REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J981/2014

In the matter between:

BUSINESS CONNEXION (PTY) LIMITED Applicant

and

NAGEL CHRISTOFEL GERT PETRUS First Respondent

EOH MTHOMBO (PTY) LIMITED Second Respondent

Case no: J1022/2014

BUSINESS CONNEXION (PTY) LIMITED Applicant

and

JOHANNES HENDRIK STRYDOM First Respondent

EOH MTHOMBO (PTY) LIMITED Second Respondent

Date heard: May 20 2014

Delivered: June 11 2014

Summary: Urgent applications for interdictory relief iro restraint of trade agreements.

JUDGMENT

Rabkin-Naicker J

[1] These matters were heard as consolidated applications which the applicant sought to be heard as semi-urgent. By the time the matter came to court the relief sought was final and was claimed against the first respondents in each matter, as well as the second respondent company:

2.1 "that the First Respondent be, and is hereby, interdicted and restrained for a period of 12 (twelve) months with effect from 14 April 2014 within the boundaries of the Republic of South Africa:

2.1.1 from directly or indirectly persuading, inducing, encouraging, procuring, soliciting or employing any employee or consultant of the Applicant to terminate his employment or association with the Applicant or furnish any information or advice acquired by that employee to any unauthorized person;

2.1.2 from being interested or engaged, either directly or indirectly, in any firm, business or undertaking which carries on any activity, either solely or in conjunction with any party, in competition with the business carried on by the Applicant;

2.1.3 taking up and/or continuing employment with the Second Respondent;

2.2 that the First Respondent be, and is hereby, interdicted and restrained for a period of 6 (six) months with effect from 14 April 2014 within the boundaries of the Republic of South Africa from directly or indirectly persuading, inducing, encouraging, procuring or soliciting any licensor or supplier or client of the Applicant to:

2.2.1 terminate its license and/or supply and/or other agreement with the Applicant; or

2.2.2 enter into a license and/or supply and/ or other agreement with him or any other third party or entity; or

2.2.3 require any license and/or supply and/or the agreements with the Applicant to be altered to terms or conditions less advantageous to the Applicant; or

2.2.4 purchase any products supplied by the Applicant as at 14 April 2014 from a competitor of the Applicant;

2.3 that the First Respondent be, and is hereby, interdicted and restrained from using and/or disclosing any of the Applicant's trade secrets or confidential business information;

2.4 that the Second Respondent be, and is hereby interdicted and restrained for a period of 12 (twelve) months with effect from 14 April 2014, from employing the First Respondent directly or indirectly, or in any manner whatsoever, within the boundaries of the Republic of South Africa."

Background

[2] Essentially, the applicant (BCX) wishes to enforce restraint of trade agreements that it entered into with its former employees, the first respondents (Nagel and Strydom). It is common cause on the papers that BCX and the second respondent (EOH) are trade rivals, direct competitors in the IT industry and provide similar services to respective clients throughout the country. The industry they operate in is highly competitive, and BCX and EOH often target the same clientele and compete for the same budget from such clientele. BCX and EOH also compete for resources in the form of employees in the industry.

[3] During 2013, both BCX and EOH submitted extensive tenders to provide manufacturing execution systems (MES) to Sasol Group Services (Pty) Ltd (Sasol). The MES managed services had been rendered to Sasol by BCX since 2001. This entailed full-time support of various software and hardware components to support Sasol's production operations and processes.

[4] The 2013 tender was awarded by Sasol to be E0H by way of a three-year contract with effect from 1 November 2013, with an estimated contract value of approximately Rand 60 million per year. BCX in line with its contractual obligations, has since entered into a "transitional phase" in which it has

cooperated in the process of handing over the MES managed services to EOH.

[5] On 11 March 2014, Nagel tendered his resignation with BCX. This resignation was followed by what the applicant describes as a bidding war between EOH and BCX during which Nagel eventually signaled his intention to remain with BCX. However on 8 April 2014, he suddenly indicated that he was in fact leaving for EOH as he had originally planned. His last date of employment with BCX was Friday 11th of April 2014 and he immediately took up employment with EOH on Monday, 14 April 2014. Since that time it is alleged that he has met with several of his subordinates from BCX and advised them to follow him to EOH. Strydom has followed Nagel to join EOH.

[6] The key issues which must be interrogated by the court in this matter are as set out in **Mozart Ice Cream Franchises(Pty) Ltd v Davidoff and Another 2009 (3) SA 78 (C)** as follows:

(1) Is there an interest on the part of the applicant that is deserving of protection after the termination of a business relationship?

(2) Is that interest prejudiced by the conduct of respondents?

(3) If the interest is so prejudiced, how does that prejudice get weighed both qualitatively and quantitatively against the interest of the respondents to be gainfully employed and to pursue the right of the dignity of work if the order sought is so granted?

(4) Is there any other aspect of public policy as mediated by the values of the Constitution and which is unrelated to the relation between the parties that, nonetheless, requires the restraint either to be upheld or to be struck down?

(5) Does the restraint go further than absolutely necessary to protect the legitimate interest of the applicant that it is deserving of legal protection in terms of the balancing exercise which I have outlined?[1]

Evaluation

[7] In its founding affidavit BCX avers that:

[1] At page 85 I-J to 86 A-B

"BCX and Sasol are currently in the final stages of negotiating a "Cooperation Agreement" whereby BCX, EOH and Sasol jointly agreed that EOH would refrain from further interference, and in particular to stop soliciting or employing BCX employees.

This agreement however does not deal with previous offenders such as Nagel and Strydom."

[8] It is further averred by the general manager of the applicant that:

"It took considerable time and effort for me to normalise the situation, to pacify BCX employees and to negotiate the aforementioned Cooperation Agreement (which would prevent a further interference with BCX employees).

[9] The continued employment of Nagel and Strydom (the previous offenders) it submits, creates an ongoing infringement of the restraint undertakings in question and a further threat of BCX's confidential information finding its way to a trade rival.

[10] It is further submitted that the harm will not "easily be remedied" by a claim for damages after the fact, because by the time such a claim is heard the harm would have been done. BCX will also "likely struggle" to mount a sustainable claim for damages once the information is leaked, it is alleged.

[11] The restraints of trade in question are contained in the first respondent's contracts of employment with BCX, include the following:

> "the employee shall not, while he is associated in any capacity with the company or the group for the period of 1 (one) year from the date of termination of this association with the company (for any reason whatsoever), directly or indirectly, use for his own benefit, or the benefit of any other person, and shall keep confidential and not disclose, any of the trade secrets and confidential business information of the company and/or the group and/or any client of the company and all the group other than to those persons connected with the company or the group, who are required to know those secrets will to have that information."

[12] The restraint undertakings provide that the expression "trade secrets and confidential information of the company and/or the client shall include, but shall not be limited to the technical details, techniques, know-how, method of operating, cost and source of material, pricing and purchasing policies, names of customers of the company and/or the group and/or that any client of the company and/or the group (including potential customers with whom the company has not yet contracted, but intend contracting for the purpose of doing business)." There is also a prohibition on "pirating fellow employees". The restraints set out in the agreements apply in all the magisterial districts of the Republic for a period of one year.

[13] The founding papers deal with the 2013 Sasol tender and state as follows:

> "27. In order to facilitate a smooth transition of the MES managed services, BCX eventually agreed to release a specific 11 (eleven) of its technical oriented employees (who had by then dedicated more than 80% of their working time on MES managed services) to become employed by the EOH, should the employees so wish, but on strict condition that:
>
> 27.1 this would not constitute a section 197 transfer;
>
> 27.2 E0H shall not solicit any more BCX employees during the transitional phase; and
>
> 27.3 the said 11 (eleven) employees would keep BCX confidential information secret.
>
> 28. This arrangement was confirmed by way of written Heads of Agreement on 7 November 2013…"

[13] The said Heads of Agreement annexed to the founding affidavit contain the following salient term:

> "8. EOH will not solicit any Business Connexion employee whose name is not stated on the list as provided by Sasol to EOH. <u>Business Connexion agrees that it cannot prohibit an employee from approaching EOH's directly….."</u> (my emphasis)

[14] The Heads of Agreement are dated 7 November 2013. In the light of the above provisions, it is curious to understand how the applicant now submits that there is a protectable interest which is prejudiced by the conduct of first respondents. The proposition is further weakened by averments in the answering papers that the tender with Sasol was reviewed during January 2014 to the extent that 60% of the MES services were awarded to EOH (which EOH has been rendering since 1 May 2014) and 40% to BCX. Both companies are therefore rendering MES services to Sasol.

[15] It is further submitted on behalf of the respondents that in determining whether or not there are propriety interests that can be protected, or warrant being protected by enforcing the restraints of trade, that the following evidence contained in the answering affidavits is relevant:

15.1 Sasol was an existing long-standing and very well-known client of EOH, which had rendered extensive services, including MES services, to Sasol since 2008.

15.2 It is common cause, taking into account an admission in the replying affidavit, that prior to EOH being awarded the current tender there was a due diligence process and that EOH was made privy to all of Sasol's information with regard to the MES environment as well as the relevant services by way of a due diligence process

15.4 Employees of EOH and BCX worked closely together at Sasol, and EOH became fully acquainted with Sasol's production operations in process and Sasol has been a long-standing and very well-known client of EOH.

15.5 Whatever knowledge any employees of BCX might have gained in regard to the production operations and processes of Sasol has equally been gained by employees of EOH and thus the knowledge of Sasol's production operations and processes does not constitute confidential information.

[16] In all the above circumstances, and specifically given the content of the Heads of Agreement annexed to the founding papers (most especially clause 8 thereof) I find that in the context of the Sasol tender and the provision of MES services, BCX has waived its right to enforce the restraints of trade it had with the first respondents in these applications. The Heads of Agreement

clearly did not prohibit any BCX employee from approaching EOH directly in the context of the Sasol tender. Clause 8 of that agreement flies in the fact of an allegation that a protectable interest has been prejudiced on the facts of this case. BCX has not even passed go on the test as enunciated in the Mozart Ice Cream Franchises case. In fact the tenor of the applications leads this court to conclude that the litigation had more to do with the competitive relationship between BCX and EOH within the industry that they operate. I see no reason why costs should not follow the result.

Order:

1. The applications are dismissed with costs.

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Rabkin-Naicker J

Judge of the Labour Court of South Africa

Appearances:

Applicant: Adv. J du Plessis instructed by Gildenhuys Malatji Incorporated

Respondents: Advs L Hollander and M de Oliveira instructed by Botoulas Krause & Da Silva INC