IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 85563/14

23/12/2014

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

2014 -12- 23

DATE SIGNATURE

In the matter between:

ACTOM (PTY) LTD	APPLICANT
and	
GERHARDUS STEPHANUS COETZER	1st RESPONDENT
ERB TECHNOLOGIES (PTY) LTD	2nd RESPONDENT

Coram: HUGHES J

JUDGMENT

Delivered on: 2014 -12- 23

Heard on: 17 December 2014

HUGHES J

1. This application came before me in the urgent court. The applicant seeks the order as appears in the notice of motion pages 1 and 2 of the indexed and paginated papers.

2. The applicant is a company with various divisions. One of these divisions is Actom Signalling Division. This specific division designs, manufactures and installs railway signalling equipment and turnkey systems covering train control systems, track side equipment, interlocking, remote control, automatic train routing and train management information. The Actom Signalling Division has four department's namely technical management, engineering management, manufacturing and contracts department.

3. The applicant went through a number of changes in respect of name and entities, be that as it may, the first respondent commenced employment with the with the applicant on 18 August 1971. The first respondent worked as a contracts manager, in the contracts department of the applicant, since its incorporation in 2008.

4. On 29 September 2014, the first respondent tendered his resignation citing that he intended to retire effective 1 November 2014. The applicant *"accepted with reluctance"* the first respondent's resignation. However, on 10 November 2014, he took up employment with the second respondent.

URGENCY

5. The applicant submitted it was entitled to bring this matter on an urgent basis and they had tried as best as they could to have the matter heard expeditiously. The applicant advanced that this matter dealt with the breach of a restraint of trade and breaches thereof were *"invariably of an urgent nature"* reference was made of **Advtech Resourcing t/a Communicate Personnel Group v Kuhn 2008(2) SA 375 at 378C-D**.

6. The applicant also argued that they had wasted no time in bring the matter to court, as they became aware of the breach on 17 November 2014 during a telephone conversation between Mr Nel, CEO of Actom EPC and Mr Sullivan

the managing director of the second respondent. They immediately instructed their attorneys on 18 November 2014 to seek an undertaking from the first respondent and as there was no response from the first respondent a letter was addressed to both first and second respondent, advising that an undertaking was sort from the first respondent by no later than 21 November 2014.

7. No undertaking was provided, thus during the week of 24 November 2014 to 28 November 2014 the applicant instructed its attorney to draft papers to move this application. A letter from the second respondent's attorneys was received on 1 December 2014 requesting copies of the documents that contained the restraint clauses. On 2 December 2014, the applicant served this application upon the respondent's with the matter placed on the roll for 17 December 2014.

8. The first and second respondents were to file their answering papers on 8 December 2014. In this instant, they did so on 9 December 2014. The respondents argued that on the facts of this matter the applicant has advanced a case that amounted to pure commercial urgency and as a general rule these case did not warrant this court deviating from the normal rules of court.

9. Further, that there was no difference whether one divulged trade secrets in a month or a year. The respondents took issue with the fact that it was in fact a month ago that the applicant discovered the fact that the second respondent employed the first respondent, if the matter was urgent they could have brought this application sooner.

10. I considered the submissions of both parties and I find that the matter is sufficiently urgent to be heard as such. To my mind, the applicant did bring the matter expeditiously to court and cannot be penalised for attempting to seek an undertaking from the respondents in order to avoid litigation. I cannot find that this matter is not urgent or that urgency in this instance was self-created. See **Stock and Another v Minister of Housing and Others 2007 (2) SA 9 (C) at 12I-13A.**

FACTS

11. The applicant is a subsidiary of Actom SA(Pty) Ltd ("Actom SA") which is a subsidiary of Actom Investment Holdings (Pty) Ltd ("Actom Investment Holdings") which was previously known as Main Street 646 (Pty) Limited. In the trust deeds relevant to this matter, the applicant is defined as an associate and subsidiary of Actom Investments Holdings.

12. As an incentive the applicant invited management employees to acquire units in a share trust, mentioned above, that was established. The first respondent became a member of the Alstom Founders Investor Secondary Trust in 2008 and a member of the Alstom Founders Investor Secondary Trust No 2 in 2011. In both trust the first respondent purchased and acquired notional shares in Actom Investments Holdings.

13. In respect to both trusts, the employees that acquired these shares had to sign Deeds of Adherence, which encompassed a restraint of trade undertaking. It is evident from the papers that the first respondent signed the first deed of adherence but did not sign the second deed of adherence.

14. According to the Deed of Adherence, the first respondent gave an undertaking that, whilst he is a beneficiary or represented by a beneficiary, and for a period of 24 months after he ceases to be a beneficiary or represented by a beneficiary, he will not compete with the group or be interested in any business which is similar to any of the fields of activity of each business within the group. The area of restraint would be applicable to every province of the Republic of South Africa and every territory in which the group had a place of business with a turnover of R100 000.00 or more, at the time and during the period of restraint.

15. The applicant contends that the respondent, by virtue of him being employed with the second respondent, a direct competitor, 10 days after he resigned, is in breach of the restraint contained in the Deed of Adherence signed.

ISSUES RAISED

16. I propose to deal with the *points in limine* raised by the respondents as well as the evidence advanced by the applicant in support of its application at the same time.

17. The point raised by the respondent's is that the trusts that exist in this instance are not valid. They submit that the first respondent is not a beneficiary of the trust; instead, it is rather the applicant. Mr *Pienaar*, for the respondents, argued that for a *stipulation alteri* to come to the fore there must be a beneficiary and the said benefiary is the third party for whom the benefit is created. This is not the case as the respondent's contend that the benefit is in fact for the applicant. As such, for the applicant to have *locus standi,* there must be an acceptance of the benefit by the applicant with notification of such acceptance being given to the first respondent. Further, the trust deeds do not provide for a gift over as such and in the absence of it, the trust deeds are void *ab initio.* These trust deeds thus contain a *nudum praeceptum* as such the trusts are flawed and fatally defective. In this case, the applicant proceeded by way of application instead of action. As there are disputes of fact regarding the validity of the trusts deed and the deeds of adherence, the applicant should have proceeded by action to obtain the final relief that it seeks.

18. Mr *Hollander*, for the applicant confirmed that the onus as regards the enforceability of the restraint trade undertaking lies with the applicant, whilst the respondents bear the onus to show that the restraint of trade was unreasonable and unenforceable.

19. There are two separate deeds of trust, likewise there are two deeds of adherence and both deeds of adherence are self-standing and separate from the deed of trusts. According to the applicant, the first respondent in terms of the deed of adherence undertakes to become and remain bound by the terms of the trust deeds.

20. *Hollander* argues that the applicant is a subsidiary of Actom SA, which in turn is a subsidiary of Actom Investment Holdings. Thus, the applicant is a subsidiary

of Actom Investments, which is referred to in the trust deeds as the Company, as defined in terms of Section1 as read with Section 3(1) (a) (ii) of the Company Act 71 of 2008. Actom Investment Holdings indirectly control the applicant, who owns all the shares in Actom SA, which is the applicant's holding company, with Actom Investment Holdings and the applicant having the same directors. Thus, the applicant is an associate of Actom Investment Holding as defined in the trust deeds.

21. If this is the case, the first respondent became an initial beneficiary of the trust deed in respect of Actom Investor Secondary Trust, as per annexure B of the trust deed. By signing the deed of adherence, the first respondent agreed to bind himself to the terms and conditions of the trust deed, becoming a beneficiary of the trust with an allocated of 12 181shares, which benefit he accepted.

22. The applicant has *locus standi* in respect of the Actom Investor Secondary Trust to enforce the restraint of trade undertaking. By signing the deed of adherence, the applicant's representative accepted the benefit conferred upon the applicant in terms of clause 2 of this deed of adherence. The applicant notified the first respondent on 20 November 2014 of its acceptance and it notified the first respondent when it provided him with copies of the trust deeds and by the service of this application.

23. The applicant submits that the trust in question are not *"bewind"* trust as suggested by the respondents because the gift over is to the trustees and a *nudum praeceptum* to the beneficiaries does not arise. In addition, the first respondent wanted his unit shares sold and they were sold at his request, the first respondent retained the money he received.

COMMON CAUSE FACTS

24. The second respondent, a competitor of the applicant, employed the first respondent as a contracts manager since 10 November 2014, which is the same position that he was in before he resigned from the applicant. The first respondent has breached the restraint of trade encompassed in the deeds of adherence, in that he is competing with the applicant and is interested in business, which competes with the applicant.

THE LAW

25. The principles governing the legal relationship between the parties in a *stipulation alteri* are explained in the cases set out below.

26. Ponnan AJA in the case of **Pieterse v Shrosbree NO & others 2005 (1) SA 309 (SCA) para [9] and [10]** said the following:

> "[9] In such a case, the policy holder (the *stipulans*) contracts with the insurer (the *promittens*) that an agreed offer would be made by the insurer to a third party (the beneficiary) with the intention that, on acceptance of the offer by that beneficiary, a contract will be established between the beneficiary and the insurer. What is required is an intention on the part of the original contracting parties that the benefit, upon acceptance by the beneficiary, would confer rights that are enforceable at the instance of the beneficiary against the insurer, for that intention is at the 'very heart of the *stipulatio alteri*' (Ellison Kahn 'Extension Clauses in Insurance Contracts' (1952) 69 *SALJ* 53 at 56). Thus the beneficiary, by adopting the benefit, becomes a party to the contract (see *Total South Africa (Pty) Ltd v Bekker NO1992 (1) SA 617 (A)* at 625D - G).
>
> [10] On the death of the insured, provided that the nomination has not been revoked during the insured's lifetime, any claim to the policy proceeds by the beneficiary against the insurance company would be based on the contract of insurance between the deceased and the insurance company. It is to the insurance company and no one else that the beneficiary would have to look for payment."

Mention is made of the case **McCullogh v Fernwood Estate Ltd 1920 AD 204 at 205-6** where Innes CJ said:

"With regard to the nature of contracts for the benefit of third persons Grotius has some illuminating remarks. In his Introduction (3.3.38) after discussing the rule of the Civil law that a stipulation in favour of another was invalid and enumerating the exceptions to that rule he proceeds: "But besides these exceptions, as equity is more regarded with us than legal subtleties, a third person may accept the promise and thus acquire a right, unless the promisor revokes the promise before such acceptance by such third person." In his subsequent work de Jure Belli et Pacis (Bk. 2. C. 11, par. 18), he deals more in detail with the circumstances under which a promise of this nature may be withdrawn. A distinction must be observed he says, between a promise made to me for the benefit of a third person, and a promise expressed directly in favour of such person (in ipsius nomen collatam cui res danda est). In the former case I having closed with the promise may hold the promisor to it, pending the decision of the third person. The promisor cannot revoke his undertaking, but I can in the meantime release him. In the latter case he thinks a further differentiation is necessary. For either the contracting party has authority - special or general - to accept the benefit or be has not. If he has, the transaction is complete and there can be no withdrawal; if he accepts without authority, then he cannot grant remission pending the decision of the third person for whom he purported to act; nor apparently can the promisor withdraw without breaking faith. The significance of this passage, for present purposes, lies in this that Grotius divides all unauthorized agreements for the benefit of third persons into two classes, - those made with principals in favour of third persons, and those made with agents purporting to act on behalf of third persons. Both are valid, and both, if duly accepted or ratified, are enforceable by the third person concerned. The division seems satisfactory; for it is exhaustive and founded on principle."

27. To my mind, the cases mention above spells out the exact situation that is evident in the current matter. There exist a contract between the applicant and the trust where an agreed offer is made by the trust for the benefit of the first respondent (the third party) beneficiary. On the beneficiaries acceptance the contract is established between the beneficiary and the trust.

28. The applicant in my view has made out a case regarding the validity of the trust deed and the deed of adherence as it pertains to Actom Investor Secondary Trust and not in relation to the second trust that was not signed by the first respondent and he had refused to sign.

IS THE RESTRAINT REASONABLE

29. The applicant amended the original restraint period from 24 months to 12 month. The question of reasonableness places reliance on a valued judgment taken judicially. The onus lies with the respondents to show that the restraint is not reasonable. The respondents have raised the issue of the right to engage freely in trade, occupation or profession of ones choice as intended by section 22 of the Constitution of the Republic of South Africa. There was also the submission that the first respondent had attained the knowledge that he had from the public domain and not from company secrets.

30. The question to be answered in this section is whether the restraint was reasonable and justifiable in the open and democratic society based on human dignity, equality and freedom. Firstly, the first respondent was in the employ of the applicant for about 43 years. It cannot be said that all the knowledge he had attained was that which was in the public domain. In order for the first respondent to reach, the position of contracts manager there must have been a process of imparting in house skills and training. There is also the fact that the first respondent is employed in exactly the same position that he had been employed prior to him resigning from the applicant.

31. Turning to deal with section 22 of the Constitution it must be borne in mind that the first respondent went to work for the applicant's direct competitor. Nothing

precludes the first respondent from attaining employment in his profession. In the first week of the first respondent's employment with the second responded he was called upon to comment on the second respondents rates for tender purposes. Having said so, it came to the fore that both the applicant and the second respondent would be taking part in a tender process by Transnet that close on 6 January 2015.

32. In the circumstances, I find that the applicant has made out a case for the relief sought in the notice of motion with the amendment to period of restraint reduced to 12 months instead of 24 months.

33. I make following order:

33.1 Condoning the applicant's non-compliance with the Uniform Rules of Court relating to service and time periods, and dealing with this application as a matter of urgency as contemplated by the provisions of Rule 6(12);

33.2 Interdicting and restraining the first respondent for a period of 12 months from 1 November 2014 and in South Africa from:-

33.2.1 directly or indirectly, competing with the Signalling Business of the applicant or being interested in any business which trades in an field of activity which is similar to the Signalling Business of the applicant;

33.2.2 becoming engaged or interested, whether directly or indirectly, and whether as an employee, proprietor, partner, shareholder, agent, consultant, financier or otherwise, in any company, firm, business or undertaking which carries on business in any field

of activity which is similar to the Signalling Business of the applicant;

33.2.3 soliciting any business relating to the Signalling Business of the applicant;

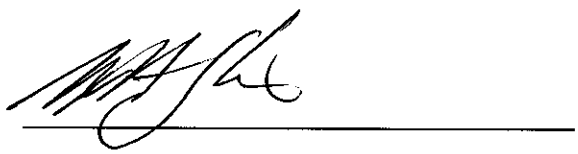
33.2.4 enticing away from the applicant, any customer or prospective customer of the applicant in regard to the Signalling Business of the applicant;

33.2.5 persuading, inducing, encouraging or procure any employee of the applicant, or any person who was an employee of the applicant at any time during the previous 12 months, to become employed by or interested in any competing business, or to terminate his or her employment with the applicant.

33.3 Interdicting and restraining the first respondent, for a period of 12 months from 1 November 2014, from being employed by the second respondent.

33.4 Interdicting and restraining the second respondent for a period of 12 months from 1 November 2014, from employing the first respondent.

33.5 The first and second respondents are to pay the costs of this application jointly and severally.



W. Hughes Judge of the High Court

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