THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 1768/19

In the matter between:

SERVICE PARTS LOGISTICS (PTY) LTD **Applicant**

and

PHUMLANI MSHENGU **Respondent**

Heard: **13 September 2019**

Delivered: **27 September 2019**

JUDGMENT

PRINSLOO, J

Introduction:

[1] *In casu,* it is common cause that the Respondent had signed a restraint of trade agreement with the Applicant, valid for a period of 24 months. It is further common cause that he had left the employ of the Applicant on 31 July 2019 and had commenced employment with Bakwena, a direct competitor of the Applicant.

[2] It is also common cause that there were negotiations between the parties to find an amicable solution, even prior to the Respondent joining Bakwena. There was also negotiations regarding the restraint of trade period and for it to be reduced from 24 to 12 months, but that such negotiations had failed.

[3] It is common cause that in an effort to resolve the matter without resorting to litigation, a consent agreement was prepared and proposed by the Applicant, in terms of which it sought certain undertakings from the Respondent. The Respondent's response to this is no more than a bare denial that his conduct is in breach of the restraint of trade agreement.

[4] The consent agreement was subject to certain confidentiality undertakings, as the Applicant was not prepared to divulge its customer and supplier lists, in the absence of a confidentiality agreement. In its founding affidavit, the Applicant made it clear that it was prepared to make the customer list and supplier list available to the Respondent's legal team, subject to undertakings being furnished concerning the retention of the customer and supplier list and an undertaking that same would not be disclosed to any third parties, including Bakwena. In his answering affidavit, the Respondent did not provide any answer to this and evidently, he did not take up this offer, nor did he consider it serious, as he instead filed an answering affidavit in opposition of this application.

[5] The Respondent did not dispute the Applicant's version that on 14 August 2019, the Applicant's attorneys made a final effort to resolve the matter amicably and requested him to agree to the terms as set out in the consent agreement. The Respondent however made it clear that he had no intention of reaching an agreement with the Applicant and he had no intention to discontinue his relationship with Bakwena.

[6] The Applicant regarded the Respondent's conduct as a breach of the terms of his restraint of trade agreement. In answer to this, the Respondent did no more than to make a bare denial and 'put the applicant to the proof', which is unusual in motion proceedings where the Respondent is expected to provide this Court with his version, if he has one, and not to make a bare denial and put the other party to the proof. The Respondent only stated that the period of the restraint was excessive and the area was unreasonable. The Respondent did not say why the restraint period was excessive and why the proposed reduced period of 12 months was still excessive and not acceptable.

[7] After all efforts to resolve the matter amicably had failed, the Applicant approached this Court on an urgent basis on 6 September 2019 to enforce the

restraint of trade agreement, as contained in the Respondent's contract of employment. The relief sought by the Applicant as set out in the notice of motion is as follows:

"1. That the forms and services provided for in the Rules of Court are, to the extent necessary, dispensed with and that the matter is heard urgently.

2. An order interdicting and restraining the respondent until 31 July 2021 from:

2.1 Recommending to any company of which he may be an employee, director, member or shareholder, or with which he may have any form of association whatsoever, that such company offer employment to any person who will, as at 31 July 2019, be and will thereafter continue to be an employee of the applicant;

2.2 In any way imparting to any company of which he may be an employee, director, member or shareholder, or with which he may have any form of association whatsoever any knowledge acquired by him with reference to the qualifications, ability or character of any person who will, as at 31 July 2019, be and will thereafter continue to be an employee of the applicant;

2.3 Without the prior written consent of the applicant, which consent shall not be unreasonably withheld, either directly or indirectly from being employed by, connected with, interested in or interest himself in (either personally or financially), any trade, business, company or undertaking competitive with that of the business conducted by the applicant;

2.4 As principal, agent, partner, representative, shareholder, director, member or employee, directly or indirectly be associated with, interested in, or interest himself in (whether financially or personally) any firm, person or company carrying on business, in competition with the applicant.

3. An order interdicting and restraining the respondent from using or directly or indirectly divulging to any third party, the applicant's trade secrets.

4. An order directing the respondent to pay the costs hereof.

[8] On 6 September 2019 and by agreement between the Applicant and the Respondent, this Court granted an interim interdict in the following terms:

1. Pending the return date of 13 September 2019, the Respondent is interdicted and restrained from performing any of the activities as set out in paragraph 4.4.1 – 4.4.10 of annexure FA 9 to the founding affidavit;

2. Costs are reserved

[9] Annexure FA 9 is the consent agreement, as was prepared by the Applicant and between 6 and 13 September 2019, the parties were to have a discussion regarding the customer list, as was proposed by the Applicant in the founding affidavit.

[10] On the return day, 13 September 2019, the parties indicated that they have agreed to a draft order in the following terms:

'The Respondent —

1.1 will not visit or contact any customer as per the attached customer list ("the Customer list"), for the purpose of selling, marketing or promoting IT services and/or products;

1.2 will not share information about any of the Applicant's details on the Customer list attached hereto to any third party who is employed at Bakwena and/or any third party, whose business is in direct opposition to the Applicant's business, including the employees, directors, shareholders or consultants of such third party entity;

1.3 will not share any Project information to any third party who is employed at Bakwena and/or any third party whose business is in direct opposition to the Applicant's business, including the employees, directors, shareholders or consultants of such third party entity;

1.4 will not share prices and pricing structures of the Applicant with any third party who is employed at Bakwena and/or any third party whose business is in direct opposition to the Applicant's business including the employees, directors, shareholders or consultants of such third party entity;

1.5 will not share information regarding the Applicant's stock holding with any third party who is employed at Bakwena and/or any third party

whose business is in direct opposition to the Applicant's business including the employees, directors, shareholders or consultants of such third-party entity;

1.6 will not share any information regarding the Applicant's suppliers with any third party who is employed at Bakwena and/or any third party whose business is in direct opposition to the Applicant's business including the employees, directors, shareholders or consultants of such third-party entity;

1.7 will not share any information regarding the Applicant's shareholding, business model and/or any other proprietary information with any third party who is employed at Bakwena and/or any third party who's business is in direct opposition to the Applicant's business including the employees, directors, shareholders or consultants of such third party entity;

1.8 will not solicit any of the Applicant's employees to take up employment with Bakwena or any third party whose business is in direct opposition to the Applicant's business including the employees, directors, shareholders or consultants of such third-party entity;

1 .9 will not discuss personal details of any of the staff members, directors and or executives of the Applicant with any third party including the employees, directors, shareholders or consultants of such third-party entity;

1.10 will delete any data obtained during his employment with the Applicant;

1.11 will not make any statements, verbal or in writing including comments on social media, which may bring the Applicant in disrepute or damage the Applicant's reputation in the market.

2. The obligations contained in paragraph 1.1 to 1.11 above shall apply and be valid for a period of _____ months from the date of this order.

3. The Respondent will keep as confidential the Customer list and will not disclose it to any third party who is employed at Bakwena and/or any third party whose business is in direct opposition to the Applicant's business, including the employees, directors, shareholders or consultants of such third party entity.

4. Costs are reserved'.

[11] The draft order agreed to by the parties, is almost a *verbatim* version of the consent agreement. The only two issues outstanding were the period of the restraint and the issue of costs.

[12] The general principles applicable to restraint agreements are well-established. In *Massmart Holdings v Vieira and another*[1] the Court summarised them as follows:

> 'Restraint agreements are enforceable unless they are unreasonable (see *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A)). In general terms, a restraint will be unreasonable if it does not protect some proprietary interest of the party seeking to enforce a restraint. In other words, a restraint cannot operate only to eliminate competition. The party seeking to enforce a restraint need only invoke the restraint agreement and prove a breach of the agreement, nothing more. The party seeking to avoid the restraint bears the onus to establish, on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable (see 2013 (1) SA 135; *Magna Alloys and Research (SA) (Pty) Ltd* supra; *Den Braven SA (Pty) Ltd v Pillay and another* 2008 (6) SA 229 (D))'.

[13] The Respondent, as the party seeking to avoid the restraint, bore the onus to show that the restraint agreement was unenforceable because it was unreasonable. The Respondent did not discharge the onus in his opposing papers as he tendered nothing more than a bare denial and he made no submissions as to why the reduced period of 12 months should be regarded as excessive and unenforceable. After hearing argument on the duration of the restraint period, I granted an order that the obligations set out in the draft order would be valid until 31 July 2020. It was evident from the papers before me that the Respondent did no more than to make a bald statement that the period of the restraint was excessive, without providing any version or facts to substantiate his position or to place this Court in a position to understand why the reduced period of 12 months was excessive.

[14] The issue of cost was reserved and that is the only remaining issue for this Court to determine.

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[1] Unreported Labour Court case J1945-15.

The arguments

[15] Mr Williams, for the Applicant, submitted that the Respondent should be ordered to pay the costs associated with the urgent application. The argument in support of a cost order was that, prior to the commencement of litigation, there was a discussion between the Applicant's attorney and the Respondent to resolve the matter amicably. The Applicant provided the Respondent with a consent agreement, valid for a period of 12 months, which allowed him to work for the opposition, subject to certain conditions as set out in the consent agreement.

[16] The Respondent refused to sign the consent agreement and he was not prepared to negotiate on the terms contained therein. Pursuant to the institution of an urgent application, the matter became resolved in the same manner the Applicant always proposed, even prior to the litigation.

[17] The Applicant was forced to approach this Court on an urgent basis, due to the Respondent's unwillingness to negotiate around his restraint of trade and subsequently he agreed to an order in the same terms as what was offered to him prior to the commencement of litigation.

[18] Mr Maphuta for the Respondent submitted that the Respondent was always cooperative to resolve the issue and to negotiate a settlement, but for the terms on the customer list and the period of the restraint. When he refused to sign the release agreement, the Applicant had approached this Court, whereas the Respondent's attitude was to have a discussion to resolve the dispute.

[19] Mr Maphuta further submitted that the burden of a cost order will leave the Respondent poor.

[20] Mr Williams disputed this and submitted that the restraint of trade agreement made provision for the Respondent to approach the Applicant for permission to work for a competitor, which he had not done, notwithstanding the fact that he had to do so in terms of his contractual obligation and the fact that he was employed by a competitor. The consent agreement was forwarded to the Respondent, but he refused to sign it, yet he is now prepared to agree to an order in the same terms.

[21] Mr Williams submitted that it is evident from the founding affidavit that as recent as 14 August 2019, the Applicant's attorney had a telephonic discussion with the Respondent in a final effort to resolve the matter amicably and the Respondent was requested to agree on the terms included in the consent agreement. During the discussion the Respondent made it clear that he had no intention of reaching an agreement with the Applicant and that he had no intention of discontinuing his relationship with Bakwena, a direct competitor of the Applicant.

[13] The consent agreement was further subject to certain confidentiality undertakings concerning the conclusion of the agreement as the Applicant was not prepared in the absence of a confidentiality agreement, to divulge the particular customer and supplier lists. The Applicant clearly proposed a way to deal with the issues.

[22] Evidently from the Applicant's side, an undertaking was given to provide the customer list, but instead of engaging the Applicant, the Respondent filed an opposing affidavit in the urgent application and forced the Applicant to proceed to Court.

[23] The terms of the draft order, agreed to by the Respondent, are the same as the terms that were sent to the Respondent on 5 August 2019, which he refused to sign or to engage the Applicant on. The matter could have been resolved amicably had the Respondent adopted a different attitude and it would be wholly unreasonable to saddle the Applicant with costs in circumstances where litigation could have been avoided.

The legal principles applicable to costs

The general principles

[24] The general accepted purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation. In considering whether costs should be awarded, the requirements of law and fairness become applicable.

[25] The requirement of law has been interpreted to mean that the costs would follow the result.

[26] In considering fairness, this Court has held that the conduct of the parties should be taken into account and that *mala fide*, unreasonableness and frivolousness are factors justifying the imposition of a costs order. Another factor to be considered is whether there is an ongoing relationship that would survive after the dispute had been resolved by the Court. If so, a costs order may damage the ongoing relationship.

[27] In *Zungu v Premier of Kwazulu-Natal and Others*[2] the Constitutional Court confirmed the legal position that the rule of practice that costs follow the result does not apply in labour matters, but that the Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court and have their disputes dealt with and, on the other hand allowing those parties to bring to this Court cases that should not have been brought to Court in the first place.

Matters settled without hearing the merits

[28] *In casu,* the matter effectively became settled, without a hearing on the merits, but for the period of the restraint and the issue of costs.

[29] The Courts have awarded costs in instances where matters are settled without hearing the merits of the matter as the applicant in such a case was substantially successful and the broad general approach applied namely; that costs be awarded in favour of such applicant.

[30] In *National Union of Mineworkers and Others v Coin Security Group (Pty) Ltd*[3] the Court was persuaded, after a matter became settled and the Court had to determine the issue of costs only, that on the facts, the applicants would have been substantially successful had the matter proceeded to trial. In this regard the Court held that:

> 'In a case such as this, where the merits have been settled, a court will adjudicate the question of costs on broad general lines and not on lines that would necessitate a full hearing on the merits of a case. Thus in J*enkins v SA Boilermakers', Iron & Steel Workers' & Shipbuilders' Society*, Price J held:

[2] (2018) 39 ILJ 523 (CC) at paras 25-25.
[3] 2011 (32) ILJ 137 (LC) at para 9 – 10.

'The concession in respect of the first claim admittedly disposes of the dispute on the merits. It seems to me to be against all principle for the Court's time to be taken up for several days in the hearing of the case in respect of which the merits have been disposed of by the acceptance of an offer in order to decide questions of costs only ... I cannot imagine a more futile form of procedure than one which would require Courts of law to sit for hours, days or perhaps even weeks, trying dead issues to discover who would have won in order to determine the question of costs, where cases have been settled by the main claims being conceded ... When a case has been disposed of by an offer which concedes the main claim and the costs of the whole case have still to be decided, I think the Court must do its best with the material at its disposal to make a fair allocation of costs, employing such legal principles as are applicable to the situation ....

In my view the costs must be decided on broad general lines and not on lines that would necessitate a full hearing on the merits of a case that has already been settled.'

The issue in *Roupell v Metal Art (Pty) Ltd & Another* also concerned the costs that should be awarded in respect of a matter that had been settled on the merits the day before the trial was meant to commence. Margo J, following the principle in Jenkins, decided that: 'I therefore do not propose to engage in a close scrutiny of the various issues of fact raised in the conflicting affidavits that have been filed, nor do I propose to conduct a full investigation into the legal arguments advanced by the parties. I intend to resolve this issue of costs on the basis of a broad general approach to the matter.' The court then being of the opinion that the application would have succeeded and applying 'the broad general approach' awarded costs against the defendant.'

[31] In *Dladla v Council of Mbombela Local Municipality and Another*[4] the Court considered the issue of costs as the employer had, subsequent to the filing of the urgent application, uplifted the employee's 'special leave' and the reason for the urgent application fell away. The Court held that:

' The award of costs is a matter which falls wholly within the discretion of the court. In coming to a conclusion, the circumstances of the particular case should be taken into consideration including but not limited to the conduct of the parties which may have a bearing on the question of costs.

[4] 2008 (29) ILJ 1893 (LC) at para 15.

> …. Where a party is successful, a disputing party would generally be entitled to costs. I have already alluded to the fact that I am of the view that the applicant would have been successful had the application to interdict proceeded on the merits. In the light of this fact, the applicant would have been entitled to an appropriate costs order. The merits of the application were, however, not argued for the reasons set out above. There is, however, a more compelling argument why costs should be awarded in favour of the applicant: Because the resistance to the claim was effectively withdrawn when the resolution (on 11 February 2008) was taken to suspend the applicant in terms of clause 9 of the contract of service, the need to seek an interdict fell away.'

[32] I have to consider the fact that it was the conduct of the Respondent which caused the Applicant to bring this application in the first place and when the matter was enrolled, he subsequently agreed to an order in the same terms that he could have agreed to before this matter came before Court and to compound matters, on an urgent basis.

[33] The fact that the Respondent agreed to the same terms shows that the Applicant was substantially successful in its application and if this Court is to apply the general rule, the result is that the Applicant is therefore entitled to costs.

[34] I can see no reason not to follow the rule of practice in circumstances where this application was brought not in terms of the provisions of the Labour Relations Act[5] (LRA), but purely on a contractual basis where the requirement of 'fairness' finds no application in deciding the issue of costs.

[35] A cost order is a method of ensuring that decisions to litigate in this Court are taken with due consideration of the law and the prospects of success.

[36] This Court is ordinarily reluctant to make orders for costs against individual employees, for whom the prospect of an adverse costs order may serve to inhibit the exercise of what they perceive as their rights. This is not an immutable rule.

[37] In the present instance, the Respondent had ample opportunity to consider his position and to avoid litigation, which is evident from the fact that he had

[5] Act 66 of 1995 as amended.

ultimately agreed to the terms of the consent agreement. The Respondent provided no convincing explanation, safe for bald statements, as to why he could not have done so earlier or why he had not made any effort to enter into a settlement with the Applicant, notwithstanding the invitation for him to do so, before forcing the Applicant to approach this Court urgently. The Applicant has been obliged to incur costs in filing and pursuing this urgent application, in circumstances where it could have been avoided.

[38] The Respondent is employed and he is not entirely without means. Ultimately, the Respondent, who is bound by a restraint of trade agreement, which he disregarded and made no subsequent effort to negotiate an agreement with the Applicant, is the author of his own misfortune. It seems to me that in the present circumstances, the interests of justice require that the Respondent pays at least a portion of the Applicant's costs. In my view, a sum equivalent to 50% of the Applicant's costs will best serve those interests.

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

Order

1. The Respondent is to pay the costs of the application, limited to 50% of the Applicant's taxed costs.

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Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate D L Williams
Instructed by:	Marshall Attorneys
For the Respondent:	Advocate M R Maphuta
Instructed by:	K Montjane Incorporated Attorneys