IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION, BLOEMFONTEIN

Case No. : 4907/2013

In the application between:-

CBS- BLOEMFONTEIN BRAKE & CLUTCH BK Applicant

(Reg No. 2010/150850/23)

and

WERNER STEYN BRITZ 1st Respondent

DICKY BOTHMA 2nd Respondent

JUDGMENT BY: MOLOI, J

HEARD ON: 11 MARCH 2014

DELIVERED ON: 27 MARCH 2014

---

[1] In this matter, the applicant seeks to enforce a trade restraint against the former employees, the first and the second respondents. The trade restraint was contained in the employment contract signed by both the respondents. The applicant is conducting the business of repairing brakes, clutches, brake drums and rebuilding brake shoes.

[2] It is common cause that the two respondents resigned from the employ of the applicant at the beginning of July 2013 as they wanted to start their own workshop. The first respondent was the sales manager of the applicant and was second in command. The first respondent communicated and visited the applicant's clients, dealt with them and established relationships with them. He was so to say "the face" of the applicant. The second respondent was a specialist technician with knowledge and experience in repairing brakes, clutches, brake drums and rebuilding brake shoes. He was also supervisor of the other workers and signed off their work.

[3] Later on 10 October 2013 the applicant discovered that the business called HBC Centre was run by the two respondents and was equipped with exactly the same equipment it had and was conducting the same business as itself despite the limitations contained in the restraint clause referred to above. The services rendered by the applicant in making brakes and brake shoes is highly specialised and requires specialised equipment and expertise to ensure accuracy.

[4] After the departure of the two respondents many of the applicant's clients no longer made use of the applicant's services without giving reasons why. The applicant's monthly gross income dropped by 35% threatening retrenchment of some workers because of the slump in the business. The First respondent had excellent business relationship with the applicant's clients and their employees. Though the respondents deny enticing the applicant's clients to their business, some names appearing on a list purporting to be HBC Centre clients are, in fact, the applicant's former clients who have since ceased to do business with the applicant.

[5] The respondents contended that their business, HBC Centre, is an ordinary workshop and do business with hydrolic brakes and clutches for motor vehicles and that the applicant's business has nothing to do with installation and manufacturing of hydrolic brakes and clutches for heavy vehicles. They further contended that HBC Centre is different and is not in competition with the applicant's business. The respondents deny the services rendered by the applicant are specialised, deny that the slump in the applicant's business is due to the business of the HBC Centre and deny that some clients who are no longer the applicant's clients are now HBC Centre clients. The respondents deny tauting the applicant's clients. The respondents contend further that they resigned from the applicant because the applicant's business was doing badly to an extent that their salaries were cut. They deny further that HBC Centre is their business and

that Viday Y Arte Trading CC owns HBC Centre and that the CC has the first respondents' wife as its sole member.

[6] In our law restraints of trade are valid if they are not contrary to public policy and are reasonable; **Magna Alloys & Research (SA) (Pty) Ltd v Ellis** 1984 (4) SA 874 (A). In **J. Louw & Co (Pty) Ltd v Richter** 1987 (2) SA 237 (N) at 243 B – D the court stated as follows:

> "Covenants in restraint of trade are valid. Like all other contractual stipulations, however, they are unenforceable when, and to the extent that their enforcement would be contrary to public policy. It is against public policy to enforce a covenant which is unreasonable, one which only restricts the covenantor's freedom to trade or work. In so far as it has that effect, the covenant will not therefore be enforced. Whether it is indeed unreasonable must be determined with reference to the circumstances of the case."

[7] The onus of proving that a restraint of trade agreement is not enforceable rests on the party seeking not to be bound thereby i.e. the covenantor, on the ground of being contrary to public policy. **Magna Alloys & Research (SA) (Pty) Ltd v Ellis** 1984 (4) SA 874 (A) at 897F - 898E. All the covenantee needs to prove to enforce the restraint is the existence of the contract and that it is being breached: **Basson v Chilwan and Others** 1993 (SA) 742 (A) at 776H. A restraint of trade is enforceable unless it is unreasonable and against

public policy: **Magna Alloys** case, *supra*, at 898 A - B where the following was stated:

> "It is generally accepted that a restraint of trade will be considered to be unreasonable, and thus contrary to public police, and therefore unenforceable if it does not protect some legally recognizable interest of the employer but merely seeks to exclude or eliminate competition."

In **Basson v Chilwan and Others** 1993 (3) SA 742 (A) at 767 E - F the following was stated:

> "Wat die partye self betref, is 'n verbod onredelik as dit die een party verhinder om hom, na beëindiging van hul kontraktuele verhouding, vryelik in die handels- en beroepswêreld te laat geld, sonder dat 'n beskermingswaardige belang van die ander party na behore daardeur gedien word. So iets is op sigself strydig met die openbare beleid."

In the same case at 767 G – H the test set for determining the reasonableness or otherwise of the restraint of trade provision was said to be:

(a) Is there an interest of the one party which is deserving of protection at the termination of the agreement?

(b) Is such interest being prejudiced by the other party?

(c) If so, does such interest so weigh up qualitatively and quantitatively against the interest of the latter party that the latter should not be economically inactive and unproductive? and

(d) Is there another facet of public policy having nothing to do with the relationship between the parties, but which requires that the restraint should either be maintained or rejected.

(e) The further requirement is whether the restraint goes further than is necessary to protect the interest: **Kwik Kopy (SA) Pty) Ltd v Van Haarlem and Another** [1998] 2 ALL SA 362 at 484 E.

If the interest in (c) is greater than the interest in (a) the restraint will as a rule be unreasonable and consequently unenforceable: **Basson v Chilwan**, *supra*, at 767 G - J.

[8] Our law recognizes two categories of proprietary rights that the restraint of trade may protect. Firstly, is that relating to the relationships one might have or develop with existing or potential customers of a business, or its suppliers commonly referred to as “trade connections”. Secondly, is that relating to confidential information useful for the well-being of the business commonly referred to as “trade secrets”. **Rawlins and Another v Caravantruck (Pty) Ltd** 1993 (1) SA 537 (A); **Townsend Productions (Pty) Ltd v Leech and Others** 2001 (4) SA 33 (C) and

Mossgas (Pty) Ltd v Sasol Technologies (Pty) Ltd [1999] 3 All SA 321 (W) at 333 f.

[9] In this case the applicant's case is that the first respondent was the sales manager of the applicant. As such he served the applicant's customers daily and developed personal relationships with them; he knew the prices and was consulted on every aspect thereof as he knew the business of the applicant. The first respondent was the "face" of applicant's business and the intimate relationships he developed with the customers constitutes a proprietary interest worthy of protection. The second respondent was a technician in the applicant's workshop and had expertise and experience with regard to the repair of brakes, clutches, brake drums and re-building of brake shoes. To can do all this one needed to use complicated and specialised machines provided by the applicant and if not properly done could be life threatening. The expertise and 'know-how' the second respondent possessed is not public knowledge and is limited to a few select people. The second respondent also knew the business of the applicant as well as its clients. HBC Centre had acquired specialised equipment like the applicant's which would put HBC Centre in a position to do similar services as the applicant. As a consequence it was submitted that both the first and second respondents were in a position to jointly cause damage to the applicant's business. The general complaint of the applicant is that the respondents rendered the services similar to those of applicant and enticed, directly or indirectly, the existing customers of the

applicant leading to the slump in the applicant's business which necessarily negatively affected the profits. The relationship the respondents developed with the applicant's clients made it possible for them to entice the applicant's customers leading to the infringement of the applicant's proprietary interest.

[10] The essence of the applicant's case is that the respondents are conducting business under the name and style of HBC Centre. This is not denied. The respondents deny the ownership of the business and allege Viday Y Arte Trading CC is the owner of HBC Centre. This denial is of no consequence, however, since the respondents are doing the business at HBC Centre contrary to the restraint clause providing in paragraph 21.4 that:

> "The employee further undertakes not to be directly or indirectly interested in, or carry on, or to be engaged in or concerned with, any business, or to be interested in or concerned with any company, firm, partnership or close corporation, trust, undertaking or concern, either as employee or in any other capacity of whatsoever nature, which <u>carries on any business which competes in anyway, either directly or indirectly, with the business carried on by the employer</u>." (My emphasis)

[11] The applicant, in its founding affidavit described its business as follows at 11.1:

> "Dit dien vermeld te word dat die Applikant se besigheid gemoeid is met die verkoop en herstel van remme en koppelaars. Die Applikant herbou voorts ondermeer remskoene en sny en herstel remdromme. Ongeveer 70% van die besigheid van die Applikant bestaan uit die herbou van remskoene."

The applicant's sole member, Snyman, visited the premises of HBC Centre and noticed that the business had exactly the same equipment as the applicant and it purports to do business "For all your hydrolic brake and clutch requirements and fitment". He took photographs of a business card having the same message and the equipment. Snyman, however, did not say what products were found to be produced at HBC Centre nor what services were being rendered at HBC Centre. The respondents deny they are rendering the same services as the applicant and categorically stated that:

> "Die Applikant se besigheid is geensins bemoeid met die installasie en/of vervaardiging van hidroliese remme en koppelaars en die meegaande dienste wat daarmee gepaard gaan nie. HBC installer spesifiek hidroliese dienste van remme en koppelaars en spesifiek ten aansien van swaar voertuie. Ek bevestig en ek lê klem daarop dat die besigheid van die Applikant en die van HBC wesenlik verskil en geensins in direkte kompetisie met mekaar is nie".

It was only in replication that the applicant alleged it also dealt with hydrolic brakes and clutches. It is clear that the applicant already knew what HBC Centre advertised as its core business, namely the installation and manufacture of hydrolic brakes and clutches from the business card and sign board placed outside the business premises before the founding affidavit was drawn up. In replication the applicant goes at length to explain the difference between ordinary and hydrolic brakes to display its intense knowledge of the difference between the two. Clearly there is a dispute of fact in this regard and a final interdict sought by the applicant would be granted only if those facts averred by the applicant had been admitted by the respondent together with the facts alleged by the respondent. **Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd** 1984 (3) 623 (A) at 634 F – H. The applicant knew the difference between ordinary and hydrolic brakes and clutches and he knew that before Snyman made his founding affidavit but chose to talk about hydrolic brakes only in replication.

[12] It is not mentioned anywhere that the respondents sell and repair breaks and clutches; that they rebuild brake shoes which consists of 70 % of the applicant's business and repair brake drums. If any of these activities were taking place at HBC Centre, Snyman, during his visit, could not have missed noticing it. It consequently cannot be said that there is proprietary interest to be protected by the restraint. The respondents, on the other hand deny that the applicant has a proprietary interest deserving of the protection by a restraint clause in the employment contract.

[13] In the restraint clause itself as quoted above it is clear from the underlined phrase that the applicant sought to protect its business from competition and not to protect its proprietary interest which, as I have pointed above, cannot be said to be under threat from the activities of the respondents which are not what the applicant described as its main business. The basis of the respondent's opposition is that their business consists of installation and manufacture of hydrolic brakes and clutches for heavy motor vehicles whereas that of the applicant is "verkoop en herstel van remme en koppelaars. Die Applikant herbou voorts ondermeer remskoene en sny en herstel remdromme. Ongeveer 70 % van die besigheid van die Applikant bestaan uit herbou van remskoene."

[14] Even if the applicant succeeded to prove an infringement of its proprietary interest, how would it fare when the test in **Basson v Chilway and Others**, *supra* at 767 G-H is applied to the set of facts? Public policy requires that people engage in income-producing activities in order to sustain themselves and their families. Where one is possessed of skills that he/she can deploy profitably and legally, such person may not be restricted from doing so. Even section 22 of the Constitution of the Republic of South Africa Act 1996 guarantees such right. If the applicant had a protectable right under the contract of employment, that right is qualitatively and quantitavely weighing less than the respondents interest in economic activity and productivity. The skills the respondents have and the relationships they are able to build are not acquired from their

employment with the applicant and it will be against public policy and consequently unreasonable to restrain them from employing their skills to earn a living: **Basson v Chilwan** at 767 G - J. The underlined case in the restraint clause clearly indicates that the applicant sought to curtail competition other than protecting a proprietary right.

[15] In the premises the following order is made:

ORDER

The application is dismissed with costs.

K. J MOLOI , J

On behalf of the applicant: Adv. W Groenewald

Instructed by:

Hill Mchardy & Herbst

BLOEMFONTEIN

On behalf of the first respondent: Adv. L le Roux

Instructed by:

Jordaan Rijkheer

BLOEMFONTEIN