REPUBLIC OF SOUTH AFRICA

Of interest to other judges

# THE LABOUR COURT OF SOUTH AFRICA,

# IN JOHANNESBURG

# JUDGMENT

**CASE NO: J 151/14**

In the matter between:

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| **DUST A SIDE PARTNERSHIP** | **Applicant** |
| **and** | |
| **LUDIK, ERIK** | **First Respondent** |
| **PURPLEGLAZE 3 CC t/a E-CAT** | **Second Respondent** |

Heard: 27 March 2014

Delivered: 03 April 2014

**Summary:** (Restraint of trade – applicant having protectable interest which the coventor's employment by the second respondent threatened – enforcement nonetheless declined - unreasonable to enforce one month before restraint due to expire – Costs – fair and equitable for respondents to pay the costs despite successful opposition).

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## JUDGMENT

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**LAGRANGE, J**

**Introduction**

[1] This is an urgent application to enforce an agreement in restraint of trade. The matter was originally set down for hearing on 30 January 2014. On that date the parties agreed to postpone the matter for an extended period until 27 March 2014 to permit the filing of answering and replying papers as well as heads of argument.

[2] The essential features of the provisions of the restraint agreement contained in the first respondent's contract of employment were that, for a period of six months calculated from the date of termination of his employment on 25 October 2013, he had undertaken:

2.1 to keep confidential and not to disclose any of the applicant's trade information and secrets to any other person during the continuance of his employment or at any time thereafter;

2.2 not to be interested in any way whatsoever in any competing business to that of the applicant in the areas of Sishen and the Northern Cape;

2.3 not to solicit the custom, transact or deal with or accept any custom from, any of the applicant's customers or any person that was a customer of the applicant.

The restraint further defined the term 'interested' to include an interest as an employee of a competing business.

[3] The applicant conducts a dust prevention undertaking mainly serving various mining sites throughout the country, in which it has been engaged for over thirty years. The applicant was employed as a contract manager at the applicant's Sishen mining site for a period of about eleven months until he resigned with effect from 25 October 2013. After that he had a brief stint of employment with another firm, but that did not work out because of the shift he was required to work. He then urgently sought work through a labour broking firm. In December 2013 was approached by the second respondent, Purple Glaze 3 CC t/a E-CAT,

with an offer of employment which he accepted. He was offered alternative employment by the applicant but that would have required him to relocate to Witbank which was not feasible given that his wife was still currently employed by a building contractor in Kathu, where she had worked for the last eight years. In January when he took up employment with the second respondent, he was made aware by the applicant that it might seek to enforce the restraint of trade agreement against him, but he felt he had little choice but to pursue his employment with the second respondent.

[4] In summary, the applicant asserts that it has the following interests which it claims are deserving of protection:

4.1 the sourcing, costing and pricing of its own unique bitumen emulsion product, which it claims is very successful and sought after, is a trade secret;

4.2 the knowledge of the method of applying the emulsion for dust control purposes, known as the' application protocol' which the applicant claims is an important element in generating revenue;

4.3 knowledge of the pricing, specification and sourcing of specialised brooms developed by the applicant for cleaning surfaces;

4.4 relationships with customers in the relatively small Northern Mining community in which the applicant has developed through its long-term operation in the industry, and

4.5 a detailed knowledge of pricing products and operational activities of the applicant which are essential to servicing the applicant's customers.

[5] In my view anyone who has knowledge of the elements of the applicant’s business described above and who played a direct role in fostering and maintaining customer relations would be a valuable asset to a competitor of the applicant by reason of such knowledge and experience. The respondents also do not claim that any of the information mentioned is public knowledge or easily obtainable from sources other than persons with inside knowledge of the applicant’s business, save in respect of the

specialised brooms supplied by the applicant. In the circumstances, I am satisfied that the interests described above do constitute interests deserving of protection.

[6] Although the respondents' dispute that the second respondent is a competitor of the applicant, they do so only on a narrow basis, namely that they are resellers or agents of suppliers of dust control products whereas the applicant also manufactures its own unique bitumen emulsion in conjunction with one of its suppliers. However, the respondents do not contend that the second respondent is not in the business of providing dust control products and services in the mining industry. The fact that the second respondent is not involved in the development of its own products, but simply sources them from suppliers and uses them in accordance with the supplier's own application protocols does not mean in relation to the final service they provide to customers that they are not competing in the same market as the applicant. On the papers there is nothing to suggest that a mining company could not approach either the applicant or the second respondent to provide similar dust control products or services. Accordingly, on the balance of probabilities, I believe the second respondent is a competitor of the applicant.

[7] The main thrust of the respondents' defence is to dispute the existence of the protectable interests asserted by the applicant, and to deny that the first respondent has any knowledge, or partial knowledge of any value concerning the information which it seeks to protect. In respect of the specialised brooms referred to by the applicant, the first respondent denies that he has the know-how to assist the second respondent in developing a competing product and asserts that it could not be difficult for third parties to acquire information about the brooms. The first respondent claims a sweeping ignorance of information about the bitumen emulsion product and its application for dust control purposes.

[8] Similarly, he denies any detailed or intimate knowledge of the applicant's products, operations, services and pricing. He also volunteered that he never took part in any meetings at which the sensitive issues referred to

were discussed. This is strongly disputed in reply by the applicant. It mentions a number of site managers meetings that the applicant attended at which budgets, the financial statements and forecasts for the Northern Cape region were discussed in detail. It also points out that on a monthly basis he received information on product prices per litre, available square meterage of road surface area and the rand value of the contract per square metre. The applicant further contends that given his position as the person managing one of the applicant's largest contracts, his claim to be so ignorant of the information in question is ludicrous.

[9] The first respondent avers that as the contract manager, the information he had access to, was common knowledge to anyone on site who had anything to do with the contract including those involved in safety incident investigations or the authorisation of licenses for water tankers. Although the applicant admits that some of the information about the bitumen emulsion product might have been common knowledge among other employees, there was information such as the actual application of the product per square metre which only he had access to.

[10] On the question of customer relationships the second respondent admits he had built a working relationships with the people he came into contact with, but denies that this had any material impact on the business of the applicant because the applicant’s customers do business with it on the basis of its products, which he was not in a position to supply from the second respondent's business. The respondent disputes the applicant’s contention that the working relationships were of insignificant commercial value because it was those relationships that would enable the first respondent to persuade a customer to do business with the second respondent.

[11] Although there is some dispute of fact on the papers, the onus falls on the respondents to prove that the applicant’s protectable interests are not compromised or likely to be compromised, by the first respondent's employment by the second respondent. There are some issues raised in reply by the applicant disputing the second respondent’s claimed ignorance of significant information. Ordinarily, some of these replies

might be ignored, but to a degree they do arise out of specific averments by the second respondent which could not have been anticipated by the applicant and required a response. If the second respondent felt that he could have rebutted some of that additional information it was open to him to have applied for leave to file a supplementary affidavit.

[12] In any event, a further difficulty I have in evaluating the respondents' case is that the answering affidavit is characterised by a certain shyness when it comes to detailing why the second respondent's business is supposedly that different from the applicant. More importantly, there is precious little detail about what the first respondent's duties, responsibilities and actual knowledge of the applicant's business was. Similarly, virtually nothing is laid before the court to elaborate on the scope of his current duties and responsibilities in his new employment with the second respondent.

[13] Had he provided greater detail on these matters, it might have gone some way to demonstrate that he was able to perform his job as a contract manager without any knowledge of the sensitive information the applicant seeks to protect. I am not persuaded on what is before me that his level of ignorance of sensitive information could have been as extensive as he claims.

[14] Consequently, there is reason to believe that the relationships the first respondent developed with the applicant's customers and his knowledge of information about the applicant's business, which he could only have gained through his employment with it, would be of value to the second respondent and the applicant's interest in preventing a competitor from accessing that value is compromised by the second respondent employment of the first respondent.

[15] In *Basson v Chilwan* 1993 (3) SA 742 (A) at 775I–777B, it was stated that

> *"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.*

[16] On the evidence, I am satisfied that the applicant has established that the first respondent has breached the terms of his restraint of trade with the applicant by taking employment with the second respondent, a competitor of the applicant, before 6 months had expired since he left the applicant's employment. Further, the respondents have failed to disprove that the applicant has a protectable interest in relation to information about its products, pricing and costing and its customer relations which was threatened by the first respondent's breach in taking up employment with the second respondent.[1]

[17] The only question that remains, in the absence of the existence of alternative defences, is whether it is reasonable at this juncture to enforce the restraint, given that on the date when the parties had agreed the matter should be heard the restraint was due to expire in one month's time.

[18] *Mr Snyman* for the applicant contended that since the parties had agreed to postpone the matter, the respondents could not rely on the lateness of the hearing to contend that it would be inappropriate to enforce when the period of the restraint has almost run. Whilst I agree that the respondents were party to the postponement, it was really in the hands of the



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[1] It is not that the applicant must disclose an actual breach of the duty not to provide information to the second respondent, it is sufficient that there is a real risk of that happening and an undertaking by the employee that he will respect the confidentiality of the information he acquired is not enough to deny the employer the right to enforce the restraint. See ***Reddy v Siemens Telecommunications (Pty) Ltd*** **2007 (2) SA 486 (SCA)** at 499-500 at [20].

applicant to agree to such a leisurely timetable for finalising the matter, having initially launched the application on six calendar days notice.

[19] The order sought is in the form of an order of specific performance. It is well known that a plaintiff is always entitled to claim specific performance and assuming he makes out a case, his claim will be granted, subject only to the court's discretion. In *Haynes v King Williams' Town Municipality* 1951 (2) SA 371 (A) at 378G, it was stated:

> *"The discretion which a Court enjoys, although it must be exercised judicially, is not confined to specific types of cases, nor is it circumscribed by rigid rules. Each case must be judged in the light of its own circumstances."*

Further, it has been held that:

> *Good and sufficient grounds for refusing specific performance is where it would operate unreasonably hard on the respondents or where the agreement giving rise to the claim is unreasonable, or where the decree would produce injustice, or would be inequitable under all the circumstances."*[2]

[20] It is also well established that the time for assessing the reasonability of the restraint is the time when enforcement is sought.[3] It is with these principles in mind that I turn to the question whether or not the restraint should be enforced at this time.

[21] In this instance, if an order of specific performance was granted it would have the effect of the first respondent having to leave the second respondent's employment for a period of a month having been employed for three months already. I accept on the one hand that the applicant is

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[2] ***Klimax Manufacturing Ltd and another v Van Rensburg and another***
**[2004] 2 All SA 301 (O) at 304, para [13]**

[3] ***Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A)** at 894F–G

entitled to enforce the restraint, but in deciding if it reasonable to do this now I must also consider the relative value to the applicant of removing the first respondent from the second respondent's employment for a month at this juncture and the loss of an entire month's income by the first respondent. My concern is that the protectable interests the applicant has are unlikely to be served at this point by neutralising the first respondent's employment with the second respondent for the last month of the restraint. Further, any potential prejudice the applicant might suffer as a result of the first respondent's breach of the restraint in all probability has already occurred. At this juncture, depriving the first respondent of a month's earnings where his absence from the second respondent's workplace is unlikely to serve the purpose of the restraint does not seem to strike a reasonable balance between the applicant's right to enforce the agreement and the second respondent's freedom to engage in economic activity.

[22] Had the applicant pressed ahead with this application on the urgent basis on which it launched it, at which stage the applicant had scarcely been employed by the second respondent for a month and there was a better chance of shielding the applicant's protectable interest from being prejudiced by neutralising the first respondent's involvement in the second respondent's business, the position might well have been very different. At that time the value of enforcing the restraint to the applicant would have been much more obvious as it still had three months to run.

[23] Nevertheless, even though I decline to enforce the restraint, the applicant was fully justified in launching the application at the time it did and I do not see why it should have to bear the costs of this application, despite being ultimately unsuccessful solely on account of the time when the enforcement of the restraint came to be considered. I am also mindful of the fact that the second respondent admitted to being made aware that the applicant may bring this application if he was employed by the second respondent. Accordingly, I believe it would be just and equitable for the respondents to pay the applicant's costs.

**Order**

[24] In light of the above,

24.1 The application is dismissed

24.2 The respondents are jointly and severally liable for the applicant's costs, the one paying the other to be absolved.

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**R LAGRANGE, J**

**Judge of the Labour Court of South Africa**

**APPEARANCES**

APPLICANT: S Snyman of Snyman Attorneys

FIRST RESPONDENT: H Vorster instructed by Wynand Bester Attorneys