

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 483/2012

In the matter between:-

PANZAPIX (PTY) LTD

Applicant

and

SUSANNA ELIZABETH VAN NIEKERK

1st Respondent

DAVID MÜLLER FERREIRA

2nd Respondent

MATTHYS JOHANNES JONKER

3rd Respondent

MARIA SUSANNA OPPERMAN

4th Respondent

NICOLETTE VORSTER

5th Respondent

CASPESTEP (PTY) LTD

6th Respondent

HEARD ON:

23 FEBRUARY 2012

JUDGMENT BY:

EBRAHIM, J

DELIVERED ON:

10 MAY 2012

- [1] This is an application for final interdictory relief based on a covenant in restraint of trade. The applicant is a limited liability company duly incorporated and registered and carrying on the principal business of trading in grain. The first to fifth respondents are all former employees of the applicant, who are currently in the employ of the sixth respondent, also a limited liability company duly incorporated

and registered as such by the first respondent in order to carry on business as a grain trading entity.

- [2] The applicant, who is represented in these proceedings by its sole director, Christiaan Johannes Botha Barnard (hereinafter referred to as “Barnard”), seeks specific performance of a contractual arrangement between applicant and the first to fifth respondents, arising from the following factual matrix.

2.1 At the beginning of 2011, Barnard and the first respondent had a discussion about the possibility of setting up a grain trading business. First respondent indicated she had no starting capital although she had the expertise to conduct such a business based on her years of experience in the industry. It was agreed between them that a company (the applicant) would be incorporated and registered to trade in grain, maize and other arable crops. First respondent’s input would be her know-how and expertise and Barnard would furnish starting capital. The exact amount of this capital is disputed on the papers but it is common cause that Barnard did pay into the business an

amount of R150 000,00.

2.2 The business of the applicant flourished to the extent that the annual turnover for the first year of trading as evidenced from its trial balance sheet (annexure “CJB2” to the papers) reflected an amount of approximately R36 million.

2.3 At the commencement of the business, two agreements were signed by the first respondent. On 20 August 2011, both she and Barnard signed a Shareholder’s Agreement as representatives of the contracting parties *viz* the trustees of the BTJJ Trust and the trustees of the J & I Trust, the owners of the applicant. On 2 February 2011, the first respondent and the second, third, fourth and fifth respondents (who were all employed by the applicant) each signed a confidentiality and restraint agreement in terms of which they undertook not to trade in competition with the applicant in the Free State, Northern Cape and North West Provinces, during their term of employment with the applicant and for a period of one year after termination of such employment. They also agreed not

to disclose any of the applicant's confidential trade information. A similar restraint cause is contained in the Shareholder's Agreement.

2.4 The restraint is recorded in clause 3 of the Restraint Agreement as follows:

“3.1 It is recorded that –

3.1.1 In the course of his/her duties to the Company, the employee will become intimately concerned with the business and affairs of the group;

3.1.2 By reason of his/her association with the group, the employee will acquire considerable knowledge and know-how relating to the group and its business/es.

3.2 The employee acknowledges that if he/she is not restricted from competing with the group as provided for herein, the group will potentially suffer considerable economic prejudice including loss of custom and goodwill. Accordingly, the Company considers it essential, to protect the group's interests, that the employee agrees to a restraint of trade undertaking in favour of the group to ensure that the employees will be precluded from carrying on certain activities which would be harmful to the business of the group.

3.3 The employee –

3.3.1 undertakes in favour of the group, its successors-in-title and assigns that he/she will not, during the restraint period, directly or indirectly, and whether for his/her own account, or as a principal, agent, partner, representative, shareholder, director, employee, consultant, contractor, financier, assistant, administrator, (including any employee of any member of the group), syndicate, partnership, joint venture, Company, Trust, business undertaking, concern or other association of any nature –

3.3.1.1 anywhere in the prescribed area be interested in, engaged in, concerned or associated with any business which is directly or indirectly competitive with the business carried on by any member of the group at any time during the restraint period ('the protected business');

3.3.1.2 anywhere in the prescribed area canvass, solicit or entice, or endeavour to entice, in respect of any business which is directly or indirectly competitive with the protected business, any person who, is then, or was at the termination date or during a period of one year prior to the termination date ('pre-termination period') a client, customer, supplier or distributor in respect of the protected business or is then or was at the termination date

accustomed to dealing with any member of the group, or a principal or agent *vis-a-vis* any agency, or licensor or licensee in respect of any licence granted in respect of the protected business;

3.3.1.3 canvass, solicit or entice, or endeavour to entice away from the group or employ, or appoint, or procure the employment or appointment of, in respect of any business which is competitive with, or similar to the protected business, any person who is then an employee, officer or agent of the group;

3.3.1.4 persuade, induce, solicit, encourage or procure any employee of any member of the group to terminate his/her employment with such member;

3.3.1.5 solicit the custom of or sell to or attempt to sell to or deal with, in respect of the protected business, any customer from whom the employee, on behalf of any member of the group, obtained or attempted to solicit business at any time during the continuance of the employee's employment;

3.3.2 acknowledges and agrees that each undertaking given by or restraint imposed upon him/her in terms of clause 3.3.1-

3.3.2.1 is to be construed where reference is made –

3.3.2.1.1 to any period, as applying separately to each month failing wholly or partly within

- such period;
- 3.3.2.1.2 to any business, as applying separately to each aspect thereof or activity failing wholly or partly within such business;
- 3.3.2.1.3 to any type, class or category of person, as applying separately to each person of such type or class, or failing within such category;
- 3.3.2.1.4 to any area, as applying to each magisterial district (or the equivalent thereof) in such area;
- 3.3.2.2 is to be construed, whether in relation to duration, area and scope of operation, or otherwise, as a separate and independent undertaking or restraint from each of the others given by or imposed upon him/her pursuant thereto;
- 3.3.2.3 is reasonable in its duration, area and scope of operation for the protection of the direct and indirect proprietary interests of the group, having regard, *inter alia*, to the matters recorded in 3.1 and 3.2.
- 3.3.3 agrees that this undertaking is a stipulation of the benefit of each member of the group and its successors-in-title and assigns capable of enforcement by each member of the group and its successors-in-title and assigns on the basis that the signature hereof by the Company constitutes an acceptance of such benefit by each

member of the group and its successors-in-title and assigns.

3.4 The failure by any member of the group to –

3.4.1 exercise any of its rights in terms of this clause 3 in consequence of any breach by the employee of any of the provisions of clause 3.3;

3.4.2 succeed in any proceedings instituted by it to enforce any of its rights in terms of the restraint given by the employee in clause 3.3 as a result of the finding of any court;

shall not preclude any member of the group from exercising any such rights in consequence of any subsequent breach by the employee or of any subsequent findings of any court, as the case may be.

3.5 If after the termination date and prior to the expiry of the restraint period, the employee –

3.5.1 acts in breach of his/her obligations in terms of clause 3.3; and

3.5.2 is ordered by a court of law to abide by the undertakings made by him/her, in terms of clause 3.3,

then the restraint period will, at the election of the Company, be deemed to commence running from the date upon which the employee ceases to act in breach of his/her said obligations or

the date of the employee's last known act in breach of his/her said obligations.

3.6 The employee acknowledges that if he should at any time dispute that any of the provisions of this clause 3 are reasonable and/or contend that they are unreasonable then the onus of proving such unreasonableness will rest upon him/her.

3.7 Without limiting the generality of the foregoing, the employee will comply with, and the group will be entitled to enforce, the provisions of this clause 3 notwithstanding-

3.7.1 that the termination of the employee's employment or the termination of this agreement results from -

3.7.1.1 a breach (material or otherwise) of any of the provisions of this agreement by the employee;

3.7.1.2 repudiation by either party of this agreement (notwithstanding acceptance of such repudiation by the other of them);

3.7.1.3 fair or unfair dismissal by the employee;

3.7.1.4 notice of termination by either party.

3.8 A breach of any of the restraints stipulated in this clause 3 shall entitle any member of the group, without prejudice to any other rights available to it in law and notwithstanding

any other provision of this agreement, to apply to any court of competent jurisdiction for an appropriate interdict.”

2.5 In contravention of the restraint agreement, the first, second, third, fourth and fifth respondents, resigned with immediate effect on 13 January 2012 and commenced trading on 16 January 2012 under the auspices of the sixth respondent in the same commodities as the applicant.

2.6 The sole director and shareholder of the sixth respondent is the first respondent. The other respondents are its employees.

2.7 In the founding papers in support of this application, Barnard alleges that the relief is warranted because not only did the first respondent commit theft by stealing documents, computers and flash storing discs (containing information relating to the applicant’s business and its clients, but she also wrote to the applicant’s clients to entice them to do business with the sixth respondent.

[3] Only the first respondent has opposed the relief sought. In her opposing affidavit she advances the defence that the restraint agreement is unreasonable, contrary to public policy and therefore unenforceable. Her defence is based on five grounds.

3.1 The applicant has no protectable interest as it ceased trading when the respondents resigned on 13 January 2012.

3.2 Barnard made it impossible for any of the respondents to continue in the service of the applicant because of his mismanagement of the finances of the applicant.

3.3 Barnard's conduct was not reasonably foreseeable at the time the restraint agreements were signed by the respondents. Accordingly to hold them to the covenant does violence to their rights in terms of section 22 of the Constitution of the Republic of South Africa, Act 108 of 1996 (Freedom of Trade, Occupation and Profession).

3.4 Barnard has an ulterior motive in launching this application in that his sole intent is to deny the respondents the right to earn an income, particularly where the first respondent is concerned, regard being had to the threats Barnard made that he would destroy the reputation of the first respondent.

3.5 The sixth respondent does not do business with the applicant's clients.

[4] 4.1 It follows that the determination of this application rests on the reasonableness of the restraint. The common law position on this issue is that essentially each agreement should be examined with reference to its own particular circumstances (i.e. on the facts) to ascertain whether the enforcement of the agreement would be contrary to public policy and consequently unenforceable. Public policy requires that agreements freely entered into should be honoured, but it also requires that persons should be free to seek fulfilment in their choice of profession, trade or occupation. See **MAGNA ALLOYS & RESEARCH SA (PTY) LTD v ELLIS** 1984 (4) SA 874 (A). This common law

freedom is underpinned by section 22 of the Bill of Rights in the South African Constitution which provides as follows:

“22. Freedom of trade, occupation and profession. — Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.”

Contractual autonomy is part of the freedom informing the constitutional value of human dignity. An unreasonable restriction of a person’s freedom to trade or pursue a chosen profession, trade or occupation, would thus be contrary to public policy and attract constitutional invalidity should it be enforced.

- 4.2 The assessment of the reasonableness of the restraint requires a value judgment and the incidence of the onus plays no part in that assessment. The value judgment required to be undertaken must be done with full comprehension of the considerations referred to in

section 36(1) of the Constitution since it necessarily requires determining whether the restraint was “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”. The two principal policy considerations which have to be borne in mind when undertaking the exercise is that the public interest requires firstly that contractual obligations be complied with and secondly, that all persons should in the interest of society be economically productive by being permitted to engage in trade, commerce or the professions. See **REDDY v SIEMENS TELECOMMUNICATIONS (PTY) LTD** 2007 (2) SA 486 (SCA).

- [5] 5.1 In applying these two principal considerations, the respective interests of the applicant and the respondents must be examined, bearing in mind that a restraint is unreasonable and unenforceable if it prevents a party from engaging in a trade, occupation or profession after termination of his or her employment with the other party without a corresponding interest of the latter being infringed and

thus deserving of protection. Such a restraint is not in the public interest.

5.2 In **BASSON v CHILWAN AND OTHERS** 1993 (3) SA 742 (AD) at 767 G – H Nienaber JA identified four questions which should be asked when considering the reasonableness of the restraint.

- a) Does the one party have an interest that deserves protection after termination of the agreements?
- b) If so, is that interest threatened by the other party?
- c) Does such interest weight 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, which requires that the restraint be maintained or rejected? Where the interest of the party sought

to be restrained outweighs the interest to be protected, the restraint is unreasonable and consequently unenforceable.

5.3 This common law approach of balancing the competing interests or reconciling the concurring interests of the parties, gives effect to the precepts of section 36(1) of the Constitution, which provides:

“36. Limitation of rights.—(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.”

An agreement in restraint of trade is concluded pursuant to a law of general application, the law of contract which allows for contractual freedom and the conclusion of agreements giving effect thereto.

- [6] Consequently the value judgment postulated in **BASSON** and **REDDY**, *supra*, necessarily requires determining whether the restraint is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.

The enquiry into the reasonableness of the restraint covers the value, extent and duration of the restraint as well as the respective bargaining powers and interests of the parties and factors peculiar to them. To the extent that any facts are in dispute, same must be resolved in favour of the respondents, these being motion proceedings for final relief. See **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** 1984 (3) SA 623 (A).

- [7] In its founding papers, the applicant relied exclusively on clause 3.3 of the restraint agreement which prevents the first to fifth respondents from being employed by a competitor of the applicant in the Free State, Northern Cape and North

West Provinces for a period of 12 months (one year) after termination of their employment with the applicant. The restraint is aimed at the choice of employer. The first to fifth respondents are not restrained from being economically active on the open market for the period and in the areas covered by the restraint. The applicant does not seek to inhibit each of the respondents from engaging in employment in any other field (other than trading in the grain industry) in respect of which their skills could be productively put to use. It is consequently the nature and extent of the limitation in respect of which the restraint is sought. Whether such a restraint is reasonable depends exclusively on the question whether the sixth respondent is a competitor of the applicant, in other words, whether the applicant has a protectable interest. It has not been argued that the limitation as to time is unreasonable.

- [8] It is common cause that the relationship between Barnard and the first respondent had soured during the applicant's first year of trading. It is also common cause that each of the second, third, fourth and fifth respondents had been trained and recruited as employees of the applicant by the first

respondent, who together with them was in charge of the day to day running of the applicant's business whilst Barnard was in charge of the finances. On the respondents' version, the reason for the deterioration in her relationship with Barnard was his indiscriminate dissipation of applicant's funds on expenses not connected to the trading activities of the applicant. The details of these expenses are irrelevant for the purposes of the adjudication of these proceedings. What is relevant is that the first respondent believed that Barnard's reckless spending was financially sabotaging the applicant's business as the effect thereof was that clients of the applicant could not be paid at all or timeously. It was her concern that clients would incur financial loss which ultimately caused her to resign and take the second to fifth respondents with her on 13 January 2012.

- [9] As at the date of her resignation, the first respondent concedes that the applicant had done business with several business entities throughout 2011 and in her letter of resignation she undertook to "finalize all outstanding contracts" with the assistance of the applicant's accountant, one Christien Jonker (Jonker"). She was aware that without

her input, knowledge and skill of the grain trading business and the corresponding industry and skills of the second to fifth respondents, the applicant's business would come to a standstill because it possessed of no employee or trader with the know-how to deal with the grain trading business and perform the contractual obligations, which had been undertaken by the first respondent in respect of the buying and selling of grain and whatever other commodities it happened to trade in on its behalf. At the time of her resignation even Jonker resigned but reconsidered her decision shortly thereafter.

- [10] The first respondent wrote to each and every client of the applicant informing them she was no longer a director and employee of the applicant. She undertook to ensure personally that their contracts with the applicant were performed so that they incurred no damages as a result of a breach. She and the second to fifth respondents then took their departure of the applicant together with the applicant's computers containing confidential information of its client data base and its pricing structures and documents pertaining to the business and trading activities of the

applicant with its existing and prospective clients. According to the first respondent this information was required in order to assist her to finalise outstanding contracts with clients whom she had engaged for the applicant and with whom she had been negotiating whilst trading on behalf of the applicant. As a result the applicant's business came to a grinding halt and the applicant successfully embarked on urgent motion proceedings in this court to retrieve all its confidential information from the possession of the first respondent.

- [11] What all of the foregoing amounts to is merely that the first respondent over the weekend of 13 January 2012 effectively commandeered the entire business portfolio of the applicant. It matters not, in my view, that it was the first respondent who initially introduced the clients and their corresponding business to the applicant and that the customer connection with the applicant was at her behest in the first place. But that is not all, the first respondent, simultaneously, registered and incorporated a new company, the sixth respondent, on 13 January 2012 and, whilst still in the applicant's employ, concluded a contract for the sale of white maize with

Unigrain, a client of the applicant, on behalf of the sixth respondent, as seller. Clearly, not only was the first respondent in possession of confidential information belonging to the applicant as at the date of her resignation, but she was proactively using same in order to solicit a client of the applicant. The contract referred to forms annexure “REP1” to the applicant’s replying papers and was not challenged by Mr. Reinders in oral argument. I have no doubt that this was due to the respondents’ defence that the restraint precludes each of them from earning a livelihood. Here there is no risk of disclosure to a competitor. There is, objectively assessed, a factual disclosure of applicant’s confidential information to a competitor (the sixth respondent) and a factual transfer of the business of a client of the applicant to the competitor (the sixth respondent). In these circumstances the first respondent will clearly have no loyalty to the applicant in her dealings with any/all of the applicant’s clients whose contracts she professes she intends seeing to finality. Her loyalty will be with the new company she has formed which carries on the same business as the applicant, her aim being to trade in competition with the applicant, having taken with her all of the applicant’s clients. I might add, as a further slap in the

face to the applicant, the first respondent has given her new company, the sixth respondent, the same trading name as that of the applicant viz Grain Commodities and Feeds. She has opened a new bank account and written to each and every client of the applicant, furnishing them with the new banking details. Each of the respondents occupies a position in the sixth respondent similar (if not precisely the same) to that which they occupied with the applicant. Can one then say that in these circumstances, the restraint which was aimed at relieving this kind of competition and disclosure is unreasonable, because the applicant has no protectable interest, its entire clientele and business having been removed by the first respondent and her co-respondents due to Barnard's conduct which made it impossible for them to work with him and because they are entitled to exercise their constitutional right to earn a living?

- [12] I am of the view that in these circumstances the restraint is neither unreasonable nor contrary to public policy nor constitutionally impermissible. It cannot be expected of the applicant that it adopt a passive role rather than insist on enforcing the bargain which it has exacted from the five respondents in terms of the covenant with them. The words

in clause 2.2 of the Restraint Agreement

“... on termination of the employees’ employment in terms of this agreement for any reason whatever...”

indicate that the restraint is to operate once there is no longer an employment relationship between the applicant and the respondents irrespective of the circumstances in which that relationship comes to an end. The underlying cause of the termination is thus irrelevant to the operation of the restraint. The respondents are each members of the public who have been gainfully employed in one or other field during their adult life. From the evidence it is clear to me that each is capable of obtaining some form of employment, unrelated to the nature of the applicant’s business for the remaining period of restraint. None of the respondents have indicated an inability to engage in any other form of employment on the open market. In fact, there is no indication whatsoever in the answering affidavits of each of the first to fifth respondents what their qualifications are, what skills they possess and

what options are open to them on the open market.

This is noteworthy and indicative of a determination to defeat the restraint by entering and remaining in the service of a trade competitor of the applicant, the sixth respondent.

[13] The public interest requires contracts to be enforced. This is consistent with the constitutional values of human dignity and autonomy. The restraint is not unreasonable and the respondents must honour it as they entered into it voluntarily each in accordance with his/her own freedom to contract. Their employment with the sixth respondent must be restricted as it is a breach of their contractual undertaking with the applicant. I cannot conceive of what less restrictive means could achieve the same purpose.

[14] The application succeeds. An order is granted in the following terms:

1. The first, second, third, fourth and fifth respondents are interdicted and restrained – for a period of one year calculated from 13 January 2012 and within the Free

State, Northern Cape and North West Provinces – from directly or indirectly, for his or her own account, or as principal, agent, partner, representative, shareholder, director, employee, consultant, contractor, financier, assistant, administrator, advisor, officer, syndicate, partnership, joint venture, company, trust, business undertaking, any other association of any nature:

- 1.1 being interested, engaged in, concerned or associated with any business which is directly or indirectly competitive with the business carried on by the applicant;
- 1.2 canvassing, soliciting or enticing or endeavouring to entice, in respect of any business which is directly or indirectly competitive with the applicant's protected business, any person who, is then or was on 13 January 2012 or during a period of one year prior to this date a client, customer, supplier or distributor in respect of the protected business of the applicant or is then or was at 13 January 2012 accustomed to dealing with the applicant or a principal or agent *vis-à-vis* any agency or licensor or licensee in respect of

any license granted in respect of the applicant's business;

1.3 persuading, inducing, soliciting, encouraging or procuring any employee or any member of the applicant to terminate his/her employment with the applicant;

1.4 soliciting the custom of or selling to or attempting to sell or deal with, in respect of the protected business of the applicant, any customer from whom the respondents, on behalf of the applicant, obtained or attempted to solicit business at any time during the continuance of the respondents' employment with the applicant.

2. The first to fifth respondents are ordered to immediately terminate their employment with the sixth respondent.
3. The first respondent is ordered to pay the costs of this application on the scale as between attorney and own client.

On behalf of applicant:

Adv. S. Grobler
Instructed by:
Honey Attorneys
BLOEMFONTEIN

On behalf of 1st to 5th respondents: Adv. S.J. Reinders

Instructed by:
Rossouws Attorneys
BLOEMFONTEIN

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