

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

Case No. : 4861/2005

In the matter between:-

METCASH TRADING AFRICA (PTY) LTD Applicant

and

CARL GREGORY PAULS Respondent

HEARD ON: 1 DECEMBER 2005

JUDGMENT BY: KRUGER J

DELIVERED ON: 8 DECEMBER 2005

[1] Applicant seeks to enforce a restraint of trade against respondent. The application was brought as one of urgency on 17 November 2005. It was postponed by agreement and an interim order was made.

[2] Respondent was employed by Metcash Trading Ltd which applicant acquired in 2004. From January 1999 to August

2005 the respondent was employed by Metcash Trading Ltd.

- [3] Respondent started as manager in training and thereafter –
May 1999 to December 1999 branch manager Thaba N'chu;
January 2000 to July 2000 branch manager Harrismith;

July 2000 to November 2001 branch manager Botshabelo;

November 2001 to April 2002 branch manager Thaba N'chu;

April 2002 to September 2004 branch manager Botshabelo;

September 2004 to August 2005 branch manager
Bloemfontein.

- [4] Applicant conducts business as a wholesaler and retailer of a large range of fast moving products in various parts of Africa and trades throughout the Republic of South Africa. A major part of applicant's business is the sale of goods on a wholesale basis through various wholesale stores located throughout South Africa. Three such stores that were managed by respondent were the Botshabelo, Bloemfontein and Thaba N'chu wholesale stores.

- [5] On 24 February 2003 the respondent signed an agreement in confidentiality and a covenant in restraint of trade. Therein respondent acknowledged that he had acquired and would

continue to acquire knowledge of the trade secrets and trade connections of the applicant. The agreement also generally acknowledged that the applicant had protectable interests in the restraint. Respondent was prohibited from carrying on any competitive activity for a period of 24 months after termination of his employment throughout the Republic. A “competitive activity” includes the business of the sale by wholesale cash and/or conventional distribution of fast moving consumer goods. Respondent was paid R70 000,00 as consideration for signing the restraint of trade agreement.

- [6] Applicant says a major part of its business is the sale of goods through stores such as the Botshabelo, Thaba N’chu and Bloemfontein stores which were managed by the respondent on a wholesale basis to retailers and shops in the townships and rural areas. In weighing up a restraint there are two conflicting considerations. **BASSON v**

CHILWAN AND OTHERS 1993 (3) SA 742 (A) at 767 D - I:

“Wat die breëre gemeenskap betref is daar twee botsende oorwegings: ooreenkomste moet gehandhaaf word (al bevorder

dit ook onproduktiwiteit); onproduktiwiteit moet ontmoedig word (al verongeluk dit ook 'n ooreenkoms) (vgl Sunshine Records (Pty) Ltd v Frohling and Others 1990 (4) SA 782 (A) te 794D-E). Wat die partye self betref, is 'n verbod onredelik as dit die een party verhinder om hom, na beëindiging van hul kontraktuele verhouding, vryelik in die handels- en beroepswêreld te laat geld, sonder dat 'n beskermingswaardige belang van die ander party na behore daardeur gedien word. So iets is op sigself strydig met die openbare beleid. Origens mag 'n beperking wat *inter partes* redelik is nietemin, vir 'n rede wat nie aan die partye eie is nie, die openbare belang skaad. En besmoontlik ook omgekeerd.”

Four questions have to be asked:

- “ (a) Is daar 'n belang van die een party wat na afloop van die ooreenkoms beskerming verdien?
- (b) Word so 'n belang deur die ander party in gedrang gebring?
- (c) Indien wel, weeg sodanige belang kwalitatief en kwantitatief op teen die belang van die ander party dat hy ekonomies nie onaktief en onproduktief moet wees nie?
- (d) Is daar 'n ander faset van openbare belang wat met die verhouding tussen die partye niks te make het nie maar wat verg dat die beperking gehandhaaf moet word, al dan

nie?”

In **KWIK KOPY (SA) (PTY) LTD v VAN HAARLEM AND ANOTHER** 1999 (1) SA 472 (W) at 484 D - E a fifth question was added:

“ ‘Gaan die inkorting verder as wat nodig is om die belang te beskerm?’ ”

- [7] A contract in restraint of trade must protect some proprietary interest of the person who seeks to enforce it before it will be enforced. Such interest may take the form of trade secrets, confidential information, goodwill or trade connections.

See **SIBEX ENGINEERING SERVICES (PTY) LTD v VAN WYK AND ANOTHER** 1991 (2) SA 482 (T) at 486 I – 488 D; **BASSON v CHILWAN AND OTHERS** 1993 (3) SA 742 (AD) at 769 C – I;

ARANDA TEXTILE MILLS (PTY) LTD v HURN AND ANOTHER 2000 (4) ALL SA 183 (E) at 192 f.

- [8] The covenant in restraint is enforceable unless the

respondent discharges the onus of proving on a balance of probabilities that it would be unreasonable to enforce the covenant in restraint of trade that he has undertaken in favour of the applicant, that the applicant is not entitled to the protection of the trade secrets identified by it or its customer connections, or that the restraint was wider than what was reasonably necessary for the legitimate protection of such proprietary interests as the applicant might enjoy.

See **SIBEX**, *supra* at 502 H – I, 503 A;

MAGNA ALLOYS AND RESEARCH (SA) (PTY) LIMITED v ELLIS 1984 (4) SA 874 (A) at 893 C – E;
WALTER McNAUGHTAN (PTY) LIMITED v SCHWARTZ AND OTHERS 2004 (3) SA 381 (C) at 388 E - F.

[9] The time for determining when a restraint is or is not unreasonable and therefore that the enforcement thereof would be against public policy is when the Court is asked to enforce the restraint.

See **RAWLINS AND ANOTHER v CARAVANTRUCK (PTY) LTD** 1993 (1) SA 537 (A) at 540 J – 541 I.

[10] After the respondent left the applicant he became employed by or involved with an entity known as Overland Cash & Carry Botshabelo (“Overland Botshabelo”). Overland Botshabelo operates in Botshabelo and is a direct competitor of the applicant, and operates in the same market as the applicant selling goods on a wholesale basis to retailers and shops in townships and rural areas, including so-called spaza shops. The respondent is thus acting in breach of the restraint of trade agreement.

[11] The Respondent relies on *inter alia* the following facts and circumstances for his view that the restraint should not be enforced:

- (i) That the information regarding the Applicant’s prices and so called “trade secrets and confidential information” are the “pillars of any business”.
- (ii) That he did not, during his employment with the Applicant, gain any information to attract the business of the Applicant.
- (iii) Selling prices and minimum pricing are public knowledge and may be obtained from any wholesaler or on brochures.

- (iv) Senior management was concerned with making arrangements with franchise groups or banner groups and that the Respondent (as branch manager) had no influence thereon,
- (v) The Respondent was not privy to any trade secrets if same existed at all.
- (vi) The Applicant's senior management and head-office had all relevant dealings pertaining to trade secrets, confidential information, etc.
- (vii) No customer of Applicant followed the Respondent to his new place of employment.
- (viii) His main contact was with representatives who worked for agencies and not for the suppliers.
- (ix) Overland (his new employer) has its own pricing structures, policies and procedures. Overland has a different approach to the business and has been in business for approximately 15 years.
- (x) Prices frequently change.
- (xi) As supported by VISSER, the respondent denies that his employment with Overland will result in him competing with the Applicant.
- (xii) That the balance of convenience favours him taking into consideration his personal circumstances (*inter alia* a father of three minor children) and the adverse economical impact it will have on him if he be retained as prayed for by the Applicant.
- (xiii) The area of the restriction being the Republic of South Africa is too wide, especially when taken into consideration that wholesale businesses are to be found "in every town, every city and every province of the Republic".
- (xiv) The prejudice that the Respondent will suffer outweighs the "uncalculated and unsubstantiated and unproved damages of the Applicant".

[12] The main thrust of respondent's defence is that the applicant has failed to prove the existence of a protectable interest. He says the prejudice he will suffer outweighs any possible damages the applicant relies upon.

[13] In regard to trade connections or trade secrets, in order to qualify as confidential information, the information concerned must satisfy certain requirements:

13.1 The information must be capable of application in trade or industry, that is, it must be useful; not be of public knowledge and property.

13.2 The information must be known only to a restricted number of people or a closed circle.

13.3 The information must be of economic value to the person seeking to protect it.

See **TOWNSEND PRODUCTIONS (PTY) LTD v LEECH**

AND OTHERS 2001 (4) SA 33 (C) at 53J – 54 B;

WALTER McNAUGHTAN, *supra* at 389 A.

[14] On the Respondent's own version at the time that he left the Applicant's employment:-

14.1 The Respondent had been involved in reaching budget targets.

14.2 The Respondent had built up a relationship with

representatives of suppliers.

14.3 The Respondent had knowledge of the prices charged by suppliers.

14.4 The Respondent in fact had knowledge of margins albeit that same were “dictated to us by Head Office”.

[15] Mr. Van Rhyn, for respondent, submitted that public policy is

an acceptable criterion for unlawfulness. See **ATLAS**

ORGANIC FERTILIZERS (PTY) LTD v PIKKEWYN

GHWANO (PTY) LTD AND OTHERS 1981 (2) SA 173 (T) at

188 H. One should consider the society in which the

restraint is to be enforced, Mr. Van Rhyn says. There must

be competition, in particular in the society in question here,

being the low income society of Botshabelo. The fact that

competition is important in a low income society is thus, so

says Mr. Van Rhyn, a factor which the Court should weigh up

in deciding whether the restraint is to be enforced. He says

the applicant wishes to have a monopoly in Botshabelo and

that is why it is seeking to prevent the respondent from being

employed in Botshabelo.

[16] The next point Mr. Van Rhyn made related to the fact that

applicant indicated that it would be satisfied with a restraint only for the three magisterial districts of Botshabelo, Bloemfontein and Thaba N'chu. Mr. Van Rhyn asks why is there only a protectable interest in those three areas and not nationwide as the contract provides for?

[17] Mr. Van Rhyn relied on WALTER McNAUGHTAN (PTY) LTD v SCHWARTZ AND OTHERS, *supra* because facts thereof were similar to the present facts especially at 388 E – H. The application was dismissed in that case because the information was no longer of any value because the stocks were ordered almost a year previously and would have been disposed of and therefore the usefulness of the knowledge anticipated to such an extent that the restraint did not need to be enforced (at 389 C – D).

[18] An important facet of this case is whether the respondent knew applicant's mark up. Respondent says the mark up was negotiated by head office. Respondent admits that he knew the prices charged to the applicant by its suppliers.

That means he also knew the mark up. That is the pricing structure. That is confidential information within the definition thereof set out above. An applicant, in seeking to enforce a restraint of trade to which a respondent has bound himself, does not have to show that such respondent has in fact utilised or disclosed information confidential to the applicant, but merely that the respondent could do so.

See **BHT WATER TREATMENT (PTY) LTD v LESLIE AND ANOTHER** 1993 (1) SA 47 (W) at 57 H – 58 D;

[19] Despite the respondent's denial that Overland Botshabelo will be able to make use of the confidential information of the applicant within the knowledge of the respondent, nowhere in the respondent's answering affidavit does he state that he will not disclose any information in his knowledge to Overland Botshabelo. Likewise, the affidavit of Visser contains no averment that Overland Botshabelo is not interested in the prices charged by the applicant's suppliers.

[20] I am satisfied that applicant's pricing structures and customer connections constitute a protectable interest. Although it

may be true that prices fluctuate, the very fact and nature of fluctuation are part of the pricing structure. In this case it is not useless information as in the **WALTER McNAUGHTAN**-case, *supra*. The next question is whether the restraint should be enforced in the circumstances.

[21] I have to weigh up the prejudice to the parties:

21.1 Respondent worked as applicant's branch manager at its Bloemfontein store until 19 August 2005. He took up employment with Overland Cash and Carry, Botshabelo on 17 October 2005, a direct competitor of applicant (admitted by respondent). Overland Botshabelo was opened on 3 November 2005. Thus the respondent assisted Overland to start off a new business in direct competition with applicant after he left applicant.

21.2 Respondent's denial of knowledge of pricing structures of applicant is given the lie by what he says in the

answering affidavit at p. 92 at par. 42:

“The contents hereof is only admitted in as far as my knowledge of the prices charged to the Applicant by its suppliers is concerned.”

Thus the applicant admits that he was aware of the prices charged by supplies to applicant. Obviously he was aware of the prices at which applicant sold – any member of the public was aware thereof. This meant that he was aware of the mark up.

21.3 Respondent’s denial that the R70 000,00 was paid for signing the restraint is ingenious:

a) The contract itself states the purpose of the payment:

“9.4 Without in any way derogating from the contents of this Agreement and in addition thereto, the Company will pay to the Employee, as consideration for signing this Agreement, the aggregate sum of R70 000,00 (Seventy

thousand rand);”

(b) All contracts with the employees continued as before the take-over and section 197 of the Labour Relations Act applied. Thus there was no need, as respondent would want one to believe, that the payment was made in order to entice employees not to resign. Their employment was secure and the only possible reason for the payment was to obtain the committal to the confidential information.

(c) The restraint was signed by respondent on 24 February 2003 and the take-over agreement took place on 24 June 2004, some 14 months after the restraint agreement. This illustrates the unreliability of respondent and his distortion of facts pertinent to the restraint when he says that the R70 000,00 was connected to the take-over.

21.4 The applicant runs a business. It trained respondent and gave him various opportunities. Respondent has left and assisted an opposing company to commence business in an area where the respondent worked (Botshabelo as branch manager for the applicant).

21.5 Applicant does not want to eliminate competition as Mr. Van

Rhyn would want one to believe. Applicant cannot eliminate competition. Applicant can only seek to enforce its legitimate interests by depriving the opposition of an employee. It certainly does not limit competition. It does however limit unfair competition. It stops its opponent using confidential information against it.

21.6 This is a selling business. Pricing and strategy as to discounts are important elements. The respondent worked in the field at the place where he is now working for a direct competitor. It must be against public policy to permit such conduct in the face of an agreement not to do so, for which respondent was paid a handsome once-off consideration of R70 000,00.

21.7 As to the possible prejudice which respondent can suffer, he says that since he was dismissed in August 2005 he was unable to find any other employment with which he was familiar. His unemployment had an adverse economical impact on himself and his family. He is a husband and a father of three minor children aged 10, 5 and 2 years. He says he is the sole breadwinner of his family and responsible to provide

daily meals, that the responsibility rests solely upon himself. He is also responsible for payment of a bond in the amount of R4 300,00 and further municipal account, rates and taxes amounting to approximately to R1 500,00. He says it is therefore not in the best interests of himself and his family to continue to be unemployed. Mr. Hollander points out that no details are given by the respondent as to what employment he looked for, what steps he took. This is not such a highly specialised field that he would not be able to find any other employment. Furthermore the restraint sought is very limited and the respondent would be able to work in many other magisterial districts in an identical business without fear of breaching the terms of the restraint. The fact that he is working in Botshabelo in opposition to the applicant and can only amount to unlawful competition. Respondent has not been deprived of his livelihood. It is not as if the respondent is only capable working in this field. It is not a highly specialised one.

[22] As to area and time, the applicant refers to clause 6 of the restraint which provides for severability of the restraints. The restraints are deemed to separate undertakings (clause 6.2) and for the benefit of the company (clause 6.3). The Court can enforce a restraint less than that stipulated for. See **ROFFEY v CATTERALL, EDWARDS & GOUDRÉ (PTY) LTD** 1977 (4) SA 494 (N) at 507 A – G and **NATIONAL CHEMSEARCH (SA) (PTY) LTD v BORROWMAN AND ANOTHER** 1979 (3) SA 1092 (T) at 1114 A – B.

[23] The applicant wishes to be reasonable towards the respondent. Although it might be entitled in terms of the restraint agreement to protection countrywide, it only wishes to enforce the restraint in three magisterial areas. Also as to the time period, the applicant is entitled to 24 months, but seeks only 12 months. It is claiming lesser protection creating a lesser burden for respondent.

[24] The burden upon respondent is one of the factors to be

weighed up in determining whether the restraint is to be enforced or not.

[25] Applicant's businesses range much wider than simply the wholesale business. However, the respondent was only involved in the wholesale arm of applicant's businesses and Mr. Hollander was willing to accede to the restraint being limited to wholesale businesses.

[26] As to the costs of 17 November 2005, there is no reason why those costs should also not follow the cause.

[27] The order I therefore make, is the following:

1. The respondent is interdicted and restrained, for a period of one year, from 19 August 2005 and within the magisterial districts of Botshabelo, Bloemfontein and Thaba N'chu, either solely or jointly or together with any other person or entity or as agent for any other person or entity, whether corporate or incorporate, from

directly or indirectly and whether for reward or not:-

1.1 carrying on or assisting financially or otherwise
being engaged or concerned or interested in any
business;

1.2 being a director or a shareholder in any company;

1.3 being a member of a close corporation;

1.4 being employed by or in or acting as a consultant, advisor,
contractor, representative, trustee or beneficiary of any trust or
agent of any business;

which carries on any wholesale business conducted by
the applicant, or endeavours to carry on any wholesale
business conducted by the applicant at 19 August
2005.

2. The respondent is to pay the costs of this application
which are to include the costs of the hearing on 17
November 2005.

A. KRUGER, J

On behalf of applicant:

Adv. L. Hollander
Instructed by:
Israel Sackstein Matsepe Inc.
BLOEMFONTEIN

On behalf of respondent:

Adv. A.J.R. van Rhyn SC
Instructed by:
Symington & De Kok
BLOEMFONTEIN

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