



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J 1216/2014

WALTONS (PTY) LTD

Applicant

and

BOTHA GEOFFREY

First Respondent

BCF MICRO FINANCE (PTY) LTD

Second Respondent

Heard: 5 June 2014

Delivered: 27 June 2014

JUDGMENT

TLHOTLHALEMAJE, AJ

Introduction:

[1] The Applicant approached the Court to seek an order in the following terms:

- 1.1 Interdicting and restraining the First Respondent from being employed at his current place of employment at the Second Respondent.
- 1.2 Interdicting and restraining the Second Respondent from employing the First Respondent.

1.3 Alternatively issuing a *Rule Nisi* to act as an interim interdict against the First and Second Respondent for them to show cause on a date and time to be determined by this Honourable Court, why a final order should not be granted in terms of prayers 1.1 and 1.2 above.

[2] The Second Respondent had confirmed that it did not oppose the relief sought and wished to abide by any court order. The First Respondent, (herein referred to as Botha) has opposed the application on the following grounds;

(a) In the application, there is no clear indication who the real Applicant is as it is not properly identified in the Notice of Motion, the Founding Affidavit and the alleged Restraint of Trade (agreement).

(b) The existence of a restraint of trade agreement was disputed.

(c) There were a number of factual disputes that had an impact on the final relief sought by the Applicant.

[3] The application initially came before the court on 29 May 2014. The hearing was postponed before my brother the Honourable LaGrange J in order to enable Botha to file any answering affidavit and for the Applicant to file any replying affidavit.

Factual background:

[4] The Applicant's founding affidavit was deposed to by Darren Ledden, a member of the Applicant's Employer's Organisation CTL Management Forum. The Applicant is engaged in the business as wholesalers and retails of stationary, furniture, office supplies, computer media, software and other related products and equipment. Its main business involves complete solutions for stationary, furniture and the goods already mentioned.

[5] According to the Applicant, Botha was employed as the Applicant's Sales Manager with effect from September 2005. He had tendered his resignation from the Applicant's employ on 10 March 2014. Whilst serving his notice period, Botha had informed the Applicant that he would be joining the Second Respondent, which is a direct competitor of the Applicant operating from

Bloemfontein in the Free State. On 30 April 2014, Botha was reminded of his obligations by e-mail of the terms of the restraint of trade that he had signed on 20 September 2005, and was given until 2 May 2014 to confirm that he will comply with the terms of his restraint and that he will not commence employment with the opposition company. Botha responded on 2 May 2014 and indicated that he had already accepted the proposal from the Second Respondent, and confirmed that he had read the contract and understood the restraint of trade agreement.

- [6] On 8 May 2014, the Applicant had also sent correspondence to the Second Respondent stating that Botha was in breach of his restraint of trade agreement and that his employment should be terminated with immediate effect. On the same day correspondence was also sent to Botha, informing him that the Applicant will approach the Court for relief should he not provide them with an undertaking as requested.

Some preliminary issues:

- [7] Botha had raised a number of preliminary points which need to be disposed of prior to determining the main issue. The first related to the correct citation of the Applicant. In this regard, Botha submitted that at paragraph 3.1 of the founding affidavit, the Applicant was cited as '*Waltons Inland Region (Pty) Ltd*,' whilst in the main citation it was cited as '*Waltons (Pty) Ltd*'. Furthermore, he had submitted that his letter of appointment was signed with an entity called '*Vans Office Supplies*', whilst at the same time, the Applicant contended that the restraint of trade agreement was signed with '*Waltons Stationary Company (Pty) Ltd*'. In this regard, Botha contended that the identity of the Applicant was not clear, thus creating 'a factual defect' in the application. In response, the Applicant's contention was that '*Waltons Inland Region (Pty) Ltd*' and '*Waltons (Pty) Ltd*' were the same companies, and that there could be no ambiguity with regards to the parties' citation or its identity.
- [8] Botha had conceded that '*Van Office Supplies*' has since been incorporated into '*Waltons Stationary Company (Pty) Ltd*', and in the light of the Applicant's contentions that these entities were one and the same, there is no basis for a

conclusion to be reached that there is indeed confusion as to the identity of the Applicant. I did not understand Botha's contention to be that notwithstanding the different names attributed to the Applicant, he also challenged any employment relationship with any of these entities.

- [9] In the light of the conclusions to be reached below, it would not be necessary to deal with the preliminary points raised regarding the service of this application and complaints surrounding whether supporting annexures were attached to the founding papers or not.

The contested contract of employment:

- [10] It is trite that a party that relies on an agreement bears the onus of not only proving its existence, but also the parties' common intention to enter into that agreement, and its specific terms¹. It follows from these principles that in determining whether there is any breach of restraint of trade clause, it must first be established that there is indeed a valid agreement in that regard.
- [11] The Applicant had contended that Botha signed a 'Confidential and Restraint of Trade Agreement'² on 20 September 2005. Botha in his answering affidavit averred that he had indeed signed a restraint of trade agreement, but with an entity called Vans Office Supplies on 1 April 2005³, and that the agreement relied upon by the Applicant was unknown to him as he had not attached his signature to it.
- [12] Botha handed in annexure 1 to his pleadings, which is a letter of appointment, and which he had signed on 1 April 2005. The letter incorporates a restraint of trade clause, and it confirms his appointment as Order Clerk. It is this agreement that Botha had acknowledged was binding on him, and in regard to which he had conceded acknowledgement of in reference to his response to the Applicant on 2 May 2014.
- [13] In regards to the restraint clause incorporated in the letter of appointment, Botha had contended that Vans Office Supplies has since been incorporated

¹ See *Cotler v Variety Travel Goods (Pty) Ltd and Others* 1974 (3) SA 621 (A)

² Annexure A to the Founding Affidavit

³ Annexure 1 to the Replying Affidavit

into 'Waltons', and that the restraint agreement which the Applicant sought to enforce was not the same as the one he had entered into with Van Office Supplies. To the extent that the Applicant had not relied on that agreement in seeking to enforce the restraint of agreement, or in making averments against him, Botha contended that the Applicant had not made out a proper case against him for the purposes of the final relief sought.

[14] In its replying affidavit, the Applicant had contended that on his own version, Botha had confirmed that he had indeed signed a Restraint of Trade Agreement, and that the 'Confidentiality and Restraint of Trade Agreement' before the Court was signed by both parties as evident from the two signatures⁴. The Applicant further submitted that Botha's submission that he did not sign the agreement was deceitful. In this regard, reference was made to his letter of resignation which bore his signature, and the agreement relied upon, which it was contended bore the same signatures. To the extent that Botha had not attached his Annexure 1 to his answering affidavit, it was submitted that the only document to be relied upon was the one before the Court, and that any submissions made by Botha in regard to his Annexure 1 should be disregarded.

[15] The purpose of the postponement granted by the Honourable LaGrange J on 29 May 2014 was to enable Botha to file an answering affidavit, and for the Applicant to file a reply. This was done and emanating from these, Botha had furnished the Applicant with Annexure 1, which incorporates the restraint of trade agreement clause which he had acknowledged and considered himself bound to. In these circumstances, I fail to appreciate the reason the Court should ignore any submissions made by Botha in regard to this agreement.

[16] The dispute surrounding the existence of the agreement relied upon by the Applicant further has an impact on what Botha's position was whilst he was employed by the Applicant. Ultimately, it is indeed the existence of a valid restraint of trade agreement, and most importantly, the position he held whilst in the employ of the Applicant that is determinative of whether the Applicant's allegations of a breach of restraint of agreement is sustainable or not.

⁴ Page 38 of Annexure B in the Applicant's Founding affidavit

- [17] The approach in dealing with disputes of facts within the context of an application for a final order was properly captured and restated in *Jonsson Workwear (Pty) Ltd v Lawrence John Williamson and Another*⁵ by Snyman AJ in the following terms;

'Rule 7(7)(b) of the Rules for the Conduct of Proceedings in the Labour Court makes provision for this where it is provided that: 'The court must deal with an application in any manner it deems fit, which may include — (b) referring a dispute for the hearing of oral evidence.' Rule 6(5)(g) of the High Court Rules provides as follows: 'Where an application cannot properly be decided on affidavit the court may dismiss the application or make such order as to it seems meet with a view to ensuring a just and expeditious decision. In particular, but without affecting the generality of the foregoing, it may direct that oral evidence be heard on specified issues with a view to resolving any dispute of fact and to that end may order any deponent to appear personally or grant leave for him or any other person to be subpoenaed to appear and be examined and cross-examined as a witness or it may refer the matter to trial with appropriate directions as to pleadings or definition of issues, or otherwise.' In *SA Football Association v Mangope* (Citation omitted) the Court said that in applying Rule 7(7)(b) of the Labour Court Rules, this Rule, being in *pari material* with Rule 6(5)(g), should be construed similarly to that effect.'

- [18] Other than the factual disputes surrounding the agreements the parties seek to rely on, a further issue of contention is that the 'Confidentiality and Restraint Agreement' allegedly entered into between the parties and relied upon by the Applicant does not make reference to Botha's position, whilst Annexure 1 relied upon by Botha indicates that he was employed as an 'Order Clerk'. In its founding affidavit, the Applicant indicated that Botha was employed as a Sales Manager, and the latter in his answering affidavit had disputed that he was employed in that position. His contention was that one Mr. Hein Faber was appointed in that position. In its replying affidavit, the Applicant merely denied Botha's contentions and put him to the proof thereof.

- [19] In the light of these disputes of fact, which go to the heart of the issues to be determined, and further taking into account Botha's rights in terms of the

⁵ (D 426/2013) [2013] ZALCD 24 (12 August 2013) at para 12.

provisions of section 22⁶ of the Constitution of the Republic of South Africa, it would not be in the interests of justice to make any determination of the issues before the Court in the absence of oral evidence being led. It is in the light of these circumstances that the provisions of Rule 7 (7) (b) of the Rules of this Court should be invoked, and to direct that the matter be referred for oral evidence. To this end, the order below is deemed to be appropriate.

Order:

- i. The determination of the dispute surrounding the alleged breach of a restraint of trade agreement is referred for oral evidence.
- ii. The Registrar of the Court is directed to place this matter on the trial roll and for it to be heard on an expedited basis.
- iii. The costs of this application are to be in the cause.

Tlhotlhemaje, AJ

Acting Judge of the Labour Court of South Africa

⁶ 22. Freedom of trade, occupation and profession. — Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”

Appearances:

For the Applicant: Mr. Ross Atcherson of Lee And McAdam Attorneys

For the First Respondent: Adv. JP Breytenbach

Instructed by: Rothmann Attorneys Inc