REPUBLIC OF SOUTH AFRICA

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

Appeal Case Number: A 2022-055430

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

[1] **13 /09/2023** _____

[2] DATE SIGNATURE

In the matter between:

TAX CONSULTING SOUTH AFRICA First Appellant

XPATWEB (PTY) LTD Second Appellant

And

MOEKETSI PERCY SEBOKO First Respondent

MS IMMIGRATION ADVISORY Second Respondent

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by e-mail, uploading to Case lines and release to SAFLII. The date and time for hand down is deemed to be 10h00 on 13 September 2023.

Restraint of trade – against ex-employee – ambit of – whether employer falling within ambit of "group" of entities restraint of trade agreement is applicable – employment contract not defining "the group" – interpretation of – established that employer part of associated entities.

Restraint of trade – ambit of – restraining employee from contacting, approaching, and soliciting employer's clients – restraint not unreasonable, only restraining in choice of clients and not ability to engage in employment – restraint of trade principles restated.

JUDGMENT

MUDAU, J:

[1] This is an appeal with the leave of the court *a quo* against a judgment and order of Yacoob J, following an application that was dismissed to interdict the first and second respondents from, *inter alia*, contacting, approaching and soliciting any of the appellants' prescribed clients. The application was to enforce a restraint of trade agreement contained in the employment contract of the first respondent concluded between the first appellant and the first respondent on 28 June 2017. The application was launched as a matter of urgency in December 2022.

[2] Since the restraint was for a limited period of twelve months from 30 September 2022 until 30 September 2023, the court *a quo* correctly treated the matter as being an application for final interdictory relief and therefore, urgent. This appeal turns on whether the first appellant, the first respondent's employer, was part of a group of entities in respect of which the restraint of trade agreement was applicable.

Background facts

[3] The facts are uncontroverted. The first respondent, Seboko, a former employee of the first appellant, Tax Consulting South Africa (TCSA), which is a sole proprietorship, worked for Xpatweb (Pty) Ltd (Xpatweb), the second appellant

from 1 August 2017 until September 2022. He worked initially as an immigration manager and later as a director of, TCSAS Group Services (Pty) Ltd (TCSAS Group), when he resigned. Seboko, a work visa specialist, was employed to provide visa application and immigration consultancy services. He rendered these services to the second appellant as the entity within the group that deals specifically with visa application and immigration consultancy services. After his resignation, Seboko incorporated and established MS Immigration Advisory (Pty) Ltd (MSIA), the second respondent.

[4] TCSA acted as the parent business for various legal entities within its group, which included Xpatweb. Marisa Jacobs (Ms Jacobs) the deponent to the appellants' affidavits and Christoffel Botha (Mr Botha) the deponent to the confirmatory affidavits, are directors of and each holds a third of the issued shares in Xpatweb. TCSA is the employer of all employees in the group. Also, when the first appellant expanded, it formed groups of companies such as Xpatweb, which performs work visa services. Seboko as indicated, rendered these services to Xpatweb as the entity within the group that deals specifically with visa application services and immigration consultancy and advice. In sum, he provided specialist professional advisory and support to corporate clients of the group.

[5] The material portions of Seboko's employment contract in relation to the restraint clause provide as follows:

> "1.3.12. 'prescribed client/customer' means any person:
>
> 1.3.12.1. who is or was a client/customer of the employer during, and prior to, any part of the employee's employment; and/or
>
> 1.3.12.2. who is or was a prospective client/customer of the employer at the Termination Date whom the employee approached to do business with the employer within a period of 1 (one) year preceding the Termination Date; and/or
>
> 1.3.12.3. who purchased or acquired services from or through the employer within a period of 1 (one) year preceding the Termination Date; and/or

1.3.12.4. to whom services were rendered by the employer within a period of 1 (one) year preceding the Termination Date."

[6] On the definition of "the group", the agreement provided -

"1.3.9. 'the group' means the company and/or any of its current or future associated brands or entities for which the employee may be required to act on behalf of during the course of their employment".

[7] Clause 13.2 provides further -

"By signing this agreement, the employee acknowledges and agrees that these legitimate interests exist, and the employee agrees to abide by the obligations as set out below. In this regard, the employee irrevocably and unconditionally agrees and undertakes:

…

13.2.3. not to, for a period of 12 (twelve) months subsequent to the termination date and anywhere within the Republic of South Africa, either for the employee's own account or as representative or agent for any third party:

…

13.2.3.3. contact or approach or furnish any information or advice (whether written or oral) to any prescribed client/customer (whether as proprietor, partner, director, shareholder, employee, consultant, contractor, financier, agent, representative or otherwise) directly or indirectly, for the purpose of or with the intention of persuading, soliciting or inducing such prescribed client/customers to terminate their mandate with the employer or to offer to such prescribed client/customers the rendering of any prescribed services".

[8] Clause 13.5 states that "the provisions of this clause 13 shall apply in respect of any employment services rendered by the employee in respect of any entity contained within the group".

[9] It is common cause that the definition of "*the group*" in the first respondent's employment contract does not state which entities belong to the group. However, from the founding papers, the second appellant where the

first respondent rendered services, as well as the first appellant belonged to the group.

[10] On 10 and 11 November 2022, Seboko, through the second respondent, was in contact and gave visa application and consultancy advice to Carlcare Services ZA (Pty) Ltd ("Carlcare"), a client of the second appellant, through an email address "@moeketsimsiadvisory.co.za" with the second respondent. This was in breach of clause 13.2.3.3 of his employment contract. This was baldly denied in the answering affidavit.

[11] Again, on 26 November 2022 Seboko, through the second respondent was in contact with and gave visa application and consultancy advice to IXM Africa (Pty) Ltd ("XM), a client of the second appellant for which Xpatweb, through Seboko, had executed three visa instructions previously. The contents of the emails attached as "FA13" to "FA15" show that Seboko, when contacted by IXM Africa on his Xpatweb's email address, responded from his new email address through his new business, MSIA as indicated in the preceding paragraph. This he was not permitted do in terms of the restraint of trade agreement.

[12] It is trite that where the material facts are in dispute and there is no request for the hearing of oral evidence, a final order will only be granted on notice of motion if the facts as stated by the respondent, together with the facts alleged by the applicant that are admitted by the respondent, justify such an order[1] unless, of course, the court is satisfied that the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is so far-fetched or so clearly untenable or so palpably implausible as to warrant its rejection merely on the papers.[2]

[13] The court *a quo* had no difficulty, correctly, in concluding that clause 13.5 of the restraint of trade agreement pertains to associated brands or entities of TCSA.

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[1] See in this regard *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty)* Ltd 1957 (4) SA 234 (C) at 235.

[2] See in this regard *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* (53/84) [1984] ZASCA 51; 1984 (3) SA 623 (A) at 635C; *National Director of Public Prosecutions v Zuma* (573/08) [2009] ZASCA 1; 2009 (2) SA 277 (SCA) at para 26; *South African Reserve Bank v Leathern NO* 2021 (5) SA 543 (SCA) at para 24 n 12; *Mtolo v Lombard* (CCT 269/21) [2021] ZACC 39; 2022 (9) BCLR 1148 (CC) at para 38.

In addition, that the provisions of clause 13 thereof applied in respect of any employment services rendered by Seboko in respect of any entity contained within the group. Further, the court *a quo* concluded, correctly, that the group included the first appellant "and/or any of its current or future associated brands or entities for which (the first respondent) may be required to act on behalf of" during Seboko's employment. The court *a quo* however reasoned that if Xpatweb was able to establish that it is an associated entity within the group as defined in the restraint of trade agreement, then the restraint of trade agreement would apply in favour of Xpatweb against the respondents, which it failed to do.

[14] In the respondents' answering affidavit, Seboko says there is no reference to Xpatweb in the agreement relied upon; further, that there was no agreement between him and Xpatweb. He also made issue of the lack of an organogram to explain these arrangements. In his version however, he knew that there was an arrangement between the first and second appellants, the details of which he was not privy to, which he contended did not give rise to a contract between him and Xpatweb. The court *a quo* nevertheless concluded that these denials were not fictitious. It found that because the appellants did not annex objective documentary proof that they were associated entities, the restraint of trade agreement was not enforceable in favour of Xpatweb.

[15] The respondents contended that the appellants were not able to establish that they are associated entities, as such the restraint of trade cannot apply in favour of all the appellants but can only apply in favour of the first appellant. The much-cited dictum on the tools of interpretation in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[3] para 18 bears repeating:

> "Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax;

[3] 2012 (4) SA 593 (SCA).

the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document."

[16] It is apparent that, having regard to the context and purpose of Seboko's employment contract, the second appellant was intended by the wording to fall and indeed fell within the definition of the group in the contract. The very reason therefor was to enable group entities to enjoy the benefits and protection of the restraint in recognition of the fact that protection would be required if the first respondent was deployed to a company or entity within "*the group*" as occurred with the first respondent's employment by the first appellant and deployment to the second appellant. The interpretation advanced by Seboko regarding the employment contract, viewed objectively, is far removed from commercial reality and was not sensible or business-like. From the established facts and under oath, the appellants proved that the second appellant was a company in the group in whose favour the restraint operated. The first respondent was accordingly bound by its terms in favour of the first and second appellants.

[17] In my view, the denials were not supported by any evidence as no information was provided by Seboko to support his denials in the face of the appellants' evidence. Seboko, accordingly, furnished what is considered a bare denial of the appellants' averments in respect of the second appellant being part of "*the group*". It follows accordingly, on the application of the *Plascon Evans* principle, the denials did not go far enough to raise a material dispute of facts.

[18] It is trite that that a restraint is enforceable unless it is shown to be unreasonable, which necessarily casts an onus on the person who seeks to escape it. The first respondent contended that the restraint is unreasonable as he would consequently be subjected to poverty, which is an affront to human dignity. There is quite clearly no merit in this contention. The appellants' case is

straightforward. It sought a prohibitory interdict to prevent the respondents from contacting their prescribed clients. Restraining Seboko from contacting their prescribed clients does not affect him rendering services to unprescribed clients elsewhere or his ability to engage in the employment he was trained and had expertise in. The nature and extent of the limitation is thus restricted.

[19] The principle of *pacta sunt servanda* finds application in this matter in the absence of some other factor of public policy. In *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*[4] it was held that agreements in restraint of trade were valid and enforceable unless they are unreasonable and thus contrary to public policy, which necessarily as a consequence of their common-law validity has the effect that a party who challenges the enforceability of the agreement, bears the burden of alleging and proving that it is unreasonable as the respondents readily conceded.

[20] As *Reddy v Siemens Telecommunications (Pty) Ltd*[5] in para 15 reminds us:

> "A court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint. The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the *maxim pacta servanda sunt*. The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions. Both considerations reflect not only common-law but also constitutional values. Contractual autonomy is part of freedom informing the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life".

[21] In this matter, it has not been suggested that the limitation as to time is unreasonable. Seboko is restrained only in the choice of his clients and even then, for a limited period. Certainly not in his being economically inactive at all as he contended. Restraining him from contacting the prescribed lists of clients does not affect his employment or his ability to engage in the employment he was trained for. The nature and extent of the limitation is accordingly restricted. In these circumstances, it appears to me that it has not been shown that it would be contrary to public policy to hold Seboko to the terms of his agreement

[4] (109/84) [1984] ZASCA 116; 1984 (4) SA 874 (A).
[5] (251/06) [2006] ZASCA 135; 2007 (2) SA 486 (SCA).

with the appellants and to enforce compliance with those terms as the restraint is neither unreasonable nor contrary to public policy.

[22] It follows that the court *a quo* erred in not holding Seboko to his contractual undertaking. The requirements for a final interdict have been met, not only has TCSA's clear right been demonstrated but also its breach. There is no reason why costs should not follow the result.

[23] Therefore, the following order is made -

1. The appeal is upheld with costs.

2.The order of the court *a quo* is set aside and replaced with an order in the following terms:

2.1. this matter is enrolled as an urgent application and the forms and service provided for in the Uniform Rules of this Court are dispensed with in terms of Rule 6(12) of the Rules;

2.3 the first respondent and second respondent are interdicted and restrained until 30 September 2023 and throughout the Republic of South Africa either on their own account or as a representative or agent for any third party from contacting or approaching or furnishing any information or advice (whether oral or written) to any client/customer of the applicants whose name appears on annexure "RA3" to the replying affidavit; and

2.3. the respondents are ordered to pay the costs of this application including the costs attendant on the employment of two counsel where two counsel have been employed.

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T P MUDAU

JUDGE OF THE HIGH COURT

I agree

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R STRYDOM

JUDGE OF THE HIGH COURT

I agree

_____

M V NOKO

JUDGE OF THE HIGH COURT

APPEARANCES

For the Appellants:	R Grundlingh
Instructed by:	Helena Strijdom Attorneys
For the Respondents:	Adv. K Mvubu
Instructed by:	Malatjie & Co
Date of Hearing:	23 August 2023
Date of Judgment:	13 September 2023