

IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA
(ORANJE-VRYSTAATSE PROVINSIALE AFDELING)

Saak Nr. 2143/2004

In die saak tussen:

AUCTION ALLIANCE VRYSTAAT
(PTY) LTD

Applikant

(voorheen bekend as Dotcom Trading
388 (Pty) Ltd h/a Auction Alliance
Free State)

en

FRANZ OTTO BOBBERT

Eerste Respondent

AUCOR FREE STATE (PTY) LTD

Tweede Respondent

CORAM: **VAN COPPENHAGEN, R**

AANGEHOOR OP: **13 MEI 2004**

GELEWER OP: **27 MEI 2004**

[1] Op 15 April 2004 het die applikant aansoek gedoen om ‘n bevel
met die volgende bepalings:

- “1. Condoning the Applicant’s failure to comply with the forms, service
and time limits prescribed by the rules of the above Honourable
Court; and directing that the matter be heard as a matter of urgency in
terms of Rule 6(12)(a).

2. That a rule *nisi* be issued calling upon Respondents to show cause to the above Honourable Court, if any, on a date to be determined by the above Honourable Court as to why a final order should not be granted in the following terms:
 - 2.1 interdicting and restraining the First Respondent from divulging or disclosing to the Second Respondent any of the Applicant's systems, methods, procedures, trade secrets, trade marks, patents, customer lists/client lists including contact details and telephone numbers, details or information relating to suppliers, business connections and other confidential information obtained by the First Respondent in the course of his employment by the Applicant;
 - 2.2 interdicting and prohibiting the First Respondent from directly or indirectly being engaged or concerned or interested in any way in or employed by or soliciting business for or being a director, shareholder, member or partner in or consultant, trustee, manager, auctioneer or appraiser, agent, representative, partner, advisor, or officer to or rendering any service to, the Second Respondent (or its holding or subsidiary or associated companies) or any other firm, person or entity conducting an activity which competes with the Applicant, for a period of 12 months in the Republic of South Africa, from the date of termination of employment of First Respondent's employment with Applicant;

- 2.3 interdicting and restraining First Respondent from soliciting orders, canvassing business or providing services to any client or customer of Applicant;
 - 2.4 interdicting and restraining First Respondent from persuading, inducing, encouraging or procuring any of Applicant's employees to become employed by Second Respondent or any competitor of Applicant or to terminate their employment with Applicant;
 - 2.5 interdicting and restraining the Second Respondent from employing the First Respondent as an employee or in any of the capacities referred to in paragraph 2.2 above;
 - 2.6 directing that the First and Second Respondents pay the costs of this application on the scale as between attorney and client, jointly and severally, the one paying, the other to be absolved;
 - 2.7 granting such further or alternative relief as this Honourable Court may deem fit.
3. That the provisions of paragraphs 2.1 to 2.5 above operate as an interim order pending the return day of the rule *nisi*.
 4. Further and/or alternative relief."

Die aansoek was egter by ooreenkoms op gemelde datum uitgestel tot 23 April 2004 en gelas dat koste oorstaan.

Op 23 April 2004 het ek aan die advokate debattering van die houdbaarheid van 'n kontrakbepaling waardeur 'n persoon verbied word om sy verkose bedryf, beroep of professie te beoefen in lig van die bepalings van veral artikel 13 van die Grondwet, aan die orde gestel. Die aansoek was, omdat geeneen van die advokate voorbereid was om die punt sinvol te beredeneer nie, uitgestel tot 13 Mei 2004.

- [2] Wat ookal die bedes in die aansoek uiteengesit mag wees, is en bly die wesensvraag in die onderhawige aansoek of die bepaling in die ooreenkoms, 'n dienskontrak, tussen applikant en eerste respondent ingevolge waarvan eerste respondent na diensbeëindiging by die applikant verbied word om vir 'n periode van 12 maande in die Republiek van Suid-Afrika enige afslaers, waardeerders en ander besigheid soortgelyk aan die wat die applikant bedryf, te beoefen, afdwingbaar is.

Dit verg beklemtoning dat die partye dit eens is dat applikant se

regshulp gegrond word op die skriftelike kontrak wat die partye aangegaan het laatstens op 16 November 2001.

- [3] Die feite waarop enige uiteindelijke bevinding ooreenkomstig die rigtinggewende uitsprake in **PLASCON-EVANS PAINTS LTD v VAN RIEBEECK PAINTS (PTY) LTD 1984 (3) SA 623 (A) te 634E-635C** en sake daarin aangehaal, gebaseer moet word is eenvouding.

Eerste respondent het nadat hy in 1997 van 'n kursus waarin hy in alle aspekte van die afslaaersbesigheid onderrig was in dieselfde jaar sy eie afslaaersbesigheid in Bethlehem onder die naam "Royal Auctions" begin. Sy kontak met Rael Levitt, 'n direkteur van applikant en 'n deponent tot applikant se funderende verklaring wat op daardie stadium, onder andere, 'n besigheid onder die naam "Seeff Auctions" bedryf het, het in 1998 plaasgevind toe hy versoek was om 'n veiling vir Delmonte Foods in Kaapstad te behartig.

Latere gepreke tussen gemelde Levitt, eerste respondent, en ene

Hattingh aangaande uitbouing van Levitt se besigheid na die Vrystaat het in 2001 daartoe gelei dat 'n maatskappy wat as konsessiehouer vir Levitt se besighede kon dien, deur Hattingh en sy vennoot Marais gestig was. Hierdie maatskappy, na 'n naamsverandering na Auction Alliance (Free State) (Pty) Ltd het as Auction Alliance Free State as afslaers, met eerste respondent wat die funksies vervul en verrig het, besigheid gedoen. Dit was dan ook later besluit dat eerste respondent na Bloemfontein sou verhuis vanwaar die besigheid weens gegronde en gesonde besigheidsredes bedryf sou word. Die besigheid van voormelde maatskappy was deur "Dotcom Trading 388 (Pty) Ltd" waarvan die naam later na Auction Alliance Vrystaat (Pty) Ltd verander was, gedurende 2001 oorgeneem. Eerste respondent het as deel van die besigheid na applikant oorgegaan. Die gewraakte dienskontrak was dan ook in November 2001, nadat eerste respondent reeds vir 'n geruime tyd in Bloemfontein was en aldaar gewerk het, onderteken.

Eerste respondent gesetel in Bloemfontein het na ondertekening van die kontrak met sy pligte voortgegaan en was in Julie 2002 as direkteur van applikant aangestel.

Op 9 Februarie 2004 het eerste respondent sy bedanking, wat op 9 Maart 2004 effektief sou wees, skriftelik ingedien. Hierdie bedanking was na verdere onderhandelings en gesprekke op 4 Maart 2004 per e-pos deur eerste respondent bekragtig.

Eerste respondent het na onderhandeling in Maart 2004 'n diensooreenkoms aangegaan om op 1 April 2004 by tweede respondent diens te aanvaar.

- [4] Klousule 17 van die dienskontrak, (Aanhangsel “RL1” tot die funderende verklaring) beslaan in omvang die helfte van die ooreenkoms tussen die partye en bevat die wese van die kontraksverhouding waarop applikant steun. Dit lees as volg:

“17. CONFIDENTIALITY AGREEMENT AND RESTRAINT OF TRADE

17.1 In this clause, unless clearly inconsistent with the context, the words and phrases defined hereunder shall bear the meanings assigned to them in this sub-clause:

17.1.1 “**the business**” means the business conducted by the company from time to time, namely that of:

17.1.1.1 Auctioneers and appraisers; and

17.1.1.2 any other business conducted by the

company in the ordinary course of the
company's business;

17.1.2 “**competitive activity**” means any activity which is the same
as or similar to the business;

17.1.3 “**confidential information**” includes but is not limited to
any of the group's trade secrets, know how, confidential
information, goodwill and intangible assets in general which
relate to the business, including (but not limited to):

17.1.3.1 financial methods, policies and philosophies;

17.1.3.2 marketing methods, policies and philosophies;

17.1.3.3 formulae;

17.1.3.4 processes;

17.1.3.5 systems;

17.1.3.6 sources of supply;

17.1.3.7 business methods including techniques and
business practices;

17.1.3.8 inventions;

17.1.3.9 quality control of products;

17.1.3.10 any discounts obtained from
suppliers;

17.1.3.11 control of stock losses;

17.1.3.12 methods of distribution;

17.1.3.13 specialised knowledge of training
programmes and staff welfare;

17.1.3.14 business connections;

- 17.1.3.15 internal control systems;
 17.1.3.16 buying policies and strategies;
 17.1.3.17 salary and wage policies;
 17.1.3.18 security methods;
- 17.1.3.19 knowledge of the customers and
 business associates;
- 17.1.3.20 contractual arrangements and
 financing techniques;
- 17.1.3.21 personnel;
 17.1.3.22 strategic plans;
- 17.1.3.23 other matters which relate to the business of
 the group in respect of which information is
 not readily available in the ordinary course
 of business to a competitor of the group;
- 17.1.4 “**entity**” includes any association, business, close
 corporation, company, concern, enterprise, firm, partnership,
 person, trust, undertaking, voluntary association or similar
 entity;
- 17.1.5 “**the restraint period**” means a period of 12 (twelve) months
 after the date of termination of the Auctioneer’s employment
 for any reason whatsoever;
- 17.1.6 “**the restraint area**” means the Republic of South Africa;
- 17.1.7 “**prescribed customers or suppliers**” means any person –
- 17.1.7.1 who is or was a customer or supplier of the
 business during the existence of this
 Agreement and as at the termination date;
- 17.1.7.2 who is or was a prospective customer or supplier of the business as at the termination

date or whom the Auctioneer or any other representative of the company had approached to do business with the company within the fixed term period of 3 months;

17.1.8 “**prescribed goods**” means any and all goods which are dealt in or by the company in the ordinary course of business as at the termination date or duration of this agreement;

17.1.9 “**prescribed services**” means any and all services rendered by the company in the ordinary course of business as at the termination date or during the duration of this agreement;

17.1.10 “**termination date**” means the date upon which the Auctioneers Contract of Employment is terminated for any reason whatsoever.

17.2 It is recorded and agreed that:

17.2.1 the business is highly competitive;

17.2.2 the group has valuable trade connections;

17.2.3 by reason of the Auctioneer’s prior direct or indirect interest in the business, as well as his appointment in terms hereof, the Auctioneer has and will acquire an in-depth knowledge of the confidential information;

17.2.4 should the Auctioneer sever this association with the group and make the confidential information available to a competitor of the group or utilise such confidential information in competition with the group, it would cause the group to suffer considerable financial loss;

17.2.5 substantial benefits have directly or indirectly accrued or will accrue to the

Auctioneer arising out of

- 17.2.5.1 the related agreements
- 17.2.5.2 his employment in terms hereof;
and
- 17.2.5.3 his remuneration and other benefits that he

shall become entitled to by virtue of the

appointment;

17.2.6 it is accordingly necessary for the company, in order to protect it and the groups goodwill and legitimate proprietary interests in the confidential information and other legitimate interests, to conclude an agreement with the Auctioneer pursuant to which the Auctioneer will be restraint in certain respects.

17.3 In consideration of the various matters referred to above, the Auctioneer undertakes to and in favour of the company that:

17.3.1 the Auctioneer shall not, directly or indirectly, whilst an employee of the company or at any time thereafter, use for his own benefit, or the benefit of any other person, and shall keep confidential and not disclose any confidential information, other than to those persons connected with the company, who are required to have that information;

17.3.2 he shall not, either during the currency of this agreement or during any of the months of the restraint period, directly or indirectly:

- 17.3.2.1 carry on or otherwise be engaged or concerned or interested in or employed by;
- 17.3.2.2 solicit business for;
- 17.3.2.3 be a director, shareholder, member or partner in;
- 17.3.2.4 act as a consultant, trustee, manager, Auctioneer, agent, representative, partner, advisor, officer, or in any other capacity to;

17.3.2.5 render any service (gratuitously or otherwise) to;

17.3.2.6 lend or advance, or bind himself as surety for, any sum of money or assist financially any entity directly or indirectly engaged or interested in any competitive activity in the restraint area.

17.3.3 without derogating from the obligations in terms of clause, the Auctioneer agrees that neither he nor any entity in which he is directly or indirectly interested will, during any month of the restraint period and in the restraint area, directly or indirectly, through any entity, and whether for reward or not

—

- 17.3.3.1 solicit orders from prescribed customers or suppliers for the prescribed goods and/or the prescribed services;

17.3.3.2 canvass business in respect of the prescribed goods and/or the prescribed services from prescribed customers or suppliers;

17.3.3.3 sell or otherwise supply any prescribed goods to any prescribed customer or suppliers;

17.3.3.4 render any prescribed services to any prescribed customer or supplier;

17.3.3.5 purchase any prescribed goods from any prescribed customer or supplier or accept the rendering of any prescribed services from any prescribed customer or supplier;

- 17.3.3.6 solicit appointment as a distributor, licensee, agent or representative of any prescribed customer or supplier in respect of the

prescribed goods and/or the prescribed services;

17.3.3.7 carry on a competitive activity or any portion thereof;

17.3.4 at any time during the restraint period do anything referred to in 16.3.2 or 16.3.3 outside the restraint area which has the effect of causing the group or the business prejudice in the restraint area;

17.3.5 the Auctioneer shall not, either for the Auctioneer's own account or as a representative or agent for any third party, whilst an Auctioneer of the company or thereafter during any month of the restraint period, persuade, induce, encourage or procure an Employee employed by the company (including any Employee employed by the Company within a period of 3 (three) months prior to the termination date) –

17.3.5.1 to become employed by, or interested directly or indirectly in any manner whatsoever, in competitive business, or;

17.3.5.2 terminate his employment with the company; or

17.3.5.3 to furnish any confidential information acquired by that Auctioneer as a result of his employment by the company to any unauthorised person.

17.4 The Auctioneer agrees that –

17.4.1 the restraints imposed upon him in terms of this Agreement (interpreted in their widest sense as contemplated in 16.4.5

below) are reasonable as to subject matter, period and area and that the said restraints are fair, reasonable and justifiable (taking into consideration his personal knowledge, wholly or partially, or the confidential information, the considerable loss which the group would suffer if the Auctioneer were to make his expertise, knowledge and experience available to a competitor of the group, and the direct or indirect benefits referred to in 16.2.5 and go on no further than is reasonably necessary to protect the proprietary rights and legitimate interests of the company and the group;

17.4.2 this agreement is entered into upon the basis and it is a material term of this agreement that the company would be entitled to the benefit of the restraints as set out in this Agreement interpreted in their widest sense as contemplated in 16.4.5;

17.4.3 the stipulations in this 16 are separate, severable and independent stipulations in favour of –

17.4.3.1 the company;

17.4.3.2 any other subsidiary of the Company carrying on the business;

17.4.3.3 any successors-in-title of such parties, and for purposes of this clause “successors-in-title” means any person who –

17.4.3.3.1 acquires the business; or

17.4.3.3.2 becomes the bene-ficial

owner of the business
through him/its shareholding
in any company; or

17.4.3.3.3 has acquired by cession the
rights to enforce the
restraints embodied herein
which are capable of
acceptance and enforcement
by any such parties or
successors-in-title at any
time hereafter in any
combination of one or more
of them;

17.4.4 the provisions of this 16 shall be construed as imposing
separate, severable and independent restraints in respect of –

17.4.4.1 each of the months falling within the
restraint period;

17.4.4.2 each state, province, division or council area, municipal area, magisterial district,
town and locality falling within the restraint area;

17.4.4.3 each activity falling within the ambit of a competitive activity;

17.4.4.4 each capacity in relation to the competitive
activity which the Auctioneer is prohibited
from undertaking in terms of this 16;

17.4.4.5 each category of services falling within the
definition of the prescribed services;

17.4.4.6 each category of goods falling within the definition of prescribed goods;

17.4.4.7 each category persons falling within the definitions of prescribed suppliers or customers;

17.4.4.8 each division of the purchaser;

17.4.5 the restraints set out in this 16 shall be given the widest possible interpretation and no restraint or combination of restraints shall be limited by reference to or inference from or to any other restraint or combination of restraints provided, however, that the invalidity or unenforceability of any one or combination of restraints referred to above (including the restraints interpreted in their widest cumulative senses aforesaid) shall not affect the validity and enforceability of the other restraints referred to in this 16 or any other combination of such restraints.

17.5 The Auctioneer hereby further agrees and acknowledges that:

17.5.1 should he at any time deny that any of the restraint covenants contained this 16 are reasonable or enforceable, then the onus of proving their unreasonableness or enforceability shall be upon the Auctioneer (and the restraint will therefore be presumed to be enforceable and valid in all aspects until the contrary is proved by the Auctioneer);

17.5.2 he has carefully read the provisions of the restraint of trade

covenants contained in this 16 and fully realises the implications and effect of the provisions thereof and has entered into such restraint of trade covenants freely and voluntarily and that such restraint of trade covenants will not cause him any hardship which he is not willing to bear in return for the benefits referred to in 16.2.5.

17.6 No restraints referred to in this clause 16 shall preclude the Auctioneer from –

17.6.1 holding a direct or indirect beneficial shareholding in any company listed on a recognised stock exchange, where the direct holding or cumulative indirect holdings of the Auctioneer does not exceed 5% (five per cent) of any class of that listed company's issued share capital and the interests of the Auctioneer are solely those shareholder;

17.6.2 Holding beneficially share in the issued share capital of the Company or Group of Companies;

17.6.3 From being appointed to the board of the company.”

[5] Applikant bevestig dat die aansoek ten doel het om eerste respondent te verhoed om applikant se handelsgeheime en vertroulike inligting bekend te maak asook om in diens te tree of betrokke te raak by tweede respondent vir 'n periode van 12 maande vanaf diensbeëindiging.

- [6] Die grondslag van die aangevraagde regshulp, so word deur applikant aangevoer, is dat eerste respondent uit hoofde van sy posisie by applikant toegang gehad het tot – wat vir doeleindes hiervan “handelsgeheime” genoem sal word, en ook intieme kennis opgedoen het van kliënte en besigheids- en vertrouensverhoudings opgedoen het met kliënte. Daardie inligting, so voer applikant aan, verg beskerming, regtens.
- [7] Eerste respondent verklaar as feit dat al die sogenaamde handelsgeheime asook die kliënte basis waarop applikant beroep doen inderwaarheid in die betrokke bedryf alom bekend is en in die algemeen in die bedryf benut en aangewend word, trouens eerste respondent verklaar nadruklik dat hy geen formules, metodes en/of werkwyses of kliënte basis vir die bedryf anders as waaroor hy persoonlik beskik het by applikant ontvang of geleer het nie.
- [8] ‘n Persoon se unieke talente, gawes, kundigheid, bedrewendheid, vaardigheid en persoonlikheid kan nooit deur ‘n ander in beslag geneem word nie. Botha AR verduidelik in **BASSON v**

CHILWAN AND OTHERS 1993 (3) SA 742 (A) te 778C-D:

“In essence, the Chilwans are seeking to prevent Basson from using his skill and experience, and his innate or acquired abilities, to the potential detriment of their investment. In this respect the case bears no resemblance to the case of the seller and buyer of a business. On the contrary, it approximates closely to the case of an employer and employee relationship in one respect. In relation to such cases it has often been said in the authorities that a man’s skills and abilities are a part of himself and that he cannot ordinarily be precluded from making use of them by a contract in restraint of trade.”

Voormelde uitspraak het myns insiens op 8 Mei 1996 sterk onderskraging gekry toe die Grondwet, Wet 108 van 1996, as hoogste reg (*cf* artikel 2 Wet 108 van 1996) op die wetboek geplaas was. Artikel 22 van die Grondwet verleen aan elke burger die reg om ‘n bedryf, beroep of professie te kies. Geen regulering in die beoefening van die gekose professie, beroep of bedryf wat as slawerny, knegskap of dwangarbeid aangemerkt kan word sal egter geduld word nie (*cf* artikel 13 van die Grondwet). Enige kontrak wat dus bepaal dat ‘n persoon sy unieke en persoonlike kundigheid, gawes, talente, bedrewenheid of vaardigheid slegs aan ‘n bepaalde persoon of instansie moet diensbaar stel, sal gevolglik as ‘n reël

contra bones mores wees.

- [9] Op die feite wat vir doeleindes van hierdie aansoek aanvaar moet word, is die afleiding onvermydelik dat applikant wens te verhoed dat eerste respondent vir 'n periode van een jaar binne die Republiek van Suid-Afrika sy persoonlike en unieke talente, gawes, vaardighede, bedrewendheid, en kundigheid, hetsy tot voordeel van homself hetsy tot voordeel van 'n ander, anders as applikant beskikbaar moet stel of kan stel. Dit kan ook anders gestel word; eerste respondent mag vir gemelde periode binne die RSA slegs sy persoonlike unieke vaardighede, kundighede, talente, bedrewendheid en gawes in diens van applikant aanwend.

Die voorgestelde beperkings is myns insiens in die omstandighede *contra bones mores* en dus regtens onafdwingbaar.

- [10] In die loop van die argument was namens applikant, toe hy gekonfronteer word met die moontlike onhoudbaarheid van die beperking, aangevoer dat indien die beperking weens die omvang betreffende gebied en tydsduur die een of ander of beide as onredelik aangemerkt kan word, die area verskraal moet word tot

die provinsies Noord-Kaap, die Vrystaat en Gauteng.

Die versoek tot verskraling van die area van die beperking was tydens argument vir die eerste keer voorgedra; applikant spreek dit nie in die aansoekstukke aan nie.

[11] Die beginsel van toepassing waar 'n party 'n beperking of inkorting op 'n ooreengekome handelsbeperking aanvra is duidelik.

In **NATIONAL CHEMSEARCH (SA) (PTY) LTD v BORROWMAN AND ANOTHER** 1979 (3) SA 1092 (T) te 114D-E lig Botha R toe:

“If there is to be such a development, it might well be expected of the party seeking to enforce something less than what was agreed upon to put forward himself the limits of the restraint which he proposes as being reasonable, and to satisfy the Court that an order by the Court within those limits would be reasonable; he should not simply cast the restraint as agreed upon in the lap of the Court and expect the Court itself to devise a more limited restraint that would be reasonable.”

(Cf. **SIBEX ENIGNEERING SERVICES (PTY) LTD v VAN WYK AND ANOTHER** 1991 (2) SA 482 (T) te 488D;

**MACPAIL (PTY) LTD v JANSE VAN RENSBURG AND
OTHERS 1996 (1) SA 594 (T) te 599B-C).**

Geen getuienis was voorgelê waarom die area beperking ingekort sou word nie, en was ook nie enige basis gelê waarom dit nou juis, soos deur die applikant voorgestel, ingekort moet word nie. Ek behoort gevolglik nie aan die versoek gehoor te gee nie.

- [12] Applikant se regshulp teen tweede respondent is en kan slegs uit die *lex Aquilia* ontleen word. Regshulp kan egter slegs verleen word indien 'n party, *in casu* tweede respondent, opsetlik inbreuk maak op 'n kontraktuele verhouding tussen applikant en eerste respondent sodat kontrakbreuk uit daardie inmenging voortvloei.

**(ATLAS ORGANIC FERTILIZERS v PIKKEWYN
GHWANO 1981 (2) SA 173 (T) te 202G; DUN AND
BRADSTREET (PTY) LTD v SOUTH AFRICAN
MERCHANTS COMBINED CREDIT BUREAU (CAPE)
(PTY) LTD 1968 (1) SA 209 (K) te 215G).**

Die feite, selfs op waarskynlikhede regverdig as afleiding dat

tweede respondent nie met die aanstelling van eerste respondent bewus was van die handelsbeperking nie; tweede respondent kon dus nie opsetlik vir eerste respondent oorreed het om sy kontrak met applikant te verbreek of inbreuk te maak op kontraksterme tussen applikant en eerste respondent nie.

[13] Die resultaat van voorafgaande is dat die aansoek nie kan slaag nie. Geen rede doen voor waarom die koste nie die resultaat sal volg nie.

[14] Die volgende bevel word gemaak:
 (1) Die aansoek word afgewys.
 (2) Applikant om eerste en tweede respondent se koste insluitende die koste van 15 April 2004 te betaal.

G. VAN COPPENHAGEN, R

Namens Applikant:

Adv. A.J.R. van Rhyn SC
 Bygestaan deur:
 Adv. S.J. Reinders
 i.o.v.
 Honey Prokureurs
 Bloemfontein

Namens 1ste Respondent:

Adv. P.U. Fischer
i.o.v.
Symington & De Kok

Namens 2de Respondent:

Adv. F.W.A. Danzfuss SC
i.o.v.
Bezuidenhouts Ing.

/scd