

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 906/2008

In the matter between:-

ROYAL PACK DISTRIBUTORS (PTY) LTD

Applicant

and

VAN GREUNEN, ANDRÉ

Respondent

HEARD ON: 31 JULY 2008

JUDGMENT BY: EBRAHIM, J

DELIVERED ON: 20 AUGUST 2008

[1] Pursuant to a covenant in restraint of trade signed by the parties on 19 January 2004, the applicant launched an application for a final interdict in this Court prohibiting the respondent from trading in competition with any of the existing clients of the applicant in any concern which carries on business similar to that carried on by the applicant, nationwide, in the whole of the Republic of South Africa until 19 May 2009. More specifically the applicant requires an interdict that the respondent is prohibited from selling or

supplying food packaging products and food containers to the firm of Fruit and Veg City in the Showgate Centre, Curie Avenue, Bloemfontein, until 19 May 2009.

- [2] The applicant is a limited liability company with its principal place of business at 15 Beryllium Street, Alrode, Alberton and carries on business countrywide in the sale and distribution of generic and customised food packaging materials and allied products. It offers a one-stop solution to the food and catering industry, with a comprehensive selection of quality products. The applicant is active in the whole of South Africa, including the Free State Province in which it has a regional office at 8 Maroela Street, Oos-Einde, Bloemfontein.
- [3] On 19 January 2004 the applicant entered into an employment contract with the respondent in terms of which the applicant appointed respondent as a sales consultant. On the same day the applicant and the respondent signed a restraint of trade agreement in terms of which the respondent acknowledged that he would be given the opportunity to develop and maintain close personal contact with the

applicant's clients and, that, in the event he was required to perform any independent service for a client or competitor of the applicant without the applicant's knowledge and permission, the benefit of the applicant's client connections would be available to its competitors and would enable the competitor to compete unfairly with the applicant to the prejudice of the applicant. Ultimately the respondent agreed not to carry on or be engaged in or have any interest directly or indirectly in any capacity in any concern or business which carries on business similar to that carried on by the applicant or in competition with the applicant or with any of the existing clients of the applicant.

- [4] It is common cause, although there appears to be some dispute on the papers as to the exact date on which the respondent left the employ of the applicant (the applicant alleges that it was on 20 April 2007 and the respondent alleges that it was on 1 May 2007), that the restraint would be valid for 24 months hence. It is also common cause that Fruit and Veg City in the Showgate Centre, Curie Avenue, Bloemfontein was a client of the applicant since February 2004 and that sometime during the latter part of 2007 the

applicant discovered that Fruit and Veg City were no longer purchasing products from the applicant and that they were being supplied by the respondent through a new firm operated by the respondent of products similar to that manufactured by the applicant. On becoming aware of the situation the applicant instructed their attorneys to address a letter of demand to the respondent by registered post requesting him to desist from dealing with the applicant's client that is Fruit and Veg City, as he was in breach of the restraint agreement. The respondent failed to respond. This occurred in July 2007. Thereafter in February 2008 this application was launched.

- [5] The applicant contends that it has a valid protectable interest, which has been infringed by the respondent. It was argued on applicant's behalf by Mr. Moorcroft that the conduct of the respondent in committing a breach in respect of even a single client of the applicant poses a serious threat to the continuity and success of the applicant's business in that other sales consultants employed by the applicant may be encouraged to do the same. In addition, whilst conceding that there were no trade secrets to be protected and

therefore confidentiality did not form an element of that protectable interest, the applicant alleges that the goodwill built up by it, which has been established and maintained over a period of many years mainly through its sale consultants had been sullied because of the unlawful competition which the respondent engaged in by doing business with Fruit and Veg City, Showgate Centre, Bloemfontein. The respondent has admitted that he supplied Fruit and Veg City, Showgate Centre, Bloemfontein with lines of products similar to those carried by the applicant. Respondent denies that he is in breach of the restraint agreement in view of the fact that it was not he who solicited the applicant's client, but the client, Fruit and Veg City, through one of its employees, who approached him.

- [6] The question then arises whether, upon an analysis of the specific clause in the agreement of restraint, a breach of that clause was in fact committed by the respondent when he did business with Fruit and Veg City, Showgate Centre, Bloemfontein.

- [7] The offending clause in the restraint agreement appears at clause 1.5 which reads as follows:

“Therefore, the Employee agrees that he/she will not in any way, without the prior written consent of the Organisation, for the duration of this agreement and for a period of 24 (twenty-four) months after the termination of this agreement, within the Territory, carry on or be engaged or have an interest in, whether directly or indirectly and whether a director, manager, employee, agent, contractor, consultant or in any other capacity, in any concern of business which carries on business similar or comparative to that carried on by the Organisation, or in competition with the business of the Organisation, or any of the existing clients of the Organisation at the time of the termination of this independent contract agreement or be engaged independently of the Organisation by the client in any capacity whatsoever.”

To my mind the prohibition is clear and it is this: that for a period of 24 months after the termination of the agreement of employment the respondent is not to engage in any way directly or indirectly with any client of the applicant independently of the applicant in any capacity whatsoever. The agreement does not make any specific provision for the

eventuality of the client approaching the respondent. It simply and unambiguously prohibits the respondent from engaging the clients of the applicant in business in competition with the applicant without the knowledge and permission of the applicant for the period of the restraint. It does not provide that the restraint is only invoked if it is the respondent who approaches the applicant's client to do business in competition with the applicant. I conclude, therefore, that the respondent was in breach of the restraint agreement.

- [8] Whether, however, the applicant has a protectable interest in terms of its goodwill is quite another matter. It was not disputed by the respondent that the applicant has goodwill which it has built up by way of its trade reputation and good name, its credit worthiness and/or the personality of its management and staff. These are features undoubtedly worthy of protection, but on the evidence before me the applicant has not established that any of these was threatened by the respondent's conduct in approaching Fruit and Veg City, Showgate Centre. I am accordingly not

convinced that the applicant has made out a case that it has a protectable interest insofar as its goodwill is concerned.

- [9] 9.1 But the matter does not rest there. The thrust of Mr. Moorcroft's submissions, when this matter was argued, was that despite what was conveyed in the founding papers, the main asset which the applicant was seeking to protect in this case was its customer connection. There is authority in our law for protection of this kind. In **RAWLINS AND ANOTHER v CARAVANTRUCK (PTY) LTD** 1993 (1) SA 537 (A) at 542E – H the court held:

“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 on 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'.

In *Morris (Herbert) Ltd v 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 . . .'

This statement has been applied in our Courts... Whether the criteria referred to are satisfied is essentially a question of fact in each case, and in many, one of degree. Much will depend on the duties of the employee; his personality; the frequency and duration of 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."

9.2 What remains to be done now is to apply these legal principles to the particular facts of the present case.

These facts are that the respondent was initially one of

three sales consultants (later increased to six) employed by the applicant to service the Bloemfontein-area and the applicant's clients therein. The respondent does not dispute the applicant's allegation in the founding papers that he serviced Fruit and Veg City, Showgate Centre, on a regular basis and that approximately six months after he terminated his employment with the applicant, this client stopped purchasing its usual supplies from the applicant and was supplied by the respondent instead. What is disputed is the reason why this client terminated its relationship with the applicant. As this is an application for final relief, I have decided this factual dispute on the basis of the respondent's version.

See **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD** 1984 (3) SA 623 (A) at 634H – I.

- 9.3 His version is that the branch manager of the applicant's Bloemfontein branch, one Daniël Conrad van den Berg ("Van den Berg") was ill-mannered and

on more than one occasion respondent had to persuade clients of the applicant not to cease trading with the applicant because of Van den berg's rude behaviour towards these clients. According to the respondent the relationship between the applicant and Fruit and Veg City, Showgate Centre, became tense and soured because of Van den Berg's rude behaviour towards its owner, one Oeloff Abraham Visser, who threatened to end his business association with the applicant and purchase the product lines supplied to him by the applicant from a supplier in Johannesburg. The respondent persuaded him to carry on trading with the applicant through engaging the services of the respondent as sales consultant, to which he agreed.

- 9.4 In my view this version establishes clearly that the respondent had personal knowledge of and influence over Visser and that Visser had formed some attachment to the respondent as a result of the respondent calling on him on a regular basis. This, together with the fact that shortly after the respondent left the applicant's employ he started supplying Visser

through his own new business, proves on a preponderance of probabilities that a close business relationship of sorts between the respondent and Visser had been forged solely as a result of the respondent's tenure of employment with the applicant, to such a degree that the respondent successfully induced Visser to follow him and break trade ties with the applicant. I find accordingly that the threat to the applicant's customer connection has been established on the respondent's version and the applicant is therefore entitled to the relief it seeks.

- [10] The applicant wisely obviated the necessity for argument to be advanced and for this Court to decide the further issue raised on the papers of the unreasonableness or otherwise of the restraint by conceding that it would be satisfied with a partial restraint limited only to the city of Bloemfontein. In NATIONAL CHEMSEARCH (SA) (PTY) LTD v BORROWMAN AND ANOTHER 1979 (3) SA 1092 (T) at 1116D – G the following approach was held by Botha J to be the proper approach to follow in the enforcement of restraint of trade undertakings:

“When a restraint according to its terms as agreed upon is found to be unreasonably wide in its scope of operation, the Court can, in a proper case, enforce the restraint partially, by issuing an order incorporating the addition of such limiting words to the restraint as agreed upon as are appropriate to restrict its scope of operation to what is found to be reasonable.”

It is apposite also to quote from the well-known decision of **MAGNA ALLOYS AND RESEARCH (SA) (PTY) LTD V ELLIS** 1984 (4) SA 874 (A) where Rabie CJ held that the onus of proving that the restraint was unreasonable rested upon the party bound by the restraints. With regard to partial enforcement of the restraint he held as follows at p. 894F of the judgment:

“Aanvaarding van die sienswyse dat wanneer 'n Hof gevra word om 'n beperkende bepaling af te dwing, hy ag slaan op omstandighede wat heers wanneer hy gevra word om die beperking af te dwing, bring myns insiens verder logies mee dat die Hof op daardie tydstip moet beslis of hy gaan beveel dat die geheel, of slegs 'n gedeelte, of geen gedeelte, van die beperking afgedwing behoort te word. Dit sou miskien gesê kan word dat die afdwing van enigiets minder as die geheel van die beperking waarop die partye oorspronklik ooreengekom het,

daarop neerkom dat die Hof se bevel op 'n wysiging van die ooreenkoms wat die partye aangegaan het, neerkom, en in 'n sekere sin is dit natuurlik so. Hou 'n mens egter in gedagte dat die vraag waarom dit gaan die afdwingbaarheid al dan nie van die beperkende bepaling is en, verder, dat oorwegings van die openbare belang bepaal of so 'n beperking afdwingbaar behoort te wees, dan is dit myns insiens logies en realisties om die houding in te neem dat indien die afdwing van enige gedeelte van 'n beperking op die relevante tydstip vir die gemeenskap skadelik sou wees, die Hof by magte moet wees om te beveel dat daardie gedeelte nie afgedwing kan word nie. Hierdie gedagte dat die Hof nie daartoe beperk moet wees om te kan sê dat 'n beperking in sy geheel òf afdwingbaar òf onafdwingbaar is nie, maar dat hy ook by magte moet wees om in 'n gepaste geval, in die lig van die vereistes van die openbare belang, te kan sê dat 'n beperking slegs ten dele afdwingbaar of onafdwingbaar is, is reeds in sekere onlangse beslissings uitgespreek, en ek stem daarmee saam.”

In passing I merely remark that on the facts of this case I am not entirely convinced that a partial restraint would result in any injustice to the parties themselves.

[11] There remains the question of costs. In view of the fact that the applicant has made the concession as to partial legality of the restraint agreement, it is not entitled to a costs order in its favour. I therefore make the following order:

11.1 The respondent is interdicted from carrying on or being engaged in or having any interest directly or indirectly in any capacity, in any business concern which carries on business similar or comparative to that carried on by the applicant and/or which is in competition with the applicant and with any of the existing clients of the applicant in the area and city of Bloemfontein until 19 May 2009.

11.2 The respondent is interdicted from selling or supplying food packaging products and food containers to the firm Fruit and Veg City, Showgate Centre, Curie Avenue, Bloemfontein until 19 May 2009.

11.3 Each party is to pay its own costs.

S. EBRAHIM, J

On behalf of Applicant:

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On behalf of Respondent:

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