IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 055430/2022

DATE: 2022-12-23

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
DATE 25 January 2023
SIGNATURE

In the matter between

TAX CONSULTING SA	First applicant
XPATWEB (PTY) LTD	Second applicant
TCSAS GROUP SERVICES(PTY) LTD	Third applicant
and	
MOEKETSI PERCY SEBOKO	First respondent
MS IMMIGRATION ADVISORY SERVICES	Second respondent

J U D G M E N T

YACOOB J: The applicant approaches this Court on an urgent basis to enforce a restraint of trade clause that is contained in the employment agreement between the first applicant and the first respondent.

The first respondent, having left the employ of the first applicant, went into business and the second respondent is the company through which the first respondent carries out that business. It is not in dispute that the first respondent does the same kind of work that he did when he was employed for the first applicant. It is also not in dispute that the contract at issue contains a restraint clause. The respondents contended that the matter was not urgent. However, I found that it was urgent because the applicants did not delay upon finding out that the first respondent had been in contact with their clients.

The founding affidavit sets out certain client lists as the clients of the second and third applicants and seeks to enforce the restraint against the first and second respondents by interdicting them from being in contact with these named clients. This is in terms of clause 13, which at 13.2.3.3 prevents any contact, or approach, or advice to any prescribed client or customer by the employee. A prescribed client or customer is defined in the agreement as a person who is or was a client or customer of the employer during, before, and during any part of the employment, any person who was a prospective client or customer of the employer at the time of termination of the employment relationship or within one year preceding the termination, and who purchased or acquired services from the employer

within a period of one year before termination, and also to whom services were rendered by the employer within a period of one year preceding the termination date.

Paragraph 13.5 of the agreement says that the provisions of clause 13 shall apply in respect of any employment services rendered by the employee in respect of any entity contained within the group. The group is defined in the contract as the company and/or any of its current or future associated brands or entities for which the employee may be required to act on behalf of during the course of their employment.

It is common cause that even though the company is not a company but an individual trading as a sole proprietor, the company means the first applicant.

As far as the group is concerned, it was argued for the respondent that there is no group, firstly because the first applicant is not a holding company and therefore there is no group as defined in terms of the Companies Act, and also that because the second and third applicants are not mentioned by name in the contract, the contract could not have meant to restrain him insofar as those applicants are concerned.

I disagree with these contentions. In my view, the contract is perfectly clear that the group means associated brands or entities of the first applicant and if the first

applicant or the applicants are able to establish that they are associated entities, then the contract will apply and the restraint clause will apply in favour of the applicants against the respondents.

When the applicants discovered that the respondents were communicating with certain of their clients, they contacted him and asked him to refrain from doing so in accordance with his restraint. His response was to ask for a copy of the contract. He did not provide any undertaking within the time demanded by the applicants, and therefore the applicants brought this application.

The deponent to the founding affidavit makes the allegation that the three applicants are part of the group. In fact, that the second and third applicants are part of the group which is under the parentage of the first applicant, that the first applicant is the employer of all employees in the group, and that the first applicant has formed companies to render specific services as it expanded.

The allegation was also made that the deponent to the founding affidavit, Ms Jacobs, and Mr Botha, who is the proprietor of first applicant, between them own two thirds of the shares of the second applicant. There was no allegation regarding the shares of the third applicant. There was no documentary evidence or objective evidence annexed to the founding affidavit which supported these

allegations.

The respondent denies that he is bound as far as the second and third applicants are concerned. According to him, the first applicant was his employer. He did do work at the second applicant, but he was always employed by the first applicant, he was always paid by the first applicant, his contract was with the first applicant. As far as that goes, that is correct.

With regard to the allegations that the companies are part of a group, the respondent pointed out, in amplification of his denial, that the applicants do not even provide an organogram, let alone any other documentary evidence that they are in fact associated entities. In reply, the applicants again did not provide this evidence despite the fact that the question had been placed in dispute. Instead, once again, the applicant relies simply on affidavits of its employees. There are then three further affidavits which confirm the version in reply.

It was argued for the applicants that taking into account that the first respondent was employed by the first applicant, but immediately started work at the second applicant while he was paid by the first applicant, taking into account that the three applicants had the same principal place of business, which is an office park, that the first respondent had as his email signature the details of the

second applicant, that the first and second applicants both had secondary offices in George, and that, even though the first respondent brought clients in when he was employed by the first applicant, it was the second applicant who serviced the clients, the Court should find on the probabilities that the three applicants form part of a group.

However, it is not the norm to deal with probabilities in application proceedings. There is absolutely no reason why the applicants were not able to annexe objective documentary proof that they are in fact associated entities, for example, showing that Mr Botha is the shareholder or majority shareholder in the two companies, or something along those lines. It did not have to be that the first applicant by name should be reflected in those documents because, in any event, the first applicant is not a juristic person, but Mr Botha certainly should have been. There is no reason why an organogram could not have been produced. It simply was not done, and the Court is asked to take the say-so of the deponents to the various affidavits.

Even though these affidavits are obviously under oath, and therefore it is their say-so under oath, that is not sufficient. If that were the case, there would never be any need for anyone to annexe anything to an affidavit and a Court would simply have to weigh up the say-so of one person under oath in an affidavit against the say-so of

another person under oath in an affidavit without the benefit of any cross-examination. That is obviously not how motion proceedings work.

I do not find that the respondents' denial is something that is outside the realms of belief such that it may be rejected even though these are motion proceedings, particularly as it is a common business practice to second employees to work at entities which may simply be clients and not necessarily related entities.

I therefore find that the applicants have not established to my satisfaction that the employment contract protects the second and third applicants insofar as they have not established that they are part of the group as defined. There is no relief sought protecting the interests of the first applicant.

For these reasons, the application is dismissed with costs.

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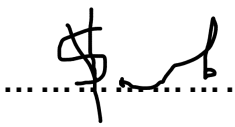

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YACOOB, J

JUDGE OF THE HIGH COURT

DATE OF JUDGMENT: 23 December 2022

DATE OF WRITTEN REASONS: 25 January 2023

Counsel for the applicants: Ms Swartz

Counsel for the respondent: Mr Mvubu