IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 11014/2022
REPORTABLE: YES
OF INTEREST TO OTHER JUDGES: YES
REVISED.
13 May 2022

In the matter between:
KIRON INTERACTIVE (PTY) LTD Applicant
and

AMBANI GERALD STANLEY NETSHISHIVHE Respondent

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be 13 May 2022.

JUDGMENT

MALINDI J:

Introduction

[1] The Applicant seeks an order interdicting and restraining the Respondent from:

> "2.1 taking up employment with any direct or indirect competitor of the Applicant within the virtual sports betting industry and/or from directly or indirectly carrying on business in the virtual sports betting industry in competition with the Applicant;
>
> 2.2 Directly or indirectly, using the confidential information of the Applicant for his own benefit or for the benefit of any third party;

2.3 Disclosing and/or publicising or permitting to be disclosed and/or publicised, whether directly or indirectly, any of the Applicants confidential information.

2.4 Soliciting, interfering with or enticing or attempting to entice away from the Applicant any clients of the Applicant.

2.5 Soliciting, interfering with, or enticing or attempting to entice away from the Applicant any of the Applicant's staff.

2.6 Carrying on, assisting, be connect with, or interested in, directly or indirectly, in any capacity whatsoever, in any trade or business within the virtual sports betting industry.

2.7 Selling virtual sports software on behalf of any alternative and competing supplier of the Applicant.

3. That the above restraint operates for a period of 12 months from the date of grant of this order and in South Africa, East Africa and specifically Kenya, Tanzania, Ethiopia, South Sudan, Rwanda, Burundi, the democratic Republic of Congo and Malawi.

4. Alternatively, to paragraph 2 and 3 above, granting the relief sought in paragraph 2 and 3 above as interim relief pending mediation alternatively arbitration proceedings to be commenced by the Applicant against the Respondent for substantially the same relief sought in paragraph 2 and 3 above, including a possible claim for damages, and which proceedings to be commenced within 30 days of the date of this order.

5. That the Respondent be directed to pay the costs of this urgent application on the attorney and client scale."

[2] The Applicant further seeks an order to strike out certain allegations against it contained in the Respondent's answering affidavit.

[3] The Respondent has raised two preliminary points and the Applicant has given notice of an application to strike out certain matter. I deal with these applications first, having traversed the merits of the whole application.

Application to strike out in terms of Rule 6(11) and (15)

[4] On 27 March 2022 the Applicant gave notice of application to strike out paragraphs 3, 6, 7, 8 and 9. The application is opposed.

[5] Subrule (15) provides that:

> "The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court shall not grant the application unless it is satisfied that the Applicant will be prejudiced in his case if it be not granted."

[6] The matter or allegations sought to be struck out are not answers to the Applicant's allegations. On their face, they are scandalous, defamatory or made recklessly without any substantiation. They are prejudicial to the Respondent and should not be allowed in the public domain unless substantiated or form part of a cause of action against the Respondent.[1]

Hearsay evidence of Dieg Mavambu and Ashalin Pounasamy

[7] The hearsay evidence of these witnesses is admitted on the basis that appropriate weight will be attached to it, having assessed the probabilities of the evidence as a whole.

Deponent to the founding affidavit's authority

[8] The Respondent challenges the deponent to the founding affidavit's authority to depose and act on behalf of the Applicant. He does so on the basis that the

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1 *Vaatz v Law Society of Namibia* 1991 (3) SA 563 (NM).

deponent's authority was given after the Applicant disputed his authority in terms of Rule 7(1).

[9] This matter has been resolved in the case of *ANC Umvoti Council Caucus and Others v Umvoti Municipality*[2] which held that a litigant has authority, or does not need authority to prosecute their case. It is the attorney who requires authority to act on behalf of a party and that such authority may be provided after their authority has been disputed.[3] A string of SCA judgments have endorsed the judgment of Flemming DJP in *Eskom v Soweto City Council*[4] to this effect.

Background

[10] The Applicant was established in 2001 and claims to be a tier one provider in the virtual sports betting industry. Its products are found on popular websites such as Betway and Hollywood Bets. Its products are branded Jika Sports. The Applicant alleges that it is a front runner and market leader in virtual sports betting in the African market, including the South African and East African markets. It has a client base in 32 African countries and over 52% of its revenues are generated on the continent.

[11] As to the fierce competition between it and Global Bet the Applicant states:

> "27. As a result of the niche and specialised global virtual sports betting market, the competition between the suppliers such as the Applicant and Global Bet is constant and fierce, and the state of technology software and content is constantly being advanced. Any edge which a competitor can lawfully and skilfully gain over another is critical to obtain market share and ultimately distinguish itself from its competitors, and thus maximise profits." [added emphasis]

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2 2010 (3) SA (KZP) at [27].
3 See also *Moosa and Cassim NNO v Community Development Board* 1990 (3) SA 175 (A).
4 1992 (2) SA 703 (W).

[12] The Applicant employed the Respondent on 31 August 2018 as East Africa account manager. The terms of the employment contract were, among others, that:

> "29.4 The Respondent will use his best endeavours to conduct, improve, extend, develop, promote, protect, and preserve the business interests, reputation, and goodwill of the Applicant and carry out his duties in a proper, professional, loyal, and efficient manner."

[13] It was agreed between the parties that the Respondent will use the Applicant's confidential information only in the interests of the Applicant and only in the proper course and scope of his duties under the agreement. He would utilise information for his own benefit or for the benefit of any third party which he has acquired independently of the performance of his duties for the Applicant.

[14] According to the Applicant, the Respondent bound himself for a 12 months' period from the termination date that he will not directly or indirectly be employed by any person or entity within the virtual sports industry, or have an interest, direct or indirectly, in any capacity in any trade or business within the industry. In short, he would not conduct or be interested in any business within the industry.

[15] On 26 January 2022 the Respondent tendered his resignation with effect from 28 February 2022. The question is therefore whether the alleged 12 months restraint binds him.

<u>Respondent's employment by Global Bet</u>

[16] Upon having established that the Respondent was employed by Gobal Bet, the Applicant requested the Respondent to provide an undertaking that he will immediately resign from Global Bet and comply with the restraint agreement in regard to any other future employment on 18 March 2022.

[17] The Applicant's apprehension is that:

> "63. If the rival competitor was to come into possession of such confidential information, this would mean that its confidential information may be used to

out manoeuvre the Applicant unlawfully, in unlawful competition with the Applicant. In this instance, the Respondent employment with Global Bet (which is already a breach of the employment agreement and restraint) will give rise to this scenario."

[18] What distinguishes the Applicant from Global Bet and what the Respondent had access to are set out in paras 54 and 55 of the founding affidavit as follows:

"54. Importantly, the Respondent had access to the licensing arrangements and content regarding a derivation of virtual sports using real football clips with a product called Soccerbet. Global Bet does not have such a product. This product gives Kiron a significant edge in the East African market. The Respondent knew the detail behind and the importance of the delivery of a unique product such as this.

54.1 The detail on what gave the Applicant the edge, especially some of the licensing arrangements with the suppliers of certain content to the Applicant, is sensitive and confidential. …

55. The first Respondent also had access to:

55.1 all the Applicants' budgets and worked specifically with the budget for Africa.

55.2 all other financial information of the Applicant's financial spend in Africa, including the turnover and revenue.

55.3 the Applicants and its client's revenue by territory (i.e.: Africa). ...

55.4 the Applicants' products and technology (i.e.: virtual sports games) and...

55.5 customer proprietary information…provided by the Applicant's customers to the Applicant for the purpose of developing the software, games,

and necessary strategy for the implementation of the Applicant's product not only on the client's platform, but also within that specific territory...

55.6 the technology and software of the games, how the technology and software would be used and how the technology and software would be deployed. ...

55.7 sales and marketing strategies, how the technology would be sold, into which markets, at what price and the strategy for implementing the products into different areas. This information would in the ordinary course be geared towards a specific client and/or region and is based on the research and development conducted by the Applicant.

55.8 all the sales and marketing materials and strategies of the Applicant."

[19] The Respondent confirms that he was employed by the Applicant, first on probation on 1 December 2017, and on a permanent basis thereafter. He denies having signed the contract containing the restraints, averring that he availed himself as a "take me or leave me" employee in his resistance to the restraint while negotiating a permanent contract.

[20] The Respondent denies the signature on the contract and points out discrepancies in the dates relating to the purported date of signature in August 2018 and commencement date of permanent employment as 1 December 2017 whereas his probation had commenced on 1 December 2017 and ended on 31 May.

[21] The Respondent disputes that his position at Global Bet places him where he would potentially use the Applicant's confidential information. He states:

"12. It is untrue that working for Global Bet automatically puts me in a position to disclose any confidential information of the Applicant even if I wanted. I feel the Applicant is questioning my integrity and sincerity. This is because my expertise and employment with Global Bet is not in sales which is where the Applicant harbours great fears; but it is in account management

which has nothing to do with disclosing confidential information of the Applicant."

[22] In reply the Applicant denies this assertion. It points to the position that the

Respondent holds Global Bet as Account Manager, exactly the same as at the Applicant's employ.

[23] The dispute concerning the existence of the contract of employment and/or any aspects thereof is subject to adjudication in terms of clause 20 thereof. This dispute was spelt out in the answering affidavit on 24 March 2022. In the replying affidavit filed on 25 March 2022 the Applicant responds to the allegation that the Respondent did not sign Annexure "SS1", that is, the employment contract. Its explanation is that after the expiry of the fixed term probation period a new contract had to be entered into but that this was only formalised on 31 August 2018. This contract was then made with effect from 1 December 2017 in order to incorporate the probation period as is the norm with confirming the permanent employment of a probationary employee.

Analysis

[24] The Respondent's denial of the signed contract of employment is contrived. It is not a genuine dispute as envisaged in *Luna Meubel Vervaardigers (Edms) Bpk v Makin and another (t/a Makin's Furniture Manufacturers)*[5]. His contention is that because the contract was only signed more than two months after he commenced permanent employment and his surname is wrongly spelt and then amended by *"inserting"* the missing *"shi"* above the signature, it demonstrates a fraud committed by the Applicant. This contention fails in the face of a production of the probation contract signed by him which contradicts the one not signed by him and annexed to his papers. Similarily, there is a plausible explanation why the permanent contract was only signed two months after his commencement of permanent employment. This was occasioned by the exchange of drafts and the

5 1977 (4) SA 135 (W).

remissness of the Applicant's managers. The fact that his surname was misspelt takes his case not far. Had the Applicant wished to produce a fraud it would have produced a "properly signed version of the contract and would have assigned it a date coinciding with the commencement date. I am conscious of the fact that the Respondent was coy when questions were put to him about whether he was aware of the restraint clause in his employment and did not provide responses. His reaction sought to avoid answering these questions to his detriment.

[25] The Applicant has established a *prima facie* right, though open to some doubt.[6] I have dealt with what the Applicant says distinguishes it from Global Bet above. It is a narrow scope (though technologically important to the Applicant) of the virtual sporting industry as described by the Applicant. As also stated above, *"sensitive and confidential"* information referred to in paragraph 54.1 of the founding affidavit could not be responded to by the Respondent until it is provided. Such evidence requires a proper and fuller examination through oral evidence by this Court or other mechanisms agreed to by the parties for dispute resolution where such process will not prejudice any of the parties. The arbitration process will therefore resolve any dispute whether the Respondent's position at Global Bet is identical to the one he held at the Applicant's and whether the information referred to is confidential and therefore protectable. In view of the order that I impose below, the mediation, alternatively arbitration process must be proceeded with expeditiously.

Urgency

[26] The Applicant avers that it only confirmed on 16 March 2022 that the Respondent has taken employment with Global Bet although it had suspected from that he was taking new employment elsewhere since 3 February 2022 and had confirmed this on 28 February 2022. The Applicant had also established on 2 March 2022 that Global Bet was the intended employer but needed time to confirm this, and did so only on 16 March 2022.

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6 *Webster v Mitchell* 1948 (1) SA 1186 (W).

[27] The Applicant submits that it acted expeditiously from 16 March 2022 by preparing its application over the weekend for the matter to be heard on 29 March 2022.

[28] On 17 March 2022 the Respondent had failed or refused to give an undertaking that his new employer was not the Applicant's direct competitor.

[29] This scenario, considered together with the principle expenses in *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another*[7] that applications for the enforcement of restraints of trade have an inherent degree of urgency, meets the requirements for this matter to be heard as a matter of urgency. Failure to do so would serve to defeat the Applicant's right to restraint the Respondent before a significant lapse of the restraint period that it claims applies and would not be reasonably easily able to claim damages as damages in these matters are not susceptible to easy calculation.

[30] I find that this matter must be heard urgently as the Applicant will not get substantial redress in the ordinary course if it is successful therein.

Conclusion

[31] I have come to the conclusion that the Respondent's preliminary points stand to be dismissed and that the Applicant's application to strike out be upheld. I have also come to the conclusion that the Applicant is entitled to interim, not final relief.

[32] Therefore I make the following order:

1. That the Applicant's non-compliance with the Honourable Court's rules in respect of the time periods and service be condoned, that such rules be dispensed with and that this application is enrolled as an urgent application in terms of Uniform Court Rule 6(12).

2. The Respondent is interdicted and restrained from:

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7 2009 (3) SA 78 (C) at 88J.

2.1. taking up employment with any direct or indirect competitor of the Applicant within the virtual sports betting industry and/or from directly or indirectly carrying on business in the virtual sports betting industry in competition with the Applicant;

2.2. directly or indirectly, using the confidential information of the Applicant for his own benefit or for the benefit of any third party;

2.3. disclosing and/or publicising or permitting to be disclosed and/or publicised, whether directly or indirectly, any of the Applicants confidential information.

2.4. soliciting, interfering with or enticing or attempting to entice away from the Applicant any clients of the Applicant:

2.5. soliciting, interfering with, or enticing or attempting to entice away from the Applicant any of the Applicant's staff.

2.6. carrying on, assisting, be connected with, or interested in, directly or indirectly, in any capacity whatsoever, in any trade or business within the virtual sports betting industry.

2.7. selling virtual sports software on behalf of any alternative and competing supplier of the Applicant.

3. That the above restraint operates for a period of 12 months from the date of grant of this order and in South Africa, East Africa and specifically Kenya, Tanzania, Ethiopia, South Sudan, Rwanda, Burundi, the democratic Republic of Congo and Malawi.

4. Alternatively, to paragraph 2 and 3 above, granting the relief sought in paragraph 2 and 3 above as interim relief pending mediation alternatively arbitration proceedings to be commenced by the Applicant against the Respondent for substantially the same relief sought in paragraph 2 above, including a possible claim

for damages, and which proceedings to be commenced within 30 days of the date of this order.

5. That the Respondent be directed to pay the costs of this urgent application on the attorney and client scale.

G MALINDI
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

FOR THE APPLICANT:	Adv. BSW Marais
INSTRUCTED BY:	Trever Jaggard Attorneys
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INSTRUCTED BY:	Ratshibvumo Attorneys Inc
DATE OF THE HEARING:	29 March 2022
DATE OF JUDGMENT:	13 May 2022