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REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

DELETE WHICH IS NOT APPLICABLE
[1] REPORTABLE: ~~YES~~ / NO
[2] OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
[3] REVISED
DATE 22/5/15 SIGNATURE

27/01/2016.

CASE NO: 38625/05

DATE HEARD: 02/03 - 05/03/2015

In the matter between:

HOSPITALITY INDUSTRIAL AND COMMERCIAL UNDERWRITING MANAGERS (PTY) LTD	Plaintiff

and

LEON IAN DIETRICH	First Defendant
ANNAA BARBARA DIETRICH	Second Defendant
FIRST ON INVESTMENTS CC	Third Defendant
SURENET (PTY) LTD	Fourth Defendant
SURENET GROUP (PTY) LTD	Fifth Defendant

JUDGMENT

J W LOUW, J

[1] The plaintiff does business as insurance underwriting managers. It opened a branch of its business in Pietersburg in July 2000 and appointed the first defendant as manager of the branch. The first defendant gave notice of his resignation on 1 March 2005, the notice period terminating on 31 March 2005.

[2] During April 2005, the plaintiff instituted an action against the first defendant and the other four defendants. The plaintiff claimed payment of damages by the first defendant arising from an alleged breach by the first defendant of a confidentiality and restraint of trade agreement. It further claimed payment of damages by the first defendant and from the other four defendants as joint wrongdoers arising from alleged unlawful competition and copyright infringement. There was also a claim based on unlawful interference with contractual relationships and a claim for return of documents, but those fell by the wayside. The trial did not proceed against the fourth and fifth defendants, the plaintiff, so I was informed, having reached a settlement with them. I was not made privy to the reasons why it took ten years for the matter to come to trial against the first three defendants, to whom I shall refer as the defendants.

The restraint of trade

[3] During April 2004, whilst the first defendant was still employed, the plaintiff required of the first defendant and the other employees of the plaintiff at the branch to sign a "Confidentiality and Restraint of Trade Agreement". This is the agreement which the plaintiff alleges was breached by the first defendant. A copy of the agreement, which bears the signature of Mr. John Fitzpatrick, who was the plaintiff's managing director at the time, and that of the first defendant is annexed to the plaintiff's particulars of claim. The agreement provides that the first defendant shall not, during his employment, divulge any confidential information or trade secrets other than to persons connected with the

plaintiff, including the names and contractual arrangements between the plaintiff and its clients and trading partners. It further provides that the first defendant shall not for a period of one year after termination of his employment with the plaintiff represent any of the plaintiff's competitors or render services of a like nature which are likely to compete with the service rendered by the plaintiff or solicit, interfere with or entice away any client of trading partner of the plaintiff.

[4] The plaintiff's case was that the first defendant breached those terms. It was conceded by Adv. Arnoldi SC, who appeared for the defendants, that if those were the terms of the agreement, they were breached by the first defendant and that the only issue would then be the quantum of the plaintiff's damage. The defence which was pleaded by the first defendant in his plea, which was prepared by the first defendant's previous counsel and delivered on 20 June 2006, was that the agreement was signed by the parties against the background of a letter attached to the plea, that the agreement was signed by the parties with the common intention that the letter would be incorporated into the agreement, and that the letter provided that the agreement would become null and void *"should the company decide to restructure, centralize and/or close branches, dismiss or terminate my employment, non-acceptance of staff transfer offers to any alternative venues or where any such change will directly or indirectly adversely affect me."* It was pleaded that the plaintiff closed its Pietersburg branch during May 2005 and that the restraint therefore lapsed in terms of this stipulation.

[5] The evidence of Mr. Fitzpatrick was that the plaintiff's business was doing well in 2004 and that he started looking at the plaintiff's exposure to competition. It also came to his attention that certain employees wanted to start their own business and that the plaintiff's data was being used in the market. He therefore instructed the plaintiff's attorneys to draw up a confidentiality and restraint agreement. When he received the

document from the attorneys, he discussed it with the plaintiff's shareholders. He then sent it to the first defendant by fax after inserting the date "April" on the last page and signing it himself.

[6] He received the agreement back from the first defendant under cover of a letter dated 13 April 2004. The relevant part of the letter reads as follows:

> *"In the light of our meeting held on the 8th April 2004, I agree to the principal* (sic) *of the contract, subject to the amendments as set out below.*
>
> *1) Attached, letter of amendment of certain terms to the contract, which forms an integral and inseparable part of the contract stipulated above and without which the original contract remains nil* (sic) *and void."*

[7] The letter indicates that the first defendant had signed and faxed the agreement back to Mr. Fitzgerald. Before doing that, the first defendant inserted the following final clause in the agreement:

> *"Addendum: (attached) – TO BE COUNTERSIGNED PLEASE."*

[8] It is common cause that the letter of amendment referred to in the covering letter and the addendum referred to in clause 12 which the first defendant inserted into the agreement are the same document. The relevant part of that letter reads as follows:

"*THIS DOCUMENT FORMS AN INTEGRAL AND INSEPERABLE PART OF THE AGREEMENT SUBMITTED BY HIU* (the plaintiff) *FOR SIGNATURE AND APPLIES TO ANY FORM OF RESTRAINT OF TRADE*

The contract will be declared nil (sic) *and void, should:*

1) *Mr. J Fitzpatrick – retire, resign, pass away (decease), become incapable of functioning in his current position for whatever reason, sell any shareholding or any portion thereof which may result or bring about a change in his Management position as General Manager of HIU.*
2) *Should the company be sold.*
3) *Should the company decide to restructure, centralize and or close branches, dismiss or terminate my employment, non acceptance of staff transfer offers to any alternative venues or where any such change will directly or indirectly adversely affect me.*

And:

1) .....
2) *The agreement applies ONLY to HIU core business being Hospitality driven business projects, and all other forms of short term business does not form part of this agreement.*
3) .....
4) .....
5) .....
6) *In the absence of any form of counter protection for myself, i.e.: Share options, financial or monetary incentive, and or (currently) unclear/undefined advancement potential within the Company, clauses 2.4 and 2.4.1 and 2.4.2*[1] *– is amended to read 6 (six) months.*

[1] These are the clauses which provide that the first defendant shall not compete with the plaintiff for a period of one year after termination of his employment.

.....

Please sign a counter copy of this document and return at your earliest convenience."

[9] Mr. Fitzpatrick testified that he did meet with the first defendant around 8 April 2004 at which meeting the first defendant raised his concerns about the restraint agreement. The first defendant was concerned that the agreement would limit him in his area and he wanted to impose terms and conditions. Mr. Fitzpatrick, on the other hand, felt that if he agreed to the first defendant's conditions, it would place him in a predicament as other staff members had signed the agreement. He said he agreed to, what he termed, certain *"soft amendments"* which he put in writing to the first defendant.

[10] The letter which Mr. Fitzpatrick wrote to the first defendant about the *"soft amendments"* was dated 7 May 2004. However, that was only after the first defendant had written his two letters to Mr. Fitzpatrick on 13 April 2004, referred to above. Mr. Fitzpatrick conceded in cross-examination that it was possible that he had said to the first defendant at their 8 April 2004 meeting that he should put his concerns in writing. When he received the letter containing the first defendant's conditions, he wrote the words *"AS DESCRIBED"* next to the second paragraph 2 thereof. He said that he wrote the words because they had discussed this issue at the meeting. He said in cross-examination that he didn't disagree with the first defendant about this and that he had no problem with it. He further wrote the word *"NO"* next to paragraph 6 of the letter. He said he did that as he would never have agreed to changing the period of the restraint to six months as that would be unfair to the other members of the staff who had agreed to a period of one year.

[11] Mr. Fitzpatrick was asked what the reason was for only replying to the first defendant's letter on 7 May 2004. He said that he thought that he had first referred his letter to the shareholders for their approval. His letter reads as follows:

> *"Thank you for your response on the Restraint documentation sent by you to our office in Johannesburg. As discussed with you we are not in a position to change any details of the proposed restraint document. At our meeting we agreed to waive the restraint should I resign or leave the Company or that I become deceased this we have no problem with however all other conditions of the restraint document will apply. Therefore your conditions stated in your covering letter are not acceptable or is to form part of the restraint document. This letter as agreed with you will for* (sic) *the basis for the agreed change to the document clause pertaining to the above amendments to your signed original document.*
>
> *It would be deemed unfair to favor individuals with a lesser restraint therefore it will apply to all other employees who are contracted to the restraint document."*

[12] Mr. Fitzpatrick did not receive any response to the letter from the first respondent. When the first respondent resigned in March the following year, the plaintiff was not able to find a suitable replacement and closed the branch down at the end of May 2005.

[13] During cross-examination, Mr. Fitzpatrick said that his views as expressed in the notes which he made on the first defendant's letter of 13 April 2004 were discussed with the first defendant at their meeting of 8 April 2004. His first communication with the first defendant after receipt of the first defendant's letter of 13 April 2004 was the letter which he wrote to the first defendant on 7 May 2004. He thereafter said that he

summoned the first defendant to a meeting after he received the first defendant's letter, where some of the first defendant's points were discussed. Such second meeting was not mentioned by Mr. Fitzpatrick in his evidence in chief and was also denied by the first defendant when he testified. The letter of 7 May 2004 does also not refer to a second meeting and rather appears to be a response to the first defendant's written proposals for amendment. The discussion to which the letter refers is more likely the discussion of 8 April 2004. I don't believe much turns on whether a second meeting took place or not.

[14] After completion of Mr. Fitzpatrick's evidence in chief, Mr. Arnoldi applied for an amendment of the defendants' plea which was not opposed and which was granted. The amendment introduced an alternative to the defendants' plea, to which I have referred. The amendment was to the effect that the first defendant's letters of 13 April 2004 constituted a counter-offer which was not accepted by Mr. Fitzpatrick; that by writing the words *"as described"* and *"no"* on the first defendant's letter of 13 April 2004 a further counter-offer to the first defendant was prepared but not communicated to him; and that Mr. Fitzpatrick's letter of 7 may 2004 constituted a further counter-offer in which the first defendant was advised that his conditions were unacceptable. The conclusion pleaded is that no confidentiality and restraint agreement was entered into between the plaintiff and the first defendant.

[15] The question whether or not an agreement was concluded depends on whether the first defendant received the letter of 7 May 2004 and whether he accepted that his conditions had been rejected by the plaintiff. I must immediately say that I was not impressed with the first defendant's evidence in general. If one has regard to the position to which he was appointed and to the letters which he wrote, he is clearly not unintelligent. But he could not explain why he had previously in his plea and in an affidavit to which he had deposed in an Anton Piller

application which had been brought by the plaintiff prior to the institution of the action, admitted that an agreement had been concluded. He said that he was not legally qualified, that he did not consider the restraint as binding because his conditions were not accepted and that he had thought that his offer was still open. When asked why he did not say in his affidavit that he did not consider himself bound, he said that he was led by his counsel. It was common cause between the parties that the letter of 7 May 2004 formed part of the papers in the Anton Piller application. I have little doubt that if it had been the first defendant's case that he did not receive the letter, he would have said so and would therefore have said that no agreement had been concluded.

[16] The question whether the first defendant received the letter of 7 May 2004 is a question about which there was much vacillation by the first defendant when he testified. In his evidence in chief he said that he couldn't remember receiving the letter but that it was possible that he did receive it. In cross-examination he said that he doesn't remember receiving the letter and that there was therefore no finality. When it was later put to him that when he received the letter saying that the plaintiff did not agree to his conditions but that it would waive the restraint if Mr. Fitzgerald should die, he said that that is what the letter says. He did not deny receiving it. It was then put to him that he must have known after a month had passed that there had been no agreement on the restraint. He said that that must have been his line of thinking. When it was then put to him that that was contrary to his earlier evidence that he realised in 2006 that there was no agreement, he said that he didn't recall receiving the letter and that he thought that his conditions were still open for acceptance. This despite the fact that he had resigned in 2005. He was asked why he did not effect an amendment to his plea for the next seven years. His answer was that from a cost perspective he couldn't afford to. He was later asked why, when certain other amendments to the plea were done in 2010, the plea was not also amended to introduce

the latest amendment. He again resorted to saying that he was led by his counsel. He couldn't comment why his counsel did not make such amendment.

[17] It is clear from the aforegoing that the first defendant was simply not telling the truth when he said that he did not recall receiving the letter of 7 May 2004. He had put his conditions in writing to Mr. Fitzpatrick and was obviously waiting for an answer. If he did not receive an answer, he would have followed it up. In my view, the probabilities are overwhelming that he did receive the letter and that he accepted that, save for his condition about Mr. Fitzpatrick resigning or passing away, the plaintiff was not prepared to agree to his other conditions. That also explains why he had previously not disputed that an agreement did exist and why he relied on the defence that he was not bound by the restraint as the Pietersburg branch was closed down. The closing down of the branch was one of the first defendant's conditions which was not accepted by the plaintiff. That defence can accordingly not succeed. This was conceded by Mr. Arnoldi.

[18] I conclude, therefore, that the plaintiff has proved that the first defendant was bound by the terms of the confidentiality and restraint agreement. As mentioned earlier, it was conceded on behalf of the first defendant that if the first defendant was bound by those terms, they were breached by the first defendant and that the only issue would then be the quantum of the plaintiff's damage. The plaintiff and the defendants reached an agreement regarding the quantification of the plaintiff's claim for damages arising, according to the heading of the written agreement, out of the first defendant's breach of the restraint and "other unlawful competition". Mr. Arnoldi conceded that if any award was made against the first defendant, that it be made jointly and severally against the second and third defendants. In paragraph 1 of the written agreement, which was handed in as an exhibit, the parties agreed as follows:

"In the event of the court finding that the restraint of trade bound the first defendant for a period of 12 months, commencing upon the termination of his employment with the plaintiff, then (subject to argument by the parties) the court ought to award the plaintiff R543 895.79 in damages arising out of the breach of the restraint of trade, if the plaintiff is correct in its argument to be delivered on the principle of how the damages ought to be calculated (being that, whenever the transgression is made, one year of lost income is added), ***alternatively****, the plaintiff ought to be awarded R221 527.00, if the first defendant's argument is accepted as to (the) principle of how the damages ought to be calculated (being that the loss is calculated with the date of the transgression as point of departure, and taking it until the last day of the 1 year period.)"*

[19] Paragraph 2 of the agreement on quantum provides alternative figures in the event of it being found that the restraint bound the first defendant only for the period from the date of termination of his employment until 31 May 2005, being the date on which the branch was closed down. In view of the finding that the closure of the branch was not a condition to which the plaintiff agreed, this alternative method of calculation need not be further considered.

[20] The one year restraint is worded as follows in clause 2.4 of the agreement:

"The Employee shall not, directly or indirectly, for a period of 1 (one) year after termination of his/her employment agreement with HIU:-

2.4.1 represent HIU or any of its competitors or render services of a like nature or which are likely to compete with the service

being rendered by HIU in the Hospitality Underwriting Business enter into any transactions with customers or trading partners of HIU in competition with HIU, if such transaction falls within the scope of HIU's normal business on termination of his/her employment, without the prior written consent of HIU, which shall not be unreasonably withheld.

2.4.2 shall not directly or indirectly for a period of 1 (one) year after the employee ceases to be employed with HIU solicit, interfere with or entice away from HIU any customer or trading partner."

[21] The evidence of Ms. Dendleigh Wilensky, the plaintiff's current executive director and who has been employed by the plaintiff since September 2000, was that clients on average maintained their policies for four to five years. The basis of the agreement between the parties in regard to the quantum of the plaintiff's claim is that, had it not been for the first defendant's breach of the restraint, the policies sold by the defendants would have been sold by the plaintiff and that such policies would not have been cancelled by the clients in question within the first year of the life of the policies. That means that the plaintiff would have received the benefits from those policies for a period of at least one year. The principle of how the plaintiff's damage ought to be calculated as contended for by the plaintiff, i.e. that whenever a transgression occurred, one year of lost income is added, is obviously correct. It is not correct, as contended for on behalf of the defendants that the loss should be calculated from the date of a transgression until the end of the one year restraint period. If a policy sold by the defendants in breach of the first defendant's restraint was, say, six months old at the date of the expiry of the restraint, it would leave the defendants reaping the benefits of such policy for the remaining six months. I accordingly find

that the quantum of the damages to which the plaintiff is entitled is the sum of R543 895.79.

Unlawful competition

[22] Having regard to the heading of the written agreement between the parties in regard to quantum, I understood that the agreement related to the alleged breach of the restraint by the first defendant and to the alleged unlawful completion by the defendants. Adv. Arnoldi was, at least initially, of the view that it applied to both. Adv. Bishop, however, submitted that there was no agreement on the quantum of the plaintiff's claim for unlawful competition. It was, however, contended by Adv. Bishop, who appeared for the plaintiff with Adv. Hardy, that it did not matter because contractually the first defendant was obliged not to breach his restraint and, thus, to place the plaintiff in a position in which the obligation not to breach was fulfilled would have the same result as applying the delictual but-for approach. I agree with the submission. It is therefore not necessary to separately consider the quantum of the plaintiff's claim for unlawful competition.

Copyright infringement

[23] The plaintiff claims ownership of copyright in certain portions of certain documents used by it in the course of its business. The evidence of Ms. Wilensky and Mr. Fitzpatrick was that those portions of the documents were the result of a long process of amending documents over the years. The documents had originally come into existence in about 1998. Some base documents appear to have come from Allianz Insurance when it formed a joint venture with Hanover Re as joint

shareholders of the plaintiff at the time. The plaintiff's case is that large portions of those documents, including the portions which were added, were copied verbatim by the plaintiff.

[24] The documents, if original, qualify as literary works in terms of 2 of the Copyright Act, 98 of 1978 (the Act). Section 3 of the Act provides that copyright shall be conferred by that section on every work, eligible for copyright, of which the author is at the time the work or a substantial part thereof is made, in the case of an individual, a South African citizen or is domiciled or resident in the Republic. In terms of s 21(1)(d) of the Act, if a work is made in the course of the author's employment by another person under a contract of service, that other person shall be the owner of any copyright subsisting in the work by virtue of s 3 or 4 of the Act. Section 4 is not relevant for present purposes. In order for an employer to claim ownership of copyright in a work created by an employee during the course of his or her employment, the employer must therefore prove who the author of the work was, that he or she is a South African citizen or is domiciled or resident in the Republic, and that the author was employed by the employer at the time the work was made.

[25] The allegation in the plaintiff's particulars of claim is that the authors of those parts of the documents in which the plaintiff claims copyright are Mr. Fitzpatrick, alternatively Mr. Paul Halley, and that they both are South African citizens. The evidence of Mr. Fitzpatrick was that he, Mr. Paul Halley and Mr. Carl Hamel looked at the existing policy wording and that they changed the wording when they saw an opportunity for the plaintiff. He said that HIU broadened their product as time progressed. They broadened the cover for which the policy provided based on the needs of clients. I understood Mr. Fitzpatrick to convey that the amendments were done by the three of them jointly,

i.e. that they were co-authors. He did not testify that any specific amendments were done by him alone or by any of the other two gentlemen acting alone. He testified that he was the plaintiff's managing director and that he was employed by the plaintiff from June 1998 until January 2007. He did not say whether Mr. Halley or Mr. Hamel were employed by the plaintiff. Ms. Wilensky, who joined the plaintiff in September 2000, testified that the amendments were done by Mr. Fitzpatrick and Mr. Halley. She, of course, had no knowledge of what occurred before she joined the plaintiff. She said that Mr. Halley was a director of the plaintiff. That does, of course, not mean that he was employed by the plaintiff. No evidence was presented that either Mr. Halley or Mr. Hamel were South African citizens or that they were domiciled or resident in the Republic.

[26] It follows that the plaintiff failed to prove that the authors were all employed by the plaintiff when the amendments were made and that they were all South African citizens or domiciled or resident in the Republic at the relevant time. The plaintiff is accordingly not entitled to any relief in respect of the alleged copyright infringement.

Costs

[27] In addition to the costs of the action, the plaintiff applies for the costs of the Anton Piller application brought by it against the defendants, which costs were reserved. The defendants formally admitted that the documents contained in exhibits A1 and A2, bearing the stamp of the sheriff, were found by the sheriff in hard copy form during the execution of the order. Many of the documents were referred to in evidence during the trial. During argument, Mr. Arnoldi agreed that the costs of the Anton Piller application should follow the result.

[28] In the result, the first, second and third respondents are ordered, jointly and severally, to pay to the plaintiff, the one paying the other to be absolved:

(i) the sum of R543 895,79 together with interest thereon at the rate of 15,5% per annum from 8 May 2006 to date of payment;

(ii) the plaintiff's costs of the application, including the costs of the Anton Piller application which were reserved on 6 December 2005 and 14 March 2006, and the costs of two counsel where two counsel were employed.

Counsel for plaintiff: Adv.A. Bishop, Adv. G. Hardy

Instructed by: Dewey Hertzberg Levy Inc, Sandton

Counsel for 1st, 2nd and 3rd defendants: Adv. A.F. Arnoldi SC

Instructed by: Coetzer & Partners, Pretoria

[28] In the result, the first, second and third defendants are ordered, jointly and severally, to pay to the plaintiff, the one paying the other to be absolved:

(i) the sum of R543 895,79 together with interest thereon at the rate of 15,5% per annum from 8 May 2006 to date of payment;

(ii) the plaintiff's costs of the action, including the costs of the Anton Piller application which were reserved on 6 December 2005 and 14 March 2006, and the costs of two counsel where two counsel were employed.

Counsel for plaintiff: Adv.A. Bishop, Adv. G. Hardy

Instructed by: Dewey Hertzberg Levy Inc, Sandton

Counsel for 1st, 2nd and 3rd defendants: Adv. A.F. Arnoldi SC

Instructed by: Coetzer & Partners, Pretoria