



REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 649/2015

In the matter between:

SIGN AND SEAL TRADING 154 (PTY) LTD

t/a DAVIDSON'S DISCOUNT BOARDS

APPLICANT

and

ROCHELLE SEBASTIAN

FIRST RESPONDENT

SPECTACULAR TRADING CC t/a

BORDWORX

SECOND RESPONDENT

Heard: 18 September 2015

Delivered: 30 September 2015

JUDGMENT

VAN NIEKERK J

Introduction

- [1] The first respondent was employed by the applicant in 2001. She resigned on 22 May 2015 and commenced employment with the second respondent on 2 July 2015. The applicant and the second respondent are competitors. In this application, brought on an urgent basis, the applicant seeks to enforce restraint and confidentiality undertakings given by the first respondent in its favour, against both her and the second respondent.
- [2] Neither of the respondents disputes that if the restraint is valid, the first respondent's employment by the second respondent would breach the terms of the restraint agreement. In essence, the application turns on whether the restraint agreement is valid and enforceable.

Jurisdiction and *locus standi*

- [3] The respondents raised a number of preliminary points. Not all of these were pursued at the hearing of the application. Notably, those points in relation to the onus of proof, duress and urgency were either expressly abandoned or not advanced. The primary points persisted with relate to the jurisdiction of the court to hear the application, and the applicant's *locus standi* to sue.
- [4] The respondents contend that the court lacks the requisite jurisdiction to entertain the application since s 77 (3) of the Basic Conditions of Employment Act, 75 of 1997 (BCEA), confers jurisdiction on this court only to determine matters concerning a contract of employment. They do so on the basis that the

restraint agreement in question is not an agreement between the first respondent and the applicant, her erstwhile employer. The respondents also contend that the restraint agreement was concluded between the first respondent and an entity that is a party other than the applicant, i.e. Kaydav Group Limited (Kaydav). It is not disputed that the applicant is a subsidiary of Kaydav, but in the respondents' submission, this does not make it a party to the restraint agreement and the applicant accordingly lacks any contractual basis on which it can sue.

- [5] There is of course a conceptual overlap between the jurisdictional and *locus standi* points referred to above. The single issue raised by both points is whether the restraint agreement can be enforced by the applicant (a subsidiary company of Kaydav Group Ltd) where the agreement is concluded in favour of the latter. The answer to that question, in my view, is to be determined by reference to the wording of the agreement itself.
- [6] The signatories to the restraint agreement are Kaydav Group Limited and the first respondent. The agreement was signed by the first respondent on 29 September 2014, and on behalf of the Kaydav Group Ltd on 23 October 2014. That part of the agreement which restrains the first respondent from entering into employment with the applicant's competitors after the termination of her employment with the applicant reads follows:

3.2.4 On Employment

3.2.4.1 On the basis of the acknowledgements contained in clause 3.1.2, the Employee agrees that it is firm reasonably necessary for the protection of the Company's and/or the Group's business and proprietary interests that she should be restrained from competing with the business actively carried on by the Company and the Group for a reasonable period.

3.2.4.2 The employee accordingly undertakes not, (unless otherwise agreed to by the company in writing):

3.2.4.2.1 At any time while she is employed in any capacity by the Company or the Group; and

3.2.4.2.2 should she leave the employ of the company with the group, for a period of 12 months after the date upon which her employment terminates, to be interested or engaged, whether directly or indirectly, and whether as proprietor, partner, shareholder, member, director, employee, Employee (sic), employee, agent, consultant or otherwise, in any firm, business or agreement which carries on any activity, either solely or in conjunction with any other party, in competition with the business actively carried on by the company or the group at the date on which employment terminates, including but not limited to, the business of the wholesale and retail distribution, upgrading and value adding to any wooden board panel products (and related products), any product manufactured or sold by Sonae Novoboard, Masonite, William Tell and PG Bison, any imported wooden board panels and related products.

[7] Also relevant for present purposes is clause 3.2.6.3. That clause reads as follows:

'The Employee agrees that the undertakings furnished in that terms of this agreement are given to each of the companies which form part of the Group on its behalf and for the benefit of its successors in title and assigns. Accordingly, the provisions of this agreement shall be construed as separate stipulations in favour of each of such companies, its successors in title and assigns, each of which shall be capable of accepting the rights conferred by this agreement at any time by written notice to that effect to the Employee.

[8] In consideration for the restraint undertaking, the applicant agreed to pay the first respondent a restraint payment, payable monthly in arrears, together with the first respondent's monthly remuneration. It is not disputed that a letter was addressed to her headed 'Confirmation of appointment' which recorded, amongst other things:

'Kindly ensure that you sign the Restraint of Trade as it forms part of your conditions of employment. All your other terms and conditions of employment will remain the same.'

- [9] The letter was addressed to the first respondent on a letterhead of 'Sign and Seal Trading 154 (Pty) Ltd t/a Davidson's Manufacturing', reflected as a subsidiary of Kaydav Group Ltd. Although the first respondent endorsed the foot of the letter with the following '*Hi Please relook as companies made me much better offers then this (R5000-00 more)*' (sic), it is not disputed that she accepted the new terms introduced by the letter and that an additional amount of R3000.00 per month was paid to her in consideration for the restraint.
- [10] In clause 2 of the agreement, the "Company" is defined as Kaydav Group Ltd. The 'Group' is defined to mean 'the Company' and all of the subsidiaries and associated companies of the Company, from time to time... (emphasis added).
- [11] The respondents contend that the restraint has two parties – 'the Company' (defined as Kaydav) and the 'Employee', being the first respondent. The applicant, a separate legal entity, is not a party to the agreement, nor did it become so by virtue of its relationship with Kaydav. Further, they contend that the applicant's inclusion in the definition of 'Group' is of no consequence. 'Group' is not a party to the agreement – the agreement was not signed between the 'Group' and the first respondent; the agreement is one concluded between 'the Company' (Kaydav) and the first respondent. To the extent that the agreement contemplates that certain rights enforceable by Kaydav may benefit the applicant, the respondents submit that the terms of the agreement are such that the applicant ought necessarily to have accepted the offer to contract with the first respondent in terms of clause 3.2.6.3 of the restraint agreement.
- [12] The court is required to describe a sensible meaning to the agreement which is consistent with the apparent purpose of the document. The starting point is the language of the document itself, but this should be construed in the light of its

context, the apparent purpose to which it is directed and the material known to those responsible for its production. In other words, the purpose of the document and the background to its production are fundamental to the process of interpretation. (see *Natal Joint Municipal Pension Fund v Ndumeni Municipality* 2012 (2) SA 593 (SCA) and *Dex Group v Trust Group Co Group International* 2013 (6) SA 520 (SCA)). As I have indicated, clause 2.1.3 of the restraint agreement defines 'Group' to mean the company and all of its subsidiaries and associated companies. The terms of the various restraints contained in the agreement are in favour of the company and all the group. Clause 3.1.2.7.1 specifically provides that the provisions of the restraint agreement must be construed as imposing a separate and independent restraint in respect of each of the companies which form part of the group. This being so, sensible construction of the agreement is that the applicant, a subsidiary of Kaydav, is the beneficiary of a separate and independent restraint established by the terms of the agreement. In short, it is clear from the terms of the agreement that the designation of the "Group" as the principal contracting party is a matter of convenience as to ensure uniform restraint agreement applicable in all of the group's subsidiary and associated companies. The applicant's intention to exercise the rights conferred on it under the restraint agreement evident from the wording of the restraint, the applicant's letters of appointment in the circumstances in which the documents were signed.

- [13] Even if clause 3.2.6.3 would be construed so as to require separate written notice by any company, such as the applicant, which forms part of the group so as to accept the rights conferred by the restraint agreement, I am satisfied that the written notice given in terms of the replying affidavit is adequate notice of acceptance of the rights conferred by the agreement on the applicant and that the applicant accordingly has locus standi to sue on the agreement.

- [14] In my view, for the above reasons, in my view, this court has jurisdiction (by virtue of s 77 (3) of the BCEA to entertain the present application, and the applicant has locus standi to sue.

The applicable legal principles and the merits

- [15] The respondents contend that even if the court finds that the applicant is a party to the restraint agreement and that the agreement was validly incorporated into the first respondent's contract of employment, the application should fail because the restraint agreement is unduly wide and oppressive and because the applicant lacks any interest worthy of protection. In other words, the respondents contend that any agreement found to exist between the applicant and the first respondent is unreasonable.
- [16] It is well-established that an agreement in restraint of trade is enforceable unless it is unreasonable, and will generally be considered unreasonable, and thus contrary to public policy, if it does not protect some legally recognisable interest of the party in whose favour the restraint is granted, but merely seeks to eliminate competition (see *Automotive Tooling Systems (Pty) Ltd v Wilkens & others* 2007 (2) SA 271 (SCA), *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 406 (SCA), *Den Braven v Pillay & another* 2008 (6) SA 229 (D)).
- [17] A party seeking to enforce a contract in restraint of trade is required only to invoke the restraint and to prove a breach of its terms. Once a restraint agreement has been invoked and a breach of the agreement proved, the onus is on the respondent to prove on a balance of probabilities that the restraint agreement is unenforceable because it is unreasonable (see *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874 (A)).

- [18] In *Basson v Chilwan* 1993 (2) SA 742 (A), the court held the determination of the reasonableness or otherwise of a restraint requires, in addition to the existence of an interest deserving of protection, a consideration of the following:
- (a) whether that interest is being prejudiced by the other party;
 - (b) if so, whether the interest weighs up qualitatively and quantitatively against the interest of the latter party that he or she should not be economically inactive and unproductive; and
 - (c) whether there are any considerations founded in public policy which require that the restraint should either be maintained or rejected (at 767 G-H).
- [19] Proprietary interests that are legitimately capable of protection by a restraint agreement extend both to confidential matters which are useful for the carrying on of the business and which could be used by a competitor, if disclosed, to gain a relative competitive advantage, and to relationships with customers, potential customers, suppliers and others that go to make up what is referred to as the 'trade connection' of the business. The second kind of proprietary interest capable of protection is that which comprises confidential matter useful for the carrying on of the business, and which could be used by a competitor, if disclosed, to gain a relative comparative advantage. These are referred to as 'trade secrets' (see *Sibex Engineering Services (Pty) Ltd v Van Wyk* 1991 (2) SA 482 (T)).
- [20] Not every contact between an employee and the employer's customers constitutes or forms the basis of a protectable interest in the form of customer connection. The need of an employer to protect a trade connection arises where the employee has access to customers and is in a position to build up a particular relationship with the customer. It is sufficient for the applicant to show that the customer contacts exist and that they can be exploited by the former employee. In *Rawlins v Caravan Truck (Pty) Ltd* 1993 (1) SA 537 (A) at 541 C-D it was said that the need of an employer to protect its trade connections arises where the

employee has access to customers and is in a position to build up a particular relationship with the customers, and could easily induce the customers to follow him or her to a new business. Once that conclusion has been reached and it is demonstrated that the prospective new employer is a competitor of the applicant, the risk of harm to the applicant if its former employee would take up employment becomes apparent.

[21] As the Labour Appeal Court recently observed in *Ball v Bambela Bolts (Pty) Ltd & another* [2013] 9 BLLR 843 (LAC), the enforceability of the restraint essentially hinges on the nature of the activity that is prevented, the duration of the restraint, and the area of operation of the restraint. The court also emphasised that the determination of reasonableness in essence, is a balancing of interests to be undertaken at the time of enforcement and includes a consideration of the nature, extent and duration of the restraint and factors peculiar to the parties and the respective bargaining powers and interests (see paragraph 17 of the judgment).

[22] In the present instance, it is not disputed that:

- (a) the first respondent signed the restraint agreement, incorporating those clauses which correspond with the relief sought in the notice of motion;
- (b) the first respondent resigned from the applicant's employ to take up employment in a similar position with the second respondent; and
- (c) the applicant and the second respondent are competitors.

[23] It follows that in order for the first respondent to escape enforcement of the restraint, it is incumbent on her to establish that the restraint agreement is unreasonable. It is not disputed that the first respondent had been employed by the applicant for some 14 years. It is also not seriously disputed that she knew the names of the applicant suppliers, the contractual agreements and arrangements between the applicant and its suppliers, the materials that the

suppliers were able to supply, the quality and availability, the manufacturing methods used by the applicant and the names of the applicant's customers and their specific requirements and preferences. It is not sufficient, as the first respondent is done, simply to assert that she would not have had knowledge of all that the applicant claims that she knew. The principles outlined above make it clear that all the applicant need to show is that there is confidential information to which the first respondent had access and which, in theory, she could transmit to the second respondent should she wish to do so.

- [24] In the answering affidavit, the applicant does not dispute that she has made contact with a number of the applicant's customers to solicit business on behalf of the second respondent. The first respondent's stance would appear to be that she has no intention of complying with the contractual obligations contained in the restraint agreement as she does not regard them as binding. In the circumstances, in my view, there is a clear and substantial threat to the respondent's predictable interests which are being prejudiced by the first respondent's conduct.
- [25] Of some significance is the provision for a restraint payment. The undisputed evidence is that the first respondent had at least three meetings with members of the applicant's management or with its consultants at which the nature and content of the restraint of the restraint agreement were explained. The first respondent was offered an additional amount of R 3000 per month on condition that she accepted the terms of restraint. The first respondent signed the document and accepted the payment. Further, the restraint is narrowly tailored both in respect of time and area to protect the applicant's legitimate interests. Insofar as the prejudice to the applicant weighs up as against the first respondent's interest in being economically productive, the first respondent has not made out a case to show why she, as an obviously skilled and experienced salesperson, could not obtain employment pending the expiry of the restraint with an employer does not compete with the applicant. In my view, the threat to the

applicant's predictable interests far outweigh the interest which the first respondent may have in continuing to be employed by the second respondent. The second respondent's contention that it would be prejudiced by losing a third salesperson (in the form of the first respondent) can hardly weigh heavily since this is not the sort of prejudice ordinarily considered in the present context.

[26] Insofar as costs are concerned, there is no reason why costs should not follow the result. This is not one of those cases (such as *Ball v Bambela Bolts* referred to above) in which the court set aside a costs order made against an individual employee labouring under a misperception as to the nature and extent of the restraint and not in a position to afford legal representation. There is no reason in the present instance why the applicant should not be entitled to its costs nor why a costs order ought not to be made jointly and severally as against both respondents.

I make the following order:

1. The first respondent is interdicted, until 30 June 2016, from:
 - 1.1 being interested or engaged, whether directly or indirectly, and whether as a partner, shareholder, member, director, employer, employee, agent consultant or otherwise, in the second respondent or any firm, business or agreement which carries on any activity, solely or in conjunction with any other party, in competition with the business actively carried on by the applicant or the Kaydav Group including but not limited to, the business of the wholesale and retail distribution, upgrading and value adding to any wooden board panel products and related products;
 - 1.2 approaching the applicant's suppliers, customers and clients with a view to soliciting them to procure any goods or services supplied by the applicant or the Kaydav Group at the date of the termination of employment with the applicant, from the second respondent or any other competitor of the applicant of the Group.

2. The first respondent is ordered to keep secret and holding confidence and not to disclose, divulge or pass on to any other third party any information, documentation or other data which has come to the knowledge, or which she may have received or come into possession of by virtue of her employment with the applicant.
3. The second respondent is interdicted and restrained, until 30 June 2016, from employing or associating with the first respondent as an employee, manager or agent or being otherwise engaged in or being concerned with the first respondent in breach of the restraint of trade agreement between the applicant and the first respondent.
4. The first and second respondents are to pay the costs of the application, jointly and severally, the one paying the other to be absolved.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicant: Adv. Colin Kahanowitz SC, instructed by Webber Wentzel

For the first and second respondents: Adv. BL Studti, instructed by Bellairs Solomons