**IN THE HIGH COURT OF SOUTH AFRICA,**

**FREE STATE DIVISION, BLOEMFONTEIN**

| | |
|---|---|
| **Reportable:** | **YES/NO** |
| **Of Interest to other Judges:** | **YES/NO** |
| **Circulate to Magistrates:** | **YES/NO** |

Case number: 2177/2019

In the matter between:

**LIESEL THOMAS N.O** 1St Applicant

**VERNON VAN DER WESTHUIZEN N.O** 2nd Applicant

**REGINALD THOMAS N.O** 3rd Applicant
(In their capacity as trustees for the time being of the **BLOEMSEC TRUST**)

and

**JANICE AVRIL CHRISTIANS** 1st Respondent

**VR SECURITY** 2nd Respondent

---

**CORAM:** **MHLAMBI J,**

---

**HEARD ON:** **6 June 2019**

**REASONS FOR JUDGMENT: 28 June 2019**

---

## REASONS

---

**MHLAMBI, J**

[1] On 06 June 2019, I granted an order enforcing a restraint of trade agreement against the first respondent much in line with the prayers sought in the notice of motion, save that I shortened the restraint period to a period of eight months instead of twelve months. I undertook to furnish my reasons for the order in due course. The application was opposed by the first respondent.

[2] The application served on the urgent roll on 30 May 2019 before Daffue, J and was postponed to 06 June 2019 with directions as to the filing of heads of argument. All issues relating to costs were reserved for later adjudication.

[3] The first respondent opposed the relief sought on the following grounds:

3.1 She signed the contract of employment containing the restraint of trade under duress and could not be held bound to it;

3.2 The applicants failed to demonstrate that they had a protectable interest;

3.3 Should the court find that there is indeed a protectable interest, the respondent posed no threat to it;

3.4 The protectable interest did not weigh up, qualitatively and quantitatively against her interest to be economically active and productive; and/or

3.5 It would be against public policy for the restraint to be maintained.

[4] It was submitted in both the heads of argument and orally that if the application was not dismissed, I was urged to make an order in terms of the tender contained in the respondent's answering affidavit.

[5] The tender reads as follows:

*"51 For the purpose of settling this matter I propose the following:*

*51.1 I will only deal with leads provided to me by the VR Security sales team and or management up and until May 2020;*

*51.2 I will not, directly or indirectly approach any existing Bloemsec client/s insofar as it is not at the instance of said Bloemsec client requesting a quote from VR Security."*

[6] The court was urged that the enforcement of the restraint of trade agreement should be no more constrictive than what was contained in the tender.

[7] It was conceded in the papers that even though the application was brought on an urgent basis, the matter was overtaken by events in that the application was postponed on 30 May 2019 for hearing on 06 June 2019.[1] It was submitted that the wasted costs of 30 May 2019 should be borne by the applicants as they should have foreseen the inevitable postponement of the matter.

[1] Paragraph 12 of the respondents heads of argument

[8] The first respondent is employed by the second respondent and previously was in the employ of Bloemsec Trust represented in this application by the applicants in their capacities as trustees. The trust and the first respondent entered into a written contract of employment on 10 May 2018 which included a confidentiality clause and a very extensive restraint of trade agreement. Her initial employment with the trust commenced on 03 February 2014 and apparently did not contain a restraint of trade clause as the parties did not enter into a written and signed contract of employment. On 24 April 2019, the first respondent gave a written notice to terminate her employment with Bloemsec with the last day being 24 May 2019. The reason for the resignation was stated in the letter of resignation as "*the acceptance of an offer from another company*".

[9] The notice of motion was fashioned *verbatim* along the lines of clause 1.3 of the confidentiality agreement and restraint of trade. The applicable and relevant portions of that clause read as follows:

*"1.3.2 the employee shall not, during the currency of this agreement or after the termination of his employment during the months of the restraint period, directly or indirectly:*

*1.3.2.1 carry on or other wise (sic) be engaged or associated or concerned or interested in or employed by;*

*1.3.2.2 solicit business for;*

*1.3.2.3 be a director, shareholder, member, employee or partner in;*

*1.3.2.4 act as an consultant, trustee, manager, agent, representative, partner, advisor, officer, or in any other capacity to;*

*1.3.2.5 render any service (gratuitously or otherwise) to;*

*1.3.2.6 lend or advance, or bind himself as surety for, any sum of money or assist financially;*

*1.3.3 the employee nor any entity in which he is directly or indirectly interested will, during any month of the restraint period and in the restrained area, directly or indirectly, through any entity, and whether for reward or not;*

*1.3.3.1 solicit orders from prescribed customers, clients or suppliers for the prescribed good and/or the prescribed service;*

*1.3.3.2 canvass business in the respect of the prescribed good and/or the prescribed services from prescribed customers, clients or suppliers;*

*1.3.3.3 sell or otherwise supply any prescribed good to any prescribed customer, client or suppliers;*

*1.3.3.4 render any prescribed service to any prescribed customer, client or supplier;*

*1.3.3.5 Purchase any prescribed goods from any prescribed customer, client or supplier or accept the rendering of any prescribed service from any prescribed customer, client or supplier;*

*1.3.3.6 solicit appointment as a distributor, license, agent or representative of any prescribed customer, client or suppliers in respect of the prescribed goods and/or the prescribed services;*

*1.3.3.7 carry on a competitive activity or any portion thereof;"*

[10] Clause 1.4 of the said agreement reads as follows:

*"1.4.1 endure for a period of twelve (12) months as and from the date of cessation of his employment with the employer for any reason whatsoever (**the restraint period**"), and*

*1.4.2 be operative within the whole of the Bloemfontein area ("**the restraint area**")."*

[11] The first respondent stated in her opposing affidavit that she commenced her employment with Bloemsec during February 2014. Prior to this employment, she was employed by ADT which is a company providing security services in Bloemfontein. She was head hunted by Bloemsec from ADT. Her services were procured because she was experienced in sales in the security industry. She was already knowledgeable of the selling and quoting on alarm panels and systems. At the time of her employment at Bloemsec she already had three years of experience in the security industry. She was called on or about 09 May 2018 by the human resources manager of Bloemsec, a certain Liesel Opperman, to sign a backdated employment contract which indicated that she would have signed same and became employed during 2014. She refused to sign the backdated contract even more so that it contained a restraint of trade clause. She wanted an opportunity to read through the contract before she signed. She was told that unless she signed, she would lose her work. She walked away without signing the agreement and considered her options that evening at home. The following day she signed the agreement, protesting that she was unhappy as she felt pressurised. Had it not been for the threat that she would be left unemployed, she would not have signed the agreement.

[12] She admitted the salient terms of the agreement and that she undertook not to compete with the trust in Bloemfontein for a period of twelve months in the way prescribed by the contract and the notice of motion.[2] However, she pleaded that she signed the agreement under duress and stated that *"I signed the agreement under duress. Also, and in the event that the Honourable Court would find me to be bound to this, I emphatically state that the effect of the restraint of trade is unreasonable and unconstitutional in my specific circumstances, not only relating the manner of the restraint, the area as well as the period involved. It is specifically denied that I would have signed without any demure (sic)"* [3]

[13] The above response was triggered by the following passage in the founding affidavit[4], in which the first applicant stated that *"What happened was that during the early part of 2018, a change in management of Bloemsec took place. When I took over the lion's share of the management responsibilities at Bloemsec at that stage, amongst others an audit of the employee files was undertaken. At that stage it appeared that Mrs Christians had never signed a contract of employment. As a result of the importance of her role within Bloemsec's structures, I immediately attended to the finalisation of her employment contract, which included a restraint of trade, and presented same to Mrs Christians for signature. She signed without demur, a fact that will become relevant later."*

[14] After the replying affidavit was filed the first respondent filed what was styled the first respondent's affidavit in duplication, the purpose of which was to answer to certain new allegations contained in the applicants' replying affidavit. In the replying

---

[2] Paragraph 46.2
[3] Para 46.1 of the opposing affidavit
[4] Para 16.2

affidavit[5] the applicants restated that the first respondent was an extremely good employee. She won the sales person of the year award at Bloemsec in 2018. She collected a PMR award for Bloemsec in 2018 as well as the "Best of Bloem" award for security service during 2018 as well. It was incorrect that she was unhappy at work and even if she was, it was not of Bloemsec's doing. In support of the good relationship that existed between the parties, the applicants attached as "REP3" a whatsapp message the first respondent sent to them describing the deponent and Mr Thomas as a "power couple" and thanking them in general for whatever they had done for her and that they "*inspired her*". The applicants pointed out that this was not commensurate with the version that Mr Thomas is a ranting and shouting tyrant.

[15] She also failed to address the allegations that she had secured a large contract with PACOFS and that together with a well-known businesswoman in Bloemfontein, Anri Powell, and that she would pursue a "Lets Talent" business.[6] Appended to the whatsapp message to the replying affidavit and marked "REP 4" was another whatsapp message, which was apparently sent on 19 April 2019 seeking permission from the first applicant to post an advert concerning the Lets Talent/PACOFS/Radio contract. In this advert she described herself as "*Janice Christians owner of Urban Talent Dance Studio. Janice is also the co-owner of Lets Talent with local businesswoman Anri Powell".* The advert also referred to the many accolades she received during 2018.

[5] Para 6.11 and 6.13
[6] Para 6.15

[16] The first respondent gives the impression that the reason for the termination of the employment relationship is that the employment relationship had become unbearable. Since the change of management in Bloemsec during April/May 2018 she was unable to meet her target. The conditions deteriorated to such an extent that she could no longer remain employed there. The environment was unhealthy and she was treated like the office "whipping boy". Mr Reginald Thomas shouted at her daily.[7]She denied that on 6 May 2019 Mr Thomas had a candid discussion with her during which certain proposals were made to her in an attempt to retain her services[8]. She maintained, on the contrary, that he was very aggressive during such discussions and indicated that he would make her life miserable and he would enforce the restraint of trade to the extent she would be left unemployed. This militates against the apparent cordial relationship reflected in the emails between the first respondent and Mr Thomas during early May 2019.

[17] In the replying affidavit, it was pointed out that the first respondent, by making the tender indicated above, apparently accepted that Bloemsec had a protectable interest by way of its existing clientele. Even though the tender appeared inviting, it was prudent not to accept same as it would have been difficult to monitor it, and there was nothing that would have prevented the first respondent from contravening the undertaking, and subsequent order in such a way as to escape detection. On her

[7] Paras 30 and 31 : Opposing affidavit
[8] Para 15.7 of the founding affidavit

own evidence, she at no stage intimated to any person at Bloemsec that she had signed the agreement under undue pressure. There was no evidence to support her allegations that she did so under duress. She also failed to present evidence to underscore her contention that the restraint of trade was unconstitutional and unenforceable. The first respondent failed to respond to these allegations in her affidavit in duplication.

[18] It is clear from the authorities that a contract maybe vitiated by *duress (metus)* as it renders consent of the party subjected to duress no true consent[9]. Where a person seeks to set aside a contract, or resist the enforcement of a contract, on the ground of duress based on fear, the following elements must be established:

(i) The fear must be a reasonable one;

(ii) It must be caused by the threat of sum considerable evil to the person consent or his family;

(iii) It must be the threat of an imminent or inevitable evil;

(iv) The threat or intimidation must be unlawful of *contra bonos mores;*

(v) The moral pressure used must have caused damage.[10]

[19] In **Paragon Business Forms (Pty) Ltd v Du Preez** [11] the following was stated:

"*To prevent the remedy getting out of hand one must, in my view, have regard to the person complaining of the duress and the circumstances in which he found himself at the time, and then gauge, in the light of all those*

[9] Broodryk v Smuts N.O. 1942 TPD 47 at Page 53

[10] Arend and another v Astra furnishers (Pty) Ltd 1974 (1) SA 298 (c) at 305; Broodryk, supra

[11] 1997 (1) SA 434 (SE)

*relevant factors, whether it was reasonable for him to have suffered fear and to have succumbed thereto. I adopt the approach of Christie (op cit at 369):*

*'The point is that every person who complains of duress is entitled to be seen as the sort of person he or she is, but to prevent the remedy getting out of hand he is not entitled to repudiate the contract if he claims to have succumbed to a fear that would be unreasonable even for the sort of person he is.'"*

[20] The learned Judge (Leach, J, as he then was)[12] continued to say:

*"and in the light of the fact that the respondent is apparently a man who has been able to make his way in the exacting and competitive world of retail sales, and who has now started his own business after spending many years in the employ of the applicant, it does not seem to me to lie in his mouth to allege that he had any reasonable fear of dismissal when no such threat was in fact made, when the applicant's representative merely insisted upon him signing the restraint and when he took no steps to ascertain what the consequences would be if he failed to comply. Even if he did fear dismissal upon non-compliance with the instruction to sign (something which I do not believe), such 'fear' was so unreasonable that it does not satisfy the requirement of fear or the anticipation of harm required to enable him to avoid the restraint agreement."* The onus to show that she entered into the agreement under duress rested on the first respondent to make the necessary averments to support a claim based on duress[13]. In my view, the issue that she was coerced to sign the contract is not real.

[21] The respondent made a tender not to directly or indirectly approach any of the existing Bloemsec clients. The evidence revealed that she was a very successful salesperson who built up a relationship with customers of the applicants. She took up employment with the applicants' competitor. In **Den Braven SA v**

[12] Paragon Business Forms, supra, page 441:
[13] Rothman v Curr Viviers Inc. 1997(4) SA 540 (C) at 551

**Pillay and Another**,[14]the court had difficulty with the suggestion "*that the relationship between the applicant and its customers is not one involving a particular connection with the applicant through Mr Pillay, but is a more tenuous relationship governed by price".* The court was of the view that the respondent, as salesperson, had built up a relationship with customers of the applicant and account should be taken of such factors as customer loyalty to a particular supplier; customer inertia in continuing to purchase from an established supplier rather than going to the effort of always checking the market for the best possible price; and the fact that where two different suppliers quote very similar prices for comparable products, the trade connection established through the sales person may well be the decisive factor. It suffices for the applicant to show that trade connections through customer contact exist and can be exploited by the former employee if employed by a competitor[15]. The applicant in that case had discharged that onus and that the applicant had a commercial interest deserving of protection at the termination of the agreement. The applicant would be prejudiced if the ex-employee took up employment with a competitive rival.

[22] Once that conclusion is reached and it is demonstrated that the prospective new employer is a competitor of the applicant, trading in a range of similar products, the risk of harm to the applicant if its former employee is able to take up employment with that competitor is apparent. The risk is increased where, as here, the employee in question is an excellent and highly successful

[14] 2008 (6) SA 229 para 17

[15] See also Reddy v Siemens Telecommunications (Pty) Ltd 2007 (2) SA 486 (SCA)

salesperson with a lengthy track record working in the particular market.

[23] The reasonableness of the enforcement of the restraint of trade depends upon deciding the following questions[16]: (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?; and (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?; (e) does the restraint go further than necessary to protect the relevant interest[17].

[24] The enquiry into reasonableness of the restraint is essentially a value judgment that encompasses a consideration of two policies: the duty of parties to comply with their contractual obligations and the right to freely choose and practise a trade, occupation or profession. A restraint is only reasonable and enforceable if it serves to protect an interest, which, in terms of the law, requires and deserves protection. Confidential information and customer connections are recognised as such interests.[18]

[25] When it comes to the quantitative and qualitative weigh off to be conducted, the scope and period of the restraint is relevant as a

[16] Basson v Chilwan and Others 1993 (3) SA 742 (A) at 767 G-H
[17] Medtronic (Africa) (Pty) Ltd v Van Wyk and Another (2016) 37 ILJ 1165 (LC) at para15.
[18] Labournet (Pty) Ltd v Jankielsohn and another (JA48/2016)[2017] ZALAC 7; [2017] 5 BLLR 466 (LAC);(2017) 38 ILJ 1302 (LAC) (10 January 2017).

shorter restraint and properly limited geographical area would mitigate in favour of enforcement, whilst an unduly long and broad restraint would mitigate against it.[19]The reasonableness of the restraint is determined with reference to the circumstances at the time the restraint is sought to be enforced.

[26] An undertaking by an employee that the employee would not exploit trade connections where employment with a competitor can be seen to be a violation of the restraint is not a consideration that can be applied in favour of an employee and does not serve as a defence[20]. The applicant should not have to content itself with crossing its fingers and hoping that the first respondent would act honourably or abide by the undertakings he has given[21].

[27] In conclusion I refer to **Wightman t/a TW Construction v Headfour (Pty) Ltd and Another**[22] where it was said that a real, genuine and bona fide dispute of fact can only exist where the court is satisfied that the party who purports to raise a dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. As indicated above, the first respondent failed to traverse the issues raised in the affidavits. I agree with the submission that, properly considered, her defence is simply that she is not in a position to cause harm to the applicants.

[19] Vumatel (Pty) Ltd v Mohammed Salmaan Majra and others case no. J2400/18 (LC); Labournet, supra paras 43 and 45.
[20] Vumatel, supra para 40; Reddy, supra para 20.
[21] BHT Water Treatment (Pty) Ltd v Leslie and Another 1993 (1) SA 47 (W).
[22] 2008 (2) SA 512 SCA.

[28] In **Reddy**,[23] the court applied the principle in **<u>Plascon-Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd</u>**[24] and said that a final order could only be granted in motion proceedings if the facts stated by the respondent together with the admitted facts in the applicant's affidavits justify such an order, and this applies irrespective of where the onus lies. If the facts disclose that the restraint is reasonable, then the party seeking the restraint order must succeed; but if those facts show that the restraint is unreasonable, then the party sought to be restrained must succeed.[25]

[29] In the light of the above, I am satisfied that the first respondent failed to prove the defences she raised, namely, that she signed the contract of employment containing the restraint of trade under duress and that it would be against public policy for the restraint to be maintained. The restraint agreement in this matter is not against public policy and should be enforced. She entered into the agreement voluntarily in the exercise of her freedom of contract and she should honour it. Taking into account that the restraint of trade agreement was only signed in May 2018, a year before the first respondent's resignation, I was of the view that a shortened period of eight months was both reasonable and appropriate in the circumstances.

[30] When it came to the aspect of costs, I found no reason to deviate from the principle that costs should follow the event. Due to the nature of the application from the onset, I was of the view that the

[23] Supra, para 4.
[24] 1984 (3) SA 623
[25] Ball v Bambalela Bolts (Pty) Ltd and Another (2013) 34 ILJ 2821 (LAC) at para 14.

applicants were entitled to the costs of the postponement of the application on 30 May 2019.

[30] These are my reasons.

**MHLAMBI, J**

Counsel for applicants: Advocate S Grobler
Instructed by: Honey Attorneys
Honey Chambers
North Ridge Mall
Bloemfontein

Counsel for 1st Respondent: Advocate LA Roux
Instructed by: Rossouws Attorneys
119 President Reitz Avenue
Westdene
Bloemfontein