



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, 23 January 2012,
26 January 2012

Delivered on: 24 February 2012

JUDGMENT:

MILLER, AJ: [1] This is the return date of a *rule nisi* I granted in favour of the applicant on 23 November 2011. The order I granted reads as follows:

“

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.”

[2] The applicant who is still represented by Ms. Visser seeks the confirmation of the *rule nisi*. The respondent which is represented by Mr. Geier, on the other hand, seeks the discharge of the rule.

[3] In issue between the parties is the enforceability or otherwise of certain restraint of trade clauses contained in a written agreement of employment concluded between the parties during February 2009. The restraints are recorded in Clause 18 of the agreement and reads as follows:

“

18. 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 or indirectly 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 of clauses (18.1), (18.2) and (18.3) *supra* shall be construed as imposing separate, severable and independent restraints in respect of-
- 18.4.2.1 The time period included in the restraint;

18.4.2.2 The activity within the ambit of the 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 the 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 imposed 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 restraint.”

[4] The applicant remained an employee of the respondent until 31 October 2010, having tendered her resignation on 10 October 2010. On 16 October 2010 the respondent acknowledged receipt of the applicant’s resignation and addressed a letter to her which 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

[5] Following her resignation the applicant commenced her own business trading under the name and style of Support.Com. The nature of her business

is to market Pastel computer software and to render the necessary technical report. Since the respondent is the sole distributor of Pastel software in Namibia, the applicant is compelled to source all the software she requires from the respondent. What is of considerable importance to the applicant on this aspect is the membership of I-Forum to which reference is made in the respondent's letter dated 16 October 2010. Her membership entitles her to certain discounts on the prices of the software she purchases from the respondent, which in turn provides a profit margin when she re-sells the software to the clients. This scheme is not confined to the applicant but is extended to other entities like the applicant who do similar business using Pastel products and who are I-Forum members.

[6] The relationship between the applicant and the respondent remained ostensibly amicable until the 31st of October 2010. On that day the respondent wrote two letters to the applicant. They read as follows respectively:

1)

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

2)

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

[7] It was this turn of events and the failure to resolve the disputes which arose which prompted the applicant to file this application.

[8] Applicant contends that Clause 18.3 of the Contract of Employment should not be enforced as it is against public policy firstly and secondly it is in contrast to her constitutional right to carry on a trade or profession as enacted in Article 21(1)(j) of the Constitution. As regards the latter point, it must be remembered that the fundamental right of freedom to trade is not an unlimited right. In my view the constitutional right does not *per se* preclude agreements which has the effect that the freedom to trade is in some sense or other restricted. It follows that the attack on this basis must fail.

[9] I turn to consider whether Clause 18.3 is against public policy. Clauses 18.1 and 18.2 are no longer in force. In ***Alpine Caterers Namibia (Pty) Ltd v Owen & Others (2) 1991 NR 341, Frank J*** stated the general principles as follows on p. 346 and 347 (a-f):

“

Before I deal with the particular restraints in this matter it is perhaps apposite that I state certain principles relating to restraints in general.

- (a) The position in our law is that each agreement should be examined with regard to its own circumstances to ascertain whether the enforcement of the agreement would be contrary to public policy, in which case it would be unenforceable. Although public policy requires that agreements freely entered into should be honoured, it also requires, generally, that everyone should be free to seek fulfilment in the business and professional world. An unreasonable restriction of a person's freedom of trade would probably also be contrary to public policy should it be enforced.”

See : ***Magna Alloys and Research (S) (Pty) Ltd v Ellis 1984 (4) SA 874 (A)*** at **875H** and **897I-898B** and ***Book v Davidson 1989 (1) SA 638 (ZS)***.

- (b) Public policy or public interest can vary from time to time and does not remain static. Furthermore, the fact that a certain provision is regarded as contrary to the public interest in South Africa would not necessarily mean that it would be contrary thereto in Namibia.

See the ***Magna Alloys*** case *supra* at **891H**.

- (c) A restraint invoked purely for the purpose of avoiding competition and not to protect some proprietary interest would be unreasonable and against the public interest. I respectfully agree with Stegmann J where he states the position as follows in ***Sibex Engineering Services (Pty) Ltd v van Wyk and Another 1991 (2) SA 482 (T)*** at **502J-503B**.

“A contractual restraint curtailing the freedom of a former employee to do the work for which he is qualified will be held to be unreasonable, contrary to the public interest and therefore unenforceable on grounds of public policy if the ex-employee (the covenantor) proves that at the time enforcement is sought, the restraint is directed solely to the restriction of fair competition with the ex-employer (the covenantee); and that the restraint is not at that time reasonably necessary for the legitimate protection of the covenantee’s protectable proprietary interests, being his goodwill in the form of trade connection, and his trade secrets.”

The terms “trade connection” and “trade secrets” are used in the same extended sense as was done by Stegmann J, and as appears in the Sibex case *supra* at **502A-F**.

That this approach is the one to follow in Namibia is further strengthened by the Constitution.

Article 21 (1)(j) of the Constitution under the heading of “Fundamental Freedoms” stated as follows:

“All persons shall have the right to: practise any profession, or carry on any occupation, trade or business.”

- (d)** Whether a covenant is contrary to public policy is a factual issue. See the Sibex case *supra* at **486H**.
- (e)** The Court will have regard to the circumstances pertaining at the time when it is asked to enforce the restriction. See the Magna Alloys *supra* at **895E-I**.
- (f)** A court would be entitled to cut down a restraint so as to enforce only that part of it which would be reasonable and not against public policy. See the Magna Alloys case *supra* at **896A-E**.”

[10] Clause 18.3 is cast in the widest possible terms. It is intended to one of unlimited duration and prevents the applicant from ever seeking to conduct business with any of the respondent’s clients and is in my view directed solely

to the restriction of fair competition with the respondent. I find that Clause 18.3 is against public policy. I did not understand Mr. Geier to contend otherwise. He correctly and properly conceded the point.

[11] Instead Mr. Geier argued that Clause 18.3 was amended in the manner stated in Paragraph 2 of the respondent's letter dated 16 October 2010 inasmuch as the applicant became entitled to trade with the clients mentioned in the attached list: It is clear, however, that despite the relaxation granted in respect of those clients, the respondent made it clear to the applicant that "... the above does not in any way indicate any relaxation of the restriction after termination (point 18) of your Employment Contract signed 23rd February 2009".

[12] It is also noteworthy that the respondent's understanding of the term "new client" mentioned in the letter dated 16 October 2010, is a person who had never before used a Pastel product.

[13] I find that assuming in favour of the respondent that Clause 18.3 was in fact amended, the amended Clause still remains one against public policy. Its effect is to restrict the applicant *ad infinitum* to do business with any existing client or entity whose name does not appear on the list attached to the letter dated 16 October 2010. As far as non-existing clients are concerned the applicant is prohibited again *ad infinitum* from doing business with any person who at some stage in the near or distance past used a Pastel product.

[14] The restriction also has the effect that existing clients for instance, except those whose names appear on the list, are prohibited from doing business with the applicant even if they want to. Such a restrictive regime is against public policy.

[15] The matter does not end there. It is common cause that when the respondent decided to enforce Clause 18.3 it did so on the understanding that Clause 18.3 survived in its original form and not in its amended form. Mr. Geier submitted in argument that the respondent misunderstood the position and only came to realize that the agreement had been amended, when it consulted its lawyers after the application was filed. An attempt to enforce a contract contrary to its terms in the manner the respondent did constitutes a repudiation of the agreement and it is no answer to say that the repudiating party was *bona fide*. In ***Datocolor International (Pty) Ltd vs Intamarket (Pty) Ltd (2001) ALL SA 581, Nienaber JA*** said he following:

“The emphasis is not on the repudiating party’s state of mind; on what he subjectively intended, but on what someone in the position of the innocent party would think he intended to do; repudiation is accordingly not a matter of intention, it is a matter of perception.”

[16] It follows in any event that assuming that the agreement was amended and that it is not against public policy, there was a repudiation thereof by the respondent. In bringing this application seeking an interdict restraining the respondent from enforcing the agreement, the applicant clearly demonstrated an intention and election not to be bound by the agreement any longer which

she was entitled to do. Although this issue was not raised directly on the applicant's papers, I raised it with Mr. Geier during the course of his argument.

[17] Some argument was advanced for the first time during argument that Clause 18.3 contravenes the Competition Act, No. 2 of 2003. In view of my findings it is not necessary to deal with those submissions.

[18] Finally it is necessary that I deal with the applicant's I-forum status. I was informed during the hearing that the scheme was abolished and replaced with a new scheme. In the circumstances and in view of my findings it will be fair and reasonable that the applicant benefits from the new scheme on the same basis as other entities if she meets the objective requirements required.

[19] In the result I make the following orders:

- 1) Paragraphs 2.3 and 2.4 of the *Rule Nisi* are confirmed.
- 2) The respondent is directed to admit the applicant to the scheme which replaced the new defunct I-Forum if the applicant meets the objective requirements for admission.
- 3) The respondent must pay the applicants costs of suit, which will include the costs of one instructing and one instructed counsel.

MILLER AJ

ON BEHALF OF THE APPLICANT:

Instructed by:

Ms. Visser

Petherbridge Law Chambers

ON BEHALF OF DEFENDANTS:

Instructed by:

Mr. Geier

du Pisani Legal Practitioners