IN THE LABOUR COURT OF SOUTH AFRICA,

DURBAN

Not Reportable

Not of interest to other judges

Case no: D 769/18

In the matter between

EMD TECHNOLOGIES (PTY) LIMITED Applicant

and

MINAL VASANTHRAI SONI First Respondent

VISISO ADVISORY SOLUTIONS (PTY) LIMITED Third Respondent

MOTION CAPITAL (PTY) LIMITED Fourth Respondent

Heard: **15 June 2018**

Delivered: **15 June 2018**

Edited: **1 August 2018**

Summary: **Restraint of trade – whether an agreement was concluded**

***EX TEMPORE* JUDGMENT**

COETZEE AJ

[1] This is the *ex tempore* judgment in the matter of EMD Technologies (Pty) Limited, the applicant and Minal Vasanthrai Soni the first respondent, Visiso Advisory Solutions (Pty) Limited, third respondent and Motion Capital (Pty) Limited, the fourth respondent.

[2] In this matter the applicant on an urgent basis seeks to interdict and restrain the first respondent until 15 March 2023 in all areas in which the applicant operates in the Republic of South Africa from using and disclosing confidential information carrying on or being interested in a competitor of the business of the applicant or rendering services to any business similar to or endeavouring to compete with that of the applicant and not to encourage or entice the applicants' employees to be employed by the first respondent. It has settled with the second respondent and it asks for no relief against the third and fourth respondents. I refer to the parties as the employer and the employee.

[3] Before I dealt with the application itself I raised with the parties the state of the Court file. By 12 June 2018, three days before the hearing, the court file had not been paginated or indexed, only some of the documents were indexed. On 13 June 2018 my preparation was interrupted for purposes of getting the file in order.

[4] On 13 June 2018 the file was returned with the following challenges: Firstly, the answering affidavit was not added to and bound to the paginated documents. The loose copy of the answering affidavit was not paginated and still has not been paginated or added to the papers.

[5] The answering affidavit is referred to in the index but not placed and bound with the documents. The confirmatory affidavit of Katwa is referred to in the index but not added to the paginated and bound documents. It has still not been paginated by the parties, I paginated it.

[6] On 13 June 2018 the applicant's heads prepared for the undefended application that was set down for 17 April 2018 was the only attempt at filing heads. The first respondent's heads were delivered on 13 June 2018. The applicant filed supplementary heads with the court on 14 June 2018. On 13 June an application for condonation for the late filing of the answering affidavit and an objection thereto were filed.

[7] I required the parties to address me on the consequences of the above state of affairs and why the Court should hear the matter today. It was clear to me that this matter might not have been ripe for hearing as the practice manual have in various respects not been followed. I was urged to hear the matter because it was an urgent matter.

[8] Urgency does not extend to where parties have at least 10 or 12 days in which to get the file in order, to file heads and to prepare in such a way that this Court is able to deal with the matter. The parties addressed the Court, apologised and urged the Court to hear the matter. I have decided to hear the matter nonetheless.

[9] Firstly, there was an application for condonation for the late filing of the answering affidavit. The first respondent applied for condonation for the late filing of his answering affidavit. The

answering affidavit was filed outside the period granted by the Court in terms of an agreed order of 17 April 2018.

[10] The delay is approximately 12 days. In my view it is not an excessive delay having regard to the time periods in this matter. The explanation of the first respondent is that because the applicant did not pay the first respondent's salary for March 2018 for that part of the month that he worked until the date of his resignation, he was unable to instruct his legal representative until he procured finance and that took some time.

[11] This was challenged by the applicant on the basis that he did not add supporting confirmatory affidavits or explain from whom and how and when he succeeded in borrowing money. This is not decisive in this matter as the first respondent's financial position is known to him.

[12] I find the explanation acceptable for purposes of granting condonation for the late filing of the answering affidavit.

[13] As far as the prospects of success are concerned, although no specific mention thereof is made in the application, by this is an urgent matter the contents of the answering affidavit sets out the defence of the first respondent. His defences are that he did not sign the restraint of trade agreement (referred to as the MOU) and that he in any event did not intend to or has commenced doing business in competition with the core business of the applicant.

[14] In short, if he could show for purposes of condonation that he did not sign the MOU and did not intend to do business that is in competition with that of the applicant (if he signed the MOU) or

enticing the employees then he has sufficient prospects of success for purposes of the condonation application.

[15] As to prejudice to the applicant it submits that it had to file a second replying affidavit thereby incurring further costs and it caused a delay to the applicant in preparing its heads of argument.

[16] The applicant, however, was in possession of the answering affidavit from 18 May 2018 and filed its second replying affidavit on 1 June 2018. That left the applicant with 15 days until the date of the trial. This is not prejudice that cannot be cured by a cost order.

[17] The late filing of the answering affidavit is condoned, and the first respondent is ordered to pay the wasted costs occasioned by the delay in filing the answering affidavit.

[18] In my view the opposition to the application for condonation is unreasonable and costs should follow the result. The applicant is ordered to pay the costs of opposition to the application for condonation.

[19] I requested the parties to first address me on the memorandum of understanding (the MOU) which forms the basis of the relief that the applicant seeks against the first respondent. It is referred to as a memorandum of understanding and it contains restraint provisions. The applicant relies upon those restraint provisions when it asks for a final interdict.

[20] In the founding affidavit it relied on a signed agreement that was signed. In response to the answering affidavit the applicant

extended the basis for its relief to an agreement that was agreed to even if it was not signed. In other words, so goes the submission, it was a collective effort that led to a document that the first respondent understood to be binding upon him.

[21] The first respondent contends that the applicant is restricted to what it said in its founding affidavit. If it wanted to extend the cause of action then it had to file a supplementary affidavit or introduced this ground in such a manner that the first respondent had an opportunity to deal with it, either in the answering affidavit or in a second supplementary answering affidavit.

[22] The applicant is required to prove a signed agreement binding upon the employee. It cannot in its replying affidavit introduce a new basis as it attempted to do.

[23] The applicant contends that the first respondent signed the MOU and/or agreed to it. The first respondent denies that he signed it or that he agreed to it.

[24] The Court has been referred to various facts, circumstances and the probabilities in determining whether it is possible to resolve the dispute between the two versions. The two versions are that the MOU upon which the applicant relies as having been signed and the second version which is the denial by the employee.

[25] The following are relevant factors either one way or the other.

[26] It is common cause that the employee initialled every page of the MOU; this favours the version of the applicant.

[27] On the last page there is a line designated for the signature of the person whose name is printed below the line. The printed name below the line is that of the employee. Below that is a space for a name and below that space for a date. In the space for the name there appears in handwriting the printed name of the employee. This, according to the applicant, is the "signature" of the employee. *Ex facie* the document a name was placed in the space designated for a name. The space where the first respondent was supposed to sign does not carry any signature. The first respondent says it is because he did not sign the MOU. This favours his version.

[28] The applicant's director and the applicant's attorney, Ms Moni, with the first respondent and his wife were present when the first respondent appended his name to the last page. This may not be quite correct as on the version of the first respondent the director placed his signature on the document, turned and left.

[29] Assuming that all of them were there when he placed his name on the MOU, then according to the director and Ms Moni he never indicated to them that he was not agreeing to the contents of the MOU. According to them in the end he picked up the document, looked at it and indicated that he was satisfied with the document. This favours the applicant's version that he might have agreed to the document but not that he signed it.

[30] The applicant had its attorney present at the meeting of 15 March when the MOU was discussed. The first respondent says he was ambushed. On the facts that seems to be the position. He was called to a meeting and then the applicant asked its attorney who was present to sit in and go through the MOU that was pre-prepared for the applicant.

[31] It is surprising that the applicant's attorney did not explain to the first respondent to sign the agreement where they made provision for such a signature and to append his signature instead of writing his name in print where there is space for the identification of a name. According to the papers she explained the whole document to him, but she failed to explain to him where to sign. This counts in favour of the employee's version.

[32] The applicant relies upon a WhatsApp in which the first respondent said he could sign anything, to show what his state of mind was, that is that, he would sign the MOU and in fact therefore signed it. Having regard to contents of the WhatsApp it merely says that he was not going to compete regarding the software programme of the applicant and that he would sign anything to that effect. This does not assist the applicant but rather favours the version of the first respondent.

[33] It is also clear that when push came to shove he did not just sign anything presented to him. This supports the contents of the WhatsApp that he was prepared to sign anything to show that the software programme would not be competed with. It is apparent from the papers that, the software programme of the applicant is a core part of the applicant’s business.

[34] The applicant submits that, it is indicative of the fact that the first respondent agreed to the MOU that there was no further correspondence from the first respondent’s attorney regarding the MOU after 15 March 2018. This seems to me to be a neutral factor as his attorney would have to take her instructions from the first respondent. There was no obligation upon her to return to or correspond with anybody on behalf of the employee unless instructed to. She had one telephone call with the attorney for the

applicant during the discussions and she sent one email and thereafter the communication was between the first respondent and the applicant's representatives.

[35] What is also clear is that in the email the first respondent's attorney clearly said that she could not comment in such short time on the pre-prepared MOU. She referred to quite a substantial number of issues and amongst others included four items that she identified that had to be included in the agreement. Those issues are not included in the agreement. The email with the comments was sent to Ms Moni, the applicant's attorney who was present at the discussions. The omission of the four items from the MOU counts against the applicant's version.

[36] The first respondent denies that by writing his name in his handwriting in the space for the name of the person to sign he thereby signed the MOU. This favours his version.

[37] The first respondent contends that the five-year period and the geographical area mentioned in the MOU are unfair and that he was advised by his attorney not to sign and agree thereto. In the end he decided not to sign and not to agree to the document unless he had the opportunity to have his attorney looking at it with sufficient time to comment. This favours the first respondent's version.

[38] The first respondent explains his initials to the various pages in that he was requested to agree to the changes on those pages.

[39] The first respondent's attorney filed a confirmatory affidavit confirming the first respondent's version. She also referred to a

telephone call between them while she was in her car and when the first respondent had left the meeting. She sets out in some detail what occurred and the last paragraph, paragraph 11 reads as follows:

> "I recall that I later received a further telephone call whilst I was driving. I recall that the first respondent advised that the meeting was concluded and referred to the agreement."

[40] The applicant submits that the reference in paragraph 11 to "agreement" means that this paragraph should be interpreted to confirm that the first respondent informed her that he had agreed to the MOU and that there was an agreement. I find no support for this contention in this paragraph. She throughout her affidavit refers to the document as "the agreement" or the "MOU". At least a number of times she referred to "the agreement". The first reference an agreement is even before the anything has been changed on the MOU. This does not favour the version of the applicant.

[41] There clearly is a dispute of fact as to whether the MOU was signed by the first respondent. Some of the probabilities favour the applicant's version and others favour the first respondent's version.

[42] In my view I cannot resolve the dispute of fact on the probabilities. There are too many probabilities that favour either the one version or the other. None of them are decisive. I therefore apply the principles in *Plascon-Evans*[1] and the *Stellenbosch*-case.[2]

[1] *Plascon-Evans Paints Ltd v Van Riebeeck Paints* (Pty) Ltd [1984] 2 All SA 366 (A)
[2] *Stellenbosch Farmers' Winery v Stellenvale Winery (Pty) Ltd 1957 19871 (4) SA 234 (C)*

[43] According to those authorities the respondents' version must be real, genuine or *bona fide*, in other words it should not be fanciful or without any foundation. His version may well be genuine and *bona fide*. The applicant has not gone that far as to say that the first respondent is *mala fides*. On that basis I cannot reject the version of the first respondent that he did not sign the MOU. This would have been a proper case to refer to evidence but none of the parties requested that.

[44] The applicant must show that the agreement upon which it relies is binding. In this case the dispute was exactly as to whether the agreement was signed. The "signature" is in dispute. The onus rests with the applicant to prove that the MOU was signed by the first respondent.

[45] The applicant has not discharged the onus to show the MOU was signed and that the first respondent is bound by the MOU.

Costs

[46] The first respondent was successful. There is no reason why costs should not follow the result.

[47] Under the circumstances I make the following order:

[47.1] The late filing of the answering affidavit is condoned, and the applicant is ordered to pay the cost of the opposition to the application.

[47.2] The first respondent is ordered to pay the wasted costs occasioned by the late filing of his answering affidavit.

[47.3] The application is dismissed with costs.

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F Coetzee

Acting Judge of the Labour Court

APPEARANCES:

For the applicants:	Adv S Swartz
Instructed by:	Moni Attorneys Inc
For the first respondent:	Adv S K Dayal
Instructed by:	Maharaj Attorneys