

Sneller Verbatim/ASS

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: J322/03

2003-02-23

In the matter between

NAAP

Applicant

and

NAIL OUTDOOR (PROPRIETARY) LIMITED

1st Respondent

MITED

2nd Respondent

J U D G M E N T

LANDMAN J: The applicant, Dave Saunders van der Knaap was one of two shareholders and the chief executive officer of a business belonging to a company called Natanya Signs (Pty) Limited. He sold his shares in the company to the 1st respondent, Nail Outdoor (Pty) Limited to which I shall refer as

Nail Outdoor. The sale of the shares included the sale of Natanya's business relating to the marketing of outdoor signs in Africa excluding South Africa which was to be incorporated in a company to be formed off-shore. 70% of the shares in this company would be held by Nail Outdoor and 30% by the applicant.

The purchase price was payable in two ways:

1. Payment of R20-million; and
2. Payment of R660 667,00 per annum provided the company reached prescribed target figures (earnings before interest tax depreciation and amortisation).

These amounts were payable provided the end targets were met by the end of December 2002, December 2003 and December 2004. This amount is referred to as the "agterskot".

At the same time, and part of the same transaction, two further agreements were concluded by the parties. First, the shareholders' agreement in relation to the off-shore African Business later styled Outdoor Africa. The second agreement was an employment contract also concluded on 4 February 2002. This contract has the following features:

1. It is a fixed term contract for three years terminating at the end of December 2004 (when the last earnings target is to be

met).

2. The applicant will receive R600 000,00 per annum.
3. The applicant will receive a bonus based upon performance.

The employment contract is an integral part of the agreements concluded between the parties and there is also a link between the "agterskot" and the applicant's appointment as chief executive officer. His appointment as chief executive officer arises by virtue of the sale of the business and his knowledge of the business.

It is common cause between the parties that the applicant at all material times operated as the chief executive officer of the Outdoor Africa business and has performed the duties which are required to run that business.

In early December 2002 representatives of the respondents discussed the applicant's position with him. Meetings were held on 2, 4 and 6 December. The letter of 11 December 2002 sets out the respondents' position.

The writer, Mr Kenny Setzin, referred to the discussions regarding possible restructuring of Nail Outdoor. The restructuring suggested is that the applicant relinquish his position as chief executive officer of Nail Outdoor and take up the position as chief executive officer of Outdoor Africa on

substantially the same remuneration package as his current package.

After discussions, the applicant delivered a letter to the respondent setting out his response. He denies that there is any need for material restructuring of the companies and that he considers that his appointment as chief executive officer of Outdoor Africa would put him in a materially worse position than that which he currently occupies. He also says that provided an acceptable exit strategy can be agreed upon he will reluctantly "resign" as executive director and chief executive officer of Nail Outdoor.

On 31 January two meetings were held between Mr Setzin and the applicant. At the meeting, held at the Hilton Hotel, a signed employment contract was presented to the applicant. He declined this offer and consequently was handed a letter which is to the effect that:

1. The applicant is reassigned to be the chief executive officer of Outdoor Africa.
2. The re-assignment occurs in accordance with the provisions of clause 2.2 of his employment agreement which provides that the applicant's designation may change if the company undergoes a change of structure or nature for example

through a merger, acquisition or amalgamation.

3. The reasons for this are threefold which are regarded as in accordance with corporate governance and best business practice:

- (a) The enormous growth of Outdoor Africa.
- (b) The corporate governance issues to avoid conflicts of interest.
- (c) The fact that it is in the applicant's interest to focus on the African market.

Mr Redding, who appeared on behalf of the applicant, submitted that there is no doubt that the move constituted a demotion. I will assume that this is so and that Nail Outdoor and the 2nd respondent have breached the contract of employment.

The applicant deals, in his founding affidavit, with the urgency of this application. He says:

"I respectfully submit that this matter should be dealt with as one of urgency for the reasons stated above and as a consequence of the following:

9.1.1 I am suffering an irrevocable loss in earnings in terms of the sale agreement due to the 1st and 2nd respondents failure to comply with the terms of my employment agreement attached

to my affidavit marked DK3;

9.1.2 The 1st and 2nd respondents had been given an opportunity to rectify the unfair conduct on numerous occasions and they have refused to do so;

9.1.3 The current remedies available to me in terms of the provisions of the Labour Relations Act are such that I will only be in a position to obtain relief many months from now. The current backlog at the CCMA will mean that I will unlikely be afforded an opportunity to state my case at arbitration proceedings within the next few months. As a consequence of the delay which will be occasioned through no fault of my own the damage will have been done and I will be unable to remedy the damage and harm caused to me financially as well as to my reputation by the unfair conduct committed by the 1st and 2nd respondents. It is impossible to quantify in financial terms the harm to my reputation and any future employment opportunities."

Mr Franklin SC, with him Mr Myburgh, appeared on behalf of the respondents. Mr Franklin submitted that this court has repeatedly found that financial prejudice does not create urgency. See for example *Hultzer v Standard Bank of South Africa Limited* 1999 20 ILJ 1806 (LC) at paragraph 3. This has

also been the approach adopted by the High Court see *IL and B Marcow Caterers (Pty) Limited v Greatermans SA Limited and another* 1981 (4) SA 108 (C) at 113H. This court has also not been prepared to accept that damage to reputation entitles an applicant to obtain relief in this court by way of urgency. In the *Hultzer v Standard Bank*-case, supra Revelas J said:

"I have considered the grounds for urgency raised by the applicant in so far as the applicant alleges that there would be an injury to his reputation and a possibility that the respondent could employ another person in his position, these are not factors which distinguish the applicant's case from any other dismissal case."

It is also correct that urgency plays even more a critical role and represents more of a hurdle for an applicant who seeks final relief by way of urgency. The reason for this has been expressed by Loxton AJ in *Tshwaedi v Greater Louis Trichardt Transitional Council* [2000] 4 BLLR 469 (LC) at paragraph 11 where he said:

"An applicant who comes to court on an urgent basis for final relief bears even a greater burden to establish his right to relief than an applicant who comes to court for *interim* relief.

Where *interim* relief is sought respondent can always address the issues at his leisure at a later stage. Where final relief is sought that is not possible."

In the present case the applicant came to court seeking final relief, but after requesting a postponement, the applicant amended his papers to claim *interim* relief. However, a claim for *interim* relief on the grounds of urgency on which the applicant relies does also not assist him.

In the result I find that the applicant has not shown urgency and the application is, therefore, dismissed with costs. Costs are to include the costs of two counsel.

**SIGNED AND DATED AT BRAAMFONTEIN ON APRIL
2003**

A A LANDMAN

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA