THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JS1043/16

In the matter between:

MASSMART HOLDINGS LIMITED **Applicant**

and

JACQUES THERON **Respondent**

Heard: 20 November 2017

Delivered: 11 January 2018

Summary: Breach of contract – former employee enticed a former colleague to join his current employer in breach of his contractual undertaking – claim for damages incurred in recruiting his replacement consequent to the breach – the quantum is fair and reasonable.

JUDGMENT

NKUTHA-NKONTWANA. J

Introduction

[1] The applicant is a South African-based retailer with the divisions made up of, *inter alia*, Makro, Game, Dion Wired, Builders Warehouse, Jumbo Cash and Carry. The respondent was employed by the applicant in terms of a contract of

employment dated 6 November 2008. Arising out of the contract of employment with applicant, the respondent signed an undertaking of confidentiality (the undertaking) in favour of the applicant on 1 November 2008, the undertaking reads as follows:

> 'I hereby undertake to you that throughout the period of my employment with you and after the termination thereof, for any reason, and save as authorised, in writing, by a director or a person delegated by the Board of Directors, …I will not…Nor will I or any company, firm, undertaking or concern in or by which I am directly or indirectly interest or employed within 12 months, directly or indirectly encourage or entice or incite or persuade or induce any person employed by you or any associate and/or subsidiary companies terminate his employment with the group'

[2] The respondent resigned on 25 January 2016 and left at the end of February 2016. At that time, he held the position of head of Business Intelligence (BI). The respondent took employment with African Bank Limited (the bank) as the Head of Finance Distribution.

[3] On 11 April 2016, the respondent signed an offer of employment on behalf of the bank, an offer that was presented to Mr Eden Pillay (Mr Pillay) who had just been promoted to succeed the respondent as the applicant's head of BI. On 13 April 2016, Mr Pillay tendered a notice of resignation from the applicant's employ.

[4] Accordingly, the applicant claims damages from the respondent arising out of a breach by him of the undertaking not to entice any of the applicant's employee(s) to join his new employer. In this instance, the applicant contended that the respondent enticed Mr Pillay to resign and take up employment with the bank where he is the Head: Finance Distribution; as a result, the applicant had to replace Mr Pillay at some costs. The costs of the replacement are the damages suffered by the applicant and are in the sum of R284,961.24.

[5] The merits and quantum are in dispute.

Survey of evidence

The applicant's case

[6] The applicant led the evidence of two witnesses, Mr Llewellyn Steeneveldt (Mr Steeneveldt) and Ms Bianca Mnkandla (Ms Mnkandla). Mr Steeneveldt testified that he was employed by the applicant as its Group Commercial Executive and has 16 years' service. The respondent was his immediate subordinate and was responsible for the BI. The BI was involved in real-estate decisions analytics, corporate governance and analytical services. The BI provided service to the various divisions with its primary function being to assist these divisions in decision making in relation to establishing of stores. These involved analysing the areas in which the divisions proposed opening stores, the demographics of the area and to ensure that the divisions do not compete with each other.

[7] The BI consisted of six individuals including the respondent as its head. Mr Pillay reported to the respondent. The respondent and Mr Pillay were instrumental in the risk assessment function of the department. The consequences of the BI's recommendations could be massive if incorrect. The divisions could end up establishing stores in areas that are not suitable and end up being burdened with long term leases and costs.

[8] At the time of his resignation, Mr Pillay never mentioned that he was unhappy with the applicant. He even showed Mr Steeneveldt his appointment letter from the bank that had been signed by the respondent.

[9] The respondent and Mr Pillay had a close relationship when they were still in the employ of the applicant. The respondent was Mr Pillay's mentor who had been recruited by him to join the applicant. In fact, he even signed his contract of employment with the applicant. Mr Pillay was the respondent's successor title, having been groomed by the respondent as such. Mr Pillay was exceptionally skilled in respect of dealing with the complex issues which arose out of the relationship with the applicant and its holding company Walmart. His resignation was extremely prejudicial to the applicant.

[10] Mr Pillay's notice period ended in the middle of July 2016. On 1 August 2016, one Mr Hasjee, another member of the BI resigned to join the bank. The

applicant lost three important components of the BI to the bank within a space of 6 months. The applicant was a stable employer as compared to the bank that had just came out of curatorship. Mr Pillay had told him (Mr Steeneveldt) that he was leaving to join the bank, despite the risks, because he was going to work with the respondent.

[11] He was not aware that Mr Pillay had been looking for other employment or had been unhappy during his employment by the Applicant. The only issue that Mr Pillay had raised with him was in relation to the red tape and bureaucracy at times with the applicant and its holding company, Walmart.

[12] He was of the view that the remuneration package that had been offered by the bank was essentially the same as the one Mr Pillay enjoyed with the applicant.

[13] The applicant found a replacement for Mr Pillay, Mr Solomon Monama (Mr Monama) through a recruitment agency, Assessment Technologies International (ATI). Mr Monama commenced his employment with the applicant on 1 November 2016. ATI charged the applicant R284,961,24 for their services, a direct damages suffered by the applicant for replacing Mr Pillay.

[14] The second witness, Ms Mnkandla, ATI operations manager, testified that ATI is a talent management, provision and recruitment company. ATI was mandated by the applicant to urgently find a replacement for Mr Pillay. She is the one who undertook the task and conducted a talent based search against the specification which took about 21 days. She interviewed the candidates on the sample in order to create a shortlist. 76 candidates were interviewed during the first round of interviews and 10 were shortlisted. Final interviews were held on 25 July 2016 and 5 candidates underwent psychometric assessment. Mr Monama was the successful candidate.

[15] ATI charged the applicant 20% of the selected candidates' total remuneration package and R11 500.00 per candidate for psychometric test. The total amount charged by ATI is R284 961.24.

The respondent's case

[16] The respondent had been recruited from ABSA to join the applicant through the services of ATI. He was recruited to join the bank by Mr Gustav Raubenheimer (Mr Raubenheimer), whom he had worked with at Nedbank and ABSA. He had met with Mr Raubenheimer twice before accepting the bank's offer on 28 January 2016.

[17] He, indeed, had had a good relationship with Mr Pillay while he was still with the applicant. They had a number of confidential discussions about the job offers Mr Pillay was considering at that time. He never disclosed these activities with Mr Steeneveldt. Mr Pillay had attended an interview at Nike but rejected the offer because he did not like their culture.

[18] Mr Pillay had been identified to take over his role as the head of BI, this he did discuss with Mr Pillay. He did not arrange a meeting between Mr Pillay and the bank. He was told by Mr Pillay that he had been contacted by Mr Raubenheimer regarding a position at the bank. He then told Mr Pillay that he is the one who had given Mr Raubenheimer his contact details but he told him that the bank was unstable as compared to the applicant as it had just come out of curatorship.

[19] He never gave reference for Mr Pillay and Mr Raubenheimer had not spoken to him about Mr Pillay. He signed two offers of employment for Mr Pillay's merely because he is the head of department. However, he was never involved in the recruitment of Mr Pillay. He signed a request for approval to make an offer to Mr Pillay on 23 March 2016. However, he did not have anything to do with the increased offer that was ultimately accepted by Mr Pillay.

[20] Under cross examination, the respondent made the following concessions:

20.1 He had given Mr Pillay's contact details to Mr Raubenheimer who had asked him if he was aware of any good analysts who could be approached;

20.2 Mr Pillay took his views seriously and would be persuaded by them. He had signed Mr Pillay's offer of employment when he joined the applicant and did the same when he joined the bank;

20.3 There was no evidence to suggest that Mr Pillay had been in discussion with the bank prior to his resignation from the applicant;

20.4 He was employed in a position of trust and owed the applicant a duty of care;

20.5 He was bound by the undertaking;

20.6 The BI unit was important and if its recommendations were incorrect and relied upon by one of the decisions, it could have cost implications for that division.

[21] Mr Pillay testified that he was employed by the bank as a customer analyst. He had placed his profile in Linked In which made him available to be contacted for offers of employment. He never saw himself retiring with the applicant as he wanted to grow and expand his career, hence he joined the bank. He did discuss with the respondent that he had attended an interview at Nike but did not get the job.

[22] He was also approached by various recruitment agencies before he received an offer by the bank. He never discussed his departure from the applicant with the respondent. However, after he had been contacted by Mr Raubenheimer, he informed the respondent and his response was that he should do what was good for himself.

[23] He was influenced to join the bank by Mr Ramosedi, an executive at the bank who was part of his interview. He was made an offer on 4 April 2016, signed by the respondent. He discussed the possibility of an increased offer with the respondent. He promised to speak to Mr Raubenheimer. Thereafter, he received a revised offer signed by the respondent.

[24] The applicant made a counter offer which was more than that which he was getting at the bank but he rejected it. He conceded that the recruitment emails he had received prior to taking up employment with the bank were unsolicited cold calls by recruitment agents. He was happy at the applicant and never told anyone that he was not happy. He even stated in his letter of resignation that he enjoyed working at the applicant.

[25] He found out that the bank was under curatorship through the media. The respondent did not inform him that he had given his contact details to Mr Raubenheimer. However, he knew that he was going to work with the respondent at the bank.

Issues for determination

[26] The real issues for determination are clearly elucidated in the pleadings, read with the pre-trial minute. Consequent to the material concessions that were made during evidence, the remaining issues are as follows:

26.1 Whether the respondent breached the undertaking;

26.2 Whether the respondent is liable for the damages suffered by the applicant;

26.3 Whether it was within the contemplation of the parties when the undertaking was signed that damages as claimed would flow from a breach of the undertaking; and

26.4 Whether the amount of damages claimed is fair and reasonable.

The legal principles and application

[27] This is a civil claim for damages in terms of section 77(3) of the Basic Conditions of Employment Act[1] (the BCEA).[2] There are two issues that arise in respect of a claim for damages consequent to a breach of contract and are succinctly stated in *KwaZulu-Natal Tourism Authority and Others v Wasa;*[3] firstly, the applicant must prove: (i) that it had suffered damages as a consequence of the breach of the undertaking by the respondent, that there is a link between the damages it suffered and the breach; and secondly (ii) the quantum of damages it actually suffered.

[28] In this instance, the respondent denied having influenced or been involved in the recruitment of Mr Pillay to the bank and that he breached the contractual

[1] No 75 of 1997.
[2] Section 77(3) of the BCEA provides that this 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'.
[3] *[2016] ZALAC* 35; [2016] 11 BLLR 1135 (LAC); (2016) 37 ILJ 2581 (LAC) at para 32.

undertaking. He tried to distance himself from the recruitment of Mr Pillay by the bank, despite the following evidence:

28.1 He resigned from the applicant’s employ on 25 January 2016 and left on 29 February 2016 to join the bank consequent to being headhunted by Mr Raubenheimer, whom he had worked with at Nedbank and ABSA.

28.2 He gave Mr Pillay’s contact details to Mr Raubenheimer who had specifically asked him whether he knew any analysts he could approach. It is undisputed that Mr Pillay and Mr Raubenheimer did not know each other prior to the respondent’s intervention. On 11 February 2016, Mr Raubenheimer initiated a process of recruiting Mr Pillay as a potential recruit for the respondent’s new team of analytics.

28.3 Mr Pillay attended an interview meeting with the bank’s executives on 17 February 2016 and then informed the respondent about being approached by the bank. The respondent, despite having supported Mr Pillay’s appointment as his successor as the applicant’s head of the BI, remained mum about Mr Pillay’s intentions. It must be mentioned that the process of recruiting Mr Pillay commenced during the respondent’s notice period in February 2016. His half-heartened caution about the risks of joining the bank as it was still under curatorship was disputed by Mr Pillay.

28.4 Hardly a month of his employment with the bank, on 21 March 2016, the respondent signed a request for approval of employment of Mr Pillay. On 4 April 2016, he signed Mr Pillay’s offer of employment. The respondent, not Mr Raubenheimer, was approached by Mr Pillay requesting an increase in the bank’s offer. Mr Pillay’s request was acceded to and a revised offer was also signed by the respondent on 8 April 2016.

28.5 The applicant’s attempts to retain Mr Pillay were in vein. He was resolute that he would rather leave the applicant, when he had just been promoted and was enjoying working for it, to join bank that had just emerged from curatorship.

[29] The respondent’s counsel endeavoured to discredit the applicant’s evidence in various ways. He submitted that the applicant failed to tender evidence that the

respondent had breached the contractual undertaking. Mr Steeneveldt expressed his opinion based on the chronology of events that led to the departure of Mr Pillay to join the bank. In the absence of direct evidence to prove facts giving rise to the inference sought to be drawn would amount to speculation. Mr Steeeveldt's evidence is inadmissible and as such the applicant's circumstantial claim is unsustainable, so the further submissions went.

[30] I do not agree with the above submissions. It is clear from the objective and admitted facts that the respondent was instrumental in the headhunting of Mr Pillay. He is the one who recommended Mr Pillay to Mr Raubenheimer and went further to provide Mr Pillay's contact details. He signed his offer of employment and facilitated the revised offer which was ultimately accepted by Mr Pillay. The respondent conceded in cross examination that he had recruited Mr Pillay to join the applicant and, similarly, had signed his offer of employment. Clearly, he was not a passive bystander as he would want the Court to believe.

[31] It is also highly improbable, as correctly contended by the applicant's attorney, that the respondent would have distanced himself from the headhunting of Mr Pillay because he was not aware of his contractual undertaking at that time. He testified that he became aware of his contractual undertaking when he was served with the applicant's letter of demand sometime in October 2016.

[32] Mr Steeneveldt testified that Mr Pillay was an essential resource in the BI unit. He had been trained and groomed as the respondent's successor. He did not expect him to leave soon after the respondent's resignation especially since he had accepted a promotion into a position he had been groomed to occupy. The applicant had no high turnover; no one had left its employ for eight years prior to the respondent's resignation. This evidence was never challenged. Mr Pillay, contrary to the respondent's evidence, testified that he was happy at the applicant. The applicant had no choice but to go into the market to search for Mr Pillay's replacement.

[33] To sum up to this point, I am persuaded that the respondent, a former employee of the applicant, was directly involved in headhunting of Mr Pillay to

join the bank in breach of the contractual undertaking and consequently rendered himself liable for damages suffered by the applicant in replacing Mr Pillay.

[34] The next stage of the enquiry is whether applicant is entitled to the damages claimed. Put differently, whether there is a link between the damages it suffered and the breach. In *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd,*[4] the referred to by the respondent, the Court stated:

> 'The fundamental rule in regard to the award of damages for breach of contract is that the sufferer should be placed in the position he would have occupied had the contract been properly performed, so far as this can be done by the payment of money and without undue hardship to the defaulting party… To ensure that undue hardship is not imposed on the defaulting party the sufferer is obliged to take reasonable steps to mitigate his loss or damage (ibid.) and, in addition, the defaulting party's liability is limited in terms of broad principles of causation and remoteness, to (a) those damages that flow naturally and generally from the kind of breach of contract in question and which the law presumes the parties contemplated as a probable result of the breach, and (b) those damages that, although caused by the breach of contract, are ordinarily regarded in law as being too remote to be recoverable unless, in the special circumstances attending the conclusion of the contract, the parties actually or presumptively contemplated that they would probably result from its breach…The two limbs, (a) and (b), of the above stated limitation upon the defaulting party's liability for damages correspond closely to the well-known two rules in the English case of Hadley v. Baxendale, 156 E.R. 145, which read as follows (at p. 151):
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>> "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."' Emphasis added.

[4] [1977] 4 All SA 94 (A) at page 108; 1977 (3) SA 670 (A) at page 687 C-F.

[35] In the present case, the second limb of *Holmdene Brickworks* is applicable. As such, it is my view that the damages incurred by the applicant for Mr Pillay's replacement are natural and a foreseeable consequence of the respondent's contravention of the contractual undertaking. Mr Pillay, a succession plan appointee and the respondent's successor in title, was headhunted by the bank at the instance of the respondent. The applicant was left with no alternative but to seek the assistance of the ATI to recruit Mr Pillay's replacement. The bank, on the other hand, had been spared the recruitment expenses because of the respondent's breach of his undertaking.

[36] The respondent further submitted that the applicant failed to prove that the amount of damages claimed is fair and reasonable in the circumstances. However, the respondent failed to tender any evidence that there were other cost effective remedies that the applicant ought to have adopted, when the onus rested upon him.[5] Conversely, Ms Mnkandla testified that the damages suffered by the applicant were purely for the ATI's service charges for placing Mr Pillay's replacement. In practice, recruitment agencies charge 20% to 30% of the appointed candidate's total remuneration package. The applicant was billed 20% of Mr Monama's total package; R11 500.00 for conducting the psychometric tests for 5 candidates but the applicant was billed for 3 candidates, a discounted amount because of the long term relationship ATI enjoys with the applicant. This evidence was undisputed. Therefore, I accept that the total amount claimed by the applicant is fair and reasonable.

<u>Conclusion</u>

[37] I am persuaded that the respondent, a former employee of the applicant, was directly involved in headhunting Mr Pillay to join the bank in breach of the contractual undertaking and consequently rendered himself liable for damages suffered by the applicant in replacing Mr Pillay. The total amount claimed is fair and reasonable.

[38] There is no reason why costs should not follow the result. Even though the respondent is an individual litigant, he ought to have been better advised of the

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[5] *Supra* at Page 110; see also *Lawson v Schmidhauser Electrical CC* (7596/2007) [2012] ZAWCHC 146 at para 35.

consequences of unsuccessfully resisting the applicant's claim. The applicant duly claimed, also, for the payment of interest at the rate of 10.25% per annum on the award of damages as from the date of this judgment. This rate was not disputed in the pleadings nor in argument. There is therefore no reason why it should not be applied. [6]

[39] In the circumstances, I make the following order:

<u>Order</u>

1. The respondent is ordered to pay the applicant an amount of **R284 961. 24**.

2. The respondent is ordered to pay interests on the above amount at 10.25% per annum a *tempore morae*.

3. The respondent is ordered to pay the costs.

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P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

[6] *Russell, N.O. and Loveday, N.O.* v. *Colllins Submarine Pipelines Africa* (*Pty*.) *Ltd.*, 1975 (1) S.A. 110 (A.D.) at p. 156)

Appearances:

For the Applicant:	Mr D Woodhouse
Attorney from:	Mervyn Taback Incorporated
For the Respondents:	Advocate BD Hitchings
Instructed by:	Charmaine Gray Attorneys