

IN THE HIGH COURT OF NORTH GAUTENG

HELD AT PRETORIA

In the matter between:

CASE NO. 10975/2011

2/10/2013

DELETED - NEVER IS NOT APPLICABLE
(1) REPEATED YES/NO.
(2) OFFERED TO OTHER JUDGES. YES/NO.
(3) REMOVED.
27/9/2013 [Signature]
SIGNED

PREMIER FOODS (PTY) LTD

APPLICANT

and

FRANCISCO DOS REIS

RESPONDENT

JUDGMENT

PRELLER J:

The applicant seeks, by way of motion proceedings, final interdictory relief enforcing an agreement of restraint of trade. There is no alternative claim for interim relief.

The applicant does business as a manufacturer and seller of food, including maize and other grain products and to a large extent in the production and sale of bread. The respondent was initially employed as distribution manager and later site manager of the applicant's Middelburg area between September 2008 and August 2010. In August he was transferred to the applicant's Durban branch as "site manager", which seems to refer to the entire Durban area. Before starting to work for the applicant, he was employed in the sales department of Albany, another competitor in the field. At about the same time he was requested to sign an employment agreement which contains the restraint that the applicant is seeking to enforce. Towards the end of November the respondent gave notice of his intention to terminate his employment with the applicant as from the end of January 2010, and it is common cause that the respondent has since taken up employment in Ermelo with Albany, one of the competitors of the applicant.

The restraint is cast in the widest of possible terms, is for a period of 24 months and covers the entire area of the Republic of South Africa. The restraint is patently too wide. According to the founding affidavit the respondent became privy to a wide variety of confidential information belonging to the applicant, ranging from secret bread recipes and production costs to their sales strategy and client lists. The applicant alleges that approximately 70% of its bread sales is to "informal" clients, being spaza shops and tuck shops throughout the rural and township areas around Middelburg. The client lists and the details thereof are of paramount importance since the informal customers need to be approached individually at locations known to the employees of the applicant, and the drivers of the delivery trucks constitute the important link between the applicant and its customers. The applicant has 3058 customers scattered over 64 routes in the Middelburg region. That would mean that there are approximately 2400 informal customers. It seems

to me that the respondent would need to spread himself rather thinly in order to keep his finger on the pulse of all this important confidential information belonging to the applicant.

In his answering affidavit the respondent deals extensively with the allegations in the founding papers and I do not propose to deal in any detail with the disputes. Suffice it to say that every important allegation by the applicant is disputed by the respondent. As pointed out by Mr. Oosthuizen on behalf of the respondent, the highwater mark of the applicant's case is the access that the respondent had to its customer lists. As far as that is concerned there can be no doubt that the identity of all the "formal" customers, being well-known retailers like Spar, Checkers and the like, will be either known or easily ascertainable by any competitor. By the very nature of the business done by these retailers, every supplier in the field will probably do business with all the applicant's customers in any event. The applicant can have no protectable interest in their names. On the applicant's own showing the contact with the informal customers is with the drivers/sellers working for the applicant and the respondent could not possibly, in addition to all his other duties as site manager of the region, have personal contact with the owner of every informal shop or even with any substantial part of them. Quite apart from that, all that any new competitor in the field would need to do to find out the identity of the applicant's customers is to simply follow the applicant's delivery trucks on their rounds

I need to refer to but two example of trade secrets which the applicant claims to have been poached by the respondent. The first relates to a promotion drive by the applicant in which informal customers were advised to supply buyers of the applicant's bread with some free achaar and which the respondent apparently

copied. Another complaint relates to discounts in the form of three free loaves for every ten bought, which Albany has copied since the applicant had joined its ranks. That kind of promotion must necessarily rely on publicity among members of the public and informal traders for its success and with that the confidentiality of the trade secret flies out of the window. There can be no doubt that if informal traders are offering this kind of benefit in respect of applicant's products, the other suppliers will be asked why they are not offering something similar.

In view of the serious doubt about the existence of a protectable interest and also the disputes that arose on the affidavits, the application cannot succeed.

ORDER: The application is dismissed with costs.


F G PRELLER
JUDGE OF THE HIGH COURT