IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: J2793/02

DATE:

In the matter between:

LABOURNET HOLDINGS (PTY) LTD Applicant

and

PETER McDERMOTT First Respondent

DANIEL KRYNAUW Second Respondent

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J U D G M E N T

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LANDMAN J:

1. This is the return day of an application for a final interdict to enforce a restraint of trade term found in two contracts which are alleged to be contracts of employment. The applicant is Labournet Holdings (Pty) Ltd, a company with limited liability (to which I shall refer as "LNH"). The first respondent is Peter McDermott, a former employee of LNH. The second respondent is Daniel Krynauw, who is alleged to be a former employee of LNH.

2. In order to appreciate what LNH is, and its right to enforce the terms of the restraint of trade clauses, it is necessary to deal with the events leading up to the establishment of LNH. In 1996 a partnership consisting of Willem Christiaan de Jager, Andre Heyns and Sean Snyman was formed, which traded under the style Labournet Management Services (I shall refer to this as "LMS"). The partnership specialised in industrial relations, human resources and labour law. It owned and traded through a number of business vehicles which Mr Snyman, the deponent to the founding affidavit, terms "the Labournet business". This business comprises:

"*9.2.1 A registered employer's organisation called 'The National Employers Forum' ("NEF");*

9.2.2 the labour law consulting business of attorneys Snyman, Van der Heever & Heyns; and

9.2.3 Labournet, a human resources and client service consulting entity."

3. In August 1998 the partnership sold the Labournet business to Avtec Limited as part of the sale of goodwill. The right to use the name "Labournet Management Services" passed to Avtec. Mast Commercial Operations (Pty) Ltd, an operating

company wholly owned by Avtec, was a party to the agreement. It was later renamed Avtec Resourcing (Pty) Ltd. As a result of the conclusion of the sale of agreement, the Labournet business became a business unit of Mast Commercial Operations. This was from 1 January 1998 when the agreement of sale took effect. During the course of 1999, and as a result of restructuring within the Avtec Group, the Labournet business became a business unit of Avtec Resourcing (Pty) Ltd.

4. On 27 November 2001, Lawatera Investments (Pty) Ltd (to which I shall refer as "Lawatera") concluded an agreement of purchase and sale. It purchased the Labournet business from Avtec Resourcing. The purchase was made retrospective to 1 October 2001. It is alleged that, with effect from this date, Lawatera became the owner of the entire Labournet business. Included in the sale was the transfer of the right to use the name Labournet Management Services. During May 2002, Lawatera underwent a name change and became known as Labournet Holdings (Pty) Ltd, the applicant. It is alleged that LNH continues to carry on the Labournet business under the same name as Lawatera and previously Avtec and the partnership before it.

5. In a replying affidavit, Mr Snyman says that LNH is a holding

company and does not trade. Trading takes place in subsidiary companies, namely Labournet Central (Pty) Ltd, Labournet Free State (Pty) Ltd and Labournet Western Cape (Pty) Ltd. He says that it is these companies that provide the services to the NEF and invoice the NEF for such services. He says that LNH and its subsidiary companies are collectively referred to as the Labournet. Mr Snyman also says that LNH has a bank account at Nedbank. Labournet Central (Pty) Ltd, which is a wholly owned subsidiary of LNH, also has a bank account at the same bank under the name of "Labournet Management Services". Labournet Free State (Pty) Ltd and Labournet Western Cape (Pty) Ltd operate their own accounts in Bloemfontein and Cape Town respectively.

6. The founding affidavit sets out the following in regard to the Labournet business. It is said that the Labournet business provides labour relations services to employers throughout the Republic of South Africa. The employers are enrolled as clients on the basis of a monthly retainer and/or payment per hour for services rendered. This business is extremely competitive. The services rendered to employers/clients include a comprehensive industrial relations and human resources consultation and advisory service, furnished by trained professionals. The service

also extends to a labour law advisory and litigation service by labour law experts. Clients are also provided with industrial relations and human resources policies and documents, including a specially designed industrial relations manual. I shall deal presently with the services rendered by LNH to the NEF.

7. In his replying affidavit, Mr Snyman says:

"*It has in fact never been alleged that any of the clients concerned belong to the attorney's firm or that the attorney's firm has been a party to any of the sale transactions of the Labournet business. This is in answer to the various allegations about the integration of the firm of attorneys with the Labournet business.*"

For the moment I shall leave it there. The founding affidavit goes on to submit that under each of the sale agreements - which have been detailed above - the Labournet business was sold as a going concern. In each of the agreements of sale provision was made for the cession of the rights enjoyed by the sellers as employer against the employees and the delegation of the concomitant obligations.

8. It is alleged that the two respondents, were included within the scope of these provisions, continued to work in the

Labournet business in the knowledge that it was being sold and thus tacitly, if not expressly, consented to the assignment of the rights and obligations referred to above. It was also submitted that the sales constituted the transfer of a business as a going concern and therefore fell within the compass of section 197 of the Labour Relations Act 66 of 1995. This is the section that makes provision for the automatic transfer of contracts of employment and the rights, and obligations attendant on those contracts, when a business is sold as a going concern. The result of this, it is submitted, is that LNH became the employer of the two respondents and other employees on 27 November 2001 and remained their employer until their resignation in circumstances which are set out in the founding affidavit.

9. At this stage it is necessary to deal with the National Employers Forum. At the time of the promulgation of the Labour Relations Act of 1995, Labour Management Services were rendering legal, advisory and consultancy services to employers, particularly with regard to industrial relations. Some employers did not have the resources, infrastructure, time or will to establish employers' organisations; nor the will to manage them. Labour Management Service facilitated the establishment of an employers' organisation called the National Employers’

Organisation (the NEF). Labour Management Services expected to be remunerated for their work in this regard.

10. The NEF was established and registered as an employers' organisation in terms of section 95 of the LRA. Its constitution appears to be a fairly standard one, save in the respects that I will mention later. A membership fee is payable yearly. On the incorporation of the NEF on 2 December 1996 the fee was set at R1 080 *per annum.* The constitution also makes provision for the payment of other fees for funds which the NEF may establish. Clause 10.1 of the constitution is important. It provides:

"*The management of the affairs of the organisation between general meetings shall be vested in an executive committee consisting of the chairperson, the vice-chairperson and 5 (five) other members of the organisation who shall be elected at the annual general meeting of the organisation on nomination duly seconded and voted.*"

11. On 15 December 1997, the NEF entered into a management agreement with Labour Management Services. Labour Management Services is identified in the agreement as follows:

"'*LMS*' - *shall mean Labournet Management Services, a partnership created in terms of an agreement entered into*

between the partners or their successors."

The critical provisions of the management agreement are the following:

"*2. Management Services*

2.1 NEF hereby employs the services of LMS to manage the affairs of NEF in full compliance of its constitution, and to exercise the powers of NEF's executive committee as provided for in clause 10 of the constitution.

2.2 The membership fees payable by NEF's members in terms of clause 5 of its constitution or any other fees, income or monies due and payable to NEF will be received and collected by LMS.

2.3 The partners will utilise NEF's income to create and maintain the required infrastructure as determined from time to time by NEF's executive committee, which infrastructure shall serve the objects of NEF as provided for in terms of clause 3 of its constitution.

2.4 Nothing contained in clauses 2.2 and 2.3 will

restrain LMS from collecting or demanding a fee or price over and above the membership fee provided for in terms of clause 3 of the constitution.

3. Management fee

3.1 LMS is entitled to such income which NEF is capable of generating after all its expenses are paid, as its fee from NEF for fulfilling its functions in terms of this agreement.

3.2 The said fee is payable monthly in advance to LMS without any deduction of any nature whatsoever.

3.3 Payment shall be made to LMS monthly at the time and place directed by them.

4. Copyright, trademarks and other immaterial goods

4.1 The parties will acquire certain copyrights, trademarks and other immaterial goods which will remain the property of LMS.

4.2 LMS hereby grants to NEF permission to use such immaterial goods for its own purposes during the term of this agreement.

4.3 The trademarks and trade names 'LABOURNET' and 'NATIONAL EMPLOYERS FORUM' and its respective logos, remains the property of LMS."

12. I turn now to the status of the respondents. The first respondent, Mr McDermott, was an employee. This is common cause. LNH relies on section 197 of the LRA to show that Mr McDermott was an employee of LNH and that the restraint of trade clause is still applicable to him. Mr Kennedy SC (with him Mr Durandt), who appeared for the respondents, submitted that section 197 cannot properly be interpreted to mean that restraint covenants can be transferred without the grantor's consent, unless this intention appears from the restraint itself. He submits that such an interpretation would be inconsistent with the common law and

would also be inconsistent with the constitutional right to engage freely in trade.

13. For the purposes of this judgment, I am prepared to assume that section 197 applied and did so with the effect that Mr McDermott is bound by the restraint of trade.

14. The second respondent, Mr Krynauw, signed an agreement with LNH in terms of which it was expressly stated that he enjoyed the status of a consultant, i.e. an independent contractor, and that he was not an employee.

15. In practice, Mr Krynauw was treated, in some respects, in much the same way as any other employee of LNH. LNH now submits that he is an employee and that this court has jurisdiction to entertain this matter in terms of section 77 of the Basic Conditions of Employment Act 75 of 1997. I am invited to look past the formal contract and to examine what is submitted to be the true relationship between the parties. It is submitted that the arrangement was merely entered into to facilitate a favourable arrangement between Mr Krynauw and the fiscus. In my opinion the parties knew what they were doing. If they did not bargain on equal footing, then LNH had the upper hand. A

court will give effect to substance above form to protect the weak. See **Building Bargaining Council (South & Eastern Cape) v Melmons Cabinets CC & Another** (2001) 22 ILJ (LC). But it is another kettle of fish to suppose that the court should come to the aid of those who deliberately, and without any undue pressure, conclude a misleading contract.

16. I do not find Mr Krynauw to be an employee. It is for this reason that the rule *nisi*, as regards him, was discharged with costs.

17. It is necessary to turn and examine the legal relationship between LNH and the NEF, an employers' organisation.

18. Mr Snyman, who signed the founding affidavit, says that employers who enrol with the Labournet business become members of the employers' organisation, the NEF. The NEF employs no personnel but relies on the services provided for it by LNH through the Labournet business. LNH in effect, according to Mr Snyman, provides the entire infrastructure to the NEF and thereby enables it, in turn, to provide services to its members. It is the LNH that recruits members on behalf of the NEF. For this LNH is paid a fee by the NEF. Mr Snyman says that, therefore, there is a very close bond between the LNH and the NEF. Each

promotes the interests of the other in a symbiotic manner. Mr Snyman expands on this in his replying affidavit. He says the Labournet business encompasses the services provided to the NEF, the NEF member pays an annual membership fee. The LNH provides services to these NEF members, and, in doing so, these members also become the clients of LNH, the one not being exclusive of the other. The NEF pays a fee to the LNH for the services rendered to its members, the members of NEF are, therefore, also clients of LNH.

19. Mr Snyman goes on to submit that the NEF did not belong to the partnership and does not belong to the LNH. In terms of the service or management agreement between the LNH and the NEF, the previous partnership and the currently the LNH, has been given permission and licence by the NEF to trade and conduct services under the name "National Employers' Forum". Mr Snyman says this is a practical arrangement due to the nature of the services provided by the LNH to the NEF. He says that it is in this context "*that I referred to in my founding affidavit that the partnership traded through NEF*".

20. In terms of the management agreement between the NEF and the LNH, and due to the nature of the services that LNH renders

to the NEF, the NEF ceded to LNH the right to appoint officials of the LNH. Mr Snyman submits that the appointment of the respondents as officials of the NEF are valid and legal. A website (www.labournet.com/nef.asp) which has been downloaded and annexed to the papers, proclaims:

"*National Employers' Forum (NEF) provides the expertise, advice and advocacy to manage the workplace effectively in changing times. NEF is an employers' organisation registered in terms of section 96 of the Labour Relations Act. It is the largest independent organisation of its kind in South Africa, with a sophisticated infrastructure, personal staff and considerable experience in the industry.*

The company provides a range of services in the field of industrial relations and labour law. These services range from setting up streamlined procedures to manage the workplace effectively, to dealing with confrontational issues such as grievances, disciplinary procedures, collective bargaining, dismissals and labour law legislation. By paying a monthly membership fee, organisations have access to these services, providing them with professional advice and representation whilst ensuring flexibility and cost-effectiveness. Members can be confident that they have the backing of a considerable support structure without having to increase their staff or their

payroll!

...

By offering its members a full range of related services, NEF is able to build up an intimate knowledge of the member's company culture, business goals and challenges. The NEF official sees himself as an integral part of the member's team. This enables NEF to maintain an unsurpassed level of service within the member organisation, and an impressive record of successful litigation before bargaining councils, arbitrators and the Labour Courts.

...

NEF officials have right of representation at all industrial relations forums contemplated by the Labour Relations Act. In the Labour Court, NEF has a similar track record. Of the last 30 review applications brought on behalf of NEF members, 27 were successful. NEF currently has a membership of over 1 700 employers who employ in excess of 400 000 staff. Members' organisations range from those with just one or two staff to large corporates with more than 17 000. Our membership continues to grow by an average of 40 new members per month."

21. It is said that a symbiosis exists between the NEF and LNH. A symbiosis between organisms occurs when there are

mutual advantages. In this case there has been a complete take-over of the NEF by LNH. The NEF is controlled by LNH. It has no employees. Therefore it also has no officials which may operate on its behalf. See the definition of "official" in section 213 of the LRA. It has lost any independence which it may have had. It is doubtful whether it indeed was ever an independent employers' organisation. It's very name does not belong to it. The NEF, as an employers' organisation, exists merely on paper. It is something of an ethereal being. It has no controlling mind of its own; it has contracted this out. LNH controls its activities. The business which is conducted by LNH or LNH under the trademark of and in the name of the employers' organisation NEF, is conducted by subsidiaries. NEF, the employers' organisation, is indistinguishable from the ordinary business carried on by LNH or its subsidiaries.

22. It is true, as counsel for LNH argued, that it would be permissible for an employers' organisation to contract with a private organisation to render services to its members. But, in this case, the boundaries of such an arrangement have been overstepped. So much so that, if anything, the NEF has become a subsidiary of LNH.

23. I now turn to the restraint of trade clause which is *prima facie* binding on Mr McDermott. The restraint of trade clause, in the contract of employment, is preceded by an obligation of confidentiality. After acknowledging why the restraint of trade is necessary, clause 13.3 provides:

"*13.3 In terms of this restraint of trade, the employee specifically undertakes and agrees to:*

13.1.3.1 Not to be interested in any business in the territory which carries on business, manufactures, sells or supplies any commodity or goods, brokers or acts as agent in the sale or supply of any commodity or goods and/or performs or renders any service, in competition with or identical or similar or comparative to that carried on, sold, supplied, provided, brokered or performed by the company during the period of the employment of the employee up to and including the last day of the employment of the employee; and

13.3.2 Not to solicit the custom of or deal with or in any way transact with, in competition to the company, any business, company, firm, undertaking, association or person which during the period of 3 (three) years preceding the date of termination of the employment of the employee has been a customer or supplier of the company in the territory; and

13.3.3 Not to directly or indirectly offer employment to or in any way

cause to be employed any person who was employed by the company as at the termination of the employment of the employee with the company or at any time within a period of 3 (three) years immediately preceding such termination.

13.4 *Each and every restraint in this entire clause shall operate and be valid and binding for a period of 3 (three) years, calculated from the date of termination of the employment of the employee with the company, for any cause or reason.*"

24. The law relating to the legality of a restraint of trade clause has been considered in **Basson v Chilwan & Others** 1993 (3) SA 742 (A). A headnote summarises the judgment of Nienaber, JA (Botha, JA and Milne, JA concurring) as follows:

"*An agreement is assailable either in its entirety or partially if it damages the public interest and is therefore in conflict with public policy. A provision of this nature which attempts to restrain an employee or partner after termination of the contract is in conflict with public policy if the effect of the restraint would be unreasonable. The reasonableness or otherwise of the restraint is judged on the basis of the broad interests of the community, on the one hand, and of the interests of the contracting parties themselves, on the other hand.*

As far as the broad interests of the community are concerned, there are two conflicting considerations: agreement should be

abided by (even if this should promote unproductivity); and unproductivity should be discouraged (even if that should wreck an agreement). As far as the parties themselves are concerned, a restraint is unreasonable if it prevents one party, after the termination of their contractual relationship, from participating freely in the commercial and professional world without a protectable interest of the other party be properly served thereby. Such a restraint is as such contrary to public policy. Moreover, a restraint which is reasonable inter partes might nevertheless, for a reason not peculiar to the parties, damage the public interest; and possibly also vice versa. In this connection four questions should be asked:

(a) Is there an interest of the one party which is deserving of protection at the termination of the agreement?

(b) Is such interest being prejudiced by the other party?

(c) If so, does such interest so weigh up qualitatively and quantitatively against the interest of the other party that the latter should not be economically inactive and unproductive?

(d) Is there another facet of public policy having nothing to do with the relationship between the parties but which requires that the restraint should either be maintained or rejected?

Insofar as the interest in (c) surpasses the interests in (d), the restraint would as a rule be unreasonable and accordingly

unenforceable. It is a matter of judgment which can vary from case to case."

See also the remarks of Wunsh, J in **Tor Industries (Pty) Ltd v Gee-Six Superweld CC & Others** 2001 (2) SA 146 (W) who would add a further consideration.

25. In this case the following questions arise for decision:

1. Is LNH the holder of the rights contained in the restraint of trade clause?

Mr McDermott was an employee of LNH at the time of his dismissal. I am prepared to accept, that on the strength of the purchase and sales of the business detailed earlier, he was LNH's employee. But LNH does not trade in Gauteng. The Labournet business is carried on by Labournet Central (Pty) Ltd which uses the name LMS, at least vis-à-vis its bank. LNH, Labournet Central and the two other companies may form a group of companies but they still remain individual entities. See H S Cilliers *et al* **Corporate Law** (2nd ed) 433-4.

26. Mr Kennedy, who appeared on behalf of the respondents, submitted that the Labour Court has no jurisdiction to hear the matter. Mr Kennedy submitted, in the alternative, that this court,

if it had jurisdiction, should exercise a discretion not to assume jurisdiction over the matter. I need not deal with the latter submission. The Labour Court is a specialised court that adjudicates disputes founded in labour law, but only those disputes adjudicable by it in terms of various Acts of Parliament. O'Regan, J in **Fredericks & Others v MEC for Education and Training, Eastern Cape, and Others** 2002 (2) SA 693 (CC) said at 693H-J, with reference to the LRA, that it does not confer "*general jurisdiction on the Labour Court to deal with all disputes arising from employment*" This is correct, but in this instance the Basic Conditions of Employment Act 75 of 1997 confers jurisdiction upon this court to entertain, concurrently with the civil courts, "*any matter concerning the contract of employment*". Mr Kennedy submitted that the question whether a restraint covenant can be considered a “matter” concerning a contract of employment should be answered negatively. The restraint clause regulates matters outside the employment relationship and after the employment relationship has come to an end. The dispute, he says, affects many parties who have no employment relationship with the applicant.

27. In my opinion, a restraint of trade clause, when it is seated in a contract of employment, is a matter concerning the contract of

employment as envisaged by section 77 of the BCEA. *Prima facie* this court has jurisdiction to grant the relief which LNH seeks. However, I do not have to determine the issue finally. I will proceed on the assumption that the BCEA confers jurisdiction on this court to adjudicate the present dispute.

2. Does LNH hold the right to enforce the restraint clause, and should this right be protected?

28. The first part of this question requires that there be a legal nexus between LMS, which the contract of employment of 8 August 2001 refers to as "*the company*", and LNH. It may be assumed that "*the company*" was Avtec Resourcing (Pty) Ltd, which sold its LMS business to Lawatera, which is now Labournet Holdings. It may be that LNH became Mr McDermott's employer as set out above. But it must be assumed that at some time LNH transferred its business or part of its business to the subsidiary companies. However, the services of Mr McDermott, according to the papers, remained with LNH. The right to a restraint of trade can be ceded. See **Dunman v Trautman** (1892) 9 SC 14 in R H Christie **The Law of Contracts in South Africa** (2nd ed) 555. This case may not, of course, be applicable to a contract in restraint of trade between an employer and an employee but

prima facie it appears to be so.

29. In any event, there has been no suggestion of a cession of LNH's rights in respect of the contract of employment. I therefore hold that the right to enforce the restraint resides in LNH, but on its own version it is merely a holding company and does not trade. Trading takes place in various subsidiary companies, including Labournet Central (Pty) Ltd. It is these companies that provide the services to the NEF and invoice the NEF for such services. It does not seem to me that LNH has any protectable interest in this case.

30. Even if I were to find, which I do not, that LNH has a business to protect, part of that business is, in my opinion, in *fraus legem*. This is the part that relates to the NEF. It may be that if the NEF's business is excised, some legitimate business may remain, e.g. the production, use and sale of the Labournet manual. But the facts do not show that Mr McDermott has any intention of trading with this document. Furthermore, the attorney's firm does not, according to Mr Snyman, form part of LNH's business. Mr Kennedy submits, and I agree with him, that the NEF should be governed by fair democratic principles and should be used in the interests of its members to pursue its objectives. It should not

be used to enrich an outside body such as the LNH, or to give LNH the benefit of VAT exemptions or, for that matter, any other advantage. It should certainly not be exploited to give LNH's employees the right of appearance in labour forums such as the CCMA and the Labour Court. LNH's business, to utilise an employers' organisation such as the NEF, to give it an unlawful and unfair advantage in the labour law consulting industry, is not in the public interest. The restraint should not be protected.

31. The business model used by LNH requires of its employees, such as the respondents, to misrepresent their capacities. They purport to be officials of an employers' organisation when they appear before the CCMA, councils and the Labour Court. The NEF deceives the Registrar of Labour Relations in regard to its true nature. The public at large is encouraged to think that they are dealing with the NEF, an employers' organisation, when, in fact, they are dealing with LNH or one of its subsidiaries. This is not a legitimate interest that is worthy of protection. It is against the public policy to carry on this sort of business. It would also, in my opinion, be against public policy to enforce a restraint and protect such a business. At the same time it would be inappropriate to encourage Mr McDermott or any other employee to engage in similar activities. Insofar as I have any discretion,

considerations of public policy, persuade me to exercise my discretion against granting relief to the LNH.

32. For the reasons set out above:

1. The rule *nisi* was discharged firstly as regards the second respondent and thereafter as regards the first respondent.

2. The rule as regards both respondents is discharged with costs. Such costs are to include the costs of the interim application, the respondents' application to compel discovery of documents and the hearing on 20 August 2002. Costs are to include the costs of two counsel.

3. The Registrar is directed to furnish a copy of this judgment to:

(a) The Judge President of the Labour Court.

(b) The Director of the CCMA.

(c) The Registrar of Labour Relations.

SIGNED AND DATED AT BRAAMFONTEIN ON 23 OCTOBER 2002.

A A LANDMAN

JUDGE OF THE LABOUR COURT

aring 24 July 2002 and 20 August 2002

23 October 2002

plicant Advocate M Brassey S C and Advocate A Du Plessis instructed by Snyman Van der Heever Heyns / De Wet & Partners.

Advocate P Kennedy S C and Advocate J Durandt instructed by Blake, Bester Attorneys Inc.