THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: J1591/19

In the matter between:

MEGAFREIGHT SERVICES (PTY) LTD **Applicant**

and

LYNNETTE BEZUIDENHOUT **First Respondent**

HENEWAYS FREIGHT SERVICES **Second Respondent**

Heard: 16 August 2019

Judgment delivered: 28 August 2019

JUDGMENT

VAN NIEKERK J

[1] This is an application, brought as a matter of urgency, to enforce restraint and confidentiality undertakings given by the first respondent (the employee) in favour of the applicant in August 2018, as part of her contract of employment. The employee resigned on 3 July 2019. It is not disputed that the employee has been employed by the second respondent, nor is it disputed that the second respondent is a competitor of the applicant.

[2] The factual background is not in dispute. The restraint undertakings given by the employee extend to a restraint of trade, the solicitation of employees and clients and confidentiality.

[3] The employee raises two defences to the applicant's claim. The first defence is one based on the *exceptio non adempleti contractus*. The employee contends that the applicant is in material breach of the contract of employment in a number of respects and on the basis of reciprocity of obligation, she is not obliged to abide by the restraint. The second defence is that the applicant has no proprietary interest that warrants protection by way of the enforcement of the restraint undertakings.

[4] In *Universal Storage Systems (Pty) Ltd v Crafford and others* 2001 (4) SA 249 (W), a decision of the full bench, the court said the following:

> [8] The first respondent raised the *exceptio non adimpleti contractus* as a defence to the relief sought on the second restraint and referred to *International Executive Communications Ltd t/a Institute for International Research v Turnley and Another* 1996 (3) SA 1043 (W) at 1047F - I where the following was said:
>
> 'So far as final relief is concerned, the applicant's performance of its obligation (payment of a percentage of its net profit) is obviously reciprocal to the first respondent's obligation to abide by the restraint after leaving the employ of the applicant, and would have had to have been performed first. The *onus* of proving that there was performance of that obligation or that such performance was excused, is on the applicant: *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at 491H; and
> "Solank as iets nog oorbly wat gepresteer moet word, kan die eksepsie dat vervulling nie gevolg het nie, teen beide die eiser self en sy erfgenaam geopper word - selfs as die kleinste deel van die kontrak nie vervul is nie of die nie-vervulling slegs op *accidentalia* betrekking het."

The court held that where in a covenant in restraint of trade certain consideration has been promised to the party restrained (the respondent), the obligation to abide by the restraint is reciprocal to the obligation of the party in whose favour the restraint operates (the applicant) to render the promised consideration, and the latter obligation has to be performed first. As long as something remains which has to be performed by the

applicant, the respondent may raise the *exceptio non adempleti contractus* as a defence to any attempt by the applicant to enforce the restraint.

[5] Annexure B to the contract of employment sets out the applicant's policy regarding sales targets and commission. Clause 8.1 of the contract of employment makes provision for the employee's remuneration, and the prospect of earning sales commission in relation to sales targets. The obligation on the applicant to pay commission earned in terms of the policy is clearly reciprocal to obligations that the employee assumed in terms of the contract, including the restraint undertakings. In essence, annexure B provides that commission quarters are January to March, April to June, July to September and October to December. Payments for any quarter are made in the following month's pay run. The policy provides 'Should the employee resign from the company, any commission shall cease from that date although, any payment due before this date shall be paid.'

[6] As I have indicated, it is not disputed that the employee was employed by the applicant until 3 July 2019. In other words, the employee was employed by the applicant and rendered services to the applicant for the quarter April-June 2019. The applicant does not dispute that the employee met her sales targets. In her answering affidavit, the employee contends that the applicant owes her R62 483.70 in commission for the quarter ending June 2019. The replying affidavit contains no more than a bare denial, with no explanation of the basis on which commission is being withheld. The plain meaning of the words 'any commission shall cease from that date…' is that the clause does not affect commissions that have been earned or that have vested as at the date of resignation. Specifically, the policy does not state that an employee will forfeit commission earned for any quarter if the employee resigns after the end of the quarter.

[7] The applicant has failed to proffer any evidence or otherwise make out a case why it is entitled to withhold commission (and thus why it is not in breach of the employment contract). In my view, the *exceptio* defence stands to be upheld. Since the applicant seeks a final order, it is obliged to establish a clear right to

the relief it seeks. For the above reasons, it has failed to do so, and the application stands to be dismissed. In these circumstances, it is not necessary for me to make any decision in relation to the further breaches of contract alleged by the employee, or to consider the employee's defence of an insufficient proprietary interest to render the restraint undertakings enforceable.

[8] Finally, in relation to costs, the court has a discretion in terms of s 162 to make an order for costs according to the requirements of the law and fairness. The non-payment of the employee's commission was raised in the first exchange of correspondence between the parties' attorneys. The applicant's attorney ought to have been alerted then to the consequences of the breach of contract that the employee alleged had been committed by the applicant. The employee has succeeded in her opposition to the application, and I see no reason to deny her the costs of the proceedings.

I make the following order:

1. The application is dismissed, with costs.

André van Niekerk
Judge

REPRESENTATION

For the applicant: Adv. L Pillay instructed by Wehncke Attorneys

For the respondent: Adv. L Van der Merwe instructed by Minnie & Du Preez Inc.