



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: J 2977/11

In the matter between:

BAMBELELA BOLTS (PTY) LTD

Applicant

and

TREVLIN BALL

First Respondent

ACTION BOLTS (PTY) LIMITED

Second Respondent

Heard: 13 January 2012

Delivered: 1 March 2012

Summary: The first respondent was employed by the applicant until she resigned in October 2011 and took up employment with the second respondent. The applicant approached this court for an interdict on the basis that by working for

the second respondent, the first respondent was acting in breach of a restraint of trade agreement between the applicant and the first respondent.

Held for a restraint of trade agreement to be enforceable it must not just protect a former employer from competition in the industry it operates in. It must protect confidential information which consist of not only knowledge in the public domain which the employee would have acquired by working in the industry the former employer operates in but knowledge the employee would not have acquired had he/ she not been employed by the former employer. The knowledge must be capable of being used by the former employer's competitor to its advantage and to the former employer's detriment.

The employee's constitutional right to choose his/her trade, occupation and profession freely must be considered in determining the enforcement of a restraint of trade agreement . It must also be determined whether the contract in restraint of trade affects the employee's future employment in the area of his/ her expertise.

JUDGMENT

LALLIE J

- [1] The applicant approached this Court on an urgent basis for an order in the following terms:

‘2 Ball is restrained from being employed by, conducting business with, or associating herself directly or indirectly whether as partner, proprietor, shareholder, director, member, consultant, or otherwise with any supplier, manufacturer, wholesaler or retailer of any products stocked, supplied or sold by Bambelela during the six months prior to 28 October 2011.

3 The restraint endures for a period of one (1) year from the 28th of October 2011 and applies within the provinces of Gauteng, Mpumalanga, Free State, Limpopo and North-West.

4 Action Bolt is ordered to terminate the services of Ball with immediate effect.’

- [2] Only the first applicant opposed the application. On 13 January 2012, I granted an order in favour of the applicant. The following are brief reasons for the order.
- [3] It is common cause that the first respondent was appointed by the applicant as an internal sales consultant on 1 February 2010 after she had worked for the applicant on a fixed term contract from September 2009. She dealt directly with customers and her duties included quotations, sourcing costs and stock, internal sales, cold calling customers, keeping customer/ supplier information up to date. Although the first respondent denied ever handling exports, during argument she conceded having dealt with exports.
- [4] It is common cause that the parties entered into a restraint of trade agreement part of which restrained the first respondent from being employed by a business trading in competition with the applicant for a period of a year after her

resignation from the applicant, in Gauteng, Mpumalanga, Free State, Limpopo and the North-West. The first respondent resigned from the applicant and took up employment with the second respondent which is the applicant's competitor in breach of the restraint of trade agreement. The applicant submitted that after joining the second respondent, the first respondent contacted National Socket Screws one of the applicant's suppliers as well as Bascol Manufacturing Engineers, a client of the applicant. According to the first respondent both entities she contacted are suppliers which had dealings with the second respondent since 1983, long before she became its employee.

- [5] The first respondent denied that when working for the applicant she was privy to information which could prejudice the applicant when disclosed to the second respondent. She denied taking any information from the applicant and submitted that she joined the second respondent because it offered her the better remuneration she needs as she is in financial difficulties. Her main argument was that the order sought by the applicant should be denied because should it be granted her right to work, earn an income and support her children would be violated.
- [6] One of the requirements for the enforcement of a restraint of trade contract is that it must protect some proprietary interests for the person who seeks to enforce it. The interest may take the form of trade secrets, confidential information, goodwill or trade connection. In this regard see *Townsend Productions (Pty) Ltd v Leech and Others* 2001 (4) SA 33 (C). It was confirmed in *Advtech Resourcing (Pty) Ltd t/a The Communication Personnel Group v Kuhn and Another* [2007] JOL 20689 (C) that an employer's protectable interests include trade secrets, confidential information, and customer goodwill or trade connection.
- [7] The applicant argued that it has a protectable interest in the form of confidential information. Such information includes tailor made supplier deals between the applicant and its local and international suppliers and is not in the public domain.

The applicant also submitted that the first respondent has knowledge of its pricing structure and profit margins, information which would give the second respondent an unfair advantage in the market. The first respondent argued that she has no intention of using any information she acquired as an employee of the applicant to advance the business of the second respondent.

- [8] In determining whether the information the applicant sought to protect by the restraint of trade agreement is confidential and constitutes trade secrets I have considered the following test relied on in *Advtech Resourcing (supra)*:

‘... before information can qualify as a trade secret, it needs to comply with three requirements:

1.

The information must not only relate to but also be capable of application in the trade or industry.

2.

The information must be secret or confidential. The information must accordingly – objectively determined only be available and thus known to a restricted number of people or to a close circle, or as is usually expressed, the information must be something which is not public property or in the public knowledge.

3.

Finally, the information, objectively viewed, must be of economic or business value to the plaintiff. Van Heerden & Neethling *Unlawful competition* (1994) at 225.¹

- [9] Information which falls outside the realm of information which can be protected by a restraint of trade agreement is defined in *Aranda Textile Mills (Pty) Ltd v Hurn* [2000] 4 All SA 183 (E) as knowledge and skill in the public domain, which

¹ *Advtech Resourcing* at para 51.

a workman may otherwise have gained.

- [10] Terms of specialised supplier deals put in place by the applicant with the applicant's local and international counterparts, the applicant's pricing structure and profit margins are certainly not in the public domain. It is information the first respondent would not have acquired had she not worked for the applicant. Knowledge of the pricing structure and profit margin places a competitor of the applicant in a position to tailor make its own pricing structure and profit margin to its advantage and to the detriment of the applicant. As a sales consultant, the first respondent developed goodwill with customers. She got to know which client ordered which product and in what quantities. That kind of information is not in the public domain. The applicant stands to be prejudiced should the first respondent be allowed to pass it to the second respondent. The applicant does not seek protection just from competition in the industry.
- [11] I have also considered the first respondent's right in terms of section 22 of the Constitution to choose her trade and occupation or profession freely. The industry the first respondent works in is not her field of expertise. It is common cause that she has worked for nine years as a conveyancing secretary and for seven years in internal sales at Fiber Centre Africa (Pty) Ltd.
- [12] In the circumstances, I found that the first respondent has knowledge of the applicant's confidential information and the continued employment of the first respondent by the second respondent exposes the applicant to the prejudice it sought to protect itself from by concluding a restraint of trade agreement with the first respondent.
- [13] It is for the above reasons that the order in favour of the applicant was granted on 13 January 2012.

LALLIE J

Judge of the Labour Court

APPEARANCES:

FOR THE APPLICANT: Ms Dippenaar of Du Randt Du Toit Pelser
Attorneys

FOR THE FIRST RESPONDENT: Ms Ball (In person)

FOR THE SECOND RESPONDENT: No appearance