REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 32030/2018

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

…ML SENYATSI… SIGNATURE
...25 June 2021… DATE

In the matter between:

ZIZWE DSD (PTY) LTD	**First Applicant**
RIVIGAN INFRASTRUCTURE SOLUTIONS (PTY) LTD	**Second Applicant**
and	
JEMMA HOLDINGS (PTY) LTD	**First Respondent**
LEONARD LYNDON JOHNSON	**Second Respondent**
PETRO RIECKERT	**Third Respondent**

JUDGMENT

Delivered: *By transmission to the parties via email and uploading onto Case Lines the Judgment are deemed to be delivered. The date for hand-down is deemed to be 25 June 2021*

SENYATSI J:

[1] On 9 October 2019, I handed down an order in terms of which an interdict was issued against the respondents. The reasons for the order are as set out below.

[2] The applicants provide electrical services to public and private entities. They also install, upgrade and maintain electrical infrastructures for municipalities and other public utilities such as Eskom. They are therefore involved in a variety of projects in the electrical business sector.

[3] Due to their business activities, the applicants have traded with Government entities located in Bloemfontein, Johannesburg City Power, Ekurhuleni Municipality, Emfuleni Municipality, Beaufort West and George Municipalities.

[4] The second respondent Mr Leonard Johnson was employed by both applicants as their Chief Principal Officer. He however concluded an employment agreement with the second applicant although, in practice, he worked for both applicants.

[5] The second respondent is a director and shareholder of the first respondent. He holds shares with his wife and daughter. The first respondent trades in direct competition with the applicant. The second respondent was employed as a chief executive officer of the applicants.

[6] The third respondent is also actively involved in the business of the first respondent and was also employed by the applicants. Both the second and

third respondents were served with the suspension letters at the same time and resigned at the same time from the applicants.

[7] The respondents have not opposed the majority of the prayers in the notice of motion. There are only three points opposed in the application, namely:

(a) The lack of *locus standi* in respect of the relief sought in prayers 1.3 and 1.7 of the notice of motion by the first applicant;

(b) the averment that the Bulk of the information used as evidence was obtained illegally and that the court should- ignore same;

(c) the illegality of the restraints.

[8] I will now deal with the protection afforded by section 35 (5) of the South African Constitution Act No 108 of 1996 ("The Constitution"). Section 35(5) of the South African Constitution Act 108 of 1996 provides thus:

> "Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise detrimental to the administration of justice."

[9] The provisions of section 35 (5) relate, in the main, to evidence of self-incrimination in criminal proceedings. In *Ferreira v Levin and Others, Frejenhoek and Others v Powell and Others* [1] it was held that the Court has discretion to exclude otherwise admissible evidence if the evidence was improperly obtained. However, it should always be remembered that the

[1] 1996 (1) SA 984 (CC)

pronouncement on Constitutional imperatives of section 35 (5) deals with evidence in the criminal trial.

[10] I have not been provided with the basis for contending that the evidence found in the flash drive was stolen. What is undeniable is that the second respondent who was in a position of trust as the CEO of the applicants took advantage of his authority. He floated a competing company whilst in the employ of the applicants who were paying him a handsome monthly nett salary of R100 000 and abused his position by using all the information to unlawfully compete with the applicants in a clear breach of this fiduciary duty. In so doing, the second respondent sought and obtained the assistance of the third respondent. This behaviour in my view, calls for sanction by this Court.

[11] In *Ferreira v Levin and Others Frejenhoek and Others* [2], the two Constitutional cases that had been consolidated to consider the validity of the self-incriminating evidence obtained in the course of the liquidation inquiry, in terms of section 417 and 418 of the Companies Act of 1873, the court correctly held that the provisions of section 417 (2) (b) of the Companies Act is inconsistent with the right against self-incrimination in terms of the Constitution to the extent that such evidence is used in the subsequent criminal trial.

[12] There is no suggestion in the present case that the evidence found in the flash drive is going to be used in the criminal trial. In fact, I have not been provided with evidence that a criminal charge had been laid on account of evidence derived from the flash drive. In my view, the flash drive which was used within the premises of the applicants, could not be possibly stolen by the applicants,

[2] supra

but have possibly handed to the first and second respondent as a tool of trade such as any assets like computers and telephones allocated to the employees of any company. Therefore, I find it highly unlikely that the applicants had illegally obtained the flash drive containing the evidence with probative value to these proceedings.

[13] It is only evidence that is to be used in the criminal trial which is covered by section 35 (5) of the Constitution which must be excluded. In such a case the court hearing the criminal trial has no discretion to admit the evidence illegally obtained. This is so to ensure that self-incrimination by an accused person is impermissible and that the trial should always be fair and in accordance with the principle of legality.

[14] In the instant case, as already stated, no evidence has been led in the papers that the information contained in the flash drive is going to be used in the criminal trial. Again, I restate that no criminal charges have been laid by the applicants against the second and third respondents. The contention that the evidence obtained from the flash drive should be ignored by this court, must in my respectful view fail.

[15] The second respondent contends as a second point that the first applicant has no *locus standi* to bring the application as he was only employed by the second applicant in terms of the written contract of employment.

[16] The closer perusal of the papers reveal that the second respondent managed the business of both applicants. This is confirmed by what the second respondent who says in paragraph 5.9 of the opposing affidavit where he states the following:

> "*In my capacity as CEO of the second applicant it was also expected of me to oversee and manage the business activities of the first applicant. Prior to my appointment as CEO, the applicants' bank accounts were all in overdraft. During the period between March to September 2013, I managed to transform the applicants' negative bank balances into positive bank balances cumulatively in excess of R20 000 000.00 (twenty million rands).*"

[17] The concession by the second respondent that he managed the business activities of both applicants is proof that he worked for both applicants. In my respectful view, the contention that the first applicant has no *locus standi* to bring the application must therefore fail.

[18] The evidence adduced in the papers before me is overwhelmingly in favour of the applicants. The second respondent whilst a CEO of both applicants conspired and engineered the high jacking of the business of the applicants. He used the applicants' letterheads to appoint the first respondent as a sub-contractor on projects the applicants had with the clients; ensured that the first respondent unfairly competed directly with the applicants whilst he was still employed by them. This is confirmed, for instance by the Johannesburg City Power tender where the first respondent also tendered for the work and the second respondent ensured that the applicants do not become preferred service providers by reducing the number of technicians who were to be briefed by Johannesburg City Power. This omission, despite being short-listed, led to the applicants losing the tender due to the illegal conduct of the first and second respondents.

[19] A CEO of a company occupies a special position within the company. Consequently, whilst he is in that position, he is always expected to act in the

best interests of the company he manages. This is a trite principle of our company law. In this case, the second and by extension, the third respondent acted in direct conflict with their employment contract with the applicants.

[20] The resignations by the second and third respondents from the employ of the applicants do not, in my view, make their conduct lawful. I say this because, on merits, the respondents contend they should not be restrained from engaging in competition.

[21] In opposing the application, the second respondent sought to challenge Mr Zami Nkosi and Mr Brian Johnson and alleged that the two transferred millions of rands of the applicants' money to fund their lifestyles. The second respondent called upon them to make available to these proceedings their personal bank accounts statements. I fail to understand the relevance of the demands as the two gentlemen are not parties before this Court. This is not an inquiry into the personal lifestyle of Mr Nkosi and Mr Johnson.

[22] I now deal with the restraint of trade. It is trite that every person has a right to carry on his trade without wrongful interference from others. In *Schultz v Butt*[3] the court held as follows:

> "*In order to succeed in an action based on unfair competition, the plaintiff must establish all requisites of acquilian liability, including proof that the defendant has committed a wrongful act. In such a case, the unlawfulness which is a requisite of acquilian liability may fall into a category of clearly recognised illegality as in the illustrations given by Corbett J in Dunn and Bradstreet (Pty) Limited v SA Merchants Combined Credit Bureau (Cape) (Pty) 1968 (1) SA 209*

[3] 1986 (3) SA 667 (AD) at 678 H-I

(C) at 216 F-H, namely trading in contravention of an express statutory prohibition, that the making of fraudulent misrepresentations by the rival trader as to his own business; the passing off by a rival trader of his goods or business as being that of his competitor, the publication by the rival trader of injurious falsehoods concerning his competitors business; and the employment of physical assaults and intimidation designed to prevent a competitor from pursuing his trade, but it is not limited to unlawfulness of that kind."

[23] In this case, the respondents have made all concessions regarding the following:

(a) passing off the business of the first respondent as that of the applicants;

(b) leaning on the applicants' goodwill and reputation in the promotion of their own business;

(c) appropriating the applicants' business ideas, acquisition and use of the applicants' trade secrets and confidential information;

(d) misappropriating i.e. adopting or copying the applicants' performance;

(e) interfering with the applicants' contractual obligations and/or relationship with co-contracting parties and/or customers whether potential or existing.

[24] In *Cochrane Steel Products (Pty) Ltd v M-Systems Group (Pty) Ltd and Another*[4], the Court held as follows:

"No one can claim an absolute right to exercise of his or her trade, profession or calling, or competition often brings about interference in one way or another

[4] 2016 (6) SA 1 (SCA) at para [18]

about which rivals cannot legitimately complain (Matthews v Young 1922 AD 492 at 507). All that a person can, therefore, claim is the right to exercise his calling without unlawful interference from others. As Corbett J pointed out Dunn and Bradstreet at 216 (E) [o]ne of the "rights" comprehended in the general right to carry trade is the right to attract custom competition by a rival trader necessarily involves an interference with the exercise of this right in that it results, to some degree, in the diversion of such customs to the rival trader. Thus, the main difficulty in this branch of law is to determine the dividing line between lawful and unlawful interference with the trade of another."

[25] Having given consideration to the facts of this matter, I am satisfied that the line for lawful competition has been crossed. This is demonstrated by the lies perpetrated by the first respondent that it has been appointed as a sub-contractor to carry out work on behalf of the applicants, the interference relating to tender processes for Johannesburg City Power tenders which was lost by the applicants owing to failure to meeting the minimum number of technicians specified in the tender document.

[26] The last point to be considered is that of costs on a punitive scale. The second respondent occupied the most important position as the CEO of the applicants. He owed his fiduciary duty towards both applicants in running their business. I am of the view that he abused his position by conducting wrongful acts through the first respondent. In my view, the first respondent was his alter ego in that he controlled it, although his wife and daughter were also shareholders,

[27] It follows in my judgment that the conduct of the respondent should be visited upon by the respondents on many of the prayers, it is not necessary to issue a punitive costs order.

ORDER

The following order is made:

The respondents are hereby interdicted from:

(a) passing of the business of the applicants as that of the respondents

(b) leaning on the applicants' goodwill and reputation in promotion of their own business;

(c) appropriating any of the applicants' business ideas, acquisition and use of the applicant's trade secrets or confidential information;

(d) misappropriating i.e. adopting or copying the applicant's performance;

(e) interfering with the applicant's contractual obligations and relationships with contracting parties and/or customers whether potential or existing;

(f) entering into or attempting to enter into any contract whereby the object set out in paragraphs as above is sought to be achieved;

(g) as against the second respondent by competing with the applicants in the business of the applicants in a personal capacity or by use of the first respondent as a vehicle to do so;

(h) the respondents are directed to hand over any computer program material, manuals, tender documents, contract and/ or any other documents generated unlawfully for use by the business of the of the first respondent whilst the second and third respondents were in the employment of the applicants;

(i) the respondents are ordered to pay the costs of suit on a party and party scale.

SENYATSI ML

Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

REPRESENTATION

Date of hearing: 09 October 2019

Date of Judgment: 25 June 2021

Applicants Counsel: Adv AP Den Hartog

Instructed by: Marques Soares Fontens Attorneys

Respondents Counsel: Adv JA Du Plessis

Instructed by: Van Velden-Duffey Incorporated