

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

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES/NO.	☒ YES
(2) OF INTEREST TO OTHER JUDGES: YES/NO.	☒ YES
(3) REVISED.	☐
DATE <u>25 08/09</u>	SIGNATURE <u>[Signature]</u>

CASE NO: 20123/2007

DATE: 26 08 2009

In the matter between:

WILLIAM JAMES FREDERICK VIGNE

Plaintiff

and

AFGRI TRADING (PTY) LIMITED

1st Defendant

AFGRI OPERATIONS LIMITED

2nd Defendant

JUDGMENT

HARTZENBERG J

This is a rare, if not a unique, instance of a covenant of restraint of trade ending up in court where the employee, and not the employer, claims compliance with the terms thereof. The matter first came before the court as an application in which the plaintiff claimed payment of the amount of R677 063,26 from the second defendant, after his resignation of his

employment with the second defendant as a senior trader. His claim was based upon clause 2.8 of the covenant of restraint of trade which he signed simultaneously with his appointment in this position by his employer. The defendant raised a number of defences and by agreement between the parties the matter was referred to trial, the notice of motion and founding affidavit to stand as a simple summons and the answering affidavit to stand as a notice of intention to defend. The issues were defined in a subsequent declaration and a plea and counterclaim.

At the trial the parties were agreed that the factual allegations in the initial affidavits were correct and that the court could decide the matter on that basis as the main issues are whether the covenant is enforceable by the plaintiff and whether upon a proper interpretation of the agreement, the plaintiff is entitled to payment of the amount, in the circumstances that prevailed at the time of his resignation. A final issue is whether the defendant was entitled to cancel the agreement and thereby rid itself of its obligation to pay the amount.

The common cause facts are as follows: The plaintiff worked for a company Farm Feed Services (Pty) Ltd (“Farm Feed”) since 1990. That entity was acquired by the defendant during 2001 as a going concern. Although the plaintiff, like the other employees, was officially appointed as a senior trader by the second defendant¹ during December 2001, he, in fact, only carried on with his normal duties. He was required to sign the covenant of restraint of trade. He refused to do so unless the document was changed so that there would be a *quid*

¹ The plaintiff initially cited the first defendant, Afgri Trading (Pty) Ltd, as respondent. When the first defendant denied liability on the ground that it had no agreement with the plaintiff, but that he was appointed by OTK Ltd, which entity thereafter changed its name to that of the second defendant, Afgri Operations Ltd., the plaintiff joined the second defendant as a party. It is now common cause that the plaintiff was employed, at the relevant time, by the second defendant.

pro quo. After negotiations clause 2.8 was inserted in the agreement and the area of the restraint was limited to the Republic of South Africa. The second defendant maintains that at the time of the negotiations it had not made an evaluation of the plaintiff's position and whether it was necessary for it to protect itself against unlawful competition by the plaintiff.

Relevant terms of the document bearing the title "Restraint of Trade" and signed by the parties on 11 December 2001, were:

"2.1.1. *'area restraint' means the Republic of South Africa as defined in the Constitution of the Republic of South Africa,*"

"2.1.2. *'fields of activity' means any business in which Vigne is involved in terms of his service agreement with OTK"*

" 2.1.4. *'restraint period' means the period of Vigne's employment with OTK and a period of one year after the termination of such employment, for whatever reason;*"

"2.2. *Vigne undertakes to OTK that during the restraint period, he will not, without the prior consent in writing of OTK directly:*

2.2.1. *Compete with OTK in any of the fields of activity within the area of restraint."*

"2.3. *For the purposes of this clause, Vigne shall be deemed to be competing with OTK if he becomes directly engaged or interested as proprietor, partner, shareholder, **employee**, agent consultant or otherwise, in any*

*company, close corporation, trust, firm business or other undertaking which carries on business in **any of the fields of activity in the area of restraint.***”

“2.5. *This restraint of trade agreement shall come into force on the date of signature of the service agreement and the restraint of trade payment referred to in clause 2.8 shall be payable by OTK within 14days upon termination of the service agreement with Vigne.*”

“2.6. *The parties agree that this restraint undertaking shall be capable of being undertaken by Vigne in favour of any business of OTK in the event of Vigne being employed by that business.*”

“2.7. *Vigne acknowledges that in the circumstances it is fair and reasonable and necessary for the protection of the interests of OTK that Vigne be restrained in the manner set out in this agreement.*”

“2.8. *On termination of employment, for whatever reason, OTK will pay Vigne a lump sum equal to one year’s remuneration (basic salary + pension contribution + Medical Aid contribution and all applicable allowances) within 14 days of termination of employment.*”

(Own emphasis)

The plaintiff gave notice of his intended resignation at the end of March 2007, on the first of March 2007. In the letter of resignation he drew the attention of the second defendant

to the provisions of clause 2.8 of the Restraint of Trade agreement and asked for payment of the amount within 14 days from termination of the service agreement.

The second defendant by letter, dated 14 March 2007, on the letterhead of the first defendant replied to the letter of 1 March 2007:

“RE: RESIGNATION AND RESTRAINT OF TRADE

We are in receipt of your letter dated 1 March 2007.

Having considered all the facts and circumstances under which the Restraint of trade Agreement was concluded with you, the basis upon which your portfolio changed during the course of your employment and the circumstances under which you signed (sic) from the employ of the Company, we hereby wish to confirm that the restraint provisions contained in paragraph 2.2 of the Restraint of Trade Agreement between OTK (Proprietary) Limited and yourself on 11 December 2001 are hereby waived and the Company shall not, either directly or indirectly, be attempting to enforce the provisions of the restraint on you.

Under the aforementioned circumstances, and in the light of the fact that you have been released from all the provisions of your Restraint of Trade Agreement, the Company shall not be effecting the consideration in terms of clause 2.8 of the Restraint of Trade agreement.”

The plaintiff insisted upon payment of the amount. On 16 July 2007 the plaintiff took up employment with a concern that trades in grain products in Paarl, Grainco, as a trader. The second defendant avers that that was a material breach of the restraint of trade to work for Grainco, a merchant trading in grain commodities in competition with the second defendant, within a year of the termination of its service agreement with it. The allegation further is that the second defendant was entitled to cancel the restraint of trade and did so on 7 February 2008.

At the time of the negotiations and the conclusion of the agreement the plaintiff's position entailed buying and selling protein rich agricultural products, such as soybeans and sunflower seeds. At the beginning of 2004 he took over the position of one Grobler and became a key accounts manager. He became responsible to administer a contract with Premier Foods for the regular supply of wheat and white maize. He had to acquire those commodities on the open market at ruling prices. The relationship between the plaintiff and the suppliers of the commodities was, according to the second defendant, of little commercial value. The second defendant maintains that the plaintiff's position changed from trading to administrative. As a trader he required a wide range of skills which one could be taught or could acquire in the course of one's employment. Those skills enable a trader to predict future prices of commodities against the background of various factors such as expected supply and demand, fluctuation in currencies, the gold price and other economic data. Traders have to buy large quantities far in advance.

The second defendant maintains that at the time of his resignation the plaintiff did not possess any confidential information which, if imparted to its competitors, could significantly impact on its business. He posed no threat to the second defendant. In the circumstances the restraint of trade was unenforceable.

The restraint of trade imposed the following obligations on the parties. The plaintiff undertook not to compete with the second defendant unfairly. Unfair competition by the plaintiff spanned quite a wide range of possibilities: Any employment that he would enter into in the Republic of South Africa, within a year after his resignation, would immediately come under scrutiny. He was not allowed to do any business in which he was involved in terms of his employment with the second defendant. At the time that he signed the agreement he was in possession of information that, if imparted to competitors, could harm the second defendant. The second defendant could assign the plaintiff to any position. It assigned him to a position where he was not in possession information that, if used by others, could harm the second defendant. The plaintiff could at any stage have been assigned to a different position by the second defendant. It was unknown to the parties precisely what functions the plaintiff would have to fulfil in the future. The parties did not know what the second defendant's assessment of the situation would be if the plaintiff resigned and started working for another employer. As a *quid pro quo* for its protection or potential protection the second defendant undertook to pay the plaintiff a year's income. That situation did not change until the plaintiff resigned from his position with the second defendant.

It is not necessary to do more than to refer to the summary of the case law that culminated in the judgment in *Magna Alloys and Research (SA)(Pty.) Ltd. v Ellis*, 1984 (4) SA 874 (A) by Didcott J in *J Louw and Co. (Pty.) Ltd. v Richter and Others*, 1987 (2) SA 237 (N) at 243B-C:

“From the judgments that were delivered one learns the following, all of which is now clear: Covenants in restraint of trade are valid. Like all other contractual stipulations, however, they are unenforceable when, and to the extent that, their enforcement would be contrary to public policy. It is against public policy to enforce a covenant which is unreasonable, one which unreasonably restricts the covenantor’s freedom to trade or work. In so far as it has that effect, the covenant will not therefore be enforced. Whether it is indeed unreasonable must be determined with reference to the circumstances of the case. Such circumstances are not limited to those that existed at the time when the parties entered into the covenant. Account must also be taken of what has happened since then and, in particular, of the situation prevailing at the time enforcement is sought.”

There is no doubt that the covenant was valid at the time that the plaintiff resigned. *Pacta servanda sunt*. The effect was that the plaintiff as covenantor was under an obligation not to compete with the second defendant contrary to their agreement. In exchange for that undertaking the second defendant was obliged to pay to the plaintiff, one year’s income. In law there is no basis upon which the second defendant can escape to pay the amount that it had undertaken to pay. It was a contract that it insisted that the plaintiff was to enter into. If it had negotiated a bad bargain it has only itself to blame.

Nowadays virtually all service agreements contain elaborate restraint of trade clauses. It is probably so because *pro forma* precedents are readily available electronically. Very often such clauses are utterly inappropriate. Menial workers, sales personnel and administrative staff very often find themselves to have been restrained from looking for better employment. Those agreements are negotiated for the benefit of the employers. Insofar as it is contrary to public policy to restrict the covenantors' freedom to trade or work, unreasonably, those restraint agreements are not enforceable. It does not follow that the other terms of those agreements are not enforceable.

The result is that I do not agree with the submission on behalf of the respondents that the correct interpretation of the clause 2.8 of the agreement is that once it is established that the employer cannot enforce the agreement that it follows that the employee (the plaintiff) is no longer entitled to the benefit that the employer undertook to pay to him. I also do not agree that the two obligations are reciprocal. The position simply is that, unless the employer undertakes to afford the employee some sort of mechanism that will enable him to resign and to take up other employment, he may regard himself as trapped in the employment of his employer, for the rest of his working life, because the employer can expose him, at any time, to information which the employer regards as confidential and covered by the clause. The mechanism in this instance is the guarantee of a year's income. It will enable the employee to be in a position not to compete with the employer.

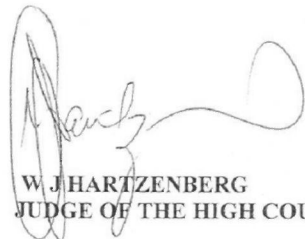
The position of the employer is different. The employer protects himself against unfair competition by insisting that a restraint clause be signed. If at the time when the employee resigns there is a risk that he can harm the business of the employer, the employer is protected by the clause that it insisted upon, so long as the clause is not otherwise against public policy. If on the other hand the employee does not pose a threat to the employer, public policy dictates that the employee cannot be interdicted from taking up other employment. If the terms stipulated by the employer are so unreasonable that public policy also dictates that they are not enforceable, the situation will be the same. The mere fact that the protection that the employer bargained for is unenforceable on termination of the service agreement does not extinguish the undertaking that he bound himself to.

The second respondent's argument that the plaintiff breached the agreement by taking up employment with Grainco, and that it became entitled to cancel the agreement and so released itself of its obligation to pay, what it undertook to pay, is without merit. The second defendant has made it clear in the answering affidavit that the plaintiff posed no threat to it regardless of where he took up employment. Its magnanimous waiver of its rights constituted no waiver at all as it admittedly had no right that it could enforce. It sounds strange in the mouth of the second defendant, whose attitude was that the plaintiff was to go and work, and who refused to provide him with the year's income, that he had expected, to begrudge him taking up employment, which posed no threat to it.

The plaintiff is entitled to judgment in the amount claimed, against the second defendant. Insofar as it was necessary for the plaintiff to bring an application for the joinder of the second defendant, the second defendant has only itself to blame. It repudiated its obligation on the letterhead of the first defendant. It cannot blame the plaintiff for thinking that the first defendant was his employer. The plaintiff is entitled to all its costs against the second defendant.

The following order is made against the second defendant in favour of the plaintiff:

1. Payment of the amount of R677 063,26:
2. Interest thereon at the rate of 15,5 % per annum from 15 April 2007 to date of payment.
3. Costs of suit.



W. J. HARTZENBERG
JUDGE OF THE HIGH COURT

HEARD ON : 5 August 2009

ON BEHALF OF THE PLAINTIFF

Counsel : T P KRUGER

Instructed by : MACROBERT INCORPORATED

ON BEHALF OF THE 1st AND 2nd DEFENDANT

Counsel : H A VAN DER MERWE

Instructed by : FLUXMANS INCORPORATED C/O GROSS PAPADOPULO & ASS