

A...../Mm

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)

22/01/2010

Case number: 29624/10

BELIEVE WHICH VERBS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	☒ YES
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	☒ YES
(3) REVISED: YES/NO.	☒ YES
21.10.2010	<i>[Signature]</i>
DATE	SIGNATURE

In the matter between:

BERCO EXPRESS (PTY) LTD

APPLICANT

and

DAVID IAN ANDERSON

FIRST RESPONDENT

UPS SCS SOUTH AFRICA (PTY) LTD

SECOND RESPONDENT

JUDGMENT

RAULINGA J,

[1] The Applicant brought an urgent application seeking an order that:

1. The first respondent be interdicted and restrained from:
 - 1.1 being associated with, engaged or interested in or employed by any business which renders services which fall within the ambit of the services rendered by the Applicant.
 - 1.2 rendering any services falling within the ambit of the services rendered by the Applicant, to or for the benefit of any person or entity who as at 31 July 2010, or during the period of twelve

- (12) months preceding 31 July 2010, was a customer of the Applicant or a potential customer of the Applicant who was in negotiation with the Applicant for the rendering of services;
- 1.3 Soliciting the business, or enticing away from the Applicant (or attempting to entice any person or entity referred to in prayer 2.2).
 - 1.4 disclosing or divulging to any person or entity information pertaining to:
 - 1.4.1 the names of the Applicant's customers, or prospective customers.
 - 1.4.2 the operating requirements of the applicant's customers, or prospective customers;
 - 1.4.3 the financial details (including pricing, credit and discount terms) of the Applicant's customers or prospective customers;
 - 1.4.4 the contractual arrangements between the Applicant and its customers.
 - 1.4.5 the remuneration paid by the Applicant to its employees;
 - 1.4.6 the business of the Applicant which is not readily available in the ordinary course of business to a competitor;
 2. That the restraint referred to in prayers 2.1 – 2.3 shall operate:
 - 2.1 for a period of twelve (12) months calculated from 31st July 2010.
 - 2.2 within a radius of seventy (70) kilometres of the Applicant's business premises;
 - 2.2.1 53 de Havilland Crescent, Persequor Park, Pretoria, Gauteng.
 - 2.2.2 1 Quark Crescent, Linbro Park, Sandton, Gauteng.
 - 2.2.3 26 Platinum Street, Ladine, Polokwane.

[2] The parties did not pursue the alternative to prayers 2 – 3 nor did the court refer to it when making an order on the 7th September 2010. In fact, this judgment is a response to the 1st respondent's request for reasons for that order.

[3] The first Respondent was employed by the Applicant at three of its branches, namely in Polokwane, Sandton, and Pretoria. The second Respondent conducts business in direct competition with the Applicant by way of rendering courier services, inter alia, in Gauteng and Limpopo.

Subsequent to the first Respondent having left the employ of the Applicant on the 31st July 2010, the Applicant received information that the first Respondent had taken up employment with the second Respondent. The Applicant therefore seeks the order on the basis of the agreement in restraint of trade entered into between the Applicant and the first Respondent on 6th May 2008 (the memorandum of agreement is marked "BA5" on page 51 of the papers).

[4] Although the restraint agreement applies to its terms, in respect of the Applicant's branches throughout South Africa, the Applicant seeks to enforce it in respect only of those branches in the areas in which the first Respondent worked for the Applicant. The Applicant conducts a courier and logistics business throughout South Africa. The courier business is a highly competitive business involving many competitors competing for customers.

The first Respondent commenced employment with the Applicant on the 27th March 2006. (Annexure "BA2" is the letter of appointment. The first Respondent worked at the Johannesburg, Polokwane and Pretoria branches, as an Account Manager or Business Development Manager. The first Respondent's duties involved that he developed close

commercial relationships with customers. The first Respondent signed a memorandum of agreement containing restraint of trade and confidentiality provisions on 5th April 2006 – Annexure “BA4”. As already stated above, the restraint agreement was concluded on the 6th May 2008, which restrains him for a period of twelve (12) months after date of termination of his employment with the Applicant, from being, associated with, engaged or interested in or employed by any business similar to or competing with the business of the Applicant within 70 (seventy) kilometre radius of any of the Applicant’s business premises. The restraint agreement was concluded on the basis that the first Respondent would during the course of his employment; acquire confidential information of the Applicant. In clause 5 of the restraint agreement, the first Respondent acknowledged and agreed “that the restrictions and restraints herein contained are reasonable and fair and that each of the restrictions and restraints is severable from the rest of them”. The restraint agreement was entered into by the first Respondent freely and voluntarily, with full knowledge of its provision.

- [5] The first Respondent left the employ of the Applicant with effect from the 31st July 2010, after tendering his resignation by way of a letter dated 25th June 2010 – Annexure “BA6”. After his resignation A LETTER DATED 28th June 2010 (annexure “BA7”) was handed to the first Respondent confirming that he was bound by the restraint. On the 2nd July 2010, the first Respondent replied to the letter furnishing certain undertakings (annexure “BA8”) but he did not undertake to abide by the terms of the restraint agreement. On the 23rd July 2010, the Applicant received a letter from the first Respondent’s attorney – annexure “BA9”. However, the first Respondent still refused to comply with the terms of the restraint agreement.

- [6] The Applicant contends that it is settled law that the trade secrets of a party constitute a legitimate interest which is deserving of protection

by means of a covenant in restraint of trade. Such connection arises where the party against whom the restraint of trade is sought to be enforced had access to clients, and was in a position to large customer connections. Further, that an Applicant seeking to enforce a restraint of trade is not required to show that the party against whom the restraint is sought to be enforced has exploited its confidential information or customer connections, or that he/she would do so.

[7] The Respondent avers, that the Applicant was aware, from the 28th June 2010 of the first Respondent's intended move to take up employment with the second Respondent and that the first Respondent provided undertakings required by the Applicant and requested the Applicant to negotiate the matter and requested a non litigious resolution to the dispute. The first respondent has been in the employ of the second respondent for six weeks since and has intergrated himself into the business of the second Respondent.

[8] The position in our Law regarding the validity and enforceability of a restraint of trade agreement has been well discussed in **Magna Alloys and Research SA (PTY) LTD v Ellis 1984 (4) SA 847 (A)**.

It was decided that a party wishing to be absolved from a restraint of trade agreement has to allege and prove that the enforcement of the restrictive condition would be contrary to public policy. Each agreement should be examined with regard to its own circumstances to ascertain whether the enforcement of the agreement would be contrary to public policy, in which case it would be enforceable. Although public policy requires that agreements freely entered into should be honoured, it also requires, generally, that everyone should be free to seek fulfilment in the business and professional world. An unreasonable restriction of a person's freedom of trade would probably also be contrary to public policy, should it be enforced. See also the unreported judgment of

Makgoba J in **Subtropico Marko Centre (EDMS) BPK vs Marius Karsten and Another- Case number 42671/08.**

- [9] I am of the view that the first Respondent has not succeeded in proving that the enforcement of the restrictive condition is contrary to public policy. The circumstances in this case are such that the first Respondent in his letter dated the 2nd July 2008 admitted that the contents of the restraint agreement clauses entered into and signed by the parties on the 6th May 2008 were fair and reasonable. The restraint agreement so signed would therefore limit the freedom of the first Respondent to fulfil his business and professional desires.

Trade connections of a party constitute a legitimate interest which is deserving of protection by means of a covenant in restraint of trade – **Rawlins and Another V Caravantruck (Pty) Ltd 1993 (1) SA 537 (A).**

Protection of trade secrets arises where a party against whom the restraint of trade is sought to be enforced was privy to confidential information of the party seeking to enforce it.

- [10] As already indicated, the first Respondent in his letter of 2 July 2008 states that he understands the particulars of the restraint of trade agreement which he has signed. He also admits that during his employment with the Applicant's company he was privy to certain confidential information of the company. Further, that the company is at risk in that he would dissolve confidential information to his prospective employer who is a direct competitor of the Applicant.

The first Respondent has been in the employ of the Applicant for more than 4 years. It is common cause that during this period he has gathered a lot of information and trade secrets. It therefore follows

that in the event that this information is disclosed to a competitor it will harm the business of the Applicant.

- [11] The Applicant is not required to show that the first Respondent has exploited its confidential information or customer connections or that he/she would do so - **Reddy V Siemens Telecommunications (Pty) Ltd 2007 (2) 486 (SCA)**.

The first Respondent signed the restraint agreement freely and voluntarily and also stated that the restraint is not unreasonable – Reddy's case supra.

It is not necessary to deal with each minute aspect in this matter. Suffice to mention that although I find all the other terms of the restrictions reasonable, I am however not satisfied that a period of 12 (twelve) months is reasonable. In my order I intend reducing this period to 6 (six) months.

- [12] **In the premises I would make the following order:**

1. **That the first respondent be interdicted and restrained from:**
 - 1.1 **being associated with, engaged or interested in or employed by any business which renders services which fall within the ambit of the services rendered by the Applicant.**
 - 1.2 **rendering any services falling within the ambit of the services rendered by the Applicant, to or for the benefit of any person or entity who as at 31 July 2010, or during the period of 6 (six) months preceding 31 July 2010, was a customer of the Applicant or a potential**

customer of the Applicant who was in negotiation with the Applicant for the rendering of services;

- 1.3 Soliciting the business of, or enticing away from the Applicant (or attempting to entice away), any person or entity referred to in prayer 1.2
- 1.4 disclosing or divulging to any person or entity information pertaining to:
 - 1.4.1 the names of the Applicant's customers, or prospective customers.
 - 1.4.2 the operating requirements of the applicant's customers, or prospective customers;
 - 1.4.3 the financial details (including pricing, credit and discount terms) of the Applicant's customers or prospective customers;
 - 1.4.4 the contractual arrangements between the Applicant and its customers.
 - 1.4.5 the remuneration paid by the Applicant to its employees;
 - 1.4.6 the business of the Applicant which is not readily available in the ordinary course of business to a competitor;

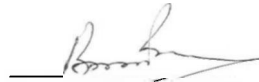
2. That the restraint referred to in prayers 1.1-1.3 shall operate:

- 2.1 for a period of 6 (six) months calculated from 31st July 2010.
- 2.2 within a radius of seventy (70) kilometres of the Applicant's business premises at:
 - 2.2.1 53 de Havilland Crescent, Persequor Park, Pretoria, Gauteng.

2.2.2 1 Quark Crescent, Linbro Park, Sandton, Gauteng.

2.2.3 26 Platinum Street, Ladine, Polokwane.

3. That the first respondent pays costs of the application.



TJ RAULINGA
JUDGE OF THE HIGH COURT
NORTH GAUTENG HIGH COURT

FOR THE APPLICANT: Adv TWG Bester
INSTRUCTED BY: Cliffe Decker Hofmeyer
FOR THE RESPONDENT: Adv P Van den Oederl
INSTRUCTED BY: Hlatshwayo Du Plessis Van der Merwe Nakiseng
DATE OF JUDGMENT: 22/10/10
HEARD ON: 7/09/10