



THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JA34/2024

In the matter between:

ANDRIES JOHANNES JACOBUS VENTER

First Appellant

HELGAR KELDER

Second Appellant

LUSAPHO ELVIS NQAKWANA

Third Appellant

SHEDRACK SIPHO NZIMANDE

Fourth Appellant

MLANDENI NKULULEKO MTHETHWA

Fifth Appellant

and

TWENTY FOUR MOTORS CC t/a FORD ERMELO

Respondent

Heard: 30 May 2024

Delivered: 28 June 2024

Coram: Savage ADJP, Van Niekerk JA and Nkutha-Nkontwana JA

JUDGMENT

SAVAGE, ADJP

- [1] This unopposed appeal, with the leave of the Labour Court, is against the judgment and orders of that Court in terms of which seven former employees of the respondent, Twenty Four Motors CC t/a Ford Ermelo, were found to have breached the provisions of the restraint of trade agreements they had entered

into with the respondent. The employees were interdicted by the Labour Court for a period of 12 months from being employed by or starting a business that competes with or undertakes a similar business to that of the respondent within a radius of 300 kilometres from the respondent's business premises in Ermelo, Mpumalanga. In addition, they were prevented from using or divulging any of the respondent's confidential information to third parties. The former employees were ordered to pay the costs of the respondent's urgent application.

- [2] The respondent thereafter unsuccessfully sought, in terms of section 18(3) of the Superior Courts Act,¹ to enforce the order of the Labour Court pending finalisation of the appeal. That application was dismissed by the Court with no order of costs.

Background

- [3] The appellants are five of the seven former employees of the respondent against whom relief was granted by the Labour Court. The remaining two employees have since been re-employed by the respondent. The first appellant, Mr Andries Venter, was employed by the respondent as a vehicle sales manager. The second appellant, Ms Helgar Kelder, was employed as a finance and insurance trainee. The third to fifth appellants, Mr Lusapho Nqakwana, Mr Shedreck Nzimande and Mr Mlandeni Mthethwa were employed as vehicle salespersons by the respondent.
- [4] The respondent, which does not oppose the appeal, is one of twenty motor dealerships in Ermelo that sells second-hand vehicles and the only dealership franchised to sell new Ford vehicles in Ermelo. The appellants' new employer, which was the second respondent before the Labour Court, but is not a party to this appeal, only sells second-hand vehicles.
- [5] The respondent sought to enforce the restraint agreements against the appellants on the basis that they had unfettered access to confidential information concerning strategic relationships with clients, banks, service providers and suppliers and strong profitable relationships with customers. This

¹ Act 10 of 2013.

information was said to provide their new employer with a distinct competitive advantage, enabling it to predict client needs and agree on discount structures and pricing models. The respondent sought to prevent the use by competitors of this information to gain such a competitive advantage in the market given that the employees had been responsible for generating new business, developing existing business, maintaining and negotiating deal structures with customers and buying agreements with sellers of second-hand vehicles, particularly car rental outlets and car auction houses.

- [6] The appellants were said to have gained intimate knowledge of the respondent's business, its services, the methods it used to provide optimal services to customers, deal structures, customers, stakeholders such as banks and suppliers and commission structures. If this information was shared with competitors, the respondent contended that this would erode its position and competitive advantage in the market, in circumstances in which there exists stiff competition between competitors. The appellants' conduct was therefore said to threaten its interests and risk causing severe financial loss to the respondent, the integrity of its business, brand, and services, all of which were said to constitute protectable business interests.

Judgment of Labour Court

- [7] The Labour Court enforced the restraint agreements against the seven employees, including the appellants, on the basis that they had close contact and influence over the applicant's customers, with information as to current and future clients and the service they received. Their connections with customers were found to risk business being taken to their new employer given that they were privy to confidential information relating to pricing and were uniquely positioned to use this information for the benefit of their new employer in breach of their restraint of trade agreements. It found that the public interest required that the appellants should comply with the terms of such agreements.

Evaluation

- [8] Restraint of trade agreements are valid, binding, and enforceable unless their enforcement would be unreasonable.² In determining the reasonableness of a restraint of trade agreement, a court must make a value judgment keeping in mind the principles expressed through the maxim *pacta servanda sunt* on the one hand, and a party's interest in engaging freely in their chosen trade, occupation or profession, on the other.³
- [9] As stated in *Basson v Chilwan and Others*,⁴ the test for determining the reasonableness of a restraint of trade agreement turns on the following: (a) whether one party has an interest that deserves protection after termination of the agreement; (b) whether that interest is threatened or being prejudiced by the other party; (c) if so, whether that interest weighs qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive; and (d) whether there is an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected. A fifth consideration, identified in *Reddy v Siemens Telecommunications (Pty) Ltd*,⁵ is whether the restraint goes further than necessary to protect that interest. This consideration has been found to correspond with s 36(1)(e) of the Constitution. It requires that it be considered whether less restrictive measures exist which can achieve the purpose of the limitation by determining whether the restraint or limitation is "*reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom*".⁶
- [10] It is trite that the party seeking to enforce a restraint of trade agreement must prove a breach of the contract, with the party seeking to avoid enforcement of

² *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* [1984] ZASCA 116; 1984 (4) SA 874 (A) (*Magna Alloys*).

³ *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronjé and another* [2010] ZALC 198; (2011) 32 ILJ 601 (LC) (*Esquire*) at para 36.

⁴ [1993] ZASCA 61; 1993 (3) SA 742 (A) at 767G-H.

⁵ *Reddy v Siemens Telecommunications (Pty) Ltd* [2006] ZASCA 135; 2007 (2) SA (SCA) (*Reddy*).

⁶ *Id* at para 17. See also *Beedle v Slo-Jo Innovations Hub (Pty) Ltd* [2023] ZALAC 17; (2023) 44 ILJ 2493 (LAC) at para 23 - 25.

the contract bearing the onus to demonstrate that the restraint is unenforceable because it is unreasonable.⁷

- [11] The party seeking to enforce a restraint of trade must establish an interest worthy of protection and that the other party is threatening that interest. The party resisting enforcement must prove that it would be unreasonable to do so.⁸
- [12] In *Ball v Bambalela Bolts (Pty) Ltd and another*⁹, this Court stated, in relation to the reasonableness of restraint, that:

[13] ... Prior to the decision in *Magna Alloys and Research SA (Pty) Ltd v Ellis*,¹⁰ restraints of trade were only enforceable if they were proved to be reasonable. Since then they have been regarded as enforceable, unless they are proved to be unreasonable. The effect of the *Magna Alloys*' decision was to place an onus on the party, sought to be restrained, to prove, on a balance of probabilities, that the restraint was unreasonable. However, because the right of a citizen freely to choose a trade, occupation, or profession, is protected in terms of s 22 of the Constitution and a restraint of trade constitutes a limitation of that right, the onus may well be on the party who seeks to enforce the restraint to prove that it is a reasonable or justifiable limitation of that right of the party sought to be restrained.

- [14] In *Reddy v Siemens Telecommunications (Pty) Ltd*,¹¹ it was held that the reasonableness of a restraint could be determined without becoming embroiled in the issue of onus. This could be done if the facts regarding reasonableness have been adequately explored in the evidence and if any disputes of fact are resolved in favour of the party sought to be restrained. If the facts, assessed as aforementioned, disclose that the restraint is reasonable then the party, seeking the

⁷ *Magna Alloys supra* at 891B-C; *Reddy supra* at para 14; *Labournet (Pty) Ltd v Jankielsohn and another* [2017] ZALAC 7; (2017) 38 ILJ 1302 (LAC) at para 39; *Esquire supra* at para 26; *SPP Pumps (SA) (Pty) Ltd v Stoop and another* [2014] ZALCJHB 453; (2015) 36 ILJ 1134 (LC) at para 26; *Shoprite Checkers (Pty) Ltd v Jordaan and Another* [2013] ZALCJHB 333; (2013) 34 ILJ 2105 (LC) at para 20; *Waco Africa (Pty) Ltd t/a Form-Scaff v Sack and Others* [2019] ZALCJHB 360; (2020) 41 ILJ 1771 (LC) at paras 17 - 18.

⁸ *Sadan and another v Workforce Staffing (Pty) Ltd* [2023] ZALAC 23; (2023) 44 ILJ 2506 (LAC) at para 19.

⁹ (2013) 34 ILJ 2821 (LAC) at paras 13 - 14.

¹⁰ *Magna Alloys supra* at 891B - C.

¹¹ *Reddy supra* at para 14.

restraint order, must succeed, but if those facts show that the restraint is unreasonable, then the party, sought to be restrained, must succeed. Resolving the disputes of fact in favour of the party sought to be restrained involves an application of the Plascon-Evans rule.'

- [13] The respondent was required to do no more than establish the existence of the restraint and its breach, neither of which were disputed. The appellants bore the onus of showing that the restraint was unreasonable for lack of any proprietary interest. For the reasons that follow we are satisfied that the appellants succeeded in doing so.
- [14] A protectable interest in the context of a restraint of trade constitutes confidential information and trade secrets, trade connections, or both. The confidential information, whether information, know-how, technology or a method, must be objectively worthy of protection and have value in the sense that it concerns matters such as business opportunities, customer information, proposals, marketing, price or pricing arrangements, product specifications, know-how, technology or manufacturing details which are unique to the business and not generally available to third parties. It must have actual economic value to the party seeking to protect it, in circumstances in which the employee is obliged contractually to keep it confidential. The information must not be public knowledge, public property or be available in the public domain. To be confidential and therefore worthy of protection, it must be shown to be specific or unique to the respondent, with economic value, and known only to a restricted number of people or a closed circle within its business while being capable of use or application within the same trade or industry.
- [15] To find that trade connections exist as an interest worthy of protection, the employee must be found to have had access to customers and customer relationships which could be used by the employee to induce customers to follow the employee to the new business. Whether the employee has the ability to exert this kind of influence, depends on the seniority, position and duties of the employee, the nature and extent of the employee's contact with customers, and knowledge of the particular requirements of the customer in contrast to rival businesses.

[16] The respondent only sought enforcement of the restraint agreements in respect of its second-hand vehicle business and not its new vehicle business. The facts advanced did not, however, prove that the respondent held a protectable interest in respect of its second-hand vehicle business. It proved no evidence of confidential information, trade secrets or trade connections held by the former employees that warranted protection. There was also no evidence advanced that repeat customers formed the backbone of the business, nor any dispute that all second-hand vehicle deals rely on the “book value” of a vehicle as a guide for determining its value. It was not proved that the appellants were aware of trade secrets or had trade connections, even the first appellant given his managerial role, that could be used by the employee to induce customers to follow the employee to the new business. Nothing proved that any of the appellants were in a position to exert influence on customers, on the basis of specific and unique knowledge held by them, to the prejudice of the respondent. Far from being unique to the respondent’s business, the information and connections it sought to protect were available widely in the industry. There was no evidence that relationships with repeat customers existed or that the appellants held unique access to customer relationships which could be used by the employee to induce customers to follow the employee to the new business. This was even more so in the case of the second appellant who was a trainee and not exposed to customers, with no confidential information to disclose to her new employer, and the third to fifth appellants who were vehicle salesmen.

[17] It follows that in deciding that it was reasonable to enforce the restraint of trade agreements, the Labour Court erred. The appeal must therefore succeed.

[18] Given that the application concerns a civil matter between the parties there is no reason why the ordinary rule that costs follow the result should not be applied in relation to the substituted order of the Labour Court. We are not persuaded, given that the respondent elected not to oppose the appeal, that a costs order on appeal is appropriate.

[19] In the result, the following order is made:

Order

1. The appeal succeeds with no order of costs.
2. The order of the Labour Court is set aside and substituted as follows:

‘1. The application is dismissed with costs.’

SAVAGE ADJP

Van Niekerk JA and Nkutha-Nkontwana JA agree.

APPEARANCES:

FOR THE APPELLANTS: G Ebersöhn of Gerrie Ebersöhn Attorneys Inc.

FOR THE RESPONDENT: No appearance