THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C178/2023

In the matter between:

WARWICK WEALTH (PTY) LTD	**APPLICANT**
and	
ANDERSON JULIE CAROLINE	**First Respondent**
OVERBERG ASSET MANAGEMENT (PTY) LTD	**Second Respondent**
PSV INDUSTRIAL (PTY) LTD	**Third Respondent**

Heard: 16 May 2023

Delivered : 18 May 2023

Summary: An application to enforce a restraint of trade is generally heard on an urgent basis provided the requirements of Rule 8 are met. Urgency follows as a matter of course when Rule 8 requirements are met. A party seeking to enforce a restraint of trade must allege and prove the agreement as well as its breach by the other party. The former employee breached the restraint and the breach continue to prejudice the applicant. Held (1): The former employee is interdicted and restrained. Held (2): Each party to pay its own costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is an urgent application seeking to restrain and interdict a former employee of the applicant. The application is opposed by the first respondent (the former employee).

[2] Urgency was challenged, however, this Court, in the exercise of its discretion, heard the application as one of urgency. The core disput in this matter is one of whether there is a breach of the terms of the restraint. It being motion proceedings, ultimately a dispute of fact, if any genuine one exists, would be resolved by application of the *Plascon Evans* test.

Background facts

[3] Given the narrow basis on which the present application fulcrums, a detailed narration of the facts may not be necessary. Ms. Julie Caroline Anderson (Anderson) commenced employment with the applicant, Warwick Wealth (Pty) Ltd (Warwick) on 1 June 2019 as a Client Relationship Specialist (CRS). Prior to commencement of employment, Warwick and Anderson concluded and signed an employment contract on 7 May 2019. The said employment contract incorporated a restraint of trade clause. In terms of clause 10 of the employment contract, Anderson undertook that for a period of three years after the date of termination she will not do certain things as spelled out in clause.

[4] On or about 21 December 2022, Anderson resigned from employment with Warwick with immediate effect. In a four paged resignation letter, Anderson lamented intolerable working conditions which forced her to resign. Warwick accepted her resignation letter and sought to hold her to the notice period of three months as stipulated in the employment contract. Anderson was also informed that Warwick reserves the right to enforce the restraint of trade against her by way of an interdict. In correspondents it was mentioned to Anderson that should she be contacted by any client of Warwick she should act in line with clause 10.5.4 of the restraint clause. The clause prohibits contact with clients of Spirit Invest Group (SIG) or providing business service of whatever nature to the clients of SIG or solicit business from those clients.

[5] Anderson in some correspondence exchanged regarding the resignation terms and notice period issue undertook to comply with the restraint clause. However, Warwick alleges that contrary to the undertaking, it discovered on 28 March 2023 that Anderson approached Westlake Golf Club (Westlake), an entity within Warwick's Network, and effectively solicited it by effecting a sponsorship for Westlake through the second respondent. Such conduct was allegedly in direct violation of the restraint. Anderson vehemently denies these allegations of breach and alleges that Westlake does not belong to the so-called "*Network*" and for a period of time even before her being employed by the second respondent, the second respondent has been sponsoring golf days for Westlake and there was a longstanding relationship between the second respondent and Warwick. These denials and assertions were not seriously disputed by Warwick in reply.

Evaluation

Is there a restraint agreement?

[6] There is no dispute that Anderson signed an employment agreement which incorporates a restraint of trade clause. Therefore, there exists a valid, binding and enforceable restraint agreement between the parties.

Is the agreement enforceable?

[7] As far back as 1984, Rabie CJ held that there is nothing in our common law which states that a restraint of trade agreement is invalid and unenforceable. It is in the public interest that agreements entered into freely should be honoured and that everyone should, as far as possible, be able to operate freely in the commercial and professional world. In *casu*, the enforceability of the restraint of trade has not been challenged. Anderson alleged that Warwick has no protectable interest. Thus, since the enforceability was not challenged, the answer to the question is that the agreement is enforceable. in the papers, Anderson somewhat suggested that Warwick has no protectable interest. However, counsel for Anderson conceded that what Anderson sought to convey by that suggestion was that she did not breach the restraint clause.

Was the restraint breached?

[8] It is trite that a party in motion proceedings is bound to make his or her case in the founding affidavit[1].Warwick only discovered 28 March 2023 that Anderson approached Westlake. No evidence was led as to when and how was the approach effected. Nevertheless, Anderson does not seriously specifically dispute the fact that she approached Westlake and solicited its customers by effecting a sponsorship in the name of the second respondent. Other than a bare denial she does not specifically deny that she utilized the confidential information in order to solicit sponsorship for and on behalf of the second respondent. On application of the *Plascon Evans* rule, this Court must conclude that Anderson did (a) approach Westlake (b) solicited sponsorship using the confidential information of Warwick, which information she amassed whilst in the employ of Warwick.

[9] It seems to be the case of Anderson that Westlake did not form part of the so-called Network of Warwick. She considered Westlake to have been a club that Warwick would sponsor golf days for. Clause 10.5.5 defines Warwick's Networks as an extensive network which includes but is not limited to amongst others sports clubs. Accordingly, it must fall under the Warwick's Networks, this Court concludes.

[10] Clause 10.5.5 of the restraint clause specifically provides that Anderson will not for a period of 3 (three) years after the date of termination of the employment agreement either for herself or as an agent of anyone else, persuade, induce, solicit, encourage, or procure (or endeavour to do any of the aforegoing) any entities through whom Warwick markets its services and products, to become interested in any manner whatsoever in any business, firm, undertaking or company directly or indirectly in competition with Warwick.

[1] *Betlane v Shelly Court CC 2011 (1) SA 388 (CC) para 29 and De Beer v Minister of Safety and Security and Another* [2011] 32 ILJ 2506 (LC)

[11] On the facts as alleged and admitted by Anderson (that she approached Westlake and used confidential information to solicit a sponsorship for the second respondent) an order interdicting her is justified. Her undisputed conduct is in direct violation of clause 10.5.5 of the restraint clause. Accordingly, on the preponderance of probabilities, Anderson is in breach of the restraint clause.

[12] However, there is no evidence to suggest that Anderson is in contravention of clause 10.5.4 of the employment agreement or had any contact or solicited any business from the clients of the SIG. The fact that Anderson had access to the clients does not transmute into contact and solicitation as prohibited by the contractual provisions. Warwick barely denied the allegation that Anderson did not contact any of Warwick's known clients. On application of the *Plascon Evans* principle, Warwick failed to demonstrate, on the preponderance of probabilities, that Anderson contacted and or solicited business from any clients. Therefore, the prayer sough in paragraph 2 of the notice of motion ought to be denied.

[13] Accordingly, her conduct as outlined above is prejudicing Warwick's protectable interest – Warwick's Networks, being the extensive network of entities and Westlake is one of those entities. On the basis of the above breach, the applicant is entitled to the relief sought.

Issue of the costs.

[14] This is effectively a civil claim justiciable under section 77 (3) of the Basic Conditions of Employment Act, 1997 (BCEA). Accordingly, the principle of the costs following the results finds application. Nothing was suggested by Anderson that the principle should not be applied. For her part she asked for a punitive costs order. However, Warwick did not achieve outright success in this matter. The main prayer, to which Mr. Snyman, appearing for Warwick, harped on has not been granted by this Court. In the circumstances, the appropriate order to make is that of each party bearing its own costs.

Conclusion

[15] Ultimately, this Court comes to the conclusion that there is a valid and enforceable restraint and that the interest of Warwick is worthy of protection. I am satisfied that Anderson is prejudicing such an interest. As to costs, each party must bear its own costs.

[16] In the results I make the following order:

Order

1. The application is heard as one of urgency.

2. Anderson is interdicted from directly or indirectly either by herself or as the agent of anyone else, persuade, induce, solicit encourage or procure (or endeavor to do any of the aforegoing) any of the entities through whom Warwick markets its services and products, to become interested in any manner whatsoever in any business, firm, undertaking or company directly or indirectly in competition with Warwick.

3. Anderson is interdicted from directly or indirectly revealing or disclosing in any way utilize, whether for herself and the second respondent's own purposes, or for the purposes of any third party, any of Warwick's confidential information and/or trade secrets and/or client particulars.

4. Each party to bear its own costs.

GN MOSHOANA
Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr S Snyman of Snyman Attorneys, Rosebank.

For the First Respondent: Mr. B Braun.

Instructed by: Ross Munro Attorneys, Sandton.