



REPUBLIC OF SOUTH AFRICA

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Case no: J 05/13

In the matter between:

SHOPRITE CHECKERS (PTY) LTD

Applicant

and

IZAAN JORDAAN

First Respondent

PICK N PAY HOLDINGS LTD

Second Respondent

Heard: 15 January 2013

Delivered: 18 January 2013

Summary: Restraint of trade upheld.

JUDGMENT

STEENKAMP J

Introduction

- [1] The first respondent, Ms Izaan Jordaan, has taken up employment with the second respondent, Pick n Pay Holdings Limited ("Pick n Pay") in breach of a restraint of trade agreement with the applicant, Shoprite Checkers (Pty Ltd, her former employer.

- [2] The question to be decided on an urgent basis is whether the agreement in restraint of trade is reasonable and enforceable. Pick n Pay abides the decision of the Court.

Background facts

- [3] Ms Jordaan is an LLB graduate. She completed her articles of clerkship, but then decided to pursue a different career. In January 2010 she was employed by the applicant, initially as a junior buyer. After her first year of employment she worked as a buyer in its glassware department. Before she took up employment with the applicant, she signed a contract of employment that included clauses pertaining to confidentiality and restraint. Immediately above her signature, she recorded:

“I have received a copy of the contract of employment and a letter of appointment. I understand and accept the terms and conditions of employment contained in these documents.”

- [4] A representative of the applicant signed a copy of the agreement on 30 November 2009. Ms Jordaan only did so on 3 January 2010. It appears that she had ample time to consider the agreement. She raised no objection and did not attempt to renegotiate the confidentiality and restraint clauses.
- [5] Ms Jordaan underwent training and made rapid progress. According to her, she had a “keen eye” for glassware. Her annual remuneration for 2012 was in the region of R300 000. Her specific area of responsibility was the sourcing and purchasing of glassware (all over the world) for the applicant. She became the sole buyer for glassware for the applicant’s Checkers and Checkers Hyper stores. During her employment with the applicant, the volume of purchases with one supplier that she dealt with increased from a sales value of R6,9 million to R14, 9 million.
- [6] Ms Jordaan is married to an attorney who is employed by one of the largest law firms in South Africa, DLA Cliffe Dekker Hofmeyr. At the end of 2012 he was transferred to the firm’s Johannesburg office. On 30 November 2012, Ms Jordaan tendered her resignation on one month’s notice. She advised her superior, Mr Stephen Braude, that she intended to

take up employment with Pick n Pay in Johannesburg in essentially the same position as the one she had with the applicant, i.e. a buyer of glassware. It is common cause that Pick n Pay and the applicant are direct competitors. Although Ms Jordaan refused to make a copy of her contract of employment with Pick n Pay available to the Court, it also appears to be common cause that is being paid more than she earned at the applicant .

- [7] Having learnt that Ms Jordaan was going to take up employment in direct competition with the applicant, the applicant advised her that she was not required to serve her notice month and she left immediately.
- [8] On 5 December 2012 the applicant's human resources director, Mr Callie Burger, wrote to Ms Jordaan and informed her that she had breached the restraint agreement by taking up employment with Pick n Pay. He warned her that, unless she terminated her employment with Pick n Pay and complied with clause 17 of her contract of employment (the restraint and confidentiality clause), the applicant would seek an interdict.
- [9] Ms Jordaan responded by email to Burger (and apparently to the applicant's CEO, Whitey Basson) on 7 December 2012 in these terms:

“Ek het mnr Burger se skrywe ontvang en sal graag die situasie met u wil bespreek.

Ek is nie seker of u bewus is van die omstandighede wat die aanvaarding van my posisie by Pick n Pay genoodsaak het nie. Ek het dit dus goed geag om hierdie epos aan beide van u te rig.

My man is 'n prokureur by Cliffe Dekker Hofmeyr Inc en is verplaas na sy firma se kantoor in Johannesburg. My bedanking by Shoprite was dus weens omstandighede buite my beheer. Ek en my man is afhanklik van my salaris en dit was dus noodsaaklik dat ek 'n nuwe werk moes soek. Ons is nie in 'n finansiële posisie om my indiensneming by Pick n Pay te beeindig nie. Dit was ook nie vir my moontlik om u te nader vir 'n moontlike verplasing nie, aangesien, en soos u bewus is, die aankopers in die Non Foods afdeling van Shoprite in die Kaap gestasioneer is.

Ek was baie gelukkig by Shoprite en is dankbaar vir die geleentheid wat u destyds vir my gebied het toe ek van loopbaan verander het. Ek wou dus ten alle koste verhoed dat ek die maatskappy op 'n slegte voet verlaat.

Ek verstaan dat u beide baie besig is en indien u dus nie beskikbaar is om die aangeleentheid met my en my man vandag te bespreek nie, kan u dalk iemand aanwys om met ons te ontmoet.

Ons trek Maandag en sal dus u spoedige terugvoering opreg waardeer.”

[10] As it happens, the applicant was prepared to discuss matters, albeit not on the same day. It appears that the applicant also had sympathy for Ms Jordaan’s position in having to relocate to Johannesburg and it was, once again, prepared to accommodate her and to offer her an opportunity not to part ways “op ‘n slegte voet”.

[11] The parties met on 19 December 2012. The applicant offered Ms Jordaan a position as a buyer in Johannesburg at their House and Home group, dealing with furniture and electronics. Even though she would have to undergo some retraining, it would be without any loss of salary.

[12] Ms Jordaan was not prepared to accept this compromise position. On 26 December 2012 she wrote to the applicant in these terms:

“Ek verwys na my ontmoeting die 19de Desember 2012 met mnr Horn by House and Home se hoofkantoor.

Daar is aan my genoem dat ek moontlik kan deel vorm van die House and Home groep.

Na deeglike oorweging het ek besluit dat ‘n posisie by H & H weens verskeie redes nie gepas sal wees nie.

Gedurende my tyd by Shoprite was ek uitsluitlik blootgestel aan huisware en dus sal ‘n skuif na die aankoop van meubels my aansienlik terug sit in my loopbaan.

Ek bedank u vir die tyd wat u afgestaan het om my te ontmoet.”

[13] Mr Burger responded:

“Ek is baie spyt om dit te hoor want ek het gehoop dat ons jou sou kon behou.

Sterkte op die pad vorentoe en ek vertrou dat jy by die kontraktuele ooreenkomste van jou kontrak met ons (soos in van my vorige kommunikasies aan jou genoem) sal bly. Ek sal waardeer as jy dit so aan

my sal bevestig veral aangesien die pos by Pick n Pay 'n verbreking van sodanige ooreenkoms sal beteken.”

- [14] This hope was in vain. Ms Jordaan reiterated on 28 December 2012 that she was not prepared to refuse the position at Pick n Pay. She took up employment with Pick n Pay on 7 January 2013. The applicant launched this application on an urgent basis on the same day. It was heard on 15 January 2013.

Urgency

- [15] Mr *Du Plessis*, for the first respondent, took issue with the matter of urgency. He argued that Ms Jordaan had played open cards with the applicant and had told it at the time of her resignation on 30 November 2012 that she intended to take up employment with Pick n Pay. He criticised the applicant for having waited until she did so before bringing the application.
- [16] This argument does not take cognisance of the interim events. As I have set out above, the applicant continued with its efforts to accommodate Ms Jordaan in Johannesburg. It is only on 26 December that she refused that offer and on 28 December that she made it clear that she would continue to act in breach of the restraint. From that time onwards, and taking into account the difficulties occasioned by the fact of many of the actors in this drama being on leave at the time, the applicant did not unduly delay the application.
- [17] In a previous matter concerning a restraint of trade, this court remarked in *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes & another*:¹
- “In my view, litigants should be encouraged in any attempt to avoid litigation, rather than rushing to court as a first option. Litigation is costly and often unnecessary.”
- [18] I stand by those remarks. The applicant cannot be criticised for attempting to accommodate Ms Jordaan before resorting to this application. Once she

¹ (2012) 33 *ILJ* 629 (LC) para [22].

had refused its offer of continued employment in Johannesburg, it acted expeditiously.

The applicable legal principles

[19] This Court has recently set out the legal principles dealing with restraints of trade fairly comprehensively in *Vital Aire*² and in *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronjé & another*.³

[20] It is unnecessary to do so again. In short, restraints of trade in our law remain valid and enforceable unless the party seeking to escape their effects show that they are unreasonable and thus contrary to public policy.⁴

[21] This requires a value judgment which encompasses the considerations referred to in section 38(1) of the Constitution, requiring a determination as to whether the restraint is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”.⁵

[22] The value judgment required encompasses two principal policy considerations, the first being that public interest requires that parties should comply with their contractual obligations and the second being that all persons should, in the interests of society, be productive and be permitted to engage in trade and commerce or their professions.⁶

[23] The four questions, identified in *Basson v Chilwan & Others*⁷, that should be asked when considering the reasonableness of a restraint are :

23.1 Does the one party have an interest that deserves protection after termination of the agreement?

23.2 If so, is that interest threatened by the other party?

² *Supra*.

³ (2011) 32 ILJ 601 (LC).

⁴ *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA).

⁵ *Reddy supra* at 495E-496D.

⁶ *Reddy supra* at 496D-F.

⁷ 1993 (3) SA 742 (A) at 767 G-H.

23.3 In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?

23.4 Is there another facet of public policy not having anything to do with the relationship between the parties which requires that the restraint should either be enforced or disallowed?

[24] *Wunsh J in Kwik Kopy (SA) (Pty) Ltd v Van Haarlem and Another*⁸ added a further consideration, namely whether the restraint is wider than what is necessary to protect the protectable interest.

Evaluation

[25] It is common cause that Ms Jordaan has taken up employment with a direct competitor in breach of the restraint. The question is whether that restraint is reasonable and enforceable.

[26] The confidentiality and restraint clause is couched in wide terms. It reads:

“17.1 By virtue of your appointment, you will be privy to information which is confidential and/or proprietary to the Company. This includes information concerning the Company’s business, its operations, finances, policies, practices, planning, purchases, pricing, sales, suppliers, stocks and other matters. You agree that you will not (save so far as is necessary and appropriate) disclose to any person, without the written consent of the Company, any confidential and proprietary information as to the business, operations, dealings or any other affairs of the Company during your employment or after the termination of your employment.

17.2 You agree further that, should you become involved in any business or other activity with the Company or its associated operating divisions, this would severely prejudice the business of the Company. You therefore agree and undertake in favour of the Company, that during your employment and for a period of two (2) years from the date of the termination of your appointment with the company, or with any associated or related company, you will not anywhere in the Republic of South Africa, directly or indirectly, alone or with any other person, and whether as an

⁸ 1999 (1) SA 472 (W) ([1998] 2 All SA 362) at 484E (SA) and 375a (All SA).

agent, employee, consultant, in partnership or as a company, body corporate, franchisor or franchisee, or in any other capacity, be engaged, retained, employed or have a material interest in any company, business, firm, enterprise or undertaking, carrying on a business involving the distribution and/or sale, through retail chain stores or any other retail outlet or wholesale operation, of any food or related products, household products, furniture, beverages or any other product, product category or other items that are distributed or sold through the retail chain operations of the Company or any associated company.

17.3⁹ ...

17.4 You acknowledge that the terms of this restraint are fair and reasonable and go no further than is reasonably required to protect the proprietary interests, trade secrets and confidential information of the Company, to which you would have had access or to which you would have been exposed.”

- [27] Ms Jordaan has belatedly tendered to agree to a court order enforcing the terms of clause 17.1. With regard to the remainder of the relief sought, she has offered an undertaking that neither she nor Pick n Pay will “directly or indirectly engage” the applicant’s two major suppliers for another 12 months. She also tendered to honour whatever “exclusivity agreements” the applicant may have in place with any suppliers for as long as those agreements remain in place.
- [28] I agree with Mr *Stelzner* that, given the applicant’s preparedness to accommodate Ms Jordaan in one of its divisions in Johannesburg and her own qualifications and talents, the second consideration outlined above – i.e. the ability of the employee to be economically active and productive – is in the present matter not really at odds with the first, namely the enforcement of the restraint in compliance with the maxim *pacta servanda sunt*.
- [29] The questions outlined in *Basson v Chilwan*¹⁰ remain to be addressed.

⁹ This is a non-solicitation clause that is not relevant to the current dispute.

¹⁰ *Supra*.

An interest worthy of protection?

- [30] The applicant relies on its trade secrets and confidential information as defined in clause 17.1 of its contract of employment with Ms Jordaan to be its protectable interest. In addition it relies on its trade connections with suppliers as the interest worthy of protection.
- [31] “Trade secrets”, “trade connections” and “confidential information” are all three recognised to be categories of interests worthy of protection.
- [32] The applicant argued that these would relate to :
- 32.1 the names of the applicant’s suppliers and agents,
 - 32.2 the contractual arrangements between the applicant and its agents and suppliers (such as the duration thereof, whether exclusive or not),
 - 32.3 the financial details of the applicant’s relationship with its suppliers and agents (such as credit terms, discounts, rebates, other terms of payment),
 - 32.4 the names of prospective suppliers and agents and their requirements / demands,
 - 32.5 details of the applicant’s operating structure, results and future strategies and plans ; and
 - 32.6 other technical detail, techniques, operating methods and any other matter which relates to the business of the Applicant which information is not readily available in the ordinary course of business to a competitor of the applicant.
- [33] If exploited by a competitor this would be to the serious detriment of the business, goodwill and best interests of the applicant.
- [34] The applicant provided numerous detailed examples of its confidential information and trade secrets. These examples arise from Ms Jordaan’s position as the sole buyer for glassware at the applicant’s Checkers and Checkers Hyper stores. This included detailed information about the suppliers, sourcing, pricing, stocks, profit margins and merchandise

trends, as well as contact details for specific contact persons at overseas suppliers.

[35] The information relied on by the applicant appears to me to meet the three general requirements for a trade secret :

35.1 It relates to and is capable of application in the trade or industry.

35.2 Most of it is secret or confidential – it is only available and thus known to a restricted number of people or to a close circle. Apart from the names of certain suppliers that would appear on the product itself, it is not in the public domain.

35.3 Objectively viewed it is of economic or business value to the plaintiff.

[36] The same considerations apply to at least some of the trade secrets that the applicant relies upon, such as her password protected access to the Shoprite Data Warehouse. This is an enterprise wide source of information that includes current and historical data on sales quantities and values, margin values and percentages, stock quantities and pricing. She also had access to the applicant's Tradestone system, a global sourcing and logistics information technology system pertaining to imported goods. Detailed supplier information – examples of which were provided to the Court by way of “screen shots” – is contained on the system.

[37] Examples of the connection between Ms Jordaan and the applicant's suppliers are equally detailed. She admits that, inter alia, discounts are negotiated on each transaction with these suppliers. It stands to reason that, should she contact any of those suppliers as a glassware buyer for Pick n Pay, she will be able to use her prior knowledge of, for example, discounts given to the applicant in her existing relationship with that supplier in order to negotiate a similar discount for Pick n Pay to compete with the applicant.

[38] The connection is such as to constitute a protectable interest.¹¹

¹¹ *Den Braven SA (Pty) Ltd v Pillay and Another* 2008 (6) SA 229 (D) ([2008] 3 All SA 518) para [6].

Is the interest threatened?

[39] As I have set out in the example above, the applicant's interests are clearly threatened by the respondents. Ms Jordaan's access to the applicant's confidential information, her intimate knowledge of its whole glassware procurement process and pricing, and especially her connections with its suppliers, places her in an ideal position to share this information with Pick n Pay to the detriment of the applicant.

[40] The situation is very similar to that in *Reddy v Siemens Telecommunications (Pty) Ltd*.¹² In that case, the SCA upheld a 12 month restraint against an employee who had joined a competitor (Ericsson). Malan AJA stated that it was not necessary for the court to find that the employee *would* use his previous employer's trade secrets and confidential information in his new employment but that it was sufficient if he *could* do so:

"Reddy is in possession of confidential information in respect of which the risk of disclosure by his employment with a competitor, assessed objectively, is obvious. Reddy will be employed by Ericsson, a 'concern which carries on the same business as [Siemens]' in a position similar to the one he occupied with Siemens. His loyalty will be to his new employers and the opportunity to disclose confidential information at his disposal, whether deliberately or not, will exist. The restraint was intended to relieve Siemens precisely of this risk of disclosure. In these circumstances the restraint is neither unreasonable nor contrary to public policy."

[41] The SCA in *Reddy* agreed with the sentiments expressed by Marais J in *BHT Water Treatment (Pty) Ltd v Leslie and Another* : ¹³

"In my view, all that the applicant can do is to show that there is secret information to which the employee had access, and which in theory the employee could transmit to the second respondent should he desire to do so. The very purpose of the restraint agreement was that the applicant did not wish to have to rely on the bona fides or lack of retained knowledge on the part of the employee... In my view, it cannot be unreasonable for the applicant in these

¹² 2007 (2) SA 486 (SCA) para [20] at 499 G-H.

¹³ 1993 (1) SA 47 (W) 58H – 59A; See also *Fidelity Guards v Pearmain* 2001 (2) SA 853 (SE) 859 D-I and *Esquire Technology (supra)* paras [30] – [34].

circumstances to enforce the bargain it has exacted to protect itself. Indeed, the very ratio underlying the bargain was that the applicant should not have to content itself with crossing its fingers and hoping that the employee would act honourably or abide by the undertakings that he has given.”

[42] The same considerations apply in this case. The undertakings tendered by Ms Jordaan are impossible to police while she is in the employ of Pick n Pay. It is also not helpful to suggest, as Mr *Du Plessis* did, that the applicant can police and, if necessary, take action against suppliers who breach their exclusivity agreements with the applicant. It is exactly in order to avoid this type of harm, and the attendant legal costs, that the applicant sought to enter into a restraint of trade agreement with Ms Jordaan. She agreed to it without amendment. And she is not an ignorant or low-level employee. She has apparently qualified as an attorney.¹⁴ Her husband is an attorney with a large international law firm. She had ample opportunity to consider and reflect upon the restraint agreement before she agreed to it. She entered into the agreement with open eyes and she wilfully breached it.

[43] The undertakings belatedly offered by the employee can also not save her. As the court pointed out in *BHT Water*:¹⁵

“In my view, an ex-employee bound by a restraint, the purpose of which is to protect the existing confidential information of his former employer, cannot defeat an application to enforce such a restraint by giving an undertaking that he will not divulge the information if he is allowed, contrary to the restraint, to enter the employment of a competitor of the applicant. Nor, in my view, can the ex-employee defeat the restraint by saying that he does not remember the confidential information to which it is common cause that he has had access. This would be more so where the ex-employee, as is the case here, has already breached the terms of the restraint by entering the service of a competitor”.

¹⁴ It is not clear whether she was admitted as an attorney, but she has completed her articles of clerkship.

¹⁵ *Supra* 58 C-D.

Weighing up the qualitative and quantitative interests

- [44] The situation in this case is an unusual one. The exercise of weighing up the threat to the applicant's interests against the interest of the other party not to be economically inactive and unproductive is a simpler one than usual. Ms Jordaan need not be economically inactive and unproductive. The applicant offered her a position in Johannesburg – ostensibly the reason why she had to resign – at the same salary. She had the opportunity to continue with her career as a buyer, albeit in a different entity, without any loss of salary, without breaching her restraint. She elected not to do so.
- [45] The period of the restraint is another matter. So is the wide terms in which it has been couched.
- [46] Ms Jordaan signed off what are known as “die-lines” for each season (usually 6 months in advance) with the result that she has direct knowledge of forward orders, new product ranges and other operational issues for at least the next six months, but it is unlikely to endure for as long as 24 months. New prices and product ranges are revealed at annual trade fairs. The information changes fairly frequently, and at least on an annual basis. A restraint period of 12 months would appear to me to adequately protect the applicant's interests.
- [47] Our courts have in the past cautioned against the “reading down” of an overbroad restraint.¹⁶ But the approach adopted by Wallis AJ¹⁷ in *Den Braven SA (Pty) Ltd v Pillay and Another*¹⁸ seems to be a sensible one in a case such as this:

“The proper approach in my view is for the court to ask itself whether the conduct that the applicant seeks to restrain by way of an interdict is conduct that falls within the terms of the restraint agreement and from which the former employee agreed to abstain. If the answer to that question is in the affirmative the court then moves to an analysis of whether it should, in accordance with the principles of public policy, enforce the agreement to

¹⁶ Cf *National Chemsearch (SA) (Pty) Ltd v Borrowman* 1979 (3) SA 1092 (T) 1117 A-B.

¹⁷ as he then was.

¹⁸ 2008 (6) SA 229 (D) 260F – 263C paras [50] – [54].

that extent by granting relief to the applicant. It has no need in those circumstances to have regard to those portions of the agreement that are more extensive than the relief actually being sought.

....

I confine my remarks to the question whether a restraint of trade agreement that is too broad in its terms can on those grounds be held to be contrary to public policy and unenforceable in circumstances where, within the four corners of the agreement, there are restraints clearly spelt out which are reasonable in nature and which are the only restraints that the court is asked to enforce. In my judgment in that situation the court should in accordance with binding precedent grant relief to the applicant. There is no basis in law for it refusing to do so by holding the entire agreement to be unenforceable on the grounds of public policy.”

- [48] In the course of oral argument, I debated with Mr *Stelzner* whether the whole of the restraint as drafted in clause 17.2 needed to be enforced in order to protect the applicant’s interests vis-à-vis Ms Jordaan. He agreed that it did not. He helpfully drafted an alternative order that I intend to grant.

Another aspect of public policy?

- [49] There is no other aspect of public policy that would render the restraint unreasonable and thus unenforceable. This is especially so where Ms Jordaan’s Constitutional right¹⁹ to choose her occupation freely was not directly threatened in this case.

Conclusion

- [50] For these reasons, I am satisfied that the restraint of trade should be enforced, albeit in a more limited form. The first respondent has already conceded that clause 17.1 of the contract of employment (the confidentiality clause) should be enforced.
- [51] The applicant has established a clear right for the relief it seeks. It will suffer irreparable harm if the restraint is not enforced. And the alternative

¹⁹ Constitution of the Republic of South Africa s 22.

remedy of a damages claim in due course – probably after the restraint period had run its course – would be difficult to prove, costly, and against the very purpose of a restraint of trade.²⁰

Costs

[52] Mr *du Plessis* submitted that, should the applicant be successful, the first respondent should not be ordered to pay its costs, given that she is an individual who may be rendered unemployed as a result of this judgment and the applicant is a large company with extensive financial resources. In the circumstances of this case, I do not agree. Ms Jordaan acted recklessly, both in wilfully breaching the restraint and in pursuing this litigation. The applicant made her aware of her breach before launching this application. It went further and offered her an alternative position at the same salary. She elected to refuse the offer, persist with the breach and defend the application. There is no reason in law and fairness why she should not be ordered to pay the applicant's costs.

Order

[53] For these reasons, I issue an order in the following terms:

53.1 The first respondent, Ms Jordaan, is interdicted from disclosing to any person, including the second respondent (Pick n Pay), any confidential and proprietary information of the applicant, including but not limited to confidential information concerning the applicant's business, its operations, finances, policies, practices, planning, purchases, pricing, sales, suppliers and stocks;

53.2 The first respondent is interdicted and restrained until 31 December 2013 and within the Republic of South Africa from directly or indirectly being engaged, retained, employed by or having a material interest in the second respondent or any other company, business, firm, person, enterprise or undertaking carrying on a business in competition with the applicant involving the distribution or sale,

²⁰ Cf *Esquire Technology (supra)* para [40]; *Vital Aire (supra)* para [50].

through retail chain stores or any other retail outlet or wholesale operation, of *inter alia* glassware.

53.3 The first respondent is ordered to pay the applicant's costs.

AJ Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: R G L Stelzner SC
Instructed by Perrott Van Niekerk Woodhouse
Matyolo Inc.

FIRST RESPONDENT: APJ du Plessis
Instructed by Van der Merwe Du Toit Inc.

SECOND RESPONDENT: Bowman Gilfillan Inc.