

IN THE KWAZULU-NATAL HIGH COURT, DURBAN
REPUBLIC OF SOUTH AFRICA

CASE NO: 2442/2012

In the matter between:

**CMC WOODWORKING & MACHINERY
SUPPLIES (PTY) LTD**

Applicant

and

**COLIN DAVID WILKIE
AUSTRO WOOD (PTY) LTD**

**First Respondent
Second Respondent**

JUDGMENT

Delivered on: 23 October 2012

Henriques J

Order

It is ordered:

1. The first respondent is interdicted and restrained until 31 January 2013, from being interested, whether directly or indirectly, in, or by, or concerned with, whether as proprietor, partner, director, shareholder, employee, consultant, contractor, financier, principal, agent, representative, assistant, advisor, administrator, trustee or beneficiary of a trust or otherwise:
 - 1.1 any business which competes with the applicant in South Africa, Zimbabwe, Botswana, Zambia, Mozambique and/or Swaziland;

and

1.2 the second respondent.

2. The first respondent is interdicted and restrained from using, whether directly or indirectly, or divulging or disclosing to any other person or entity (save and except as may be required of him by law, or with the express written permission of the applicant), any of the applicant's confidential information or trade secrets pertaining to:

- 2.1. the requirements of any of the applicant's customers;
- 2.2. the fact, details or nature of any negotiations between the applicant and its customers or prospective customers;
- 2.3. prospective customers and their possible requirements;
- 2.4. any quotations provided by the applicant to any of its customers or prospective customers;
- 2.5. any details in respect of the prices or discounts offered by the applicant's suppliers to the applicant;
- 2.6. any details relating to the applicant's profit margins or prices;
- 2.7. the identities of the applicant's existing or prospective customers as at 31 January 2012.

3. The first respondent is interdicted and restrained from furnishing any information or advice acquired by the first respondent as a result of his employment with the applicant, to any other person or entity, which

results or may result in any of the applicant's employees becoming employed by, or directly or indirectly interested, in any other business, firm, undertaking, company or entity, including the second respondent;

4. The first respondent is interdicted and restrained from soliciting, interfering with (in any way, whether directly or indirectly), enticing or endeavouring to entice away from the applicant, any person, firm or company who or which, during the period 2 July 2005 to 31 January 2012 was a customer of the applicant or was accustomed to dealing with the applicant;
5. The second respondent is interdicted and restrained from using any of the applicants confidential information disclosed to the second respondent by the first respondent;
6. The first and second respondents are directed to pay the applicant's costs of the application, the one paying the other to be absolved jointly and severally, which in the case of the first respondent is on the attorney and client scale.¹

Nature of Application

7. This is an application in which the applicant seeks to enforce the terms of a restraint agreement concluded between itself and the first respondent. The applicant did not initially seek any relief against the second respondent, but in light of the contents of the answering affidavit delivered, sought an order against the second respondent interdicting and restraining it from using any of its confidential information which was disclosed to it by the first respondent.

¹ The restraint agreement makes provision for the payment of costs on an attorney client scale in the event of legal proceedings being instituted and decided in favour of the applicant.

The Restraint Agreement

8. In the restraint agreement, which was concluded in June 2005, the first respondent expressly acknowledges that he has and will be entrusted with confidential information regarding all aspects of the applicant's business, methods techniques, clients and confidential information which was unknown to him at the time of commencing his employment with the applicant.
9. The first respondent specifically agreed that the restraint was reasonable in relation to duration and area and that he would not persuade, induce, solicit or procure any employee of the applicant to terminate his/her employment with the company or become employed with a competitor of the applicant.

The Applicable Test

10. The test² in determining whether a restraint is enforceable is trite and five factors must be considered namely:
 - 10.1 Does the applicant have an interest deserving of protection on termination of the first respondent's employment
 - 10.2. Has the applicant's interest been threatened by the first respondent?
 - 10.3 If so, does the applicant's interest outweigh the first respondent's interest not to be rendered economically inactive and unproductive?

² Basson v Chilwan and Others 1993(3) SA 742 (A) at 767 G to H; Reddy v Siemens Telecommunications (Pty) Ltd 2007 (2) SA 486 (SCA) at 497 paragraph 16

- 10.4 Does public policy require that the restraint be upheld or rejected?
- 10.5 Does the restraint go further than is reasonably necessary to protect the applicant's interest?
11. Our courts have held that restraint agreements are valid and enforceable unless they are unreasonable and contrary to public policy. Should the restraint be designed to exclude or eliminate competition and not protect a protectable interest of an employer, it will be considered unreasonable and against public policy.³ The party who challenges the enforceability of the restraint bears the burden of alleging and proving that it is unreasonable and against public policy⁴.
12. If the facts concerning the reasonableness of the restraint are in dispute, it must be resolved in favour of the respondent. What is called for is a value judgment by the court on the assessed facts⁵. The exercise of the value judgment involves two considerations namely that the parties should comply with their contractual obligations i.e the legal maxim *pacta servanda sunt* is applicable and that all persons should be productive and permitted to engage in trade and commerce or in their professions.⁶
13. The enquiry to be undertaken is done at the time that enforcement of the restraint provisions is sought.

³ Automotive Tooling Systems (Pty) Ltd v Willkens & others 2007 (2) SA 271 SCA @ 277 – 278 at paragraph 8

⁴ Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A)

⁵ Omni Technologies (Pty) Ltd v Barnard & others [2008] 2 All SA 207 (SA) @ 211 a-c referring to Reddy supra at paragraph 14 pages 495 to 496

⁶ Reddy supra at paragraph 15 page 496

14. Among the considerations are:

14.1. is there any other activity that the employee can undertake;⁷

14.2. does the interest which is sought to be protected belong to the employer. The question is whether the skill, expertise and knowledge that the employee acquires was one which accrues to the employer and not to the employee. The dividing line between the two is often difficult to define and is a question of degree⁸.

15. The mere fact that an employee has taken up employment with a competitor would not in itself entitle the erstwhile employer to relief if all that the employee will be doing is applying his or her skills and knowledge acquired while in the erstwhile employment, but without such activity impinging on a proprietary interest of the erstwhile employer.⁹

16. In *Aranda Textiles* supra confidential information, which includes trade secrets it was held *"that in order to qualify as confidential information, the information must be capable of application in trade or industry; not be public knowledge (objectively determined, it must be known to a restricted number of people or to a closed circle); objectively determined be of economic value to the person seeking to protect it. The nature of the information is irrelevant, as long as it complies with the above requirements...the mere fact that a trade secret is known to a group of people who compete with each other does not necessarily lead to the inference that it ceased to be a trade secret."*¹⁰

⁷ *Aranda Textile Mills* [2000] 4 All SA 183 SE @ 189 c

⁸ *Automotive Tooling Systems (Pty) Ltd v Willkens & others* 2007 (2) SA 271 SCA @ 277 -279

⁹ *Automotive Tooling Systems (Pty) Ltd v Willkens & others* 2007 (2) SA 271 SCA @ 277 -279

¹⁰ *Aranda Textile Mills* supra at paragraphs 29 and 30, *Omni Technologies* supra at paragraph 12

17. In *Rawlins & another v Caravan Truck (Pty) Ltd*¹¹ in so far as an employers trade connections are concerned the court held the following *“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...”*.

18. Our courts have held that in order to determine whether the criteria are satisfied involves a question of fact and *“will depend on the duties of the employee, his personality, the frequency and duration of the contact between him and the customers, where such contact takes place, what knowledge he gains of their requirements and business, the general nature of their relationship including whether an attachment is formed between them, the extent to which customers rely on the employee and how personal their association is, how competitive the rival businesses are, in the case of a salesman, the type of product being sold; and whether there is evidence that customers were lost after the employee left.”*¹²

19. In *Reddy v Siemans*¹³ the court held the following *“it is not that the mere possession of knowledge is sufficient, and this not what was suggested by Marais J in BHT Waters case , Reddy will be employed by Ericsson a concern which carries on the same business as Siemans in a position similar to the one he occupied with Seimans his loyalty will be to his employers and the opportunity to disclose confidential information at his disposal, whether deliberately or not, will exist. The restraint was intended to relieve Siemans firstly of this risk of disclosure. In this circumstance the restraint is neither unreasonable nor contrary to public policy.*

¹¹ 1993 (1) SA 537 AD @ 541 c-h

¹² *Omni supra* at page 213 d - g

¹³ 2007 (2) SA 486 @ 497 @ para 20 @ 499 G -500 E

20. In Reddy the court referred to the remarks of Marais J in BHT Water 1993 (1) SA 47 at 57 J – 58 B where the court held the following *“In my view, all that the applicant can do is to show that there is secret information to which the respondent had access, and which in theory the first respondent could transmit to the second respondent should he desire to do so. The very purpose of the restraint agreement was that the applicant did not wish to have to rely on the bona fides or lack of retained knowledge on the part of the first respondent of the secret formulae. In my view, it cannot be unreasonable for the applicant in these circumstances to enforce the bargain it has exacted to protect itself. Indeed, the very ratio underlying the bargain was that the applicant should not have to content itself with crossing its fingers and hoping that the first respondent would act honourably or abide by the undertakings he has given...In my view, and ex employee bound by a restraint, the purpose of which is to protect the existing confidential information of his former employer, cannot defeat an application to enforce such a restraint by giving an undertaking that he will not divulge the information if he is allowed, contrary to the restraint, to enter the employment of of a competitor of the applicant. Nor in my view, can the ex- employee defeat the restraint by saying that he does remember the confidential information to which it is common cause that he has had access. This would be the more so where the ex- employee, as is the case here, has already breached the terms of the restraint by entering the services of the competitor.”*

Respondents Challenge

21. The respondents oppose the application on the following grounds namely :-
that the application was not urgent;

that there are countless factual disputes on the papers which require the application to be determined on the respondent's version;

the restraint is unreasonable as there is no protectable interest and consequently there is no threat;

the interests of the first respondent should a protectable interest be found to exist, outweighs that of the applicant.

22. At worst for the first respondent the submission is that the applicant proved the requirements of a protectable interest in respect of the areas of Gauteng, Limpopo, North West, Mpumalanga, Botswana, Zimbabwe and Mozambique.
23. If one has regard to the test to be applied, the respondents do not appear to take issue with the restraint on the basis of the requirement referred to in paragraph 10.4. above. The challenge is limited to the other requirements.
24. Essentially the relief which the applicant seeks is final in form. Consequently, such relief can only be granted in motion proceedings if the facts as stated by the respondent together with the admitted facts in the applicants affidavit justify the order¹⁴.
25. The first respondent has to show that the applicant does not have a proprietary or protectable interest which is threatened by his employment with the second respondent.

¹⁴ Plascon-Evans Paints v Van Riebeeck Paints 1984(3) SA 623 A

26. The applicant in its founding papers relies on the following protectable interests namely, its customer connections and confidential information. These have long been recognised as protectable interests¹⁵.
27. It is common cause between the parties that the first respondent was employed by the applicant as a salesperson in Durban, thereafter he was employed as a branch manager. The first respondent resigned and took up employment with the second respondent with effect from the 3rd February 2012.
28. During the course of his employment with the applicant the first respondent concluded a restraint of trade agreement, on 6 June 2005. The terms of the restraint are common cause.
29. The applicant and the second respondent are in direct competition with each other in the woodworking and aluminium working machinery sales industry.
30. It would appear that there is a close link between the customer connections and confidential information of the applicant.

Was the first respondent in a position where he had access to customers and can now build up a relationship with customers of the applicant so that he will easily induce customers to follow him?

31. The applicant's business is that of an importer and distributor of industrial and domestic woodworking machinery and related equipment. In or about 2008 the applicant, also imported and distributed aluminium working machinery and related equipment. In addition the applicant's business includes the sale of new and second hand industrial and domestic

¹⁵ Rawlins vs Caravantruck (Pty) Ltd 1993 (1) SA 537(A) at 541 B
Sibex Engineering Services vs Van Wyk 1991 (2) SA 482 (T) at 502 C-F, 505 F-I; 507 D to 508 A.

woodworking machinery. It has expanded its business outside the domestic market and has undertaken extensive advertising and established contact with the respective chambers of commerce in Swaziland, Botswana, Zimbabwe and Mozambique. Amongst its customers who operate nationally and internationally are York Timbers and Hans Merinsky and Steinhoff and Lumber City.

32. The second respondent operates in the same national market as the applicant but according to the founding affidavit does not import and sell aluminium machinery and related equipment. The second respondent is one of the applicant's largest direct competitors.
33. The first respondent was employed initially as a salesperson and subsequently moved up the ranks in the company and became its managing director. The first respondent was in a peculiar relationship to the applicant specifically its managing director. It is not disputed that the first respondent had repeatedly approached Olivier requesting employment and had no experience as a sales person or that Olivier took him under his wing and mentored him personally. He received detailed training at the applicant's expense and accompanied Olivier to visit the applicant's clients and was personally introduced to their clients and received the applicants support and assistance every step of the way. In addition he accompanied Olivier to Italy where he was acquainted with the applicant's imported products. He attended trade fairs in Germany to learn the applicant's products and this enabled him to give expert advice to the applicant's customers.
34. On the 30 March 2007, the parties concluded an addendum to the contract of employment in terms of which the first respondent undertook to reimburse the applicant for certain of the expenses that the applicant had

incurred in the event of the first respondent leaving the applicant's employment within a specified period of his return.

35. The first respondent progressed and was appointed as the applicant's branch manager in Johannesburg in December 2007 and as branch manager 80% of his time was focused on sales to the applicant's customers and he became the applicant's key sales person nationwide.
36. It would appear that the first respondent was able to develop personal relationships with applicant's customers and this stood him in good stead to attract orders from customers of the applicant. In addition to building customer connections, the first respondent became acquainted with the applicant's confidential information. He became familiar with the applicant's suppliers, the discounts and pricing structures in place both in Europe and in Asia.
37. It is clear that the first respondent was trained and acquired the skill and expertise at the expense of the applicant but also which accrued to the applicant by its very nature. In as much as the applicant and second respondent may share the same customers this cannot assist the first or second respondents if one has regard to *Rawlins*.¹⁶ The first respondent in my view through his interactions with the applicant's customers has built up a special relationship which places him in a position where he can induce them to follow him, Lisa Hartzenberg being one such example and Knight Shopfitters having regard to the papers.
38. By virtue of his mentoring, training and positions held during his employment with the applicant, the first respondent in my view has had access to confidential information. It is not necessary for purposes of this judgement to canvass these in detail but the first respondent has had

¹⁶ At page 544

- access to client lists, pricing, quotations etc. In addition if one has regard to the papers it is apparent that the first respondent has used this information acquired, for the benefit of his new employer to entice customers and orders have been lost. The second respondent has had access to this information and has benefitted from it.
39. Not only has the first respondent threatened the applicant's confidential information and customer connections but appears to have attempted to entice the applicant's employees. It is clear that the first respondent's loyalty is to his new employer, the second respondent. Thus the first two legs of the test in my view have been satisfied.
 40. If one has regard to the first respondent's work history and curriculum vitae, he has technical skills which he can utilise to obtain alternative employment alternatively engage in sales with an entity not in competition with the applicant. In my view, he would not be rendered economically inactive and the interests of the applicant outweigh his.
 41. The period of the restraint is a year and in my view is not unreasonable. The applicant's customer connections in South Africa and the neighbouring countries have been threatened and warrant protection.
 42. I am accordingly of the view that the applicant has shown it has a protectable interest warranting protection in terms for the restraint. The various legs of the test for a restraint have been satisfied and consequently, the applicant is entitled to the relief it seeks.
 43. As far as costs are concerned, the restraint agreement makes provision for the first respondent to pay these costs on an attorney client scale. In light of the fact that the second respondent has had access to the applicant's customer connections and confidential information and

appears to have benefitted from same, I am satisfied that the costs order requested by the applicant is warranted.

44. I am also of the view that there is no merit in the points raised by the respondents in relation to the aspect of urgency or non compliance with the rules.

HENRIQUES J

DATE OF HEARING: 28 MARCH 2012

DATE OF JUDGMENT: 23 OCTOBER 2012

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