



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 2553/15

Reportable/Not Reportable

In the matter between:

HIGH TECH MEDICAL SERVICES CC

Applicant

and

CLINTON OBERHOLZER

First Respondent

AKACIA HEALTH CARE (PTY) LTD

Second Respondent

Heard: 23 December 2015

Delivered: 05 January 2016

JUDGMENT

MOLAHLEHI, J

Introduction

- [1] This is an urgent application in terms of which the applicant seeks an order enforcing the restraint of trade and confidential undertaking agreement made with the first respondent. The restraint of trade is for a period of 12 months.
- [2] The first respondent opposes the application essentially on the ground that the restraint is invalid for the following reasons:
- the restraint is unreasonable in that the applicant has no proprietary interest which is capable of protection.
 - the applicant waived its right to enforce the restraint of trade agreement when it accepted his undertaking made after leaving the applicant's employment.
 - he was not in breach of the undertaking he made after joining the second respondent
 - that the confidential information which the applicant relies on is readily available in the Internet
 - that he had extensive knowledge of the flexible endoscopic equipment before joining the applicant
 - that the training he received from the applicant was only for two days.
 - that he was not involved in the pricing of products.

Background facts

- [3] The applicant conducts its business of distributing Flexing Endoscopic fuji film in various provinces in South Africa. The business includes training and repairs of the high medical equipment which the applicant distributes to various hospitals and private medical practitioners in the country. The applicant is one of the four high-tech medical companies operational in the in South Africa and currently provides its services and supply its product to the following hospitals:
- (a) Netcare Mediacross
 - (b) Mediclinic group of hospitals
 - (c) Life Health Care group of hospitals

- [4] The applicant also performed the function of processing applicants for government tenders.
- [5] The first respondent was prior to his resignation employed as a sales representative. He resigned after working for applicant for a short period of seven months. After his resignation he immediately joined the second respondent, a competitor to the applicant as an employee.
- [6] According to the applicants the sales representatives, such as the first respondent, undergo training before they could be allowed to conduct demonstrations and presentations to the various clients of the applicant. They would only be allowed to conduct demonstrations and presentations once they had undergone the training and Mr Vosloo was satisfied that the particular employee has mastered the skill.
- [7] The applicant says that because of the training he received from it the first respondent became versed in the following skills:
- 'a) The specification of the products
 - b) The advantage of the product when compared to those of the two opponents of the Applicant.
 - c) How the opposition operated and which products the promoted and marketed,
 - d) Was equipped to do a comparative study to use during presentation and demonstrations,
 - e) Was duly knowledgeable about the technology used in the products marketed by the Applicant,
 - f) Was thoroughly aware and trained on the pricing and price lists of the Applicant.'
- [8] The other point made by the applicant in its founding affidavit is that the first respondent often arrived early at work and during that period he would be alone in the office and would then have access to the following information:
- 'a) all the data
 - b) quotations,
 - c) price structure and lists,

- d) client basis and their individual and specific needs and requirements,
- e) potential clients and their needs,
- f) state and other tenders.'

[9] On 11 November 2015 the applicant's attorneys addressed the letter to the second respondent confirming that after resigning from the applicant the first respondent took employment with it (second respondent) and further reminded it of the restraint of trade agreement with the applicant. The letter further require of the second respondent to give an undertaking that would not breach the terms of his contract with the applicant.

[10] The second respondent's attorneys responded to the above letter the following day 12 November 2015 and amongst other things made the following undertaking:

'9 Without detracting from what is set out above, our client has instructed us that it would not-

9.1 receive or accept any of your client's confidential information (properly so-called) from Mr Oberholzer for any purpose whatsoever;

9.2 instruct, request or permit Mr Oberholzer to impart relay, divulge or disclose any of your client's confidential information to any of its employees or representatives. On the contrary (and without conceding that such confidential information exists) our client has instructed Mr Obeholzer not to do so.'

[11] On 19 November 2015 the first respondent's attorneys addressed a letter to the applicant's attorneys and amongst other things made an undertaking on behalf of the first respondent in the following terms:

'7. Without detracting from what is set out above, our client has instructed us that he will not:

7.1 utilise distribute any of your client's confidential information for any purpose whatsoever;

7.2 impart, relay, divulge or disclose any of your client's confidential information to Akacia or its representatives.'

- [12] The incident that gave rise to the present proceedings arose on 19 November 2015 when the applicant noticed a flyer from the first respondent at one of its customers. The flyer contained the details of the first respondent. The second incident occurred on 7 December 2015 when the first respondent attended a presentation by the employees of the applicant at Milpark hospital.

The requirements of final relief in an urgent application

- [13] The applicant in the present matter is seeking a final interdict and therefore in order to succeed it had to satisfy the following requirements:

- (a) a clear right
- (b) an injury which was actually committed or one which is apprehended
- (c) That there is no other satisfactory remedy to protect its interests.

- [14] The other key requirement involves the applicant satisfying the requirements of rule 8 of the Rules of this court which requires an applicant in an urgent application to set out in the founding affidavit the following:

- (a) The reason for agency and why an urgent relief is necessary
- (b) The reasons why the requirements of the rules were not complied.

- [15] In *National Mineworkers Union v Black Mountain- a division of Anglo Operations Ltd*,¹ the Court held that:

‘Only once an applicant has persuaded the court that sufficient grounds exist which necessitates a relaxation of the rules and ordinary practice, will the court proceed to consider the matter as one of agency. The extent to which the court will allow the parties to dispense with the rules relating to the period will depend on the degree of agency in the matter.’

- [16] The general principles governing restraint of trade are summarized by this Court in *SPP Pumbs (South Africa) Pty Ltd v Stoop and Another*,² in the following terms:

- a. ‘The restraint of trade agreement is an enforceable contract.

¹ (2007) 28 ILJ 2796 (LC) at paragraph 12.

² [2014]ZALCJHB 453.

- b. The restraint of trade is enforceable if it protects legally recognized interests of the party seeking to enforce it.
- c. The restraint of trade is unenforceable if it is unreasonable and contrary to public policy.
- d. The restraint of trade is unenforceable if it merely seeks to limit competition.'

[17] It was also stated in that case that the onus to establish the existence of the restraint of trade agreement rests with the party seeking the enforcement including the breach thereof. Thereafter the onus rests on the party resisting the enforcement of the restraint of trade to show that the restraint is unreasonable and therefore unenforceable.

[18] In *Fertility Guards Holding (Pty) Ltd t/a Fidelity Guard v Pearmain*,³ the court held that the onus to prove that the restraint of trade is unreasonable and therefore not enforceable rests with the respondent.

[19] The factors to consider in determining whether the restraint of trade is reasonable or otherwise are set out in *Basson v Chilwan and Others*⁴ in the following terms:

- a. Is there interest of the one-party which is deserving of protection at the termination of the agreement?
- b. Is such interest prejudiced by the other party?
- c. If so, does such interest so weigh up quantitatively and qualitatively against the interests of the latter party that the latter should not be economically inactive and unproductive?
- d. Is that another facet of public policy having nothing to do with the relationship between the parties but requires that the restraint should either be maintained or rejected?

[20] According to *Basson*⁵ there are two kinds of propriety interests that may be protected through the restraint of trade contract; namely:

'all confidential matters which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclose to him, to gain a relative competitive advantage. Such confidential material is sometimes compendiously referred to as "trade secrets" and the relationship with customers, potential customers, suppliers and others that go to made what is compendiously referred to as the "trade

³ 2001 (2)SA 853 (SE).

⁴ 1993 (SA 742 (A)

⁵ (supra)

connection” of the business, being an important aspect of incorporeal property known as goodwill.’

Evaluation

- [21] In the present instance it is common cause that the parties concluded a restraint of trade agreement which was to be operational between 4 November 2015 and 4 November 2016. The restraint of trade amongst others prohibited the first respondent from, carrying on business or being involved in a business which would be in competition with that of the applicant.
- [22] It is common cause that the first respondent tendered his resignation on 5 November 2015 and also on the same day notified the applicant that he would be taking employment with the first respondent who as indicated is a competitor of the applicant. At the time the deponent to the founding affidavit was aware of the implication of what the first respondent had informed him about in relation to the provisions of the restraint of trade agreement. He in fact in that respect reminded the first respondent of the implication that this may have on the restraint of trade.
- [23] It follows that the applicant waited for six weeks before instituting this proceedings despite the fact that it was aware of the breach. There is no explanation for this delay and therefor the urgency in that regard was self-created.
- [24] In my view applicant's urgent application stands to fail due to lack of urgency.
- [25] The other aspect of this case relates to the undertaking made by the first respondent after his commencing of employment with the second respondent. The first respondent in his answering affidavit contends that in accepting undertaking which was made through his attorney the applicant waived its right to enforce the restraint of trade beyond the parameters of that undertaking.
- [26] The applicant did not file a replying affidavit and hence the point about waiver remains unopposed. The point is also not dealt with in the heads of argument neither did Ms Swanepoel for the applicant deal with it in her submission during the hearing of this matter.

- [27] I agree with Mr Van As, for the first respondent, that in order to enforce the restraint of trade agreement in these circumstances the applicant had to show that the first respondent had breached the undertaking made.
- [28] It is important to note that the first respondent did not give an undertaking that he would not do business with other clients. The first respondent in his answer contends that he did not breach the undertaking.
- [29] There is no evidence that the first respondent breached his undertaking. The placing of the flyer at Linmed hospital does not, in my view, constitute a breach of the undertaking. The response of the employee that he had gone to Linmed hospital to introduce himself as a new representative of the second respondent and to inform them that he would be assisting them with after sales needs in relation to the existing equipment has not been disputed by the applicant. It has also not been disputed that the first respondent did not do business with Linmed hospital whilst in the employ of the applicant.
- [30] The first respondent also denies participating in a demonstration at Milpark hospital. He states in his answering affidavit that on the day in question he had attended at Milpark hospital to deliver the endoscopes. He also states that he did not do any business with Milpark hospital whilst he was in the employ of the applicant.
- [31] Turning to the issue of the enforceability of the restraint of trade I find, based on the reasons set out below, that there is no proprietary interest to protect. The problem that the applicant faces in this regard is that it did not file a replying affidavit.
- [32] In contending that the restraint of trade was unreasonable the first respondent relies on the following:
- a. the confidential information which applicant relies on in seeking to enforce the restraint of trade is readily available on the Internet.
 - b. that he had extensive knowledge of flexible endoscopic equipment prior joining applicant.
 - c. he received a two day training on the product of the gender applicant.
 - d. He was not involved in the pricing of the product.

- [33] Ms Swanepoel argued that the experience which the first respondent was referring to, was not relevant to the flexible endoscopic equipment. There is however no evidence to assist the court in determining the difference in the operation of the two systems.
- [34] In relation to the experience the applicant had in applications for the government tenders, Ms Swanepoel contended that the applicant may have had experience in government tenders but it was not specific to the business model of the applicant. There is again no evidence detailing the difference in the experience of dealing with the government tenders between those that involved the business model of the applicant and other business models.
- [35] In light of the above the case of the applicant stands to fail. I see no reason why in both the law and fairness the costs should not follow the results.

Order

- [36] In the premises the applicant's application is dismissed with costs.

E,Molahlehi

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv Swanepoel

Instructed by: Aucamp and Cronje' Attorneys

For the Respondent: Adv Van As

Instructed by: Witz Callichio, Isakow and Shapiro Attorneys