IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE DIVISION, CAPE TOWN]

Case No: 15061/2018

In the matter between:

GATEWAY ADVISORY SERVICES (PTY) LTD	First Applicant
GATEWAY INTERNATIONAL EDUCATION FUND (PTY) LTD	Second Applicant
and	
COLLEEN MILLAR TRADING AS RALLIM HOUSE MODERN LEARNING ENVIROMENT	First Respondent
RALLIM HOUSE (PTY) LIMITED	Second Respondent
GARDEN CITIES NON-PROFIT COMPANY (RF)	Third Respondent

REASONS: 04 SEPTEMBER 2019

LE GRANGE, J:

[1] This matter came before me on 27 August 2019. Having heard Counsel for the respective parties and having regard to the papers filed of record, I made an order in the following terms:

> "1. The oral application by counsel for the Applicants, for leave to amend the Notice of Motion, is refused.
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> 2. In view that the application for leave to amend was refused, it follows that the matter has effectively become moot. In the result the Application is dismissed with costs."

[2] Herewith my reasons: The Applicants sought final interdictory relief against the First Respondent (“Millar”) and the Second Respondent (“Rallim”), (“the Respondents”) who had entered into a written non-disclosure and or non-circumvention agreement (“NCA”) with First and Second Applicants (“Gateway Services” and “Gateway Fund”), respectively on 27 October 2016 - the first agreement. No relief was sought against the Third Respondent.

[3] The Applicants seek to enforce a restraint contained in the NCA arising from an alleged breach that occurred in July 2017. The Respondents however contend that any rights arising from the NCA were waived in terms of the provisions of an indicative offer (“the Offer”) which became binding between the parties subject to certain conditions precedent – the second agreement -. Furthermore, a claim for the recovery of damages arising from the alleged breach was instituted and that any restraint period that there may have been has in any event lapsed.

[4] The second agreement was entered into between the parties on 10 January 2017. The fulfilment of the conditions precedent was mutually extended by the parties on 27 March 2017 to 31 May 2017.

[5] The Applicants had launched the current application on 14 August 2018, wherein final interdictory relief is sought against the Respondents for a period of 24 months from 19 July 2017.

[6] In terms of the Notice of Motion, prayers 1 and 2 were recorded as follows:

> "*1. Interdicting the First and Second Respondents from circumventing or attempt to circumvent the First and Second Applicants in regard to the Third Respondent, in any manner whatsoever with the intention or effect of depriving them of any fees, consideration, profit or other remuneration that would reasonably be expected to be derived from a transaction or prospective transaction for a period of twenty four months from 19 July 2017;*
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> *2. Interdicting the First and Second Respondents from making contact with Third Respondent in respect of any transaction or prospective transaction, including the purchase, lease or otherwise of the property situate at the Third Respondent's Sunninghill development for a period of twenty four months from 19 July 2017;*"

[7] On the day of the hearing Applicants' counsel, Mr AC Mckenzie, orally sought leave to amend the Notice of Motion. The amendment sought was in relation to the date, in paragraphs 1 and 2 of the Notice of Motion. According to Mr Mckenzie, the correct date should read 15 January 2018 instead of 19 July 2017 and that such amendment would not prejudice the case of the Respondents.

[8] Counsel for the Respondents Mr L Olivier, SC objected and submitted that the amendment sought would certainly prejudice the Respondents case

and that the Applicants were in essence seeking to make out a new cause of action.

[9] It needs to be mentioned that the Applicants did not serve a notice as contemplated in terms of Rule 28 (1) of the Uniform Rules of this Court on the Respondents, that they were desirous to amend their Notice of Motion. The Applicants also never offered any reasonable explanation as to why they require the amendment and for the delay in seeking it.

[10] Before dealing with the objections raised by Mr. Olivier, it is perhaps necessary to briefly sketch the background facts underpinning the application. Millar in late 2016 began to negotiate the purchase of land zoned for educational purposes from Third Respondent on behalf of Rallim. Millar intended to develop a school. She needed financial support in order to fund such a project. The project was the development and establishment of a Preparatory and Secondary school on land in phases 1 and 2 to be housed in Rallim or a newly incorporated company, SchoolCo.

[11] On 27 October 2016, the Respondents entered into the written NCA with the Applicants, the first agreement. On 10 January 2017, Gateway Fund expressed interest in investing in such a project and made a written indicative offer (the Offer) to Millar, which was accepted. This Offer is also referred to as the second agreement.

[12] The conditions precedent to which the Offer was subjected, were waived by Gateway Fund on 31 May 2017. In terms of clause 9.1 of the document, the Offer represented the entire agreement between the parties and in terms of clause 9.4 thereof, the Offer shall not operate as a waiver or release until the condition's precedent have been met. On 31 May 2017 Gateway Fund further exercised its rights in terms of the Offer to take up and receive 90% of the entire issued ordinary shares in the share capital of Rallim and confirmed that the Offer and its terms and conditions were fully operational.

[13] In terms of clause 8.4 of the Offer, a break fee or damages of R250 000 would be payable, should the conditions precedent have been waived and Millar wish to discontinue negotiations with Gateway Fund or for any reason advise Gateway Fund that they do not wish to proceed to establish a joint owned venture.

[14] On 14 July 2017 Gateway Fund called upon Millar to give an undertaking that she would not deal with any of the issued or authorised share capital of Rallim or negotiate, discuss, agree or settle any terms or conditions with the Third Respondent in relation to the sale of the property or any aspect of the property or the school to be developed thereon failing which proceedings to prevent and interdict Millar from doing so would be brought.

[15] On 19 July 2017 Millar gave notice to Gateway Fund of her termination of the Offer with immediate effect and exercise her right not to negotiate

further with Gateway Fund. She refused to provide the undertaking that was sought. Gateway Fund on 12 December 2017 instituted an action against Millar based on her written notice of discontinuation of negotiations and claimed a break fee, alternatively damages of R250 000 pursuant to the provisions of clause 8.4 of the Offer. At the time, no proceedings were brought to interdict or restrain Millar or Rallim.

[16] In an application for summary judgment, Millar in an opposing affidavit dated 20 March 2018, had set out her various defences to the claim. In the opposing affidavit, she explained that the waiver of the conditions precedent did not bring into effect a final joint venture agreement nor oblige her to perform in terms of such agreement. According to Millar, the waiver merely meant that the reciprocal obligation to negotiate continued, that Gateway Fund refused her *bona fide* efforts to negotiate and as a result terminated the negotiations.

[17] According to Millar, the Third Respondent and herself formed a business relationship; Rallim consists of Millar and four of Third Respondents directors.

[18] The Third Respondent holds 80% of the issued shares of Rallim pursuant to a shareholder's agreement; and through the venture, the Third Respondent invested an amount of approximately R96 million in the development of the school.

[19] On 14 August 2018, the Applicants launched the present application wherein final interdicts against Millar and Rallim are sought for a period of 24 months from 19 July 2017.

[20] According to the founding affidavit, the Applicants in no uncertain terms stated that the Respondents are in breach of clauses 2.3, 4.1. 4.1.1 and 4.1.3 of the NCA and notwithstanding demands, they refused to comply with their obligations in terms of the NCA and circumvented the Applicants with effect from 19 July 2017.

[21] Millar in her replying papers set out the Respondents' case in detail. She recorded that the Applicants predicated their demands on their alleged rights in terms of the Offer and not the NCA. Millar denied that the Respondents breached any of their obligations in terms of the NCA and or the Offer as she terminated the Offer on 19 May 2017. Millar also recorded that the Offer in any event had lapsed on 31 May 2017.

[22] Millar further recorded that the property transaction had taken place between Third Respondent and herself and there was no need for the services of the Applicants. The school had been built and is fully operational. According to Millar any restraint period that there may have been had lapsed.

[23] The core dispute between the parties is therefore one of interpretation of the relevant provisions of the written agreement(s) between the parties. To this end the current approach to be adopted in interpreting contractual

provisions and or documents has been pronounced upon by our Higher Courts in recent judgments[1].

[24] In the present instance, the Applicants had accepted, having regard to the founding affidavit and the Notice of Motion, that the purported breach of the NCA occurred when Millar on 19 July 2017 gave written notice of the termination of the NCA. It is further common cause that the Applicants since 14 July 2017 have threatened the Respondents with interim interdictory relief.

[25] The current application was ultimately launched on 14 August 2018 in the long form and on 20 September 2018 the matter was postponed for hearing to 25 March 2019. As the papers exceeded 200 pages an early allocation was required as provided for in this Division's Practice Directive 43(1). The Applicants despite requests, at the time, from the Respondents failed to deliver their heads of argument in compliance with Practice Directive 50(1)(a). On that day, the application was removed from the roll due to the Applicants failure to comply with Rule 62 (4) of the Uniform Rules and Practice Directives 43(1) and 50(1)(a) of this Division.

[26] The matter was re-enrolled on 23 April 2018 at the behest of the Applicants. The matter was then postponed to 27 August 2018 and the Applicants were ordered to pay the costs occasioned by the postponement. In the postponement order, the Applicants were allowed to file a further set of

[1] In this regard see *KPMG Chartered Accountants (SA) & Another v Securefin Ltd* 2009 (4) SA 399 (SCA) at 409 para [39]; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at 603 para [18] and *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* 2014 (2) SA 494 (SCA) at 499 para [12].

papers. In the supplementary affidavit the Applicants aver that, upon advice of their attorneys, a point in the Founding Affidavit needed to be clarified. In paragraphs 7-12, the Applicants now contend that neither party had cancelled the NCA and that the NCA only expired on 15 January 2018 with the restraint to expire on 15 January 2020.

[27] Turning to the objections: The general approach to be adopted in applications for amendment has been set out in numerous cases and the approach to an amendment of a notice of motion is the same as to a summons or pleadings in an action[2] 'The vital consideration is that an amendment will not be allowed in circumstances which will cause the other party such prejudice as cannot be cured by an order for costs and, where appropriate, a postponement. The power of the court to allow material amendments is, accordingly, limited only by considerations of prejudice or an injustice to the opponent. Prejudice in this context 'embraces prejudice to the rights of a party in regard to the subject matter of the litigation, provided there is a causal connection which is not too remote between the amendment of the pleading and the prejudice to the other party's rights'[3].

[28] Moreover, a litigant who seeks to add new grounds of relief at the eleventh hour does not claim such an amendment as a matter of right but rather seeks an indulgence. The greater the disruption caused by the amendment, the greater the indulgence sought and the burden upon the applicant to convince the court to accommodate him/her.

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[2] Affordable Medicines Trust v Minister of Health 2006 (3) SA 247 (CC) at 261 C- D.
[3] See: Erasmus Superior Court Practice- Volume 2 D1 – 332 [Service 7, 2018] and the cases referred to therein

[29] Courts ordinarily adopt a liberal approach in matters of this nature, as the primary object for allowing an amendment is to 'obtain a proper ventilation of the dispute between the parties'[4]. It would however be incorrect to accept that the liberal attitude shown by courts to amendments, means obtaining leave to amend is merely for the asking.

[30] A litigant seeking to make an amendment is in fact asking for an indulgence. The litigant must at least offer some explanation as to why the amendment is required, and if the application for amendment is not timeously made, some reasonable satisfactory account for the delay. Where a delay causes prejudice to the other party which cannot be cured by an order for costs and where appropriate a postponement, the amendment will generally be refused[5].

[31] In the present instance, the Applicants in their papers, including the supplementary affidavit filed on 29 March 2019 provided no explanation why the amendment is required, apart from the alleged advice they received from their legal team in preparation of the heads of argument. Moreover, no reasonable explanation has been offered for the delay.

[32] On a conspectus of all the papers filed of record, the Applicants have approached this matter with a great degree of tardiness.

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[4] J R Janisch (Pty) Ltd v W M Spilhaus & Co (WP) (Pty) Ltd 1992 (1) SA 167 (C) at 169 H-I.
[5] GMF kontrakteurs (Edms) Bpk & Another v Pretoria City Council 1978 (2) SA 219 (T) at 223A-B; Ciba-Geigy (Pty) Ltd v Sushof Farms (Pty) Ltd 2002 (2) SA 447 (A) at 450 A- C.

[33] The Applicants have failed to provide any reasonable explanation for their failure to have brought the application for interim interdictory relief at an earlier stage, despite the opportunity to supplement the founding affidavit. The Applicants during this delay of more than 12 months before launching the application have lulled the Respondents into a false sense of security. The letter of demand by the Applicants' attorneys on 14 July 2017 (MO12) to the Respondents, after all is explicit. It conveys the threat that the wrath of the Applicants will descend upon the Respondents in this court unless the Respondents accede to those demands. That letter was answered by the Respondents attorneys on 19 July 2017, and nothing more was heard from the Applicants in respect of their immediate threat to institute interdictory relief, until 14 August 2018. The lack of urgency and concern by the Applicants were further demonstrated when the matter was removed from the roll on 25 March 2019 due to the Applicants failure to comply with Rule 62 (4) of the Uniform Rules and the Practice Directives of this Division.

[34] There can be no doubt that in this instance, the self-created delay by the Applicants in bringing the application for leave to amend would cause prejudice to the Respondents that cannot be cured by a costs order and or a postponement. A postponement of this case to the semi-urgent roll in this Division would in any event have necessitated a date in early February 2020 as those are the dates semi urgent matters were postponed to at the time of my order. On the Applicants' latest version (not the Notice of Motion), the restraint would lapse on 20 January 2020, which means that the postponement date will be after the event and the matter would become moot.

[35] The tardiness in bringing forward the amendment in the Notice of Motion is clearly prejudicial to the Respondents. For all these reasons stated it follows that the discretion bestowed upon me, could not be exercised in favour of the Applicants.

[36] In view of the abovementioned, the restraint had lapsed on 18 July 2019. It is well established that Courts will not grant declaratory relief in cases where abstract, hypothetical or academic issues are raised, or where there is no dispute between the parties[6]. It follows that the present matter had become moot and unnecessary to consider.

[37] Even, if the Applicants' current version is accepted that the restraint would terminate in January 2020, to interdict the Respondents for the remaining 5 months for what they have been doing, with apparent unconcern for the better part of 19 months on the part of the Applicants would in my view operate unreasonably harsh and inequitable under all the circumstances.

[38] For all these reasons stated, the relief sought by the Applicants cannot succeed.

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LE GRANGE, J

[6] JT Publishing (Pty) Ltd v Minister of Safety & Security 1997 (3) SA 514 (CC) at para 15. (was referred to more recently with approval in Director-General Department of Home Affairs v Mukhamadiva 2014 (3) BCLR 306 (CC)).