IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 38700/2022

DATE: 2022-10-03

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
DATE 7 OCTOBER 2022

SIGNATURE

10 In the matter between

TRYSOME AUTO ELECTRICAL ENGINEERING (PTY) LTD Applicant

and

STANLEY MASHABA First Respondent

WBHO CONSTRUCTION (PTY) LTD Second Respondent

J U D G M E N T

20

DAVIS J:

Introduction

[1] The applicant, Trysome Auto Electrical Engineering (Pty) Ltd (Trysome) renders services relating to collision avoidance systems for vehicles, also referred to as “the products” in the restraint of Trade Agreement which forms

the subject-matter of this urgent application. These services are rendered to the second respondent, WBHO Construction (Pty)Ltd (WBHO).

[2] Until 29 July 2022, the first respondent, Mr Stanley Mashaba (Mashaba) used to work for Trysome. Since 8 August 2022, he is employed by WBHO.

[3] Trysome seeks to enforce a written restraint of trade
10 agreement against Mashaba alleging that Mashaba is inhouse rendering the services which Trysome rendered to WBHO in breach of his restraint agreement. Mashaba denies this, claiming he is merely employed as a fleet manager. WBHO did not oppose the application.

The restraint of trade agreement

[4] On 1 June 2016, Mashaba became employed by Trysome as a technical trainer. His contract of employment
20 contained confidentiality and restraint of trade clauses. As this agreement had become superseded by a later agreement, Trysome does not rely thereon.

[5] On the same day, that is 1 June 2016, Mashaba signed a separate extensive restraint of trade agreement. In it Mashaba agreed, after having made an extensive number of admissions relating to the envisaged receiving of

training and acquisition of knowledge of Trysome's products, services and customers, to, in addition to the customary restraint against working for one of Trysome's competitors:

> "*Not directly or indirectly furnish any information or advice to any prescribed customer or use any other means or take any other action which is directly or indirectly designed or in ordinary course of business calculated to result in such prescribed customer terminating its association with the company or transferring its business to or purchasing the prescribed services from any other person than the company or attempt to do so*."

10

[6] The reference to "the company" refers to Trysome and "the services" means the supply of specialised services which Trysome renders. WBHO is one of the "prescribed customers" and at the relevant time, was one of Trysome's largest clients. The period of the restraint is for 24 months after termination of employment. The area of the restraint is the Republic of South Africa.

20

[7] From 18 January 2018, Mashaba had been employed by Trysome as an accounts manager in terms of a new employment contract and subsequently from 1 August 2021, as "Technical Service and Support Lead". These new contracts of employment did not contain restraint of trade clauses as the general restraint agreement of 1 June 2016 remained operative[1]. This also dispenses forthwith with Mashaba's argument regarding novation of agreements.

10 **The alleged breach and the evaluation of the allegations**

[8] The services that Trysome renders at WBHO involves the supply, installation, repair and upgrade of collision avoidance systems to vehicles operated by WBHO at one of Anglo American's platinum mines called Der Brochen. This is not in dispute.

[9] Mashaba has received extensive training during his employment at Trysome in performing these services. By 20 the end of his employment, he was instrumental to Trysome's business at Der Brochen and provided oversight and support to technicians on site. Trysome's agreement with WBHO is to have a so-called MOS technician, that is a "man-on-site" at Der Brochen, in order to perform the required technical services. This *inter alia* included the maintenance of the older version of the units, that is the

[1] See regarding the existence or co-existence of separate agreements: *National Health Lab Services v Van Vuuren* (2010/41313) [2020ZAGPJHC212] (10 September 2020)

QC235 units or replacing them with newer units. Upgrades and repairs to the software of the units are done by way of a "SM Tool" installed on a technician's laptop with each programme and laptop registered in terms of Trysome's sole licence to provide this kind of work. Trysome is in this fashion a "single source supplier" of heavy duty auto electrical collision avoidance systems in South Africa.

[10] In terms of the Mine Health and Safety Act 29 of 1996
10 all mines are required to have collision avoidance and proximity detection systems in place. The units supplied by Trysome, also referred to as a CAS system, are GPS units that are installed on heavy commercial vehicles which warn the operators of such vehicles of obstacles in the immediate vicinity so as to avoid collisions with such obstacles. The units are produced and supplied by Hexagon Mining Incorporated (Hexagon) for which Trysome is a licensed distributor.

20 [11] Mashaba left Trysome's employ on 29 July 2022. In terms of a letter uploaded by Mashaba's attorney, purportedly in terms of Rule 6(5)(e), WBHO had invited Mashaba already on 21 July 2022, to take up employment at WBHO on 8 August 2022. His position would be that of a "planner/technician". Mashaba accepted this invitation on 10 August 2022. A further letter from WBHO confirms that

Mashaba's place of employment is at WBHO's "Plant North Department", that includes its operations at Der Brochen.

[12] Trysome was initially unaware that Mashaba had taken up employment with WBHO. On 27 July 2022, he had informed the business unit manager of Trysome, one Tania Bambrough that he would be resigning with effect from 29 July 2022. During an interview regarding his resignation, he stated he did not have any other employment and wanted to
10 spend time with his family and on his farm. He requested a copy of his restraint agreement and was furnished therewith. The documents uploaded by Mashaba's attorney indicate that Mashaba's statement about no other offer of employment, was a lie.

[13] What alerted Trysome that Mashaba might be acting in breach of his restraint of trade agreement, was when Hexagon informed Trysome on 17 August 2022, that Mashaba was working for Trysome's client, WBHO. When
20 Bambrough telephonically confronted Mashaba on 18 August 2022 with this allegation, Mashaba denied that he had taken up employment with WBHO. The documents uploaded by Mashaba's attorney indicate that this was another lie.

[14] Subsequent to this, a site agent at WBHO, copying a contract manager at WBHO, one Scott Robertson, who was also the author of the WBHO letter of 1 August 2022, sent

two emails to Mashaba, inadvertently using his Trysome email address, leading to Trysome gaining knowledge of the contents thereof. In these emails dated 23 August 2022, Mashaba is referred to a spreadsheet containing a list of vehicles in which the CAS systems had been installed, some with the older QC235 units and some with newer versions. Mashaba was requested to change some of the units on which he had been "working" and to "sort out" other units and to see to a list of new installations.

10

[15] The day after the emails had been sent, Scott Robertson attended a virtual meeting, also attended by Trysome and Hexagon. Robertson informed Bambrough that Mashaba will be performing installations of the systems at the Der Brochen site. When Bambrough informed Robertson that Mashaba is not authorised to do so, Robertson moved to a next topic. When confronted with these facts, particularly the emails referred to above, Mashaba in his answering affidavit claimed to only being a fleet manager.

20 The other allegations are met with an bald denial. Notably no affidavit by Robertson or any employee of WBHO has been annexed.

[16] More than a decade ago the Supreme Court of Appeal in *Wightman t/a JW Construction v Headfour (Pty) Ltd and*

Another, 2008, (3) SA 371 (SCA) at paragraphs 12 and 13 explained that,

> "*While there may be instances where a simple denial of a fact might suffice, but where detailed allegations are made and the answers thereto clearly lie within the personal knowledge of a respondent, his failure to pertinently deal therewith, then raises no real or bona fide dispute of fact*."

10 This is the situation here.

[17] Elsewhere in his affidavit, Mashaba alleges that due to a dispute between Hexagon and Trysome originating in June 2022 and culminating in July 2022, WBHO became entitled to purchase units directly from Hexagon. The minutes of a subsequent meeting between the parties, including Hexagon, being that of 13 August 2022, directly contradicts this however. In yet another version Mashaba alleges that WBHO is entitled to purchase units from an 20 erstwhile supplier of the older version of the units, one Mintek. There is no proof that this contradictory statement, is true at all. It is also belied by Trysome's sole distribution licence.

[18] Irrespective of the contradictions already contained in Mashaba's answering affidavit regarding the purchase of

units, none of these justify Mashaba's involvement in a business with one of Trysome's clients which take business away from Trysome. Mashaba's woes were exacerbated when his counsel explained yet another version during oral argument. This version had apparently been obtained from Mashaba during consultation. It is to the effect that the contents of the emails referred to above are nothing sinister, they merely reflected the method by which Mashaba as a fleet manager was alerted to units which required
10 attention. Not only was this attempted presenting of evidence from the bar grossly inappropriate and disallowed but it indicated yet another reason why Mashaba's evidence in his answering affidavit should be rejected as palpably false. He alternates between either having nothing to do with the units to only managing the units as a fleet manager to being allowed to deal with the units as WBHO is allegedly entitled to purchase such units. And then he alternates between whether such purchase would be from Hexagon or from another supplier. Added to these woes are Mashaba's
20 false statements regarding taking up employment at WBHO in the first place, as already referred to above.

[19] A last aspect bears reference. It is Mashaba's question posed in his answering affidavit in rhetoric fashion, as to how he could be suspected of accessing units when he

had handed in his laptop on which the software, that is the SM Tool had been installed, upon leaving Trysome's employ. Mashaba had however himself, when he had some years previously, assisted Trysome in enforcing a similar restraint of trade agreement against yet another technician, in detail explained how easy it is for a technically skilled person to copy the SM Tool software onto a personal laptop and to bypass the licensing requirements.

10

[20] There are a number of other discrepancies in Mashaba's versions in his totally uncorroborated answering affidavit to the extent that I am convinced that Trysome had sufficiently indicated that Mashaba is acting in breach of his restraint of trade agreement. The denials which Mashaba raised are therefore rejected.

Other requirements

20 [21] I am similarly satisfied that the other requirements for a final interdict have been satisfied. I point out that Trysome has indicated that, should Mashaba be allowed to divert WBHO's business away from Trysome, it would suffer a loss in excess of R5,6 million. This constitutes a clear indication of a measure of a protectable interest which is as

a result of the relationship between Trysome and its customers[2].

[22] The other requirements relating to the enforcement of a restraint of trade such as area or time period had not been seriously placed in dispute with Mashaba contending alternately that there is no binding restraint in existence or that he is not breaching the existing restraint of trade in a fashion as set out above. Notably, the enforcement of the
10 restraint shall not deprive Mashaba of his employment particularly if restricted only to the fleet management operations which he claimed he does. His constitutional rights of employment would therefore not be denied him other than by way of the restriction to which he had agreed[3].

[23] Regarding the issue of costs. It appears that WBHO is complicit in Mashaba's conduct. However, Trysome has elected to only claim costs against WBHO in the event of its opposition, which did not take place. I see no cogent
20 reason why the normal rule should not apply, namely that cost should follow the event as against the unsuccessful respondent, that is Mashaba. This case is further one where a court should display its displeasure at the manner in which a litigant has conducted his case. It is sufficiently

[2] See in this regard *Rawlins and Another v Caravantruck*, 1993(1) SA537 (A) at 541C-H
[3] See: *Beadica 231 CC v Trustees, Oregon Trust* 2020 (5) SA 247 (CC), discussing *Magna Alloys and Research (SA) Ltd v Ellis* 1984 (4) SA 874 (A).

clear as indicated above, that not only was Mashaba acting in breach of the agreement but he was dishonest about it and about his employment with WBHO, including the nature thereof, not only towards Trysome but also towards the court. Such conduct justifies the granting of a punitive costs order.

ORDER

[24] The order is as follows:

10

1. The first respondent is interdicted and restrained until 29 July 2024 from directly or indirectly selling, supplying or otherwise rendering to the second respondent those services which the applicant sells, supplies or renders to the second respondent, in particular in relation to installation, programming, maintenance and/or repair of collision avoidance units for vehicles.

20

2. The first respondent is directed to delete any and all copies of the SM Tool software described and defined in the founding affidavit, that he has in his possession or control.

3. The first respondent is ordered to pay the costs of the application with such cost to include the costs

consequent upon the employment of two counsel on the scale as between attorney and client

- - - - - - - - - - - - -

……………………………

DAVIS J

JUDGE OF THE HIGH COURT

10 **GAUTENG DIVISION, PRETORIA**

DATE OF HANDING DOWN OF JUDGMENT: 3 OCTOBER 2022.