



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: J2237/16

In the matter between:

INCLEDON (PTY) LIMITED

**DISTRIBUTION AND WAREHOUSING
NETWORK LIMITED**

DPI HOLDINGS (PTY) LIMITED

DPI PLASTICS (PTY) LIMITED

and

SLABBERT, GEORGE

ELS, GARY

BOTHA, MORNE

SIBANYONI, SIPHO

EVANS, JOHANITA

KISHUGU HOLDINGS (PTY) LTD

PROCURE POINT (PTY) LIMITED

First Applicant

Second Applicant

Third Applicant

Fourth Applicant

First Respondent

Second Respondent

Third Respondent

Fourth Respondent

Fifth Respondent

Sixth Respondent

Seventh Respondent

Heard: 27 October 2016

Judgment: 5 April 2017

JUDGMENT

VAN NIEKERK J

- [1] This application was launched on an urgent basis, to enforce a restraint and confidentiality agreement. In the light of the evidence adduced in the answering affidavit to the effect that the sixth and seventh respondents are not competitors of the applicants, the applicants elected not to pursue the application. They seek the court's leave to withdraw the application and an order that the first, second and fourth respondents bear the costs of the application because they failed to disclose material facts relating to the application when demand was made upon them. The first, second and fourth respondents seek to have the application dismissed, alternatively, and in the event that leave to withdraw is granted, an order to the effect that the applicants pay the first, second and fourth respondents' costs. (For convenience, unless the context indicates otherwise, I shall refer to the first, second and fourth respondents collectively as 'the respondents'.)
- [2] In relation to the withdrawal of the application, the court has a discretion to grant leave to withdraw. It is not the function of the court to compel a party to proceed with an action against its will. A party is ordinarily permitted to withdraw a claim, subject to an appropriate order as to costs, unless the withdrawal amounts to an abuse of process (an instance which the court in *Levy v Levy* 1991 (3) SA 614 (A) described as 'one difficult to visualise'). In my view, there is no material prejudice to the respondents should leave to withdraw the application be granted,

nor would any injustice result. There is no counter-application or other compelling reason for the respondents, in effect, to take charge of the proceedings. I see no reason to refuse the application for leave to withdraw the application.

- [3] The real issue between the parties is that of costs. The basis on which the applicants seek a costs order is that the respondents have treated the present litigation as a game, in particular, because they failed to disclose, in response to a letter of demand addressed to them, that the sixth and seventh respondents were not competitors of the applicants. Had they done so, the applicants contend, the application would never have been filed.
- [4] The court has a broad discretion to make orders for costs. Section 162 requires the court to exercise a discretion, taking into account all relevant factors, and to ensure that any order (to grant costs or not) meets the requirements of the law and fairness.
- [5] The factual background is one in which the respondents had given certain restraint and confidentiality undertakings in respect of various of the applicants. During the period March to August 2016, the respondents tendered their resignations from the respective applicants' employ and took up employment with the sixth and/or seventh respondent.
- [6] On 31 August 2016, the applicants' attorney addressed a letter of demand to the respondents, recording the restraint undertakings and alleging a breach of them by virtue of the respondents' employment with the sixth and/or seventh respondents. In particular, the applicants' attorney asserted that the sixth and seventh respondents were engaging in the same or a similar business as the applicant and were thus competitors. An undertaking to comply with the restraint undertakings was sought, failing which the applicants indicated their intention to institute appropriate proceedings to enforce them.
- [7] On 2 September 2016, the first and second respondents' attorney replied. The substance of the reply is no more than a page long and disputes the

enforceability of the restraints in the light of the fact that the restraint in respect of the first respondent was unsigned, the respondents were not a party to the restraint agreement, and in respect of the second respondent, that the restraint was not enforceable by his employer alternatively, that the restraint it expired. The letter concluded with the following paragraph:

4. With reference to your letter, our clients dispute all other allegations set out therein and reserve the right to that they are in direct breach of the restraints in any event (sic).

[8] A rather different response was received from the sixth respondent's attorney. On 20 September 2016, a full and considered response to the letter of demand was provided. In that letter, and in respect of the fourth respondent, the sixth respondent addressed the issue of the competitive interface and made certain undertakings regarding the employment of the fourth respondent that it considered addressed the applicants' concerns.

[9] On 30 September 2016, the present application was filed. In the founding affidavit, the applicants aver that the applicants and the sixth and seventh respondents compete in the same industry. Paragraph 40 of the founding affidavit records that in the letters of demand addressed to the respondents, the applicants contended that either the six or seventh respondents, or both, were operating in direct competition with the applicants. The response to that was that there was no obligation on the part of the second to seventh respondents to respond to the letters of demand. That is not in dispute to that none of the respondents responded to the letter of demand by saying that the applicant's concerns were unfounded for the reason that neither the sixth and/or seventh respondent was a direct competitor of the applicants. Instead, as I have indicated, the response focused on the enforceability of the restraints. In the introduction to the answering affidavit, in an explanation covering some three pages, the respondents make the case that the sixth and seventh respondents are not competitors of the applicant and for the first time, spill out in some detail the nature of the activities undertaken by the sixth and seventh respondents

respectively.

[10] As I have stated, when it became clear from the papers that the sixth and seventh respondents were not direct competitors of the applicants, the applicants elected to withdraw the application. The applicant contends that it employed the requisite measures of prudence before launching the application by addressing letters of demand to all of the respondents in order to provide each with an opportunity to answer the assertions made by the applicants and thereby avoid the application. The applicants contend further that the respondents, rather than addressing the applicants' concerns and advising them that they were mistaken, adopted an approach in which it sought to secure a tactical advantage with the consequence that unnecessary costs have been incurred

[11] One of the fundamental rules of fairness that underlies the court's rules of procedure and evidence is that litigants should be warned in advance of points being taken against them (see *King William's Town v Border Alliance Taxi Association* 2002 (4) SA 152 (ECD)). The very purpose of a letter of demand is to avoid litigation, amongst other things, by affording a party the opportunity to respond to all of the material allegations articulated in the demand. In the present instance, the respondents raise the point that the sixth and seventh respondents are not direct competitors of the applicants. Here, the respondents say:

The seventh respondent, Procure Point (Pty) Ltd, is the procurement arm of Kishugu, (the Sixth Respondent). Kishugu and Procure Point's business is in fire management and accordingly unrelated to that of the applicants. The seventh respondent is not in the business of supplying pipes, fittings, valves or other listed products to customers in the listed market segments, all generally.

[12] There is no reason why that point could not have been made in the letter written on behalf of the first and second respondents on 2 September 2016. The letter, as I have observed, contains no more than a number of technical defences and a bare denial of every other allegation made in the letter of demand. The failure to address the issues raised by the applicants relating to the competitive interface

was unprofessional, to say the least. It indicates either a degree of negligence or worse, as the applicants submit, the deliberate setting of an ambush. This is not to suggest that a response to a letter of demand ought to assume the particularity of a pleading – what is required is at least that the material allegations made be addressed with sufficient particularity to enable an applicant to decide whether to take the next step of initiating litigation.

[13] Ordinarily, I would have had no hesitation in ordering the first and second respondents to pay the costs of the application. In my view, had the letter of demand been addressed with the required degree of diligence, in all likelihood, the application would never have been filed. However, I must necessarily take into account that the response to the letter of demand addressed to the applicant's attorney on 20 September 2016 alerted them, albeit from the sixth respondent's perspective to the possibility that the sixth and seventh respondents were not engaged in the same area of business activity. In my view, the applicants ought properly to have further investigated this issue before filing the application, as they did, ten days later.

[14] Having regard to all of the relevant facts, in my view, the requirements of the law and fairness are best satisfied by each party bearing its own costs.

I grant the following order:

1. The applicants are granted leave to withdraw the application against the first, second and fourth respondents.
2. There is no order as to costs.

ANDRÉ VAN NIEKERK

Judge of the Labour Court of South

Africa

REPRESENTATION

For the applicants: Adv. C Whitcutt SC, with him Adv. C De Witt, instructed by Fluxmans

Inc.

For the first, second and fourth respondents: Adv. C Nel, instructed by MacGregor Erasmus Attorneys.

Labour Court