Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 2419/15

In the matter between:

SAIL RIGHTS COMMERCIALISATION (PTY) LTD **APPLICANT**

and

TENGELE (TEX) RIBA **RESPONDENT**

Heard: **12 February 2016**

Judgment delivered: 19 February 2016

JUDGMENT

VAN NIEKERK J

[1] The applicant seeks a final order to enforce restraint of trade and confidentiality clauses contained in the respondent's contract of employment. In summary, the undertakings given by the respondent in the applicant's favour include a confidentiality undertaking in terms of which the respondent agreed that during and after the termination of his employment, he would not divulge or communicate to any person whose province it was not to know the same, any of the applicant's secrets and other confidential information which the respondent obtained in relation to the company's affairs. Further, the respondent agreed that after his employment with the applicant ceases for any reason he would for a period of 12 months after the termination date not be employed by any of the applicant's direct competitors. This is a gloss on the comprehensive restraint undertakings given by the respondent to the applicant, but it will suffice for present purposes.

[2] The applicant is engaged in the sporting hospitality sector and makes available to its clients services that include site management, logistics, case management, land management and the like in respect of specific events. It operates throughout the country and boasts a significant client portfolio. At the heart of the present dispute is a seven-year commercial agreement with exclusive rights to soccer city and other sports stadiums concluded with Stadium Management South Africa. Respondent was employed by the applicant as a senior sales manager and on termination of his employment on 20 November 2015, he was engaged as the head of sales. During the course of his employment, the respondent was required to exploit relationships and connections established for the benefit or potential benefit.

[3] The deponent to the founding affidavit and the applicant's chief executive officer, Mr Beukes says during the course of October 2015, it came to his attention that the respondent had been in contact with one of the applicant's direct competitors, 5th Dimension. The respondents laptop was checked (ostensibly a spot check for

viruses) and a number of emails exchanged between the respondent and 5th Dimension were discovered. Amongst these were correspondence between 5th Dimension’s client service and project manager, Bertrand, in which Bertrand requested the respondent’s input for a business plan, details of the tender for which the applicant was applying, a list of sponsorships and commissions and other information. The applicant avers that it is apparent from these exchanges that the respondent was siphoning information and clients from the applicant’s business for his personal gain. The respondent was suspended on 22 October 2015 and given notice to attend a disciplinary enquiry. At the enquiry, the respondent was found to have committed the misconduct alleged, i.e. that he was conspiring with a competitor to divert work away from the applicant. The respondent was summarily dismissed on 20 November 2015.

[4] Beukes then says the following:

> It is, therefore, overwhelmingly likely that – if the relief sought is not granted – respondent will take up employment with 5th dimension and form a business in competition with the applicant. There is a real risk he may divulge further of other applicants proprietary and confidential information. Any business it up by the respondents will, as a result of information disclosed, be competing with the applicant unlawfully.

[5] In response, the respondent admits that he was approached by Bertrand to join 5th Dimension on an unsolicited basis with a view to his joining that company or a new venture to be formed. He concedes further that he entered into exploratory discussions but had made no decision whether or not to leave the applicant’s employ when the present course of action was instituted.

[6] The principles regulating the enforcement of restraint of trade agreements are relatively well-established. In broad terms, restraint of trade agreements are enforceable unless and to the extent that they are contrary to public policy because they impose an unreasonable restriction on the freedom to trade or to work (*Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 891B-C)). Put another way, the restraint of trade agreement is manifestly valid

and enforceable unless it is unreasonable. A restraint will be considered to be unreasonable and thus contrary to public policy, and therefore unenforceable, if it does not protect a legally recognisable interest of the employer, but merely seeks to exclude or eliminate competition (see *Magna Alloys* (*supra*) at 893C-G and 897H – 898D). An applicant seeking to enforce a restraint of trade agreement need only invoke the contract and prove a breach of the contract; the onus to prove that the restraint is unreasonable and therefore unenforceable rests on the party resisting its enforcement.

[7] When it determines the reasonableness of the restraint, a court is required to make a value judgment, bearing in mind two principal considerations. The first is the public interest that requires a party to comply with the contractual obligations (*pacta sunt servanda*); the second is the broader interest that requires all persons to be productive and to be permitted to engage in trade and commerce (*Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA)). The test for reasonableness of restraint of trade provisions remains that expressed in *Basson v Chilwan and others* 1993 (3) SA 742 (A) where the court said the following, at 767A-D:

a. Is there an interest of the one party which is deserving of protection at the termination of the agreement?
b. Is such interest being prejudiced by the other party?
c. If so, does such interest so way up qualitatively and quantitatively against the interest of the other party that the letter should not be economically inactive and unproductive?
d. Is there any other 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?

[8] Some decisions have added a fourth requirement in the form of an enquiry into whether the restraint goes further than is necessary to protect the interest claimed. Others have considered that this enquiry is part and parcel of the test

reflected above. What matters for present purposes is that the reasonableness enquiry extends to both the geographical and temporal elements of restraint.

[9] In so far as the first leg of the test in *Basson* is concerned, the interests that can be protected by a restraint agreement include confidential information regarding the running or carrying on the business which could be used by a competitor, if disclosed, to gain a relative competitive advantage, and secondly the relationship with customers, potential customers and suppliers (sometimes referred to as 'trade connection' of the business), being a component of the incorporeal property known as goodwill.

[10] I am not satisfied in the papers before me that the applicant has shown, as it is required to do, that the respondent is actually in breach of his restraint undertakings. He may well have been, if only by disclosing confidential information to a competitor but the applicant elected to deal with that breach by instituting disciplinary proceedings against the respondent, and ultimately by dismissing him summarily as it did on 20 November 2015. There is no evidence in the papers before me that after the termination of the respondent's employment (which in terms of the restraint agreement, as the trigger for the restraints on which the applicant relies) that the applicant disclosed any confidential information to any third party or that he breached the restraint by soliciting any of the applicant's clients. In short, the conduct of the respondent in which the applicant now relies to enforce the restraint agreement occurred prior to the date on which the restraint was triggered. I appreciate that can be said in the circumstances that the applicant is in breach of the restraint, certainly in so far as restraints against the disclosure of confidential information are concerned. In so far as the restraint of trade is concerned, similarly, the high water mark in the applicant's case is that it thinks it is 'overwhelmingly likely' that if relief is not granted, the respondent will take up employment with 5th Dimension or form a joint venture in competition with the applicant. The applicant has therefore failed to show any breach of the restraint undertaking by the respondent, in the form of

his being engaged as an employee or in some other prohibited capacity by any direct competitor.

[11] Ordinarily, the failure by an applicant to clear the hurdle established in paragraph (b) of the *Basson v Chilwan* test would result in the application being dismissed. However, the present matter is unusual in that the respondent does not seek to oppose the application on the basis that the applicant has no protectable interest either in the form of confidential information or customer connections. In his answering affidavit, the respondent states that he opposes the relief sought by the applicant because the terms of the restraint are 'too restrictive' the effect of which is unconstitutional, that he was coerced into signing the restraint undertaking, and that the hearing which resulted in his dismissal was substantively procedurally unfair and which thus led to the 'wrong outcome'.

[12] The fairness of the respondent's dismissal is irrelevant to these proceedings. Should the respondent feel aggrieved by the outcome of the disciplinary hearing he is entitled, as it appear he has done, to refer the matter to the relevant statutory dispute resolution structures. In so far as the respondent relies on duress, the answering affidavit falls hopelessly short of what is required to establish duress for the purposes of escaping a contractual obligation. It is telling that the respondent does not appear to have made any formal objection at the time to the applicant's insistence that he signed the restraint undertakings; this is a matter expediently raised at the point of an attempt to enforce those undertakings. In so far as the respondent suggests that the restraint undertakings are unconstitutional and therefore unenforceable, this is a submission that ignores the properties to be applied in a matter such as the present. The courts have long recognised that by requiring a respondent in any application to enforce a restraint agreement to discharge the onus to establish the unreasonableness of the restraint, constitutional values are realized. This is particularly so in relation to the last of the enquiries in the *Basson v Chilwan* test, which accounts for the broader public interest.

[13] In so far as confidential information is concerned, the respondent admits in his answering affidavit that he was privy to a great deal of information that is proprietary and confidential to the applicant. Further, he admits that relationships with clients form an important part of the applicant's business and that he was crucial to the applicant's success in recent years but states that this is 'by no means all that is required for success'. In *Den Braven SA (Pty) Ltd v Pillay and another* 2008 (6) SA 229 (D), Wallis AJ cautioned against the subconscious temptation to regard the person engaged in sales as 'just a salesman' and to treat the attempt to enforce the restraint as one in which the employer seeks to use a sledge hammer to crack a nut (see paragraph 11 of the judgment). The court went on to say:

> However, in any business dependent for its profits on the sale of its products, the sales function is of fundamental importance and the salesperson's ability to damage the business of the employer may be very considerable or even fatal, notwithstanding the fact that the salesperson may seem to stand fairly low in the staff hierarchy.…
>
> It must be borne in mind that what is referred to in the cases as a customer connection is often constituted by intangibles such as the relationship on personal issues between salesperson and purchaser; the reputation of the salesperson for dealing with complaints and problems and his or her all round willingness to 'go the extra mile' in order to secure a sale.

[14] Given that the applicant has established at least a likelihood that the respondent may become employed by a direct competitor, and given the respondent's coyness about his short term employment-related intentions (he states that no decision has been taken as to his future employment or career but admits that it is 'very likely' to be in the same line of business), coupled with the respondent's concessions on the papers in relation to his access to the applicant's confidential information and its trade connections, it seems to me that the equitable order to make in the present instance is an unusual one, but one that acknowledges the interests of both parties and serves to preserve the status *quo.* The order that I intend to make is to remove the application from the roll, but to grant the

applicant leave to re-enroll the matter, supplemented with further affidavits if necessary, during what remains of the restraint period.

I make the following order:

1. The application is removed from the roll.
2. The applicant is granted leave to re-enroll the application for hearing, as a matter of urgency if required, supplemented by such additional affidavits as may be necessary, at any stage during the balance of the restraint period, should it become apparent that the respondent has become employed by any direct competitor of the applicant or otherwise acted in breach of his restraint undertakings.
3. There is no order as to costs.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

APPEARANCES

For the Applicant: Ms. L Salt of Baker & McKenzie

For the Respondent: Adv. J Kayser instructed by DHD Attorneys