



CASE NO.: A 285/2011

REPORTABLE

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ALIETA ELIZABETH WIESE t/a SUPPORT.COM

APPLICANT

vs

PASTEC DISTRIBUTION & TRAINING CC

RESPONDENT

CORAM: MILLER, AJ

Heard on: 14-15 November 2011, 22 November 2011

Delivered on: 23 November 2011

JUDGMENT:

MILLER, AJ: [1] The applicant is a former employee of the respondent. She was employed by the respondent with effect from 1 January 2008. Much later

and on 12 September 2008 the respondent presented the applicant with a written agreement of employment which it requested the applicant to sign.

[2] Although the applicant was reluctant initially to sign the agreement, it is common cause that she signed the agreement on 23 January 2009.

[3] The applicant remained so employed until the end of October 2010, whereupon she started her own business under the name and style of Support.Com. Her business consists of the marketing and the supply of Pastel Computer Software and the provision of training to the users thereof.

[4] The respondent on the other hand is the exclusive distributor of Pastel Software in Namibia.

[5] From this it becomes apparent that to some extent the applicant and the respondent compete for business in the same market.

[6] In the context of the proceedings before me, regard must be had to two aspects which impact upon the business relationship between the parties.

[7] The first is clause 18 of the agreement of employment concluded between the applicant and the respondent. It reads as follows:

Restrictions after Termination

18.1 For a period of 12 (twelve) months after the termination of the Employee's employment with the Corporation, whether by effluxion of time or in any other way whatsoever, the Employee shall not on behalf

of him/herself or any other person canvass or solicit orders from any person or firms who shall at any time during the continuance of his/her employment with the Corporation have been a customer/client of the Corporation.

18.2 The Employee shall also not directly be concerned in any competitive business involving the sale, distribution, installation or support of Sage Pastel Software within the Khomas Region or Erongo Region for a period of 12 (twelve) months after the date of termination of the Employees employment with the Corporation.

18.3 In order to protect the proprietary interests of the Corporation and its branch office, the Employee undertakes that he/she will not, during or after the termination of his/her employment with the Corporation, entice or attempt to entice customers/clients of the Corporation and/or its branch office away from the Corporation.

18.4 The Employee acknowledges and agrees that:

18.4.1 The obligations imposed upon him/her in terms of Clauses (18.1), (18.2) and (18.3) above, are separate, severable and independent obligations in favour of the Corporation;

18.4.2 The provisions Clauses (18.1), (18.2) and (18.3) supra shall be construed as imposing separate, severable and independent restrains in respect of-

18.4.2.1 The time period included in the restraint;

18.4.2.2 The activity within the ambit of competitive business;

18.4.2.3 Namibia, Khomas and Erongo Regions.

18.4.3 The invalidity or unenforceability of any one or any combination of restraints referred to above shall not affect the validity and

enforceability of other restraints referred to in Clauses (18.1), (18.2) and (18.3) supra or any combination of such restraints;

18.4.4 The restraints contained herein are fair and reasonable under the circumstances.

18.5 In consideration for the restraint impose herein, the Employee expressly acknowledges that the Corporation pays to the Employee a specified sum of money every month over and above the Employees normal salary, which said sum of money is paid to the Employee and accepted as such, to be paid in pursuance of the imposed restraint, and which serves the purpose of ensuring that the Employee will not be left destitute during the period of the restraint."

[8] The second is the applicant's membership of what is termed I-Forum. According to the applicant, and this not disputed, I-Forum is a package developed by Pastel International (South Africa), which makes provision for an additional dealer category in Namibia: It entitles members of I-Forum to obtain certain discounts and commissions on Pastel products and training sold.

[9] Since the respondent holds the exclusive right to distribute Pastel software and products in Namibia, the applicant is obliged to obtain her supplies from the respondent, at the discounts and with the commissions she was entitled to.

[9] I mention that upon the resignation of the applicant; the respondent addressed a letter to the applicant dated 10 October 2010. It reads as follows:

Dear Mrs. Alieta Wiese,

Regarding: **Letter of Resignation**

We hereby acknowledge receipt of your written resignation, dated the 15th October 2010 and confirm that your resignation has been accepted with the provisions detailed below. Your last working day is confirmed as 31st October 2010. Remuneration and any other income due to yourself will be paid by the 10th November 2010.

As agreed, you will sign on as an I-Forum Member with Pastec Distribution and Training cc. Your client base will be limited to the client list as per Attachment "A" which will be linked to your I-Forum Account. Any new clients will be added to this list.

Please note that the above does not in any way indicate any relaxation of the restrictions after termination (point 18) of your employment contract signed 23rd February 2009.

We would like to take this opportunity to thank you for your efforts and wish you the best for your future endeavours.

We hereby certify that you were employed by this company as a Support Consultant for the period 1st January 2008 until 31st October 2010.

Yours sincerely,

On behalf of the Pastec Distribution and Training

Peter Hearne

Managing Member

[10] I mention it here for the reason that the respondent contends that this letter constituted an amendment to Clause 18 of the Contract of Employment. I will return to it at the appropriate stage.

[11] Matters remained on even keel until the respondent addressed a letter to the applicant on 31st of October 2011 in the following terms:

Dear Ms. Wiese

RE: REVOCATION OF I-FORUM STATUS

The above matter refers.

Kindly note that you are hereby informed that Pastec Distribution and Training CC is herewith revoking your i-forum status with immediate effect.

The reason therefore being that you deliberately, and with full knowledge of the consequences of your actions, breached the terms upon which Pastec Distribution and Training CC graciously agreed to relax a part of the restraint of trade contractually applicable to you, which restraint came into operation upon your termination of employment with our offices.

As a consequence of such revocation of your status you will no longer be entitled to benefit from the discount applicable to i-forum members.

Furthermore, and solely in the event of a referral of potential clients who have never used the Pastel package you will be eligible for a referral commission, however same is only payable upon the successful conclusion of a transaction with such potential client.

Yours faithfully,

PH Hearne

Member

[12] This was followed by a second letter also dated 31 October 2011 which reads as follows:

Dear Ms. Wiese

RE: PROTECTION OF PROPRIETARY INTEREST

The above matter refers.

Upon your assumption of employment with Pastec Distribution and Training CC you concluded an employment agreement with our offices, certain conditions contained in the aforesaid contract and more specifically clause 18.3 thereof specifically survived the termination of the employment relationship.

In terms of the aforesaid clause you undertook and contractually bound yourself not to, either before or after the termination of this employment relationship, entice or attempt to entice away customers/clients of Pastec Distribution and Training CC and/or its branch office.

You are hereby informed that Pastec Distribution and Training CC will strictly be enforcing this restriction ad infinitum. Absolutely no relaxation and/or waiver of this restriction will be granted, and under no circumstances will any breach of this restriction be countenanced.

In the event of you electing to infringe upon Pastec Distribution and Training CC's proprietary rights we shall be constrained to approach the appropriate forum for the necessary relief.

Yours faithfully,

PD Hearne

Member

[13] Thereafter further correspondence followed between the applicant's legal practitioners and the respondent. It is not necessary to refer to those for purposes of this judgment. Suffice to say that the respondent remained resolute that it will enforce particularly Clause 18.3 of the Contract of Employment.

[14] Since the dispute could not be resolved between the parties the applicant approached this court seeking some interim relief on an urgent basis. The Notice of Motion contains the following prayers:

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1. Condoning the Applicant's non-compliance with the Rules, forms and services of this Honourable Court and hearing this application as one of urgency in terms of Rule 6(12) of the Rules of the above Honourable Court.

2. That a *rule nisi*, be issued, calling upon the Respondent to show cause, if any, on Tuesday, the 29th of November 2011, why an order in the following terms should not be made final:
 - 2.1 An order directing the Respondent to reinstate the Applicant's Pastel International Forum Program's Professional membership;
 - 2.2 An order directing the Respondent to allow the Applicant to renew her Pastel International Forum Program's Professional membership the year 2012;
 - 2.3 An order in terms of which the Respondent is restrained and interdicted from attempting to enforce, by whatsoever means and/or enforcing any of the trade restrictions placed on the Applicant in terms of the provisions of the entire Clause 18 of the Employment Contract between the parties.
 - 2.4 An order in terms of which the Respondent's attempt to enforce, *ad infinitum*, the trade restrictions placed on the Applicant in terms of the provisions of Clause 18.3 of the Employment Contract between the parties be declared contrary to the public interest and *ab initio* null ad void;
 - 2.5 An order interdicting and restraining the Respondent from in any manner whatsoever intimidating, harassing or interfering with the clients, suppliers, licence grantors and business activities of the Applicant.
 - 2.6 An order confirming and declaring that the provisions of Clauses 18.1 and 18.2 of the Employment Contract between the parties had expired by the effluxion of time.
3. Issuing an order directing that the relief set out in paragraph 2.1, 2.3 and 2.5 shall, subject to a further order of the Court, operate as immediate interim relief pending the finalization of this application.
4. Authorising the Applicant to amend her notice of motion and to supplement her papers, if necessary, within 10 days from the date of this order.
5. Issuing an order that Respondent pays the costs of this application on an attorney client scale.
6. That the Honourable Court grants such further and/or alternative relief as it may deem fit.

[15] The matter become opposed. At the hearing before me Ms. Visser appeared for the applicant and Mr. Geier represented the respondent.

[16] The stance adopted by the respondent in essence is that the applicant did not make out a case urgent relief, since so it was contended she failed to

establish the requisites required which will entitle her to the relief she claimed. It pointed to the fact that the applicant's membership of I-Forum had expired on 12 November 2011 and to the fact that I-Forum will be replaced by another scheme from December this year.

[17] As far as Clause 18.3 of the Employed Contract is concerned, the respondent contends that the letter dated 10 October 2010, to which I referred earlier, effectively amended Clause 18.3 of the Contract of Employment.

[18] That being the case, so the argument went, the respondent is fully entitled to enforce the amended agreement, since it longer amounts to a restraint of trade.

[19] This being an application for interim relief, I need not finally decide those issues.

[20] The requirements for interim relief as are well settled in law. The formulation by Corbett, J in ***L.F. Boshoff Investments v Cape Town Municipality 1969 (2) SA 256 (c)*** has been consistently adopted in both South African and Namibian Courts.

[21] The passage I have in mind is the following:

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Briefly the requisites are that the applicant for interim relief must show.

- (a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear, and if not clear is prima facie established, though open to some doubt;
- (b) that, if the right is only prima facie established there is a well grounded apprehension of irreparable harm if the interim relief is not granted and he ultimately succeeds in establishing his right;
- (c) that the balance of convenience favours the granting of interim relief;
- (d) that the applicant has no other satisfactory remedy. “

[22] I am satisfied that the applicant on the papers satisfies those requirements.

[23] Prima facie I am satisfied that the applicant has established that her right to conduct her business is being infringed upon by the respondent through the enforcement of restraints of trade that are not in law enforceable.

[24] In this I have kept in mind the argument that Clause 18.3 after it was amended, will pass muster.

[25] That the applicant will suffer irreparable harm financially through loss of income and clients admits of no doubt.

[26] The balance of convenience dictates likewise that the applicant's business should not be curtailed by what appears to me prima facie at least to be unlawful conduct on the part of the respondents.

[27] It is no argument to say that the applicant can ultimately bring an action to recover her damages. Whilst that may be a remedy it does not appear to me to be a satisfactory remedy given the facts of this case.

[28] Whilst it is correct that the applicant's membership of I-Forum expired on 12 November and no application for its renewal was made, that situation arose only because the respondent unilaterally revoked it.

[29] Some of the relief claimed appear to me to be not necessary and need not be considered.

[30] I consequently make the following orders:

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1. That the Applicant's non-compliance with the Rules, forms and services of this Honourable Court with regard to service and filing is condoned and that this matter be dealt with as one of urgency in terms of Rule 6(12) of the Rules of this Honourable Court.
2. That a *rule nisi*, be issued, calling upon the Respondent to show cause, if any, on Tuesday, the 29th of November 2011, why an order in the following terms should not be made final:
 - 2.2 An order directing the Respondent to allow the Applicant to renew her Pastel International Forum Program's Professional membership the year 2012;
 - 2.3 An order in terms of which the Respondent is restrained and interdicted from attempting to enforce, by whatsoever means and/or enforcing any of the trade restrictions placed on the Applicant in terms of the provisions of the entire Clause 18 of the Employment Contract between the parties.
 - 2.4 An order in terms of which the Respondent's attempt to enforce, *ad infinitum*, the trade restrictions placed on the Applicant in terms of the provisions of Clause 18.3 of the Employment Contract between the parties be declared contrary to the public interest and *ab initio* null ad void;

3. Issuing an order directing that the relief set out in paragraph 2.2, 2.3 and 2.4 shall, subject to a further order of the Court, operate as immediate interim relief pending the finalization of this application.
4. That the respondent is ordered to pay the costs of this application, such costs to include the costs of one instructing counsel and one instructed counsel.”

MILLER AJ

ON BEHALF OF THE APPLICANT: Ms. Visser
Instructed by: Petherbridge Law Chambers

ON BEHALF OF DEFENDANTS: Mr. Geier
Instructed by: du Pisani Legal Practitioners