THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

Case no J 2832/16

In the matter between:

WEIR MINERALS AFRICA (PTY) LTD Applicant

and

MARTHINUS JOHANNES POTGIETER First Respondent

RUI FELIX GOMES Second Respondent

GOODWIN SUBMERSIBLE PUMPS AFRICA (PTY) LTD Third Respondent

Application heard: 16 March 2017

Date of judgment: 26 May 2017

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JUDGMENT

VAN NIEKERK J

[1] On 16 December 2016, Steenkamp J postponed this application and granted an interim order, the terms of which included the enforcement of a restraint agreement (albeit in terms more curtailed than those originally sought) between the applicant (Weir) and the first and second respondents. The applicant seeks final interdictory relief to enforce the pared down restraint of trade and confidentiality undertakings given by the first respondent (Potgieter) and the second respondent (Gomes).

[2] It is not disputed that Potgieter and Gomes signed the restraint undertakings on 27 March 2007 and 13 January 2007 respectively. The restraint undertakings were given in favour of their then employer, Warman Africa (Pty) Ltd. That entity was wholly owned by an Australian company, Research and Development (Pty) Ltd (R&D). In March 2008, Weir Group Plc, listed in the United Kingdom, purchased all of the shares in Warman. On 1 March 2010, Warman changed its name to Weir Minerals Africa (Pty) Ltd, the applicant in these proceedings.

[3] Potgieter was employed by Warman on 27 March 2007 as a sales engineer. At the time of his resignation from Weir on 31 August 2017, he was employed as the rentals manager and based in Middleburg. During the first week of September 2016, Potgieter took up employment with the third respondent, Goodwin. At that stage, Goodwin was in the process of establishing a presence in southern Africa. Goodwin did not commence trading until 13 November 2016.

[4] The second respondent, Gomes, was employed by Warman in January 2002 as a sales engineer. At the time of his resignation from the applicant's employ on 31

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October 2016, he held the position of product manager. He too took up employment with Goodwin during the first week of November 2016.

[5] The restraint agreement signed by Potgieter and Gomes contain undertakings, amongst others, that they will not, for a period of 12 months and in the Republic of South Africa, either directly or indirectly:

1. be concerned or engaged in any business which competes with the business of Weir;
2. provide or attempt to provide any service or product which is the same as or similar to a service or product or marketed by Weir in the carrying on of its business, to any prescribed client of Weir; and/or
3. solicit, interfere with, entice or attempt to entice away from Weir any of its prescribed clients or customers.

[6] Weir's core business is the manufacture, sale, support, service, repair, rental and supply of a variety of pumps, including submersible slurry pumps. Weir was until recently the exclusive supplier of submersible slurry pumps manufactured by Goodwin International, the international parent company of Goodwin and in particular, the 100 ANZE submersible slurry pump. These pumps are typically made available to customers in the mining, oil and gas, power and industrial sectors. Prior to 13 November, Weir marketed the 100 ANZE pump in terms of a distribution agreement with Goodwin International. That agreement has been terminated and Goodwin has been incorporated with a view to entering a market previously serviced by Weir. Weir contends that by taking up employment with Goodwin, Potgieter and Gomes are in breach of the restraint undertakings, because since 13 November 2016, Goodwin entered the pump supply market in South Africa and thus became a direct competitor of Weir.

[7] Potgieter and Gomes have raised a number of defences to Weir's claim. The first substantive defence is that the restraints that form the subject of these proceedings were given in favour of R&D and its subsidiaries, and that Weir is

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not a subsidiary of R&D. The second is that Potgieter is not bound by any restraint of trade in favour of Weir. The third defence is that the restraints of trade sought to be enforced by Weir are overly broad, and interfere unreasonably with the constitutional right to freedom of trade and occupation, and that they are against public policy. The fourth and possibly related defence is that Weir is seeking to use the enforcement of the restraints as part of a negotiating tool in its dealings with Goodwin. Further, Potgieter and Gomes contend that Weir and Goodwin are not in competition with one another and that they are thus not in breach of any restraints. Finally, they contend that the license agreement between Goodwin International and Weir permitted Goodwin International access to the information that Weir claims is confidential and that Potgieter and Gomes cannot therefore be interdicted from providing this information to Goodwin.

[8] Prior to considering the above issues, and to the extent that urgency remains a live issue, Potgieter and Gomes place reliance on the factor that they resigned from Weir's employment in August 2016 when they aver that they advised Weir that they were taking up employment with Goodwin. They contend that in circumstances where the present proceedings were launched only on 1 December 2016, that any urgency is self-created. It is not in dispute that Potgieter left Weir's employ on 1 August 2016, and Gomes on 31 October 2016. It is also not in dispute that Goodwin entered the market for the sale and rental of the 100 ANZE submersible pump on 13 November 2016 or that it became a competitor (potentially at least) only from that date. It was only after Goodwin entered the market, after the negotiations on the renewal of the license agreement between Weir and Goodwin International had failed, that on Weir's version at least, the restraints became operative. In the circumstances, I am satisfied that the application is urgent, as disputes of this nature inevitably are. In any event, the restraints are for a limited duration. They expire at the end of August 2017 and the end of October 2017 respectively. If the application is to be heard in the ordinary course, the applicant will not be able to obtain any substantial adequate redress.

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[9] The principles relevant to the enforcement of restraints of trade are well-established and I do not intend to repeat them here. A party seeking to enforce the restraint agreement is required only to invoke the agreement and prove a breach of it. A respondent who seeks to avoid the restraint there has an onus to demonstrate on a balance of probabilities that the restraint agreement is unenforceable because it is unreasonable. In regard to the latter, the test remains is that set out in *Basson v Chilwan and others* 1993 (3) SA 742 (A), where the court stated that the reasonableness or otherwise of a restraint is to be determined by the following:

1. Is there an interest of the one party, which is deserving of protection at the termination of the agreement?
2. Is that interest being prejudiced by the other party?
3. If so, does the interest weigh up qualitatively and quantitatively against the interests of the latter party so that the latter should not be economically inactive or unproductive?
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?

[10] It is equally well-established that in relation to the first enquiry established by *Basson v Chilwan* that proprietary interests deserving of protection are of two kinds. The first is all confidential matter which is useful for the carrying on of the business and which could be used by competitor, if disclosed to them, to gain a relative competitive advantage. The second is 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. The onus is on the respondent to prove the unreasonableness of the restraint.

[11] To the extent that Weir's right to seek a paring down of the restraint is the subject of challenge, this court has previously addressed this issue. In *New Just Fun*

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Group (Pty) Ltd v Turner and others (J786/14, unreported) the court said:

> The truncated relief sought seeks to limit the scope of the restraint… There are at least two reasons why the applicant ought not to be bound to attempt to enforce the full ambit of the restraint. First, it is well-established that a court is entitled to enforce the restraint partially by restricting the scope of its operation to reflect what is found to be reasonable.

The court referred to the judgment by Wallis AJ (as he then was) in *Den Braven SA (Pty) Ltd v Pillay* 2008 (6) SA 229 (D) and continued:

> The nature and extent of any partial restraint is a matter to be determined from the papers. I do not understand the applicable authorities to preclude an applicant from seeking a partial restraint only because the applicant has sought in its founding affidavit to enforce the full ambit of the agreed restraint. In any event, the extent to which any restraint agreement ought to be pared down is ultimately the decision of the court, having regard to all of the facts and circumstances, to grant more limited relief than that initially sought….

[12] In the present instance, neither Potgieter nor Gomes deny having signed the restraints. Insofar as they contend that the restraints were given in favour of R&D and that they are not enforceable by Weir. The papers disclose the following: the written restraint undertakings were concluded, as I have noted above, in favour of Warman Africa (Pty) Ltd. That entity changed its name on 1 March 2010 to Weir Minerals Africa (Pty) Ltd. The restraint undertakings were given in favour of 'the Company', defined explicitly to include Warman Africa (Pty) Ltd, i.e. the applicant. When reading the restraint, references to 'the Company' and its business include Weir and its business. That Weir used to be wholly-owned by R&D and that is now wholly-owned by Weir Group PLC is entirely irrelevant. The operative provisions of the restraint of always included the applicant itself. There was no need therefore for any restraints to be transferred or assigned to the Weir Group after the purchase by that entity of all of the shares in Warman – in other words, there was never a sale of the business as a going concern but a transfer

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of the shareholding in the business of the applicant that necessitated either a transfer or assignment. In any event, it is not in dispute that the business operated by Weir, the applicant, both before and after the sale of its shareholding, has always been the same. It is that business which employed both Potgieter and Gomes and which the restraints operated to protect.

[13] To the extent that Potgieter contends that on his promotion to branch manager with effect from 1 November 2008 the restraint that he had given in March 2007, (the date of the commencement of his employment with Warman) somehow fell away, the plain wording of clause 4.1 of his restraint is that '*whilst employed by [the applicant] and for a period of 12 months after the termination*' he will be restrained. What matters for the purposes of the restraint is that Potgieter remained employed by Weir, not that he was promoted. It is not disputed that Potgieter remained employed by Weir until he resigned with effect from 31 August 2016. His promotion and his averment that he was thereafter required to sign a restraint but refused to do so takes the matter no further - the restraint agreement that forms the subject of these proceedings is not linked to any particular position held by Potgieter. Finally, there is nothing to indicate that Weir had ever released Potgieter from his restraint undertaking.

[14] I turn next to the issue of any breach of the restraint agreements. It will be recalled prior to 12 November 2016 (in fact, for some 15 years), Weir was the exclusive supplier of the Goodwin ANZE 100 submersible slurry pump, manufactured by the international parent company of Goodwin, in terms of a licence agreement between Warman and Goodwin International. In addition to being the supplier of submersible slurry pumps, Weir offers its customers after-sales support in the form of spares, repairs and maintenance services and also operates a rental division from which submersible slurry pumps are rented to its customers. It is not in dispute that Goodwin International confirmed to Weir by way of correspondence on 4 November 2016 that as at 12 November 2016, it would start trading its submersible pump range in South Africa through the

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newly-established Goodwin. It is clear therefore that with effect from 12 November 2013, Goodwin has commenced business on terms that bring it into direct competition with Weir. Although the respondents have made reference to some of the regulatory and logistical difficulties in commencing trade and the impact that this will necessarily have on the conduct of business, the fact remains that from the date of the termination of the licensing agreement, Goodwin has been open for business. Indeed, the competitive relationship between Weir and Goodwin exists despite the fact that the license agreement has been terminated. It is not in dispute that Weir remains in possession of existing stock of the ANZE submersible pump that it purchased prior to the termination of the agreement, which it intends to sell into the market until the stock is depleted. Further, Weir intends to continue to endeavour to support its some 800 customers with ongoing support, repair and maintenance services. Weir also intends to continue to rent out the approximately 45 workable pumps designated for that purpose to its customers. It will do so in competition with Goodwin's rental division. In my view, there is no substantive difference between the rental options offered by Weir and by Goodwin respectively. The respondents concede that Goodwin has established its business and that it commenced Ltd trading in November 2016, that it has sold at least six 100 ANZE submersible pumps, that it at least intends to provide maintenance and support services and also that it operates a rental division.

[15] An article published in mining weekly in relation to the launch of Goodwin's business makes the nature and extent of the competitive interface clear –

> Increased demand for the high-performance reliable range of Goodwin submersible pumps has led to the opening of the local division to support the large customer base.
>
> Goodwin submersible pumps Africa which will officially open in November 2016, will operate from a comprehensively equipped facility in Tunney Ext 9 Germiston. The custom premises will house a fully equipped workshop, a state-of-the-art pump test bay, a warehouse and a service exchange store, as well as a large

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> rental fleet…
>
> All products are backed by highly skilled and knowledgeable technical personnel with an in-depth understanding of pump applications. The range of products includes the well-known ANZE submersible pumps, pontoon mounted pumping solutions, control panels, couplings and ancillary equipment.

[16] In my view, Weir has discharged the onus of demonstrating a competitive interface between it and Goodwin. It follows from the time that Goodwin commenced trading that Potgieter and Gomes have been in breach of their restraints.

[17] To the extent that Potgieter and Gomes dispute the reasonableness of their respective restraints, as the branch manager of the Witbank branch, Potgieter was required to develop and grow Weir's current market with an art increasing sales. He was required to have direct contact with customers, develop relationships with them and to pursue new business. As pump rental store manager for Middleburg, Potgieter was instrumental in the operation of Weir's rental business, the core component of which was the Goodwin ANZE 100 submersible pump. As a sales engineer, Gomes was responsible for establishing and maintaining customer relationships. As a product manager, he was responsible for reporting and sales, margins, competitor activity and the like. In the various capacities, both Potgieter and Gomes had access to and knowledge of Weir's customers, the market that Weir had developed for the ANZE 100 submersible slurry pump, the identity of those customers who had purchased the pump and the after sales service maintenance and repair needs. The employment of Potgieter and Gomes by Goodwin would place Goodwin in a position to exploit the knowledge of Weir's customer connections and to garner business for Goodwin. Both Potgieter and Gomes also had access to strategic business information that sales meetings were cross selling opportunities were discussed across the sales network, as well as pricing strategies and mechanisms, current and pipeline project, customer purchasing patterns, discard strategies and the like. Particular significance in this regard is the undisputed

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fact that for the previous 15 years, Weir was the exclusive supplier of the Goodwin 100 ANZE submersible pump in South Africa. It built the market for this product in South Africa, it established a brand of the goodwill attached to it, it developed an extensive installed base of customers to whom it sold the pump, rendered maintenance, support, rental and repair services. It is obvious that these relationships, when supplanted from Weir to Goodwin, will be of an enormous value to the letter and will permit it a head start in developing its business.

[18] In so far as it is contended that in terms of the license agreement, Weir was obliged to provide Goodwin International with certain information which Potgieter and Gomes say was proprietary to Weir and that Weir therefore cannot claim confidentiality over this information. Any disclosure obligations contained in the license agreement exists between the applicant and Goodwin International and do not exist between Weir and Goodwin, being a new South African entity which has entered the market to compete directly with Weir. Goodwin is not a party to the license agreement. In any event, customer lists and the like were not disclosed by Weir to Goodman International in terms of the agreement.

[19] In so far as Potgieter and Gomes contend that the restraint agreements are overbroad, the fact remains that enforcement of the restraints is sought only in respect of the Republic of South Africa and only in respect of the market for the manufacture, distribution and sale of submersible slurry pumps. The enforcement of the restraints will not render either Potgieter or Gomes unemployable. They will be limited, for a period, in the choice of employment. They are entitled to seek employment and remain employed in the mining and related industries but most simply not, for a short period, take up employment with Goodwin or competitor of the applicant which renders the defined services in respect of submersible slurry pumps. In my view, the enforcement of the restraints on these limited terms is fair and reasonable.

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[20] For the above brief reasons, in my view, Weir has satisfied the requirements relevant to the granting of final relief and is entitled to an order for the pared down relief that it seeks.

[21] Finally, this court has a broad discretion in terms of s 162 of the LRA to make orders for costs according to the requirements of the law and fairness. In my view, there is no reason to deny the applicant its costs, including the costs of the proceedings on 15 December 2016 when the application was postponed and cost reserved.

I make the following order:

1. The first and second respondents are restrained within the Republic of South Africa, until 31 August 2017 and 31 October 2017 respectively, from:

    1.1 being concerned, engaged, interested or employed in any capacity with a directly or indirectly in:

        1.1.1 the third respondent; or

        1.1.2 any other entity which carries on a business in the sale, rental or maintenance of submersible slurry pumps including the Goodwin 100 ANZE (‘ the submersible slurry pump’);

    1.2 directly or indirectly providing or attempting to provide any service or product which is the same as or similar to the submersible slurry pump to any client of the applicant that has previously purchased or rented the submersible slurry pump from the applicant;

    1.3 directly or indirectly, soliciting, interfering with, enticing or attempting to entice any client that has previously purchased or rented the submersible slurry pump from the applicant away from it;

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1.4 directly or indirectly soliciting or otherwise approaching any employee or consultant of the applicant with a view to encouraging, persuading or inducing him/her to become employed by or interested in, in any manner whatsoever, in any entity which competes with the applicant or to terminate his/her employment or association with the applicant and/or to furnish information including confidential information or advice to anyone.

2. The first and second respondents are restrained from directly or indirectly using, divulging or disclosing the applicant's confidential information to any person, including the third respondent.

3. The first and second respondents, jointly and severally, the one paying the other to be absolved, are to pay the costs of these proceedings, including the costs of proceedings on 15 December 2016 when an interim order was granted, such costs to include the costs of two counsel.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT

REPRESENTATION

For the applicants: Adv. C Whitcutt SC, with him Adv. P Bosman, instructed by ENS

For the first and second respondents: Adv. G Hulley SC, with him Adv. GM Young, instructed by Teixeira Du Toit Attorneys

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