IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, EAST LONDON)

Reportable

CASE NO: 1251/2023

In the matter between:

ALGOALEX (PTY) LTD T/A DEPOT GONUBIE	APPLICANT
and	
ZANE GOWER	FIRST RESPONDENT
BUID IT GONUBIE (PTY) LTD	SECOND RESPONDENT
KYRASCORE (PTY) LTD T/A DEPOT KIDDS BEACH	THIRD RESPONDENT

JUDGMENT

Noncembu J

[1] A *rule nisi* enforcing a restraint of trade agreement against the first respondent was granted by Collet AJ on 15 August 2023. Same was extended from time to time. In terms of the *rule* which operates as an interim order the respondent is restrained, until 12 July 2024, and within 15 km from 35 Main Road, Gonubie, East London, from *inter alia*, working for any business which trades similarly or competes with the business of the applicant, that is, in conducting a hardware store.

[2] The matter was referred to oral evidence by order of Bloem J on 24 August 2023 on two limited issues. These were:

2.1 whether the applicant and first respondent concluded the written employment contract attached as Annexure “BB” to the founding affidavit, lawfully or at all; and

2.2 whether the first respondent was employed from 1 September 2022 at Kidd’s Beach DIY Depot in terms of a tacit contract of employment with Kyrascore (Pty) Ltd.

[3] The first respondent was also granted leave to file a further affidavit on the above-mentioned issues as part of the aforementioned order.

[4] On 24 October 2023 an order joining the third respondent to the proceedings at the instance of the first respondent was granted by Bloem J and the matter was postponed to 2 November 2023 for oral evidence on the two issues stated above. Costs for the joinder application were reserved.

[5] On 2 November 2023 this court heard the oral evidence of three witnesses, namely; Preshan Lawa, the sole director of the applicant; Nikita Lawa, the administrator of the applicant and the sole director of the third respondent; and the first respondent himself, Zane Gower. The matter was thereafter postponed until 11 December 2023 for arguments, with the *rule nisi* extended accordingly.

[6] Before this court therefore, the applicant seeks a confirmation of the *rule nisi*, whilst the first respondent seeks a discharge of the *rule* with costs.

Factual background

[7] It is common cause before this court that Preshan Lawa and Nikita Lawa are married to each other. It is also common cause that the Preshan Lawa is the sole director of the applicant which owns DIY Depot Gonubie and DIY Depot Buffalo Road, both operating as hardware stores. It is further common cause that Nikita Lawa is the administrator of the applicant and the sole director of the third respondent which owns DIY Depot Kidd's Beach, also a hardware store. Acting in such capacities, Nikita deposed to the founding affidavit on behalf of the applicant as well as the affidavit on behalf of the third respondent. This is primarily because the issues raised in the third respondent's affidavit were pre-empted in the founding affidavit of the applicant. For similar reasons, both the applicant and the third respondent are represented by the same attorney and counsel in these proceedings.

[8] But for the crisp issues for determination at the hearing of the oral evidence in this matter, the bulk of the evidence is common cause. The first respondent was

appointed by the applicant as a sales person at Gonubie DIY Depot on 26 May 2021. In the course of his employment to the applicant, he signed a restraint of trade agreement marked as annexure “B” to the founding affidavit. According to the applicant, a competitor, Build It, had opened a competing business within their area, and hence it became necessary for all the employees to sign a restraint of trade agreement. The employment of the first respondent was terminated on 12 July 2023 and he took up employment with the second respondent (Build- It), a competitor of the applicant.

[9] It is further common cause that the first respondent also worked at Kidd’s Beach DIY Depot on instructions from Preshaan. On the applicant’s version, this was out of concern for the first respondent as business had slowed down at the Gonubie DIY. As an option to having him retrenched, the first respondent was utilised at Kidd’s Beach DIY but retained his duties as a supervisor at Gonubie, and his salary continued to be paid by the applicant. According to the first respondent however, his employment at Gonubie DIY was terminated when he was transferred to Kidd’s Beach DIY on 1 September 2022, and a tacit employment contract was entered into with the third respondent (Kyrascore). This is denied by both the applicant and the third respondent.

[10] According to the evidence of Nikita, materially supported by that of Preshaan, the first respondent was employed as a sales person at Gonubie DIY on 26 March 2021, promoted to the position of supervisor in March 2022 and in May 2023 signed a one-year employment contract as a supervisor at Gonubie DIY. Video evidence depicting the signing of the said contract was presented in court as well as the

contract itself marked as annexure “BB”. Payslips of the first respondent depicting the position of supervisor were also presented to the court in support of the applicant’s case in this regard.

[11] Quite significantly, the first respondent disavowed ever signing an employment contract as a supervisor with the applicant in his answering affidavit, to the extent that he even referred to the said contract as a fraudulent document. He contended that his signature had been fraudulently obtained and placed on the said document. This is significant because he dedicated an entire topic (almost 5 pages) to this issue in his answering affidavit titled “Fake/Fraudulent contract of employment”.

[12] At paragraphs 26 and 27 of his answering affidavit he deposes to the following:

> “26. I have only signed two contracts with the applicant. My first contract was a probation contract which is not attached, and my second contract was the salesman position, which is annexed to the founding papers and marked as annexure **A.**
>
> 27. Annexure **BB** which purports to be my employment contract is disingenuous and false I am seeing this contract for the first time during my disciplinary hearing on the 12 July 2023. In the circumstances, the applicant is put to the proof thereof.”

[13] He states the following at paragraphs 31 – 33:

"31. I reiterate, I did not enter into annexure **BB.** I intend to open a criminal case of fraud regarding annexure BB. The applicant seeks to bind me to the restraint of trade by attaching a fake document that I was not a party to.

32. I suspect that annexure **BB** was tempered with because annexure **BB** reflects my signature on the last page. I suspect that my signature was taken from another document (i.e. my probation contract). The initials that I see on the bottom of the pages look suspicious.

33. Nikita must explain where she received this contract. She brought it into these proceedings. She must explain these discrepancies and the circumstances and the circumstances that led to the conclusion of this purported contract. Annexure **BB** is suspicious and dubious."

[14] In a significant turn of events however, after Nikita does provide proof and the circumstances under which the contract was signed (in the replying affidavit), the first respondent makes an about turn and suddenly remembers signing the contract in question. Notably, this was one of the two issues that were referred to oral evidence because on his earlier version that he had never seen the contract in question until his disciplinary inquiry on 12 July 2023.

[15] In the supplementary affidavit he deposed to in preparation for the oral evidence, the first respondent admits to signing the supervisor contract, but contends that this was intended as a ploy to show the labour inspector that all was well at the applicant's business and that all the employees had employment contracts. He therefore signed the contract on the instructions of Preshaan as he was told that it was to be destroyed afterwards.

[16] This however, does not add up because on his own version, he already had an employment contract of a salesperson (annexure “A”) with the applicant. It therefore makes no sense for him to sign a bogus contract to mislead the labour inspector when there was a valid contract in place which was to serve the same purpose, i.e. show the inspector that all was well with the applicant’s business. From having never seen the contract before and even threatening criminal prosecution, to having signed it for a bogus purpose makes for a 360^0 shift. The fist respondent’s version in this regard therefore (both the initial and the latter version) is simply untenable.

[17] It was explained to court that the initial promotion in February 2022 was by means a verbal contract. Proof thereof however, is shown in the first respondent’s payslip for the month of March 2022 which reflects both the new position of supervisor and an increase in salary which goes with such a position. Clearly there is nothing bogus about those and the first respondent gives no explanation in this regard, nor does he dispute the said payslip. It was further explained on behalf of the applicant that it was after it was decided that all employee contracts had to be on a 1-year basis that the contract changed to a written contract, and hence the first respondent’s contract was only signed in May 2023 even though it was effective from March 2023. This evidence was not gainsaid by the first respondent.

[18] The above also conclusively answers the question of the termination of Gower’s employment by the applicant on 1 September 2022. Surely the first respondent would not have signed a contract with the applicant in May 2023 if his

employment had been terminated in September the previous year. His pay slips are objective evidence supporting that of Nikita and Preshaan; that he continued to be employed and to receive his salary from the applicant even though he also worked at the Kidd's Beach and the Buffallo Street stores on instructions of Preshaan. The explanation given for this is that business had slowed down at the Gonubie store because of the competitor store opened in the area, and to avoid retrenching the first respondent, Preshaan had decided to utilise him in the other stores as well.

[19] The evidence presented to court also shows that during the times that the respondent worked at the Kidd's Beach DIY he also continued with his supervisory duties at the applicant's store in Gonubie. He did not receive any salary at the Kidd's Beach DIY and continued to receive his instructions from Preshaan the entire time. No evidence therefore has been tendered to show that a tacit agreement had been concluded between the first respondent and the third respondent.

[20] The test for the existence of a tacit contract was established by the Appellate Division in *Standard Bank of South Africa Ltd v Ocean Commodities*[1] where Corbett JA stated:

> "In order to establish a tacit contract it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged. It must be proved that there was in fact consensus *ad idem*.[2]

[1] *Standard Bank of South Africa Ltd v Ocean Commodities* [1984] ZASCA 2; 1983 (1) SA 276 (A).
[2] *Ocean Commodities* above n 12 at 292 A – C.

[21] A party alleging the existence of a tacit contract must show on a balance of probabilities unequivocal conduct on the part of the other party that proves that it intended to enter into a contract with it.[3]

[22] It is not disputed that the first respondent worked at the Kidd's Beach DIY, however, it has been clarified how this came about and under what circumstances. It can therefore not be said that the conduct of the third respondent is capable of no other reasonable interpretation than that the parties intended to, and did in fact, enter into an employment contract. In these circumstances therefore, the first respondent has failed to establish the existence of a tacit contract of employment on a balance of probabilities.

[23] Given that the first respondent did not dispute signing the restraint of trade agreement, his argument in this regard being that it no longer applied to him because he had ceased working for the applicant in September 2022 when he started working for the third respondent, and given that this argument has been dispelled as reflected above, the only logical conclusion remaining is that he is indeed bound by the restraint of trade agreement. Furthermore, as is clear from the agreement itself, the restraint is not attached to any position, so long as one is an employee of the applicant they are bound by it. It is therefore irrelevant whether the first respondent was a salesperson or a supervisor at the time of signing the agreement. What matters is that he was an employee, a factor I am satisfied that the applicant has established on a balance of probabilities.

[3] *Buffalo City Metropolitan Municipality v Nurcha Development Finance (Pty) Ltd* [2018] ZASCA 122. Paras 16-22.

[24] It is common cause that the first respondent took up employment with Build-it which is situated within the prohibited radius in terms of the restraint agreement. Under these circumstances therefore he has breached the terms of the restraint of trade agreement and as such, the *rule nisi* stands to be confirmed.

[25] Nothing turns on the argument raised by the first respondent pertaining to the lifting of the corporate veil. The law is clear under which circumstances that can be applied and no case for same has been made in the present matter. The first respondent is not seeking relief against the applicant or the third respondent in this matter, an aspect which could warrant a consideration of the lifting of the corporate veil under relevant circumstances. Therefore, this issue does not arise.

Conclusion

[26] The only issue that remains for determination is the aspect of the reserved costs for the joinder of the third respondent. Given the nature of the defence raised by the first respondent in the matter, which placed the third respondent squarely within the midst of the issues that arose in the matter, specifically with regards to the lifting of the corporate veil defence, I am persuaded that the third respondent was a necessary party to the proceedings, and as such its joinder was warranted. There is no reason therefore why costs should not be in the cause.

Order

[27] Therefore, the following order shall issue:

(a) The *rule nisi* is confirmed with costs.

(b) The reserved costs for the joinder application shall be costs in the cause.

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V P NONCEMBU

JUDGE OF THE HIGH COURT

APPEARANCES

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Counsel for the Applicant (Defendant):	*C D Kotze*`
Instructed by:	Gravett Schoeman Attorneys
	Beacon Bay
	East London
Counsel for the Respondent:	*A Mafu*
Instructed by:	Dyushu & Mabece Inc Attorneys
	Nahoon
	East London
Date of hearing:	11 December 2023
Date judgment delivered:	07 May 2024