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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: 2608/2016

In the matter between:

TALISMAN HIRE BLOEMFONTEIN (PTY)
LTD
[Registration Number: 2.....]

Applicant

And

HELENA JACOBA VAN NIEKERK
[Identity Number: 8.....]

First Respondent

BASE HIRE & SALES (PTY) LTD
[Registration Number: 2.....]

Second Respondent

CORAM: LEKALE, J

HEARD ON: 4 AUGUST 2016

JUDGMENT BY: LEKALE, J

DELIVERED ON: 18 AUGUST 2016

BACKGROUND AND INTRODUCTION

- [1] On 30 March 2015 the applicant and the first respondent, who had been associated to each other in an employment relationship since 1 February 2010, concluded a written contract of employment which included a restraint of trade covenant in terms whereof the first respondent, as an employee, undertook not to be involved in any business that is similar to that of the applicant, as the employer, or in competition therewith within an area of 150km for a period of 1(one) year after termination of her employment with the applicant.
- [2] In January 2015 the first respondent verbally informed the applicant, through its managing director, of her intention to resign and take up employment with one of the applicant's clients, one Lohan Civil Construction Pty Ltd (Lohan). The applicant was keen to retain her services and offered, in vain, to increase her monthly salary. The first respondent, however, gave written notice of her resignation on 4 January 2015 and left the applicant's employ with effect from the 4th February 2016.
- [3] The second respondent and Lohan share directors and operate from the same business premises. The first respondent is, in fact, employed by the second respondent which conducts a business similar to that of the applicant and is, as such, its competitor in Bloemfontein.
- [4] The applicant felt aggrieved by the employment relationship between the first and second respondents and sought to enforce the restraint agreement in question. It was, however, of the view that the respondents were violating its proprietary interest in the form of trade connections and secrets. It, therefore, secured an Anton Piller order on the 19 April 2016 under case number 1910/2016 in order to search the respondents' offices for any of its documents and to preserve same as evidence for use in the instant proceedings.

- [5] Following the execution of the order in question the applicant's attorney of record directed a letter to the first respondent on the 4th May 2016 demanding that she comply with the restraint of trade covenant by terminating her services with the second respondent with immediate effect. When the demand was not met the applicant launched present proceedings moving for, inter alia, an order that the first respondent be interdicted and restrained from taking part in business activities that are similar to that of the applicant or in competition with that of the applicant, within the radius of 150 kilometres of the applicant's premises situated in Bloemfontein, Free State Province for a period of twelve months commencing from 4 February 2016.
- [6] The respondents oppose the motion and effectively contend in limine that the restraint clause in question is void for vagueness insofar as it does not refer to "a radius" but refers to " ... the area of 150 km" without specifying the point from and the direction in which such area stretches.

ISSUES IN DISPUTE

- [7] Ante Omnia parties are at variance on whether or not the restraint of trade agreement in clause 34 of the Employment Contract concluded by and between the applicant and the first respondent is void for vagueness with the respondents, in effect, and through Mr Louw, contending in argument that same is vague insofar as it refers to the area of 150 kilometres as opposed to the radius of 150 kilometres from the premises of the applicant in Bloemfontein.
- [8] In the event of the foregoing question being decided in the negative the dispute between the parties extends to the question as to whether the covenant is unreasonable with specific reference to:

- 8.1 Whether or not the applicant has a clear right or protectable interest in the form of trade connections and/ or confidential

information to which the first respondent had access during her employment with it;

8.2 In the further event of the question in paragraph 8.1 being decided in the affirmative, the parties are in dispute over whether or not such protectable interest is under threat with the respondents maintaining that there exists no evidence that the applicants interests are being prejudiced or might be prejudiced;

8.3 In the event of the question in paragraph 8.2 being positively determined, the parties are at variance on whether or not the applicant's protectable interest outweighs both qualitatively and quantitatively the first respondent's right not to be economically inactive and unproductive with Mr Louw submitting that there exists no plausible evidence that the applicant lost any customers or suffered any damages and that whatever prejudice there might have been for it was ephemeral while the first respondent, on the other hand, stands to lose substantially if the restraint is enforced;

8.4 The parties are, further, in dispute as to whether or not the restraint goes further than necessary with the respondents contending that the period of 12 months is inordinately long regard being had to the fact that it would only take a new employee a few weeks to establish a customer relationship similar to the one the first respondent had with the appellant's clients.

[9] The parties are in conclusion in dispute over who should carry the costs of the Anton Piller order with the respondents contending that the applicant should be saddled with the same given its lack of success in that matter.

DEPOSITIONS AND CONTENTIONS FOR AND ON BEHALF OF THE
APPLICANT

- [10] The applicant's managing director deposes to, inter alia, the effect that the first respondent was satisfied with and understood clearly the import of the restraint. He further maintains that the first respondent, in her capacity as the Senior Hire Specialist with the applicant, was effectively the face of the applicant and had access to confidential information which was only available to few senior employees. The first respondent received intensive training and had a strong relationship with applicant's clients to the extent that she could sway their loyalty away from the applicant and take them with her when she left the latter. The execution of the Anton Piller order on 29 April 2016 yielded valuable information and documents which clearly show that the respondents use applicant's confidential information to build the second respondent's business. The first respondent breached the covenant and should also pay the agreed penalty of R35 000 being twice her monthly salary with the second respondent. The respondents jointly breached the applicant's protectable interest and should be retrained.
- [11] Mr Coetzer for the applicant contends, inter alia, that the restraint clause is valid and enforceable insofar as it is reasonable and not against public policy. The applicant satisfied the requirements for the final interdict sought and is, as such, entitled to the relief it prays for in the notice of motion. There exist no genuine, real and bona fide disputes of fact between the parties insofar as the first respondent's version is untenable and should be rejected on the papers. The relief sought is limited to 12 months calculated from February 2016 and is, as such, reasonable.

DEPOSITIONS AND CONTENTIONS FOR AND ON BEHALF OF THE
RESPONDENTS

- [12] The first respondent, inter alia, denies that she was, in effect, the face of the applicant and contends that she only held the glorified title of Senior Hire Specialist with the applicant and had no significant authority enabling her to

access the latter's confidential information and documents such as discount structures. Her relationship with the applicant's clients was ephemeral insofar as she only dealt with walk-in clients and telephone orders. The relationship in question could not reasonably possibly allow her to influence clients so as to sway their loyalty away from the applicant. She, further, denies that the Anton Pillar order secured any confidential documents or information belonging to the applicant because the pricelist found related to the 2013 season and was easily available to all and sundry insofar as clients were entitled to ask for the same. When she left the applicant's employ she took no confidential documents belonging to it inclusive of any laptops.

- [13] On the papers and before the court Mr Louw for the respondents, inter alia, reiterates that the barring clause in question is void for vagueness insofar as it lacks specifications with regard to the area over which it applies. He, further, submits that there exists various genuine and material factual disputes between the parties which simply cannot be resolved on papers and should be resolved in favour of the respondents in accordance with the respondent-friendly test applicable in applications for final relief. The applicant failed to establish protectable interest and, even if it succeeded, the relief it seeks goes too far.

APPLICABLE LEGAL PRINCIPLES

- [14] In proceedings of the instant nature where a final relief is sought on motion the onus on the applicant includes showing on a balance of probabilities that it has a clear right which it seeks to protect, actual or imminent injury to the same as well as absence of alternative appropriate relief. (See V & A Waterfront Properties (Pty) Ltd & Another v Helicopter Marine Services Pty Ltd and Others 2006 (1) SA 252 (SCA) par [20]).
- [15] At common law where the final relief sought is the enforcement of a restraint clause the onus on the applicant is limited to proof of the existence of the covenant relied upon with the consequence that once established the

restraint is prima facie enforceable unless it is shown by the party seeking to escape it that it is unreasonable and contra bonos mores. (See Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A)).

- [16] Where the facts concerning the reasonableness or otherwise of the restraint are fully before the court, the court makes a value judgment on whether or not the restraint is reasonable regard being had to the fact that public interest requires that parties should comply with their contractual obligations in line with the notion expressed in the maxim *pacta servanda sunt* as well as the fact that it is in the interest of society that all people should “be productive and be permitted to engage in trade and commerce or professions”. (See Reddy v Siemens Telecommunications(Pty) Ltd 2007 (2) SA 486 (SCA) par [15]).
- [17] The enquiry as to the reasonableness of a contractual restraint involves consideration of facts and circumstances prevailing at the time the restrainer seeks to enforce the restraint such as the duration of the restraint, the area over which it applies, whether or not the restrainee was paid any consideration in respect of the restraint, whether the restrainee would still have the ability to earn a living if the restraint is enforced and the “proprietary interest or capital asset which the restrainer seeks to protect as well as all other relevant circumstances prevailing at the time enforcement is sought”. (See Magna Alloys and Research SA (Pty) Ltd, (supra) and J Louw and Company (Pty) Ltd v Richter and Others 1987 (2) SA 237 (N)).
- [18] In assessing the reasonableness of the restraint the court considers the questions whether or not there exists an interest which deserves protection after the termination of the contract between the parties; whether such protectable interest is threatened by the other party; whether such interest weighs both qualitatively and quantitatively heavier than the interest of the other party not to be economically inactive and unproductive; whether there is an aspect of public policy which either militates against or supports the enforcement of the restraint and lastly whether the restraint goes further than necessary to protect the relevant interest. (See Basson v Chilwan and

Others 1993 (3) SA 742 (A) at 767 and Kwik Copy (SA) Pty Ltd v Van Haarlem and Another 1991 (1) SA 472 (W) at 484 E with regard to the last enquiry).

- [19] A covenant which prevents a party after termination of his or her employment from earning a living by partaking in trade or commerce or profession without a corresponding interest of the other party deserving of protection is unreasonable and, as such, unenforceable. (See J Louw and Company (Pty) Ltd v Richter and Others supra).

- [20] Trade secrets, pricing and customer/supplier connections are all proprietary interests which prima facie deserve protection. A protectable customer or supplier relationship exists where an employee has personal knowledge of and influence over the customers or suppliers of his/her employer such that if he or she were to leave the employer he or she would automatically carry the customers with him or her and, if competition were to be allowed, he/she would be able to take advantage of his employer's trade connections. (See Rawlins and Another v Caravantruck (Pty) Ltd 1993 (1) SA 537 (A) at 541 D-I).

- [21] For a factual dispute to be real, genuine or bona fide the court should be satisfied that the party purporting to raise the same has in his/her papers seriously unambiguously addressed the alleged disputed issue. (See Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA) at par [13]).

- [22] In order to be confidential for purposes of qualifying as protectable interest information must have the necessary quality of confidence about it in the form of something which is not public property and public knowledge and be useful to trade and industry. (See Harvey Tiling Company (Pty) Ltd v Rodomac (Pty) Ltd and Another 1977 (1) SA 316 (T) at 321G).

- [23] The contract must have certainty and in the restraint clause such certainty is important to enable the restrainee affected thereby to know precisely where

he cannot operate in competition with the restrainer. The court cannot make a contract for the parties and in the event of vagueness as to the area in which the restraint operates the covenant is simply invalid for that reason. (See *Carthew-Gabriel v Fox and Carney (Pvt) Ltd* 1978 (1) SA 598 (R.AD)).

- [24] Courts interpret contractual provisions benevolently and contextually where possible to avoid having to set them aside on account of vagueness. A contract is read as a whole in order to determine the proper meaning of the words used where such words are capable of various meanings when viewed in isolation. (See *De Beer v Keyser and Others* 2002 (1) SA 827 (SCA) and *Bergh NO and Another v Van der Vyver and Another* [2010 ZAECHGHC 73]).

APPLICATION OF LEGAL PRINCIPLES AND FINDINGS

- [25] The relevant restraint clause is couched in the following words:

“34. Restraint of Trade

By virtue of the fact that the employee will, during the period of his/her employment with TALISMAN HIRE, gain possession of and acquire intermittent knowledge of the affairs and business of TALISMAN HIRE which is technical and confidential and would be of value to its competitors and to others, the employee hereby undertakes in favor of TALISMAN HIRE that, for period of one year after termination of his/her employment with TALISMAN HIRE howsoever caused, he/she will not, either directly or indirectly, be engaged or concerned or interested, within the area of 150 KM whether as principal, director, partner, agent, employee, shareholder, consultant, member, or in any other capacity whatsoever, whether similar to the foregoing or not, in any affairs of which compares with that carried on by Talisman Hire at the date of such termination.”

- [26] The clause clearly seeks to protect the business of the applicant, as the employer, from all its competitors regardless of the direction in which there

may be located and bars the first respondent, as the employee, from, inter alia, taking up employment with the former's competitors within the area of 150 kilometres without specifying the point from and the direction in which such area is to be calculated. However the fact that the clause seeks to protect the applicant indicates that the point from which the field covered by the restraint extends is the business centre of the applicant where the first respondent was employed. The fact that the clause seeks to protect the applicant's business from all its competitors suggests, in my view, that all such competitors located within 150 kilometres around the applicant at the workplace where the first respondent is placed are targeted.

- [27] I am, therefore, satisfied that a contextual and benevolent construction of the relevant clause indicates that the parties most probably intended that the restraint should operate within the radius of 150 kilometres from the applicant's Bloemfontein business centre which was the first respondent's workplace. (See Turner Morris (Pty) Ltd v Riddell 1996 (4) SA 397 (E)).
- [28] To the extent that a reading of the relevant clause in the context of the nature of the applicant's business and the employment relationship between the latter and the first respondent sheds light to what the parties most probably intended, it is, in my view, not vague. Even if I am wrong in the foregoing regard, I am satisfied that the tacit term of the relevant clause is that the bar operates within the radius of 150km from the workplace where the first respondent worked regard being had to the decision in Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A) at 531 H).
- [29] The parties are in dispute over whether or not there exists real, genuine or bona fide dispute of fact between them with regard to whether or not the applicant has protectable interest in the form of customer/supplier connections and confidential information. In the case of such a dispute the respondent-friendly approach applicable in proceedings of the instant nature requires that such a dispute be resolved in favour of the respondent in that a final order only be granted if the facts as stated by the respondent together

with those admitted in the applicant's papers justify such an order. (See Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)).

[30] Although I am satisfied from the papers that the respondents dealt seriously and unambiguously with the relevant issues, I am persuaded, on the probabilities, that the respondents' version to the effect that the first respondent's relationship with applicant's clients was ephemeral is so untenable that it can be rejected on papers as improbable regard being had to the fact that it is not in dispute that the first respondent was headhunted by Lohan, who was applicant's client and who offered her employment. If the relationship between the first respondent and Lohan, as applicant's client, was of very short duration and not intense Lohan would not reasonably possibly have been able to assess the first respondent's services to the extent of offering her employment at a monthly salary of R17 500 which was far more than the salary she was earning with the applicant viz. R11 750 and would, further, probably not have had the confidence to approach her with the offer in question. Lohan would, in my view, furthermore not have offered her that salary if she did not possess the skill commensurate with and commanding the same. On first respondent's own deposition she was already in contact with Lohan at least in 2013 when she could have, probably, provided it with applicant's 2013 pricelist. Such was definitely not a short-lived relationship in my view. (See Associated South African Bakeries (Pty) Ltd v Oryx and Vereinigte Bäckereien (Pty) Ltd & Andere 1982 (3) SA 893 (A) at 924 (A)).

[31] In respect of alleged confidential information and documents yielded by the Anton Piller order I am satisfied that there exists a real, genuine or bona fide dispute of fact on papers and that the respondents' version cannot just be rejected on papers. The applicant seeks final relief and there is no request for the issue to be referred to oral evidence. On respondents' version applicant's 2013 pricelist was found on a computer used by an employee other than the first respondent and was utilised in a comparison spread-

sheet for 2014 which was done before the first respondent's commenced employment with the second respondent.

- [32] On evidence before me I am satisfied that the applicant has protectable interest in the form of trade connections and not in the form of confidential information/documents when the respondent-friendly test is applied. In my view a mention by the first respondent of the applicant's name in an email directed to the applicant's supplier does not amount to the use of applicant's confidential information to advance the second respondent's business as correctly disputed by the first respondent. In my judgment such name-dropping, in fact, serves to identify the first respondent to the relevant supplier with reference to the applicant, thus, using applicant's trade connections. It is simply clear from the relevant mail that the relevant supplier is not easily accessible to role players such as the second respondent for, if that was not the case, it would not have been necessary for the first respondent to identify herself as follows:

"I used to be at Talisman Hire Bloemfontein, which is why I know your address."

- [33] I am, further, satisfied from available evidence that there is actual threat to applicant's protectable interest in the form of trade connections insofar as one of its suppliers has already been approached by the first respondent in the course and within the scope of her employment with the second respondent.

- [34] The question in the instant matter is not whether or not the applicant would lose clients and/or suppliers but whether or not it could lose the same regard being had to the respondents' view that there exists no plausible evidence that applicant has, in fact, lost any clients. (See Reddy v Siemens Telecommunications (Pty) Ltd (supra).

- [35] I am persuaded by available evidence that the applicant could lose clients/suppliers in that the first respondent could poach them as she has

access to and influence over them regard being had to the skill she has for which clients, such as Lohan, are prepared to pay. In my judgment applicant's clear right in the form of protectable interest weighs both quantitatively and qualitatively heavier than the first respondent's right to remain economically active and productive insofar as it provides employment to, inter alia, the two hire specialists who used to be the first respondent's colleagues.

[36] The restraint agreed upon by and between the applicant and the first respondent does not, in my view, go farther than necessary regard being had to the fact that same applies from February 2016 when the first respondent resigned and terminates 12(twelve) months later which is 6(six) months calculated from the date hereof. The first respondent had lasting relationship with the applicant's clients and it would take new employees some considerable time to build such a relationship in my view.

[37] In my judgement there exists no policy consideration which militates against the restraint in question as the applicant simply seeks to protect its interests for the benefit of continued existence of its business. In fact public policy expects of the first respondent to observe her contractual obligations as against the applicant. I am, further, at peace with available evidence to the effect that the covenant in question was made fairly with the first respondent acting freely at the time when she was already more than 5(five) years in the applicant's employ. She, thus, could not, in my view, have been desperate to secure employment when she signed the same. I am, further, satisfied that the first respondent was afforded an opportunity to reconsider her position after the Anton Piller order was executed and she, as such, reconciled herself with the possible consequences. The restraint is, therefore, reasonable and enforceable.

[38] The Anton Piller order secured by the applicant against the respondents yielded evidence tending to show that the respondents are violating its trade connections insofar as the first respondent was approaching one of its

suppliers for purposes of business. I am, thus, satisfied that the applicant was successful in that regard and deserves its costs.

ORDER

[39] In the result the following order is granted:

- 39.1 The first respondent is hereby ordered and directed to pay the amount of R35 000 to the applicant within a period of 14 days calculated from the date of this order;
- 39.2 That the first respondent is hereby interdicted and restrained from taking part in any business activities that are similar to that of the applicant or in competition with that of the applicant within a radius of 150 kilometres of the applicant's premises situated in Bloemfontein, Free State Province be it directly, indirectly, financial or otherwise, as principal, agent, partner, director, employer, employee, consultant or shareholder, whether on her own behalf or on behalf of any other person, close corporation, partnership or company with whom the applicant dealt at any time during her employment for period of 12 months commencing from 4 February 2016;
- 39.3 That the first respondent is hereby prohibited and interdicted to, directly or indirectly, make use of any of the applicant's trade secrets or trade connections in her possession;
- 39.4 That the second respondent is hereby interdicted and prohibited from, directly or indirectly, making use of or disclosing any of the applicant's trade connections;
- 39.5 That the respondents are ordered to pay the costs of this application, including the costs of the application issued under civil case cover

1910/2016 jointly and severally the one paying the other to be up solved from payment.

LJ LEKALE, J

On behalf of applicant:
Instructed by:

Adv. JC Coetzer
Lovius Block
Bloemfontein

On behalf of 1st & 2nd Respondents:
Instructed by:

Adv. MC Louw
Azar & Havenga Inc
Bloemfontein

PK