



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J2126/15

In the matter between:

FESTO (PTY) LTD

Applicant

and

ALLAN, WESLEY

First Respondent

SINGH, SHIVEN

Second Respondent

SMC PNEUMATICS (SOUTH AFRICA) (PTY) LTD

Third Respondent

Heard: 12 November 2015

Delivered: 20 November 2015

JUDGMENT

RABKIN-NAICKER J

[1] The applicant company (Festo) seeks a final interdict to enforce restraint of trade undertakings against its former employees, the first and second respondents, who were both employed by it as sales engineers.

[2] In particular, the applicant seeks to restrain the first and second respondents from:

- 2.1. Soliciting, encouraging or procuring any employee of the applicant, within South Africa, to terminate his/her employment with the applicant;
- 2.2. Dealing with, soliciting, interfering with or endeavouring to solicit away from the applicant, within the Gauteng region in the case of the first respondent and within the KwaZulu-Natal region in the case of the second respondent, any person, firm or company who or which was at date of termination of his employment, a client of the applicant or potential client of the applicant;
- 2.3. Taking up employment, within the Gauteng region and KwaZulu-Natal region respectively, with any competitors who offer a pneumatic range of automation components, including, but not restricted to the following suppliers of electric drivers and motors: the third respondent, Siemens, Tectra (Bosch), Leze, Delta, Allen Bradley;
- 2.4. Directly or indirectly divulging and/or disclosing to the third respondent or any third party, whether natural or juristic, or in any way using and/or exploiting any of the applicant's confidential information, trade secrets, know-how or customer connections, whether orally, in writing or otherwise, concerning or relating to the applicants, its business or its clients."

[3] It was submitted by Mr Malan on the basis of the founding papers that the results of Festo's investment of significant time, effort and financial resources in designing, manufacturing and developing its products and service offerings has been shared with its employees on a regular basis, including its sales engineers (i.e. the respondents) who also regularly received updates and training in this regard together with insight into future product development.

[4] The grounds of the first and second respondents' opposition to this application are that enforcement of the restraints will not serve to protect any proprietary interest of Festo but will rather operate to prevent the first and second respondents from utilising their skills and experience, in the public domain, in SMC's employ. SMC abides the order of this court.

- [5] The background material facts upon which this application is to be adjudicated are gleaned from the papers in terms of the approach set out in *Plascon-Evans Ltd v Van Riebeek Paints (Pty) Ltd*.
- [6] Festo and SMC and provide industrial automation products and solutions in the pneumatics market, on a global basis. Pneumatics is a branch of mechanics which uses compressed gases, usually air, to produce power and motion in various forms of technology. Thus, pneumatic systems utilise the study of pressurized gas to produce a mechanical motion (i.e. movement). Pneumatics is also commonly described as a type of automation control including automation manufacturing.
- [7] Both are international companies that have been engaged in designing and manufacturing pneumatic automated products for many years. They compete with each other on a global basis. In the international market, the SMC has the greater market share but locally Festo is dominant in that it has over 50% of the market share. Until recently, SMC sold its products through a distributor, Hyflo (Pty) Limited. It has now decided to enter the market in South Africa directly.
- [8] Companies within the pneumatics automation industry manufacture and sell standard automated products which customers can purchase directly. They also assist customers in modifying or adapting their standard products to meet the customer's needs as well as designing and manufacturing in conjunction with the customer bespoke products to be used in the customer's industrial processes.
- [9] The products manufactured and sold by Festo and SMC are used by their customers in their industrial processes. Those products are therefore an integral part of the customer's production or manufacturing process and the customers are reliant on the product for the proper functioning of their operations.
- [10] The research and development of new products and the process of customising and tailor-making existing products is carried out at head office level. In the case of the applicant their head office is in Germany and in the case of the third respondent it is in Japan.

- [11] In addition to this, the choice of appropriate products and the use of those products for large global customers such as BMW and Volkswagen who are customers of the applicant and Toyota who is a customer of the third respondent, are all at the corporate head offices.
- [12] For smaller customers, the decision as to which product to use is also often taken at a corporate head office level, albeit that the corporate head office is situated locally.
- [13] The industry presents various barriers-to-entry:
- 13.1 Because of the highly technical nature of the products being sold, the choice of products on the part of customers is not based on or influenced by the relationships which sales engineers have with their customers. It is the need for the pneumatic product itself from a reliable brand or supplier that sells the product, independent from customer relationship influences.
- 13.2. The products which are manufactured by Festo and SMC are used by customers in their processing or manufacturing processes. These processes are stable ongoing processes where the automated product performs a critical role. Once the process is designed and working, unless the automated product fails, it is unlikely that the customer will change the product being used.
- 13.3. Customers choose a supplier such as Festo and SMC based on the products that these suppliers sell. Information on products is available *inter alia*, on the supplier's website and through advertising.
- 13.4 For most customers the choice of a product is dictated by their internal procurement process which limits their range of suppliers to those who registered or certified.
- 13.5 Additional constraints exist by virtue of the stringent approval procedures, including international manufacturing standards which customers must follow to obtain approval to switch from one pneumatics supplier to another. The process of obtaining approval can take between one and two years to

complete, without guarantee of approval. Where a customer already has a preferred supplier, the chances of another supplier being listed as a vendor or preferred supplier are slim.

13.6 Toyota is one of SMC's biggest global customers and it designs and manufactures all the pneumatic automated products that are used by Toyota in all of its factories and vehicles. The design and manufacture is done in Japan and then rolled out on a global basis.

- [14] Further averments in the answering papers which fall to be accepted are that despite the second respondent's long involvement with Toyota during his employment with Festa, he was not able to secure the majority of the business from Toyota which has always been enjoyed by SMC. The only orders which were placed with Festa by Toyota took place when there were long lead times for the SMC's products which were needed urgently. On all other occasions, where SMC's product was available, Toyota would purchase it from SMC.
- [15] On one occasion where one of SMC's cylinders failed and there was no stock available at SMC Toyota placed an order for the cylinder from Festa. But as soon as the third respondent's stock of cylinders arrived in the country, some six weeks later, Toyota removed Festa's cylinder and replaced it with one of SMC's cylinders.
- [16] Brand loyalty is key to the supplier-client relationship and is one of the main influencing factors in suppliers achieving sales with customers in the pneumatics market.
- [17] It is the respondents' case that the relationship which a sales engineer has with a customer plays a very limited role in a customer's decision to purchase a particular product and on its own would never cause a customer to switch from its current product to that of a competitor's. It is submitted that this is exactly why for so many years the applicant did not conclude restraint of trade agreements with its employees, as it recognised that the relationships between employees such as sales engineers and customers did not constitute a recognisable proprietary interest in the form of a customer connection.

- [18] It is undisputed SMC does not require its employees to sign restraint of trade undertakings. On the first and second respondent's submission, the value of a sales engineer to a supplier is the engineering skill and experience which he or she brings to bear to assist clients in finding engineering solutions through the use of the correct product or the adaptation of a product to challenges within the customer's processes.

Employment history of the first and second respondents

- [19] The first respondent was originally employed by the applicant as a didactic sales engineer on 1 March 2013. He was not asked to sign a restraint of trade agreement when he was employed. In paragraphs 13.2 to 13.3 of the founding affidavit, Festo sets out in some detail the first respondent's employment responsibilities and alleged access to confidential information whilst deployed as a didactic sales engineer. It is common cause, however, that the first respondent has not been employed in this capacity for over a year. The first respondent, avers that he will not be employed in SMC's didactic division.
- [20] On 19 June 2014 the first respondent was asked to and did sign a letter of appointment which included a restraint of trade. On 1 August 2014 the first respondent was appointed as a sales engineer in the applicant's industrial automation division. He was employed to service the West Rand region but his geographic area was limited to "Area 108" being the area between Midrand and Krugersdorp.
- [21] The first respondent's day-to-day duties and functions at Festa in this capacity, predominantly consisted of increasing sales to existing customers. They included, *inter alia* -
- 21.1. Making use of the available equipment for demonstrations and customers' expo's with a view to winning sales and a market share;
 - 21.2. Conducting presentations to customers as part of a team selling exercise with systems engineers, other sales engineers or individually;

- 21.3. Documenting and tracking activities with respect to target customers and strategic customers;
 - 21.4. Keeping accurate reports of time spent at customers through the applicant's CRM system;
 - 21.5. Keeping the information on the CRM system up to date at all times and replicated with the server twice a week as required;
 - 21.6. Carrying out the relevant research and development for special applications that may be required by customers from time to time;
 - 21.7. Helping with the design of customer control solutions;
 - 21.8. Attending monthly sales meetings;
 - 21.9. Attending internal training and; training meetings and handling calls from customers with regards to technical and sales queries.
- [22] On 29 September 2015, after having been employed as a sales engineer by Festa for a period of 13 months, the first respondent tendered his resignation and took up employment with the third respondent in November 2015.
- [23] The second respondent commenced employment at Festa in 2006 as a junior sales engineer in Durban. As junior sales engineer his duties included *inter alia*: working with senior sales engineers to grow the applicant's customer base and turnover in the Durban South region and assisting with the management of the portfolio of customers in the Durban South region.
- [24] On 1 July 2010, the second respondent was appointed as a sales engineer in the KZN region. His new contract of employment contained a provision about confidential information but did not restrain his employment at a competitor. The second respondent's day-to-day duties were the same as those of the first respondent.
- [25] On 19 June 2014 the second respondent was asked to and did sign a letter of appointment which included a restraint of trade.

- [26] On 30 September 2015 the second respondent tendered his resignation to the applicant and commenced employment at the third respondent in November 2015.
- [27] In its replying papers Festo underlined that in so far as local customers are concerned, sales engineers such as the first and second respondents have a significant influence over decision making in the procurement of pneumatic automated products. This is why the first and second respondent were so successful and earned substantial commissions whilst employed by the company. Further because both Festo and SMC are reliable brands and reliable suppliers, customer relationships play such an important role among these two direct competitors.
- [28] It is further averred on behalf of Festo that while a sales engineer uses his engineering skills and experience to provide services to a customer client, their role is not limited to this. A sales engineer also uses information proprietary to his or her employer such as sales and marketing strategies, costings and prices as well as his or her customer relationship and knowing a customer's specific needs and requirements in order to render such services to the customer.
- [29] It is also emphasised by Festo that it is not claiming that it is the proprietor of any generic product training that is available in the public domain. It has however invested a substantial amount of time in training the first and second respondents in order to equip them with product information to render services to customers and by doing so build customer relationships. It is further concerned with protection of internal product training on new developments and future products not in the public domain.
- [30] The first and second respondent were also privy to information shared at the Festo 2020 strategy session. At this a sales overview was presented which included major activities planned for 2015-2016; sales project priorities, sales targets and expected business development regarding headcounts and infrastructure. The applicant annexes copies of the presentation outlines to its papers.

The applicable legal principles

[31] The law as it applies to restraints of trade was most usefully summarised by Mbha J in *Experian South Africa (Pty) Ltd v Haynes and Another*¹ as follows:

“Legal principles applicable to agreements in restraint of trade

[12] The *locus classicus* on this subject is *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 897F – 898E, where Rabie CJ summarised the legal position, *inter alia*, as follows:

[12.1] There is nothing in our common law which states that a restraint of trade agreement is invalid or unenforceable.

[12.2] It is a principle of our law that agreements which are contrary to the public interest are unenforceable. Accordingly, an agreement in restraint of trade is unenforceable if the circumstances of the particular case are such, in the court's view, as to render enforcement of the restraint prejudicial to the public interest.

[12.3] It is in the public interest that agreements entered into freely should be honoured and that everyone should, as far as possible, be able to operate freely in the commercial and professional world.

[12.4] In our law the enforceability of a restraint should be determined by asking whether enforcement will prejudice the public interest.

[12.5] When someone alleges that he is not bound by a restraint to which he had assented in a contract, he bears the onus of proving that enforcement of the restraint is contrary to the public interest....

[14] The position in our law is, therefore, that a party seeking to enforce a contract in restraint of trade is required only to invoke the restraint agreement and prove a breach thereof. Thereupon, a party who seeks to avoid the restraint bears the onus to demonstrate, on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable.

[15] The test set out in *Basson v Chilwan and Others supra* at 767G – H for determining the reasonableness or otherwise of the restraint of trade provision, is the following:

¹ 2013 (1) SA 135 (GSJ)

[15.1] Is there an interest of the one party which is deserving of protection at the determination of the agreement?

[15.2] Is such interest being prejudiced by the other party?

[15.3] If so, does such interest so weigh up qualitatively and quantitatively against the interest of the latter party that the latter should not be economically inactive and unproductive?

[15.4] Is there another facet of public policy having nothing to do with the relationship between the parties, but which requires that the restraint should either be maintained or rejected?

[16] In *Kwik Kopy (SA) (Pty) Ltd v Van Haarlem and Another* 1999 (1) SA 472 (W) ([1998] 2 All SA 362) at 484E Wunsh J added a further enquiry, namely whether the restraint goes further than is necessary to protect the interest.”

[32] The question for this court to determine is whether on the facts of this matter, Festo has a protectable interest which is sufficiently deserving of protection and whether any of the other enquiries laid down in *Basson v Chilwan* would lead the court to find the restraints unreasonable.

Is there a protectable interest?

[33] It is well established that the proprietary interests that can be protected by a restraint agreement are of two kinds. The first consists of the relationships with customers, potential customers, suppliers and others that go to make up what is referred to as the 'trade connections' of the business, being an important aspect of its incorporeal property known as goodwill. The second kind consists of all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him, to gain a relative competitive advantage. Such confidential material is sometimes referred to as 'trade secrets'.²

² *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) at 502D – F.

[34] In *Rawlins and Another v Caravantruck (Pty) Ltd*³ Nestadt JA stated that —

'(t)he need of an employer to protect his trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he leaves the employer's service he could easily induce the customers to follow him to a new business'.

[35] Whether information constitutes a trade secret is a factual question. For information to be confidential it must be capable of application in the relevant industry. It must thus be useful and not be public knowledge and property; known only to a restricted number of people or a close circle; and be of economic value to the person seeking to protect it.⁴

[36] It is submitted by the respondents that the information which the applicant alleges constitutes confidential information which was given to the first and second respondents is the following -

36.1. The unique products and service offerings which the applicant has specifically selected and configured to address each client's unique requirements;

36.2. The applicant's business plans, marketing strategies, new product strategies, customer lists, price lists, profit margins, discount structures and costings.

[37] First and second respondent underscore that the products are generic and homogenous amongst competitors in the industry. Each competitor goes through the process of consulting with its clients, modifying and tailor making. The intellectual property relating to any adaptations vests in the customer concerned, not in the applicant.

[38] In as far as second type of confidential information referred to above, the first respondent avers that:

³ 1993 (1) SA 537 (A) at 541C – D

⁴ *Townsend Productions (Pty) Ltd v Leech and Others* 2001 (4) SA 33 (C); *Moss gas (Pty) Ltd v Sasol Technology (Pty) Ltd* [1999] 3 All SA 321 (W) at 333f).

- 38.1. He was not aware of actual specifics of the national business plans or the strategies setting out how the applicant was to achieve these goals;
- 38.2. The applicant had no specific regional plan for the West Rand region where he was deployed;
- 38.3. He was never privy to the development of marketing strategies: his knowledge was limited to being informed about them once the products were being rolled out;
- 38.4. He was only told about new products once they had been developed and made available. He had no input into developing new product strategies;
- 38.5. He only had access to the area 108 customers on the CRM system;
- 38.6. As to price, he only dealt once with a price issue as price is fixed by the applicant's head office;
- 38.7. Any deviation from the discount structure agreed with a customer (which was in any event inserted into the SFA system price list for that customer) would have to be approved by the applicant's management;
- 38.8. He did not have access to the applicant's profit margins;
- 38.9. As to costings, there were over 32 000 products and to obtain access to the costings thereof, the first respondent would have had to obtain access to the SAP system.

[39] The second respondent deals with the second category of alleged confidential information in some detail as well, averring that:

- 39.1. As a junior sales engineer, he had no access to confidential information or trade secrets;
- 39.2. He had no access to a business plan and only knew of marketing strategies when they were rolled out and everyone was informed about them;
- 39.3. As regards price lists, he had access to this through the SAP system, but he only checked the price lists for his customers;

39.4. He did not have access to profit margins and no ability to negotiate discount structures with clients;

39.5 He only had access to the CRM system for his customers in the Durban South region.

[40] The respondents submit that while they accept that certain of the information referred to by Festo may constitute confidential information for Festo, they challenge what purpose the restraints would serve taking account of :

40.1 The limited access that first and second respondents had as to customer base (Area 108 and Durban South Region, respectively);

40.2 The way in which the market has historically been divided up;

40.3 The overwhelming influence of brand loyalties; and

40.4 In the case of the second respondent, his intended deployment in the heartland of the third respondent's existing niche business with Toyota.

[41] In view of the above, Mr Whitcutt submitted that in this regard no purpose would be served by enforcing the restraints to protect confidential information.

[42] Indeed it appears on the papers that Festo has placed most emphasis on customer connections, as a component of its proprietary interest, in its effort to enforce the restraint. Mr Whitcutt for the respondents referred the court to *Aranda Textile Mills v Hurn & Another*⁵ to submit that the proprietary interests sought to be protected must be properly described as belonging to the employer. As explained by Kroon J:

"A man's skills and abilities are a part of himself and he cannot ordinarily be 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 workmen. 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 workmen, 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."

- [43] It was stated in *Rawlins v Caravantruck*⁶ that establishing customer connections depends on the notion that:-

'the employee, by contact with the customer, gets the customer so strongly attached to him that when the employee quits and joins a rival he automatically carries the customer with him in his pocket'.

- [44] Based on the papers before me, and applying the *Plascon Evans* principle, I note that the first respondent was employed as a sales engineer for 13 months and all of the customers with whom he interacted were situated in Area 108 being the area between Midrand and Krugersdorp.

- [45] The second respondent was employed in the Durban South region for 9 years and did forge good relationships with the customers with whom he dealt. He has however been earmarked by SMC to exclusively service Toyota and thus his relationships with his former customers will not endure in his new position.

- [46] Inasmuch as the second respondent did form relationships with Festo's customers in the Durban South region, the respondents rely on the following:

46.1. Decisions about which products to buy or use are taken at head office level (globally in the case of international customers and locally in the case of South African customers), many levels up the corporate ladder from the position of sales engineer;

46.2. Products are tailor-made for specific customers. Once the lengthy process of developing the product has been completed and the product

⁶ 1993(1) SA 537 (AD) at 541 C-H

is working within the customer's business, it is unlikely that a customer would change the product being used;

46.3. Many customers can only buy products from suppliers who are registered and certified, a process which can take up to two years to complete;

46.4. Customer relationships are based on brand loyalty and not on the relationships between individuals employed by suppliers or customers;

46.5. Restraint of trade agreements are not customary in this industry in recognition of the above;

[47] As to the prejudice to be suffered by Festo should the restraints not be upheld I must take into account that it is common cause that six of its former employees have already left its employment and joined SMC before restraints were introduced by Festo. Although these employees may not have been privy to the most recent strategic plans of Festo, all six former employees, (three of whom were managers and one of whom was also a sales engineer) were from the time of taking up appointment free to disclose Festo's information to SMC and to mobilise their customer connections in order to lure customers over to SMC.

[48] Significantly, despite these employees having left several months ago and despite their free reign there is no evidence before me of any of the applicant's customers moving across to the third respondent.

[49] It is further cogently submitted by Mr Whitcutt that as far as the second respondent is concerned, because he will only be servicing Toyota in relation to existing (and historically entrenched) SMC business activities, there can be no infringement of proprietary interests and to enforce the restraint in these circumstances would be disproportionate.

[50] In view of the above, I accept that the first and second respondent's interests in remaining economically productive outweigh any of Festo's interests in its customer connections and confidential information. This is more particularly in view of the following:

50.1 Both the first and second respondent's employment at the applicant was limited to well-defined geographic areas within the province in which they were employed;

50.2 Their restraint of trade agreements restrict any employment with a competitor to the entire province, a geographic restriction which is unreasonably broad. And as has been submitted on their behalf: On what reasonable basis can information be protectable from disclosure to a national organisation when it emanates from KwaZulu-Natal, when the self-same information can freely be disclosed to the same entity by the same ex-employee from Gauteng?

[51] It is my view, given all the above circumstances, that the restraints were primarily directed at protecting Festo from the footprint of a new competitor on the national scene, one looking to employ the skills of South African personnel. Indeed Mr Malan on behalf of Festo submitted that the impending employment of the first and second respondents will advance the business of its competitor i.e. by using Festo's proprietary information as a "springboard" to enter the South African market directly, in a situation in which Festo had dominated that market for the past 42 years.

[52] On the evidence before me, taking into account the work previously performed by the first and second respondents and the work to be performed by them, as well as the issue of geographical scope of the restraints, I find that the enforcement of same would not be in line with public policy and in the public interest.

[53] I therefore make the following order:

Order:

1. The application is dismissed with costs, including the costs of two counsel.

H. Rabkin-Naicker

Appearances:

Applicant: Adv LM Malan

Instructed by: Bowman Gilfillan

Respondents: Adv C Whitcutt SC with Adv J Nicholson

Instructed by: Fasken Martineau

LABOUR COURT