

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NUMBER: 17838/2011

5 **DATE:** 14 SEPTEMBER 2011

In the matter between:

BOYD & THORN PROPERTY INVESTMENT CC

10 **t/a LANDLORDS** Applicant

and

MARK BESTER Respondent

15 **J U D G M E N T**

ALLIE, J:

In this matter I have read the papers that preceded the
20 arguments and I am of the view that the applicant makes out a
case for the relief sought, which is really to restrain the
respondent from using confidential information of the applicant
in a manner which will enable him to unlawfully compete with
the applicant, and mainly the other forms of relief sought by
25 the applicant is the return of the applicant's property and
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compliance with the terms of a restraint agreement. It is not restraint in the sense whereby the applicant is saying it does not wish to have the respondent compete with it, it is merely limited in form. The applicant also seeks costs on an attorney and client basis.

The respondent has come to court to oppose this matter, but in its affidavit it does not dispute that an agreement was concluded between the parties. It does not dispute that it traded pursuant to such an agreement and that certain financial consequences flowed as a result of that agreement. Yet, in his attorney's letter, the respondent now states that the agreement was void *ab initio* and that it was motivated by undue misrepresentation and that the respondent was induced to enter into an agreement.

The letter of the attorney appears to be a stance not supported by the respondent himself. In fact the respondent goes on then further to deny that he had ever brought the business of the applicant into any disrepute or that he has committed any defamatory acts. So it appears to be a denial. Then, of course, there is a further reference on the part of the respondent to Fidelity Fund certificates, which it said the applicant had not validly obtained at the time when it was obliged to do so.

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The further argument advanced on behalf of the respondent is that the trading name of the applicant, namely Landlords, was registered with the Estate Agency Affairs Board belatedly and
5 that the respondent was not infringing any trademark by registering a website, which he referred to as "We do Rentals".

Clearly, these aspects are disputes for a court dealing with an action in due course to consider, aspects of whether the
10 agreement was void *ab initio*, aspects of whether the respondent had been induced by negligent or fraudulent misrepresentation to enter into the agreement. Those are all aspects that a court, in due course dealing with the action, would have to consider.

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But at this stage, I cannot, despite a thorough search of the answering papers, find any basis upon which the respondent claims that he is not obliged to return data or confidential information of the applicant and that he is not obliged to return
20 the applicant's property, and that he is not obliged to fulfil the terms of the restraint agreement, save and accept to the extent that, of course, the respondent's attorney alleges that the agreement is void *ab initio*.

25 The difficulty one has with this situation is clearly that not only
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had the agreement been entered into, but the agreement had been acted upon. Certain financial and commercial consequences flows from the agreement and the agreement, had been in existence for a substantial period of time. Now at
5 the stage when this application is brought, and the respondent was called upon to return the information and property of the applicant, the respondent, through his attorney, raised issues concerning the validity of the agreement. So it is very convenient for the respondent to do so now, but not to have
10 done so at an earlier stage when the agreement had just been concluded.

The respondent offers no explanation about what is to become of the funds that he has acquired as a result of this so called
15 valid agreement, nor does he tender to return the deposits that the applicant is entitled to have returned to it.

I am not persuaded that the respondent's arguments, in any way, ward off the relief sought or present an answer to the
20 case made out by the applicant for the relief sought.

In the circumstances I, therefore, grant an order in terms of prayers 2, with all its subparagraphs, prayer 3, with all its subparagraphs, prayer 4, with all its subparagraphs, prayer 5,
25 in the event, of course, of the respondent now not performing

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is obligations in terms of prayers 2 to 4, then the sheriff would have to be authorised to do so on his behalf. Prayer 6, prayer 7, with its subparagraphs, prayer 8 and finally I order that the respondent pay the costs of this application on a party and party basis.



ALLIE, J