is my view that the major hurdle that the applicant fails to surmount is that of urgency. It is trite that an applicant instituting an urgent application must justify the necessity to circumvent the ordinary time periods set out in the rules of this Court. The question in every application brought as a matter of urgency is whether the application is urgent. In this regard, Van Niekerk J in *Jiba v Minister: Department of Justice and Constitutional Development*,⁶ stated that —

'Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and why urgent relief is necessary. It is trite that there are degrees of urgency, and the degree to which the ordinary applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self created when seeking a deviation from the rules.'

[20] Whether or not an application is urgent will of course depend on the relevant factual circumstances in each matter. I accordingly turn to an assessment of the facts of this matter.

[21] In the applicant's founding affidavit, the deponent deals specifically with the

⁵ See in this regard: *CEPPWAWU and others v Express Payroll CC* [2011] 11 BLLR 1061 (LC)

⁶ (2010) 31 ILJ 112 (LC) at para 18.

issue of 'urgency'. Under the heading of 'urgency' the deponent contended that the applicant is entitled to urgent interim relief because it has satisfied the other requirements for such relief including a *prima facie* right, the apprehension of irreparable harm, the balance of convenience and the absence of satisfactory alternative remedies. This approach is clearly incorrect precisely because the applicant must, on the basis of a factual scenario, indicate the circumstances which give rise to urgent relief as opposed to relief in the normal course.

[22] In order to contextualise the relevant sequence of events in this matter, it is necessary to record some of the relevant background facts. According to Le Roux, the applicant is a company that supplies ophthalmological products ('the products') to relevant medical practices in South Africa ('the applicant's clients'). In order to do so, it purchased these products from international suppliers including entities known as i-Medical, Rumex International Co and Staar Surgical (Switzerland).

[23] The respondent was employed as the business unit manager and she was responsible for the sales of these products in South Africa. In particular, she was required to market i-Medical's products to the applicant's clients. She earned a monthly salary of R- and her employment relationship was governed by an employment contract and the restraint agreement.

[24] For the purposes of this application, the applicant seeks to enforce clause 12 of the restraint agreement. That clause provides as follows:

'Employee and clients

12 The Employee further undertakes, in favour of the Company and in addition to and without limiting any other undertakings given by him / her in this Agreement, that for a period of 12 (twelve) months after termination of his services / her services, for whatever reason:

12.1 he/she will not solicit, interfere with or entice or endeavour to entice away from the Company, any person, firm, principal,

undertaking or company, who or which during the period of 2 (two) years immediately prior to the said termination of his / her service with the Company, is or was a client of, or was accustomed to dealing with the Company;

12.2 he/she will not solicit, interfere with or entice or endeavour to entice away from the Company, any Employee of the Company.'

[25] The applicant contended that this clause, although entitled 'employee and clients', entitled it to seek an urgent interim order interdicting the respondent from having any dealings with its 'suppliers' of its products, in addition to its 'clients'.

[26] The sequence of events in this matter commenced on the date of the respondent's resignation from employment. On 29 March 2012, the respondent informed the directors of the applicant that she would be resigning, on one month's notice, with effect from 30 April 2012.

[27] On 5 April 2012, the respondent notified the applicant's five major suppliers of the products, of her resignation. These notifications were copied to two directors of the applicant, one of which was Le Roux.

[28] On 30 April 2012, Le Roux received a letter from Ms Schroeter of i-Medical in which she informed him that she was out of the country and that she was shocked about the respondent's resignation. The further contents of her letter reads:

'No notice or sign from STAAR Surgical / VIKING Medical, I was wondering who will take care of i-Medical Ophthalmological Product's now?

Michelle in Capetown, Nirvana in Johannesburg, Lethizia in Bloemfontein, Tracy in Durban and Julia in Johannesburg and Pretoria.

All with very good skills both on Product and contact with Surgeons in their territory, all have left STAAR Surgical / Viking Medical.

Situation is very unsatisfactory, so I had to make a decision.

As there is no one with enough knowledge on both product and client, I came to the following conclusion.

i-Medical withdraws its product line with a 2 weeks notice ending on 11 May 2012.'

- [29] It was upon receipt of this letter that Le Roux indicated that he had become 'suspicious' of i-Medical's sudden termination of the business relationship, the withdrawal of their product line and indeed the timing of these events. He conducted an informal investigation, and noticed from her cellular phone records that she had: a) sent 16 sms messages to i-Medical in February 2012; b) sent a further 11 sms messages in March 2012; and c) she had made five calls to i-Medical on 16, 22, 23, 27 and 29 March 2012. Based on this information and the fact that Ms Schroeter had avoided contact with the directors of the applicant and that she did not take or return their calls—

'it had become apparent that the respondent had had discussions with Ms Schroeter and that she had persuaded Ms Schroeter to terminate i-Medical's relationship with applicant and to withdraw its product line from the applicant.'

- [30] Despite this conclusion, Le Roux indicated that the directors had simply deliberated on the appropriate course of action to take in light of this turn of events.

- [31] On 10 May 2012, Le Roux indicated that the applicant had become aware that the respondent had interfered with one of their clients, Cape Eye Hospital in Cape Town, in that she had instructed Cape Eye to remove all the applicant's stock from their shelves. Whilst there is a dispute of fact in relation to this incident, it is the applicant's version on this matter, particularly the timing of that information, that is determinative as to whether it had acted with the necessary urgency to protect its interests.

- [32] In any event, on 16 May 2012, more than 2 weeks after receipt of the letter from i-Medical, and in circumstances where the applicant had decided not to

take any action, it received a letter from Leistner Attorneys who informed them that they represented both i-Medical and the respondent, and they requested the applicant to return all i-Medical stock at cost price.

- [33] Upon receipt of this letter, the applicant took advice from its attorney, Mr Kuhn. On 16 May 2012, he wrote to Leistner Attorneys on behalf of the applicant. He responded to the issue of i-Medical stock, recorded the incident that occurred on 10 May 2012 at the Cape Eye Hospital, and confirmed that the respondent's conduct which resulted in the termination of i-Medical's relationship with the applicant constituted a contravention of her employment agreement and the restraint agreement. In the circumstances, he informed Leistner attorneys that –

‘.... we demand that Ms Lodder (the respondent) immediately desists from interfering with our client's proprietary rights. To this end, we demand that she issues a written undertaking to us that she will not solicit, entice or interfere with any of our client's customers, principals or employees. Should we not receive such an undertaking by 16:00 on Friday 18 May 2012, we shall have no alternative but to approach the Johannesburg Labour Court for an urgent interdict to restrain her from contravening the restraints. We trust that this will not be necessary.

We look forward to hearing from you by 16:00 on Friday 18 May 2012.’

- [34] On 18 May 2012, no such undertaking was given. Instead, Leistner Attorneys requested and obtained a copy of the respondent's contract of employment on the same day.
- [35] On the same day, or at some stage between the period of 18 and 23 May 2012, the applicant became aware of e-mail communication between the regional sales manager of Rumex International Co, a supplier of products to the applicant, and the respondent ('the Rumex e-mail'). The details of this e-mail will be dealt with in para 38 below.
- [36] On 23 May 2012, approximately five days after the undertaking sought in para

33 above was not received, Mr Kuhn wrote further letters to Leistner Attorneys and repeated in broad terms the offensive nature of the respondent's conduct. He also demanded that the respondent agree to and sign an undertaking - which he despatched under separate cover to Leistner Attorneys - by close of business on 24 May 2012.

- [37] Once again, the respondent did not comply with the undertaking sought by the applicant. Later that day, Mr Kuhn informed Leistner Attorneys that the applicant had no option but to interdict her from interfering with and from causing harm to its business. In particular, and with reference to the Rumex e-mail, he stated that:

‘Our client understands that Ms Lodder has now approached another of our client's principals in order to entice them to do business with her. She is therefore acting with impunity in contravening her restraints.’

- [38] As indicated earlier, the Rumex e-mail was sent by its regional sales manager to the respondent. The content thereof reads as follows:

‘Hi Julia

How are you going?

I spoke to my boss and she told me that we can collaborate with you as well. We have no any contracts with Viking that's why we can offer you the same conditions – 30%+5%

Please talk to your new directors about that, we'd be happy to continue working with you....’

- [39] Whilst it is unclear on what basis this e-mail constituted evidence, if any, of the respondent's breach or contravention of the restraint agreement, it is certainly clear from the averments made in the founding affidavit that Le Roux was of the view that the Rumex e-mail demonstrated that her conduct was in direct violation of the restraint agreement. At this stage, the applicant had, on its own version experienced three significant events which were in its view, in direct violation of the restraint agreement: the termination of the i-Medical

relationship on 30 April 2012, the Cape Eye Hospital incident on 10 May 2012 and the Rumex issue on or around the 18th of May 2012.

[40] It is apparent that the first major event in the chronology set out above, occurred on 30 April 2012 when the applicant concluded that the respondent had interfered with and was responsible for the termination of its relationship with i-Medical. Whilst the applicant deliberated about the matter, it did nothing until it received a letter from Leistner Attorneys on 16 May 2012. On that day, it acted decisively but failed to carry out its threat of urgent proceedings when the respondent had not complied with its demand by 18 May 2012. The applicant attempted again to place the respondent on terms on 23 May 2012, and in the absence of any compliance with such terms, it again threatened urgent proceedings in the Labour Court.

[41] The 'urgent' application was eventually served on the respondent on 30 May 2012, which is: one month after the i-Medical incident; twenty days after the Cape Eye Hospital incident; two weeks after the initial undertaking was sought and the threat of urgent proceedings in the Labour Court was made on 16 May 2012; and seven days after the second undertaking was sought on 23 May 2012. Moreover, the application was set down for hearing on 7 June 2012, eight days after the application was launched.

[42] The applicant averred in its replying papers that yet another event occurred on 1 June 2012 when one more of its suppliers, Staar Surgical, a Swiss company, also terminated its relationship with the applicant. The applicant did not however aver that the respondent was responsible for this incident although it suggested it implicitly by way of inference.

[43] It seems to me that when the applicant's explanation for the sombre, casual, leisurely and lackadaisical manner in which this application was launched is reduced to its essentials, it is that the parties were corresponding with each other and that the respondent's attorneys did not do what they were supposed to do, such as provide timeous responses to written communications or produce an appropriate undertaking from their client, the respondent. This

approach to urgent applications is clearly inappropriate and insufficient.

- [44] Where an applicant avers the contravention of a restraint agreement or the interference with its proprietary rights that have a resounding effect on its business activities, such an applicant must take appropriate, expedient, decisive and urgent steps to protect its interests. Given the pace at which significant events in this matter were dealt with, I fail to appreciate how in these circumstances the matter assumes any degree of urgency. The application fails on this ground alone.

Other grounds for interim relief

- [45] Aside from my view on urgency, I would not have been inclined to grant the relief sought on the merits. I will provide brief reasons for my view in this regard.
- [46] In order to obtain the relief sought, the applicant has to fulfil the requirements for interim relief, i.e. a prima facie right; the absence of an adequate alternative remedy; the apprehension of irreparable harm; and an indication that the balance of convenience favours it.

Prima facie right

- [47] The applicant annexed a copy of the employee's contract of employment to its founding papers. The contract does not itself indicate the employee's job description but refers to an annexure 'B' which apparently does. That annexure was not attached. However, it appears from Le Roux's affidavit that the applicant purchased the products from its suppliers and that the respondent was responsible for marketing such products to its clients. She was, according to Le Roux, 'in charge of sales for the whole of the Republic'. There is no averment that she was responsible for the sourcing or purchasing of such products from the suppliers.
- [48] The applicant seeks in effect, and on the strength of clause 12 of the restraint

agreement to interdict her from 'soliciting, interfering with or enticing or endeavouring to entice away from the applicant', its suppliers of the products. It does so apparently on the basis that clause 12 restrains her from having any such dealings with its clients and any other entity who 'was accustomed to dealing with the applicant'. As indicated earlier, clause 12 is entitled 'employee and clients', and it appears from a plain reading of that clause that it was intended to prohibit the respondent from having any dealings with its clients and employees.

[49] This Court has on previous occasions dealt comprehensively with the requirements for a valid and enforceable restraint agreement⁷, and I do not intend to restate the relevant principles except to confirm that I agree with the judgements of Steenkamp J in those matters. Prior to any application of such principles it is necessary in the first instance to give meaning to the precise terms of the restraint agreement. Mr Kuhn contended that the words, 'was accustomed to dealing with' the applicant, in clause 12.1 was wide enough to include its suppliers of products, and that the use of the term 'principal' in that clause was a reference to suppliers. Mr Venter submitted, and I agree with his submission, that the applicant would be 'accustomed' to dealing with a wide range of entities including cleaning and courier companies, and that it could not have been the intention of that clause to prohibit the respondent's dealing with such entities. To that extent the clause was both wide and vague. In addition, the term 'principal' was not defined in the agreement.

[50] At an interpretive level, clause 12 does not support the applicant's claim to a prima facie right.

[51] There is no reason why, in the context of this matter, costs should not follow the result.

[52] I accordingly make the following order:

1. The application for urgent interim relief is dismissed with costs.

⁷ See *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronje and another* (2011) 32 ILJ 601 (LC); and *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjies and another* (2012) 33 ILJ 629 (LC).

Gaibie, AJ
Acting Judge of the Labour Court

Appearances:

For the Applicant: Rudolph Kuhn of Rudolph Kuhn Attorney

For the Respondent: Adv Riaan Venter

Instructed by: Leistner Attorneys