REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, PRETORIA)

12/6/2013

Case no: 60238/12

(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED.

12/6/2013
DATE

SIGNATURE

In the matter between:

SG CONVENIENCE (A DIVISION OF SUPER GROUP TRADING (PTY) LTD)	**APPLICANT**

and

JORGE PAULO DE SOUSA	**FIRST RESPONDENT**
NAMIB DISTRIBUTORS CC	**SECOND RESPONDENT**

JUDGEMENT

PIENAAR A J:

[1]On 18 October 2012 Applicant launched an urgent application against First and Second Respondents for a temporary interdict pending the adjudication of Applicant's application for a final interdict, founded on a restraint of trade and confidentiality agreement allegedly entered into between Applicant and First Respondent.

[2]On behalf of Applicant appeared Mr C Whitcutt SC and Ms D Wood and on behalf of First Respondent appeared Ms L Erasmus, with no appearance on behalf of Second Respondent against whom no relief was claimed.

[3]The matter was enrolled in the urgent Court for 6 November 2012 and on 9 November 2012 the application for interim relief was dismissed, each party to pay its own costs.

[4]Thereafter Applicant proceeded to have the application enrolled to be adjudicated in order to obtain final interdictory relief against First and Second Respondents.

[5]Having regard to the content of First Respondent's answering affidavit it clearly emerged that a real factual dispute existed regarding the question whether a restraint of trade and confidentiality agreement existed between Applicant and First Respondent and, secondly, whether Applicant had acquired a

protectable proprietary interest such as to render the enforcement of the restraint of trade reasonable.

[6]Prior to the matter proceeding to Court the parties by agreement prepared a draft order which was made an order of Court. In terms thereof the following order was handed down:

> *"1 The determination of the relief sought in Part B of the Applicant's notice of motion dated 18 October 2012 is referred for the hearing of oral evidence, on 25 March 2013 for a determination of*
>
> *1.1 whether the first respondent entered into a restraint of trade undertaking with the applicant;*
>
> *1.2 if so, whether the applicant has a protectable interest such as to render the enforcement of the restraint of trade reasonable.*
>
> *2 The evidence shall be that of any witness whom the parties or either of them elect to call, subject, however, to what is provided in para 3 hereof;*
>
> *3 Save in the case of Mr Jerome and Mr De Sousa, neither party shall be entitled to call any witness unless:*

3.1 it has served on the other party at least 14 days before the date appointed for the hearing a statement wherein the evidence to be given in chief by such person is set out;

3.2 the Court, at the hearing, permits such person to be called despite the fact that no such statement has been so served in respect of his or her evidence.

4 Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not.

5 The fact that a party has served a statement in terms of para 3 hereof, or has subpoenaed a witness, shall not oblige such party to call the witness concerned.

6 Within 15 days of the making of this order, each party shall make discovery on oath of all documents relating to the issues referred under para 1 hereof, which are or have at any time been in the possession or under the control of such party. Such discovery shall be made in accordance with Rule 35 of the Uniform Rules of Court and the provisions of the Rule with regard to the inspection and production of documents discovered shall be operative.

7 To the extent necessary a pre-trial conference will be held after the exchange of witness statements and discovery but in any event not less than two weeks prior to the hearing of the matter.

8 The incidence of costs incurred to date shall be determined at the hearing of oral evidence.

[7]Suffice it to point out that no pre-trial conference was held as ordered.

[8]On 25 March 2013 the matter was set down for the hearing of oral evidence in order to determine and adjudicate the issues referred for the hearing of oral evidence in order to determine whether the relief sought by Applicant in Part B of its Notice of Motion should be granted or refused.

[9]The Applicant, SG Convenience, being a division of Super Group Trading (PTY) Ltd is involved in the retail and distribution business supplying fast moving consumer goods such as beverages, confectionary and grocery items directly to customers in various sectors of the market, including, but not limited to forecourts and the petroleum retail sector, small and medium businesses. The Applicant operates its business throughout South Africa and currently has approximately eighteen thousand customers on its books. In order to obtain business the Applicant relies almost exclusively on its sales representatives to manage and promote its business relationship with its customers, of whom a certain number

is allocated to each sales representative to service, and depending on the customers' needs, the customers are visited by sales representatives on a weekly to fortnightly basis, who then meets with the customers and manages all aspects of the customers' orders. The key to the success of Applicant's business is the emphasis placed by the Applicant on its customer relationships developed by the sales representatives attending to a dedicated number of customers with whom they build long standing relationships in order to understand and anticipate the needs of each of the customers. Consequently service delivery and customer relationships are of paramount importance to the Applicant.

[10]The Second Respondent is also involved in the retail and distribution business providing products directly to customers in various sectors of the market in direct competition with the Applicant. The business within which the Applicant and the Second Respondent operate is extremely competitive, which competitive-ness is exacerbated by the fact that customers do not enter into any direct purchasing arrangements with retail distributors such as the Applicant and Second Respondent. Accordingly, there is no guarantee of a continued support by a customer, nor is there an obligation on such a customer to purchase from only one provider, albeit the Applicant or Second Respondent.

[11]The aforesaid summation was common cause between the parties as well as the fact that First Respondent, had prior to his employment with the Applicant, been employed by the Second Respondent, who at that time was trading as Palm Tree CC, for a

period of approximately twenty two years. Furthermore it was common cause that First Respondent had been head hunted by Roy Pienaar, commencing in December 2007, in order to join his company, R & P Marketing, which was then a division of Super Group Trading (PTY) Ltd, which was subsequently changed to SG Convenience.

[12]The crux of the dispute is founded therein that the Applicant alleges that First Respondent, when he took up his employment with the Applicant during late February or early March 2008, had entered into a restraint of trade and confidentiality agreement with the Applicant, duly signed by both parties. First Respondent emphatically and vociferously denied this fact. To exacerbate the situation the Applicant was unable to produce the original written restraint of trade and confidentiality agreement signed by First Respondent or a copy thereof, whilst First Respondent is emphatic in his denial that he had not signed a restraint of trade and confidentiality agreement, contending that he had deleted the clauses dealing with the restraint of trade and confidentiality prior to signing his contract of employment. In order to overcome the hurdle with which the Applicant was faced, several requests were directed at First Respondent to once more sign a contract of employment containing a restraint of trade and confidentiality clause, which First Respondent obstinately refused to accede to.

[13]Having regard to the issues referred for the hearing of oral evidence, it is clear that should the Applicant fail to prove on a balance of probabilities that First Respondent had entered into a

restraint of trade and confidentiality agreement with the Applicant, that would be the end of the matter, *cadit quaestio*, with no need for the second issue referred for the hearing of oral evidence to be determined.

[14]Having regard to the fact that the Applicant's case is founded on a restraint of trade and confidentiality agreement, I deem it apposite to refer to the incidence of the burden of proof as expounded in **Basson v Chilwan & Others 1993(3) SA 742 (AD)** at **776I – 777A**

> *'The incidence of the onus in a case concerning the enforceability of a contractual provision in restraint of trade does not appear to me in principle to entail any greater or more significant consequences than in any other civil case in general. The effect of it in practical terms is this: the covenantee seeking to enforce the restraint need do no more than to invoke the provisions of the contract and prove the breach; the covenantor 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 the Court is unable to make up its mind on the point, the restraint will be enforced. The covenantor is burdened with the onus because public policy requires that people should be bound by their contractual undertakings. The covenantor*

is not so bound, however, if the restraint is unreasonable, because public policy discountenances unreasonable restrictions on people's freedom of trade.'

[15]The aforesaid exposition is trite law and has been followed and applied in preceding and numerous subsequent decisions. See **Magna Alloys and Research (SA) (PTY) Ltd v Ellis 1984(4) SA 863 (AD)**, **Sibex Engineering Services (PTY) Ltd v Van Wyk & Another 1991(2) SA 482(T)** at **486I – 488D**, **Aranda Textile Mills (PTY) Ltd v Hurn & Another [2000]4 B ALL SA 183(E)** at **192f**, **Townsend & Productions (PTY) Ltd v Leech & Others 2001(4) SA 33 (CPD)**, **Reddy v Siemens Telecommunications (PTY) Ltd 2007(2) SA 486 (SCA)**.

[16]In the present matter it is clear that the aforesaid legal principle will only become applicable once the Applicant has proved on a preponderance of probabilities that the First Respondent had entered into a restraint of trade and confidentiality agreement with the Applicant.

[17]The crux of the dispute is founded thereon that the Applicant alleges that First Respondent had entered into a restraint of trade and confidentiality agreement with the Applicant, signed by both parties, which First Respondent emphatically denies. To exacerbate the situation Applicant has been unable to produce the signed restraint of trade and confidentiality agreement or a

copy thereof, whilst First Respondent is emphatic in his denial adamantly confirming that he had deleted the clauses pertaining to the restraint of trade and confidentiality in the contract of employment he had signed.

[18]The Applicant called three witnesses, to wit Anthony Reznik, the chief executive officer of the Applicant, John William Gordon Jerome, the general manager of Applicant and Danie Botes, Applicant's sales manager for the past three years to substantiate and prove the issue in dispute.

[19]From the evidence presented by the Applicant it appears that the witness Reznik was aware of the fact that First Respondent was being head hunted by Roy Francois Pienaar, at the time employed by the Applicant as sales manager, to take up employment with the Applicant, although it was clear that Reznik was not personally involved during the negotiations that ultimately culminated in First Respondent taking up employment with the Applicant, except insofar as he approved the sign up fee of R250 000.00 paid to First Respondent.

[20]According to the evidence of Jerome, presently a general manager of the Applicant, but at the time First Respondent was head hunted by Pienaar, Pienaar's assistant, he was present and involved in the negotiations Pienaar conducted with First Respondent which culminated in First Respondent taking up employment with the Applicant. In this regard Jerome was the only witness presented by the Applicant, and therefore a single

witness to whom a cautionary rule applies, who was called to testify and confirm that First Respondent had indeed signed a contract of employment with First Respondent without deleting the restraint of trade and confidentiality clauses, and consequently being bound thereby. See **Woji v Sandton Insurance Ltd 1980(2) SA 971 (SE)**.

[21]The third witness, Botes, presently the sales manager, and at the time when First Respondent was head hunted, an appointed sales representative, had not been privy to the negotiations between Pienaar and First Respondent and was therefore not able to provide any assistance in this regard except to reiterate that all sales representatives were required to sign restraint of trade and confidentiality agreements with the Applicant.

[22]This concluded the evidence presented by the Applicant in support of its contention that First Respondent had bound himself in terms of a restraint of trade and confidentiality agreement when he had signed his original contract of employment with the Applicant.

[23]Thereafter First Respondent proceeded to present his case in support of his denial that he had accepted a restraint of trade and confidentiality agreement contained in his contract of employment with the Applicant.

[24]First Respondent elected to testify and emphatically denied that he had entered into a restraint of trade and confidentiality

agreement with the Applicant contained in the contract of employment which he had signed. He confirmed that he had been head hunted by Pienaar to terminate his employment with Second Respondent and to commence employment with the Applicant. According to his evidence the head hunting and the subsequent negotiations commenced during December 2007, and although presented with a contract of employment, he refused to accept the restraint of trade and confidentiality clauses and refused to sign a contract of employment with the Applicant. Subsequent thereto during January 2008 the negotiations were continued with and after being offered an inducement of R250 000.00, which had to be refunded to the Applicant should First Respondent terminate his employment with the Applicant within two years, First Respondent agreed to terminate his employment with Second Respondent, and proceeded to commence employment with the Applicant, subject thereto that First Respondent refused to be bound by the restraint of trade and confidentiality clauses contained in the contract of employment, which he deleted and was initialled by himself and Pienaar. After signature of the original contract of employment First Respondent neglected to obtain a signed copy thereof and continuously prior to his resignation endeavoured to obtain a copy of his signed contract of employment without success. Prior to his resignation First Respondent was arraigned before a disciplinary enquiry for allegedly having 'moonlighted', for which he was subsequently acquitted. Contained in the bundle of documents regarding the disciplinary enquiry was a letter in terms whereof First Respondent was informed that should he not provide the Applicant with a new signed contract of employment containing the restraint of trade and confidentiality clauses, it would be presumed that he had accepted same and agreed to be bound thereby. First Respondent denied having seen this letter or having had any knowledge of it.

[25]The next witness called by First Respondent in support of his denial that he had signed a contract of employment with the Applicant containing the restraint of trade and confidentiality clauses was Roy Francois Pienaar. Suffice it to state that Pienaar confirmed and corroborated the evidence of First Respondent, and emphatically denied that Jerome had been present during his negotiations with First Respondent, and that Jerome had been present and witnessed First Respondent signing the original contract of employment without having deleted the restraint of trade and confidentiality clauses.

[26]No further evidence was presented by First Respondent to substantiate and corroborate his version.

[27]Counsel for the Applicant handed in written heads of argument for the assistance of the Court, for which the Court extends its gratitude, besides addressing the Court on the merits of Applicant's case, whilst First Respondent's counsel deemed it meet to merely address the Court.

[28]Having heard the evidence presented by the Applicant and First Respondent the Court was faced with two mutually

destructive versions compelling the Court to be satisfied upon adequate grounds that the Applicant upon whom the _onus_ rests version is true and the other false, keeping in mind that this was an application serving before Court and not an action. See **Koster Ko-operatiewe Landboumaatskappy Bpk v Suid Afrikaanse Spoorweë en Hawens 1974(4) SA 420 (W)** at **426-7**, **African Eagle Life Assurance Co Ltd v Cainer 1980(2) SA 234 (W)**, **National Employers' General Insurance v Jagers 1984(4) SA 437 (ECD)** at **440B**.

[29]As indicated hereinbefore the evidence of Botes did not assist in determining whether First Respondent had deleted the restraint of trade and confidentiality clauses of the contract of employment he had originally signed or not. Insofar as the Applicant relied on Botes' evidence as circumstantial evidence in an attempt to refute any evidence presented by First Respondent, the Court is not satisfied that such circumstantial reliance is justified. When reliance is placed on circumstantial evidence, the inference sought to be drawn must be acceptable and credible in the light of the proved facts as to the existence of a fact in issue. See **AA Onderlinge Assuransie Assosieasie Bpk v De Beer 1982(2) SA 603 (AD)**, **Macu v Du Toit 1983(4) SA 629 (AD), Motor Vehicle Assurance Fund v Dubuzane 1984(1) SA 700 (AD)**.

[30]From the evidence presented by the Applicant it is clear that the only witness who alleges that he was intimately involved and present when the contract of employment was entered into

between the Applicant and First Respondent without the restraint of trade and confidentiality clauses being deleted, was Jerome, who as the Court has already indicated, was a single witness.

[31]As indicated hereinbefore, Jerome is to be regarded as a single witness whose evidence is subject to a cautionary rule. In order to decide whether the cautionary rule applicable to a single witness has been satisfied, the merits and demerits of Jerome's evidence has to be weighted against the totality of the evidence presented, and should the Court find that the applicable cautionary rule has not been satisfied, no reliance can be placed on Jerome's evidence to justify rejecting the direct evidence presented by First Respondent. Considering the aforesaid principle and applying the cautionary rule the Court is of the opinion that Jerome's evidence contains serious discrepancies and materially contradicts the evidence of Reznik.

[32]Although Reznik was not intimately involved in the negotiations between Pienaar and First Respondent whilst First Respondent was being head hunted, he had knowledge of the fact that First Respondent had been presented with a contract of employment during December 2007 which he had rejected. Thereanent Jerome was adamant, although being Pienaar's assistant, and intimately involved with the negotiations with First Respondent that he had no knowledge of prior negotiations. A further fact militating against the credibility of Jerome was the fact that at each occasion that a letter or document was presented to First Respondent, for example when his commission

rates were changed, although First Respondent refused to accept same, he was required to sign such document confirming his refusal, which was then co-signed by a witness who was present during the interview. This consistent conduct was also confirmed and corroborated by Botes.

[33]Significantly this procedure and conduct was not followed when the document, annexure "**B**" to the Applicant's founding affidavit, was allegedly handed to First Respondent, wherein it was stated, and I quote:

> *"We therefore request that you return a signed copy of the agreement by no later than close of business Friday 5 November 2010, failure to do so would leave us with no other option but to accept that you are in agreement with the terms and conditions set out in the document and that you will abide."*

[34]The copy of the agreement referred to in the said letter, it is common cause, refers to a contract of employment containing the restraint of trade and confidentiality clauses which First Respondent refused to accept and sign. Although Botes confirms that he was present when this document was handed to First Respondent it is significant that he failed to sign and confirm that he had witnessed same. No plausible and acceptable explanation for this conduct was presented. Besides the aforesaid, Jerome initially intimated that this document was specifically handed to

First Respondent, which First Respondent denied having received, and when Jerome was presented with the fact during cross-examination that there was no confirmation that First Respondent had received the said letter, Jerome attempted to circumvent this problem by alleging that it had formed part and parcel of the documents handed to First Respondent comprising the documents for his disciplinary enquiry. This the Court finds surprising and improbable. Having regard to the demeanour of Jerome as a witness the Court was not impressed. More than once Jerome was cautioned by the Court to answer the questions in cross-examination, not to be argumentative, nor to respond to a question by means of a counter question. Although Jerome and Pienaar had been close friends prior to Pienaar resigning from the Applicant's employment, their relationship had deteriorated and a marked animosity was discernible by Jerome towards Pienaar. Undoubtedly these are facts which reflect adversely on Jerome as a witness and considering the merits and demerits of Jerome's evidence weighted against the totality of the evidence presented, the Court finds that the applicable cautionary rule has not been satisfied and that no reliance can be placed on Jerome's evidence to justify rejecting the direct evidence presented by First Respondent and Pienaar.

[35]Juxtaposed thereto, the Applicant was confronted with the direct evidence of First Respondent and Pienaar that First Respondent had deleted the restraint of trade and confidentiality clauses prior to him signing his contract of employment with Applicant. First Respondent, as well as Pienaar, was adamant that

First Respondent was not bound by a restraint of trade and confidentiality agreement of any nature whatsoever in favour of the Applicant. Having observed and noted the demeanour of First Respondent in the witness stand the Court is satisfied that he is a credible witness, whose evidence was in all material and relevant aspects corroborated by Pienaar. Notwithstanding the fact that Pienaar initially refused to present a copy First Respondent's contract of employment to him, and although Pienaar conceded that he had lied to First Respondent in this regard, and that he had made a error when indicating to the HR Department that First Respondent had indeed signed a restraint of trade and confidentiality clause, he candidly admitted that he had erred and lied in order to prevent First Respondent resigning. The explanation presented in this regard is not implausible nor improbable. Having regard to Pienaar's demeanour in Court he was at all times during cross-examination candid in his answers and candid about facts that had the potential to reflect adversely on his credibility as a witness, nor was his evidence tainted by any animosity aimed at the Applicant, notwithstanding the fact that Jerome, and initially Reznik, was adamant that Pienaar had 'an axe to grind' with the Applicant, whilst Reznik later refuted this and conceded that all issues had been resolved amicably.

[36]When evaluating the evidence, the Court is called upon to evaluate the evidence in its totality, and not by applying a piece-meal process of reasoning, taking into consideration the merits and demerits of each witnesses' evidence, as well as the probabilities and improbabilities manifested by the evidence. Keeping the

aforesaid in mind, the Court is satisfied that the direct evidence presented by First Respondent that the restraint of trade and confidentiality clauses had been deleted when he had signed his contract of employment with the Applicant, is acceptable and credible and contains noting inherently so improbable as to justify the rejection thereof as false. Insofar as First Respondent's evidence regarding the deletion of the restraint of trade and confidentiality clauses from his contract of employment is in conflict with the evidence presented by the Applicant, such conflicting evidence by the Applicant is rejected.

[37]Consequently the Court is satisfied that First Respondent had not entered into a restraint of trade and confidentiality agreement with the Applicant and therefore the need does not arise for the Court to determine the second issue referred for the hearing of oral evidence.

[38]Although two issues had been referred for the hearing of oral evidence this remained substantially an application for final relief. See **BHT Water Treatment (PTY) Ltd v Leslie & Another 1993 (1) SA 47 (W)** at **55A – E**; **Hirt & Carter (PTY) Ltd v Mansfield & Another 2008(3) SA 512 (D & CLD)** at **515J – 516A**.

[39]In the premises, and irrespective of the incidence of the *onus*, the Court can only grant the Applicant the relief it seeks if the facts stated by First Respondent together with the admitted facts in the Applicant's affidavits and the evidence presented justifies the

order. See **Plascon – Evans Paints Ltd v Van Riebeeck Paints (PTY) Ltd 1984(3) SA 623 (AD)** at **634H – 635B**.

[40]In the result, the Court is satisfied that the Applicant has failed to discharge the *onus* that First Respondent had entered into a restraint of trade and confidentiality agreement with the Applicant.

[41]Therefore the following order is made:

1. The application is dismissed with costs, whereby is included the costs incurred relating to the draft order that was made an order of Court.

W F PIENAAR
ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT
ADV C WHITCUTT SC
ADV D WOOD

ATTORNEY FOR APPLICANT
FLUXMANS INC
C/O FRIEDLAND HART SOLOMON & NICOLSON
3rd Floor, Block 4

Monument Office Park
79 Steenbok Avenue
Monument Park
Pretoria
Ref: C G Stolp/VM

COUNSEL FOR FIRST RESPONDENT
ADV L ERASMUS

ATTORNEYS FOR FIRST RESPONDENT
DDP ATTORNEYS
Suite 301, 3rd floor
Lougardia Building
1262 Embankment Road
Centurion
Ref: J du Randt/D161