



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J2393/19

In the matter between:

WACO AFRICA (PTY) LIMITED t/a FORM-SCAFF

Applicant

and

MARTINA SACK

First Respondent

DEWALD VAN BILJON

Second Respondent

**PERI FORMWORK SCAFFOLDING
ENGINEERING (PTY) LIMITED**

Third Respondent

Heard: 19 December 2019

Delivered: 23 December 2019

Summary: Authority to institute and prosecute proceedings – if the attorney is authorised to bring the application on behalf of the applicant, application is then that of the applicant – there is no need for additional proof of authority by the deponent of the founding affidavit.

Restraint of trade – novation cannot be presumed – in the absence of any evidence that there was an intention to novate, the full terms of the confidentiality and restraint of trade agreement are enforceable.

JUDGMENT

NKUTHA-NKONTWANA. J

Introduction

- [1] This is an urgent application for a final interdict to enforce the confidentiality undertakings and restraint of trade agreement (restraint agreement) between Waco Africa (Pty) Limited t/a Form-Scaff¹ (Form-Scaff) predecessor in title, Doka South Africa (Pty) Ltd (Doka) and the first respondent, Ms Martina Sack (Ms Sack). The geographical area of the restraint encompasses the provinces of Gauteng, KwaZulu-Natal and the Western Cape (restraint territory) and the period of the restraint is 24 months commencing on 1 January 2020.
- [2] Form-Scaff's claim and the relief sought against the second respondent, Mr. Dewald van Biljon (Mr van Biljon) has since been settled. By agreement between Form-Scaff and Mr van Biljon, the agreement of settlement has been made an order of Court.
- [3] There is no relief sought against the third respondent, Peri Formwork Scaffolding Engineering (Pty) Ltd (Peri), which was joined as a party to the proceedings purely by virtue of its interest in the matter; the new employer of Ms Sack.
- [4] This Court is indebted to counsel for the helpful written submissions.

Point *in limine*

- [5] Before I deal with the merits of the application, it is necessary to deal with the point *in limine* taken by Ms Sack that Mr Michel Els (Mr Els), the Chief Executive Officer (CEO) and the deponent to Form-Scaff's founding affidavit, has no authority to institute these proceedings. It was submitted on her behalf that since Mr Els failed to attach the resolution of the Board of Directors of Form-Scaff authoring him to bring these proceedings, he accordingly lacks the

¹ The applicant trades primarily in South African mining, construction and energy related sectors of the economy and has four divisions. This application concerns the business conducted under the Form-Scaff division.

necessary *locus standi*. Oddly, this point is persisted with in oral submissions despite Mr Lerm's, counsel for Ms Sack, disavowal that the authority of Form-Scaff's attorneys of record to bring these proceedings is not challenged.

- [6] Mr Whitcutt SC, who appeared for Form-Scaff, submitted in motion that it does not avail Ms Sack to challenge the authority of Mr Els to bring these proceedings since she certainly knows that he is Form-Scaff's CEO and it would seem that she is not challenging the authority of the Form-Scaff's attorneys.
- [7] In *Ganes and Another v Telkom Namibia Ltd* 2004², quoted with authority in *Unlawful Occupiers, School Site v City of Johannesburg*,³ referred to by Mr Whitcutt, the Supreme Court of Appeal (SCA) stated that if the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant and there is no need for any other person who becomes involved whether as a witness or someone to be additionally authorised. In the event that the respondent wishes to challenge the authority of a person allegedly acting on behalf of the applicant, Rule 7(1) of the Uniform Rules of the High Court (Uniform Rules) is an adequate remedy.
- [8] Likewise, in this instance, Mr Els deposed to the affidavit which is annexed to the notice of motion signed by Form-Scaff's attorneys of record whose authority to institute and prosecute these proceedings is not challenged. In any event, Ms Sack failed to avail herself to the remedy provided by Rule 7(1) of the Uniform Rules.
- [9] It follows that the point *in limine* is injudicious and must fail.

Factual background

- [10] Form-Scaff is South Africa's market leader in hire and sale of scaffolding, formwork, false work and associated services to the construction and civil

² 2004 (3) SA 615 (SCA) at paras 18 and 19. See also: *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705F-H.

³ 2005 (4) SA 199 (SCA) at paras 14 and 15.

engineering industries across the country. With experience of over 50 years and top-notch expertise, Form-Scaff also provides design skills, technical advice and support through its branches across the country and continent.

- [11] Form-Scaff trades in over 2500 individual items in over 26 product lines. More than 90% of all products have been designed and manufactured in-house. Because Form-Scaff is primarily a rental company, most of its stock is for its own use and, as such, durability is prime. Its product line includes beams and bearers which span between two or more points to create a supporting structure for horizontal formwork, column formwork in respect of columns of all shapes and sizes, both horizontal and vertical formwork as well as modular scaffolding systems.
- [12] Form-Scaff customers will often provide it with construction plans that have been prepared by engineers and architects. Form-Scaff then assess the requirements of the customer for purposes of designing the most effective formwork solution for the project involved which often consist of a combination standard and specialised products which are manufactured and supplied by Form-Scaff.
- [13] On 26 April 2017, Ms Sack entered into a contract of employment with Doka appointing her as a Region 1 Sales Manager reporting to the Managing Director of Doka. At the same time Ms Sack concluded the restraint agreement with Doka. In terms of the restraint agreement, Ms Sack agreed that for a period of 24 months from the date on which she ceased, for whatever reason, to be an employee of Doka, she would not be employed by a competitor or solicit customers of her erstwhile employer within the restraint territory and that she would not disclose confidential information relating to its business.
- [14] The restraint agreement states that the restraints '*shall endure also in favour of the successor-in-title*', being any person who acquires the business or the goodwill of the business operated by Doka. On 1 August 2019, Form-Scaff acquired the business of Doka in terms of a written business transfer agreement. Ms Sack's employment was transferred to Form-Scaff with effect

from 1 August 2019 in terms of section 197 of the Labour Relations Act⁴ (LRA), with the result that the rights and obligations between Doka and Ms Sack continued in force as if they were rights and obligations as between Form-Scaff and Ms Sack.

[15] On 15 November 2019, Ms Sack tendered her resignation from Form-Scaff, with her last day of employment being 31 December 2019, in order to commence employment with Peri. It is common cause that Peri's business is identical to that of Form-Scaff in every respect and is its major competitor.

[16] Ms Sack seemingly concedes that her employment with Peri will constitute a breach of the restraint agreement. Also, she seems to accept that she has a particularly strong customer connection with the customers of the business operated by Form-Scaff and also that she had access to information which is of a nature that constitutes confidential information

[17] Notwithstanding, Ms Sack's main defence is that she and Form-Scaff concluded a new contract of employment in September 2019 which did not contain restraint undertakings. Mr Lerm submitted that the essence of the new contract of employment is that it superseded the Doka contract of employment and the ancillary restraint agreement. Alternative to this defence, Ms Sack staged a lukewarm attack on the reasonableness of the restraint agreement.

Has the restraint of trade agreement been superseded by the new contract of employment ?

[18] It is trite that a party seeking to enforce a contract in restraint of trade is required to invoke the restraint agreement and prove a breach thereof. Forthwith, a respondent who seeks to avoid the restraint bears an onus to demonstrate, on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable.⁵

⁴ Act 66 of 1995 as amended.

⁵ See: *Experian South Africa (Pty) Ltd v Haynes and Another* 2013 (1) SA 135; *Basson v Chilwan and Others* 1993 SA 742 (A) at 7761I-J; *Magna Alloys and Research (SA) (Pty) Ltd v 486 (SCA)* at [10] to [14], pp 493E/F to 496D; *Sibex Engineering Services (Pty) Limited v Van Wyk and Another* 1991 (2)

[19] In the present case, Ms Sack takes no issue with the fact that she concluded the restraint agreement, albeit with Doka, and that she intends to take up employment with Peri, which is a direct competitor of Form-Scaff. She further accepts that Form-Scaff stepped into Doka's shoes when the transfer of business agreement was concluded and as such will be entitled to enforce the restraint of trade undertakings against her unless the restraint of trade agreement is terminated.

[20] Ms Sack accordingly contends that the restraint agreement was terminated when she and Form-Scaff subsequently concluded the new employment contract and that such contract contains no restraint of trade undertakings.

[21] To the extent that Ms Sack's defence is premised upon novation, it is important that I deal with this aspect. The SCA succinctly expounded the principle of novation in *National Health Laboratory Service v Lloyd-Jansen van Vuuren*.⁶ It was stated that:

'[15] ...There is a presumption against novation because it involves a waiver of existing rights. When parties novate they intend to replace a valid contract with another valid contract. In determining whether novation has occurred, the intention to novate is never presumed. In *Acacia Mines Ltd v Boshoff*,⁷ the court held that novation is essentially a question of intention.

[16] In *Proflour (Pty) Ltd & another v Grindrod Trading (Pty) Ltd t/a Atlas Trading and Shipping & another*⁸ the court, when determining whether the agreement resulted in a novation, referred to the decision of *Electric Process Engraving and Stereo Co v Irwin* 1940 AD 220 at 226-227 where the court said:

SA 482 (T) at 502D-F; *IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Tarita and Others* 2004 (4) SA 156 (W) at 167 B-C; *IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Hall (aka Baghas) and Another* 2004 (4) SA 174 (W) at 178E-F, para [17]; *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 406 (SCA); *Den Braven SA (Pty) Ltd v Pillay and Another* 2008 (6) SA 229 (D).

⁶ [2015] ZASCA 20; 2015 (5) SA 426 (SCA) at paras 16 to 17.

⁷ *Acacia Mines Ltd v Boshoff* 1958 (4) SA 330 (A) at 337D.

⁸ *Proflour (Pty) Ltd and Another v Grindrod Trading (Pty) Ltd t/a Atlas Trading and Shipping and Another* [2010] 2 All SA 510 (KZD) at para 10.

‘The law on the subject was clearly enunciated as far back as 1880 in the well-known case of *Ewers v The Resident Magistrate of Oudtshoorn and Another*, (Foord) 32, where DE VILLIERS, C.J, said: “The result of the authorities is that the question is one of intention and that, in the absence of any express declaration of the parties, the intention to effect a novation cannot be held to exist except by way of necessary inference from all the circumstances of the case.”’

It follows that in order to establish whether novation has occurred, the court is entitled to have regard to the conduct of the parties, including any evidence relating to their intention.’

[22] In *Swadif (Pty) Limited v Dyke NO*,⁹ it was stated that:

‘In our law there are two forms of novation, namely novation *voluntaria* and novation *cessaria*. Novation *voluntaria*, voluntary novation, has its origin in contract. In this sense, it is essentially a matter of intention and consensus. When parties novate they intend to replace a valid contract by another valid contract.’

[23] In the absence of an express agreement to novate, the intention to do so will only be inferred; firstly, where the terms of the new arrangement are inconsistent with the continued existence of the original right; and secondly, where the admissible evidence as to the circumstances in which the new arrangement was made lead to the necessary inference that the parties intended that the original right should be novated and be replaced by the new.¹⁰

[24] In a nutshell, the requirements for a successful defence of novation are neatly summarised in *Barclays National Bank Ltd v Smith*¹¹ as follows:

- ‘(a) the onus of proving novation rests on the person alleging novation...;
- (b) the intention to novate is never presumed...;
- (c) the question is one of intention and that, in the absence of any express declaration of the parties to effect novation can’t be held to exist except

⁹ 1978 (1) SA 928 (A) at 940G.

¹⁰ See: *French v Sterling Finance Corporation (Pty) Ltd* 1961 (4) SA 732 (A) at 736D-H.

¹¹ 1975 (4) SA 675 (D) as follows at 683B-D

by way of the necessary inference from all the circumstances of the case...; and

(d) the circumstances of the case ...include the conduct of the parties...'

[25] In the present matter, there is no express declaration of the parties to effect novation to the restraint agreement. I am unable, on the facts before me, to infer from the circumstances of the case, that the parties intended to do so. I also find nothing in the conduct of the parties that points to that direction.

[26] It is common cause that Ms Sack had concluded two separate agreements with Doka; a contract of employment and, independently, the restraint of trade agreement. As correctly submitted by Form-Scaff, the contract of employment dealt with matters pertaining to rights and obligations of parties during the currency of the employment relationship. Whilst, the restraint agreement deals with post-employment obligations aimed at protecting the goodwill of the business.¹²

[27] It is also not disputed that Form-Scaff would not have concluded the purchase of the business of Doka without the restraint undertakings of, *inter alia*, Ms Sack.¹³ Clearly, when Form-Scaff purchased the business of Doka it obtained restraints of trade for the protection of the goodwill of the business together with the ability to enforce them.¹⁴

[28] The new contract of employment concluded between Form-Scaff and Ms Sack specifically replaces only the Doka employment contract. The phrase in the new contract of employment relied on by Ms Sack states:

'...this letter sets for your employment effectively from 1 October 2019 and supersedes any other employment contract you signed previously'.
(Emphasis added).

¹² See: *Reeves v Marfield Insurance Brokers CC* 1996 (3) SA 776 (A); see also: *Protea Technology Ltd and Another v Ridder and Another*, an unreported decision of this Court under case number J305/17 per van Niekerk J.

¹³ See: Founding Affidavit, paras 43 and 44; and Answering Affidavit, paras 49 to 51.

¹⁴ See: *Botha and Another v Carapax Shadeports (Pty) Ltd* 1992 (1) SA 202 (A).

[29] There is no indication that in so doing, the additional, post-employment rights contained in the restraint agreement are in any way disturbed. As such, Ms Sack's submission that this phrase should be understood to mean that the Doka contract of employment and restraint agreement are superseded by the new contract of employment is untenable. What is clear, however, is that the parties expressly replaced the Doka employment contract with the new employment contract.

[30] I am, therefore, satisfied that there is no basis to infer that Form-Scaff in any way waived any of the rights to the restraint agreement. Being mindful that novation is not to be presumed, I conclude that Ms Sacks failed to discharge the onus on her to establish that the restrain agreement was novated.

[31] In the light of the demise of Ms Sacks defence of novation, Form-Scaff has invoked the restraint agreement on which it relies and proved the necessary breach thereof.

Is the restraint of trade agreement enforceable?

[32] Ms Sack bears the onus to demonstrate on a balance of probabilities that the restraint is unreasonable and therefore unenforceable. In turn, the reasonableness of a restraint agreement is determined with reference to public policies that enjoin parties to abide by the contractual obligations and the constitutional right to freely choose a trade, occupation, or profession and to practice such.¹⁵ Therefore, for a restraint agreement to be reasonable and enforceable, it must serve to protect an interest, which, in terms of the law, requires and deserves protection.¹⁶ The principles are trite and it is not required to restate them. What follows becomes apparent when applying those principles to the issues at hand in this application.

Customer Connections

¹⁵ Christie, the Law of Contract in South Africa, 6th Edition, p 554; see also *Labournet (Pty) Ltd v Jankielsohn and Another* [2017] 5 BLLR 466 (LAC); (2017) 38 ILJ 1302 (LAC) at para 39.

¹⁶ *Labournet supra* at para 41; *Experian South Africa (Pty) Ltd v Haynes and Another* [2012] (2013) 34 ILJ 529 (GSJ) at paras 12 to 19; *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 7761 I-J; *Aqatan (Pty) Ltd and Aquatan (Pty) Ltd v Janse Van Vuuren and Another* [2017] ZALCJHB 141; (2017) 38 ILJ 2730; *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA); *Ball v Bambalela Bolts (Pty) Ltd and Another* (2013) 34 ILJ 2821 (LAC).

[33] Ms Sack concedes that she acted as the interface between Form-Scaff and Doka prior to the takeover, and its customers as she would personally call upon the customers for whom she had a sales responsibility and as such developed a close working relationship with the key decision makers at these customers. She further concedes that key to securing Form-Scaff's customers is the ongoing relationship that had been forged between her and these customers. It is also instructive that Ms Sack was specifically identified as one of the key employees to Doka's business that could play an important role in growing the business further. That, according to Form-Scaff, was one of the incentives behind the purchase of the business of Doka and securing Ms Sack's employment.

[34] In essence, Ms Sack acknowledges that the forging, preserving and maintaining of relationships between Form-Scaff and its customers is pivotal to its survival. Still, her defence is that by virtue of the economic downturn, pricing will ordinarily be more important in most instances than customer connections.

[35] Ms Sack clearly misconceived the probe. In *Den Braven SA (Pty) Ltd v Pillay and Another*,¹⁷ referred to by Form-Scaff, it was stated that:

'It is not in my view necessary for an applicant in this situation to winnow the wheat of trade connections and customer contact from the chaff of other factors that may influence purchasing decisions. It suffices for the applicant to show that trade connections through customer contact exist and can be exploited by the former employee if employed by a competitor.' (Emphasis added)

[36] The fact that more than 80% of Ms Sack's time was spent on the Msikaba River Bridge Project, which tenders had already been awarded, and that she has since handed over her work in respect thereof is of no consequence. She readily conceded that she had access to all of Doka's main customers, who are now Form-Scaff customers, including Concor whose recent form order pertains to the Msikaba River Bridge Project.

¹⁷ 2008 (6) SA 229 (D) at 240H.

[37] I am satisfied that there exist trade connections through the customer contact and that they could be exploited by Ms Sack to the benefit of her new employer, Peri. Form-Scaff's interests in being able to maintain its existing customer connections in this regard are worthy of protection.

Confidential information

[38] Ms Sack made crucial admissions pertaining her role in coordination of projects from inception to completion, including preparation of tenders, proposals and quotations. She had also possession of Form-Scaff's technical drawings, sketches, formwork solutions, temporary works designs which would be prepared for each project and the pricing information on all projects she was working on. As Sales Manager, she was privy to Form-Scaff sales strategies.

[39] Ms Sack also concedes that she did have influence in respect of the setting of prices and accordingly influence profits, albeit, with the limited scope of authority. Given her defence that by virtue of the economic downturn, pricing is more crucial, Form-Scaff correctly submitted that her access to its confidential information, including the pricing structure is even more crucial.

[40] In *Reddy v Siemens Telecommunications (Pty) Ltd*,¹⁸ the SCA, ceased with a similar matter, stated that:

'[20] ...Reddy will be employed by Ericsson, a "concern which carries on the same business as [Siemens]" in a position similar to the one he occupied with Siemens. His loyalty will be to his new employers and the opportunity to disclose confidential information at his disposal, whether deliberately or not, will exist. The restraint was intended to relieve Siemens precisely of this risk of disclosure.

In these circumstances the restraint is neither unreasonable nor contrary to public policy. I agree with the remarks of Marais J in *BHT Water*:

¹⁸ 2007 (2) SA 406 (SCA) at para 20. See also: *International Executive Communications Ltd t/a Institute for International Research v Turnley and Another* 1996 (3) SA 1043 (W) at 1055E–1057A, quoted with approval in *Reddy*.

"In my view, all that the applicant can do is to show that there is secret information to which the respondent had access, and which in theory the first respondent could transmit to the second respondent should he desire to do so. The very purpose of the restraint agreement was that the applicant did not wish to have to rely on the bona fides or lack of retained knowledge on the part of the first respondent, of the secret formulae. In my view, it cannot be unreasonable for the applicant in these circumstances to enforce the bargain it has exacted to protect itself. Indeed, the very ratio underlying the bargain was that the applicant should not have to content itself with crossing its fingers and hoping that the first respondent would act honorably or abide by the undertakings he has given. In my view, an ex-employee bound by a restraint, the purpose of which is to protect the existing confidential information of his former employer, cannot defeat an application to enforce such a restraint by giving an undertaking that he will not divulge the information if he is allowed, contrary to the restraint, to enter the employment of a competitor of the applicant. Nor, in my view, can the ex-employee defeat the restraint by saying that he does not remember the confidential information to which it is common cause that he has had access. This would be the more so where the ex-employee, as is the case here, has already breached the terms of the restraint by entering the services of a competitor.' (Emphasis added)

[41] Clearly, Ms Sack had access to confidential information and whether or not she remains in possession of it is inconsequential.

Restraint territory and period

[42] The only remaining issues are the reasonableness of the restraint territory and the period thereof. Ms Sack asserts that that it would be unfair situation if she is rendered economically unproductive for a period of 24 months. However, she does not proffer any explanation as to why she would not be in a position to find any other employment with her skills.

[43] Also, as correctly submitted by Form-Scaff, Ms Sack is not prohibited from taking up employment in her chosen vocation provided only that she does not do so for a direct competitor within the provinces of Gauteng, KwaZulu-Natal and the Western Cape. She, therefore, remains able to be gainfully employed outside of these provinces in the same industry. I am not convinced that the restraint territory is overbroad as she is free to venture into other provinces.

[44] Ms Sack is disingenuous in her submission that Form-Sack seeks to enforce a restraint agreement for the period of 24 months where, on its own version, an employee only has three months' worth of know-how in respect of its business operations. Even if Form-Scaff changed its pricing guideline three months before her resignation, the crux of the matter is that that information, *inter alia*, is confidential and would be useful in the hands of the competitor. Also, Form-Scaff's interests in being able to maintain its existing customer connections in this regard are worthy of protection for the full period of 24 months.

Urgency

[45] It is generally accepted that enforcement of the restraint of trade agreement is inherently urgent. There is no need to overly deliberate on this issue as, having read the papers before me, I am satisfied that the matter is urgent and have treated it as such.

Conclusion

[46] In all the circumstances, the restraint agreement is neither unreasonable nor contrary to public policy.¹⁹ Accordingly, the requirements for the grant of a final interdict have been met. Form-Scaff has successfully demonstrated that it has a clear right which has since been breached by Ms Sack's acceptance of employment with Peri, its competitor, the very breach is 'an injury actually committed or reasonably apprehended' and that there is no other appropriate remedy than to hold Ms Sack to her contractual undertakings.²⁰

Costs

¹⁹ See *Experian South Africa supra* at para 19; and *Reddy supra* at para 20.

²⁰ *Reddy supra* n 18 at para 22.

[47] This Court has a wide discretion in awarding costs with principles of law and fairness serving as guides. In this matter I can find no reason both in law and fairness why costs should not follow the result, including the costs of two counsel.

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

Order

1. This application is heard as one of urgency and the applicant's non-compliance with the normal time limits in relation to service is condoned.
2. The first respondent is interdicted and restrained for a period of 24 months calculated from 1 January 2020:
 - 2.1 From resuming employment with the third respondent and from rendering services to the third respondent as an employee or in any like capacity.
 - 2.2 From directly or indirectly being engaged in, concerned with, interested in as a proprietor, shareholder, member, partner, consultant, manager, employee, agent, representative, advisor, or any other capacity with any business, person, company, close corporation, partnership, trust, body corporate, association or other legal entity within geographical boundaries of Gauteng, Kwa-Zulu Natal and Western Cape that conducts or carries on the business of the applicant or that trades in any business similar thereto.
 - 2.3 From enticing away any clients of the applicant or inducing them to terminate or restrict their business relationship with the applicant in any way.

3. The first respondent is restrained and interdicted from using the confidential information of the applicant, whether directly or indirectly, for her own benefit or for the benefit of any other person other than the applicant.
4. The first respondent shall pay the applicant's costs including the costs of two counsel.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Advocate C Whitcutt SC

Instructed by: Fluxmans Attorneys

For the Respondent: Advocate JM Lerm

Instructed by: Hurter Spies Incorporated

LABOUR COURT