

/SG

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH AND SOUTH GAUTENG HIGH COURT, PRETORIA)

DATE: 15/05/2009
CASE NO: 13235/2009

UNREPORTABLE

In the matter between:

VALUE LOGISTICS LIMITED

APPLICANT

And

GERHARD VAN ZYL

1ST RESPONDENT

SAPPHIRE DAWN TRADING 109 CC
T/A DYNAMIC TRUCK RENTAL

2ND RESPONDENT

JUDGMENT

RAULINGA, J

This application was called before this court as a matter of urgency to enforce a covenant in restraint of trade contained in an employment agreement between the applicant as employer and the first respondent as an employee.

The first respondent had been employed by the applicant for approximately four years (from 23 September 2004 to

26 August 2008) when his employment was terminated after an apparent contradiction of the covenant in restraint. The relevant clauses of the agreement which are annexed as "FA2" *inter alia* read as follows, clause 13.2: *"During your employment and for a period of 2 years after the termination of your employment for any reason:*

Clause 13.2.1; 'you will not knowingly be directly employed, have an interest or be engaged within a radius of 75 kilometres of any of the company's business premises with any company, firm or business which competes with the business of the company anywhere in South Africa.'

Clause 13.2.2; 'you will not solicit or tout any clients of the company or suppliers or any other connections of the company, nor shall you seek to solicit, tout for or entice away any of the staff for the time being of the company or any of the company's clients.'

The existence of this agreement is not disputed by the respondents.

The first respondent had been employed as a sales representative, in the applicant's truck rental division, in its Pretoria branch. At the time he was recruited the first respondent had no experience in the truck business.

It is not in dispute that until recently the first respondent held 50% member's interest in the second respondent. However, he asserts that he did so because his father had an adverse credit reference. He took up a 50% member's interest in the second respondent with his mother holding the other 50% interest.

The first respondent does not dispute that the second respondent is a truck rental business. His contention is that the applicant is involved in a wide range of other businesses and it is only in this insignificant aspect of the truck rental that the second respondent is in competition – the second respondent according to him only competes in small businesses.

It is also common fact that the first respondent is involved in the business of the second respondent and that he earns remuneration from that involvement. The applicant confirmed the

involvement of the first respondent in the business of the second respondent by sending two of its employees who observed the first respondent in the early hours of the morning walking outside the business premises of the second respondent. The first respondent concedes that he does some business from the second respondent's business premises. He further concedes that he assists the second respondent on a part-time basis. The first respondent also concedes that the second respondent does business with four of the applicant's clients – he, however, does not explain how he first came in contact with them. It is not in dispute that the first respondent referred applicant's customers to the second respondent. The website of Dynamic Truck Rental for which the first respondent allegedly works reflects his cellphone number. He does not give a satisfactory explanation for this.

It is apparent from the first respondent's affidavit that he concedes that the second respondent obtained business from entities by quoting rates which are lower than those currently quoted by the applicant. Further that this is due to the fact that there is no difference in the nature of the vehicles used by the applicant and the second respondent. The first respondent complements his argument by stating that he made contact with

the applicant's customers when he referred them to his father's removal business – therefore connection is irrelevant.

It is further the submission of the first respondent that the radius of 75 kilometres in respect of only one branch in Pretoria changes the restraint of trade – therefore the restraint of trade is unreasonable. That two years is contrary to public policy – a lesser period would have been reasonable. Applicant must show that the restraint is reasonable – the *onus* is on the applicant.

It transpired when submissions were made that the first respondent has since resigned from the second respondent. As a result the applicant abandoned the relief sought under paragraphs 3 and 5.2 of the notice of motion.

As appears from the first respondent's answering affidavit, it is apparent that he made a number of concessions on behalf of himself and the second respondent. There is no need to again refer to the undisputed facts as they have been summarised hereinabove. It is also apparent that although the respondents raised a number of purported defences it does not appear on the facts that the covenant in restraint is disputed. The focus can be

devoted to finding out if the restraint is reasonable or whether it has been whittled down.

It is indeed true that the applicant seeks final relief by way of motion. I have already stated above that the respondents made a number of concessions which in my view do not advance their cause. I am of the view that the decision in *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 (A) 634E-635C and the *Plascon-Evans* test as described by HARMS JA in *National Director of Public Prosecutors V. J. G. Zuma* (537/08) (2009) ZAC SA 1 (12 January 2009) at para (26) does not come to the rescue of the respondents. Instead it strengthens the argument of the applicant.

One is therefore convinced that the legal issues can be resolved on papers. The dictum in *Wightman t/a JT Construction v Headfour (Pty) Ltd and Another* 2008 3 SA 371 (SCA) at para 13 is apposite to this case.

The first respondent resigned from the employment of the applicant on 25 August 2008. At the time of the hearing of this matter 6½ months had already expired. He was employed by the

applicant for four years only. This factor together with the argument that the first respondent only serviced 20 (twenty) different clients within a radius of 75 kilometres cannot counter the covenant in restraint which he signed without any objection.

It is also surprising why the first respondent chose to take up 50% membership in the second respondent instead of offering a loan to his struggling father so that he (the father) could hold the other 50% in the second respondent. This argument does not hold water.

The picture painted by the first respondent that he is not an employee of the second respondent is not convincing. There are no good reasons why his cellphone number would be reflected on the second respondent's website. There would be no business for him to be seen on the second respondent's premises in the wee hours of the morning. It is only a committed and dedicated employee who would sacrifice his sleep and rest in order to look after the interests of his employer's business.

The fact that the first respondent has no post matric formal education and is still young, is an indication that he learnt his

ropes at the applicant's business – the art of truck rental. It is also admitted by the first respondent that he referred certain customers of the applicant to the second respondent. Common sense should prevail that within the four years that the first respondent spent in the employ of the applicant he must have learnt the style of entertainment offered by the applicant to its customers and must also have obtained trade secrets as protectable proprietary interests of the applicant. The first respondent, during that period must have fostered a close and ongoing relationship with the customer connections and built up extremely close connections with the applicant's customers.

The criteria applied in deciding whether an employee has access to customers and is in a position to build up a particular relationship with customers so that when he leaves the employer's service he could easily induce the customer to follow him to a new business is essentially a question of fact in each case – *Rawlings and Another v Caravan Truck (Pty) Ltd* 1993 1 SA 537 (A). *In casu* the first respondent conceded that he was servicing a number of applicant's customers four of whom were referred to the second respondent. This is on his version, there could have been more.

The approach on a covenant in restraint of trade was elucidated in *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 4 SA 874. It is prudent to quote certain excerpts from the head note of this case:

“... 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 unreasonable. Although public policy requires that agreement 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.”

I would therefore agree that the effect of this is that the person seeking to attack the restraint bears the burden of establishing on a balance of probabilities that the restraint is unreasonable. The matter does not end up there, because in a constitutional democracy contractual terms are now subject to constitutional rights. Public policy is indeed informed by the Constitution – *Barkhuizen v Napier* 2007 5 SA 323 (CC) at para 28. In the same paragraph the court emphasises that public policy has since been deeply rooted in our Constitution and the values that underlie it. However, one must be mindful of the fact that the Bill of Rights as enshrined in the Constitution does not take away rights which arise from legitimate agreements entered into by the parties. The case under consideration is a good example.

I consider the decision in *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kulm and Another* 2008 2 SA 375 (1) per DAVIS J, to be quite enabling and exciting, particularly in the Constitutional era in which we find ourselves. I need quote only paragraph 28:

“Their cases support the view that an employer must justify a limitation upon the right to work, given the importance placed on the dignity of work and the concomitant limitation or eradication of that right when restraint operates. Such a conclusion would entail no radical departure from our legal tradition. It would simply amount to a reversion to the law which operated prior to 1994 and cast a burden on the employer to justify the reasonableness of the restraint.”

In my view, this does not take away the discretion created in *Magna Alloys supra*: *“... the Court would not be limited to a finding in regard to the agreement as a whole, but would be entitled to declare that agreement partially enforceable or unenforceable.”*

In *Den Braven SA (Pty) Ltd v Pillay and Another* 2008 6 SA 229 (D) & (CLD) at 262G-H and 263A-C- the court per WALLIS AJ (as he then was) held:

*“... 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 agreements, there are restraints clearly spelt out which are reasonable in nature and which are the only restrains 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 Borrowand and Another* 1979 (3) SA 1092 (T) and endorsed by the Appellate Division (as it then was) in *Magna Alloy and Research (SA) (Pty) Ltd v Ellis* 1984*

(4) SA 874 (A) and by the Supreme Court of Appeal in a number of subsequent cases, of which Reddy v Siemens Telecommunications (Pty) Ltd 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)."

I am of the view that the restraint sought by way of the interdict is conduct that falls within the terms of the restraint agreement and from which the first respondent agreed to abstain.

One cannot agree more with WALLIS AJ (as he then was). I find value in his dictum based on realistic constitutional deductive reasoning. I am of the opinion that two years as a term of restraint is too long. It appears that there are only a few customers involved. The commercial damage to the applicant may not be too severe.

As already stated above the applicant has since abandoned prayers 3 and 5.2. It is as a consequence not necessary to make such orders.

Accordingly the following order is made:

1. The first respondent is interdicted from:
 - 1.1 utilising any confidential information concerning the business or affairs of applicant which may have come to his knowledge during his employment with applicant;
 - 1.2 for a period of ten months from 26 August 2008 from being directly or indirectly employed by second respondent or any entity carrying on business in competition with the applicant's truck rental business within a 75 kilometre radius of 521 Church Street, Pretoria West.
2. The first and second respondents are interdicted and restrained for a period of ten months from

26 August 2008, from soliciting or touting business from any clients, suppliers or other connections of applicant.

3. The respondents are jointly and severally ordered to pay the costs, the one paying and the other to be absolved.

T J RAULINGA
JUDGE OF THE NORTH GAUTENG HIGH COURT

13235/2009/sg

Heard on:
For the Applicant: Adv
Instructed by: Messrs
For the Respondents: Adv
Instructed by: Messrs
Date of Judgment: