HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 92136/2019

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED: YES
DATE 19 August 2020
SIGNATURE

In the matter between:

SKITTERBLINK DORINGKLOOF (PTY) LTD Applicant

and

BSV LOGISTICS (PTY) LTD First Respondent

BRENT VORSTER Second Respondent

JUDGMENT

This application has been heard as a virtual hearing via Microsoft Teams in terms of the Directives of the Judge President of this Division dated 25 March 2020, 24 April2020 and 11 May 2020. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

[1] Introduction

This is the judgment in an opposed motion wherein the applicant (hereafter "Skitterblink") seeks enforcement of a restraint of trade agreement by way of a final interdict. The second respondent (hereafter "Vorster") is an erstwhile employee of the applicant and he is the sole director and of the first respondent, a private company (hereafter "BSV Logistics").

[2] The relationship between the parties:

2.1 It is not in dispute that Vorster was, until his resignation on 30 May 2019, an employee of Skitterblink. His employment was regulated by an extensive written employment contract dated 10 July 2018. His duties and skills requirements were described therein as that of a supervisor and his main activities were described as "*cleaning, window wash, admin*".

2.2 In addition to the employment contract, Skitterblink and Vorster were also parties to a "Confidentiality and Restraint of Trade Agreement" which inter alia stipulates that Vorster agreed *"…not to enter into any like business, whether for self or any company or individual supplying the same or similar services or products as Skitterblink. This shall be in force for a period of 24 months from date of termination of training or employment or visit for whatever reason, initiated by either party to this agreement".*

2.3 There was some dispute regarding the circumstances of Vorster's resignation which culminated in a written "Full and Final Settlement Agreement" entered into between himself and Skitterblink on 6 June 2019, which provided as follows:

"THE EMPLOYEE CONFIRMS:

1. *That he has resigned out of his own free will*
2. *The employee is not required to work a notice period*
3. *....*
4. *He will have no further claims against the employer resulting out of his employment relationship…*
5. *This agreement is the <u>full and final settlement</u> between the parties*
6. *That there will be no further claims instituted against the employer of any nature in any Court or Tribunal (including CCMA)*
7. *That he will not make contact in any manner with any clients or employees of the Skitterblink Franchise(s)*
8. *THE EMPLOYER CONFIRMS:…[certain payment obligations were then set out]…*
9. *…*
10. *....*
11. *The employer confirms that any enquiry concerning the employee's circumstances/absence from this day forward will be explained as that the employee resigned and the resignation was with immediate effect…*

By signing this agreement both parties agree to bind themselves to the terms thereof and that there will be no further claims against each other".

[3] The applicant's case:

3.1 The applicant's deponent to its founding affidavit, being its managing director, described the applicant as being a company which provides domestic, commercial, trauma and carpet cleaning services. Vorster's duties as supervisor entailed the management of four cleaning ladies as well as the administration of this team of his. He had to use his own vehicle to transport these ladies to and from different residential and commercial properties contracted to Skitterblink and assigned to him and his team to clean and service.

3.2 The deponent alleges in somewhat vague terms that he suspected that Vorster had upon leaving Skitterblink's employ "*pilfered certain employees in the employ of the Applicant. The Applicant was however not in a position to definitely confirm the suspicion".*

3.3 The deponent went on to state that during or about the end of November 2019 it came to Skitterblink's attention that Vorster was also supplying cleaning services in similar fashion as Skitterblink was doing. According to the deponent, three former employees of Skitterblink approached a co-director of his and confirmed to her that they had been approached by Vorster at the end of June 2019 to work for him and to provide the same cleaning services as they performed at Skitterblink. Confirmatory affidavits were annexed from two of these employees (wherein, incidentally they stated that they were in the employ of Skitterblink). Each of the affidavits were accompanied by a somewhat crudely handwritten note ostensibly identifying clients of the respondents. As to

the third employee, no confirmatory affidavit was annexed, but her similar list, apparently handed to the said co-director, was annexed together with a confirmatory affidavit of the co-director herself. I shall return to these afiidavits and the lists of clients later.

3.4 Skitterblink's deponent attached a typewritten list of 20 clients of Skitterblink to his affidavit. He alleged that these were the clients that were "pilfered" by Vorster.

3.5 It was initially contemplated that the application would be dealt with swiftly on an interlocutory roll of 4 February 2020 with an interim order being sought with a return day but that apparently did not materialize. Skitterblink now sought a final interdict in terms which confirm the restraint of trade and prohibits the use and dissemination of confidential information.

[4] The respondents' case:

4.1 Vorster stated in his answering affidavit that his resignation was, to the knowledge of Skitteblink and allegedly with its blessing, done with a view of taking up employment elsewhere as the income received from Skitterblink was not financially viable for him. Upon tendering his resignation, he was prepared to work his notice month, being June 2019. Upon his return to work to do so on the Monday following his resignation, he was confronted with immediate suspension pending a disciplinary hearing scheduled to take place the upcoming Thursday. After a refusal to plead guilty and as a compromise to end hostilities, the settlement agreement referred to paragraph 2.3 above was entered into. Vorster claims that this novated the previously signed restraint of trade agreement.

4.2 Vorster stated that, after having left Skitterblink in the circumstances as aforesaid, great was his disappointment when the new employment he had lined up at a national company, Servest, did not materialize as promised. Enquiries made by Vorster gave the reason that Servest had received an undisclosed telephone call which caused it to withdraw the previous offer of employment.

4.3 In order to generate income, Vorster then expanded the business of BSV Logistics which he had run as a hobby during his employment at Skitterblik. He stated that this had been done at the time with Skitterblink's knowledge. The business was the production and sale of organic food products and cooking services.

4.4 Vorster stated that at some stage the three ladies mentioned in Skitterblink's founding affidavit approached him and complained "…about the situation at their work with the Applicant…" after he had left. He says he genuinely felt sorry for the three ladies and offered them employment in BSV Logistics. As the business was in its infancy he started them with very little salary, which they accepted and which he increased month by month as the business grew. After some time, he started receiving unsolicited calls from clients of Skitterblink, requesting him to render cleaning services to them. He explained that he was no longer in that line of business, but, at their insistence and because he was still in a dire financial position, he relented. He then commenced rendering cleaning services, using the resources of BSV Logistics and the services of the three ladies in question. He never otherwise advertised those services and only took on clients at their own insistence.

4.5 About one thing Vorster was very clear and that was that none of the clients on the list produced by Skitterblink's deponent mentioned in

pargraph 3.4 above were at any stage clients of the respondents. He put Skitterblink to the proof thereof.

4.6 Vorster raised various objections to the reasonableness of the restraint sought by Skitterblink. These included the removal from economic landscape, the perpetuation of a monopoly and the unfair dispossession of his ability to provide for himself and his employees. All this, including the period of the restraint, according to him renders the restraint unreasonable and consequently its enforcement would be contrary to public interest.

[5] The applicable law:

5.1 As stated earlier, Skitterblink seeks a final interdict. Since Setlogelo v Setloglo 1914 AD 221 the requirements for such relief are: (1) a clear right, (2) an act of interference and (3) no other available remedy.

5.2 The clear rights that Skitterblink rely on are those contained in the Confidentiality and Restraint of Trade Agreement (no reliance was placed on the Settlement Agreement). The general principle is that a restraint of trade agreement is enforceable unless it is unreasonable or against public policy. In considering the enforcement of a restraint of trade agreement, a court is therefore generally faced with two competing policy considerations. The one is that parties should be bound by contracts voluntarily entered into and the other is that persons should in the interests of society be productive and permitted to engage in trade, commerce or their professions. Both are common-law and Constitutional values. See: Reddy v Siemens Telecommunications (Pty) Ltd 2007(2) SA 486(SCA). In the well-known case of Basson v Chilwan 1993(3)SA 742(A) at 767G-H four questions were identified when the reasonableness of a restraint is considered: (1) does one party have an

interest that deserves protection after the termination of an agreement, (2) if so, is that interest threatened by the other party? (3) In that case, does that interest weigh qualitatively and quantitatively against the interests of the other party not to be economically inactive and unproductive? (4) Is there another aspect of public policy which requires the restraint to be maintained or rejected? In respect of confidential information, the question is whether there existed confidential information to which a respondent had access to and which a competitor might exploit? See inter alia Experian South Africa (Pty) Ltd v Haynes and Another 2013(1)SA 135 (GSJ).

5.3 The principles regarding the resolution of factual disputes in motion proceedings where final relief is claimed are trite. They are those set out in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634 (E) – 635 D with reference to Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd 1957 (4) SA 234 (C) at 235E – G being:

> "*... where there is a dispute as to the facts a final interdict should only be granted in ... motion proceedings if the facts as stated by the respondent together with the admitted facts in the applicant's affidavits justify such an order... . The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain cases the denial by a respondent of a fact alleged by the applicant may not be such to raise a real, genuine or bona fine dispute of fact (see in this regard Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163-5 and Da Mata v Otto NO 1972 (3) SA 858 (A) at 882D – H)*".

5.4 The abovementioned approach has further been outlined in Soffiantini v Mould 1956 (4) SA 150 (E) at 154E-H: "*The respondent's affidavits must at least disclose that there are material issues in which there is a bona fide dispute of fact capable of being decided only after viva voce evidence had been heard … . If by a mere denial in general terms a respondent can defeat or delay an applicant who comes to Court on motion, then motion proceedings are worthless, for a respondent can always defeat or delay a petitioner by such a device. It is necessary to take a robust-common sense approach to a dispute on motion as otherwise the effective functioning of the Court can be hamstrung and circumvented by the most simple and blatant stratagem*". See also: Wightman t/a J W Construction v Headfour (Pty) Ltd 2008 (3) SA 371 (SCA) at [12] and [13].

[6] Evaluation:

6.1 No allegations have been made by Skitterblink's deponents that any confidential information of the nature referred to above were in danger of being disclosed or even existed.

6.2 No particulars were furnished regarding the circumstances surrounding the signing of the Confidentially and Restraint of Trade Agreement the day after Vorster had resigned. Neither the agreement nor the date was however placed in dispute by him. I find it strange that the same parties to a recently signed agreement would six days later replace that agreement *in toto* with the scant restraint terms contained in the settlement agreement without any explanation. That which had to be settled at that stage had nothing to do with any restraint but related to other matters. To have replaced the restraint, would in the circumstances have amounted to a waiver of its rights by Skitterblink, something which is generally not lightly inferred by a court. Without any express allegations in this regard

and in view of the vague detail furnished regarding the circumstances surrounding the settlement agreement in relation to this aspect, I find that Vorster has not discharged the onus on him to prove that the settlement agreement had novated, that is to say replaced, the restraint of trade agreement.

6.3 Regarding the issue of actual infringement of the terms of the restraint agreement, applying the Plascon Evans-rule referred to earlier, I find myself unable to reject Vorster's emphatic denial of having pilfered clients of Skitterblink and in particular those contained in the list referred to by Skitterblink's deponent. The challenge to prove such pilfering was not taken up in a replying affidavit. I am further fortified in this view by an analysis of the handwritten lists compiled by the three ladies. These lists , with one or two exceptions, accord with each other and list the names of some eleven clients of the respondents. None of these clients feature in the list of alleged pilfered clients relied on by Skitterblink. Having regard to the obvious level of literacy and lack of sophistication of the three lady employees in question, very little weight can be attached to the truncated confirmatory affidavits obtained from them by Skitterblink. I am therefore inclined to accept Vorster's version as to his entry into the cleaning market after having left the employ of Skitterblink.

6.4 Vorster is, however, by his own admission, acting in breach of the restraint of trade agreement. The question however still remains as to whether the agreement is reasonable and should be enforced. By Skitterblink's own admission, the contracts with its clients are largely annual in length (or less). Furthermore, the market is not of a highly technical or specialized nature. To deprive someone who is not actively soliciting a competitor's clients in such a generalized field such as the cleaning of premises from earning an income (and providing employment

to cleaning ladies operating in the same generalized market) for a period of double the general contract period of such a competitor's clients, appear to me to be manifestly unreasonable and against public policy. I determine that a reasonable period for such a restraint would be one year.

6.5 The consequence of the above determination is that the restraint for the shortened period has run its course. There is therefore no longer a clear right to protect and the basis for a final interdict has fallen away. It must follow that Skitterblink is not entitled to the relief claimed.

[7] Having reached the aforementioned conclusion, the only outstanding issue is that of costs. Ordinarily, costs should follow the event. However, the respondents had, to their own knowledge and on their own admission acted in breach of the restraint agreed to by Vorster. In the exercise of my discretion, I find that each party should pay its own costs.

[8] Order

The application is dismissed and each party is ordered to pay its own costs.

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 12 August 2020

Judgment electronically delivered: 19 August 2020

APPEARANCES:

For the Applicant:	Adv L Kinghorn
Attorney for Applicant:	J Olivier Attorneys, Pretoria
For the Respondents:	Adv D A De Kock
Attorney for Respondenst:	Clarinda Kugel Attorneys, Pretoria