REPORTABLE

SUMMARY

CASE NO.: A 426/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

LABOUR SUPPLY CHAIN NAMIBIA (PTY) LTD **Applicant**

and

AUGUST AWASEB **Respondent**

PARKER J

2010 January 26

Practice - Interim interdict – Such moved by urgent application – Court finding that applicant has complied with Rule 6(12)(b) – Consequently Court hearing application on urgent basis.

Practice - Interim interdict – Requirements applicant must satisfy in the field of unlawful competition and protection of one's right to confidential information regarding one's business and goodwill – Court finding that applicant's averments justify an order for interim protection against respondent's continuing infringements resulting in applicant's loss of business and income.

Held, that averments by the applicant are sufficient to justify an order for interim protection.

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***CORAM*:** **PARKER J**

Heard on: 2009 December 15

Delivered on: 2010 January 26

JUDGMENT

PARKER J: [1] In this matter the applicant, represented by Ms Van der Merwe, has brought an application by notice of motion, moving the Court on urgent basis to grant interim interdict and other ancillary relief in terms of prayers 2.1, 2.2, 2.3, 3, 4, 5, 6 and 7 of the notice of motion.

[2] The respondent, represented by Ms Van der Westhuizen, has moved to reject the application. The respondent's preliminary contention is that the application 'lacks any or sufficient grounds to render the application urgent'. It is to the question of urgency, therefore, that I now direct my attention. In deciding the question I cannot do any better than to repeat what I said in a recent judgment I delivered in *JA Beukes v R Martins and others*, A 431/2009 (judgment delivered on 20 January 2010). There, I stated at p. 5:

> In my opinion, the essence of rule 6(12) of the Rules is, therefore, that in the exercise of his or her discretion, it is only in a deserving case that a

> Judge may dispense with the forms and service provided in the Rules. In terms of rule 6(12), as I see it, a deserving case is one where the applicant has succeeded – (1) in explicitly setting out the circumstances which the applicant asserts render the matter urgent and (2) in giving reasons why he or she claims he or she could not be afforded substantial redress at the hearing in due course. (*Mweb Namibia (Pty) Ltd v Telecom Namibia Ltd* Case No.: (P) A 91/2007 (Unreported), where the Court relies on a long line of cases, including the Namibian cases of *Bergmann v Commercial Bank of Namibia Ltd* 2001 NR 48; *Salt and another v Smith* 1990 NR 87) Thus, in deciding whether the requirements in (1) and (2) of rule 6(12) have been met, that is, whether it is a deserving case, it is extremely important for the Judge to bear in mind that it is indulgence that the applicant is asking the Court to grant.

[3] Under requirement (1), what circumstances has the applicant set out in its papers which, according to the applicant, render the matter urgent? According to the applicant those circumstances are set out 'under the heading "Background and Facts".' Besides, the applicant says that the same 'Background and Facts' also contain the reasons why the applicant claims that it could not be afforded substantial redress at a hearing in due course. From the papers, I find that the applicant has set out – that is, 'distinctly expressing all that is meant; leaving nothing merely implied or suggested (*Shorter Oxford Dictionary*, 6 edn. (2007)) – the circumstances on which the applicant relies to render the application urgent and the reasons why the applicant claims that it could not be afforded substantial redress at a hearing in due course within the meaning of rule 6(12)(b) of the Rules of Court.

[4] In my opinion, the circumstances averred as rendering the matter urgent are that the applicant requires to be protected immediately from the continuing unlawful conduct of the applicant which has the effect of the respondent breaching his obligations (that would be a loss respecting the commercial interests of the applicant) under a contract of employment entered into between the applicant and the respondent 'whereby applicant appointed

respondent as Labour "Legal" Advisor with effect from 1 June 2009'. I point out in parentheses that I have put the word 'Legal' in double quotation marks advisedly: the respondent does not describe himself as a lawyer or a legal practitioner of any shape or hue.

[5] I find that the applicant has set out clearly, leaving nothing merely implied or suggested, a series of conduct on the part of respondent that constitutes a breach of the respondent's contractual obligations under the contract of employment and the manner in which the breach has caused and continues to cause for the applicant loss of business and resultantly income.

[6] Thus, from the papers, I am satisfied that the applicant has made out a case for the grant of prayer 1 in the notice of motion; that is, that the matter be heard on urgent basis.

[7] I now proceed to deal with the question of interim interdict which the applicant has prayed for. As I have mentioned previously, the circumstances averred as rendering the matter urgent are that the applicant requires to be protected in the interim from the loss of business and income which would result from continuing infringements on the part of the respondent. The question that arises for decision is this: are the averments by the applicant sufficient to justify an order for interim protection? In *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality, Cape Town Municipality v L F Boshoff Investments (Pty) Ltd* 1969 (2) SA 256 (C) at 267 B-D Corbett J set out the requirements for temporary interdict, which (according to Van Heerden-Neethling, *Unlawful Competition*, 2nd edn.: p 86) is often applied in the field of unlawful competition. I see no good reason why the requirements should not apply also to protection of right to confidential information regarding one's business and goodwill against loss of business and income. The requisites are briefly these:

(1) that the right which is the subject-matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is prima facie established, though open to some doubt;

(2) that, if the right is only prima facie established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;

(3) that the balance of convenience favours the granting of interim relief; and

(4) that the applicant has no other satisfactory remedy.

[8] Additionally, in order to succeed in the present application for interim order, the applicant must establish the above-mentioned requisites and also prove that the respondent has committed a wrongful act. (See *Schultz v Butt* 1986 (3) SA 667 (A) at 678.)

[9] From the papers, I discern genuine averments that go to prove on a preponderance of probabilities that the catalogue of conduct by the respondent constitute unlawful act. I also find that the right which the applicant seeks to protect by means of interim interdict is prima facie established, even if open to some doubt. The right is the applicant's protectable legal right; that is, the applicant's protection against unlawful competition and the applicant's protectable right in confidential information. I find on the papers real instances of conduct of the respondent that amount to unlawful competition by the respondent vis-à-vis the applicant, and the respondent's unlawful use of confidential information which he gained while in the employ of the applicant, to the applicant's loss.

[10] In this regard, I accept the applicant's evidence that in virtue of the respondent's employment with the applicant, the respondent became aware of all the names of the

applicant's clients, and it is many of those clients that moved to the service of the respondent's business, namely, Organization for Small and Medium Employers of Namibia (OSMEN), which, significantly, the respondent registered with the Labour Commissioner when the respondent was in the employ of the applicant. It would have been a different matter after setting up his business in direct competition to the applicant's business, if the respondent had built his own client base. It matters not, contrary to what the respondent contends, if those clients had sought and obtained the applicant's service in the first place because the respondent was the applicant's employee, and so those clients decided, according to the respondent, to move out of the applicant's service in order to obtain the respondent's service when he registered his own business.

[11] I also find that on the papers the applicant has established that there is a well-grounded apprehension of irreparable harm if the interim relief is not granted and it ultimately succeeds in establishing its right. The applicant contends that if the respondent was allowed to continue to take away the applicant's clients, it will result in the applicant having to close down its Walvis Bay branch which currently employs two employees, who in turn will have to be retrenched. The respondent's response is that the public will not be prejudiced if the applicant closed its Walvis Bay branch because the public, in the first place, do not wish to use the applicant's services. The respondent's response, with respect, adds no weight. He does not offer a scintilla of evidence that the public does not wish to use the applicant's services; and what is more, it is not the applicant's position, *pace* the respondent, that the public should not 'be allowed to choose which service provider best suit(s) their respective needs'.

[12] As I have adverted to previously, it would be a different matter if the respondent built his own client base without, by his own admission – though not in so many words –

tapping into the client base of the applicant which he came to know when he was in the employ of the applicant. It matters the least whether, as the respondent says he knew the clients before he was employed by the applicant; that is, when he was employed by the National Organization for Small and Medium Employer of Namibia (NOSMENA). (I have discussed this aspect of the respondent's evidence below). However that may be, the irrefragable fact that remains uncontradicted is that the respondent only registered his own organization when he was in the employ of the applicant; and it is that organization that is now offering service to those of the applicant's clients in Walvis Bay.

[13] In this regard, I make the following apropos significant point. The fact that the organization which the respondent says he worked for in 2007 (before he came to be employed by the applicant) was called the National Organization for Small and Medium Employer of Namibia (NOSMENA) and the organization which he registered (when, as I have said, he was still employed by the applicant) is called Organization for Small and Medium Employers of Namibia (OSMEN) speaks volumes. The apparent coincidence in my opinion, speaks volumes about the not too pious desire of the respondent to create the impression in the minds of certain clients of the applicant that his organization (OSMEN) is not so different from the organization he had worked for in 2007, particularly when the clients of (NOSMENA) had been taken over by the applicant.

[14] It follows inexorably from all this that the balance of convenience favours the applicant. From his own statements it would seem the respondent is saying that he is more knowledgeable than the applicant; that he is already known in the business; and further that service seekers will rather choose his organization over that of the applicant. In sum, the respondent will find no difficulty at all in building his own client base and business goodwill. But the applicant has built its client base and business goodwill over the years

and that is what it is asking the Court to protect in the interim. Thus, in all fairness, all these considerations impell me to the inevitable conclusion that the balance of convenience, as I have already held, favour the applicant.

[15] Furthermore, taking into account the nature of business involved in this case, I am of the view that the applicant has no other satisfactory remedy. As Mrs Van der Merwe submitted, if the interim relief is not granted, and the applicant went out of business as a consequence of the respondent's continuing unlawful conduct, there will be no applicant to seek any other satisfactory remedy and that would render the whole application nugatory.

[16] From the aforegoing reasoning and its conclusions, I think, I should exercise my discretion in favour of granting the interim relief, that is to say, there is sufficient evidence on the papers to justify an order for interim protection. It follows that I am unable to grant prayer 2.3 of the notice of motion, which is a permanent relief; and what is more, I accept the respondent's contention that the applicant does not say with any particularity what documents, materials and implements the applicant wants the respondent to return and deliver to it.

[17] Of the view I have taken of this case, it is otiose to determine on its own any application to strike out certain parts of any affidavit filed of record. Where I have found any matters to be vague and embarrassing and therefore having no probative value, I have not taken cognizance of such matters. In any case, the preponderance of factors I have taken into consideration are unaffected by such matters.

[18] As to the matter of costs; in the nature of the present proceedings, I am of the opinion that it is proper that I do not order costs at this stage.

[19] In the result, I grant the following order:

(1) That the non-compliance with the Rules as to forms and service and time limits is condoned and the matter be heard on urgent basis.

(2) That a rule *nisi* is hereby issued calling on the respondent to show cause, if any, on 26 February 2010 at 10h00 why an order in the following terms should not be made –

(a) that the respondent be interdicted and restrained from using in any way whatsoever and directly or indirectly divulging or disclosing to any third party, including an entity known as the Organization for Small and Medium Employers of Namibia (OSMEN), its members and/or employees, the confidential information, business information and/or trade secrets and/or client base and/or clientelé of the applicant.

(b) that the respondent be interdicted and restrained from, in any way whatsoever, communicating in whatsoever form and nature with any of applicant's current clients in an attempt to entice them to cancel their service contracts with applicant and/or to take up service contracts with an entity known as the Organization for Small and Medium Employers of Namibia (OSMEN) or with any other entity in direct competition with applicant's business.

(3) That the order in paragraphs 2(a) and (b) shall operate as an interim interdict with immediate effect, pending finalization of the matter on the return date of the above rule *nisi*.

(4) That the applicant is granted leave to proceed with this application by making use of facsimile or scanned copies, subject thereto that the originals be filed with the Registrar of the Court before the hearing of this matter.

(5) That the applicant is granted leave to serve all documentation (including but not limited to any order that the Court may grant) on respondent by delivery of a faxed or scanned copy thereof by the Deputy Sheriff for the District of Walvis Bay at the respondent's place of residence.

(6) That there is no order as to costs.

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PARKER J

COUNSEL ON BEHALF OF THE APPLICANT:

Adv. B Van der Merwe

Instructed by: MB De Klerk & Associates

COUNSEL ON BEHALF OF THE RESPONDENT:

Adv. C Van der Westhuizen

Instructed by: Etzold-Duvenhage