

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No:J1338/2023

In the matter between:

TWENTY FOUR MOTORS CC T/A FORD ERMELO

Applicant

And

ANDRIES JOHANNES JACOBUS VENTER

First Respondent

HELGAR KELDER

Second Respondent

LUSAPHO ELVIS NQAKWANA

Third Respondent

MTHOKOZISI MKHONZA

Fourth Respondent

LWANDILE MBANGATHA

Fifth Respondent

SHEDRACK SIPHO NZIMANDE

Sixth Respondent

MLANDENI NKULULEKO MTHETHWA

Seventh Respondent

THE CAR LOUNGE (PTY) LTD

Eighth Respondent

Heard: 17 November 2023

Delivered: 02 February 2024 (This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing-down is deemed to be 10h00 on 02 February 2024.)

JUDGMENT

MAHALELO, AJ

Introduction

[1] This is an urgent application in terms of which the applicant seeks to enforce restraint of trade clauses in the agreements which prohibit the first to seventh respondents from taking employment or engaging in a business, partnership or taking up a directorship in any company in competition with the applicant in Ermelo for a period of 12 months.

[2] The respondents took issue with the urgency of the application. They contended that the applicant self-created the urgency in the application in that it took her two and a half months to enrol the application for hearing. It is generally accepted that restraints of trade, by their definition, are urgent matters. However, the requirements of Rule 8 of the Labour Court Rules¹, remain relevant. I have considered the papers of the respective parties in relation to the issue of urgency and without repeating those details, and in the exercise of my discretion, I am satisfied that the matter is sufficiently urgent and will accordingly be treated as such.

Background facts

[3] The applicant is a close corporation incorporated and registered in terms of the laws of South Africa. The applicant was established in 1988 as a family-owned business and the only Ford dealership in Ermelo. To this day, the applicant remains the only Ford dealership in Ermelo, with the nearest other Ford dealership being some 90 kilometres away in Secunda. The applicant has been in the motor dealership industry for a period of 35 years and sells new and second-hand motor vehicles. The business of the applicant is to some extent service based. According to the deponent of the founding affidavit, the motor dealership industry is a highly competitive industry

¹ GN 1665 of 14 October 1996: Rules for the conduct of proceedings in the Labour Court.

which includes both big corporate entities and smaller individual companies and clients. The applicant contracts with both commercial and private clients.

[4] It is common cause that the first to seventh respondents who for convenience will be referred to as the respondents were employed by the applicant in different positions. The first respondent was employed as a salesperson in 2011, he progressed and in 2019 he was promoted to a sales manager. The second respondent was employed as a stock controller. By the time the third to seventh respondents resigned from the applicant, they were all vehicle sales men.

[5] The eighth respondent is a private company, duly incorporated in terms of the Company Laws of the Republic of South Africa. The eighth respondent is a direct competitor of the applicant. The eighth respondent has been joined to the proceedings as it has a substantial interest in the outcome of the matter.

[6] In addition to the employment contracts with the applicant, the respondents concluded confidentiality and restraint agreements. The first respondent however disputes the existence of same. I deal with the issue in the judgment.

[7] In terms of the contracts of employment, the respondents, amongst other things, acknowledged that by virtue of their employment with the applicant, they would have access to certain confidential information of the applicant, and this will end in them being in possession of such information. The nature of the information that they would have access to and ultimately possess was listed in the contracts of employment. The respondents also in terms of their contracts, undertook not to divulge or disclose any information to any unauthorized persons or bodies relating to any aspect of their work and operations or processes of the applicant.

[8] The respondents also undertook not to start a business for their own account, enter into a partnership, accept directorship at any group or company accept any position of employment at any company which directly or indirectly competes with the applicant's business, or which operates business in matters related to that of the applicant.

[9] The respondents resigned from the applicant's employment on 4 September 2023. They all took up employment with the eighth respondent.

The case for the applicant

[10] The case of the applicant is briefly that it has an unrivaled dedication to client satisfaction, which has ensured its position of leadership in the motor dealership industry in Ermelo for more than 35 years. The applicant says that it is one of the few motor dealerships in Ermelo including the eighth respondent who has only recently been established. According to the applicant, the motor dealership industry is a highly competitive market which includes both big corporate entities and smaller individual companies and clients. He contracts with both commercial and private customers. He avers that he has over the period of 35 years formed strategic relationships with clients, banks, service providers and suppliers. According to the applicant, the motor dealership industry relies not only on the success of the company, but also on the success and viability of the customers to whom services and vehicles are provided.

[11] The applicant contended further that it has formed a strong mutually profitable relationship with its customers and in respect of certain customers, it has specific markups which have been negotiated and agreed predominantly based on historic good relationship between the parties. It is the applicant's case that the historic relationships provide it with a distinct competitive advantage as it allows it not only to predict the customer's specific needs and advantages but also allows the applicant to agree to discount structures and pricing models that are ideal and fit for each specific customer. The applicant says that it has built a strong and mutually beneficial relationship with the banks that provide finance to the deals it enters into with customers. These banks have placed a strong level of trust in it and this allows it to achieve finance for deals which other dealerships would not be able to achieve. Furthermore, it has a strong and strategic relationship with suppliers that supply second hand vehicles for sale to it, for which it has negotiated very good deals for bulk purchases and which it has been able to achieve purely on a good track record and trustworthiness.

[12] It is further the applicant's case that it has developed methods of engaging with its customers and service providers over the many years of doing business in the industry. Additionally, it has invested significantly in training its personnel on customer relations in order to identify the customer's needs better and to assist the customer through each step of purchasing a vehicle as well as post purchase services such as servicing of vehicles. The applicant also says that it focuses on personalized services by ensuring that its customers and personnel are familiar with each other.

[13] The applicant submitted that in order to protect its business, it has gone to great lengths to ensure that its competitors do not acquire its historical research and methods of working on effective technical and industry know-how, pricing models, discount structures and information regarding relationships with key partners, service providers, banks and customers both locally and abroad. Furthermore, it has invested vast sums of money and energy to align and optimize its workflow and to equip its employees to best serve its customers.

[14] The applicant say that its confidential information includes not only operational data, but also commercial information that includes lists of service providers, customer information, including their sales histories, requirements, deal structures, discount pricing models and costs relevant thereto. This also includes preferential rates and commission structures with the banks that finance the deals, as well as preferential buying arrangements with suppliers, who supply second-hand cars to it. It is the applicant's case that if the information described above becomes widely known or is shared with competitors it will allow the competitor to unfairly compete with its prices and operating models, methodologies, processes and personalized services and also serve the customers' needs thereby eroding the applicant's position and competitive advantage in the market or motor dealership industry.

[15] The applicant complains that on the day that the first respondent resigned from his employment the first respondent contacted two of its suppliers, namely, KIA (Durban and Woodmead) and paused the supply of vehicles which had been agreed to with suppliers. The vehicles were then supplied to the eighth respondent shortly after the first respondent commenced employment with the eighth respondent. The applicant further says that two of his independent contractor drivers were instructed

by the first respondent on 7 September 2023, to collect two Volkswagen Polos from Woodmead and deliver them to the eighth respondent, and again on 8 September 2023 to collect two Kia Picanto motor vehicles from Durban and deliver them to the eighth respondent. The applicant alleged that the eighth respondent did not buy from either of these suppliers prior to the respondents taking up employment with the eighth respondent and neither did the eighth respondent make use of the services of the contractor drivers.

The respondents' case

[16] As already stated, the first respondent disputes the existence of a restraint of trade agreement. But for him, it is common cause that the six respondents are parties to restraint of trade agreements with the applicant. In their separate answering affidavits, the respondents dealt in some detail with the reasons for their resignation from the applicant which reasons related to the applicants contemplating to reduce its workforce by 20 employees because of failure to meet sales targets. The respondents complain that the applicant unilaterally changed their commission structure, thereby repudiating their contracts of employment, which repudiation they have accepted. The respondents further contended that the applicant has no protectable interest in the form of confidential information and customer connections. According to the respondents the information which is in their possession is not information that could be deemed confidential and it would then not be worthy of protection. Furthermore, the respondents pointed out that ordinary or junior employees do not have such a grip or connect to clients that if the employee moves, the client will follow. According to the respondents most of the applicant's customers are individuals who after purchasing a vehicle from the dealership may not return to purchase another vehicle and the respondents argued that the applicant is attempting to use the restraint clauses in order to stifle competition and to prevent the them from using their skill and knowledge, which they already had when they commenced employment with the applicant and the skill and knowledge which they gained whilst working for the applicant. The respondents contend that an employer cannot prevent an ex-employee from using the skill and knowledge which they already had, or which they acquired whilst working for the employer because that forms part of the general stock of knowledge. The respondents further submitted that the restraints of trade agreements are

unreasonable because they prohibit them from being employed by a competitor of the applicant for a period of two and a half years and within a geographical area with a radius of 300 kilometres. The respondents therefore contended that the effect of the restraint of trade clauses is to render them professionally inactive in their chosen trade. The respondents lastly contended that the restraints of trade clauses are against public policy and the public interest and they should therefore not be enforced.

Is there a restraint of trade agreement between the applicant and the first respondent?

[17] The agreement which the applicant relies on in respect of the first respondent was concluded on 31 January 2011. On 1 February 2019, the applicant and the first respondent entered into an addendum to the contract of employment. On 12 November 2020, the applicant and the first respondent entered into another written addendum to the contract of employment. Clause 16 provides that:

‘The employee will not divulge any information to any unauthorised persons or bodies relating to any aspect of his work or to any of the operations or processes of the employer. Such information will include methods, processes, computer software, documentation, client lists, programs, trade secrets, technical information, drawings, financial information, or any other information. which could be damaging to the employers operations or which could benefit other parties to the detriment of the employer. Such restrictions will apply during and after the employee’s employment with the employer.’

[18] The applicant’s case is that; the first respondent has breached a material term of the restraint of trade agreement by taking up employment with the eighth respondent. The first respondent disputes that he is bound by a restraint agreement because he resigned from the applicant’s employment towards the end of January 2021, as he wanted to withdraw his provident fund. He recommenced his employment with the applicant on 1 February 2021. It is for this reason that his pay slips from February 2021 recorded his employment date as 1 February 2021. When he recommenced his employment he did not sign a new employment contract.

[19] The applicant’s version is that it assisted the first respondent and other employees to submit documents to the Provident Fund in order to cash their pensions

because the first respondent was in financial distress at the time. The applicant submitted that it intentionally misrepresented to the fund that the first respondent had resigned when in fact he had not. The applicant submitted that this was done in order to assist the first respondent as an employee and the applicant derived no benefit from the misrepresentation. The applicant stated that there was never a break in the first respondent's employment with the applicant and the first respondent all along knew that there was a contract of employment containing restraint of trade and confidentiality clauses which he had signed with the applicant.

[20] I am not persuaded that the first respondent is not bound by a restraint of trade agreement. The objective facts do not favour his version. When the applicant sought an undertaking from the first respondent, at first he gave an undertaking that he would not contact the applicant's customers for a period of six months. There would not have been any need for him to give an undertaking if he knew that he had resigned from the applicant and there was no contract of employment in existence.

Legal principles

[21] It is trite that the restraints of trade agreements are valid and binding and as a matter of principle, enforceable unless the enforcement thereof is considered to be unreasonable². A restraint of trade agreement will generally be considered unreasonable and thus contrary to public policy, if it does not protect some legally recognizable interest of the party seeking to enforce it, but merely seeks to eliminate competition.³

[22] A party seeking to enforce a restraint must invoke the restraint agreement and prove its breach. A respondent who seeks to avoid the restraint bears an onus to demonstrate, on a balance of probabilities, that the restraint is unenforceable because

² *Magna Alloys and Research (SA) Ltd v Ellis (Magna Alloys)* 1984 (4) SA 874 (A); [1984] ZASCA 116 at 891 B-C

³ *Automotive Tooling Systems Pty Ltd v Wilkens and Others* 2007 (2) SA 271 (SCA); [2006] ZASCA 167, *Mozart Ice Cream Franchises Pty Ltd v Davidoff and Another* 2009 (3) SA 78 (C); [2008] ZAWCHC 118 at 82H -83C

it is unreasonable⁴. In order to determine whether a restraint is reasonable, the following questions as stated in *Basson v Chilwan and Others*⁵, must be answered:

- (a) Does the one party have an interest that deserves protection after the termination of the agreement?
- (b) If so is that interest threatened by the other party?
- (c) In that case, does such interest weigh quantitatively and qualitatively against the interests of the other party not to be economically active and unproductive?
- (d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected?

[23] In *Reddy v Siemens Telecommunications (Pty) Ltd (Reddy)*⁶, the Supreme Court of Appeal (SCA) posited a fifth consideration, namely whether the restraint goes further than necessary to protect the interest. The Court held that this consideration corresponds with section 36(1)(e) of the Constitution, requiring a consideration of less restrictive measures to achieve the purpose of the limitation and that “*the value judgment required by Basson necessarily requires determining whether the restraint or limitation is ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’*”.⁷

[24] The proprietary interest of an applicant that is worthy of protection can be found in one or both of the two considerations, namely, (a) confidential information that could be used by a competitor to gain a competitive advantage (trade secrets). (b) Relationship with customers, potential customers, suppliers and others that go to make up what is usually called trade connections.

[25] In *Labournet Pty Ltd v Jankielsohn and Another*⁸, the court held:

‘... A restraint is only reasonable and enforceable if it serves to protect and interest, which in terms of the law, requires and deserves protection. The list of such interest is not closed, but confidential information (trade secrets) and customer or trade(connection) are recognized as being such interests...’

⁴ *Magna Alloys supra*

⁵ [1993] ZASCA 61; 1993 (3) SA 742 (AD).

⁶ [2006] ZASCA 135; 2007 (2) SA 486 (SCA).

⁷ *Reddy* at para 17.

⁸ [2017] ZALAC 7; (2017) 38 ILJ 1302 (LAC) at para 4.

[26] When enquiring into whether information is worthy of protection the information relied upon by the applicant has to meet the following requirements (a) It relates to and is capable of application in the trade industry, (b) Most of it is secret and confidential, (c) objectively viewed it is of economic or business value to the plaintiff. The enquiry into whether information can be found to be confidential in this context is an objective one.⁹ One has to bear in mind that the classification of the information is not what cloaks it with confidentiality. Something that might seem common sense could be declared to be confidential and worthy of protection whereas information that might be useful might still not be classified as information worthy of protection.

[27] The need of an employer to protect its trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with the customer. It is sufficient for the applicant to show that the customer contacts exist and that they can be exploited by the former employee. Once the conclusion has been reached that the former employee could easily induce customers to follow him to a new business, and the new employer is a competitor of the applicant, the risk of harm is apparent¹⁰.

[28] The onus is on the respondent to prove the unreasonableness of the restraint¹¹. Once the applicant has shown that there is confidential information to which the employee had access and which he could transmit to his new employer the applicant is entitled to the protection afforded by the restraint.

Analysis and conclusion

[29] The respondents argued that the information the applicant complains about is freely available in that it is information that every motor dealership can access with little effort on their side. On the facts of this case that does not seem to be the case. According to the respondents, all of the customers, suppliers and service providers that they had contact with whilst employed by the applicant were individuals and or

⁹ Reddy .

¹⁰ *Rawlins v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) 541 C-D

¹¹ Reddy *supra*.

companies with which they had relationships, some of which were gained before they started their employment with the applicant. In *Refinery Post Production Facilities Pty Ltd v Lautre*¹², Mahosi J stated the following in connection with customer connections: 'Therefore, even if an employee had established a relationship with the clients prior to the commencement of his or her employment, the fact that his or her current employment allowed for the relationship to be strengthened and for the employee to gain an influence over such customers would then make those customer connections an asset of the employer. Further, it has not been argued that the relationships with all the clients on the list were from before her employ. In fact, she continuously speak of Ster-Kinekor and Nu Metro, however his clients were not exhaustive of the list.'

[30] In *Braven S.A Pty Ltd v Pillay and Another*¹³ the court held:

'Whilst the existence and identity of potential clients is well known in what is a competitive market, whatever links Mr. Pillay has been able to forge with the applicant's customers were forged in the course of his employment with the applicant. His employment was as a sales representative. Part and parcel of his duties was to find customers for the applicant's products. The fact that he did so and enjoyed some success does not ensure to his advantage in seeking to resist the enforcement of the restrained undertaking. The customers that he procured by his efforts were the customers of the applicant and the trade connection established in consequence of his efforts in the trade connection between the applicant and the customers, not one between himself and the customers. However, to the extent that the applicant has built up a trade connection with its customers in Kwazulu Natal through the efforts of Mr. Pillay over the eight years of his employment it is entitled to protect itself against being deprived of that connection by Mr Pillay's activities on behalf of a competitor. That is the very reason why it sought from him to obtain an agreement not to accept employment with a competitor for a period of two years after leaving its employ. It suffices for the applicant to show that trade connections through customer contact exist and can be exploited by the former employee if employed by a competitor.'

¹² [2018] ZALCJHB 263.

¹³ [2008] ZAKZHC 22.

[31] In the undertakings the respondents provided to the applicant the respondents boldly stated that they will not render services to the applicant's clients or previous clients. This implies knowledge on their part of the applicant's entire client base.

[32] In the matter of *Den Braven, SA Pty Ltd* supra, the court held that:

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 ...

[33] In this case the respondents have close contact and influence over the applicant's customers. The information as to current clients and future clients and what service they are used to receive from the applicant would be capable of application in the trade industry. It is quite clear that the respondents have the applicant's customer connections who they could induce to take more of the business to the eighth respondent. Indeed, it appears that sales at the applicant had dropped off significantly since the respondents left the employ of the applicant and that the eighth respondent has benefited; but the figures are not conclusive. That does not matter. It is enough that the respondents could potentially, in breach of their restraint agreements, induce customers to move the rest of their business to the eighth respondent.

[34] It is evident that as sales persons the respondents were privy to confidential information relating to pricing; and that they had extensive customer connections with the applicant. They are uniquely positioned to use this information for the benefit of

the eighth respondent. They are clearly in breach of their restraint of trade agreements in this regard.

[35] The respondents' other defence is that the applicant repudiated their contracts of employment and they have accepted such repudiation. The papers before court shows that the applicant followed the correct procedure before it could deal with the issue of reduction of the respondents' commission. In my view the respondents' defence has no merit.

[36] The reasonableness or otherwise of the restraint of trade agreement quite often depends on its duration and geographic scope. The principle regarding the reasonableness of the restraint clause is that the duration thereof should not be any longer than is necessary to protect the interest of the employer in cases such as this. In deciding whether or not it would be reasonable to enforce a restraint of trade, the court must make a value judgment, mindful of the following policy considerations: (a) that public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim *pacta servanda sunt*; and (b) all persons should, in the interests of society, be productive and permitted to engage in trade and commerce or their professions. Both considerations reflect not only common law but also constitutional values. In *Reddy*, the court held that: "*contractual autonomy is part of freedom informing the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life. In this sense freedom to contract is an integral part of the fundamental right referred to in section 22*".¹⁴

[37] In weighing up the respective interests of the applicant and the respondents I am not persuaded that the effect on their freedom to work is disproportionate. They can work for any employer anywhere, provided they do not breach the restraint clauses for a period of 12 months.

[38] In *Magna Alloys* the court held that a court may, in the public interest, order that either the whole or only a part of the restraint on trade be enforced.

¹⁴ *Reddy* at para 15

[39] In my view, the restraint is not unreasonable. The applicant has established a clear right for the relief it seeks. The respondents have committed and continue to commit an injury, as demonstrated above. The remaining question is whether the applicant has another satisfactory remedy.¹⁵ The theoretical remedy of a damages claim in due course is cold comfort to the applicant. A damages claim in these circumstances is difficult to quantify and does not protect its rights at this stage. The applicant has satisfied the requirements for a final interdict.

Cost

[40] Both parties have asked for costs to follow the result. I see no reason why that should not be the case.

[41] In the result I make the following order:

Order

1. The applicant's non-compliance with the rules of court pertaining to service and process is condoned and the application is treated as urgent.
2. It is declared that the first respondent is in breach of the provisions of the restraint of trade agreement contained in the written contract entered into between the applicant and the first respondent on 31 January 2011, together with the addendums thereto entered into on 1 February 2019 and 12 November 2020 respectively, by directly or indirectly competing with the applicant.
3. It is declared that the 2nd respondent is in breach of the provisions of the restraint of trade agreement contained in the written contract entered into between the applicant and the 2nd Respondent on 1 August 2014 by directly or indirectly competing with the applicant.
4. It is declared that third respondent is in breach of the provisions of the restraint of trade agreement contained in the written contract entered into between the applicant

¹⁵ *Setlogelo v Setlogelo* 1914 AD 221.

and the third respondent on 18 May 2018, together with the addendums thereto entered into on 1 February 2019 and 26 October 2020 respectively, by directly or indirectly competing with the applicant.

5. It is declared that the 4th Respondent is in breach of the provisions of the restraint of trade agreement contained in the written contract entered into between the applicant and the 4th Respondent on 17 May 2023 by directly or indirectly competing with the applicant.

6. It is declared that the 5th responded is in breach of the provisions of the restraint of trade contained in the written contract entered into between the applicant and the respondent on 18 May 2021 by directly or indirectly competing with the applicant.

7. It is declared that the 6th respondent is in breach of the provisions of the restraint of trade agreement contained in the written contract entered into between the applicant and the six respondent on 16 February 2023 by directly or indirectly competing with the applicant.

8. It is declared that the 7th Respondent is in breach of the provisions of the restraint of trade agreement contained in the written contract entered into between the applicant and the 7th Respondent on 16th February 2023, by directly or indirectly competing with the applicant.

9. The 1st to 7th respondents are interdicted and restrained for a period of 12 months, calculated from 4 September 2023, this being the date on which the 1st to 7th respondents resigned, with immediate, effect from their employ with the applicant from:

9.1 Starting a business for their own account, which in any way whatsoever, whether directly or indirectly, competes with the applicant's business interests or which does business or trade in matters related to that of the applicant, within a region that is within 300 kilometres(three hundred kilometres) from the applicants main business premises in Ermelo, Mpumalanga, South Africa.

9.2 Entering into a partnership, accepting directorship at any group or any company, accepting any position or employment at any company or group undertaking

or business which in any way whatsoever, whether directly or indirectly competes with the applicants business interest or which does business or trade in matters related to that of the applicant within a region that is within 300 kilometres from the applicants main business premises in Ermelo, Mpumalanga, South Africa.

10. The 1st to 7th respondents are interdicted and restrained not to divulge to any person any of the applicant's confidential information. The aforesaid includes any methods, operations, processes, computer software, documentation, client lists, programmes, trade secrets, technical information, drawings, financial information or any other information which could be damaging to the applicant's operations or which could benefit other persons to the detriment of the applicant.

11 The first to seven respondents are interdicted and prohibited from being engaged in any form of employment or engage in any capacity whatsoever with the eighth Respondent that may breach their restraint of trade agreement with the applicant.

12. The 1st to 7th respondents be ordered to pay the costs of this application.

MB Mahalelo

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant:

Sanette Lancaster

Lancaster Kungoane Attorneys

For the Respondent:

Gerrie Ebersohn

Gerrie Ebersohn Attorneys Inc