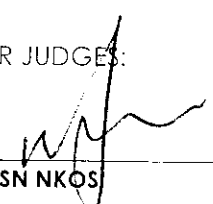


REPUBLIC OF SOUTH AFRICA



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

CASE NO: 27575/13

(1)	REPORTABLE:
(2)	OF INTEREST TO OTHER JUDGES:
(3)	REVISED.
25/10/2013	
DATE	VRSN NKOS

29/10/2013

In the matter between:

ITEC DISTRIBUTION (PTY) LTD

APPLICANT

and

TUSCAN MOOD 179 (PTY) LTD

1ST RESPONDENT

LEON AUGUST WILHELM HERB

2ND RESPONDENT

CHANTALL HERB

3RD RESPONDENT

J U D G M E N T

NKOSI AJ:

[1] The applicant seeks relief which falls within two categories:

- 1.1 In the first instance the applicant seeks an order to compel the 1st respondent to allow the applicant access to the 1st respondent's premises (situated at 4 Pieter Street, Highveld Techno Park, Centurion) with the objective of enabling the applicant to determine which of the 1st respondent's assets it wishes to purchase in terms of an option the applicant has elected to exercise.
- 1.2 In the second instance the applicant seeks to enforce against the 1st, 2nd and 3rd respondents a covenant in restraint of trade. Later abandoned against the 3rd respondent only.

[2] Both forms of relief originate from the terms of a dealership agreement which had been concluded between the applicant (then known as Itec South Africa (Pty) Ltd) and the 1st respondent in and during December 2004.

[3] In terms of the dealership agreement the applicant (defined therein as the distributor) granted to the 1st respondent (described therein as the dealer) the right to carry on the selling, trading in and supply of consumables and/or spare parts for certain Itec office equipment and spare parts made available by the applicant.

[4] It must be borne in mind that the applicant's concern includes the fact that it appears self-evident from annexure "FA6" to the founding affidavit that the 1st respondent (guided by the 2nd and 3rd respondents) is intent on diverting the existing customer base which the applicant seeks to acquire into an entirely new company. In the event that the diversion takes place it will, with respect, be an impossible task for the applicant to recover it.

[5] In the relevant letter (dated 17 April 2013) the 3rd respondent says the following:

"I do understand that you no longer want to deal with Itec, Tuscan Mood (the 1st respondent) (who traded as Itec Tswane) or anyone who was involved in the whole Itec debacle, but we have formed an entirely separate new Company, that is a fully fledged Konica Minolta dealer, with no ties to Itec at all."

[6] The following paragraph proposes that the client (USN) effectively cancel its existing agreements and take up new agreements.

[7] In their answering affidavits the respondents present the rather startling proposition that, although the aforesaid words were used:

"... it is in fact not true that we have formed an entirely new company. Those words were used in relation to the fact that the 1st Respondent now trades under the Konica Minolta brand".

[8] The denial by the respondents is not borne out by the contents of annexure "FA6" quoted above which make it clear that the 2nd and 3rd respondents sought to move the customer base into what they described to be *"an entirely separate new Company"*.

[9] In the event that the respondents are permitted to unlawfully appropriate the customer base the applicant will be left without recourse. The business that the applicant seeks to acquire from the first respondent will have a substantially reduced value and it will be an extraordinarily difficult task for the applicant to pursue its rights against the unidentified new company.

[10] In the unreported judgment of *Bottom Line Solutions (Pty) Ltd v FPT Group (Pty) Ltd* [2011 ZAWCHC 454 (16 September 2011) Gamble J said the following:

"[50] The applicant's election to hold the respondent to the main agreement is a right which is only available to the applicant to exercise. The respondent does not enjoy the right to choose to pay damages instead of being required to render specific performance.

[51] In such circumstances I am of the view that a Court will give serious consideration to a party's election to claim specific performance which is after all the primary remedy available to a contracting party. It will refuse same if to do so would cause the other party undue hardship. On the other hand a Court will more readily grant an interdict if an applicant indeed does not have an alternative or adequate claim for damages".

[11] In the current matter the parties negotiated for and contracted on the basis that, on termination of the dealership agreement, the applicant would acquire the option to purchase the consumer and service base previously managed by the 1st respondent. In addition, and given that the applicant was to purchase a range of assets which included the 1st respondent's goodwill, the parties agreed that neither the 1st respondent nor its directors or shareholders would compete with the application in relation to that customer base or business after the sale. The very purpose of those contractual terms was to preclude a situation in which the 1st, 2nd and 3rd respondents, by competing with the applicant, would erode the very customer base that the applicant was to purchase at an agreed price.

[12] In the context of the interests that the applicant seeks to protect in this application, relevant guidance can be derived from the judgment of Mr Acting Justice Rossouw in the original urgent application at par [41] where His Lordship said the following:

"Furthermore, if regard is had to the agreement as a whole, it is clear that the intention of the parties was that upon cancellation of the agreement Tuscan (the 1st respondent) would cease all business activities in order to preserve the goodwill of the business with a view to placing Itec (the applicant) in a position from where it could take an informed decision as to whether it should exercise its option to purchase, without the goodwill being contaminated with any on-going activities." (Emphasis added).

THE DEEMED PURCHASE

[13] In terms of clause 19 of the dealership agreement, the applicant was, in certain circumstances, granted an option to purchase the assets of the first respondent's business. The mechanism recording the manner in which that option is to be exercised is set out in clause 31 of the agreement.

[14] Clause 28.4 of the dealership agreement provides the following:

"In the event of the DISTRIBUTOR electing to cancel his Agreement as provided for in clause 28.2 above, and without prejudice to any other remedies which the DISTRIBUTOR may have in terms of this Agreement and/or in terms of law, the DEALER shall be deemed to have granted to the DISTRIBUTOR an option to purchase the ASSETS of the BUSINESS or a portion of such assets at the category 3 price, and on the terms and conditions, stipulated in annexure 4 hereto".

[15] The applicant avers that by notice dated 5 November 2012 it advised the 1st respondent of the latter's breaches of clauses 11.1 and 22.1 of the dealership agreement, the primary complaint being the 1st respondent's failure to comply with good corporate governance by not having made payment of amounts due to the South African Revenue Service.

[16] In the light of those breaches the applicant invoked the provisions of clause 28 of the dealership agreement and cancelled that agreement. In addition the applicant notified the 1st respondent of its election to exercise its option to purchase the service base "and any other of your assets that we may identify the details of which other assets we will notify you once so identified".

[17] The 1st respondent was pertinently advised that the letter constituted notice in terms of clause 31.3 of the dealership agreement to the effect that there would be a purchase by the applicant of still-to-be-identified assets at the category 3 price specified in annexure 4 to the dealership agreement.

[18] The 1st respondent's attorneys replied on 18 December 2012. In that response those attorneys denied any breach on the part of the 1st respondent and contended that the applicant's attempt to cancel the dealership agreement amounted to a repudiation thereof which the 1st respondent had accepted with immediate effect. In addition, the letter contains the following paragraph:

"You are thus informed that you are not entitled to access our client's premises and/or to take access into possession any of our client's Service Agreements comprising the Service Base and/or any other assets".

[19] In its opposition to the relief sought in this context the 1st respondent presents various versions:

- 19.1 it contends, in the first instance, that the applicant has already elected to acquire the entirety of the 1st respondent's customer service base and all aspects thereof as a consequence of which no access to those assets is required;
- 19.2 by launching the current application, the applicant has purportedly repudiated the deemed sale agreement which repudiation has been accepted by the first respondent as a consequence of which there is no longer any sale of assets;
- 19.3 by failing to pay the deemed purchase price the applicant has sought to *"destroy the 1st respondent"* and does not come to Court with clean hands.

[20] The propositions advanced by the 1st respondent as recorded above are, it is respectfully submitted, both fanciful and factually inaccurate. It was made abundantly clear to the 1st respondent in the applicant's letter of 5 November 2012 that the option that the applicant elected to exercise was one which still required the applicant to identify the assets it wished to acquire. The relief that the applicant seeks in terms set out in paragraphs 2, 3 and 4 of its notice of motion are justified by the express provisions of the dealership agreement. No purchase price can be determined until such time as the applicant is placed in a position to determine which assets it wants to purchase.

[21] It is self-evident from the contents of the respondents' answering affidavit that they do not intend to grant to the applicant the access that it requires and do not intend to comply with the express terms of the dealership agreement.

[22] In those circumstances the applicant is entitled to the orders that it seeks.

THE RESTRAINT PROVISIONS

[23] The relevant restraint provisions are contained in paragraph 27 of the dealership agreement and are quoted in full in the founding affidavit.

[24] The period of the restraint is for eighteen months. The restraint applies to those areas identified on annexure "X" to the notice of motion.

[25] The respondents acknowledged in the restraint that its terms were fair and reasonable and were necessary to protect the applicant's proprietary interests.

[26] The question of the onus in relation to restraint provisions was settled in *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 893 C-E and 898 C-D.

[27] The applicant does not bear an onus of proving that the restraint is reasonable. The party that alleges that the restraint is unenforceable bears the onus of proving the enforcement of the restraint provisions would be contrary to public policy.

[28] In *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 775-777 the following was said:

"The incidence of the onus in 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 covenantor seeking to enforce the restraint need do no more than to invoke the provisions of the contract to prove the breach. The covenantor seeking to avert enforcement is required to prove on a preponderance of probability that in all 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".

[29] In the circumstances, having proved the contract and its enforceability in the hands of the applicant, and having the respondents' breach of the restraint and undertakings (not challenged on the affidavits), the onus rests on the respondents to demonstrate that the restraint undertakings are unenforceable.

[30] In addition, there is an onus on the respondents to prove that the applicant has no proprietary interest worthy of protection.

[31] The applicant has admittedly discharged the onus that rests upon it, it has proved the existence of a covenant in restraint of trade which is, at the very least, enforceable against both the 1st and 2nd respondents. That covenant precludes the respondents from competing with the applicant in respect of the business and/or goodwill purchased by the applicant from the 1st respondent.

[32] The 1st and 2nd respondents are admittedly in breach of the provisions of the restraint covenant. That much is evident from the correspondence addressed on behalf of the 1st respondent on 17 April 2013.

[33] In addition, the respondents admit in their answering affidavits that the 1st respondent continues to do business in the same manner as it had prior to the applicant's cancellation of the distributorship agreement. Despite falsely denying that the contents of annexures "FA5" and "FA6" to the founding affidavit reflect an intention to continue trading in a different name, the respondents confirm the unlawful competition and the breach of the restraint provisions by stating: *"In fact, the 1st respondent continues to trade as before"*.

[34] That trade amounts in large part to an attempt on the part of the respondents to solicit the very clients forming the customer base that the applicant has purchased from the 1st respondent.

[35] The respondents raise two primary defences to the enforcement of the restraint provisions:

35.1 the 3rd respondent denies that she is a party to that agreement and, in the circumstances, denies having furnished an restraint in favour of the applicant. This serves no further purpose as 3rd respondent is left out of the litigation;

35.2 the applicant has no proprietary interest worthy of protection as it does not compete directly with the first respondent;

35.3 allied to the challenge to the applicant's proprietary interest is an argument that a proprietary interest is an argument that a proprietary can only exist in the event that the information sought to be protected is confidential in nature.

[36] It is submitted that none of the foregoing "*defences*" has any merit:

- 36.1 the parties to the agreement were the applicant and the 1st respondent;
- 36.2 the "*DIRECTORS*" are defined to mean "*the directors specified in clause 1.5 of the agreement ... or their lawful successors in terms of the provisions of this agreement*";
- 36.3 in addition, shareholders are defined in clause 3.1.9 of the agreement to be the shareholders at the time of the conclusion of the agreement of their lawful successors in title;
- 36.4 in terms of clause 27.1 of the agreement (the restraint provision) that provision is furnished by the 1st respondent and all directors and shareholders, jointly and severally;
- 36.5 in any event, and at best for the respondents, that so-called defence is available only to the 3rd respondent and does not excuse either the 1st or 2nd respondents from the restraint provisions;
- 36.6 there is no numerous clauses of protectable interests. In *Super Safes (Pty) Ltd v Voulgarides* 1975 (2) SA 783 (W) at 785 Nicholas J put the position as follows:

"A bare covenant not to compete cannot be upheld. A restraint against competition must, if it is so be valid, serve some interest of the person in whose favour it was inserted – the purchaser of a business, for example, who requires protection against the erosion of its goodwill by the competition of the seller."

- 36.7 it is respectfully submitted that the unlawful competition in which the respondents continue to engage with the applicant in respect of the purchased business falls squarely within the type of protectable interest defined by Nicolas J as aforesaid;
- 36.8 it is expressly recorded in Annexure "4" to the dealership agreement that the assets sold include the goodwill;
- 36.9 the applicant has expressed its concern that the 2nd and 3rd respondents intend to compete with the applicant in respect of the existing Itec consumer base (purchased by the applicant) from the 1st respondent) through the medium of a newly incorporated company. That process, it is stated, constitutes a deliberate attempt to avoid the express provisions of the covenant in restraint of trade and is unlawful.

[37] The harm that the applicant seeks to avoid is expressed to be the continued interference by the respondents in the Itec customer base by attempting to solicit that base for themselves. The result of that continued interference may very well be the election on the part of the customers to sever all ties or relationships with the Itec Group (including the applicant) and to contract, instead, with an alternative office supplier.

[38] The respondents do not deny in their answering affidavits that they continue to solicit the purchased customer base. Instead they obfuscate and contend that any loss that the applicant stands to suffer is in consequence of its own actions by having written threatening letters to the customer base.

[39] It has already been held by Mr Acting Justice Rossouw in the original urgent application that the applicant did not act unlawfully in seeking to protect the Itec customer base which it is deemed to have purchased from the 1st respondent. In the circumstances the denials by the respondents of the applicant's fear of substantial financial harm are entirely unfounded.

[40] **WEIGHING OF EVIDENCE & ARGUMENTS:**

- 40.1 respondent does not deny that there was an agreement to sell Itec products or to do business in these products. To start selling different products in competition with the applicant is a breach of the restraint of this. Applicant is entitled to a protection against respondent's conduct;
- 40.2 respondents submits the applicant should have done in the circumstances was the move for an order for specific performance so that the 1st respondent transfers the contracts that have purportedly being purchased with the cancellation notice and the distribution agreement;
- 40.3 it is further submitted, on behalf of the respondents that the applicant is attempting to close down the 1st respondent completely from doing business. It is further submitted that the customers that the 1st respondent obtained, and to which it sells a different brand of machinery in with whom contracts where entered into after 5 November 2012, can in this manner whatsoever be construed as being part of the "business" that the applicant had purportedly purchased in terms of the distribution agreement;
- 40.4 the above submission justify applicant's request for the access of the customer data base which is not an unreasonable request.

It is not denied that the applicant made an election to purchase the service base and relied on the provisions of the distribution agreement to deem a sale, as already having been concluded and that they were now the owners of the service base;

- 40.5 1st respondent further submits that in the light of what has been quoted from the letter of cancellation of 5 November 2012, it is clear that the applicant vat exercise its option and in fact stated categorically that a deemed sale has been constituted. Such an option having been exercised there is now no need or room for further inspection to take place. It is not clear if 1st respondent gave the applicant full access to the data base to enable it to exercise its option in full;

- 40.6 it was submitted that the applicant has failed to make out a case for the relief sought of which I disagree. I am of the view that relevant guidance can be derived from the judgment of Rossouw AJ: “furthermore, if regard is had to the agreement as a whole, it is clear that the intention of the parties was that upon cancellation of the agreement, Tuscan would cease all business activities in order to preserve the good will of the business with a view to placing Itec (the applicant) in a position from where it could take an informed decision as to whether it should exercise its option to purchase, without the goodwill being contaminated with any on-going activities”;
- 40.7 this can only be frustrated by the respondent’s refusal to abide by the agreement ex post facto. The respondents cannot, at this stage, claim not to be bound by the dealership agreement by denying the breach of the agreement, by continuing to service the same customer base obtained during the existence of the dealership agreement and by continuing to trade with the same customer base on other equipment before dealing with the original breach to its finality and start trading on other equipment from then;
- 40.8 it is further worsening the process by the attempt or actual removal of the customer base in contravention of the restraint of trade. This also placed a duty to the 1st respondent to prove that the restraint of trade is or was unreasonable, against public policy and therefore unenforceable. This was not demonstrated by the 1st respondent’s submissions;
- 40.9 it was the 1st respondent’s further submission that the applicant had not yet elected the option to buy and therefore could not have been a goodwill to protect. They have not taken the whole business which had to happen within 90 days after exercising the option to buy and the question that follows is how could it happen if access is denied?
- 40.10 it was further submitted that applicant could apply for a declaratory or institute or damages claim as an alternative and not a restraint of trade as there was no protectable interest following the fact that the 1st respondents was trading on different brand or office equipment. If applicant has to do an

inspection then there is no goodwill to protect. No offer to buy any customer base or equipment was made by the applicant. The respondent produced a document purported to be from an auditor to show that 1st respondent was not technically insolvent. The 1st respondent cannot choose which legal recourse could the applicant take to enforce its rights;

40.11 counter arguments were that the 1st and 2nd respondents owed an amount of R904 239.00 which remains unpaid to date. The statement purported to be from an auditor was not an audited statement nor it be supported by an affidavit to its accuracy. The respondents have been obstructive if not outright refusal to give applicant access to inspect the records. The offer to purchase could not happen if access to do inspection was refused.

[41] OBSERVATION FROM SUBMISSIONS:

- 41.1 what is notable, is that 1st and 2nd respondent have not settled the outstanding debt due to the applicant in the amount of R904 239.00 and this was not denied;
- 41.2 technical denials of liability do not extinguish the debt;
- 41.3 the distribution agreement is not challenged or declared void or unenforceable;
- 41.4 all parties to the agreement remain bound by its terms;
- 41.5 the 1st and 2nd respondents are obstructing the effective implementation of the applicant's rights to be exercised fully on cancellation of their agreement;
- 41.6 the restraint of trade is not found to be unreasonable given the circumstances of the distribution arrangement. It has a business interest to protect. Arguments that the respondents are selling another brand are

indicative enough that deviation from the distribution agreement had deed taken place;

41.7 respondent is duly bound to disclose the data base of the clientele in accordance with the distribution agreement.

[42] The applicant was left with no option but to cancel the agreement of which they were entitled to do so.

The computer server in the 2nd respondent's premises could not be accessed and the applicant does not know anything beyond 5 November 2012 regarding the customer base or stock.

[43] The continued preclusion of the applicant by the 1st respondent to have access left the applicant with no option but to approach this court for an order compelling the 1st and 2nd respondent access to the premises and all data kept in the computer server and to enforce the restraint of trade as 1st respondent had been suspected of diverting business to new customers and/or entering into new contracts with the pre-existing customer base. The applicant suspects that the pre-existing customer base might have been eroded by now and dismissed the assertion that they are competitors.

[44] **FINDINGS FROM ALL SUBMISSIONS:**

44.1 having heard both parties to this matter the court had to establish on a balance of probabilities whether the applicant has succeeded to make out a case worthy of being awarded the case in its favour and that a restraint of trade is there and is worth of being protected;

44.2 the agreement entered into between the parties prior to its cancellation clearly spelt the parties rights, which have not been disputed throughout this hearing;

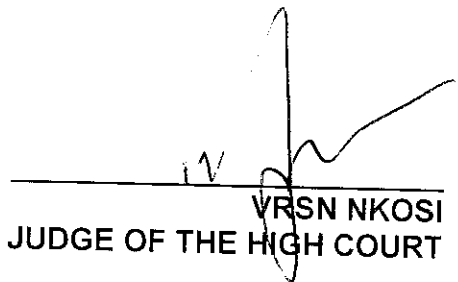
44.3 the applicant had tried everything in the book to protect its rights and to enforce such but the 1st respondent made it difficult if not obstructive to

allow the applicant to have full access to 2nd respondent and to do the necessary inspection to exercise its options in full and to have access to the customer base in the computer server;

44.4 I am of the view that the applicant had succeeded to make out its case and the respondent's arguments are more obstructive in nature rendering the applicant unable to exercise its rights in full. Therefore 1st and 2nd respondent's submission are bound not to succeed and that the defences raised have no merits. The applicant had no other alternative but to approach this court for the relief sought and the 1st and 2nd respondent have to be stopped from being obstructive and to trade against the restraint of trade.

[45] Consequent upon the above the following order is made:

1. The applicant's case succeeds in accordance with the orders prayed for in the Notice of Motion.
2. The 1st and 2nd respondents are ordered to pay the costs of this application jointly and severally each paying the other to be absolved.


VRSN NKOSI
ACTING JUDGE OF THE HIGH COURT

COUNSEL FOR APPLICANT

ADV. ARG MUNDELL SC

COUNSEL FOR RESPONDENT

ADV. RIPP SC

DATE OF HEARING

10 OCTOBER 2013

DATE OF JUDGMENT

28 OCTOBER 2013