THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: J2832/2016

In the matter between:

WEIR MINERALS **Applicant**

and

MARTHEUNIS JOHANNES POTGIETER **First Respondent**

ROY FELIX GOMES **Second Respondent**

Heard: 15 December 2016

Delivered: 15 December 2016

Summary: Interim order – restraint of trade.

***EX TEMPORE* JUDGMENT**

STEENKAMP, J

Introduction.

[1] This matter comes before the court on an urgent basis on the last day before recess in respect of the enforcement of a restraint of trade against two individuals – Mr Martheunis Johannes Potgieter (also known as Tienie) and Rui Felix Gomes.

[2] The initial relief sought by the applicant, Weir Minerals Africa (Pty) Ltd, was in its amended notice of motion whittled down somewhat to seek relief only in respect of the two individuals being employed by the third respondent, that is Goodwin Submersible Pumps Africa (Pty) Ltd, or any other entity which carries on business that is the same as, or similar to, or competes with the business of the applicant and in respect of certain prescribed clients. The third respondent, Goodwin, has not entered any opposition. The two individuals have.

[3] When the matter was called today, the parties had some further discussions. They are in agreement, having filed further papers to the already voluminous papers before the court, that the matter should be postponed to a date in January. The contentious issue remained as to what should happen in the interim.

[4] Mr *Whitcutt* for the applicant has handed up a draft order that he submits is both reasonable and should on the law be granted. Mr *Hulley*, who appears with Mr *Young* for the two individuals, disagrees. That has necessitated some fairly extensive argument; albeit not as extensive as will be necessary in the hearing of the full matter in due course. The papers already comprise more than 600 pages at this stage and the files are still growing like Topsy.

[5] In order to be entitled even to the limited relief now sought on an interim basis in the draft order, Mr *Whitcutt* was therefore compelled to make out an argument for relief on an interim basis, taking into account the principles set out in *Setlogelo v Setlogelo*.[1]

[6] With regard to a *prima facie* right, he submitted that he has shown at least *prima facie*, though open to some doubt, that there is an enforceable restraint and that there is a breach. In that regard, it is common cause that the individuals have taken up employment with Goodwin.

[7] Mr *Hulley* argued that Goodwin was not a competitor of Weir at the time when the two individuals terminated their employment. Without having had the opportunity in the fullness of time to consider that argument properly, that does appear to me at this stage to be somewhat artificial. On the language of the two restraint agreements, as they stand, it appears to me that it is clear that what was intended, was to prevent the ex-employees taking up employment with a competitor, such as Goodwin. Goodwin only became a competitor arguably on the 13th of November 2016. But, as Mr *Whitcutt* pointed out, it would be absurd to read it in the way that Mr *Hulley* contends for. That would mean, for example, that Messrs Potgieter and Gomes could resign today, set up a business in competition tomorrow, and then argue that there was no competitor the day before. I am satisfied that the applicant has demonstrated a *prima facie* right, though open to some doubt.

[8] With regard to the issue of the applicant not having set out insufficient detail in its case in the founding affidavit; I am also not persuaded by Mr *Hulley*'s argument. In *Michelin Tyre Co*

[1] 1914 AD 221 at 227.

South Africa (Pty) Ltd v Coetzee[2], having set out the general principles, Van Niekerk J pointed out:

> "This is not to say that the court ought not to adopt a more lenient approach in appropriate circumstances. This is common in restraint of trade disputes, where it is incumbent on an applicant in the founding affidavit only to establish the existence of the restraint relied on and a breach of the restraint. The reasonableness of the restraint is ordinarily canvassed only in the answering affidavit and the replying affidavit inevitably makes out the applicant's case in regard to the reasonableness threshold that is applied. The court is usually inclined to in these circumstances to depart from the general rule and even to permit the filing of further sets of affidavits."

[9] On the papers before me, I am satisfied that the applicant has, at least on a *prima facie* basis, established the existence of the restraint in its founding affidavit, as well as a breach. In its reply it then sets out in detail further facts that further compel me to find in its favour on this interim basis.

[10] The draft order severely curtails the interim relief sought. The applicant now seeks relief only for a period of about a month which is the time of year that the respondents, Messrs Potgieter and Gomes, refer to in their affidavits as a period of 'industrial slumber'. It is also only in relation to the sale or lease of the Goodwin 100 ANZE submersible slurry pump and other products. And the applicant has tendered to pay the salaries of the two individuals for the interim period, calculated at their salaries at the time of their resignation.

[11] Mr *Hulley* raises two issues in this regard. Firstly, he says that it is not the relief sought initially and that the third respondent would be prejudiced. That deals also with the issue of balance of convenience.

[2] [2016] ZALCJHB 249 (7 July 2016) par [8].

As I have debated with Mr *Hulley*, it appears to me not to lie in the mouth of a respondent who has chosen not to oppose an application that is drafted in broad terms, and specifically includes and foreshadows an interim order and any further or alternative relief, to now somewhat vicariously, through counsel that has not appeared for it, complain about a drastically reduced interim order sought.

[12] Secondly, Mr *Hulley* raises the contentious issue of whether a court can and should whittle down a broad restraint of trade. That has been the subject of varying and sometimes contradictory judgments of a number of courts and of many academic articles. It suffices to say that at this stage there does not seem to me to be any prejudice to the two respondents who are before this court in a severely restrained interim order. Again I refer to my Brother van Niekerk in *New Just Fun Group*[3] where he says:

> "The truncated relief sought seeks to limit the scope of the restraint… There are at least two reasons why the applicant ought not to be bound to attempt to enforce the full ambit of the restraint. First, it is well-established that a court is entitled to enforce the restraint partially by restricting the scope of its operation to reflect what is found to be reasonable."

[13] And he refers in that regard to *Den Braven*[4] . To return to van Niekerk J in *New Just Fun Group*, he says:

> "The nature and extent of any partial restraint is a matter to be determined from the papers. I do not understand the applicable authorities to preclude an applicant from seeking a partial restraint only because the applicant has sought in its founding affidavit to enforce the full ambit of the agreed restraint. In any event, the extent to which any restraint agreement ought to be pared down is ultimately the decision of the court, having

[3] *New Just Fun Group v Turner* [2014] ZALCJHB 177 par [16].
[4] *Den Braven SA (Pty) Ltd v Pillay & another* 2008 (6) SA 229 (D&CLD), at 263 A-C).

regard to all of the facts and circumstances, to grant more limited relief than that initially sought. Secondly, the tender made by the applicant in its replying affidavit is one made in the spirit of compromise."

[14] It appears to me that that is exactly what is before me at the moment. The applicant has, in my view, quite sensibly made a tender in an offer of compromise. That would lead to very limited prejudice to the two respondents before court, especially in circumstances when the applicant has tendered to pay their salaries for this brief interim period of about a month. Secondly, the severely pared down interim relief sought leads to little or no prejudice with regard to the sale of the company in question during the collective slumber that our country is about to embark on.

[15] As far as costs are concerned, I think the parties are in agreement that that should be reserved for the hearing in the fullness of time.

[16] In conclusion, I am satisfied that the curtailed interim relief sought by the applicant is not only legally permissible, but also that I should exercise my discretion to grant that relief where the applicant has, in my view, satisfied the requirements for the interim relief. It is also in a sensible way dealing with the interim period.

[17] An order is granted in the following terms:

17.1 The application is postponed to a date to be obtained in the second half of January 2017 or so soon thereafter as a date may be obtained, it being recorded that the parties will cooperate to obtain the earliest available date from the Registrar.

17.2 Pending the final determination of the postponed hearing ("the interim period") –

17.2.1 the first and second respondents are restrained from directly or indirectly providing or attempting to provide any service (whether sale

or lease) in relation to the Goodwin 100 ANZE ("the submersible slurry pump") and in particular from contacting the applicant's customers;

17.2.2 the first and second respondents are restrained from directly or indirectly using, divulging or disclosing the applicant's confidential information to any person including the third respondent, in particular the applicant's customer contacts.

17.3 It is recorded that the applicant will pay the salaries of the first and second respondent for the interim period, calculated at the rate payable to them prior to the respective termination of their employment, pro rata for the interim period.

17.4 It is recorded further that the parties and their legal representatives shall convene a meeting on 12 January 2017 in an attempt to settle the matter finally between them.

17.5 The costs of the hearing on 15 December 2016 are reserved.

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STEENKAMP J

Appearances:

For the Applicant:	C Whitcutt SC (with him Penny Bosman)
Instructed by:	Edward Nathan Sonnenbergs Inc.

For the first and second respondents:	G Hulley SC (with him M Young)
Instructed by:	Teixeira Du Toit Attorneys.