THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Of interest to other judges

Case No: J 2039/19

In the matter between:

HEIGHTSAFETY TRAINING ACADEMY (PTY) LTD	**First Applicant**

and

BONGANI ERNEST MOSE	**First Respondent**
EVOLUTION HEIGHT SAFETY (PTY) LTD	**Second Respondent**
EVOLUTION ROPE ACCESS (PTY) LTD	**Third Respondent**
EVOLUTION SAFETY GEAR (PTY) LTD	**Fourth Respondent**

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Heard: 7 November 2019

Delivered: 22 November 2019

Summary: (Restraint of trade – limited protectable interest in providing training and supplies to applicant's former customers – no protectable interest in training provided – delictual claim for unlawful interference in contract of employment not within labour court's jurisdiction)

JUDGMENT

LAGRANGE J

Background

[1] This is an urgent application to review and enforce a restraint of trade agreement. It is opposed by the first and second respondents.

[2] The respondents do not take issue with the urgent basis of the application.

[3] The restraint provision in the first respondent's contract of employment prohibits him, *inter alia,* from being employed with any business competing directly or indirectly with the applicant for a period of three years from the termination of his employment, and within a 200 km radius of Midrand, Cape Town, Middleburg and Steelpoort. The applicant seeks to enforce this restraint against the respondents for a period of three years from 10 December 2018, which is the date of the first respondent's dismissal by the applicant.

[4] The respondents concede that the first respondent is in breach of the restraint of trade agreement he signed with the applicant, in that, he is working for the second respondent, a competitor of the applicant, as a training facilitator, which is the same work he performed for the applicant.

[5] The applicant provides certified training programs, *inter alia,* for persons working at heights, fall arrest certification, rope work and specialized training and certification for persons working at heights as well as the supply of specialized working at heights equipment. The first respondent was employed as a facilitator and has the necessary certification to provide training on behalf of a certified training provider and students of the applicant's clients attending courses so presented by him can obtain certification.

[6] Not all of the first respondent's skills were acquired in training provided by the applicant. Prior to his employment on 9 January 2017, he had completed eight courses relating to working at heights, including an unrecognised facilitator training course. He completed a further nine training courses while working for the applicant which the applicant paid for and values at approximately R 400,000.00. In his contract of employment specific provision was made for the applicant to recover all or

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part of the costs of any training course on a sliding scale if the first respondent left the applicant's employment. No costs are recoverable in respect of any training done more than two years prior to the termination of his service. Some free training was also provided in-house.

[7] It is not disputed that a facilitator in the Height Safety Industry is a highly sought-after individual requiring a specialized skill set.

[8] The first respondent defends his employment by the second respondent on the basis that the applicant does not hold any proprietary interest or monopoly in the business of height training or training of facilitators.

[9] The applicant claims it has a protectable interest in the products and patents that it owns which products go hand in hand with its training and methodology. It contends that the first respondent will be able to impart know-how of the applicant in the course of training students for the second respondents' clients. It contends that it's technology and method of training are unique and peculiar and represents a significant investment on its part.

[10] The respondents put the applicant to the proof of its proprietary interest in the products it provides and for which it provides training. Although the applicant insists it does own the patents of the products it uses, it does not dispute the first respondent's claim that he had no part in the development of those products or knowledge thereof. Moreover, the second respondent claims it uses its own products in its training services but does not state if it does not also supply the products, which the applicant supplies to its clients.

[11] In a previous matter involving another employee of the applicant[1], who left its employment for that of the second respondent, this court made an order in the following terms:

> [1] The first and second respondents are interdicted and prohibited from directly or indirectly approaching or contacting any of the clients of the applicant for whom the first respondent performed or facilitated training whilst in his employment by the applicant, and from providing or offering

[1] *Heightsafety Training Academy (Pty) Ltd v Maluleke and Others* (unreported), J 1498/19 dated 26 July 2019.

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> any training services, which the first respondent was qualified to facilitate when he left the applicant's service, to such clients for the period ending 18 months from the date of his termination of service with the applicant, namely until 24 April 2020.
>
> [2] No order is made as to costs.

The circumstances of that matter are materially indistinguishable from this case except in respect of an additional claim made by the applicant, and that the applicant should not compete in the supply of 'working at height gear'.

[12] That additional claim relates to its contention that the second respondent is in breach of a gentlemen's agreement in the industry not to poach the employees of other competitors. The respondents deny any knowledge of such an agreement and other than a bold assertion that such a practice exists in the industry, the applicant has adduced no evidence in support of that contention. Whether this additional feature of the case justifies an order prohibiting the second, third and fourth respondents from employing the first respondent during the period of the restraint is discussed below.

[13] Before dealing with that, another aspect of this case is that the applicant sought an undertaking from the respondents prior to proceeding with this application, to which the respondents proposed an alternative undertaking. The undertaking sought by the applicant was to the effect that the second respondent undertake:

> "…that it will either dismiss Mr Mose, as his employment with yourselves is in direct contravention of his restraint of trade agreement with our client or employ him in a capacity which does not contravene the restraint of trade."

[14] The first and second respondents' counterproposal was to make an undertaking in line with the second paragraph of the order made in the *Maluleke* case. The applicant rejected this proposal on the basis that the undertaking only related to the first respondent's performance of training or facilitation work and did not prevent him from performing assessment and moderation tasks as well as performing rope access projects and recommending and selling its product range. As mentioned above, the respondents claim that the second respondent uses its own products in

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rendering services to its clients. However, I agree that the undertaking does not address other services which the first respondent might render to former clients of the applicant and this concern is not addressed by the respondent's counterproposal or in the answering affidavits. To that extent, I agree that the counter-proposal is insufficient.

[15] The other complaint raised by the applicant is that, even if the respondents deny any knowledge of a gentlemen's agreement not to poach employees of competitors, they implicitly acknowledged that this is what the second respondent is doing. I do not think this implication can be read into the second respondent's answering affidavit, though this case and the *Maluleke* one might give rise to a reasonable suspicion by the applicant that this is in fact what the second respondent is doing.

[16] However, even if I am wrong and the applicant has established that the second respondent intentionally and without justification induced or procured the first respondent to breach his employment contract with the applicant, which it has not done in this instance, this court has no jurisdiction to entertain that claim for the reasons which follow.

[17] The claim is delictual in nature. In *Country Cloud Trading CC v MEC, Department of Infrastructure Development* [2] the SCA confirmed:

> "[26] … a delictual remedy is afforded to a party to a contract who complains that a third party — who is a stranger to the contract — has intentionally deprived him or her of the benefits he or she would otherwise have obtained from performance under the contract. Examples include preventing a lessee from taking occupation of the leased property in terms of the lease (Dantex); enticing another person's employees to breach the contract (Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd 1981 (2) SA 173 (T) at 202G – H), and so forth…"[3]

(emphasis added)

[18] The labour court only has jurisdiction to hear applications to enforce restraint of trade agreements against employees, or former employees, by

[2] 2014 (2) SA 214 (SCA)

[3] At 224-5.

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virtue of section 77(3) of the Basic Conditions of Employment Act 75 of 1997, which states:

> "The Labour Court has concurrent jurisdiction with Civil Courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract."

(emphasis added)

In my view, it would require a very elastic and strained reading of that provision to interpret it as extending to cloaking the court with jurisdiction to entertain delictual claims arising from a contract of employment. Although it is true that a delictual claim can arise from a breach of contractual obligations, unlike the determination of a dispute about the enforcement of a restraint agreement, the determination of the delictual claim is not primarily concerned with the enforceability of contractual obligations.

[19] A delictual claim arising from a contractual relationship might 'concern' a contract of employment in an incidental sense, but the determination of delictual liability requires a court to determine whether the following essential elements have been met: harm sustained by the plaintiff; conduct on the part of the defendant which is wrongful; a causal connection between the conduct and the plaintiff's harm; and fault or blameworthiness on the part of the defendant.[4] When these requirements of a delictual claim are considered it is hard to conceive of that claim as one that predominantly involves the determination of a 'matter concerning a contract of employment', even if a breach of an employment contract happens to be one factual component in the claim in question.

[20] Moreover, the ambit of s 77(3) must be read in the context of the purpose of the BCEA, in which it is situated. That purpose cannot, by any stretch of imaginative interpretation, be read as intending to provide for the determination of delictual claims arising from breach of an employment contract.[5]

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[4] *Evins v Shield Insurance Co Ltd* 1980 2 All SA 40 (A); 1980 2 SA 814 (A) 838–839

[5] Section 2 of the BCEA states:

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[21] While the applicant has a protectable interest in protecting any exclusive know-how it has in relation to its own products, and in the respondents not being able to exploit his association with the applicants' existing clients as a former trainer of such clients' employees, the extent of the restraint the applicant seeks to enforce which would effectively prevent the first respondent from utilizing any of the skills he has acquired in facilitating training in the sector. Such skills as he learned through the training courses he went to whilst employed by the applicant, aside from training related to the specific equipment and products used by the applicant, are of general application in the sector and there is no evidence to suggest that the training he will provide for the second respondent will embody know-how exclusive to the applicant.

[22] Nevertheless, I accept that there is a risk that former clients of the applicant, to whom he had rendered training services as a facilitator, might seek his services. That protectable interest can adequately be preserved by limiting the type of client he can provide training to. I also accept that there is a risk he might engage with former clients of the applicant to provide other services. The applicant's interests in being able to maintain its existing customer connections in this regard are worthy of protection for a reasonable period.

[23] In the circumstances, an adequate balance will be struck between the protectable interests of the applicant, which - realistically speaking - might be threatened by the first respondent's breach, and the interests of the first respondent in being able to pursue the vocation he has been trained in, will be met by the order below.

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2 Purpose of this Act

The purpose of this Act is to advance economic development and social justice by fulfilling the primary objects of this Act which are-

(a) to give effect to and regulate the right to fair labour practices conferred by section 23 (1) of the Constitution-

(i) by establishing and enforcing basic conditions of employment; and

(ii) by regulating the variation of basic conditions of employment;

(b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation

Conclusion

[24] In light of the reasoning above, the main distinguishable feature of this case from the *Maluleke* case is the slightly wider claim by the applicant that the first respondent may engage in activities beyond training and facilitation in competition with it. Those interests are adequately protected in my view by extending the ambit of restricted activities the first respondent may not engage in.

[25] No reasons were advanced why the restraint in this case should be enforced for any period longer than the court was prepared to endorse in *Maluleke* and accordingly the order similarly curtails the period of the restraint.

[26] On the question of costs both parties have been partially successful and it would not be appropriate to make a cost award in favour of the applicant in view of the limited success it has obtained.

Order

[1] The matter is dealt with as one of urgency under Rule 8 of the Labour Court Rules, and to the extent that there has been noncompliance with the manner of service and time periods set out in the Labour Court Rules such noncompliance is condoned.

[2] The first and second respondents are interdicted and prohibited from directly or indirectly approaching or contacting any of the clients of the applicant for whom the first respondent performed or facilitated training whilst in his employment by the applicant, and from providing or offering any training services, which the first respondent was qualified to facilitate when he left the applicant's service, to such clients for the period ending 18 months from the date of his termination of service with the applicant, namely until 24 April 2020.

[3] For the period ending 18 months from the date of his termination of service with the applicant, namely until 10 June 2020, the first respondent is interdicted and prohibited from being engaged in the supply of 'working

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at height' safety gear and fall arrest equipment, which the applicant supplies to its customers, to customers who were customers of the applicant at the date of the termination of his service, and directly or indirectly approaching or contacting any of such clients of the applicant, with a view to supplying them with 'working at height' safety gear and fall arrest equipment, which the applicant supplies to its customers.

[4] No order is made as to costs.

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Lagrange J

Judge of the Labour Court of South Africa

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APPEARANCES

APPLICANT:	S Aucamp instructed by JNS Attorneys

FIRST AND SECOND RESPONDENTS:	R G Beaton SC instructed by de Villiers & du Plessis Attorneys

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