

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 2024/007833

1. REPORTABLE: ~~YES~~ / NO
2. OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
3. REVISED: YES / ~~NO~~

DATE: 29 July 2024
SIGNATURE OF JUDGE: [Redacted Signature]

In the matter between:

**COMMERCIAL MOBILE TRUCK & TRAILER
ALIGNMENT SERVICES (PTY) LTD**

Applicant

and

GEHARDUS DANIEL HARMSE

First Respondent

KAREL JOHANNES HARMSE

Second Respondent

JUDGMENT

OOSTHUIZEN AJ

BACKGROUND

[1] The applicant, the erstwhile employer of the respondents, seeks to enforce certain restraints of trade, contained in the respondents' contracts of employment, in the following terms:

"1. That the first and second respondents be interdicted and restrained for a period of 5 (FIVE) years from the date hereof from:

1.1 Enticing, soliciting, canvassing business from any of the customers of the applicant or associated companies whether it is for their own benefit or otherwise;

1.2 Becoming engaged in, associating with or interested in any way whatsoever in any business activity which competes with the business being conducted by the applicant or as a separate restraint any associated company.

1.3 Competing with the applicant by becoming engaged, associated or interested directly or indirectly in or to any company, firm, business, trust or undertaking which carries on business directly or indirectly in competition with the applicant's business in a radius of 250 km from the applicant's business premises and anywhere within the African countries in which the applicant or its associated company has an office after this employment contract has been terminated for whatever reason."

[2] The applicant's business was established in September 2020. It offers specialist services in the form of mobile wheel alignment and balancing services and trailer repairs to its clients' vehicle fleets. This service is offered on a 24-hour basis either at the applicant's workshop or at the premises of its clients.

[3] The applicant employs operational managers, secretaries and several alignment technicians.

[4] The fleets of the applicant's clients require periodical wheel balancing and alignment with the result that the applicant provides periodical return services to its clients.

- [5] The applicant described its relationship with its clients as follows in the founding affidavit:

"Since the very nature of the applicant's business is to remain at the beck and call of its clients, a certain goodwill and relationship must exist between the applicant's employees from operational management down to the service technicians with regard to servicing the immediate needs of the applicant's customers. This is usually achieved through telephonic enquiries directly with the operational team of the applicant.

This goodwill and professional relationship, as established through the appropriate specialist services and technology of the applicant is to be fostered and maintained, alternatively is susceptible to abuse and moreover unlawful appropriation for purposes of obtaining an unfair competitive advantage of the applicant's existing clientele by using such relationship and contact information for the betterance and furtherance of direct competition companies."

- [6] The applicant accordingly insisted on a restraint of trade in all its employment contracts.

- [7] On or about 1 October 2020, i.e. shortly after the establishment of the applicant's business, the first respondent was employed by the applicant as operations manager. The written employment contract between the applicant and the first respondent contained *inter alia* the following clauses in Annexure A thereto:

"2.1 As a result of the nature of the employer's business which is related to knowledge and management of activities relating to the Commercial Mobile Truck & Trailer Alignment Services Industry in which it operates, the parties agree that it is necessary for the employer to protect itself against unfair competition and substantial damage as a result of an employee or former employee competing with the employer in this regard.

2.2 In order to protect the proprietary interests of the Company and each of its associated companies the Employee shall not:

- o Entice, solicit or canvass business from any of the customers of the Employer or associated companies, whether for his own benefits or otherwise; or*

- *Become engaged, associated or interested in any way whatsoever in any business activity which competes with the business being conducted by the Employer or, as a separate restraint, any associated company.*

2.3 *The Employee, therefore, areas [sic] and undertakes not to compete with the employer for a period of 5 (five) years, and thereafter in a radius of 250 km from the Employers business premises, and anywhere within the African countries in which the Employer or its associated company has an office after this employment contract has been terminated for whatever reason. Compete for purposes of this agreement will mean to become engaged, associated or interested, directly or indirectly, in or to any company, firm, business, trust or undertaking which carries on business directly, or indirectly, in competition with the employer's business in this regard."*

- [8] On or about 3 November 2020, the second respondent was employed by the applicant as an assistant wheel alignment technician. The written employment contract between the applicant and the second respondent contained the same restraints, as set out in paragraph [7] above. I will deal with the interpretation of the restraints below.
- [9] On 2 November 2023, the first respondent tendered his resignation from the applicant's employ on 24 hours notice and on 3 November 2023, the second respondent tendered his resignation from the applicant's employ without notice.
- [10] Both respondents were subsequently employed by A J Cranes (Pty) Ltd ("AJ Cranes"), which company does not compete with the applicant, and they are apparently still so employed. The applicant takes no issue with such employment.
- [11] Although the exact date is not given, the applicant almost immediately after the first respondent's resignation appointed a new operations manager.
- [12] On 20 November 2023, a representative of one of the applicant's clients requested a refund of certain monies held for its benefit by the applicant, citing that it would in future utilise the services of "G H Fast".

- [13] On 22 November 2023, the applicant performed a company search and established that a company known as GH Fast Align Repairs (Pty) Ltd ("GH") had been registered on 15 September 2023 (whilst the first respondent was still employed by the applicant) and that the first respondent is one of two directors of GH. The second respondent is not reflected as a director of GH.
- [14] The first respondent admits that he registered GH and alleges that it was dormant until the middle of December 2023.
- [15] The applicant subsequently established that GH procured a lease at the premises previously occupied by the applicant in Kempton Park and that it operates a website which indicates that GH provides the same services as the applicant. The first respondent's email address and cellular phone number are mentioned on the website but the website does not contain the contact details of the second respondent.
- [16] The first respondent states in the answering affidavit that he is "*in the process of establishing GH as a service provider in the mobile wheel alignment industry as the wheel alignment industry is the only trade and business that [he] know[s] from which [he] can earn a living*", thereby conceding that GH is a competitor of the applicant.
- [17] He moreover states that he had concluded an agreement with AJ Cranes in terms of which they will use GH "*to expand the business into the mobile wheel alignment industry*". AJ Cranes is financing the expenses of GH until it has established a sound client base.
- [18] The applicant has lost the patronage of a number of clients since the establishment of GH. The first respondent denies that he is the reason why the clients left.
- [19] The applicant's monthly turnover decreased from R251 221,26 during October 2023 to R111 191,28 during November 2023, R55 036,09 during December 2023 and R58 682,60 during January 2024. The first respondent contends that

the festive season impacted the downturn, which does not explain the substantial difference in turnover between October and November 2023.

[20] During their employment, the respondents had access to the contact details of the applicant's clients. The applicant contends in the founding affidavit that this information *"could easily have been used to kickstart [GH] with access to the applicant's existing clientele and to the financial detriment of the applicant who is now sprawling to preserve customer confidence and to rebuild a workforce."*

[21] The applicant concluded the founding affidavit with the following contentions:

"13.3 At this stage, although impossible to predict with sufficient accuracy the business of the applicant has decreased since the exodus of the respondents and critical clients to the effect of almost 40%. I submit that this is not purely attributable to the exit of the skills of the first and second respondents, but rather the influence and utilisation directly and indirectly of the material know-how and client base of the applicant underpinned by operating from the former base of the applicant.

13.4 Properly construed on the accurate chronology it seems as though the respondents have been planning the exodus for some time, in the meantime establishing [GH] in the proverbial attempt to catch the applicant unaware and ill-equipped to deal with a substantial loss of employees and by default clients, existing and prospective.

13.5 This has been a deliberate and planned ambush to the goodwill of the applicant company and the respondents have abused the relationships formed with customers, potential customers and suppliers that go to make up what is referred to as the trade connections of the business of the applicant. This is an important aspect of the applicant's incorporeal property and is known as goodwill.

13.6 It is well known that the services offered by the applicant are offered by other competition, there is not necessarily confidential information involved in the carrying on of the business, however the strategic and hostile exodus of the first respondent has caused him to gain a relative competitive advantage over the applicant which is not only unfair but also unlawful.

13.7 Suffice as to say that the respondents by contact with the applicant's customers have managed to procure the customers

being so strongly attached to them that when the first and second respondents left and joined a rival the respondents are automatically carried the customers with them in their pocket."

[22] During November 2023 the applicant instituted an urgent application for the enforcement of the restraints of trade, which application was struck from the roll on 1 December 2023 due to a lack of urgency. For some unexplained reason, the applicant elected not to enroll the urgent application on the opposed motion role but instead decided to withdraw the urgent application and to institute this application on or about 26 January 2024.

[23] The respondents oppose the application on the following grounds:

[23.1] The employment contracts were signed on behalf of Commercial Brake and Propshaft Exchange (Pty) Ltd and not by the applicant, which implies that the applicant cannot enforce the restraint of trade contained therein.

[23.2] No case had been made out against the second respondent.

[23.3] The restraints of trade are against public policy as their sole purpose is to prevent fair competition and to prevent the respondents from applying their skills, know-how and experience to earn a living. The restraints of trade do not seek to protect any protectable proprietary interest of the applicant and are solely directed to restrict fair competition, which implies that it is contrary to public policy to enforce the restraints of trade.

[23.4] The restraints of trade are further against public policy as it applies beyond the borders of South Africa and to the applicant's associate companies.

LEGAL PRINCIPLES

[24] A party seeking to enforce a contract in restraint of trade is required only to invoke the restraint agreement and prove the breach thereof. A party who

seeks to avoid the restraint bears the onus to demonstrate, on a balance of probabilities, that the restraint is unenforceable because it is unreasonable.¹

[25] The test to determine the reasonableness or otherwise of a restraint of trade is as follows:

[25.1] Is there an interest of the one party which is deserving of protection at the termination of the agreement?

[25.2] Is such interest being prejudiced by the other party?

[25.3] If so, does such interest so way up qualitatively and quantitatively against the interest of the latter party that the latter should not be economically inactive and unproductive?

[25.4] Is there another facet of public policy having nothing to do with the relationship between the parties, but which requires that the restraint should either be maintained or rejected?²

[26] The proprietary interests that can be protected by a restraint of trade are essentially of two kinds, namely:

[26.1] the relationships with customers, potential customers, suppliers and others that go to make up what is referred to as the "trade connections" of the business, being an aspect of its incorporeal property known as goodwill;

[26.2] all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to them, to gain a relative competitive advantage, which is referred to as the "trade secrets".³

¹ *Experion South Africa (Pty) Ltd v Haynes* 2013 (1) SA 135 (GSJ) para [14]

² *Basson v Chilwan* 1993 (3) SA 742 (A) at 767G-H

³ *Experion South Africa (Pty) Ltd v Haynes supra* para [17]

- [27] The manner in which an employee should demonstrate that a restraint of trade is unenforceable where the employer relies on trade connections as its proprietary interest, was comprehensively dealt with in *Rawlins v Caravantruck (Pty) Ltd*:⁴

"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..."

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..."

In summary then, what [the employee] says is that during his employment with the [employer] he largely dealt, not with its existing customers, but with his own pre-existing following or buyers whom he later found. Does this establish that the [employer] did not have a proprietary interest of the kind under consideration? It is, of course a factor in his favour; but not conclusively so... Even though the persons to whom an employee sells and whom he canvasses were previously known to him and in that sense 'his customers', he may nevertheless during his employment, and because of it, form an attachment to and acquire an influence over them which he never had before. Where this occurs, what I call the customer goodwill which is created or enhanced, is at least in part an asset of the employer. As such it becomes a trade connection of the employer which is capable of protection by means of a restraint of trade clause.

The onus being on [the employee] to prove the unreasonableness of the restraint, it was for him to show that he never acquired any significant personal knowledge of or influence over the persons he dealt with as a salesman of respondent, over and above that which previously existed...

[The employee] says nothing, along the lines alluded to earlier, about the nature of the relationship that was formed with his customers. In particular, he does not explain how many there were or how frequently

⁴ 1993 (1) SA 537 (A) at 541C-544A

or how long he saw them. Nor, save for a bold statement that he had an 'intimate knowledge of the identities of buyers and businesses in the automotive industry', does one know how close his previous ties with such buyers were... Finally ... there would appear to be two categories of customers who cannot be said to have been part of his own trade connections. One was those customers to whom he was admittedly introduced by the respondent...

The other category consisted of the 'Yellow Pages ... contacts'. [The employee] does not say how many customers these two groups comprised or (save for describing the one as a 'very small proportion') what proportion they formed of the total number of customers he dealt with."

[28] The reasonableness of a restraint may also hinge on its area and/or duration.

[29] Nestadt JA dealt as follows with the duration of a restraint in *Rawlins*:⁵

"[T]he remaining question in regard to the enforceability of the clause is whether its duration is unreasonably long. The answer depends upon a value judgement ... taking into account (according to one test) how soon the hold of the old employee over customers will weaken... It will be recalled that the restraint is for a period of two years. I confess to thinking that this is rather a long time. It must be close to the limit which would be reasonable in this type of case. [The employee's] salary (excluding commission) was a modest one. He had not been long in the [employer's] employee. On the other hand he was a salesman who because of his experience had a particular expertise. Furthermore ... bearing in mind the limited area to which the restraint applies, it would not seem that its enforcement will appreciably inhabit [the employee's] ability to earn a living. On a conspectus of all the facts and in the absence of anything in his affidavit alleging unreasonableness of the duration of the restraint, I am not persuaded that the two-year period is unfair."

[30] Wallis AJ (as he then was) reduced a restraint period of two years to eight months on the following basis in *Den Braven SA (Pty) Ltd v Pillay*:⁶

"In my view the period of the restraint should not be any longer than is necessary to enable the [employer] to place a new salesperson in the field, enabled them to become acquainted with the products under customers and to make it plain to the latter that they are now the person with whom to deal on behalf of the applicant. Having regard to the nature of the products, the type of customer to whom they are sold on the

⁵ 544D-F

⁶ 2006 (6) SA 229 (D&CLD) para [55]

number of customers who will need to be contacted I think that the period of eight months is sufficient for those purposes... As the applicant has no doubt already started to put these matters in train that period should commence from 1 March 2008 when [the employee's] resignation took effect."

THE EMPLOYMENT CONTRACTS

- [31] The respondents' argument that the employment contracts cannot be enforced by the applicant is solely based on the fact that the director of the applicant (who deposed to the founding affidavit) applied an office stamp of Commercial Brake and Propshaft Exchange (Pty) Ltd on both employment contracts.

- [32] The employment contracts clearly defined the applicant as the respondents' employer and it is specifically stated just below the signature of the director of the applicant that he signed the contracts for and on behalf of the applicant.

- [33] The mere fact that the director of the applicant used the incorrect office stamp does not invalidate the employment contracts.

- [34] As is indicated above, the applicant attempts to enforce clauses 2.2 and 2.3 of Annexure A to the employment contracts.

- [35] The prohibitions contained in clause 2.2 apply only to the period during which the respondents were employed by the applicant and not thereafter:
 - [35.1] Clause 2.1 distinguishes between "*an employee*" and a "*former employee*".

 - [35.2] Clause 2.2 on the other hand refers only to "*the Employee*" whilst clause 2.3 applies only to a former employee.

 - [35.3] The second bullet point in clause 2.2 contains the same wording used in the second sentence of clause 2.3, which defines "*compete*".

- [35.4] If the prohibition contained in the second bullet point in clause 2.2 applies to both employees and former employees, such prohibition (which is not limited to any area or duration) would make clause 2.3 superfluous.⁷
- [35.5] The failure to limit the prohibitions contained in clause 2.2 to an area and duration, implies that such clauses would clearly be unreasonable and therefore unenforceable after the termination of the employment contract. The presumption that a lawful contract was intended,⁸ supports an interpretation that clause 2.2 only applies during the existence of the employment contract, during which period the prohibitions would be lawful in view of the respondents' fiduciary duties towards the applicant.⁹
- [36] The applicant has in any event not presented proof of the breach of the first bullet point in clause 2.2 by the respondents.
- [37] It accordingly follows that the applicant is not entitled to the relief sought in prayers 1.1 and 1.2 of the notice of motion.

BREACH OF THE RESTRAINT CONTAINED IN CLAUSE 2.3

- [38] The first respondent's admission of his involvement with GH, who is a competitor of the applicant, implies that the applicant has proven a breach of the restraint, contained in clause 2.3 of Annexure A to the employment contract ("the restraint").
- [39] Although the applicant alleges in the founding affidavit that the second respondent is involved in GH, there is no evidence to support this allegation.
- [40] It accordingly follows that the application against the second respondent falls to be dismissed.

⁷ See *Wellworths Bazaars Ltd v Chandlers Ltd* 1947 (2) SA 37 (A) at 43

⁸ *Premier, Free State v Firechem Free State (Pty) Ltd* 2000 (4) SA para [30]

⁹ See generally *Phillips v Fieldstone Africa (Pty) Ltd* 2004 (3) SA 465 (SCA) para [27]

THE FIRST RESPONDENT HAS FAILED TO DEMONSTRATE THAT THE RESTRAINT IS UNREASONABLE AND THUS UNENFORCEABLE

- [41] I have quoted extensively from *Rawlins* to demonstrate what sort of evidence should be presented to demonstrate that a restraint is unenforceable because it is unreasonable under circumstances where the employer relies upon trade connections as its proprietary interest.
- [42] The answering affidavit contains virtually no evidence to support the bald allegation that the restraint is unreasonable and thus unenforceable. The only relevant allegation is that the first respondent brought clients of his former employer with him when he joined the applicant, approximately three years before his resignation. The first respondent failed to provide any details of such clients and more specifically failed to deal with the applicant's evidence of its approximately 200 clients.
- [43] The first respondent failed to deal with his duties as operations manager; the frequency and duration of contact between the first respondent and the clients; where such contact took place; what knowledge he gained of their requirements and business; the general nature of their relationship (including whether an attachment was formed between them, the extent to which clients relied on him and how personal their association was).
- [44] The first respondent did not for instance demonstrate that he never acquired any significant personal knowledge of or influence over the persons he dealt with as operations manager of the applicant, over and above that which previously existed in respect of the unidentified clients which he brought with him.
- [45] I accordingly find that the first respondent has failed to demonstrate, on a balance of probabilities, that the restraint is unenforceable because it is unreasonable.
- [46] In view of the fact that the first respondent is currently employed by a company which does not compete with the applicant, the enforcement of the restraint will in any event not inhibit the first respondent's ability to earn a living. The

enforcement of the restraint will on the other hand protect the applicant from the first respondent's unlawful conduct for the remainder of the (reduced) restraint period.

- [47] The applicant has conceded that the area of the restraint should not include *"the African countries in which the [applicant] or its associate company has an office"*.
- [48] The first respondent has failed to attack the duration of the restraint in the answering affidavit and has more specifically failed to deal with the aspects mentioned in *Den Braven* which could possibly have justified a reduction in the restraint period to eight months, as argued by Mr Van Rensburg on behalf of the respondents.
- [49] In my judgement the duration of the restraint should however be reduced to two years, being *"the limit which would be reasonable in this type of case"* (as per *Rawlins*, quoted above). Such period should however commence on 2 November 2023, being the first respondent's resignation date, and not the date of this judgement, as argued by Mr Bowles on behalf of the applicant.

COSTS

- [50] Insofar as the first respondent is concerned, the costs should follow the result.
- [51] The applicant sought a punitive costs order against the first respondent in view of certain alleged contradictions between the answering affidavits in the urgent application and this application; the alleged bald denials by the first respondent and his alleged failure to make concessions.
- [52] I am of the view that a punitive costs order is not justified on any of these grounds.
- [53] The parties agree that costs should be on scale B, which is in my view reasonable in view of the factors mentioned in rule 67A(3)(b).

[54] Although I do not intend to grant any relief against the second respondent, I am of the view that the joinder of the second respondent did not increase the costs of opposition significantly.

[55] I am accordingly of the view that insofar as the second respondent is concerned, he should pay his own costs.

ORDER

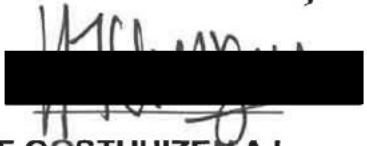
[56] I accordingly grant an order in the following terms:

[56.1] The first respondent is interdicted and restrained for a period of two years from 2 November 2023 from competing with the applicant by becoming engaged, associated or interested, directly or indirectly, in or to any company, firm, business, trust or undertaking which carries on business directly or indirectly in competition with the applicant's business (including, but not limited to, GH Fast Align Repairs (Pty) Ltd)) in a radius of 250 km from the applicant's business premises.

[56.2] The first respondent is ordered to pay the applicant's costs on scale B.

[56.3] The application against the second respondent is dismissed.

[56.4] The applicant and the second respondent must pay their own costs pertaining to the application against the second respondent.


H F OOSTHUIZEN AJ

ACTING JUDGE OF THE HIGH COURT

This Judgment was handed down electronically by circulation to the parties' and or parties' representatives by email and by being uploaded to CaseLines. The date and time for the hand down is deemed to be 29 July 2024.

Appearances

Counsel for the Applicant: R G Bowles
instructed by Couzyn Hertzog & Horak Attorneys

Attorney for the Defendant: J R Janse van Rensburg
Instructed by KMG & Associates Inc

Date of Hearing: 22 July 2024
Date of Judgment: 29 July 2024