

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 41168/2021

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
23/09/2021	
DATE	SIGNATURE

In the matter between:

KEVRO TRADING (PTY) LTD t/a BARRON

Applicant

And,

MARK SILVERMAN

First Respondent

AMROD CORPORATE SOLUTIONS (PTY) LTD

Second Respondent

JUDGMENT

FISHER J:

Introduction

[1] This matter comes before me in the urgent court. It is a restraint of trade matter and my view is that it should be dealt with as one of urgency.

[2] The Applicant ("Kevro") seeks, to enforce against the First Respondent ("Silverman") restraint of trade obligations contained in a written employment contract. Enforcement is sought for 24 months, throughout South Africa and "any other territory

which the Board has resolved the Group should enter within 6 months of the Termination Date".

[3] Silverman was retrenched by Kevro on 19 April 2021 with effect from 19 May 2021. Silverman thereafter became engaged by the Second Respondent, Amrod as an independent contractor. Relief is also sought against Amrod in relation to the employment of Silverman. Amrod abides the decision of this Court in relation to the relief sought against it.

[4] Silverman opposes the relief sought by Kevro on the grounds that (i) the restraint of trade clauses are, on the face of them, vague and ambiguous and not applicable to the position that Silverman held with Kevro and the position that he has with Amrod and (ii) in any event the enforcement of the restraint of trade obligations would be unreasonable and contrary to public policy in that there are no protectable interests warranting the enforcement of the restraint of trade especially for 24 months and throughout South Africa and "any other territory which the Board has resolved the Group should enter within 6 months of the Termination Date".

[5] I shall in due course deal with these grounds in turn and with reference to the applicable legal principles, but before doing so I shall deal with the salient facts of the matter, most of which are common cause.

Salient facts

[6] Silverman is 46 years old. His entire working experience since he left school in 1984 has been in the safety workwear industry. Silverman's knowledge and skills are limited to sales in the safety workwear industry. i.e. the sale of safety overalls (referred to in the industry as a "conti suit"), safety work trousers, safety footwear, high visibility safety wear in the form of reflective vests, bibs, jackets and the like, chef wear, security wear (clothing for security personnel), safety gloves, head protection, eye protection, ear protection, rainwear and freezer wear being clothing for low temperatures. Silverman does not have a tertiary education or any qualifications save for a sales and marketing online course which he undertook in 1999. Silverman does not have knowledge of any other industry. Silverman's knowledge of safety workwear has been

built up over many years and he had this knowledge prior to becoming employed by Kevro.

[7] He says the following in relation to his store of knowledge:

'I know which particular safety workwear is the most appropriate to be used in any particular situation. For example, I know inter alia:-

35.1 which safety footwear should be used in a high temperature environment (a rubber sole with a higher melting point as opposed to a polyurethane sole which has a lower melting point);

35.2 which safety footwear should be used in a wet and muddy environment (a gum boot as opposed to a leather safety boot);

35.3 which safety workwear (conti suit) should be used in a high temperature environment (100% cotton safety workwear which is less flammable as opposed to polyester safety workwear which is more flammable); 35.4 which safety workwear (conti suit) is appropriate to be used when handling highly flammable liquids and acids (i.e. which safety workwear is the most flame resistant and acid resistant);

which high visibility safety workwear is the most appropriate to be used during the day and at night;

35.6 which head protection (hard hats) is the most appropriate to be used'.

[8] It is not disputed that in addition to his knowledge and experience of the safety workwear industry, he is also well-known, liked and trusted in the safety workwear industry.

[9] The Applicant is a wholesaler of safety workwear as is Amrod. Wholesalers do not sell safety workwear directly to the ultimate end- user such as a business or any other organisational institution. Instead, they sell wholesale to thousands of what are known as resellers who in turn sell to the end-user.

[10] In general, the wholesalers of safety workwear in South Africa do not manufacture the safety workwear they supply to the resellers. Instead the products are primarily sourced from overseas, mainly China although there are some local suppliers and suppliers in neighbouring countries.

[11] The pricing in the industry is competitive and the margins relatively similar. There are a limited number of manufacturers servicing the industry and the manufacturers prices are known by all wholesalers. Silverman alleges that the industry is competitive and that no wholesaler can afford to price itself out of the market. The resellers also have a sense of the margins which are employed by the wholesalers. There is little room to compete when it comes to pricing as the margins are small. In order to be competitive a wholesaler needs to have stock on hand.

[12] Some wholesalers of safety workwear, such as Kevro, Amrod and Jonsson, not only sell safety workwear to resellers, but also sell branded safety workwear with the name of the reseller's customer thereon. These wholesalers of safety workwear have in-house branding departments which embroider or screen print the name of the reseller's customer onto the safety workwear. This aspect is important with reference to the application of the restraint and will be dealt with in more detail later.

[13] Prices are not static in the industry and change at least three times a year. The volatile rand dollar exchange rate also affects pricing in the industry. Silverman makes the point that any knowledge of pricing at the time of his retrenchment would be out of date at present.

[14] Silverman was employed by Kevro during November 2012 as a General Manager in Kevro's safety workwear department. He was however only asked to sign the contract in issue which includes the restraint agreement on 9 June 2015.

[15] Clause 3.2 of the contract refers to functions to be performed by Silverman as described in the job description being annexure "A" to the contract. However, annexure "A" headed "JOB DESCRIPTION" is blank.

[16] Silverman was based at Kevro's head office in Johannesburg. As part of his job he interacted with customers in South Africa, Botswana, Mozambique, Namibia and Swaziland by telephone, email and face to face meetings, and to this extent he had access to Kevro's customers and communicated with them. It is not in dispute that the customer base serviced comprises more than 250 customers.

[17] Silverman says that he did not establish key relationships with any of Kevro's customers such that any of them could or would follow him to a new employer. None

of Kevro's customers have followed him to Amrod. Silverman makes the point the sales made were not in terms of over-arching contracts with resellers. He says sales in the industry are concluded on an ad-hoc basis. It seems that vast majority of resellers who are customers of Kevro are also already customers of Amrod.

[18] During 2020, Kevro embarked upon a restructuring process. This restructuring process involved Kevro closing all of its branches, retaining the Johannesburg head office and Kevro reducing its work force.

[19] Pursuant to the restructuring process Kevro retrenched, a number of employees including Silverman. At a stage during this restructuring process Silverman was offered the position of "Key Accounts Manager". This position was not limited to selling safety workwear to resellers but also involved other aspects of Kevro's business being the sale to end-users of gifting (branded corporate gifts — pens, lanyards, notebooks, etc), apparel (branded lounge shirts, golf shirts, t-shirts, trousers, jackets, etc), display (gazeboes, pull up banners, harp banners, etc), sport (school sportswear) and headwear (caps). Silverman is not experienced in this field. The salary offered for this position was lower than held by Silverman. Silverman's position of general manager: workwear fell away as part of the restructuring process.

[20] A significant aspect of the restraint is the express limitation thereof in clause 14.2 to which reads as follows:

'The fields of activity in respect of which the restraint applies will be in respect of the marketing, sale and/or distribution of corporate and promotional products as conducted by the Group as at the Termination Date.'

[21] Silverman states that he was not involved at all in the marketing, sale and/or distribution of corporate and promotional products and that his functions and duties as General Manager: Workwear had nothing whatsoever to do with the marketing, sale and/or distribution of corporate and promotional products. He says that safety workwear is not corporate or promotional products. This aspect is important to the dispute.

[22] The main source of Kevro's aggrievement is that on 27Jul 2021 t, Amrod in an online event introduced Silverman as its new Head of Workwear.

[23] The following was said of silverman by a director of Amrod, Gabi Bricker:
 'When we go into a new category, we spend a large amount of time researching the category, understanding the products, understanding what it is that you as resellers require to be successful in this category. We speak to experts. We travel the world to look for the best products and then the best machinery and, most importantly, we make sure we have the best people. It became apparent to us really early on in the process that for workwear it was critical for us to get an industry expert. A person who really understands how workwear is sold how it's used and how to train and upskill our reseller community in selling these products. We are ecstatic that Mark Silverman will be heading up workwear at Amrod. Mark is well known to man of you on this launch. He's been involved in PPE and the workwear industry for over 20 years and brings with a real wealth of knowledge and expertise. Most importantly everyone loves Mark.'

[24] The contention of Kevro is that this shows that Silverman has key customer connections and information belonging to it which he should be restrained from using in competition with the Kevro and for the benefit of Amrod.

[25] I now move to discuss the main defences raised by the respondent being the vagueness and inapplicability of the contract and the lack of protectable interest.

Contract in restraint of trade is inapplicable.

[26] The restraint of trade is not a model of clarity. It appears to be a template document which requires to be added to in order to comply with the needs of the employer in each particular instance. To this end a portion of the agreement requires the employee's job description to be set out. This has not been attended to in the contract in issue.

[27] Ms Salduker for Kevro argued that this was of no moment as the undisputed evidence was to the effect that Silverman had been employed by Kevro as a sales manager in the safety workwear department. In my view this submission makes sense.

It is at least tacit and probably implicit that the agreement was entered into on that basis.

[28] What is more problematic is the description in the agreement of the activities in respect of which the restraint applies. It is stated to be 'corporate and promotional products.'

[29] The focal point of Silverman's position and expertise within Kevro appears, on all the facts, to be workwear and not the corporate and promotional products, which both the Kevro and Amrod trade in.

[30] Ms Salduker argued that reference to the respective websites reveals that there is a promotional aspect to the workwear in that both companies offer a branding service in relation to the workwear products sold by them. The evidence is however that the workwear products have their own identity as such. The fact is also that the knowledge and skill which Silverman brings to his employment is his expertise in relation to workwear products. The fact that both companies offer a promotional service in relation to these products does not change their main identity as workwear.

[31] Thus it seems to me that on the plain meaning of the contract Kevro has not shown that the restraint applies to prohibit the present employment of Silverman. I thus find that the applicant has not shown that the respondent is in breach of the restraint.

[32] In any event and even if this were not so, to my mind to enforce the agreement would be contrary to public policy. I examine this aspect of the enquiry below.

Legal principles re enforcement

[33] It is now settled that whether a restraint is to be enforced or not depends upon whether it would be contrary to the public interest to do so.

[34] This is to be assessed in the light of the circumstances prevailing when it is sought to enforce the restraint and involves the weighing up of two main

considerations. These were summarised by E M Grosskopf JA in *Sunshine Records (Pty) Ltd v Frohling and Others*¹ as follows:

'The first is that the public interest requires, in general, that parties should comply with their contractual obligations even if these are unreasonable or unfair. The second consideration is that all persons should, in the interests of society, be permitted as far as possible to engage in commerce or the professions or, expressing this differently, that it is detrimental to society if an unreasonable fetter is placed on a person's freedom of trade or to pursue a profession.'

[35] In general, the enforcement of an unreasonable restraint on a person's freedom to trade will be contrary to the public interest. The principal inquiry therefore is whether, having regard to the facts of this case, the restraint can be said to be reasonable.

[36] Silverman has the onus to show that the restraint is unreasonable.²

[37] The circumstances to which regard may be had cover a wide field and include typically those pertaining to the nature, extent and duration of the restraint and the legitimate interests of the respective parties in relation thereto.³

[38] The terms of the restraint are characterised by an element 'overkill'. Firstly, the restraint precludes trade throughout Africa. Ms Salduker accepts that the applicant is not jurisdictionally entitled to this relief. She contends that the applicant is entitled to be protected against competition in the whole of South Africa. The fact that the agreement purports to allow the applicant's Board to control Silverman's ability to trade even after his leaving of the applicant's employ in that it precludes trade in any territory that "it resolved the Group should enter within 6 months of the Termination Date" is in line with this overly ambitious approach.

[39] To my mind, on the facts the applicant has not established that it has an interest worthy of protection. The customer base is vast – Silverman serviced up to 250 customers in the carrying out of his functions. The applicant cannot point to any key relationship in this large sea of customers which can be said to be under threat and thus worthy of protection. It is clear that the pricing in the industry is in flux and

¹ 1990 (4) SA 782 (A) at 794C-D.

² *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 776I-J.

³ See *CTP Ltd and Others v Argus Holdings Ltd and Another* 1995 (4) SA 774 (A) at 784B.

dependent to a large extent on the cost price of imported goods and thus the Rand/Dollar exchange rate. It is not in dispute that the industry is competitive and the profit margins similar. To my mind these aspects militate against Silverman being the repository of information belonging to the applicant which would be useful in competition with the applicant.

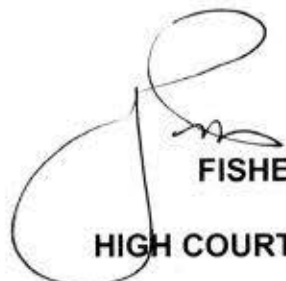
Conclusion

[40] The applicant has not shown that the activities in issue are protected by the contract. However even if it could be said to have done so, to my mind, the respondent has shown that it would be against the public interest to enforce the restraint.

Order

[41] I thus order as follows:

1. The matter is dealt with as one of urgency
 2. The application is dismissed with costs.
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FISHER J

HIGH COURT JUDGE

GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of Hearing: 15 September 2021.

Judgment Delivered: ²³ ~~20~~ September 2021.

APPEARANCES:

For the applicant:

Adv A Saldulker.

Instructed by:

Schindlers Attorneys.

For the first Respondent:

Adv L Hollander.

Instructed by

SWVG Inc.