



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J 2345/15

In the matter between:

ANDRITZ DELKOR (PTY) LTD

Applicant

and

GRANT DAVIS

First Respondent

FLSMIDTH (PTY) LTD

Second Respondent

Heard: 10 December 2015

Delivered: 17 December 2015

Summary: Urgent application- employer seeking to enforce a restraint of trade agreement- restraint of trade agreement enforceable if reasonable and not contrary to public policy - employee in position to divulge confidential information or taking employer's customers - employer have protectable interests

JUDGMENT

Nkutha-Nkontwana AJ

Introduction

- [1] This is an urgent application in terms of which the Applicant seeks, by way of final interdict, to enforce the First Respondent's obligations arising from a restraint of trade agreement and to interdict the Second Respondent from employing the First Respondent in breach of her restraint obligations. The restraint period is 24 months commencing from 30 September 2015 and the scope thereof is the whole of South Africa.
- [2] The First Respondent acknowledges signing the restraint, but opposes the application on various grounds. The Second Respondent, on the other hand, is not opposing the application but has provided certain undertakings as to the restrictions on the First Respondent's employment for the duration of the restraint period.

Factual background

- [3] The First Respondent was appointed as an After Market Sales/ Engineer in January 2011. On 1 February 2012, the Applicant and the First Respondent concluded a Restraint of Trade agreement and Assignment of Intellectual Property Agreement ("restraint agreement"). The First Respondent resigned from the Applicant with a month's notice in September 2015. Prior to his departure on 31 September 2015 he attended an exit interview wherein he was advised of and acknowledged his restraint agreement. He indicated that he understood that the restraint agreement could limit his future employability and that it was the Applicant's policy to enforce it, where appropriate.
- [4] The First Respondent refused an offer to meet the Applicant's professional advisors who could have answered his questions on the provisions of the restraint agreement. He also intimated that he understood the Applicant could, in appropriate circumstances, be willing to relax or release him partially or in totally from the restraint.
- [5] In November 2015, a month after the First Respondent's departure, it came to the Applicant's attention that he took employment with the Second Respondent, its direct competitor. The applicant did some investigations and on 11 November 2015 a browse on the First Respondent's LinkedIn profile page was

undertaken and it confirmed that he was employed by the Second Respondent since October 2015.

- [6] A further investigation revealed that in September 2015, prior to his departure, the First Respondent had accessed the Applicant's server and downloaded certain confidential information relating to business strategy, sales strategies, management wheels, plant strategies, client lists and details, and presentations.
- [7] On 12 November 2015, the Applicant's attorneys of record sent a letter to both the Respondents outlining the restraint agreement and the breach thereof. The First Respondent did not respond. Whilst on 19 November 2015, the Second Respondent replied by distancing itself from the restraint agreement whilst alleging that it was unreasonable, unfair and unlawful. On 20 November 2015, the Applicant's attorneys of record made it clear to the Second Respondent that it would approach the court since the Second Respondent failed to make an undertaking that it will terminate the First Respondents' services.
- [8] The Applicant business entails the development of engineering solutions and production and selling of various products and services in the engineering field, including project management. The Applicant manufactures various engineering products which are subsequently distributed and sold to customers worldwide. The applicant's products include belt and screw presses, belt filters, screens, drains, centrifuges, conveying system, disc and drum filters, filter presses, separators, thermal system, thickeners and flocculent systems, media screen panels and linear screens.
- [9] The Applicant has vast array of customers in South Africa and worldwide. The distribution of its products is done in wholesale and retail to various engineering houses and firms within South Africa and worldwide. The Applicant also offers an after-market sale of spare parts and servicing of equipment and parts.
- [10] The First Respondent sold products and aftermarket spares to the Applicant's clients during his employment. It is alleged that whilst in the employ of the applicant, the First Respondent, *inter alia*:

10.1 Established relationship and connections with customers and clients of the Applicant;

10.2 Was exposed to the Applicant's trade secrets, skills and know-how, inventions, costing structures, strategies, supplier lists, customers connections, business strategies, and product lists, all of which were secured and stored on the First Respondent's work computer and synchronised on his laptop; and

10.3 Was required to and did develop relationship with customers, potential customers, suppliers, and potential suppliers of the Applicant.

[11] It is common cause that Second Respondent is categorised as one of the Applicant's competitors in annexure RTA to the restraint agreement.

Jurisdiction

[12] The First Respondent, *in limine*, challenged the jurisdiction of this Court to enforce restraint of trade agreement in the present matter on the grounds that it was concluded a year after his employment and that it was not linked to his contract of employment. In his written submissions, the Counsel for the First Respondent contends the fact that the restraint of trade agreement is related to the First Respondent's employment and does not bring the matter within the jurisdiction of the labour Court. To fall within the jurisdiction of the Labour Court, the restraint must form part of or at least be related to the contract of employment, not to the employment relationship generally, so it was contended further.

[13] Clearly, the First Respondent misconstrued the provisions section 77(3) of the BCEA, which provides the following:

"The Labour Court has concurrent jurisdiction with the Civil Courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract."

- [14] In *University of the North v Franks*,¹ referred to with approval in *Rand Water v Stoop & another*,² the LAC opined that there was no indication that section 77(3) was enacted solely to solve the so-called dual claims problem. It noted that section 77(1) grants exclusive jurisdiction to the Labour Court in certain matters, but:

“Section 77(3) goes much wider. It expressly also deals with employment contracts which have no statutory basic conditions and thus fall outside the scope of the Act. Consequently, the legislature had in mind that the Labour Court should also have jurisdiction in such matters ... In short, the Labour Court is to have jurisdiction in respect of all employment contracts and exclusive jurisdiction in respect of some. But the jurisdiction is even wider. It is in respect of any matter concerning a contract of employment... [including] termination of an employment contract and the terms and conditions upon which this is to occur”, it was held, ‘are clearly matters concerning such contract.’” [Emphasis added]

- [15] Moreover, in *Rand Water*, dealing with contention that Labour Court’s jurisdiction in terms of section 77(3) is limited the terms of a contract of employment expressly provided for therein, the LAC held conclusively that:

“...the argument that s77(3) of the BCEA only permits the Labour Court to interpret the terms of an employment contract and enforce it, is neither reasonable nor logical. This is demonstrably clear when regard is had to s77A(e) of the BCEA which sets out the remedy the Labour Court may grant in respect of a dispute referred to it in respect of a dispute arising out of an employment contract. Secondly, the meaning ascribed to the word “concerning” in the relevant phrase in s77(3) is acceptable save that attributing “having proximity to”, to the word “concerning” cannot be correct. The word “concerning” while conveying a cause and effect does not convey a meaning that some causes and effects are acceptable and others not or that there has to be

¹ [2002] 8 BLLR 701 (LAC)

² (2013) 34 ILJ 576 (LAC) para 20-21.

a direct or indirect link between the contract of employment and the claim.”

[16] In the circumstances, the Court is absolutely clothed with the necessary jurisdiction to hear the present matter.

Urgency

[17] The restraint agreement the Applicant seeks to enforce is for a period of 24 months. The Applicant is accused of squandering its urgency. According to the First Respondent, the Applicant should have approached the court earlier than it did. I do not agree. Given the context of this matter, the Applicant should be commended its attempts to avoid litigation, rather than rushing to court as a first option.³

[18] In my view the delay is negligible and in any event, the breaches of restraint of trade have an inherent quality of urgency.⁴

The applicable legal principles

[19] Public policy dictates that agreements entered into voluntarily are binding and enforceable. Agreements in restraint of trade voluntarily entered into pursuant to one's right to freedom to contract, are thus valid and enforceable unless the party seeking to escape this agreement can show that the agreement is unreasonable and therefore contrary to public policy.⁵

[20] Therefore, an agreement in restraint of trade will generally be considered unreasonable, and thus contrary to public policy, if it does not protect some legally recognisable interest of the party seeking to enforce it, but merely seeks to eliminate competition. A party seeking to enforce a restraint must invoke the restraint agreement and prove its breach. A respondent who seeks to avoid the

³ *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes and Another* (J 2073/11) [2011] ZALCJHB 150.

⁴ *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another* 2009 (3) SA 78 (C) 89A.

⁵ *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at paragraph [10]; *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) and *Hirt & Carter (Pty) Ltd v Mansfield and Another* 2008 (3) SA 512 (D)1 at paragraph [39]].

restraint bears an *onus* to demonstrate, on a balance of probabilities, that the restraint is unenforceable because it is unreasonable.⁶

[21] In applying the test set out in *Basson v Chilwan*,⁷ for determining the reasonableness, the following questions must be asked:

- (a) Is there an interest of the one-party which is deserving of protection?
- (b) Is that interest prejudiced by the other party?
- (c) If so, does that interest weigh up qualitatively and quantitatively against the interest of the latter party that he or she should not be economically inactive and unproductive?
- (d) Is there another facet of public policy that requires that the restraint should be maintained or rejected?

[22] Proprietary interests that are worthy of protection are essentially of two kinds, namely:

- (a) confidential matter that could be used by a competitor to gain a competitive advantage, usually referred to as “trade secrets”; and
- (b) relationships with customers, potential customers, suppliers and others that go to make up what is referred to as the “trade connections” of the business.⁸

Disputes of fact in motion proceedings is applicable

[23] In restraint of trade proceedings, it is expected of the Applicant to anticipate a material factual dispute from the beginning and accordingly request for the matter to be referred to oral evidence as an alternative prayer.⁹ However, there is no such request in the present application.

⁶ *New Justfun Group (Pty) Ltd v Turner & Ors* [2014] LALCJHB 177 (14 May 2014).

⁷ 1993 (2) SA 742 (A).

⁸ *Sibex Engineering Services (Pty) Ltd v Van Wyk* 1991 (2) SA 482 (T).

⁹ *Singh v Adam* (2006) 27 ILJ 385 (LC) at para 15 -16.

- [24] In *Jonsson Workerwear (Pty) Ltd v Williamson and Another*,¹⁰ Snyman AJ amply dealt with this issue and stated that:

“The normal principles to resolve factual disputes in motion proceedings where final relief is sought was enunciated in the now regularly quoted judgment of Plascon Evans Paints v Van Riebeeck Paints. In Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another this test was most aptly described, where the Court said: ‘The applicants seek final relief in motion proceedings. Insofar as the disputes of fact are concerned, the time-honoured rules are to be followed. These are that where an applicant in motion proceedings seeks final relief, and there is no referral to oral evidence, it is the facts as stated by the respondent together with the admitted or undenied facts in the applicants’ founding affidavit which provide the factual basis for the determination, unless the dispute is not real or genuine or the denials in the respondent’s version are bald or uncreditworthy, or the respondent’s version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that the court is justified in rejecting that version on the basis that it obviously stands to be rejected.’ [Footnotes excluded]

- [25] I align myself with the legal principles contextualised above. However, in the present matter there are no real disputes of fact and as such, a relief could still be granted on the authority of *Plascon-Evans*.

Protectable proprietary interest

- [26] It is trite that the Applicant seeking to enforce the restraint of trade must show the existence of the contract and that there has been a breach thereof. In the present matter, the existence of in restraint of trade agreement is common cause. However, the First Respondent disputes that he is in breach of the restraint.

- [27] In the present matter, the First Respondent occupied a sales position at a reasonably senior level for almost five years and indeed it is inescapable that he must have had access to and must have developed relationships with the

¹⁰ (2014) 35 ILJ 712 (LC) at paras 9 – 10.

Applicant's customers. The First Respondent, however, asserts in his answering affidavit that the Second Respondent's division where he is currently employed deals with media screens and does not compete with the Applicant.

[28] The First Respondent's assertion is untenable in the light of the fact that Applicant's list of its products includes screens. Despite the Second Respondent being a listed competitor in the restraint agreement, the First Respondent still took up employment with it.

[29] In *Experian South Africa (Pty) Ltd v Haynes and Another*¹¹ the court, referring with approval to *Rawlins and Another v Caravan Truck*, stated that:

"In Rawlins and Another v Caravan Truck (Pty) Ltd [1992] ZASCA 204; 1993 (1) SA 537 (A) at 541C-D Nestadt JA, dealing with the issue of a party's relationship with customers, stated that the 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. The learned judge referred to Heydon The Restraint of Trade Doctrine (1971) at 108, where it is stated that the "customer contact" doctrine depended 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". In Morris (Herbert) Ltd Saxelby (1916) 1 AC 88 (HL) at 709, it was said that the relationship must be such that the employee acquires "... such personal knowledge of and influence over the customers of his employer ... as would enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer's trade connection ..."

As I have pointed out above, the onus is on the respondent to prove the unreasonableness of the restraint. He must establish that he had no access to confidential information and that he never acquired any significant personal knowledge of, or influence over, the applicant's customers whilst in the applicant's employ. It suffices if it is shown that trade connections through customer contact exist and that they can be exploited if the former employee were employed by a competitor. Once that conclusion has been reached and it

¹¹ [2012] ZAGPJHC 105; 2013 (1) SA 135 (GSJ); (2013) 34 ILJ 529 (GSJ) at para 18 -20.

is demonstrated that the prospective new employer is a competitor of the applicant, the risk of harm to the applicant, if its former employee were to take up employment, becomes apparent.”¹²

- [30] I am, accordingly, of the view that the Applicant has indeed a protectable interest. Also, the First Respondent is indeed in a position to act to the detriment of the Applicant and that his loyalty will be to his new employer and the opportunity to access the Applicants’ clients and/or disclose confidential information at his disposal, whether deliberately or not, does exist.

Weighing of interests

- [31] Last, but not least, the issue for consideration is how the Applicant’s interest weighs qualitatively and quantitatively against the interest of the First Respondent to be economically active and productive.
- [32] The Counsel for First Respondent contended that the Applicant failed to demonstrate a protectable interest that would justify the harsh terms of the order it seeks, which would effectively remove the First Respondent from the entire mining services for two years industry. Also, that the First Respondent’s right to earn a living in the area of his chosen profession would be severely restricted when the undertakings provided by the Second Respondent should suffice in protecting the Applicant interest.
- [33] The First Respondent concedes in his answering affidavit that he did not disclose his prospective employer or avail himself to the offer to discuss his restraint during the exit interview. That was so despite the facts that the restraint agreement specifically lists the Second Respondent as a competitor. I agreed with the Applicant’s Counsel that it would have been a most sensible thing to do if First Respondent was genuinely of the view that his employment with the Second Respondent would not be in breach of his restraint.
- [34] In my view, the Second Respondent’s undertaking will be of no avail. I endorse with the dictum in *Experian* that:

¹² See also an unreported decision of the Labour Court by Van Niekerk J under case number J786/14 delivered on 14 May 2014.

“The ex-employer seeking to enforce against his ex-employee a protectable interest recorded in a restraint, does not have to show that the ex-employee has in fact utilised information confidential to it: it need merely show that the ex-employee could do so. The very purpose of the restraint agreement is to relieve the applicant from having to show bona fides or lack of retained knowledge on the part of the respondent concerning the confidential information. In these circumstances, it is reasonable for the applicant to enforce the bargain it has exacted to protect itself. Indeed, the very ratio underlying the bargain is that the applicant should not have to contend itself with crossing his fingers and hoping that the respondent would act honourably or abide by the undertakings that he has given. It does not lie in the mouth of the ex-employee, who has breached a restraint agreement by taking up employment with a competitor to say to the ex-employer “Trust me: I will not breach the restraint further than I have already been proved to have done”.¹³

The public interest

[35] Finally, the public interest dictates that I interrogate the reasonableness of the restraint period. Better still, clause 2.7 of the restraint agreement empowers the court to reduce the ‘the area and/or duration to and area or duration that it regards reasonable, having regard to the contentions of the Company and the employee’. Accordingly, it is my view that the restraint period of 24 months is too wide given the fact that the restraint applies nationally. In the public interest, I deem it appropriate to restrict the restraint period to a period of 12 months.

Conclusion

[36] In the circumstances, I am satisfied that the Applicant is entitled to final relief as sought as it has shown a clear right which is being infringed by the First Respondent in commencing employment with the Second Respondent, in breach of the restraint agreement, on 1 October 2015; and that an injury therefore has been committed or is reasonably apprehended; and no other satisfactory remedy is available.¹⁴

Costs

¹³ Above n 12 at para 22.

¹⁴ Setlogelo v Setlogelo 1914 AD 221.

[37] On costs, there is no reason why costs should not follow the result.

Order

[38] I accordingly make an order in the following:

1. The First Respondent is interdicted and restrained from being employed by or associated with the Second Respondent within the Republics of South Africa for a period of 12 (twelve) months from 30 September 2015 to 30 September 2016.
2. The First Respondent is interdicted and restrained from being employed by or associated with any entity (including the Second Respondent) which conducts activities in completion with the Applicant for a period of 12 (twelve) months from 30 September 2015 to 30 September 2016.
3. The First Respondent is interdicted and restrained from being employed by or associated with the supplier to the Applicant within the Republic of South Africa for a period of 12 (twelve) months from 30 September 2015 to 30 September 2016.
4. The First Respondent is interdicted and restrained from encouraging and/or enticing any employee of the Applicant to terminate his or her employment with the applicant.
5. The First Respondent is interdicted and restrained for period of 12 (twelve) months from 30 September 2015 to 30 September 2016 from:
 51. Furnishing any advice or information or advise customers of the Applicant that he intends to or will, directly or indirectly, be interested or engaged in or concerned with or employed by entity in the Republic of South Africa which sells products or in the course of which products are sold after the expiry of the restraint period; and

5.2 Furnishing any advice or information or advise customer or supplier or using any other means or taking any other action which is directly or indirectly designed, or in the ordinary course of events calculated, to result in such customer or supplier terminating its association with the Applicant or transferring its business to or purchasing any products or services from any person other than the Applicant.

6. The First Respondent is ordered to pay the Applicant's costs.

Nkutha-Nkontwana AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

FOR THE APPLICANT: Mr D Morgan

Instructed by: McLarens attorneys

FOR THE RESPONDENTS: Advocates G Fourie

Instructed by: Hogan Lovells (SA) Attorneys

LABOUR COURT