



Republic of South Africa

**IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]**

Case No: 2264/2017

In the matter between:

**BIDFOOD (PTY) LTD
t/a BIDFOOD WESTERN CAPE**

Applicant

and

THAVAKUMARI GOVENDER

First Respondent

CHAPMANS SEAFOOD COMPANY (PTY) LTD

Second Respondent

JUDGMENT DELIVERED: 28 MARCH 2017

LE GRANGE, J:

[1] In this matter the Applicant, Bidfood Western Cape, seeks to enforce by means of an interdict, a restraint of trade agreement against the First Respondent, one of its erstwhile employees.

[2] The Applicant is a branch division of Bidfood (Pty) Ltd ("the Company") whose principal place of business is in Sandton, Gauteng Province. The Company operates a number of regionally based businesses that covers the whole of the Republic of South Africa, Botswana and Namibia. In this instance the regional sales manager, James Edward Smith ("Smith"), filed the founding affidavit on behalf of the Applicant.

[3] The Company, including the Applicant sells dry groceries, catering equipment, liquor as well as a range of frozen and chilled products to various clients. The Applicant supplies customers in the Western and Northern Cape.

[4] The First Respondent was employed as a Sales Representative and had commenced her employment with the Applicant in January 2016. She worked for different branches of the Company in Gauteng and Kwa-Zulu Natal during the period 2011- 2015 before relocating to the Western Cape. The restraint agreement was signed in December 2015. The restraint agreement is operative until 27 November 2017.

[5] The relevant paragraphs of the restraint read as follows:

"[3] I shall not for a period of twelve (12) months after the termination of my employment with the company for whatever reason, including summary dismissal, be directly or indirectly engaged or employed in, or associated in any way with business similar to any of the various businesses of the company in which I was engaged either at the date of termination of my employment or at any such time during the twelve (12) months period preceding termination.

[4] The area to which the restraint referred to in paragraph 3 hereof is applicable to is Republic of South Africa including Province of

KwaZulu Natal, Northern Cape, Free State, Northern Province, North West, Eastern Cape, Mpumalanga, Gauteng, Western Cape, Namibia and Botswana.

[5] The restraint imposed on me in paragraph 3 hereof shall:-

- 5.1 in respect of each part thereof be entirely separate, severable and separately enforceable in the widest sense from the other parts;*
- 5.2 be enforceable at the instance of the company in respect of each of the magisterial districts in the area mentioned in paragraph 3 and the fact that such restraint is not enforceable or enforced in any of the said areas of any of the said activities shall not affect its enforceability or validity in respect of the other areas or activities;*
- 5.3 be and are for the benefit of the company and shall also be deemed to be a stipulation alteri for the benefit of each of the company's subsidiary companies, any one or more of which shall be entitle to enforce such restraint."*

[6] The Applicant is seeking to enforce the restraint only in the Western Cape region. To this end, the Applicant in its replying affidavit conceded that to enforce the restraint outside of the Western Cape it would probably be a risk as it may be regarded as unreasonable.

[7] The Second Respondent, an importer, exporter and wholesaler in the seafood industry had initially opposed the Application. It subsequently filed a

Notice of Withdrawal and is abiding the decision of this court. The Second Respondent did however file an affidavit to clarify some aspects of its core business functions and related issues raised in this matter.

[8] The First Respondent in opposing the relief sought, raised a number of defences *inter alia*, that the Application was not urgent; the Applicant which is a Branch division lacks *locus standi* as it is not an independent legal entity with juristic personality of its own, separate and distinct from the Company; the First Respondent did not breach the terms of the restraint of trade agreement in that the Second Respondent is not a business similar to the Western Cape branch of the Company; the restraint of trade agreement is invalid and unenforceable as the restraint was too wide and therefore unenforceable; the severability provisions contained in the agreement is unable to save it from invalidity; the rights and interests sought to be protected by the Applicant are not worthy of protection by way of a restraint and no risk exists of disclosure of information and or trade secrets to the Second Respondent; and that the Applicant was relying on new and inadmissible evidence in its replying affidavit.

[9] As a result of the view taken in this matter, I deem it unnecessary to deal with all of the defences raised by the First Respondent.

[10] The opposition to the enforcement of the restraint by the First Respondent, on the grounds that the restraint agreement viewed as a whole

is so far-reaching and extensive in the constraints it imposes upon her, that its enforcement in any respect would be unreasonable and contrary to public policy, and that the rights and interests sought to be protected by the Applicant are not worthy of protection by way of a restraint as no risk exists of disclosure of information or trade secrets to the Second Respondent exists, requires closer scrutiny.

[11] It is now well accepted in our law that the reasonableness or otherwise of a restraint of trade agreement is a matter for the Court to determine. The fact that parties may accept and choose to describe it as reasonable is no longer the decisive factor. In this regard see Advtech Resourcing t/a Communicate Personnel Group v Kuhn 2008 (2) SA 375 (CPD) at 382 G and the cases cited therein.

[12] In considering the reasonableness of a restraint the following four questions are ordinarily asked, namely: (a) Does the one party have an interest that deserves protection after termination of the agreement? (b) If, so, is that interest threatened by the other party? (c) In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive? (d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected? Where the interest of the party sought to restraint weighs more than the interest to be protected, the restraint is unreasonable and consequently unenforceable. It

follows that the enquiry a Court needs to undertake at the time of the enforcement covers a wide field and includes the nature, extent and duration of the restraint and the factors peculiar to the parties and their respective bargaining powers and interests. In this regard see Reddy v Siemens Telecommunications (Pty) Ltd 2007 (2) SA 488 SCA, at para [16] and the cases referred to therein.

[13] The reasonableness of a restraint also entails a value judgment. This is factually driven and premised upon the facts of each case. In Reddy *supra*, the following was held at para [15]-[16]:

"A court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint. The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim pacta servanda sunt. The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions. Both considerations reflect not only common law but also constitutional values. Contractual autonomy is part of freedom informing the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life. In this sense, freedom of contract is an integral part of the fundamental right referred to in s 22 In applying these two principal considerations, the particular interest must be examined. A restraint

would be unenforceable if it prevents a party after termination of his or her employment from partaking in trade or commerce without a corresponding interest of the other party deserving of protection. Such a restraint is not in the public interest. Moreover, a restraint which is reasonable as between parties may for some other reason be contrary to the public interest.”

[14] Returning to the facts: The Applicant avers that one of its sales managers, by the name of Angelika De Bruyn, (“De Bruyn”) was advised that the First Respondent had attended to some of its customers in the Western Cape to solicit business.

[15] According to the Applicant, sales representatives are the backbone of its business and the First Respondent had apparently little or no knowledge of or experience in the business in which the Applicant is involved insofar as being a sales representative goes and had to be trained. To this end the Applicant took the First Respondent to customers and showed her how to deal with them. The First Respondent was also trained how to upsell an advance product sales. In doing this, the Applicant avers it was investing and parting with its intellectual property to the First Respondent when she joined it.

[16] According to the Applicant, it and its predecessors have devised and developed a unique sales strategy over the past 50 years in the hospitality

industry. Potential clients are divided into various groups each with its own needs for example restaurants, hospitals, schools, coffee shops, clubs and hotels. Some standard items which can be acquired at a number of places are sold to customers. Their value is known to customers and these commodities are known as known value items (KVI).

[17] According to the Applicant, its predecessors and it would have contracts with individual customers by using statistics that are specifically obtained and kept by the Applicant for this purpose. The cost price of these items are apparently revised and kept up-to-date on a daily basis.

[18] The Applicant further states that there is huge competition in the hospitality industry insofar as these KVI's are concerned and in order to survive and to be successful, it is important for any seller of the goods to sell these KVI's for competitive and market related prices. According to the Applicant, customers would specifically compare the prices of the KVI's to select a supplier.

[19] The Applicant claims it had spent a substantial amount of time and effort to establish what the KVI are and their market related prices. According to the Applicant, the identity of these KVI's and the market related prices are extremely confidential and of great value to competitors. Moreover, the profit margin on the KVI is fairly small and the Applicant relies more on volume. The Applicant now alleged that the data documents and methodology of

conducting business is highly confidential and that this information is made available to the sales consultants including the First Respondent in order for them to perform their functions. It was further alleged that it would be very easy for the First Respondent to exploit the information pertaining to the data relating to cost and price structures of the applicant which could diminish the applicants business and erode its goodwill.

[20] The Applicant further avers that the First Respondent is gifted at obtaining business and with its training and support, became a force to be reckoned with in the sales market area of the Applicant's business. The First Respondent came to know the Applicant's customer base, the customers' requirements, products that they are interested in, the duration of the contracts and the different pricing structures for the different customers.

[21] The First Respondent took issue with the Applicant's contention that the Second Respondent is a direct competitor of the Applicant. According to the First Respondent, the Applicant is in the retail business and sells approximately 5000 different products ranging from dry groceries, catering equipment, liquor, confectionary, cleaning products, meat, poultry, frozen seafood, savouries and various other chilled food. Moreover, according to the First Respondent, the Second Respondent is a wholesaler; it has an operating fishing vessel, makes use of a fishing processing plant and sells frozen as well as fresh seafood products in bulk quantities to its customers. The Applicant in contrast sells frozen seafood and other products to any purchaser irrespective

of the quantity of the order. In reply, the Applicant expressed a view that the Second Respondent's goods are also available to the ordinary public and not only to wholesalers.

[22] The First Respondent also took issue with the Applicant's apparent lack of candour to state in its founding affidavit that it is a customer of the Second Respondent. To this end the Applicant denied in its replying affidavit it has a customer relationship with the Second Respondent but admitted it occasionally purchased products from the Second Respondent when it was unable to access its normal line of supply.

[23] According to the First Respondent, during her tenure at the Applicant, she was part of a sales-team that serviced a specific geographical area in the Central Business District of Cape Town, which comprised of businesses within the Buitengracht Street, Kloofnek Street to Lower Long Street in the CBD to certain parts of Victoria Street in Woodstock in Cape Town. Her area of marketing excluded the V&A Waterfront, Sea Point, Green Point, Camps Bay the areas further north of Hout Bay, including the Atlantic seaboard. According to the First Respondent, she was given a list with names and a mandate to approach them for business and to find new customers.

[24] The First Respondent further recorded that the Applicant's business practise was that all customers details, whether active, inactive or potential were retained and stored on a database. As a sales representative she was

required to visit all these customers periodically to solicit business on behalf of the Applicant. According to the First Respondent, the Applicant did not hold exclusive rights of supply in relation to any particular customer on her list except for two major clients, being Parliament and the International Convention Centre in Cape Town. The majority of customers retained the right to purchase goods from other food service providers of their choice. The First Respondent also denied that she was privy to the Applicant's financial information relating to costs price of goods generally and seafood in particular. The First Respondent recorded that the Applicant failed to demonstrate in its founding affidavit that she sold frozen seafood during her period of employment and that she acquired knowledge of its pricing structure for frozen seafood.

[25] The Second Respondent in its affidavit clarified certain aspects of its business. It further recorded that the Applicant is one of its big corporate clients and it will be commercial suicide to compete with it.

[26] According to the Second Respondent, a sales representative in its business requires specialised, in-depth knowledge of a wide range of seafood products as it only specializes in the selling of frozen and fresh seafood products. According to the Second Respondent, the First Respondent at the commencement of her employment lacked this knowledge and had to undergo training, which included amongst others, the nature and types of seafood products, evaluating and advising clients on the storage requirements

for bulk seafood products, transportation process and procedures, the expiry date of different seafood, and other requirements of a specialised seafood sales representative.

[27] At the heart of the Applicant's case is that it and the Second Respondent are 'direct competitors'. This averment was based exclusively on the allegations in its founding affidavit that '*Second Respondent focuses primarily on wholesale frozen seafood products to restaurants and other recipients in the food and beverage industry in the Western Cape.*' This allegation was placed in dispute by the First and Second Respondent. In the replying affidavit the Applicant indeed attempted to amplify its case by advancing substantial new information and evidence to support its contention that the Second Respondent is in competition with it.

[28] It is now well established in our law that an Applicant must make out its case in the founding papers with regards to the essential material required to sustain the relief sought. In this regard see Bapedi Marota Mamone v Commission of Traditional Leadership Disputes and Claims and Others [2014] 3 All SA 1 (SCA) at para [16].

[29] As the Applicant seeks a final order, such order can only be granted in motion proceedings if the facts stated by the Respondent together with the facts admitted in the Applicant's affidavits justify the order. This applies irrespective where the onus lies. See Plascon-Evans Paints Ltd v Van Riebeeck

Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634H-635B; Reddy supra at para [4].

The contention by the First Respondent that the Applicant and the Second Respondent are not in direct competition with each other cannot be rejected as far fetched or implausible.

[30] On a conspectus of all the evidence it appears that the only commodity the Applicant and the Second Respondent have in common is the sale of frozen seafood. The Applicant on its own version sells in excess of 5000 other products to a variety of customers. The Second Respondent specialises only in frozen and fresh seafood products. On the objective evidence, it is difficult to envisage or define the Second Respondent as a 'direct competitor' of the Applicant in the true sense of the word, if they have only one product of sale in common with a potential overlap of the same customer base. Moreover, the fact that the Second Respondent on a number of occasions supplied the Applicant with certain frozen seafood products detracts from the notion that the parties are in direct competition with each other. In fact, it rather gives credence to the First Respondent's view that the Applicant and the Second Respondent has a customer's – client relationship.

[31] However, even if it is accepted that the Second Respondent is in direct competition with the Applicant in the frozen seafood market, the claim by the First Respondent that the restraint is remarkably wide and unreasonable is not without merit. I am aware that in cases of this nature Courts must avoid the temptation to think that a former employee 'is just a salesperson and to

treat the attempt to enforce the restraint as a case of the employer taking a sledgehammer to crack a nut'. Public policy indeed requires that lawful contracts be enforced where its terms are reasonable and not offensive to the Constitution. This will be consistent with our constitutional values of dignity and autonomy. In this regard see Den Braven SA (Pty) Ltd v Pillay and Another 2008 (6) SA 229 D&CLD para [11].

[32] In the present instance, the First Respondent's marketing area whilst in the employ of the Applicant was limited to a particular portion of the CBD in Cape Town. The list of customers was therefore limited to that specific area. The infraction complaint about in the founding affidavit was that the First Respondent visited some of the Applicant's customers and left her business card with them. It needs to be mentioned that some of the alleged customers visited by the First Respondent fell outside the geographical area in which she operated as a salesperson for the Applicant. Moreover, on the evidence in the founding affidavit, there is no suggestion that the First Respondent was selling frozen seafood and that she acquired confidential knowledge of the pricing structure for frozen seafood during her period of employment. The Applicant's complaint about its pricing structure and general sales operation was essentially generic in nature.

[33] The Applicant seeks to enforce the constraint in a narrower geographical area, being the Western Cape, than that provided for in the restraint agreement. In terms of clause 4 of the agreement, the restraint is

applicable to all the provinces in South Africa, including Namibia and Botswana. In terms of the agreement, the restraint is not only for the benefit of the Company but all also for all its subsidiary companies and any one or more is obliged to enforce the restraint. Clause 5.1 stipulates that each part of the restraint imposed in paragraph 3 shall be separately enforceable in the widest sense. Clause 5.2 stipulates that the restraint is enforceable in respect of each magisterial district in the area covered by clauses 3 and 4 and even if such restraint is not enforceable or enforced in any of the said areas of any of the said activities shall not affect its enforceability or validity in respect of the other areas or activities.

[34] The question now is whether the relevant clauses read as a whole is reasonable and whether in the present instance it would be proper to enforce the restraint partially despite its wide scope of operation.

[35] The general approach to severability was set out in the matter of Sasfin (Pty) Ltd v Beukes 1989 (1) SA 1 (A) at 16H-17A, where the following was held:

"In any event, it is in my view not open to parties to a contract to say to a court 'take our agreement, such as it is, excise from it all that is bad, and retain what is good, and provide us with a contract which is legal and enforceable, even though it may not be what we originally had in mind.'"

[36] The restraints in this instance, viewed as a whole are extensive and covers a multitude of forms of conduct the Applicant was trying to prevent. On the face of it, and having regard to the particular area of the CBD, the First Respondent operated in as a salesperson, the terms of the restraint does appear to be unduly oppressive towards her. On a conspectus of all the relevant evidence, this matter is not merely whether a geographical area could be refined. In my view, if the relief sought in terms of the notice of motion is granted, it will indeed constitute a radical departure from the terms of the restraint.

[37] In *Sasfin supra*, the Court confirmed that a party should not be entitled to draft such an all-encompassing contract which on its own wording is plainly unenforceable for being over-broad, too wide in scope and then seek under the guise of a severability clause, as in this instance, that the court to develop what is in effect, an entirely different contract.

[38] In my view the remarks in *Advetch supra* at para [45]-[46] is apposite in this instance:

"[45]..On what conceivable basis can it be concluded that an employee should be compelled to sign an agreement so wide, so vast in scope and application, and be compelled to be restrained from working on so a vague a basis, namely that a court will take care of the width of the agreement and read it down so as to render it reasonable? That is surely incongruent with the principles of transparency and fairness

which are inherent in our constitutional framework and part of the test of proportionality.”

[46] Given the nature of the restraint clause and the needs for courts to balance the contractual provisions against the right to be a productive worker, a restraint clause should be drafted to reflect this balance.”

[39] With regard to the question of confidential information, the First Respondent denied that she was in possession of any confidential information. According to the First Respondent, the information she received was of a generic nature. Moreover, the customer was not regular clients of the Applicant. Some were active, others not and some were only potential clients.

[40] In determining the weight to be attached to confidential information the Court in Meter Systems Holdings Ltd v Venter and Another 1993 (1) SA 409 (W) at 428 D-F, held the following:

“Customer lists drawn up by a trade and kept confidential for the purposes of his own business contain confidential information, the property of the trader ... The legal protection afforded to this type of confidential information is limited by the fact that the law, whilst prohibiting an employee from taking its employer’s customer lists, or deliberately committing its contents to memory, nevertheless recognises that, on termination of the employee’s employment,

some knowledge of his former employer's customers will inevitably remain in the employee's memory; and it leaves the employee free to use and disclose such recollected knowledge in his own interests, or in the interests of anyone else, including a new employer who competes with the old one"

[41] On the evidence in this matter there is nothing to gainsay that the clients which the First Respondent visited never came from her memory and as a result utilized it to the benefit of the Second Respondent.

[42] For these stated reasons, the Applicant failed to prove the requirements for the relief sought.

[43] It follows that the Applicant cannot succeed.

[44] In the Result the following order is made:

The Application is dismissed with costs.

LE GRANGE, J

For the Applicant	:	Adv G Quixley
For the Respondents	:	Dr F Moosa (Attorney)
Date (s) of Hearing	:	28 February 2017
Judgment delivered on	:	28 March 2017