

IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU NATAL DIVISION, PIETERMARITZBURG

Case No. 8355/2018P

In the matter between:

Otis (Pty) Ltd

Applicant

and

Phoolwanthi (Nirvana) Beni

First Respondent

Kone Elevators South Africa (Pty) Ltd

Second Respondent

Judgment

[1] The applicant in this application is Otis (Pty) Ltd ('Otis') which carries on the business of manufacturing, installing and maintaining lifts, moving walkways and escalators in South Africa and internationally. Otis seeks an order interdicting and restraining an ex-employee, the first respondent Phoolwanthi Beni ('Ms Beni') in terms of a restraint of trade agreement. Otis also seeks to interdict and restrain Ms Beni's current employer, the second respondent Kone Elevators South Africa (Pty) Ltd ('Kone') from employing her or using any knowledge of the business of Otis conveyed to it by Ms Beni.

[2] The application originally came before this court on the 2nd of August 2018. The application was then adjourned by consent between the parties to the 31st of August 2018, when the matter was heard.

[3] The history of Ms Beni's relationship with Otis is set out in her answering affidavit. Including the allegations of Otis which are admitted by her, they may be summarised as follows:

- (a) Having no formal qualifications other than a matric certificate, Ms Beni ~~was employed as a call centre agent at Otis in Johannesburg during 2005.~~
- (b) Her function was to receive calls from customers who had phoned in to report elevator breakdowns, and then to dispatch a technician qualified to attend to the problem. She did this job for three years.
- (c) In October of 2008 she was promoted to head of the call centre with the responsibility of overseeing the other call centre agents.
- (d) During the period between 2010 and 2012, Ms Beni was given the additional responsibility of being the Field Operations Department Coordinator. This involved liaising with technicians who encountered problems during a call out. Ms Beni would then ensure that the relevant field engineer contacted the technician.
- (e) In the conduct of her functions up until 2012, Ms Beni worked in a liaison position without any technical knowledge in so far as it related to the operation, installation, sales or maintenance of elevators.
- (f) In 2012 Ms Beni worked for a sister company of Otis, Sigma Lifts and Elevators (Pty) Ltd, as the National Sales Consultant. In this capacity she was trained to, and in fact sold Sigma Lifts. Between 2013 and 2014 she was employed by Sigma as an Upgrading Consultant, approaching existing customers with a view to upgrading their lifts.
- (g) In 2014 she was transferred to Otis as an 'O Sales Consultant' involving the sale of maintenance contracts to clients of Otis. Her functions included ensuring that existing contracts were maintained and renewed.
- (h) In 2015, because Ms Beni wished to relocate to Durban for family reasons, she was promoted to the position of 'Service Supervisor' in

Durban. The position entailed collecting and collating the time sheets of technicians and ensuring that they had carried out the tasks allocated to them, were equipped with the correct protective clothing and equipment, and where the technicians could not cope with the tasks, she ensured that the relevant engineering personnel were contacted. Effectively Ms Beni was monitoring the work of the technicians actually involved in call outs. This required no technical knowledge or ability on her part.

- (i) In October of 2016 she was promoted to the position of 'Branch Manager' in Durban. Similarly this task did not require technical expertise and she was not made privy to any confidential information. She would complete forms relating to queries and complaints from customers and relay those to the appropriate persons. They were usually in Johannesburg, but also in Durban, and they would deal with the problem. She did not supervise work in the field and did not deal with sales.
- (j) In her functions as the Branch Manager in Durban Ms Beni compiled reports of the sales staff which were given to head office to ensure that they were kept abreast of sales. The figures were given to her by the sales persons.
- (k) The employment contract which contained the restraint of trade relied upon by Otis was signed by Ms Beni on the 19th of October, 2016. The restraint of trade was to operate for one year after the termination of Ms Beni's employment, and to be applicable throughout the whole of South Africa.

[4] In dealing with the allegations of her functions as set out in the founding affidavit of Otis, Ms Beni emphatically avers that during 2013 and 2014, when she was involved in sales, she was in Johannesburg, and when she came to Durban she was not in any way involved in procuring new customers for Otis. She did not oversee the work done by the sales representatives, but merely forwarded returns to

head office setting out what they had reported to her. The suggestion by Otis that she was 'managing sales' is emphatically denied, and Ms Beni points out that that function was performed by one Richard Hardy, the National Sales Manager. There was also a sales manager for new equipment sales. Ms Beni also emphatically denies the suggestion that she was ever responsible for 'construction and lift installation'.

[5] Mr *Grundlingh*, who appeared for Otis, stated at the outset of his address that Otis relied only upon:

- (a) A protectable interest; and / or
- (b) The protection of its customer and trade connections,

in seeking to enforce the restraint of trade agreement. Otis does not allege that Ms Beni has used any confidential information in any way and does not seek a referral of the application for the hearing of oral evidence.

[6] Mr *Grundlingh* submitted that insofar as any disputes of fact arise between the affidavits of Otis and those of Ms Beni, they should be dealt with in accordance with the exception to the rule set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 635B-C:

'Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely upon the papers. ...'

[7] He submitted that the denials and explanations in Ms Beni's answering affidavits are so implausible and untenable that I should dismiss them without more. Mr *Grundlingh* drew attention to the fact that Ms Beni bore the onus of establishing why the restraint of trade agreement should not be enforced.

[8] I drew to Mr *Grundlingh*'s attention that the founding affidavit of Otis fails to establish either the requisite evidence for the protection of trade secrets/confidential information, or customer connections. He submitted that in restraint of trade disputes, the applicant was entitled to make its case in reply, and that there is authority for this deviation from the general rule that an applicant is obliged to make out its case in its founding papers. Mr *Grundlingh* referred me to John Staner SC: *Agreements in Restraint of Trade in South African Law* issue 21 (2017). Staner, at paragraph 15.9 refers to the application of the *Plascon-Evans* rule, and opines that the test is equally applicable in cases of restraint of trade where the onus is reversed. The incidence of the onus does not, however, affect the application of the *Plascon-Evans* rule. See: *Ngqumba en 'n ander v Staatspresident en andere: Damons NO en andere v Staatspresident en andere: Jooste v Staatspresident en andere* 1988(4) SA 224 (A).

[9] Staner suggests that because the onus rests on the respondent, facts germane to the issues will be set out in the answering affidavits for the first time, and will accordingly need to be dealt with in reply by the applicant. The footnote he refers to however, at 15-39, makes it clear that it is both necessary and desirable that the applicant set out in its founding affidavit that it has protectable interests, the nature thereof and why they are confidential. In my view, it may well be that a respondent in an application such as this may raise an unforeseen matter, which requires reply. It is quite another to suggest that the general rule in *Plascon-Evans* may be departed from simply because the application concerns a restraint of trade. I am uncertain whether that is what Staner is suggesting. If he is, I am in respectful disagreement with the learned author.

[10] Mr *Collingwood*, who appeared for Ms Beni, submitted that the case for Otis as set out in its founding affidavit was replete with meaningless terminology. There was no serious engagement with the facts. Paragraph 17 of the founding affidavit of Otis sought to establish the need for customer protection. The paragraph consists of eight sub-paragraphs dealing with the alleged interaction of Ms Beni with the customers of Otis. They are introduced with words such as 'she serviced', 'was

responsible for' (six times), 'was involved in' all the contracts with Otis' KZN customers (both locally and where appropriate nationally) and 'intimately knew what requirements were crucial to the Applicants' contracts and what were negotiable. She was intimately involved in the pricing of maintenance work and tenders for construction and installation work'. The first two phrases are immediately linked in each subparagraph with a customers' name.

[11] In none of the sub-paragraphs are the introductory phrases explained. No explanation is given of the relationships between Ms Beni and the customers of Otis, and no information is given as to her 'involvement' in maintenance work or tenders for construction and installation work. It is as if the deponent wished to list as many of the important sounding functions as possible without having to explain the facts. The allegations in paragraph 17 of the founding affidavit are dealt with extensively by Ms Beni, as far as she was able to do given the imprecise language in the paragraph. Her clarification of the functions she allegedly performed then prompted Otis to attempt to set out its case in reply.

[12] One of the allegations is that Ms Beni 'was responsible for maintenance and construction (specifically lift installation)'. This is emphatically denied by Ms Beni. Despite a long list of Ms Beni's assertions which are repeated (the purpose for so doing is unclear) in the replying affidavit, these allegations are not substantiated. The allegation is also made that Ms Beni is 'now using the information obtained from the Applicant during the course of her employment to procure employment with a competitor with reference to the possibility of using the information as a springboard to unlawfully advance her interests...' These allegations are denied by Ms Beni, and no attempt is made to explain or justify these allegations.

[13] The founding affidavits (paragraph 69) also contain obviously exaggerated suggestions of existing and possible harm were Ms Beni to be allowed to be employed by Kone – 'The harm to the Applicant is not only anticipated, but was and is actually currently committed by the Respondents. The Applicant stands to lose tens of

millions of Rands due to the Respondents' conduct, which may ultimately result in the Applicant's demise'.

[14] Mr *Collingwood* submitted that Mr *Grundlingh* made much of the fact that Ms Beni admitted being aware of a number of Otis's customers, and that she was also privy to confidential information. These statements by Ms Beni have to be read in context. For example, she admits having acquired knowledge of some personal details of some of the employees of Otis – she understands, however, that out of a duty to those persons she should not, and would not, disclose them. She makes no such admission with regard to any confidential information concerning the confidential information or trade connections of Otis, nor of any trade secrets or financial knowledge.

I agree with the submissions made by Mr *Collingwood*, both with regard to the lack of any proper substance to the allegations made by Otis regarding the ability of Ms Beni, as well as the submission that Otis has not set out facts to substantiate the conclusions it reaches. It has also failed to set out facts concerning any trade secrets and details of customer connections requiring protection.

[15] Mr *Boulle*, who appeared for Kone submitted that Otis was not entitled to an interdict against it for the following four reasons:

- (a) The lack of any protectable interest relied on by Otis;
- (b) The case against Kone;
- (c) The contents of the annexures to the replying affidavit; and
- (d) The duration of the restraint.

[16] Otis relies upon customer protection and confidential information. In order to distinguish between facts and legal conclusions, an applicant must allege facts in order to support the allegations and conclusions. Otis had not done this and its references to various customers in the founding affidavits do nothing to establish facts upon which Otis could rely for the legal conclusions it sought. Mr *Boulle*

referred to *A M Moolla Group Ltd & Others v The Gap Ink & Others* 2005 (6) SA 568 (SCA), para 31 where Harms JA stated:

'Affidavits in application proceedings must do more than make bald allegations; they must, in addition, provide the facts that support the allegations....'

Mr *Boulle* submitted that the adoption of the *Plascon-Evans* rule is a two part process:

- (a) Are there facts in the affidavits which disclose disputes? In order to reach such a conclusion there must facts from which one can assess the positions of the respective parties.
- (b) In the light of those facts, has the onus been discharged?

Mr *Boulle* argued that as insufficient facts have been alleged in the founding affidavits of Otis, the matter must be decided in favour of Kone. In this particular case the allegations and counter allegations are not such that the exception to the *Plascon-Evans* rule can be invoked against either Ms Beni or Kone.

[17] Mr *Boulle* submitted that Otis has not made out a sufficient case against Kone for the relief sought against it.

(a) Mr *Boulle* referred to *IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Hall (aka Baghas) & another* 2004 (4) SA174 (W), sub-para 13.4.2 where Schwartzman J stated:

'Where the ex-employer seeks to finally interdict a third party on the ground that it is competing unlawfully, by employing an ex-employee who has breached a restraint, the ex-employer must prove that:

- (a) It has confidential information or trade secrets.
- (b) The third party is making use of, or is likely to make use of such information or trade secrets either knowingly or innocently....
- (c) It has a real right not to be faced with unfair competition. In deciding unfairness, a court is entitled to look at the competing interests of the parties as spelled out by Van Dijkhorst J in *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd and Others* 1981 (2) SA 173 (T) at 188H–189A.

In the instant appeal, the possible damages that could be suffered by the appellant is infinitesimal when compared to the second respondent's unchallenged evidence that it would be put out of business if the interdict was granted.

(d) It has no other remedy.'

Mr *Boulle* submitted that no allegations have been made supporting these requirements.

(b) In its founding affidavits (paragraph 53) the suggestion is made of Ms Beni that:

'She is now using the information obtained from the Applicant during the course of her employment to procure employment with a competitor that may result in the employee using the information of the Applicant as a springboard to unlawfully advance her interests and the business interests of Kone, to the detriment of the Applicant.'

Mr *Boulle* points out that there are no facts alleged to substantiate these allegations and no reference whatsoever to unlawful conduct on the part of Kone.

(c) Otis also alleges (paragraph 61), with regard to Ms Beni, that she:

'Would surely use the information at her disposal (which she became possessed of during her occurrence of employment with the applicant) for the furthering of Kone's business to the detriment of the applicant.'

No basis is suggested for why this assumption should be accepted.

(d) Reference is made to the cancellation of an agreement with the Pavilion Mall Shopping Centre. This is comprehensively dealt with by Ms Beni in her answering affidavit, and no allegations involving Kone are made.

(e) A further reference (paragraph 69) is made in the founding affidavit to the effect that:

'The harm to the Applicant is not only anticipated, but was and is actually currently committed by the Respondents. The Applicant stands to lose tens of millions of

Rands due to the Respondent's conduct, which may ultimately result in the applicants demise

Once again no facts are set out to substantiate the conclusion arrived at in this paragraph, and no allegations are made in respect of Kone, which are in any way substantiated.

Mr *Boulle* submits in any event that in its answering affidavit Kone has emphatically stated that it has not sought any information from Ms Beni regarding her previous employment, and will not do so.

[18] With regard to whether Otis has discharged the onus it bears, Mr *Boulle* referred to:

(a) *Micah Kitchens CC v Romarno* 2018 JDR 0493 (GJ) at para 50 where Keightley J stated:

'Micah's case against Alto, being the sixth respondent, is based on the delict of unlawful competition. In *IIR v Hall* 2004 (4) SA 174 (W), [para 20] it was held that a competitor's employment of an ex-employee with or without knowledge of a restraint cannot of itself amount to the delict of unlawful competition. It must be established that the new employer, through the ex-employee used confidential information of the ex-employer. As I have already indicated, Micah accepts that it has no evidence to this effects. In the circumstances, there is no basis for its claim against Alto.'

No such evidence has been produced by Otis in this application.

(b) In *Roxsure Insurance Brokers (Pty) Ltd v Salomon & another* (11834/2015) [2015] ZAGPJHC 64 (20 April 2015), Nicholls J stated at paras 29-30:

'As regards the second respondent, there are no public policy considerations or legal requirements justifying the grant of an order to prevent the second respondent from employing Salomon. The relief that the applicant seeks against the second respondent is a separate cause of action founded in delict. The relief sought against Salomon is a cause of action founded in contract. As pointed by a full bench of this Court in *IIR South African BV (Incorporated in the Netherlands) t/a Institute for*

International Research v Hall (aka Baghas) & another 2004 (4) SA 174 (W), this distinction is often overlooked. A claim against a third party is a delictual one based on unfair competition. In order to succeed in interdicting the second respondent, the applicant has to plead and prove not only that Salomon has confidential trade secrets or information, but also that the second respondent is making use of this information.

The applicant has failed to allege the existence of confidential information worthy of protection and failed to allege the second respondent has utilized any such information, or intends to use it. To allege that merely by virtue of its employment of Salomon, the second respondent must possess the information, is inadequate to sustain the relief sought against the second respondent....'

(c) Mr *Boulle* also referred to *Kirk Marketing (Pty) Ltd v Burmeister 2012 JDR 2084 (KZD)*, para 13 where Pillemer AJ stated:

'As against Second Respondent the Applicant seeks to interdict it using Applicant's trade secrets communicated to it by the First Respondent. The Second Respondent says it has not been given any and has no intention of using any information. There is no reason to doubt this evidence. Against a third party like the Second Respondent the Applicant had to set out evidence to establish the delict it relied upon, but the papers did not achieve this result. The application against Second Respondent must fail for want of evidence of it committing a delict of the kind that would justify this kind of relief.'

[19] Similarly in this application Kone states that it has received no information or trade secrets of Otis from Ms Beni and has no intention of using any information. I have no reason to doubt this. In my view Otis has not discharged the onus it bears of establishing the requisites for an interdict against Kone.

[20] Mr *Boulle* referred to the correspondence referred to in annexures Z1 to Z34 to the replying affidavit of Otis. Mr *Boulle* stated that he agreed with, and adopted, the argument of Mr *Collingwood* that the lengthy contents of these annexures, consisting of emails sent by Ms Beni, assist both the respondents. He submitted that there was a complete disconnect between what was set out in the replying affidavits of Otis concerning these emails, and the contents of the emails themselves. I do not

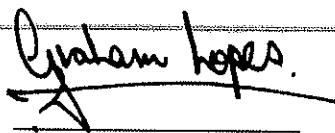
intend to trawl through all the emails and reflect on each one. Suffice it to say that in many of them the contents were drafted by one Mr Berry, a legally trained person working for Otis, and the emails were simply sent or signed off by Ms Beni. This has been made abundantly clear in emails where Mr Berry sets out the body of a letter to be used by Ms Beni in the event that a contract was to be cancelled. I agree with both Mr *Collingwood* and Mr *Boulle* that the replying affidavits assist the respondents in showing that Ms Beni in particular was simply referring one person to another and forwarding information. In the case of the tender involving National Health Lab Services, the inference sought to be drawn by Otis in its replying affidavit is simply not warranted on an examination of the emails. Indeed, a comparison between the letters which were drafted by Mr Berry for Ms Beni and those drafted by Ms Beni herself, illustrate clearly that Ms Beni could not operate at the level suggested by Otis. In numerous cases involving tenders, Ms Beni did no more than pass the information on from the customer to the person assigned to deal with the tenders.

[21] Lastly Mr *Boulle* dealt with the duration of the proposed restraint. He submitted that an appropriate restraint would only be for the time it would take for a new branch manager to be trained, acquainted with the role and introduced to customers. A period of no more than three months would be more than adequate for this process.

[22] Having assessed all the facts set out in the affidavits, I am of the view that Otis has not established a case for the restraint which it seeks to impose upon Ms Beni. Her denials and the facts alleged by Otis, both in its founding and replying affidavits are not such that I could adopt the exception to the *Plascon-Evans* rule and conclude that Ms Beni was being dishonest, or the allegations in her affidavit should be dismissed without more. Mr *Grundlingh* emphatically refuted any suggestion that Otis wished the matter to proceed to the hearing of oral evidence. I agree with the submissions of both Mr *Collingwood* and Mr *Boulle* that a case is simply not made out, and that the replying affidavit of Otis creates more problems for its case than it assists it. There is also insufficient evidence upon which to grant an interdict against Kone.

[23] In all the circumstances I make the following order:

The application is dismissed with costs.

A handwritten signature in black ink, appearing to read 'Graham Lopes', is written over a horizontal line.

Lopes J

Date of Hearing:	31 st August 2018
Date of Judgment:	5 th October 2018
Counsel for the Applicant:	Mr <i>Grundlingh</i> (instructed by Berry & Associates c/o Grant & Swanepoel)
Counsel for the First Respondent:	Mr A D <i>Collingwood</i> (instructed by Messrs Anuradha Kallideen & Associates)
Counsel for the Second Respondent:	Mr A J <i>Boulle</i> (Instructed by Messrs Barkers c/o Cajee Setsubi Chetty Inc)