

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 1932 /2015

In the matter between:

CAROSPAN (PTY) LTD t/a NASHUA FREE
STATE AND NORTHERN CAPE

Applicant

and

I.D. OELOFSE
SAMSUNG BUSINESS TELEPHONE SYSTEMS

1st Respondent
2nd Respondent

CORAM: **BOONZAAIER, AJ**

JUDGMENT: **BOONZAAIER, AJ**

HEARD ON: **14 MAY 2015**

DELIVERED ON: **28 MAY 2015**

JUDGMENT

- [1] The applicant seeks to enforce a contractual restraint of trade and confidentiality undertakings given by first respondent in favour of the applicant. He seeks enforcement of the restraint until 30st

January 2016 in the Bloemfontein/Kimberley/Welkom/Upington area.

- [2] The first respondent opposes the application. The basis of the opposition and the essential point upon which the application hinges, is whether or not the first respondent is in fact presently employed by the second respondent. First respondent contends:

- 2.1 that the applicant did not make out a proper case in it`s founding affidavit and may not do so in the replying affidavit;
- 2.2 that the applicant entered into the contract with first respondent with unclean hands, therefor the contract is illegal;
- 2.3 it is disputed whether first respondent in fact entered the service of second respondent as from 5 January 2015 after he resigned from the employment of applicant.

FACTUAL BACKGROUND

- [3] This dispute arises from an initial contract of employment entered into between the applicant and first respondent. There existed an agreement between applicant (hereafter refer to as Nashua) and 1st respondent (hereafter refer to as Oelofse) in terms of which the latter was bound not to engage in any business activity (as defined) in the prescribed area in competition with the applicant.

[4] Nashua seeks to protect its existing clientele by interdicting Oelofse to:

- 4.1 divulge or make available to any other person details of any of the applicant's confidential information, or use it for his or any other person's benefit;
- 4.2 directly or indirectly:
 - 4.2.1 carry on or otherwise be engaged or associated or concerned or interested in or employed by;
 - 4.2.2 solicit business for;
 - 4.2.3 be a director, shareholder, member, employee or partner of or in;
 - 4.2.4 act as a consultant, trustee, manager, agent, representative, partner, advisor, officer or in any other capacity to;
 - 4.2.5 render any service (gratuitously or otherwise) to:
Any entity directly or indirectly engaged or interested in any competitive activity or business in competition with the applicant.
- 4.3 Solicit orders from the applicant's prescribed customers, client or suppliers for any of the prescribed goods and/or prescribed services;
- 4.4 Canvass business in respect of the prescribed goods and/or the prescribed services from prescribed customers, clients or;

- 4.5 Sell or otherwise supply any of the prescribed goods to any prescribed customer, client or suppliers;
 - 4.6 Render any prescribed services to any prescribed customer, client or supplier;
 - 4.7 Purchase any prescribed goods from any prescribed customer, client or supplier, or accept the rendering of any prescribed services from any prescribed customer, client or supplier.
 - 4.8 Solicit appointments as a distributor, licensee, agent or representative of any prescribed customer, client or supplier in respect of the prescribed goods and/or prescribed services;
 - 4.9 Carry a competitive activity or any portion thereof.
- [5] Oelofse allegedly has taken up employment with 2nd respondent (hereafter refer to as Samsung) in direct violation of the contractual arrangement.
- [6] The issues between the applicant and first respondent is firstly whether Nashua approached the court with unclean/dirty hands. This contention is primarily based upon the allegation that Samsung had concluded a similar kind of restraint covenant with

Oelofse prior to his employment with Nashua. Secondly if Oelofse is at present employed by Samsung.

UNDISPUTED FACTS

- [7] The contract of employment between Nashua and Oelofse was entered into on 16th October 2012, the restraint of trade agreement was concluded 20th March 2013.
- [8] Oelofse worked for Samsung prior to his employment with Nashua.
- [9] Oelofse was headhunted by Nashua and brought with him an existing client basis from Samsung for Nashua's benefit.
- [10] Samsung did not enforce its contractual rights at any stage to stop Oelofse's employment with Nashua.
- [11] Oelofse was promoted and since 2014 he has been made privy to all contractual information between Nashua and its existing clientele.
- [12] Oelofse resigned at Nashua on 5 January 2015 after he encountered dissatisfaction about certain aspects of his employment.
- [13] The alleged restraint period started at the last day of employment 31st of January 2015.

[14] The reasonableness of the contract as to period and ambit is not in dispute.

NASHUA'S CASE

[15] At the time when Oelofse left the employment of Nashua he indicated that he does not intend to join a competitor.

[16] On the 14th April 2015 Nashua became aware that Oelofse has taken up employment with Samsung from a date unbeknown. This was in direct violation of this covenant.

[17] Immediate steps were taken by the legal representatives of Nashua and letters were addressed to both respondents to refrain from any unlawful conduct.

[18] Oelofse phoned Me. Ferreira from Nashua to indicate his dismay with the situation.

[19] He never admitted or denied being employed by Samsung.

[20] It was argued on behalf of Nashua that Oelofse was aware of the restraint clause and he did not honour the agreement.

[19] If regards is had to the definition in the contract it is clear that Samsung is a direct competitor, specifically as far as the selling, installing and maintenance of telephone systems is concerned.

- [20] The office automation is a cutthroat industry in general and therefore it is extremely competitive.
- [21] Because of the competitive nature of the industry, all office automation companies in general and continuously devises to obtain an edge over a competitor. This is permissible, but the pricing structures, strategies, financial information are confidential information.
- [22] Nashua to prevent its employees (especially ex-employees) from divulging such confidential information when they leave the employ of Nashua.
- [23] Oelofse is well known in the industry. He had an existing clientele which he brought from Samsung when he joined Nashua. Once he became employed by Nashua these clients became Nashua clients.
- [24] Because of his intricate knowledge and intimate involvement in the running of the business and the execution of the contracts he also gained specific and very influential relationship with the customers of Nashua.
- [25] Oelofse is an extremely influential position to conjure customers into following him to his new employer.

- [26] Counsel for applicant argued that although the evidence of the people who conveyed the information of Oelofse's employment with Samsung to Nashua is hearsay evidence, what followed subsequent to that is important to take note of.
- [27] The attorney of applicant wrote letters to both the Respondents addressed to Samsung's offices in Parkwies, Bloemfontein. Both respondents received the above letters.
- [28] It was argued that Oelofse responded by saying that Ferreira had threatened him "Ek ontken dat daar 'n afleiding gemaak kan word dat ek vir Samsung werk." No further explanation was tendered where he is employed at present or any denial that he was employed by Samsung.
- [29] Neither did he explain how it came that he received correspondence at Samsung's offices nor what he was doing there.
- [30] Counsel for applicant further advanced that it is not correct to say Nashua wants to stop competition because Nashua seeks to secure existing clientele or that Nashua wants to prohibit Oelofse from earning a salary. Nashua only wants to secure its protectable interests.
- [31] Further argument on behalf of Nashua was that if you want to raise a *bona fide* defense, then one needs to expose all the facts. One

may not only say: “I deny it” - **Wightman v Headfour (Pty)** 2008 ZASCA 6 [10 March 2008].

[32] It is accepted and trite law that a real genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purported to raise the dispute had, in his affidavit, seriously and unambiguously addressed the facts said to be disputed. When the facts averred were such that the disputing party necessarily has knowledge of them and was able to provide an answer or countervailing evidence if they not be true or accurate but, instead of doing so rested his case on a bare denial or ambiguous denial, the court will generally have difficulty in finding that the test was satisfied **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd**, 1984 (3) SA 623 (A).

[33] From the above it is clear that Oelofse is employed by Samsung and that Nashua’s argument ran.

FIRST RESPONDENT `S DEFENCES

[34] The 1st Respondent on the other hand contends that the relief sought by the applicant is only for the remaining period of about 8 months.

[35] He says that the applicant did not make out a proper case in its founding affidavit. As to Oelofse’s alleged employment with Samsung subsequent to 5th January 2015 the only allegations made by the applicant in the founding affidavit are the following:

- 36.1 Mr. Oelofse has taken employment with Samsung on a date unknown to the applicant. The applicant received word on or about 14 April 2015 that this was the position.
- 36.2 This is hearsay evidence as no evidence was produced or supporting affidavit attached as to reveal from whom such “word” was received.
- 36.3 On 14th April 2015 Mr Engelbrecht became aware that Oelofse has taken up employment with Samsung. Mr Engelbrecht was also told that Mr Oelofse had professed that he intends focusing on Nashua’s business in the Free State and Northern Cape.
- 36.4 The source of Mr Engelbrecht, (employer of Nashua) about Oelofse’s alleged employment with Samsung is not identified. Such person has not submitted an affidavit in support of these allegations. This evidence therefore also amounts to hearsay and is inadmissible.

[37] According to Oelofse he was employed by Samsung during 2010.

[38] It is disputed whether Oelofse is or was in the service of Samsung as from 5 January 2015 when he resigned from Nashua.

[39] First Respondent further avers that it is trite that the primary purpose of a replying affidavit is to put up evidence which serves to refute the case made out by the Respondent in the answering affidavit. The Applicant may not make out its case in the replying affidavit.

[40] According to Oelofse he was subject to a restraint of trade clause of Samsung when he terminated his services with Samsung in 2012.

[41] Oelofse was however enticed by Nashua with an offer to take up employment with Nashua whilst such restraint of trade conditions were still in existence, enforceable and known to Nashua.

[42] Nashua undertook to assist Oelofse financially should Samsung enforce the restraint of trade clause. Nashua's conduct was improper.

ISSUES TO BE CONSIDERED

43.1 Whether the applicant made out a case in his founding affidavit.

43.2 The legal effect of the restraint of trade clause.

43.3 The unclean or dirty hands principle.

43.4 Whether the 1st Respondent was in the employment of 2nd Respondent.

LEGAL PRINCIPLES APPLICABLE TO AGREEMENTS IN RESTRAINT OF TRADE

[44] The *locus classicus* on this subject is **Magna Alloys And Research (Sa) (Pty)Ltd v Ellis** 1984(4) SA 874(A) at 897F - 898E, where Rabie JA summarized the legal position *inter alia*, as follows:

- “44.1 There is nothing in our common law which states that a restraint of trade agreement is invalid or unenforceable;
- 44.2 It is a principle in our law that agreements which are contrary to the public interest are unenforceable if the circumstances of the particular case are such, in the court’s view, as to render enforcement of the restraint prejudicial to the public interest;
- 44.3 It is in the public interest that agreements entered into freely Should be honoured and that everyone should, as far as possible, be able to operate freely in the commercial and professional world;
- 44.4 In our law the enforceability of a restraint should be determined by asking whether the enforcement will prejudice the public interest;
- 44.5 When someone alleges that he is not bound by a restraint to which he had assented in a contract, he bears the onus of proving that the enforcement of the restraint is contrary to the public interest.”

[45] The restraint clause is described in **The Principles Of The Law of Contract** 6th edition AJ Kerr, Butterworth 2002 as follows:

“An agreement, or a covenant in an agreement, is said to be in restraint of trade if it restricts the liberty of one or both of the parties to engage in one or more specified commercial activities. Trading in a restricted sense in competition with the other party, or working for a competitor, or making improper use of or confidential information gained in the service of the other party, or competing with other party for the favour of his clients, patients or customers, are the most common activities which are the subject of restraints.”

[46] In considering whether a restraint is unenforceable each case has to be considered on its own facts as stated in **Berger v Osher** 1965 (1) SA 558(W) at 559 H.

[47] Restraint of trade clauses may seem to infringe upon a party's right to choose its trade, occupation or profession freely as set out in section 22 of the Constitution. However in **Knox D`Arcy Ltd v Shaw** 1996 (2) 651(W) Van Salkwyk J indicated that “no fixed rule could be stipulated regarding the constitutional enforceability of all restraints; these would have to be dealt with on an ad hoc basis and the question of whether or not a particular restraint violated the provisions of ...the constitution determined in relation to the facts of each particular case.... As it stands the common law requires an examination of the conflicting interests concerned in a case by case basis. Unreasonableness is always a question which must be objectively determined with reference to the particular facts of the case.”

- [48] *In casu* unreasonableness is not disputed and therefore the court only needs to decide whether the restraint was against public interest.
- [49] Section 36(1) of the Constitution of 1996 provides that fundamental rights may be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Insofar as our law of contract therefore, allows restraint of trade clauses, it can be viewed a limitation on the affected rights as contemplated in Sections 8 and 36 of the final Constitution.
- [50] With regards to the unclean hand principle, for a defense based on unclean hands to succeed the court must be able to find fraud dishonesty or *mala fides* on the part of the claimant.
- [51] The doctrine of unclean hands is mainly found in the field of unlawful competition.
- [52] The principle relied upon by Oelofse, which is referred to in trademark law as the 'doctrine of unclean hands' has been considered in several cases in this country, most of which are conveniently collected in the judgment of **Tullen Industries Ltd v Da Sousa Costa (Pty) Ltd And Others**, 1976(4) SA 218 (T) it was made clear in that case that it is not enough to disentitle as

party to relief that the conduct whereby he acquired the requisite reputation was illegal: such illegality must have taken the form of fraud or, at the very least dishonesty.

[53] It must be considered *in casu* if Nashua was fraudulent or at least dishonest when the contract was concluded with Oelofse.

[54] *In casu* a point was taken that there is no evidence to the effect that an injury was committed or any harm caused by Oelofse.

[55] In the case of **Reddy v Siemens Telecommunications (Pty) Ltd** 2007 (2) SA 486 (SCA) it was clearly stated “that it is not necessary for the applicant to show actual harm. The applicant is required to prove only that the former employee is potentially able to exploit its trade secrets or business connections in new employment.”

[56] It was also implied that Nashua tried to eliminate competition from Samsung. In the case of **Automotive Tooling Systems (Pty) Ltd v Wilken And Others** 2007(2) SA 271 it was stated that: “A restraint will be considered to be unreasonable, and thus contrary to public policy, and therefore unenforceable, if it does not protect some legally recognizable interest of the employer but merely seeks to exclude or eliminate competition.”

[57] It is interesting that Oelofse says if the court finds him to be employed, he is of the contention that Nashua seeks relief because they want to exclude competition. It seems as if Oelofse is trying every tactical option to be relieved from the restraint

clause. If he is indeed not employed why should anything else matters, one might wonder THE ONUS:

- [58] The covenantee/applicant seeking to enforce the restraint need do no more than to invoke the provisions of the contract and to prove the breach. The covenantor/first respondent seeking to avert enforcement is required to prove on a preponderance of probability that in all the circumstances of the particular case it will be unreasonable to enforce the restraint if unreasonableness is whereon he relies.

DISCUSSION OF THE LAW

- [59] It is clear that if one enters into a contract with a restraint of trade clause and one is aware of the restriction and the restriction is not unfair or unreasonable or against the public interest, that one is bound by that restriction.
- [60] As described in the case of TULLEN INDUSTRIES *supra*, the conduct of Nashua in concluding the contract with Oelofse, in my view, cannot be stigmatized as fraudulent or even dishonest.
- [61] Samsung had its own contractual rights against Oelofse when he resigned from its employment in 2012 to join Nashua. It was Samsung's choice not to enforce the restraint of trade clause and that cannot be held against Nashua.

[62] Argument on behalf of Oelofse was advanced that Nashua tried to eliminate Samsung as fair competition. In the case of **Basson v Chilwan And Others** 1993 (3) SA 742 (A) it was stated that “it has long be accepted that the mere elimination of competition as such is not the kind of interest which can be protected by a restriction of freedom of trade after the termination of a contract; that is, that it does not weigh up against the prejudice which the other party will suffer if he cannot freely exercise his calling.”

[63] I did not get the impression that this was indeed the situation in this case.

CONCLUSION

[64] Hearsy evidence can be taken in account in contexts with what followed the events.

[65] Since Oelofse had taken up employment with a rival company in a position similar to the one he had occupied with Nashua, the disclosure of confidential information presented an obvious risk to Nashua.

[66] This risk remains while Oelofse is in the employment of Samsung.

[67] The unclean hands principle does not apply in this as argued by counsel for Oelofse.

[68] I am satisfied that the Nahua has discharged its onus of proving the existence of the contract in restraint of trade, and that Oelofse is in breach of that in that he has taken up employment with a direct competitor of Nashua, being Samsung.

COSTS

[69] There is no reason why the costs should not follow the outcome of the application.

ORDER

[71] I make the following order:

71.1 prayers 2 and 3 as per Notice of Motion are granted.

71.2 First respondent is ordered to pay the applicant's costs on a party and party scale.

S. BOONZAAIER, AJ

On behalf of the applicant: Adv. S. Grobler
Instructed by:
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On behalf of the respondent: Adv. H. Cilliers
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