REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

21/4/2016

CASE NO: **73914/2014**

(1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED.

SIGNATURE

21/04/2016.
DATE

| | |
|---|---|
| **INFORMATION KINETICS CC** | **FIRST APPLICANT** |
| **ICT RECRUIT CC** | **SECOND APPLICANT** |
| **JOSEPH EVELEIGH** | **THIRD APPLICANT** |
| **LODEWIKUS JACOBUS BOTHA** | **FOURTH APPLICANT** |
| and | |
| **MONIQUE UNGERER** | **FIRTS RESPONDENT** |
| **ARMAND VAN DER WALT** | **SECOND RESPONDENT** |
| **DEWALD VAN HEERDEN** | **THIRD RESPONDENT** |
| **BLUE LABLE RECRUITMENT** | **FOURTH RESPONDENT** |

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**JUDGMENT**

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**THOBANE AJ,**

[1] This is an application wherein the applicant seeks the following relief in concise form;

1.1. Interdicting and prohibiting the first to fourth respondents from acting in breach of their employment contracts with the first applicant;

1.2. Interdicting and prohibiting the first to fourth respondents from deriving any benefit from the alleged confidential information;

1.3. Directing the first to fourth respondents to treat as confidential all information in accordance with their contracts of employment;

1.4. Directing the first to fourth respondents to surrender any documents or records relating to confidential information of the first or second applicant;

1.5. Directing the first to fourth respondents to furnish a certificate confirming that all confidential information has not been stored on any electronic devices or systems and that copies thereof have not been made;

1.6. Interdicting and restraining the first to fourth respondents from acting in accordance with paragraphs 7(a), (b) and (c), of the notice of motion;

1.7. Directing the first respondent to cease to be a member of the second applicant against payment of a nominal value of the first respondents member's interest in the second applicant;

1.8. Directing first to fourth respondents to pay the costs of this application.

[2] It must be mentioned from the onset that the parties agreed that the points raised *in limine* be argued together with the merits of this application. This was of course despite it being clear that the points *in limine* raised were dispositive of the matter. It must further be mentioned that the applicant abandoned prayer seven which dealt with restraint of trade as it had become moot.

**POINTS *IN LIMINE***

[3] The respondents have raised the following points *in limine;*

3.1. That this court lacks jurisdiction to hear this application;

3.2. That the applicants do not have *locus standi* in the current proceedings.

[4] Before dealing with the merits and the demerits of the point *in limine* as well as that of the application, a brief background, which is uncontested, is necessary;

4.1. The first applicant appointed the first respondent as a recruitment manager and towards that end concluded a contract of employment on the 19th March 2012.

4.2. After the aforementioned contract of employment was concluded in June 2012, the second applicant was registered. The third applicant, fourth applicant and first respondent became members of

the second applicant. The first respondent became both a member and an employee of the second applicant.

4.3. It is further common cause that there was no written agreement or contract of employment concluded between the second applicant and the first respondent.

4.4. What is further accepted as common cause is that on the 27th September 2013 the first respondent resigned as an employee of the second applicant, whereupon an "exit agreement" was concluded. The exit agreement stipulated that the first respondent would abide by and comply with the restraint of trade provisions thereof.

4.5. On the 18th October 2013, the first and second applicant were converted from close corporations to private companies. Subsequently first, second and third respondent formed an entity of their own, the fourth respondent.

**ISSUES IN DISPUTE**

[5] What is understood to be in dispute is the following;

5.1. Whether the employment of the first respondent was transferred from the first applicant to the second applicant in terms of section 197 of the Labour Relations Act 66 of 1995;

5.2. Whether the restraint of trade is enforceable;

5.3. Whether there was confidential information worthy of protection.

5.4. Whether the shares held by the first respondent may be ceded to the applicants.

**JURISDICTION**

[6] The respondents contend *in limine* that this court lacks jurisdiction to entertain this application. The applicants' case is that this court has jurisdiction in that the first, second and third respondent are employed within its area of jurisdiction and further that the fourth respondent has its registered address at the same address, within the area of jurisdiction of this court. Applicants argue that when a CIPC search was done on the 1st January 2014, the addresses of the respondents were as cited in the application, and that the fact that they subsequently changed is irrelevant.

[7] In assessing whether this court has jurisdiction certain key indicators must be examined, the first of which is the question as to where were the respondents resident or even employed at the time of commencement of the proceedings. Coupled with the above question is examination of the date on which the application was launched. The pertinent question therefore is, how is jurisdiction founded in this application. The application bears the court stamp of 7 October 2014 and *ex facie* the founding affidavit, it was commissioned on 6 October 2014. The CIPC report in respect of the fourth respondent shows that

the fourth respondent was registered on 18 September 2013.

[8] The version of the respondents is that the applicants are off the mark on three fronts;

8.1. Firstly, the respondents submit that they are not resident within the area of jurisdiction of this court in that the first and second respondent are resident in Jeffrey's Bay, Eastern Cape and the third respondent is residing in Cape Town, Western Cape Province.

8.2. Secondly, the first and second respondent are employed in Port Elizabeth, Eastern Cape Province whereas the third respondent is employed in Cape Town.

8.3. Thirdly, the fourth respondent has its registered address in Port Elizabeth.

[9] One must therefore consider the provisions of the Superior Courts Act 10 of 2013, in particular section 21 which reads as follows;

> *"21. (1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance, and has the power-*

*(a) to hear and determine appeals from all Magistrates' Courts within its area of jurisdiction;*

*(b) to review the proceedings of all such court in its discretion, and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination.*

*(2) A Division also has jurisdiction over any person residing or being outside its area of jurisdiction who is joined as a party to any cause in relation to which such court has jurisdiction or who in terms of a third party notice becomes a party to such a cause, if the said person resides or is within the area of jurisdiction of any other Division."*

[10] It is significant to point out that in view of the above, jurisdiction is founded on residence and on causes of action. With regard to a corporate entity, it resides where its registered office is and also in its principal place of business. See ***(Bison Board Limited v Braun Wood Working Machinery (Pty) Ltd 1991 (1) SA 482 (A); Kruger NO v Boland Bank Bpk 1991 (4) SA 107 at 112).*** The phrase 'causes arising' in the section has been interpreted

not to mean 'causes of action arising' but 'legal proceedings duly arising', that is proceedings arising from or originating within the area of jurisdiction in terms of common law. In order for the cause to be one 'arising' within the area of jurisdiction of the court, one of the recognised jurisdictional factors of the common law have to be present ***( Furniture Manufacturers v MEC Department of Education & Culture, Eastern Cape & Others 1998 (4) SA 908 (TkD) at 930 A-C).***

[11] Van der Westhuizen J delivering the judgment in ***Gcaba v Minister for Safety and Security 201 (1) SA 238 (CC)*** at para 75 observed that:

> *"Jurisdiction is determined on the basis of the pleadings, as Langa CJ held in Chirwa, and not the substantive merits of the case... In the event of the Court's jurisdiction being challenged at the outset (in time), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleading – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts*

*asserted by the applicant would also sustain another claim, cognisable only in another court. If however the proceedings, properly interpreted, establish that the applicant is asserting a claim under the LRA, one that is to be determined exclusively by the Labour Court, the High Court would take jurisdiction".*

[12] The applicants' pleaded case with regard to the first to the third respondents is that jurisdiction is derived from employment whereas with regard to the fourth respondent that it is derived from its registered address. It is my view that in this matter place of employment does not found jurisdiction and also that the registered address of the fourth respondent, as at the date of instituting current proceedings, was Port Elizabeth and not Centurion. Consequently I find that on the pleaded case this court does not have jurisdiction to entertain this matter.

[13] Counsel for the respondents drew my attention to the fact that the applicants have in their replying papers sought to rely on the place of signature of the agreements as founding jurisdiction. In argument before me he asked that such reliance be struck out. In any event, so he argued, the agreement has been left blank where the place of signature ought to be. It is trite that the applicant must set out its case in the founding papers. It is impermissible to do so in reply. The attempt to seek to rely on the place of

signature of the agreement as founding jurisdiction must be seen for what it is, an attempt to change horses in midstream. It also must fail.

***LOCUS STANDI***

[14] A party instituting legal proceedings must allege and prove that he has the requisite *locus standi.* The onus therefore rests squarely upon the applicant. See ***Mars Incorporated v Candy World (Pty) Ltd [1990] ZASCA 149; 1991 (1) SA 567 (A) AT 575H-I)***.

[15] This point *in limine* is premised on the contention by the respondents that a company derives its authority to participate in litigation from directors who must pass a resolution authorizing such participation and also granting authorization to an individual to sign all requisite papers. The submission by counsel for the respondents is that whereas resolutions are attached to the founding papers, they are not specific to these proceeding in that *inter alia* they refer to an action to be instituted, while these proceedings were already underway and also that these are motion proceedings and not action proceedings which the resolutions purport to authorize. They further argue that it was open to the applicants to ratify proceedings that were already launched and to also ratify the authority of the deponent to the founding affidavit. Therefore, in their view absent proof of authority to launch these proceedings or at the least ratification of same at the time when they were

already underway, is fatal to the application.

[16] According to the applicants when the first and second applicant were converted from close corporations to companies, the first to third respondents were members thereof. The effect of the conversion, so they argue, is that the juristic person that existed before the conversion remained the same albeit in the form of a company. They argue that the offices, premises, duties and staff remained exactly the same and that out of operation of the law, there was nothing untoward in the conversion.

[17] In motion proceedings it is usual and desirable for the resolution of the record of directors of a company authorising litigation to be annexed to and proved by the founding affidavits. See ***Industries (Pty) Ltd V Griffin & another 1978 (4) SA 353 (W) at 356 E.*** In this matter the first and second applicants are juristic persons. Nowhere in the founding affidavit is it alleged that there has been authorization granted, by way of resolution as it would apply to the first and the second respondents, for these proceedings to be instituted. The deponent to the founding affidavit, Joseph Eveleigh, simply states the following;

> *"1.1. I am a major male businessman and a member of both the first and second applicants, employed as such at*

*(.....). I am the third applicant in this application.*

2.2. *The contents of this affidavit fall within my personal knowledge unless clearly otherwise indicated and are true and correct."*

[18] The obligation to establish the aforesaid authority only arises when the authority to prosecute the process is challenged. In this matter the challenge was twofold. Firstly, that there was no resolution by the first and second applicants authorising these proceedings and secondly that the third respondent lacks the authority to depose the founding affidavit on behalf of the first and second applicant.

[19] In the answering affidavit the applicants annexed two resolutions dated 4 December 2014 in terms of which a firm of attorneys is instructed to institute "action" in respect of breach of contract and also authorising the third and fourth respondents to sign all documents to enable the attorneys to finalize the matter. These proceedings were instituted on 7 November 2014, *ex facie* the notice of motion. Only a month later on 5 December 2014, was a resolution, in respect of each entity, passed authorising institution of an action, appointing a firm of attorneys to do, and appointing signatories to all documents to enable institution of such action.

[20] This dicta by Watermeyer, J. in ***Mall (Cape) (Pty) Ltd vs Merino Ko-operasie Bpk, 1957 (2) SA 347 (D) at 351 D to 352 B***, while very long it is nevertheless apt;

> *"I proceed now to consider the case of an artificial person, like a company or cooperative society. In such a case there is judicial precedent for holding that objection may be taken if there is nothing before the Court to show that the applicant has duly authorised the institution of notice of motion proceedings (see for example in* ***Royal Worcester Corset Co v Kesleris Stores, 1927 CPD 143; Langeberg Ko-operasie Beperk v Folscher and Another, 1950 (2) SA 618 (C)****). Unlike an individual, an artificial person can only function through its agents and it can only take decisions by the passing of resolutions in the manner provided by its constitution. An attorney instructed to commence notice of motion proceedings by, say, the secretary or general manager of a company would not necessarily know whether the company had resolved to do so, nor whether the necessary formalities had been complied with in regard to the passing of the resolution. It seems to me, therefore, that in the case of an artificial person there is more room for mistakes to occur and less reason to presume that it is properly before the Court or that proceedings which purport*

*to be brought in its name have in fact been authorised by it.*

*There is a considerable amount of authority for the proposition that, where a company commences proceedings by way of petition, it must appear that the person who makes the petition on behalf of the company is duly authorised by the company to do so (see for example Lurie Brothers Ltd v Arcache, 1927 NPD 139, and the other cases mentioned in Herbstein and van Winsen, Civil Practice of the Superior Courts in South Africa at pp. 37, 38). This seems to me to be a salutary rule and one which should apply also to notice of motion proceedings where the applicant is an artificial person. In such cases some evidence should be placed before the Court to show that the applicant has duly resolved to institute the proceedings and that the proceedings are instituted at its instance. Unlike the case of an individual, the mere signature of the notice of motion by an attorney and the fact that the proceedings purport to be brought in the name of the applicant are in my view insufficient. The best evidence that the proceedings have been properly authorised would be provided by an affidavit made by an official of the company annexing a copy of the resolution but I do not consider that that form of proof is necessary in every case. Each case must be considered on its own merits and the Court must decide whether enough has been placed before it to warrant*

*the conclusion that it is the applicant which is litigating and not some unauthorised person on its behalf".*

[21] In ***Merlin Gerin (Pty) Ltd v All Current and Drief Centre (Pty) Ltd 1994 (1) SA 659 (C) 13,*** the Respondents objected to the lack of authority of the Applicant's director who at the time of signing the founding affidavit had no authority to do so. The Applicant's board of directors subsequently ratified the director's actions. Explaining the situation, Conradie J on page 660 FG stated that:

> *"For the enforcement of this right, the respondent has only one remedy, to move for dismissal of the application. Moving for dismissal is not itself a right, but a remedy for the right not to be unfairly proceeded against. And applicant now has two options. If he had no authority to begin with he would attempt to defeat the remedy (dismissal of his application) by obtaining authority by way of ratification and by putting proof of that before the court. Or he might put better proof of pre-existing authority before the court. Once the applicant has done this, he will be bound by an order for costs against him. In this way, ratification would not harm but benefit the respondent, and so would be unequivocal proof of pre-existing authority."*

[22] It is settled law that an applicant can, in circumstances where there was no prior authorisation, obtain a resolution ratifying steps that would have been already taken. The applicants were unwavering in their contention that resolutions passed were sufficient, for purposes of proving *locus standi.* This is despite the obvious fact that the resolutions were taken after the proceedings had commenced. The resolutions relied upon do not evidence pre-existing authority. The applicants were alerted to the disputed authority very early in the proceedings. They had ample time to seek ratification, in which event the only consideration would have been consideration of prejudice and the costs implications of such ratification in these proceedings. This was also highlighted by the respondents counsel during argument. I find that the applicants have failed to prove on a balance that there is *locus standi,* and that the third applicant has been authorized to act on behalf of the juristic entities in this matter. When the these proceedings were launched and sequent thereto the, the case number, the court, the parties as well as the nature of proceedings were known to the applicants. The resolutions therefore would have been specific. In the result the point *in limine* is upheld.

[23] The balance of issues relate to the merits of this matter. The parties argued at length before me on them. The issues are contained in paragraph 5 above. In light of the view that I take on the matter, I do not deem it necessary to deal with them.

## COSTS

[24] Ordinarily costs follow the event. I have been asked by the respondents, in the event I find in their favour to award costs on a punitive scale. They advance reasons which cover both the points *in limine* as well as the merits of the matter. They argue that applicants proceeded to seek an order of restraint of trade at a time when the restrained covenant had lapsed only to later concede that their claim had become moot. That the applicants wanted to interdict disclosure of information yet they failed to identify such information as required by case law. That the applicants proceeded to seek an incompetent order as reflected in paragraph 8 of the notice of motion. That the applicants flip flopped and placed reliance on the provisions of section 163 of the Companies Act when it was in their view not applicable in this matter. Finally that the founding papers contain bald allegations which are factually and legally incorrect.

[25] In having regard to costs requested by the applicant, I consider the fact that an award of costs on an scale between attorney and client scale is done as a measure of displeasure at the conduct of proceedings or the parties involved. At times the award is made in circumstances where the applicant has been guilty of dishonesty or fraud or had vexatious, reckless and malicious or frivolous motives or committed a grave misconduct, either in the transaction under scrutiny or in the conduct a case.

In ***Ward v Sulzer 1973(3) SA 701 (AD) at 706 H*** the Court, with reference to the leading case regarding attorney and client costs is, namely ***Nel v Waterberg Landbouwers Ko-operatiewe Vereeniging 1946 AD. 597***, stated the following:

> *"For example vexatious, unscrupulous, dilatory or mendacious conduct (this list is not exhaustive) on the part of an unsuccessful litigant may render it unfair for his harassed opponent to be out of pocket in the matter of his own attorney and client costs".*

[26] The Court's discretion to order the payment of attorney and client costs is not limited to cases of dishonest, improper or fraudulent conduct. It can also be justified by special circumstances and/or considerations which justify the granting of such an order. (See, inter alia, ***Van Dyk v Conradie 1963(2) SA 413(C) at 418, Pienaar v Boland Bpk 1986(4) SA 102 (O) at 116(C).*** Attorney and client costs have also been awarded where the defence was frivolous and was taken for the sole purpose of gaining time and where the defendant produced a plethora of unmerited defences and where the defendant was in default and it seemed to the Court that the defence was dilatory and not *bona fide*. See ***Suzman Ltd v Pather & Sons 1957 (4) SA 690 (D).*** In my view, there is no reason why an applicant or plaintiff whose conduct is similar to that of the defendant as depicted above, cannot suffer the

same fate.

[27] I consider a punitive costs order merited for the following reasons;

27.1. Six of the eight prayers in the notice of motion deal with breach of contract as well as information management, in whatever form, its use, deriving benefit therefrom, its non-disclosure, confidentiality, delivery, duplication and storage. The seventh prayer is about the restraint of trade and the eighth about the members interest.

27.2. The objections that were raised by the respondents against the applicants are in my view elementary. The applicant in motion proceedings must set out its claim in clear detail in the founding papers. Where a juristic person is involved, a proper basis must be laid about authority and *locus standi.* Establishing a court's jurisdiction is elementary. What is even more elementary is to reflect and introspect whenever objections are raised and to the extent that our court rules allow, correct where defects are identified.

27.3. There are five issues that right from the onset formed streams for argument, namely,

27.3.1. The points *in limine.*

27.3.2. The contract of employment,

27.3.3. The management of information,

27.3.4. The restraint of trade and,

27.3.5. Cessation of membership of a CC against payment of money,

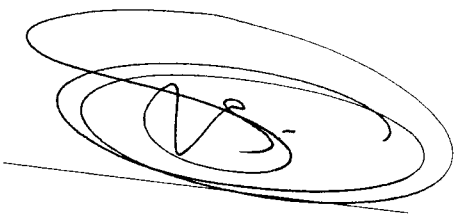
27.4. It is elementary that the first point *in limine,* that of lack of jurisdiction, was dispositive of the matter. The second point *in limine,* that of *locus standi* was not immediately dispositive in that the applicants still had recourse to ratify. The applicants were warned, very early in the proceedings, about the course the chose to take. Their posture during trial that jurisdiction had been properly established when in reality their founding papers showed otherwise is a classical example of but one instance where the court should show its displeasure at a party to proceedings before it. The same displeasure must equally be visited upon the applicants for failing, when early in the proceedings they were alerted to the disputed *locus standi,* but failed to heed such alert.

27.5. The restraint of trade covenant had lapsed even before the proceedings were instituted. That the applicants belatedly, but correctly, at the eleventh hour conceded that the covenant had lapsed does not, in my view, in the context of this matter insulate the applicants from the court taking a robust view, and expressing its disapproval through an award of costs;

**ORDER**

[28] In the result I make the following order;

1. The points *in limine* are upheld,
2. The application is dismissed,
3. The applicants are jointly and severally, directed to pay the costs hereof, the one paying the other to be absolved.



**SA THOBANE**

**ACTING JUDGE OF THE HIGH COURT**

APPEARANCES

ATTORNEYS FOR THE APPLICANT : TIAAN JOUBERT ATTORNEYS

COUNSEL FOR THE APPLICANT : ADV. T.P. KRUGER

ATTORNEYS FOR THE RESPONDENT : STROMBECK PIETERSE ATT.

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