IN HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 11211/14

EAGLEBURGMANN SEALS SA (PTY) LTD **APPLICANT**
[Registration No. 2003/015783/07]

And

NAIDOO, MARK **RESPONDENT**
[ID No, 7…………….]

JUDGEMENT

MBATHA J

[1] On the 30th of April 2015, I made the following order:

(a) The Respondent is interdicted and restrained until 31 August 2015 in the Province of KwaZulu-Natal from:-

i) divulging or disclosing to any person (private or legal) or making use of or availing himself or deriving a profit from the Applicant's name, business strategy or business image, whether for the Respondent's own benefit or that of others or any other information or knowledge relating to the business or finances or affairs or trade secrets or trade connections or marketing techniques or sales philosophies of the Applicant which may have come to the Respondent's knowledge during his employment with the Applicant, unless he is required to do so by the directors of the Applicant or a valid court order;

ii) soliciting or endeavouring to solicit, interfere with, or endeavouring to interfere with, enticing or endeavouring to entice, away from the Applicant, any person who was a customer of the Applicant who was accustomed to dealing with the Applicant;

(b) The Respondent is interdicted and restrained until 31 August 2015 in the Magisterial Districts of Durban, Pietermaritzburg, Port Shepstone, Pinetown, Reunion, Pinelands, New Germany, Mobeni, Westmead, Hammarsdale, Meadowdale, Chatsworth, Queensburgh, Merebank, La Lucia Ridge, Canelands, Phoenix, Umbogintwini, Marburg, Cato Ridge, Isipingo, Willowton, Jacobs, Ixopo, Mayville, Serena, West Beach, Mount Edgecomb, Albertsville, Glen Anil, Verulam, Cascades, Chatsworth and Congella. from:

i) carrying on any business carried on by the Applicant;

ii) being in any way employed in such business;

iii) being in any way interested or engaged in, or associated or concerned with such business, whether as principal, shareholders, director, agent or otherwise;

iv) being in any way associated with or engaged in or interested in or concern himself in financing or guaranteeing the obligations of such business;

(c) The Respondent is to pay the costs of this application, including the costs which were reserved on 10 October 2014.

I indicated that my reasons will follow.

[2] The Applicant in this case is Eagleburgmann Seals SA (PTY) LTD. The Respondent is Mark Naidoo of Motala Heights, Naidoo Road, Durban.

[3] The Applicant sought an order to enforce a restraint of trade agreement with the Respondent for a period of twelve (12) months. This application was initially brought on an urgent basis on the 25th of September 2014. A consent order was granted on the 10th of October 2014 to the effect that the application was adjourned sine die, the applicant to file its Replying affidavit within ten (10) working days of the date of the order and that pending the finalisation of the application, the Respondent undertook not to carry any business in any capacity whatsoever, as principal, shareholder, director, agent, employee, or otherwise, carried on by the Applicant with any of the Applicant's

clients who were serviced or dealt with by the Respondent at any time during his employment with the Applicant, and the costs were reserved.

[4] The Respondent was employed by Applicant as a technical sales representative of the Applicant in its Durban branch with effect from the 1st of June 2007. Prior to that he was employed in the same company as from the 4th of April 1996 as a reconditioning assistant. The Applicant is in a business of reconditioning, refurbishing, manufacturing, servicing and supplying of mechanical seals and other related products.

4.1 The Respondent was responsible for the servicing of 51 customers throughout KwaZulu-Natal. In dealing with these clients, he developed intimate knowledge of the Applicants' products and clients' base. The Respondent according to the Applicant was their highest performing sales representative in Durban and responsible for a huge turnover. This is not disputed by the Respondent. The Respondent was the face of the Applicant, servicing a total of 51 customers throughout KwaZulu-Natal. The Respondent had access to the Applicants' customer base, listings, product range and maintenance practices.

4.2 The breach of the employment contract occurred when the Applicant received invoices with the reference "Mark Naidoo". It then transpired that the Respondent was purchasing directly from SA Mechanical in his personal capacity. This was confirmed by invoices found on the Respondent's computer, with confirmed orders from the Applicant's clients which had nothing to do with the Applicant. This resulted in the dropping of the sales with one of their major clients, Dyefin. Investigations led to the discovery that Dyefin was now supplied by ACT General Maintenance, the main contact person being Mark Naidoo cell 082………., address being 22A Trotler Road, Westmeds". This major breach of contract led to the disciplinary hearing of the Respondent, which resulted in his immediate dismissal on the 27th of August 2014. He was also advised in writing after his dismissal not to breach the terms thereof, but deliberately breached such terms on the basis that he has to earn a living.

4.3 To prove further that he was acting in competition with the Applicant, the following evidence come afore. Subsequently, after his dismissal a call was received from Global Armature Winders on his business mobile phone regarding the seals. The seals were later on collected from a Malcolm Naidoo and not from the Applicant. Global Armature had been one of the Applicants' clients. This was a confirmation that the Respondent was breaching his restraint of trade agreement with the Applicant.

4.4 The Respondent also supplied Global Armature with seals which were never reflected in the Applicant's books. He supplied them with seals from MS Mechanical, a competitor to the Applicant. The Respondent continued to conduct business with the Applicant's clients after his dismissal in breach of the Restraint of Trade agreement with the Applicant.

[5] The Respondent has tried to rebut the allegations in the Applicant's affidavit, however, the Applicant has provided proof by way of emails and telephone calls, indicating that indeed the Respondent was selling a competitor's product, to its clients, in competition against the Applicant.

5.1 The Respondent disputed that the agreement was of any legal force by averring that it's a forgery, he was forced to sign the agreement and that he did not sign the last page, therefore, it was of no force and effect. This is a contradiction in terms as on the other hand he denies signing it, at the same time alleges that he did not sign the last page. He also admits signing it, but says that it was under duress. These things cannot exist side by side. To rebut the defence of forgery and duress, the Applicant has also shown that he had previously signed an identical document in January 2007. In the light therefore, I can accept that the Respondent was *au fait* with the terms of the restraint of trade agreement, that there could not have been any forgery of his signature or lack of knowledge of the terms of the agreement.

[6] I am of the view that there was a binding contract between the parties. In terms of the judgment in **Greendale Hardware and Electrical (PTY) LTD v Bangaba**[1] a restraint of trade is an obligation voluntarily undertaken by an employee to refrain from the exercise of freedom of trade in favour of the employer in the exercise of freedom of contract. Basically, a restraint of trade agreement is legally binding and therefore enforceable, unless there is a valid legal reason for not doing so, for instance, if it is against public policy or unreasonable. **Magna Alloys and Research (SA) (PTY) LTD v Ellis**[2].

For a restraint of trade to be valid, it must also relate to the protectable interest on the part of the employer. Therefore, it is vital that the employer identifies precisely the interest it seeks to protect. The interest that the Applicant sought to protect was clearly set out in the contract being the protection of its trade connections where, if competition were allowed, the

[1] (2008) JOL 21460 (ZS).
[2] 1984 (4) SA 874 (A).

employee would take advantage of the employer's customer's connections. These included trade secrets, confidential information, and customer's goodwill or trade connection. There has been no confusion with the use by the Respondent's own expertise, know-how, skill and experience. It is not in dispute that the Respondent was a highly skilled employee of the Applicant.

[7] On the date of the hearing of this matter, the Respondent had not filed any heads of argument. He appeared in person, addressed the Court only on the basis that he needed to earn a living, he was exploited by his ex-employer and that the restraint was prejudicial to him. I have also considered the reasonableness of the restraint, the period of restraint, duress, and the interests of the individual versus the interests of the company. In that regard, I have considered the various types of information that could be considered confidential.

In **Meter Systems Holdings Ltd v Venter and Another**[3] it was held that though there is *numerus clausus* as to the type of information that could be considered confidential, our courts have recognised certain categories of information as confidential. These include:

(a) Information received by an employee about business opportunities available to an employer, even if such information can be obtained from another source.
(b) Information relating to proposals or, *inter alia*, the marketing of a new product.

[3] 1993 (1) SA 409 (W).

(c) Information relating to the price at which one person has tendered competitively to do work for another is confidential in the hands of those who stand in a fiduciary relationship.

[8] I find that the information in possession of the Respondent was confidential, as it is applicable in the business of the Applicant.

(a) It was not public knowledge or property, as it was known only to a restricted number or closed circle of people; and

(b) It was of economic value to the Applicant who was seeking an order to protect it. See ***Aranda Textile Mills (PTY) LTD v Hurn and Another***[4].

The Applicant has shown that the Respondent has personal knowledge of, and influence over its customers and suppliers which has enabled him, to take advantage of his former employer's trade connections. The relationship with the Applicant's customers put him in a position to build up a particular relationship with the customers, which he easily used to induce the customers to follow him wherever he went to. In that case, the Business of the Applicant needs to be protected.

[9] I have weighed the interests of the employee to be gainfully employed against the interests of the employer. The Respondent is only restricted to specific areas and he could easily be employed anywhere in the KwaZulu-Natal province, save for the places mentioned in the order and at any other place in South Africa.

[10] Accordingly, for these reasons I gave the order dated 30th of April 2015.

[4] [2000] 4 All SA183.

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MBATHA J

<u>Appearances</u>

Date of hearing:	30 April 2015
Date for reasons for judgment:	22 June 2015
For the Applicant:	Advocate A.G. South SC
Instructed by:	Adams and Adams
	Durban
For the Respondents:	Mr Mark Naidoo (in person)