Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Regional Magistrates:	YES / NO
Circulate to Magistrates:	YES / NO

IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE HIGH COURT, KIMBERLEY)

CASE NUMBER: 1522/2023
DATE HEARD: 28 August 2023
DATE DELIVERED: 13 October 2023

In the matter between:

MARIUS KOTZE **APPLICANT**

and

GWK WELVAART PROSPERITY (PTY) LTD **RESPONDENT**

JUDGMENT - REASONS

Olivier AJ

1. After hearing argument on behalf of both the above parties on 28 August 2023 and after reading the documents filed of record, I dismissed the application brought by the APPLICANT in as far as the relief sought by way of Part A thereof is concerned with costs and I ordered the said costs to include any wasted costs incurred by the APPLICANT'S application to amend the Notice of Motion in the matter.

I furthermore stated that the reasons for my above order will follow and what is set out herein under are the reasons for the above order dated 28 August 2023.

2. The APPLICANT lodged an application on an urgent basis under the above case number on 17 August 2023 in terms whereof the APPLICANT sought relief by way of two separate parts.

3. In terms of Part A of the Notice of Motion (herein after referred to only as "*Part A*") the APPLICANT sought to obtain an order in terms whereof the RESPONDENT would be compelled to reinstate the APPLICANT'S medical aid benefit with immediate effect and to continue to make a full 100% contribution towards the medical aid fund pending the finalization of the relief sought by way of Part B of the above Notice of Motion (herein after simply referred to as "*Part B*").

The APPLICANT furthermore sought a costs order against the RESPONDENT in respect of Part A.

4. The relief sought by the APPLICANT in terms of Part B was peculiarly worded as the APPLICANT appeared to be moving for an order in the following terms:

"*1. [That] The Applicant shall institute proceedings against the Respondent to assert his rights in terms of the agreement between the parties which proceedings shall be heard in due course;*

*2. That it be declared that the Applicant has not breached nor is the Applicant in breach of the restraint of trade as provided for in the Human Resources Policy and contact (*sic*) of employment concluded between the Applicant and Respondent.*

3. Costs of suit."

5. I interrupt myself to state that it is common cause that the application revolved around the undisputed fact that the APPLICANT was subject to a restraint of trade clause

which formed part of his contract of service[1] and in terms whereof the APPLICANT was prohibited from, for a period of 3 (three) years after termination of his service with the RESPONDENT, *inter alia* competing with the RESPONDENT and/or from being involved with another employer which renders the same services as the RESPONDENT.[2]

I will henceforth refer to the restraint of trade clause simply as "*the RoT*".

6. Based on the way in which the Notice of Motion is worded, it therefore appears that by way of Part B the APPLICANT, on some or other undisclosed/unknown future date and by way of some or other undisclosed/unknown process, intends to challenge the validity of the RoT and that by way of Part A, the APPLICANT intends to protect certain rights of the APPLICANT[3] pending the finalization of the relief sought in terms of Part B.

7. I made mention herein above of the fact that Part B is peculiarly worded, the reason for this comment simply being the fact that it would, in my view, not be competent for a Court to grant an order as prayed for in terms of prayer 1 of Part B as it does not appear from said prayer when the APPLICANT intends instituting proceedings that are to be heard "*in due course*".

If such an order as prayed for were to be granted, it would effectively afford the APPLICANT the right to institute the intended proceedings at any time in the future and especially if the relief envisaged in Part A is afforded the APPLICANT, the APPLICANT will have no incentive to proceed with Part B with any amount of haste.

8. It therefore came as no surprise that the RESPONDENT, in its Answering Affidavit, raised the following 2 (two) points *in limine* namely:

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[1] The contract of service incorporated various policies of the RESPONDENT.

[2] This is an extremely rudimentary summary of the actual restraint of trade clause that formed the subject of this application, but will suffice for purposes hereof.

[3] In this case the alleged right to have his medical aid benefits reinstituted and well as a right to a contribution by the RESPONDENT to the APPLICANT'S medical aid fund.

8.1 That it would not be competent to grant the interim relief sought by way of Part A, because of the fact that the relief sought in terms of Part B is open-ended as a date for the institution of the intended further proceedings have not been set or indicated; and

8.2 That it is unclear whether the APPLICANT intends to institute separate proceedings by means of either another application or an action, particularly because the APPLICANT asserts that he has no other option but to approach this Court "*in due course*" to assert his rights.

9. These points *in limine* apparently gave rise to the APPLICANT attempting to file an amended Notice of Motion together with his Replying Affidavit which, again unsurprisingly, lead to the RESPONDENT filing a notice in terms of the provisions of ***Rule 30A*** of the Uniform Rules of Court (herein after referred to only as "*the Rules*") claiming that the APPLICANT had failed to comply with the provisions of ***Rule 28*** and also ***Rule 27*** of the Rules.

The RESPONDENT contended that the APPLICANT had failed to give notice of the intended amendment to the Notice of Motion as is required in terms of ***Rule 28*** of the Rules and further that, in the absence of an agreement with the RESPONDENT as to the intended amendment, the APPLICANT had failed to seek the necessary condonation from the Court.

10. It should be mentioned, for the sake of context and completeness that the relevant prayer in Part A prior to the intended amendment reads as follows:

"*That the Respondent be ordered to reinstate the Applicant's medical aid benefit with immediate effect and continue to make the full (100%) contribution towards the medical aid fund at the maximum agreed amount pending the finalisation of the relief sought in Part B (declaratory relief).*" (My underlining)

Subsequent to the intended amendment, this prayer would have read as follows:

"*That the Respondent be ordered to reinstate the Applicant's medical aid benefit with immediate effect and continue to make the full (100%) contribution towards the medical aid fund at the maximum agreed amount as provided for in contract of employment (annexure 'GWK1') read with 'Basis van Vergoeding' (annexure 'GWK2') read with Human Resources Policy (annexure 'FA1') <u>until such time as the agreement between the parties are cancelled</u>.*" (My underlining)

11. It should also be mentioned that it appeared from the intended amended Notice of Motion that the APPLICANT did not envisage seeking relief by way of the original Part B of the application any longer.

12. Mr. Gilliland on behalf of the RESPONDENT argued that the intended amendment should not be allowed, based primarily thereon:

12.1 That the intended amendment was sought without the APPLICANT utilizing the procedures as set out in the Rules[4];

12.2 That the RESPONDENT would be severely prejudiced if the intended amendment is allowed as the relief sought in terms of the application post-amendment is final in its effect which places a higher onus on the RESPONDENT whereas the relief initially sought by way of Part A was interim relief; and

12.3 That, whereas the APPLICANT initially and in terms of Part A and Part B of the application pre-amendment had the onus to show that he (the APPLICANT) is entitled to the declaratory relief sought in Part B, the onus is now (post-amendment) placed on the RESPONDENT to show the breach of the employment contract and to now justify the cancellation of the APPLICANT'S medical aid contribution.

13. I have to agree with Mr. Gilliland's contentions in this regard namely that the intended amendment would create an injustice to the RESPONDENT which cannot necessarily be cured by a costs order as, seeing that the application was brought on an urgent

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[4] The procedures in terms of **Rule 28** of the Rules.

basis, it would have required the RESPONDENT to change tact on a moment's notice without having the opportunity to properly consider the intended amendment and to, if necessary, answer thereto.[5]

14. The primary reason for the above is that the RESPONDENT post-amendment will incur an onus that it would not have had pre-amendment and more specifically that the relief sought post-amendment would be permanent in its effect which would mean that the RESPONDENT would have to meet a higher onus.

I therefore cannot agree with Me. Van Der Laarse on behalf of the APPLICANT namely that the RESPONDENT, post-amendment, would have to effectively meet the same case as pre-amendment.

15. The intended amendment, in my view and further to the above, would constitute a material deviation from the relief sought by way of the initial Notice of Motion and one would have expected some sort of explanation from the side of the APPLICANT as to why the intended amendment was necessary.[6]

Such explanation was however not offered by or on behalf of the APPLICANT.

16. In view of all of the above, the intended amendment to the Notice of Motion in the matter was dismissed.

17. The APPLICANT therefore had to show that, pending the institution of the proceedings mentioned in Part B, he (the APPLICANT) had the right to have the *status quo* restored in as far as payment of his medical aid contributions by the RESPONDENT as well as his continued membership of the medical aid fund are concerned.

This is exactly what the APPLICANT had to show from the outset and based on the Notice of Motion in its original (an unamended) form.

18. It is common cause that the APPLICANT therefore had to show:

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5 See **Moolman v Estate Moolman & Ano** 1927 CPD 27 at 29.

6 See the matter of **Ciba-Geigy (Edms) Bpk v Lushof Plase (Edms) Bpk & 'n Ander** [2002] 2 All SA 525 (A) at 536 to 537.

18.1 That he has a *prima facie* right, in other words *prima facie* proof of facts that establishes the existence of a right in terms of substantive law;

18.2 A well-grounded apprehension of irreparable harm if the interim relief is not granted;

18.3 That the balance of convenience favours the granting of the interim relief sought; and

18.4 That a satisfactory alternative remedy does not exist.[7]

For the reasons set out below, I hold the view that the APPLICANT unfortunately failed to meet the first requirement set out in paragraph 18.1 above.

19. It is trite and warrants very little discussion that an Applicant is supposed to make out a case for the relief sought by such Applicant, in the Founding Affidavit.[8]

20. The APPLICANT'S case in this instance and in brief, revolved around a decision by the RESPONDENT to discontinue the APPLICANT'S medical aid benefits and specifically to also discontinue making contributions towards the APPLICANT'S medical aid, which decision was based on an allegation that the APPLICANT breached the RoT clause in his service contract with the RESPONDENT and the APPLICANT consequently approached this Court for the restoration of the *status quo* in this regard.

The APPLICANT took umbrage with the above actions by the RESPONDENT submitting that, although he took up employment with Emerald Portefeulje Bestuur Upington (herein after simply referred to as "*Emerald*") an employer that conducts business in a similar field than that of the RESPONDENT, he (the APPLICANT) was not in breach of his contract of service and more specifically the RoT contained in said service contract.

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7 **Setlogelo v Setlogelo** 1914 AD 221 at 227.

8 See *inter alia* **Skjelbreds Rederi A/S & Others v Hartless (Pty) Ltd** [1982] 1 All SA 1 (W) at pages 4 and 5 as well as the authorities cited by the Court on those pages.

21. It is common cause and it appeared from the APPLICANT'S own papers that the APPLICANT retired[9] from the employ of the RESPONDENT on or about 30 May 2022 and that he took up employment with Emerald approximately a year thereafter.

It should also be mentioned that it appeared from the papers submitted by the RESPONDENT that the APPLICANT had in fact had discussions with Emerald about a possible employment option prior to him retiring from the employ of the RESPONDENT.

The APPLICANT however failed to disclose this last-mentioned fact in his founding papers.

22. It is further common cause that the APPLICANT was primarily based in the town of Prieska whilst being employed by the RESPONDENT and that he remained based in Prieska after taking up employment with Emerald.

23. The APPLICANT *inter alia* alleged that he did not act in breach of the RoT based thereon that:

23.1 The area within which he was expected to render his services to Emerald, was not confined to Prieska only;

23.2 He (the APPLICANT) did not make use of the RESPONDENT'S trade secrets and thereby gave Emerald an unfair advantage; and

23.3 He (the APPLICANT) had not influenced and/or induced any of the RESPONDENT'S existing clients to move their short-term insurance policies to Emerald.

24. It furthermore appeared from the APPLICANT'S papers that the RESPONDENT, in answer to the APPLICANT'S request for early retirement, indicated on or about 3 May 2022 that subsequent to the APPLICANT'S retirement, the RESPONDENT will proceed with making contributions towards the APPLICANT'S medical aid subject

[9] The APPLICANT in fact applied for and was afforded early retirement.

thereto that the APPLICANT does not breach the RoT clause in his contract of employment.

25. It was not denied that the APPLICANT accepted early retirement from the employ of the RESPONDENT and it was also not contended that the condition set out in the previous paragraph was an issue at the time that the APPLICANT accepted his early retirement and terminated his services with the RESPONDENT.

Me. Van Der Laarse was however at pains to convince this Court that the mere fact that such condition was contained in the above answer of the RESPONDENT to the APPLICANT'S request for early retirement, does not necessarily mean that said condition was accepted by the APPLICANT, despite the fact that this argument was never raised in the APPLICANT'S Founding Affidavit and also despite the fact that there was no indication on the papers or otherwise that the APPLICANT might somehow have been forced to accept early retirement subject to the above condition.

All indications from the papers at hand are that the APPLICANT accepted the early retirement that he himself applied for, on the conditions as it was offered to him by the RESPONDENT and without question and the only reasonable inference that may be drawn from this, is that the APPLICANT did so voluntarily.

26. I consequently find this argument on behalf of the APPLICANT unconvincing.

27. The basic problem facing the APPLICANT is that he approached this Court expecting this Court to confirm and protect a right that he claims he has whilst simultaneously on his own version and in terms of his founding papers failing to show that he is in fact entitled to such right let alone entitled to have such right confirmed and/or protected.

28. The APPLICANT does not deny being in some kind of working relationship with a competitor of the RESPONDENT, he does not deny accepting the terms of the RoT and he also does not deny that he accepted the terms of the RoT as being reasonable and fair.

29. On his own version, the APPLICANT breached the terms of the RoT and it should be mentioned that I found the APPLICANT'S contentions as set out in paragraphs 23.1 to 23.3 herein above extremely naïve as the mere fact that the APPLICANT took up employment with a competing company within the period of 3 (three) years as set out in the RoT and within the Prieska area, is already *prima facie* proof of a breach of the RoT clause.

I still hold the above view.

It should be remembered that if the shoe in this case was on the other foot, namely where the RESPONDENT attempted to enforce a restraint of trade against the APPLICANT, the RESPONDENT only had to prove the contract and its breach by the RESPONDENT and these aspects appear from the APPLICANT'S papers in this matter.

30. The APPLICANT therefore and on his own version is in breach of the RoT which, on the papers at hand, entitles the RESPONDENT to discontinue making contributions towards the APPLICANT'S medical aid and discontinue the medical benefits in general.

There is, in my view, nothing on the papers at hand that shows otherwise and I consequently find that the APPLICANT had failed to show that he has a *prima facie* right in this instance that warrants protection.

31. I could also not find any reason as to why the costs in this instance should not follow the result and why the APPLICANT should also not be ordered to pay any costs incurred by the RESPONDENT as a result of the APPLICANT'S attempted amendment of his Notice of Motion.

32. I consequently made an order as set out in paragraph 1 above.

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A.D OLIVIER

ACTING JUDGE

For the APPLICANT	:	Adv. Y van der Laarse o.i.o Cronje Attorneys Inc. c/o Engelsman Magabane Inc. **KIMBERLEY**
For the RESPONDENT	:	Adv. J.G. Gilliland o.i.o Van De Wall Inc. **KIMBERLEY**