



IN THE HIGH COURT OF SOUTH AFRICA
[NORTHERN CAPE HIGH COURT, KIMBERLEY]

JUDGMENT

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO

CASE NR : 729/2013

FREERPAK BK (CK 93/21467/23)

APPLICANT

AND

PIERRE JEAN DURAAN

FIRST RESPONDENT

JOAN MARGARET DURAAN

SECOND RESPONDENT

Date of the hearing: 16 August 2013

Date Delivered: 18 October 2013

PHATSHOANE J.

- [1] Freepak BK, the applicant, is before the Court to enforce a covenant in restraint of trade against Mr Pierre Jean Duraan and Ms Margaret Duraan, the first and second respondents (the Duraans). Essentially, the applicant seeks an order that the Duraans be interdicted from being involved in any manner in any business in the Northern Cape, which sells similar products (packaging material) as itself.
- [2] The Duraans are married to each other. Mr Duraan commenced employment with the applicant at its Kimberley branch in 1997 and his wife joined in 1998. They had 16 and 15 years of service with the applicant, respectively. Prior to Mr Duraan's involvement with the business of the applicant he worked in the administration unit of R&M Scrap Metals in Bloemfontein. He holds a degree in

Business Economics. Ms Duraan was a social worker at ACVV and holds a diploma in social work.

- [3] For a number of years the Duraans managed the applicant's business in Kimberley and were its sales persons and its face. They built this business from a struggling concern to a huge enterprise. Six or seven years into their employment, around 05 February 2004, their contracts of employment were reduced to writing. A covenant in restraint of trade is encapsulated in clause 34 of the contracts. It stipulates that if the services of an employee were to be terminated, for whatever reason, he/she may not for a period of five years, following termination, be involved in any other business which sells similar products as his/her employer. It further stipulates that should such an involvement be brought to the attention of the employer the latter would be entitled, in its discretion, to determine the amount of damages suffered by it as a result of the breach. The employee would then be compelled to pay damages as computed. It is further provided that the employer would be entitled to approach the Court for an order interdicting the employee from being involved in any business in direct competition with it and that the employee would bear the costs of such litigation.

- [4] On 25 February 2013 Mr Duraan was subjected to a disciplinary enquiry and summarily dismissed. Ms Duraan tendered her resignation on the same date. The nitty-gritty of what led to the termination of Mr Duraan's service is not necessary for purpose of this application to delve into. It suffices to note that about a month or so prior to the Duraans' departure there were negotiations between the Duraans and the applicant for the sale of the applicant's Kimberley business to them. The negotiations were deadlocked.

- [5] The applicant sells packaging material in small and big quantities both in wholesale and retail. Although its registered office is in Bloemfontein, the applicant conducts its business throughout the Northern Cape, the Free State and parts of the Gauteng Province. It has built a large client base since about 1993. It provides bags, bottles and the like packaging material to dairy companies, abattoirs, supermarkets, liquor stores, butcheries and bakers. Of its

many clients about 500 are permanent. The applicant travelled regularly to the neighbouring small towns in this Province to deliver its products to its clientele.

- [6] Having broken employment links with the applicant the Duraans decided to open a business which sells packaging material analogous to that of the applicant. It is not seriously disputed that the Duraan's proposed business would be in direct competition with the business of the applicant. They claim not to have a choice as they have to earn a living. They maintain that the applicant dropped the proverbial 'bombshell' on them when it summarily terminated Mr Duraan's employment because they were unable to reach a settlement on the purchase of the business. They contend that the enforcement of the restraint is a manifestation of Mr Nicolaas Van Der Walt's personal vendetta against them. Mr Van der Walt is the applicant's managing director and the deponent to its founding affidavit. The Duraans have been residing in Kimberley since 1996. Mr Duraan's mother, whom they are maintaining, resides in a home for the aged in Kimberley, for the past five years.
- [7] Most of the pertinent issues are common course. Insofar as there may be disputes of fact none of them are material to the issues to be decided and neither are they of a degree that this matter cannot be disposed of on the papers as they stand. The Duraans further resist the restraint on the basis that it is not valid and enforceable as it is inimical to public policy. They contend that they stand to be excluded from participation in the economic activities should the restraint be enforced against them.
- [8] Public policy, as provided for in the Constitution requires, in general, that parties should comply with contractual obligations that have been freely and voluntarily undertaken. In *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 762H-IEksteen JA held:
- "The paramount importance of upholding the sanctity of contracts, without which all trade would be impossible, was again stressed by this Court in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 9B-C, where Smalberger JA remarked inter alia that
- 'The power to declare contracts contrary to public policy should be.... exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power.'

See also see *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) at 707G-I para 57.

- [9] It is trite that the onus of proving that the enforcement of the restraint of trade would be against public policy is on the person resisting its enforcement. In *Reeves and Another v Marfield Insurance Brokers CC and Another* 1996 (3) SA 766 (A) at 776C-D Scott JA states:

“As pointed out by Botha JA in *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 776I-J, the effect of this in practical terms is that once the covenantee has invoked the provisions of the contract and proved 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'.

- [10] The principle enunciated in *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) appears in the headnote as follows:

“The position in our law is that each agreement should be examined with regard to its own circumstances to ascertain whether the enforcement of the agreement would be contrary to public policy, in which case it would be unenforceable. Although public policy requires that agreements freely entered into should be honoured, it also requires, generally, that everyone should be free to seek fulfilment in the business and professional world. An unreasonable restriction of a person's freedom of trade would probably also be contrary to public policy, should it be enforced.

Acceptance of public policy as the criterion means that, when a party alleges that he is not bound by a restrictive condition to which he had agreed, he bears the onus of proving that the enforcement of the condition would be contrary to public policy. The Court would have to have regard to the circumstances obtaining at the time when it is asked to enforce the restriction. In addition, the Court would not be limited to a finding in regard to the agreement as a whole, but would be entitled to declare the agreement partially enforceable or unenforceable.’

- [11] Before consideration of the question whether the restraint clause in issue was against the public policy or not, as a point of departure, regard should be had to the four questions to be asked in determining the reasonableness of a restraint. These were restated as follows in *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at 497D-F para 16:

"[16]...In *Basson v Chilwan and Others* [1993 (3) SA 742 (A)], Nienaber JA identified four questions that should be asked when considering the reasonableness of a restraint: (a) Does the one party have an interest that deserves protection after termination of the agreement? (b) If so, is that interest threatened by the other party? (c) In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive? (d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected? Where the interest of the party sought to be restrained weighs more than the interest to be protected, the restraint is unreasonable and consequently unenforceable. The enquiry which is undertaken at the time of enforcement covers a wide field and includes the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests."

[12] The Duraans argued that there is no infringement of applicant's trade secret or any other protectable interest worthy of any safeguard by way of the restraint clause. They deny that the applicant sells any particular or special kinds of packaging material or that its business is unique. They maintain that at least three other businesses in the Northern Cape sell the same goods as the applicant and so are four other businesses in Bloemfontein. They intimate that the erstwhile storeman of the applicant, Mr Ricardo Frits, soon after he had left the applicant's employment, established a business, Planet Packaging, in direct competition with the applicant. Van Der Walt informed them that the applicant could not do anything about Frits's conduct because the restraint clause was unenforceable. In its reply the applicant explained that Frits was by virtue of the position he held not a threat to its business because he was not known to its clients. I digress to say that waiver by the applicant to enforce a restraint clause against its erstwhile employee cannot avail the Duraans as the circumstances may vary.

[13] The protectable interests in issue can be classified into two categories: firstly, the risk of disclosure of the applicant's confidential information or the protection of confidential information; and secondly, the risk of irreparable damage to the applicant's customer connection. The two often conflate as was observed by Wallis AJ in *Den Braven SA (Pty) Ltd v Pillay and Another* 2008 (6) SA 229 (D) at 235D-E para 5.

- [14] In respect of confidential information the applicant submits that the Duraans are aware of the price structure of its products, profit margins and certain discounts which in other instances can be negotiated with its clients. This is gainsaid by the Duraans by stating that they do not bear knowledge of the applicant's income and expenditure or its profit. They intimated that the applicant operates on a centralised business structure where decisions, management, accounting and administrative functions are carried out at the head office in Bloemfontein.
- [15] What constitutes confidential information would depend on the circumstances of each case. The information must meet three requirements for it to qualify as confidential: It must involve and be capable of application in trade or industry: i.e it must be useful; it must not be public knowledge and public property: i.e objectively determined it must be known only to a restricted number of people or to a closed circle and lastly the information objectively determined must be of economic value to the person seeking to protect it.¹ In *Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg and Another* 1967 (1) SA 686 (W) at 689F-H Marais J remarked:

“The difficult question in each case would be to decide what information gleaned by an employee is to be regarded as disclosable as being harmless or general knowledge and what items are confidential or secret. The dividing line may move from case to case, according to what is the general practice or convention in the category of trade or manufacture in which the plaintiff falls, with particular reference to existing or potential competitors of his. If, however, it is objectively established that a particular item of information could reasonably be useful to a competitor as such, i.e. to gain an advantage over the plaintiff, it would seem that such knowledge is prima facie confidential as between an employee and third parties and that disclosure would be a breach of the service contract. If use has in fact been made of it in an effort to harm the business interests of the plaintiff the presumption would be even stronger that the employer and the employee, who would in the course of his employment obtain knowledge of it, intended it to be treated as confidential information not to be divulged to third parties.”

The learned Judge proceeds as follows at 691B-C:

¹Alum-Phos (Pty) Ltd v Spatz and Another [1997] 1 All SA 616 (W) at 623 g-i

“It seems to me that an employer is entitled to be protected from unfair competition, as it is called in American law, brought about by confidential information of his business having been conveyed to a trade rival by an employee or ex-employee. What would constitute information of a confidential nature would depend on the circumstances of each case, and in this regard the potential or actual usefulness of the information to a rival would be an important consideration in determining whether it was confidential or not.”

[16] Where the erstwhile employee challenges the confidential nature of the information it is for the employer to adduce proof specifying the information, the reasons why it is regarded as confidential and a trade secret, the manner and time of its development and who developed it and the period of its expected existence². There is nothing compellingly convincing or demonstrable in the papers that the applicant is in possession of confidential information which is exclusive in nature and protectable. Mr Reinders, for the applicant, did not devote much attention to this aspect. His argument hinges on risk of damage to the applicant's customer connection which I now turn to.

[17] Van Der Walt intimates that the Duraans had personal contact with the applicant's clients and are in possession of their telephone numbers and cellular phone numbers. The clients would call either one of the Duraans on a regular basis to place orders or discuss their business needs and if required bargain on the price. He says that the applicant's client base is its essential trade secret. The applicant is of the view that should the Duraans open a similar type of business most of its clients will follow them because ‘they have them in their pockets’. It therefore stands to suffer damages.

[18] The Duraans claim not to have removed any of the applicant's client list or contact list or list of telephone numbers from the premises upon the termination of employment with the applicant on 25 February 2013. Clause 17 of the contract of employment provides:

“Die werknemers algeen in ligting aan enige ongemagtigde persone of instansies voorsien in verband met enige aspek van sy/haar werk of van die bedryf of prosesse van die werkgewernie. Sodanige inligtingsluit die volgende in: metodes, prosesse,

²Hirt & Carter (Pty) Ltd v Mansfield and Another 2008 (3) SA 512 (D) at 525-526 I-A para 58; Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another 2009 (3) SA 78 (C) at 87A-C

rekenaarsagteware, dokumentasie, kliëntelyste, programme, handelsgeheime, tegnieseinligting, chemieseformules, sketse, finansiëleinligting, of enigeanderinligtingwatskadelikkanweesvir die werkgewer se bedryf of watanderpartye tot nadeel van die werkgewerkanvoordeel. Sodanigebeperkingssalgedurende en na die werknemer se diens tyd met die werkgewer geld”.

- [19] Mr Van Tonder argued that clause 17 makes reference to the clients’ list and not the client base. He argued that it was never the intention of the parties that the applicant’s clientele or client base would amount to a protectable interest which falls within the ambit of the covenant. A distinction should be drawn between possession of a clients’ list and customer connection. The following passage appears in Saner’s *Agreements in Restraint of Trade in South African Law*, at 7-26(12) para 7.6:

“In the broad sense “trade connections” must include all business relationships between an employer and its trading partners, but not limited to its suppliers and manufacturers; its employees, consultants and advisors; its contractors and agents and its customers. In the narrow sense its trade connections which fall to be protected by a restraint of trade may be limited to only one of the above categories, such as the protection of its relationship with its customers.”

- [20] In *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at 541D–F the Court pronounced:

“The need of an employer to protect his trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he leaves the employer’s service he could easily induce the customers to follow him to a new business (Joubert General Principles of the Law of Contract at 149). Heydon *The Restraint of Trade Doctrine* (1971) at 108, quoting an American case, says that the ‘customer contact’ doctrine depends on the notion that

‘the employee, by contact with the customer, gets the customer so strongly attached to him that when the employee quits and joins a rival he automatically carries the customer with him in his pocket’.

In *Morris (Herbert) Ltd v Saxelby* [1916] 1 AC 688 (HL) at 709 it was said that the relationship must be such that the employee acquires

'such personal knowledge of and influence over the customers of his employer . . . as would enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer's trade connection . . ."

See also *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 769H-I.

- [21] It therefore remains to be determined if the Duraans poses any risk of damage to the applicant's customer connection. Interwoven with the question of customer connection is the Duraans' business acumen and charisma. They built the applicant's Kimberley branch from scratch. They maintain that they did not receive any formal or informal training from the applicant. They have largely acquired knowledge of the business and experience as a result of their own drive, personality and good human relations and initiative and not as a result of their particular knowledge of the industry or products. They contend that their skills, general knowledge and experience cannot be taken away by virtue of the restraint clause. In *Automotive Tooling Systems (Pty) Ltd v Wilkens and Others* 2007 (2) SA 271 (SCA) at 279 para 10 the Court held:

"[10] In practice, the dividing line between the use by an employee of his own skill, knowledge and experience which he cannot be restrained from using, and the use of his employer's trade secrets or confidential information or other interest which he may not disclose if bound by a restraint, is notoriously difficult to define. Similarly it is difficult to determine whether the process by which a machine is built depends, in the main, for its success on the utility of the steps of the process or on the skill and discretion of the operator. If the former, knowledge of the process is protectable (provided it is sufficiently secret). If it depends on the latter for its success, it is likely that the employer has no secret process; he has only a skilled employee whose skill he cannot restrain from utilising after the termination of the employment. Where the line is to be drawn is often one of degree. The dispute in this case is about where the dividing line is to be drawn."

- [22] In *Den Braven* (supra) at 240 para 17 Wallis AJ remarked:

"[17].....It suffices for the applicant to show that trade connections through customer contact exist and can be exploited by the former employee if employed by a competitor...."

- [18] Once that conclusion is reached and it is demonstrated that the prospective new employer is a competitor of the applicant, trading in a range of similar products, the risk of harm to the applicant if its former employee is able to take up employment with that competitor is apparent. The risk is increased where, as here, the employee in question is an excellent and highly successful salesperson with a lengthy track record working in the particular market..."
- [23] The Duraans make it plain that they intend to open a business which sells similar products as that of the applicant. They do not dispute that they had personal contact with the applicant's clients or that these clients had their contact details. In their own words Van Der Walt rarely visited the branch and was seldom involved in the business. This goes to show how well they were acquainted with the applicant's clients. They also do not say why it is necessary for them to open the same business as the applicant except that they have been involved in the packaging business for 15 years; there is nothing secretive or special about this industry; and that they have been out of employment since February 2013.
- [24] The risk of harm to the applicant's customer connection cannot be discounted, more so because the Duraans have been the face of the applicant's Kimberley branch for more than a decade and had almost exclusive dealings with them throughout the Northern Cape. The terms of the restraint clause are clear and unambiguous. In my view implicit in the restraint clause is the protection of the applicant's client base or customer connections.
- [25] One aspect which was not properly ventilated relates to the question of the disproportionate or otherwise bargaining power between the applicant and the Duraans at the time they concluded the agreement. Although Mr Van Tonder raised this issue he did not pursue it with any conviction. There is a dearth of evidential material to demonstrate this disproportionality and the circumstances that were prevailing at the time the agreement was concluded. The argument, simply, cannot be sustained. Mr Van Tonder further contended that the restraint is unreasonable because the applicant dismissed Mr Duraan which led to the resignation of Ms Duraan. As earlier alluded to, the termination of the Duraans' service whether effected fairly or unfairly is an issue which falls outside the purview of the present application. In any event, regard being had

to how the restraint clause is couched it is triggered only after all forms of termination of service of an employee.

- [26] On the question whether restraint clause is against the public policy, Mr Van Tonder contended that the restraint clause is draconian and is formulated in overbroad terms particularly with regard to its period and the scope of application. He argued that the impediments cannot be severed from the contractual provision. The stipulation to the effect that the applicant could determine the amount of damage and recoup same from the Duraans is similarly unreasonable or untenable. Counsel contended that the Court would decline to perform an operation on an unreasonable restraint which requires drastic plastic surgery. In *Den Braven (supra)* at 262-263 para 54 Wallis AJ remarked:

“[54]..... I confine my remarks to the question whether a restraint of trade agreement that is too broad in its terms can on those grounds be held to be contrary to public policy and unenforceable in circumstances where, within the four corners of the agreement, there are restraints clearly spelt out which are reasonable in nature and which are the only restraints that the court is asked to enforce. In my judgment in that situation the court should in accordance with binding precedent grant relief to the applicant. There is no basis in law for it refusing to do so by holding the entire agreement to be unenforceable on the grounds of public policy. Such a finding is in my view contrary to the law as first articulated by Botha J in *National Chemsearch v Borrowman* [1979 (3) SA 1092 (T)] and endorsed by the Appellate Division (as it then was) in *Magna Alloys* and by the Supreme Court of Appeal in a number of subsequent cases, of which *Reddy v Siemens Telecommunications* [2007 (2) SA 486 (SCA)] is the most recent. It is not appropriate in those circumstances to seek to apply the principles of severability applicable in other contractual situations as laid down in cases such as *Sasfin v Beukes* [1989 (1) SA 1 (A)].”

- [27] In its current form the restraint clause impedes the Duraans' involvement in any business which sells similar products as the applicant in the whole of South Africa. It does not define the territory within which the restriction is to apply. Nevertheless, the applicant seeks an order in terms of which the restraint is to operate only in the Northern Cape. Similarly the period of five years over which

the prohibition is to endure is out of kilter with what would be reasonable in the circumstances of this case.

- [28] Mr Reinders argued that in the event that the Court finds the restraint period to be unreasonably lengthy same could be reduced to three years. Mr Van Tonder countered that the period be reduced to six months from the date the Duraans left the services of the applicant, 25 February 2013. I am of the view that the period of two years from date that the Duraans left the services of applicant should satisfy the desired effect of the restraint clause. Further, limiting the area of application of the restraint only to the Northern Cape would take care of any absurdity which trammels the Duraans' right to freely participate and engage in economic activities which the Constitution accords them. In the view I take of this matter, they do have a choice to venture in other trades or professions. I am not swayed that the Duraans discharged the onus that it would be unreasonable to enforce the restraint.
- [29] For a final interdict to succeed three pertinent requisites must be satisfied: firstly, a clear right; secondly, an injury actually committed or reasonably apprehended; and, thirdly, the absence of any other satisfactory remedy (see *Setlogelo v Setlogelo* 1914 AD 221 at 227). The question of a continuing injury or apprehension of future harm occurring need not be traversed at any length. The fact that the Duraans have decided to open a similar business in Kimberley puts paid to any doubt that they intend, if they had not already put their plan in motion, to breach the agreement. I point out *en passant* that in its replying affidavit the applicant mentioned that the Duraans opened a similar business in May 2013 in Kimberley. Mr Van Tonder confirmed from the bar this to be the case.
- [30] In the final analysis a clear right, its invasion or breach (an injury actually committed or reasonably apprehended) has been established. The applicant has no alternative satisfactory remedy but to enforce the restraint clause. Its application should succeed. The applicant has attained substantial success and I am satisfied that costs should follow the success.

ORDER:

[31] In the result I make the following order:

1. Mr Pierre Jean Duraan and Ms Margaret Duraan, the first and second respondents, are interdicted and restrained for a period of two years with effect from 25 February 2013 from being involved in any other business which sells similar products as Freepak BK(CK 93/21467/23), the applicant, in the Northern Cape.
2. The respondents are to pay the costs of this application

MV PHATSHOANE

JUDGE

NORTHERN CAPE HIGH COURT

On behalf of the applicant: Adv S.J. Reinders instructed by Roux Welgemoed & Du Plooy

On behalf of the respondents: Adv A.D. Van Tonder instructed by Engelsman Magabane Inc.