



REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 282/12

In the matter between:

KBC HEALTH AND SAFETY AND SECURITY (PTY) Applicant
LIMITED

and

VAN ZYL, MARIA ALETTA Respondent

Heard: 17 February 2012

Delivered: 07 March 2012

Summary: Application in restraint of trade. Interdicting an employee from breaching the restraint undertaking.

JUDGMENT

Introduction

- 1] The applicant in this matter seeks an interdictory order and an enforcement of a restraint of trade undertaking made by the respondent in terms of a written contract of employment. This matter came before this court on an urgent basis. The respondent did not challenge the issue of urgency. The matter is accordingly treated as urgent.

Background facts

- 2] The respondent Ms Van Zyl (respondent) is a former employee of the applicant, and was at the time of her dismissal employed as business development director of the applicant. Following her dismissal, the respondent secured employment with Height Safety Gear (Pty) Ltd (Safety Gear), a company which the applicant contends is its competitor.
- 3] According to the applicant, during the course of her employment, the respondent served the applicant in various capacities and performed several duties and functions at a high level, most of which exposed her to critical strategic business information, ranging from for instance liaising with clients, developing, designing learning materials and training facilitators through the training programs developed by the applicant. At some stage and for a period of eight months, the respondent was responsible for managing the applicant's operations and later was given the responsibility of business development and growing customer list, and customer relationship.
- 4] The applicant, KBC Health and Safety (Pty Limited is a company registered in terms of the laws of this country. The core business of the applicant is to provide consulting and training in the area of development, safety health and

environmental issues in the petrochemical, construction, food and beverages areas. The training modules which the applicant provides to his clients are targeted at three levels mainly senior management and supervisors and employees.

- 5] The training modules which the applicant provides to its clients are designed in consultation with clients and after needs analysis have been conducted.
- 6] In seeking to provide its client with comprehensive training solutions, the applicant has entered into a working relationship with Height Safety Training Academy (Height Safety) and Action Training Academy.
- 7] In terms of the service provider agreement (service agreement) with Height Safety, the applicant is recognised as an exclusive service provider of basic health and safety induction training. In terms of that agreement, the applicant makes its products and a service as a “one stop shop stop” in other words the applicant advertises its services and those of Height Safety as its own. When approached by a client for height training, which is the service rendered by the Height Safety, the applicant accepts the request and in a sense outsources the service to Height Safety once an agreement is concluded with the client. The client will however be invoiced by the applicant.
- 8] The issue between parties arose after the employment of the respondent by Safety Gear which together with Safety Heights are subsidiaries of Height Safety Holdings (Pty) Ltd Safety Holdings.
- 9] The applicant contends that it is in competition with Safety Gear and therefore the respondent is in conflict with the restraint undertaking provided for in her contract of employment. And because the respondent had full access to the applicant’s proprietary information and used to apply such information in the execution of her day to day duties and responsibilities, her taking employment with Safety Gear exposed and created a risk that its clients would follow her.
- 10] The essential terms of the contract of employment dealing with the restraint

of trade provides as follows:

‘12.5.1 Through extensive research and development initiative such as the development of training and other techniques, procedures, software products and process, *KBC* is at the forefront of providing consulting and training services relating to all aspects of occupational health and safety to companies and organisations in South Africa.

12.5.2 During the course of her employment with *KBC*, she will acquire knowledge of the trade secrets, registered and unregistered trademarks, design and patents, secret process, confidential information, technical information and know-how of *KBC*;

12.5.3 She will become acquainted with and development strong relationships with suppliers, customers and principals of *KBC*, and with prospective suppliers, customers and principals and will gain knowledge of such customers’ requirements and have influence over such customers and supplies;

12.5.4 She will not for a period of 12 months from the date of termination of her employment (i.e. until 12 October 2012) directly and/ or indirectly anywhere in each country in South Africa where *KBC* carries on business: (1) setup in business of form part of or be concerned, engaged, employed, interest in or otherwise to, in any capacity whatsoever, any business, firm or undertaking, which carries on any business that is similar to or competes with the business of *KBC*; or (2) solicit or otherwise approach any employee or consultant of *KBC* with a view to encourage her/him to become employed or interested in any manner whatsoever in any thirds party, whether natural or juristic or any undertaking or concern which competes with the *KBC*, and/or to terminate her/his employment with *KBC*; or (3) employ or retrain as an independent contractor, consultant, agent or in any other capacity whatsoever any current or former employee, consultant, director or officer of *KBC*, unless such person has been separated from any relationship with the applicant for a period of at least 12(twelve) months.’

11]The applicant in its contention that the respondent was in breach of the restraint of trade undertaking says that it came to its attention that the

respondent contacted Wilson Bailing Homes OVCAN limited (WBHO) through an email to arrange a meeting in order to solicit business. WBHO is one of the applicant's clients. The email which the respondent send to Mr Klein Smit of WBHO dated 23 January 2012 reads as follows:

'George

Hope you are well. Is it possible to become and see you we specialise in Working at Heights training, Rescue at Heights training and Rope access Training. We also sell the equipment that is needed to work at heights. Would like to come and see you. We also have teams that work at heights all training is accredited and we do all the uploads of learners. I will phone you tomorrow if that is okay with you, send my love to Carla oh I left KBC.'

The legal principles

12] The law has since the decision in *Magna Alloys & Research (Pty) Ltd v Ellis*,¹ been settled that a restraint of trade agreement is enforceable unless it can be shown that it is against the public interest to do so. However, the courts have as a general principle refused to enforce restraints of trade which are regarded as being unreasonable because that would go against public interest. In this regard, the court in *Sunshine Records (Pty) Ltd v Frohling and Others*,² per Grosskopf JA summarised the approach to be adopted as follows:

'In determining whether a restriction on the freedom to trade and to practise a profession is enforceable, a court should have regard to two main considerations. The first is that the public interest requires, in general, that parties should comply with their contractual obligations even if these are unreasonable or unfair. The second consideration is that all persons in the interests of society, be permitted as far as possible to engage in commerce or professions or, expressing this differently, that it is detrimental to society if an unreasonable fetter is placed on a person's freedom of trade or to pursue a profession. In applying these two main considerations, a court will obviously

¹ 1984 (4) SA 874 (A).

² [1990] 1 ALL SA 8 (A) at 41 and 42.

have regard to the circumstances of the case before it.'

13] The *onus* of proof in cases such as the present was set out in *Basson v Chilwan and Others*,³ by Botha JA as follows:

'The incidence of the *onus* in a case concerning the enforceability of a contractual provision in restraint of trade does not appear to me in principle to entail any greater or more significant consequences than in any other civil case in general. The effect of it in practical terms is this: the covenantee seeking to enforce the restraint need do no more than to invoke the provisions of the contract and prove the breach; the covenantor seeking to avert enforcement is required to prove on a preponderance of probability that in all the circumstances of the particular case it will be unreasonable to enforce the restraint; if the Court is unable to make up its mind on the point, the restraint will be enforced. The covenantor is burdened with the *onus* because public policy requires that people should be bound by their contractual undertakings. The covenantor is not so bound, however, if the restraint is unreasonable, because public policy discountenances unreasonable restrictions on people's freedom of trade. In regard to these two opposing considerations of public policy, it seems to me that the operation of the former is exhausted by the placing of the *onus* on the covenantor; it has no further role to play thereafter, when the reasonableness or otherwise of the restraint is being enquired into.'

14] In dealing with the issue of whether the restraint of trade should be enforced Nienaber JA in *Basson* matter held that the following questions which have been translated from Afrikaans to English in the footnote of that case should be answered. The questions are: ⁴

- '(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) If there is a protectable interest which is threatened, how does that

³ 1993 (3) SA 742 (AD) at 776 H-777 B.

⁴ See also *Henred Freuhauf (Pty) Ltd v Davel and Another* (2011) 32 ILJ 618 (LC).

interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?

- (d) Is there any aspect of public policy having nothing to do with the relationship between the parties that requires the restraint to be upheld or not?’

15] The general answer to the question of whether an employer has an interest to protect was answered in *Automotive Tooling Systems v Wilkens*,⁵ where the court held that:

‘At issue in this case therefore is whether the appellant does have a proprietary interest worthy of protection. An agreement in restraint of trade is enforceable unless it is unreasonable. It is generally accepted that a restraint will be considered to be unreasonable, and thus contrary to public policy, and therefore unenforceable, if it does not protect some legally recognisable interest of the employer but merely seeks to exclude or eliminate competition.’ [Footnote omitted]

16] The court further held that:⁶

‘Precisely what the parameters of such an interest are need not now be decided. What is clear, however, is that the interest must be one that might properly be described as belonging to the employer, rather than to the employee, and in that sense “proprietary to the employer”. The question in the present case is whether the interest that is relied upon – the skill, expertise and “know how” that the employees undoubtedly acquired in the techniques for manufacturing these machines – was one that accrued to the employer or to the employees themselves.’

17] The policy consideration for the above approach is set out in *Aranda Textile Mills (Pty) Ltd v L D Hurn and Another*⁷ as follows:

‘A man’s skills and abilities are a part of himself and he cannot ordinarily be

5 [2007] 4 ALL SA 1073 (SCA) at para 8.

6 Towards the end of paragraph [8] of that judgment.

7 [2000] 4 All SA 183 (E) at para 33.

precluded from making use of them by a contract in restraint of trade. An employer who has been to the trouble and expense of training a workman in an established field of work, *and who has thereby provided the workman with knowledge and skills in the public domain*, which the workman might not otherwise have gained, has an obvious interest in retaining the services of the workman. In the eye of the law, however, such an interest is not in the nature of property in the hands of the employer. It affords the employer no proprietary interest in the workman, his know-how or skills. Such know-how and skills *in the public domain* become attributes of the workman himself, do not belong in any way to the employer and the use thereof cannot be subjected to restriction by way of a restraint of trade provision. Such a restriction, impinging as it would on the workman's ability to compete freely and fairly in the market place, is unreasonable and contrary to public policy.'

18] In *Automotive Tooling Systems* the Supreme Court of Appeal noted the difficulty in practice of drawing a line between the 'use by an employee of his/ (her) own skill, knowledge and experience which he/ (she) cannot be restrained from using, and the use of his/ (her) employer's trade secrets or confidential information or other interest which he may not disclose if bound by a restraint, is notoriously difficult to define.'⁸

Evaluation

19] There is no dispute between the parties as to the existence of the provisions of the restraint clauses in their employment contract. There is also no dispute as to the reasonableness of the geographic extent of the application of the contract including the 12 months period limitation provided for in the contract.

20] Similar to the *Basson* matter, the issue that remains for termination is whether the applicant has a proprietary interest whose protection is required consequent to the respondent taking employment with Safety Gear. The duties and functions of the respondent as described by the applicant in its founding affidavit are also broadly speaking not disputed.

⁸ *Automotive Tooling Systems* at para 10.

21]The applicant contends that it has a protectable interest that needs protection in terms of the existing provisions provided for in the contract. The interest that it seeks to protect, the applicant submitted, takes the form of information relating to customers and the learning modules in the different fields with specific emphasis on health and safety sector. The applicant further contends that the respondent has during the course of her employment with it acquired skills and knowledge relating to the development and design of the training modules.

22]According to the applicant, the training modules are designed and developed to meet the specific needs and requirements of each client. And that a specific process is used in designing and developing the modules which entails amongst others consulting with clients and learners. The courses are according the applicant unique and custom made for a specific client and further that computer software is used in the design and development of the modules.

23]The concern the applicant has regarding its interests is that the respondent's functions and duties in her different roles whilst in its employment made her privy to sensitive proprietary information. The other concern which the applicant has with the respondent taking employment with Safety Gear is that during the period of her employment she established customer connection with its clients and therefore there exists the likelihood that they (clients) may follow her and take their business away from the applicant.

24]It is common cause that the respondent was subsequent to her dismissal employed by Safety Gear as a sales consultant. It would appear from the papers that Safety Gear is not involved in the training programs but rather in the sale of height equipments. It therefore means that Safety Gear is not involved in carrying its business in competition with the applicant.

25]The applicant introduces the issue of competition between itself and Safety Gear through the company group relationship. Safety Gear and Safety Heights are subsidiaries of Safety Holdings. The managing director of the

three companies is the same person.

26]The two companies, Height Safety and Safety Gear are in law, as I understand it two separate entities with their own independent status, irrespective of the fact that the managing director is the same person. In the absence of evidence that the two companies are a sham operated in a manner that disguises the true nature of their operations and existence, they have to be treated as separate and independent entities. It is therefore my view that Safety Gear based on the nature of its business is not in competition with the applicant and therefore the interest which the applicant seeks to protect through the restraint of trade provisions is not enforceable.

27]The risk of the applicant losing business because of the respondent taking employment with Safety Gear is unsustainable even if the contention that the competition arises because the two companies fall under the same holding company was to be accepted. This is so because in the circumstances of this case where the interest of the applicant is already protected by means of the outsourcing contract between itself and Height Safety, it goes against public interest to deny the respondent the opportunity to secure employment with Safety Gear on the basis of the restraint clause.

28]I accordingly find that Safety Gear is not a competitor of the applicant and therefore there is no basis to enforce the restraint of trade clause because of the respondent having secured employment with Safety Gear.

29]As concerning the email of Mr Du Toit which was sent to the managing of Safety Gear, there is nothing to suggest that the applicant will as result thereof becomes a competitor of Safety Gear. Accepting that Safety Heights is involved in height training and also accepting that there is a relationship between Safety Heights and the Safety Gear, the applicant is seeking to restrain the respondent from securing employment in circumstances where it (the applicant) has already secured its interest through the outsourcing agreement with Height Safety. The further undertaking made by the respondent is noted.

30] In light of the above, I am of the view that the applicant's application stands to fail. In the circumstances of this case, I see no reason why in law and fairness the costs should not follow the results.

31] In the premises, the applicant's application is dismissed with costs.

Molahlehi J

Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT: Adv L Malan Bowman Gilfillan Inc.

FOR THE RESPONDENTS: Adv Van As instructed by: Van Zyl, Maria Aletta Attorneys.