



REPUBLIC OF SOUTH AFRICA

Not reportable

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 350/2017

In the matter between:

SA KALK & GIPS (EDMS) BPK

Applicant

and

BEN KROG

First respondent

**GRASLAND
(EDMS) BPK**

ONDERNEMINGS

Second respondent

Heard: 26 June 2017

Delivered: 29 June 2017

Summary: Restraint of trade – urgent application to enforce restraint pending application in terms of BCEA s 77(3) – parties did not sign written restraint of trade agreement. Applicant failed to make out case for interim relief.

JUDGMENT

STEENKAMP J

Introduction

- [1] This is an urgent application to enforce an alleged restraint of trade agreement. I use the word ‘alleged’ because it comes before this Court in the most unusual circumstances. The parties have not signed any restraint of trade agreement. The applicant seeks an order enforcing a restraint of trade that it says came into being in terms of an oral agreement between it and its former employee, Ben Krog, pending a referral to this Court in terms of s 77(3) of the Basic Conditions of Employment Act¹. In that referral, the applicant intends to show that a restraint of trade agreement did come into existence and that it is “a matter concerning a contract of employment” as contemplated in that subsection.²
- [2] All the protagonists are Afrikaans-speaking. The applicant’s pleadings and heads of argument were drafted in Afrikaans. But although those pleadings, the negotiations and correspondence between the parties, as well as the oral argument before the Court were conducted in Afrikaans, they agreed that this judgment could be drafted in English – albeit in haste, given its urgency – as the heads of courts recently indicated that it would be useful for judges in the higher courts who are not proficient in South Africa’s indigenous official languages if judgments could be handed down in English.

Background facts

- [3] The first respondent, Ben Krog, was (until this week) the national marketing manager of the applicant, SA Kalk & Gips (Edms) Bpk.³ He resigned with effect from this Friday, 30 June 2017. To put it in colloquial Afrikaans, “hy wil groener weivelde gaan soek by Grasland” (die tweede

¹ Act 75 of 1997 (BCEA).

² That subsection reads: “The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.” In Afrikaans, it reads: “Die Arbeidshof het konkurrente jurisdiksie met die siviele hofe om enige aangeleentheid betreffende ‘n dienskontrak, ongeag of ‘n basiese diensvoorwaarde ‘n bepaling van daardie kontrak uitmaak, aan te hoor en daaroor te beslis.”

³ The name would translate to South African Lime & Gypsum (Pty) Ltd.

respondent, Grasland Ondernemings (Edms) Bpk).⁴ He is due to start working for Grasland next Monday, 3 July 2017. (Grasland does not oppose the application and abides by the Court's decision).

- [4] The applicant supplies lime and gypsum products to the agricultural industry. Grasland is its competitor nationwide.
- [5] The narrative starts just over three years ago, in April 2014. The applicant's then national marketing manager, Mr Renso Nel, resigned. The deponent to the founding affidavit, Mr Carl Taljaard (the CEO), says that his resignation occurred under unhappy circumstances and that he left in order to compete with the applicant. (That allegation is gainsaid by an email message to staff members and customers dated 5 May 2014 in which Taljaard refers to Nel in glowing terms. Amongst other things, he says: "Dit was 'n voorreg om Renso te leer ken as 'n baie besondere talentvolle mens, wat ons weet nog steeds baie goeie waarde gaan toevoeg in die bedryf. Renso het uitstekende diens by ons verrig en ons gaan hom baie mis. Ons het egter goeie begrip vir sy besluit en wens hom alle voorspoed toe vir die nuwe uitdagings wat voorlê – die lewe bly maar vol keuses. Gelukkig bly hy steeds in die bedryf en sien ons uit na goeie samewerking tot voordeel van Lime Corp en SA Kalk en Gips.")
- [6] Taljaard knew Krog. He and the operational director, Hendrik Heyl, headhunted Krog to take over as national marketing manager. They had a number of discussions culminating in a meeting on 17 April 2014 at a coffee shop, De Oude Bakkerij in Stellenbosch.
- [7] It is common cause that Taljaard and Heyl offered Krog a job. What is in dispute, is whether it was subject to a restraint of trade agreement. Taljaard and Heyl say they made it clear that a restraint of trade agreement would be a term of the contract; Krog denies it.
- [8] On the same day, 17 April 2014, Taljaard and Heyl sent Krog an offer of employment on behalf of the applicant. It contains the essential terms of the employment contract, including the position as national marketing and

⁴ He wants to depart for greener pastures at the second respondent, Grassland Enterprises (Pty) Ltd.

sales manager; his remuneration and details of a share incentive scheme; leave; and notice. It makes no mention of a restraint of trade agreement.

- [9] Krog responded by email within 10 minutes. He explained that he was on his way to Caledon and would peruse the offer more closely once he got home.
- [10] Krog replied in more detail on 19 April 2014. He had some questions about the share incentive scheme, to which Heyl responded. There was no further mention of a restraint of trade agreement. And on 24 April 2014 Krog formally accepted the offer in writing. He had some further questions about his remuneration, medical aid scheme, car scheme and a 13th cheque. Again, there was no mention of a restraint of trade agreement.
- [11] At some stage – Taljaard does not say when – Heyl asked the human resources manager, Ms Jenene Olivier, to draft a written contract of employment (over and above the appointment letter containing the terms that Krog had accepted). That draft was only sent to Krog in 2015, months after he had started working for the applicant. He did not sign it. And the applicant never raised it with him again until he resigned in May 2017.
- [12] The unsigned draft agreement contained the following clause under the heading “**NON-SOLICITATION CLAUSE**”:
- “The employer [sic] agrees and undertakes not to, during any period of employment, or for a period of 12 months after termination of employment for any reason whatsoever:
1. canvass, solicit, interfere with or entice away any person (whether individual or corporate) who is a customer, client, supplier or distributor of the employer, or attempt to do so; supply or make available or provide to any person (whether individual or corporate) who is a customer, client, supplier or distributor of the employer, any goods or service which is similar to the goods or services provided by the employee;
 2. canvass, solicit, entice, interfere with, employ, appoint or procure the employment or appointment of any person who is an employee, officer, or agent of the employer.”

- [13] Two years later, on 2 May 2017, Krog met with Taljaard and Heyl. He told them that he intended to resign on one month's notice. (It is common cause that he actually had to give two months' notice and that is currently serving out that notice period). He also handed in a written notice of resignation. Taljaard and Heyl say that they reminded him of his restraint of trade agreement; Krog admits that they raised an alleged restraint, but says that he "directly asked Heyl what he was talking about, as this was the first time the issue had been raised with me".
- [14] Krog met with Hendrik Heyl's brother, Johan – also a director of the applicant -- the next day, 3 May 2017. He told Johan that he had not discussed or agreed to a restraint of trade undertaking at the meeting of 17 April 2014. On the same day, he told Hendrik Heyl and Taljaard that he would be taking up employment with Grasland.
- [15] Correspondence between the parties' attorneys followed. The applicant sought an undertaking that Krog would abide by the alleged restraint of trade agreement. His attorneys denied the existence of such an agreement. The applicant then launched these urgent proceedings.

The relief sought

- [16] In its notice of motion, the applicant seeks the following relief:

"Dat, hangende die afhandeling van 'n verwysing van die geskil hierin ingevolge artikel 77(3) van die Wet op Basiese Diensvoorwaardes ("die verwysing"), 'n tussentydse hofbevel aan die applikant toegestaan word met die volgende terme:

- (a) Dat die eerste respondent [Krog] verbied word om vir 'n tydperk van twaalf (12) maande vanaf sy diensbeëindiging by die applikant of afhandeling van die verwysing (welke van die twee die vroegste is) vir die tweede respondent of vir enige onderneming (met inbegrip van sy eie) wat in direkte mededinging met die applikant in die Republiek is, te werk, hetsy as werknemer, konsultant, agent of aandeelhouer, of in enige ander hoedanigheid;
- (b) Dat die tweede respondent [Grasland] verbied word om op enige wyse vir 'n tydperk van twaalf (12) maande vanaf die eerste respondent se diensbeëindiging by die applikant of afhandeling van die verwysing

(welke van die twee die vroegste is) van die applikant [sic] se dienste gebruik te maak, hetsy as werknemer, konsultant, agent of aandeelhouer, of in enige ander hoedanigheid.”

[17] It will be apparent from the notice of motion that the applicant does not purport to rely on the “non-solicitation clause” contained in the draft contract of employment that its human resources manager drafted and that Krog never signed. Instead, it relies on a tacit or implied term, agreed on 17 April 2014 at the coffee shop meeting, of a restraint of trade agreement for an unspecified term in the whole of South Africa.⁵ But it seeks final relief only for a restraint period of twelve months, and interim relief pending that period or the determination of the s 77(3) referral, whichever comes first.

Jurisdiction

[18] The first respondent, Krog, has raised two jurisdictional questions. Firstly, he argues that the dispute concerning the existence of a restraint of trade agreement is not one over which this Court has jurisdiction, as the applicant relies on a self-standing agreement predating his contract of employment. And secondly, he argues that the Court does not have jurisdiction over the second respondent, Grasland.

Jurisdiction : Krog and the alleged restraint

[19] Mr *Stelzner* argued that this court does not have jurisdiction to decide the main referral in terms of s 77(3) of the BCEA, as there is – even on the applicant’s version – no restraint of trade agreement that is part of his contract of employment. Instead, he argued, the applicant relies on a stand-alone agreement that was allegedly entered into orally on 17 April 2014.

[20] I think that takes too narrow a view of the section. Section 77 (3) of the BCEA confers concurrent jurisdiction on this Court to hear and determine “any matter concerning a contract of employment”. The applicant alleges that the restraint of trade agreement was a term of Krog’s employment.

⁵ This cause of action is spelt out in the s 77(3) referral under case number C 357/2017.

Whether that is a good or a bad claim, is neither here nor there. It seems to me, though, that that is a “matter concerning” his contract of employment (“ ‘n aangeleentheid betreffende ‘n dienskontrak”).

Jurisdiction : Grasland

[21] Krog argues that the applicant seeks relief against Grasland on the basis of unlawful competition, a delictual claim over which this Court does not have jurisdiction.

[22] Mr *Stelzner* relies in this regard on *Windybrow Theatre*⁶ where Murphy AJA held:

“The matters within jurisdiction of the Labour Court are thus ‘all matters that elsewhere in terms of this Act or in terms of any other law’ must be determined by the Labour Court. These matters are all employment related disputes, including the review of CCMA arbitration awards, alleged unfair operation requirements dismissals, unfair discrimination, collective bargaining disputes and contractual claims under the Basic Conditions of Employment Act. For the most part, if not entirely, disputes falling within the jurisdiction of the Labour Court are those arising between employees and employers or their bargaining agents. Nothing in the LRA or other legislation confers jurisdiction upon the Labour Court to adjudicate a delictual or enrichment claim arising out of illegal conduct by the Sheriff in the execution process. Thus, such causes of action not being within its jurisdiction, the Labour Court cannot have any inherent powers in relation to such claims, because section 151(2) restricts the Labour Courts inherent powers to powers “in relation to matters under its jurisdiction”.

[23] But that case is distinguishable from this one. It dealt with the question whether the Labour Court has the power to order the Sheriff to repay money attached and distributed in terms of an irregular and invalid attachment. This case deals with the enforcement of an alleged restraint of trade – a matter concerning a contract of employment – against the employee, Krog, and his new employer, Grasland.

[24] In *Rand Water v Stoop*⁷ the LAC held that there does not have to be a direct or indirect link between the contract of employment and the claim.

⁶ *Windybrow Theatre v Maphela* (2016) 37 ILJ 2641 (LAC) par 22.

And it went so far as to hold that a delictual claim of fraud could be entertained in terms of section 77 (3) where the fraud was connected to the contract of employment in that the respondents, by committing fraud, had abused their positions as employees. Finally, the court rejected the argument that section 77 contemplates only claims for employees against employers, ruling that the BCEA upholds fair labour practices for both employees and employers and that an employer can therefore claim damages in terms of the BCEA for breach of contract. Waglay JP held:⁸

“Generally the Labour Court and this Court have held that if an issue in dispute relates to; is linked to; or connected with an employment contract then the Labour Court does have jurisdiction in terms of s77(3) of the BCEA to entertain such a dispute.

...

The words ‘any matter’ in section 77(3) are broad and the literal interpretation does not limit the claims, in relation to a contract of employment, to a specific category. Damages, both liquid and liquid, are included.”

[25] And in the earlier case of *Kruse v Gijima AST (Pty) Ltd*⁹, to which Mr *Rautenbach* referred, the Labour Court said:

“In *University of the North v Franks and Others* [2002] 8 BLLR 701 (LAC) the Labour Appeal Court had occasion to consider the scope of section 77(3) of the BCEA. The Labour Appeal Court was concerned with a dispute as to the existence or validity of a contract of retrenchment, the effect of which would be to terminate the contract of employment (at para [26]). For the purposes of this judgment I will refer to such an agreement as a “collateral agreement.” In that case the Labour Appeal Court decided (at paras [29] and [30]) that the Labour Court did indeed have jurisdiction to determine a dispute concerning a collateral agreement.

⁷ [2013] 2 BLLR 162 (LAC); (2013) 34 ILJ 579 (LAC). See also the discussion in Du Toit et al *Labour Law through the Cases* s.v. BCEA s 77(3).

⁸ Paras 21 and 39.4.

⁹ (2010) 31 ILJ 1898 (LC); [2010] 7 BLLR 722 (LC) paras 16-18.

The Labour Appeal Court gave a wide interpretation to section 77(3) and stated: 'In short, the Labour Court is to have jurisdiction in respect of all employment contracts and exclusive jurisdiction in respect of some. But the jurisdiction is even wider. It is in respect of *any matter concerning a contract of employment*.' (at para [29]) (own emphasis)

and

'In this appeal it is not necessary to decide exactly how wide the jurisdictional net is cast. The termination of an employment contract and the terms and conditions upon which this is to occur are clearly matters concerning such contracts. The Labour Court correctly held that it had jurisdiction.' (at para [30]).

A similar result was reached by Freund AJ in *Inspektex Mmamaile Construction and Fire Proofing (Pty) Limited v Coetzee and Others* (J1264/08 ZALC 94 (1 September 2009) where it was decided that a dispute about the validity of a settlement agreement concluded by an employer and an employee fell within the meaning of 'any matter concerning' a contract of employment and thus fell within the jurisdiction of the Labour Court in terms of section 77(3) of the BCEA."

[26] Given the wide meaning accorded to s 77(3) by this Court and by the LAC, I am satisfied that this Court does have jurisdiction over the application as pleaded with regard to Grasland.

Urgency

[27] The application is, almost by its very nature, urgent. Krog's two month notice period expires this Friday, four days after the matter has been heard. And he intends to take up employment with Grasland a week hence. The applicant could have acted with greater haste since receiving Krog's notice of resignation on the 2nd May, but as often happens in restraint of trade cases, some correspondence followed between the parties and their attorneys, including requests for undertakings that were not forthcoming. I'm satisfied that the matter is sufficiently urgent to be heard out of the ordinary course.

Evaluation

- [28] The applicant argues that, although ‘interim’ in form, the interdict may very well be final in its effect. Prayer 2 of the notice of motion asks that the interdict endure for twelve months or until the action is disposed of, “whichever occurs soonest”. Mr *Stelzner* pointed out that this already recognises that the 12 month period of the “interim” interdict could expire before the action is finally determined (particularly if one were to include any one of the possible delays which may occur – such as the applicant dragging its heels once it obtains the interdict, a full court roll, a lengthy action, an appeal, etc.). The interdict is sought for a period of 12 months. In the alternative the interdict is sought for a period until the main proceedings are finalised, which the applicant says could be sooner than 12 months from now.
- [29] Whether the main proceedings in terms of s 77(3) of the BCEA will be finalised within 12 months is hard to say. The court roll has been allocated for the remainder of this year (apart from urgent applications). It may be that the main referral will be heard in the first term of next year, i.e. before the 12 months have expired. At this stage, it is impossible to say whether the relief sought will be “final in effect”. I am satisfied that it is cast in interim terms, pending the final relief sought or the expiry of twelve months. I will consider it in that context.

Prima facie right?

- [30] The elements to be considered in deciding whether to grant an interim interdict are trite, as set out in *Setlogelo v Setlogelo*.¹⁰
- [31] In an application for an interim interdict, the rule in *Plascon-Evans*¹¹ does not apply when considering the evidence:

“The proper manner of approach is to take the facts set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to consider whether, having regard to the

¹⁰ 1914 AD 221 at 224. See also *Erikson Motors Welkom Ltd v Protea Motors Warrenton* 1973 (3) SA 658 (A).

¹¹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635B.

inherent probabilities, the applicant should on those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, *prima facie* established, may only be open to 'some doubt'. The onus of proving such *prima facie* right rests upon the applicant."¹²

[32] In *Reddy v Siemens Telecommunications Ltd*¹³ it was held that the reasonableness of a restraint could be determined without getting embroiled in the issue of onus. But the question here is whether Krog has thrown serious doubt on the applicant's case. And the applicant must, in the first place, prove the existence of a restraint of trade agreement; it is only then that the factors set out in *Basson v Chilwan*¹⁴ arise, i.e.

32.1 whether there is an interest of the applicant which is deserving of protection;

32.2 whether that interest is prejudiced by Krog;

32.3 if so, whether it weighs up qualitatively and quantitatively against Krog's interests so that he should be economically inactive and unproductive; and

32.4 whether there is another facet of public policy which requires that the restraint should be maintained or rejected.

[33] On the facts of this case, and without the benefit of oral evidence at this stage, Krog has thrown serious doubt on the existence of a restraint of trade agreement, even on the test set out in *Webster v Mitchell*.¹⁵

[34] I agree with Mr *Stelzner* that the following factors cast serious doubt upon the existence of the oral agreement that the applicant relies upon:

34.1 The plausibility of the applicant's account is undermined by the contention that the restraint was supposedly agreed at an early stage

¹² C B Prest, *The Law and Practice of Interdicts* (1996) at 55-56, citing *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189 and subsequent authorities. See also *Spur Steak Ranches Ltd v Saddles Steak Ranch Claremont* 1996 (3) SA 706 (C) at 714.

¹³ 2007 (2) SA 386 (SCA).

¹⁴ 1993 (3) SA 742 (A) 767 E-I.

¹⁵ Above fn 12.

of the negotiations between the parties, at an informal meeting at a coffee shop, before Taljaard and Heyl had made any firm offer to Krog.

34.2 When Taljaard & Heyl did write to Krog on the same day to set out the terms of the employment offer, they did not mention a restraint of trade agreement.

34.3 In fact, despite the applicant's contention that the restraint term was of vital importance to its directors, there is not a single reference to it in any of the extensive correspondence that passed between the parties at the time.

34.4 The restraint also does not make an appearance in the draft contract of employment that the applicant sent to Krog in 2015 (many months after he commenced working in June 2014). And the applicant does not rely on the "non-solicitation clause" drafted or inserted by its human resources manager, that Krog did not sign in any event.

34.5 Its contention that the employment contract was drawn up "intussen" – after the discussions of 17 April 2014 and before the commencement of Krog's employment on 25 April 2014 -- is belied by the fact that the contract was produced many months after Krog had already started working for the applicant.

34.6 The applicant also seeks support for its case with an explanation why the restraint was so important to it at the time of the negotiations with Krog during April 2014 – for which it relies on the alleged betrayal by its previous sales manager, Mr Renso Nel. But contemporaneous correspondence from the deponent to the founding affidavit does not bear this out.

34.7 Krog has consistently denied the existence of any restraint of trade agreement. He supports his denial with the contention that he would never have agreed to such a term of employment as it would effectively bar him from employment in his chosen field (as a soil scientist specialising in fertilisation) since the field of fertilisation is so closely interlinked with the use of lime and gypsum and he had

never before been required to enter into such an agreement with any of his previous employers in the same industry.

[35] In summary, the applicant has not made out a *prima facie* case that a restraint of trade exists on the evidence before me.

[36] Given that conclusion, it cannot succeed in the relief it seeks. I will nevertheless briefly consider the other requirements for an interim interdict.

Apprehension of irreparable harm?

[37] The applicant has not shown that it will suffer irreparable harm, should Krog continue working for Grasland. The nature of the lime and gypsum industry, as set out in the evidence before me, appears to be such that the factors on which transactions depend in the agricultural industry are either publicly known – such as pricing – or are the subject of industry norms – such as transport costs or commissions payable to agents. Krog may well have built up good relationships with agents, customers and suppliers, but that does not, in this case, translate to irreparable harm for the applicant.

Alternative remedy

[38] In any event, even if the applicant does suffer harm, it has an alternative remedy. It may be able, in due course, show through oral evidence in the s 77(3) hearing that a restraint agreement did come into existence. If so, and provided the other factors are satisfied, it may be able to prove and claim damages from Krog. In the unusual circumstances of this case, that remedy must be seen as an adequate one, as opposed to the typical urgent application to enforce a restraint of trade clause which is common cause, where it has been breached, and where the other factors can be sufficiently argued on the papers. In those cases, it is often prudent to prevent an imminent or further breach rather than to expect of the applicant to claim damages in due course.

Balance of convenience

[39] Even though the applicant belatedly offered to pay Krog's salary for a further four months – on the assumption that its s 77(3) referral will then go to trial – the balance of convenience favours Krog. Should he be prevented from working for a competitor, even on an interim basis and based on flimsy allegations of an oral and unspecified restraint of trade agreement, it will seriously impact on his right to earn a living in his chosen profession. And the applicant's allegation that it may "go under" as a result of the competition by Grasland being buoyed by Krog's employment is not borne out by any concrete evidence.

Conclusion

[40] The applicant has not discharged the onus to show that it is entitled to the urgent relief it seeks.

[41] Both parties have asked for costs to follow the result. I see no reason in law or fairness to disagree. And given the timeframes in which Krog's legal team had to draft its opposing papers and arguments, the use of two counsel was not unwarranted.

Order

The application is dismissed with costs, including the costs of two counsel.

Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: Frans Rautenbach

Instructed by Ward, Ward & Pienaar (Cape Town).

FIRST RESPONDENT: Robert Stelzner SC and Joseph Whitaker

Instructed by Joubert & Ferreira Inc (Somerset West).

LABOUR COURT