

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No: 2708/2011

In the matter between:

OMNIA GROUP (PTY) LTD

Applicant

and

RUDOLF JOHANNES UYS

1st Respondent

RUDOLF JOHANNES UYS N.O.

2nd Respondent

In his capacity of Trustee of Die Hanina Trust

WILHELMINA UYS N.O.

3rd Respondent

In his capacity of Trustee of Die Hanina Trust

JACOBUS PETRUS COETZEE N.O.

4th Respondent

In his capacity of Trustee of Die Hanina Trust

PROFERT (PTY) LTD

5th Respondent

JUDGEMENT:

MATHEBULA AJ

HEARD ON:

22 SEPTEMBER 2011

DELIVERED ON:

15 DECEMBER 2011

- [1] The applicant is a well known company manufacturing and selling fertilizers based in Sasolburg. It is one of the key players in this industry conducting business even beyond the

borders of the Republic. Its fertilizer business rakes in excess of R2,5 billion sales per year.

[2] The fertilizer business booms during the planting season. This business is not only price sensitive but also must keep abreast with technological innovation in maximising profits for consumers namely farmers. The competition is fierce and stiff among different manufacturers and consumers.

[3] The applicant, in order to market its products, engaged a network of sales agents to deal directly with the consumers. The First Respondent was appointed an agent in 1994 operating in the Magisterial District of Koppies, Vredefort, Sasolburg and Parys. The First Respondent did excellently and in the past year turnover from his sales was approximately R60-70 million.

[4] It is important to dwell into how these sales are conducted with the consumers. The farmers are decided into “buying groups” namely “Vredefort”, “Calculated Farms” and “Jaap van der Westhuizen”. These groups are merely bargaining tools for better prices for members. The applicant as the

major player in the area considered these groups as its major clients and the First Respondent was the agent in charge. According to the applicant the First Respondent was effectively the first port of call for the clients and its face in the area.

- [5] The business relationship between the parties came to an end on the 18th April 2011. It appears that the breakdown of the relationship was brought about by changed commission structure with falling income. This led to disputes and finally the termination of the agreement.
- [6] The parties signed a Memorandum of Agreement on the 16th March 2009. The parties cited are Omnia Kunsmis a division of Omnia Group (Pty) Ltd represented by its Marketing Director, Maartens Jacobs van Jaarsveld and Die Hanina Trust represented by Rudolf Johannes Uys, its Trustee. This is the agreement that is at the crux of the dispute between the parties. The essence of the matter is that the applicant is seeking to interdict and restraint the First Respondent from being engaged as a salesperson directly or indirectly in the aforementioned magisterial districts. The First Respondent

is of the view that the agreement was entered into by the applicant and the trust which excluded him personally.

- [7] In his submission Mr Redding referred extensively to the Memorandum of Agreement signed by both parties. In particular, the restraint **clause 5** on **page 107** of the Founding papers. His argument was that the background and surrounding circumstances manifest the intention that the aim was to bind a person. He emphasised that the Trust is neither a juristic nor a natural person. The Trust was simply a conduit to render services or perform obligations.
- [8] The services and obligations as per the Memorandum of Agreement were of such a nature that they could be rendered or performed by a natural person. This is also substantiated by the conduct of the parties in particular the cancellation of the agreement by the First Respondent. The reference to **“we”** and the usage of reference to **“I”** and **“Trust”** interchangeably in the opposing papers. It was his view that the extrinsic evidence points to the parties having entered into the relationship as per his submission.

[9] I was referred to by Mr Grundligh to the ambiguity of the agreement. He submitted that the applicant was not claiming rectification of the agreement. Further that the Trust was formed in 1994 but the restraint was inserted in the 2009. Importantly in this matter, there was no allegation of any abuse of the Trust. In addition, that Profert (PTY) Ltd was an entity belonging to another person and that it was not formed to defraud the applicant. The proper analysis is to look this matter in totality given its own peculiar circumstances while taking cognisance of the intention of the language used and its object See PICARDI HOTELS LTD v THEKWINI PROPERTIES (PTY) LTD 2009 (1) SA 493 SCA. In COOPERS and LYBRANDT v BRYANT 1995 (3) SA 761 (A) at 767 – 768 E per JOUBERT JA the court stated the following:-

“The correct approach to the application of the ‘golden rule’ of interpretation after having ascertained the literal meaning of the word or phrase in question is, broadly speaking, to have regard:

- 1) to the context in which the word or phrase is used with its interrelation to the contract as a whole, including the nature and purpose of the contract...;

- 2) to the background circumstances which explain the genesis and purpose of the contract. ie to matters probably present to the minds of the parties when they contracted...;
- 3) to apply extrinsic evidence regarding the surrounding circumstances when the language of the document is on the face of it ambiguous, by considering previous negotiations and correspondence between the parties, subsequent conduct of the parties showing the sense in which they acted on the document, save direct evidence of their own intentions.”

[10] In this matter, the applicant appointed different agents for its regions to deal with its clients. It did not dictate the manner which the agents conducted their business but relied on their business acumen to further its objectives in maximising profit. In addition it made available its trade secrets in its business models and support for the agents to perform. In doing so it also sought to protect itself by inserting the restraint clause in the event of termination of the agreement.

[11] In this matter the agreement, some of the obligations to be performed by the agent is to attend training courses. Further, the agreement will terminate when the agent dies. The agent indemnified the applicant in the event of firearm

related incidents. These obligations could not be performed by a Trust but a natural person. In this regard, it will be the First Respondent.

[12] In concluding whether restraint was unreasonable or not the court in **RANOLINGS and ANOTHER v CARAVANTRUCK (PTY) LTD** (1993) 1 ALL SA 389 (A) at 391:-

“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 of 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”

HERBERT MORRIS LIMITED vs 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...”

[13] It is indeed, so that the First Respondent was a qualified agronomist and well known in the area. However, it cannot be discounted that during a period of 22 years he came to know the clients of the applicant well and its trade secrets. This is manifested in his conduct immediately after cancelling the agreement. He solicits through newsletter the very same clients of the applicant. In essence marketing the products of the competitor much against the agreement between the parties. Through his conduct the First Respondent was tapping unfairly on the vast network created before him and which he developed and strengthened. In acting contrary to the agreement, between the parties this was to the detriment of the applicant.

[14] Given the short period of the restraint it can never be

classified as against public policy. It was contended that the granting of this interdict will be of academic value. This submission is neither based on law or fact. It is real that the First Respondent through his conduct is negatively affecting the applicant. It must be emphasized that the demands of public policy is that parties must honour their agreements. I could also find no other remedy appropriate in this regard. The First Respondent ought to be restrained.

[15] This matter by its very nature is an involved one. The importance to the applicant cannot be overemphasized given its magnitude. It will be expected that two (2) counsels will be required to bring an application of this nature. I could find no basis to depart from the rule that the costs follow the event.

[16] I make the following order:-

16.1 The First Respondent is interdicted and restrained for a period of 12(twelve) months from 19 April 2011, from being employed by or engaged by the Fifth Respondent as a salesperson, whether directly or indirectly, in the Magistrate's Districts of Parys,

Vredefort, Koppies and Sasolburg;

16.2 The First Respondent is interdicted and restrained for a period of 12(twelve) months from 19 April 2011, from contacting or soliciting, drawing away or dealing with, canvassing or enticing or attempting to draw away, deal with, canvass or entice any of the Applicant's customers, that were customers the Applicant in the Magistrate's District of Parys, Vredefort, Koppies and Sasolburg as at 19 April 2011, with a view to causing them to terminate their relationship with the Applicant.

16.3 The First Respondent is to pay the applicant's costs including the costs of two (2) counsels.

M.A. MATHEBULA, AJ

On behalf of the applicant: Adv AIS Redding SC
assisted by
GA Fourie
Instructed by:
Lovius Block
BLOEMFONTEIN
Ref: PD YAZBEK/C10777/rb/S169/11

On behalf of the 1st respondent: Adv R Grundlingh
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