Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT JOHANNESBURG

Case No: J 2720/17

In the matter between:

MIKEVA CASH AND CARRY (PTY) LTD	**First Applicant**
MASSCASH (PTY) LTD	**Second Applicant**
and	
JAN ANDRE MARX	**Respondent**

Heard: 08 November 2017

Delivered: 12 December 2017

Summary: (Restraint of trade – sale of business –ring fenced stores – new store not covered by ring-fencing provision – geographical scope unnecessarily wide – set down at inappropriate seat of court -costs)

JUDGMENT

LAGRANGE J

<u>Background</u>

[1] This is an application to enforce restraint of trade provisions in the employment contract concluded between the first applicant, Mikeva Cash & Carry ('Mikeva') and the respondent, Mr J Marx ('Marx').

[2] The second applicant Masscash (Pty) Ltd ('Masscash') acquired a controlling interest in Mikeva in 2009. On the same premises where Mikeva conducted a cash and carry business at the time, Marx owned a butchery business RA Meat CC trading as Ultra Meats ('RA Meat').

[3] In April 2014, Mikeva purchased RA Meat and a greengrocer's business ('Ritma') operated by Marx's spouse, which was also situated on the same premises. The businesses were acquired as going concerns subject to the provisions of section 197 of the Labour Relations Act, 66 of 1995 ('the LRA'). RA Meat was purchased by Mikeva for close to R 8 million. It was a condition of the respective sales that both Marx and his wife entered into restraint of trade agreements and were employed by Mikeva for a fixed period of 3 years under separate Service Agreements. Marx was employed as the Perishables Manager of Mikeva for the period of the Service Agreement which ended in April 2017.

[4] As part of the sale of business arrangements, the parties concluded a Memorandum of Understanding ('MOU'), which was specifically incorporated as part of the Sale of Business Agreement ('SOBA') between them. Clause 11 of the MOU reads:

> 11 RESTRAINT OF TRADE
>
> 11.1 R A MEAT, RITIMA, JA MARX and R MARX each by their signature hereto, hereby find themselves in their own capacities as well is jointly and severally with one another to the restraints imposed by the Restraint of Trade, as set out in clause 11 of the Service Agreement, attached hereto … They hereby agree that such restraints and provisions in that clause 11, shall apply to them mutatis mutandis.
>
> 11.2 It is agreed that notwithstanding the fact that such restraints are imposed in the Service Agreements as obligations upon JA MARX, as an employee of Mikeva, the same restraints, to the benefit of Mikeva, are

> hereby imposed on R A MEAT, RITIMA, JA MARX and R MARX , as well, in their capacities as Sellers of the BUSINESSES.
>
> 11.3 Notwithstanding the provisions of this clause 11, and as a sole exception there too, it is recorded that MIKEVA consents to J A MARX holding his current interest in two retail stores, known as Meatspot, in which he presently holds an interest, provided that such interest does not interfere with his employment obligations with MIKEVA, as set out in the Service Agreement …"

(Emphasis added)

[5] Clause 11 of the Service Agreement contains a detailed restraint of trade provision. Only the relevant portions will be referred to.

[6] The area of the restraint is a 200 kilometer radius from any premises at which the former business of RA Meat or the business of Mikeva is conducted. The restraint period is a period of 24 months from the date Marx's services terminated with Mikeva, which was 30 April 2017.

[7] Clause 11.3 read with clause 1.2.6 prohibits Marx participating in any capacity in relation to any entity engaged in an activity "which is the same or similar to or directly competitive with the businesses and/or activities of the company as at the termination date" (capitalisation excluded). Further, clause 11.4 prevents him from soliciting orders from customers or clients of the business at the time of his termination in respect of all goods or services dealt with or supplied by the business or the company. In passing, to be mentioned that the reference to 'the company' includes a holding company such as Mass Cash. Likewise, it prevents Marx from canvassing business in respect of the same goods or service from such customers or clients or respectively selling or rendering such goods or services to them.

[8] There is no dispute the various agreements are binding on Marx. The central issues in dispute are:

8.1 Is the application urgent?

8.2 Did Marx breach the restraint of trade agreement in the following respects:

8.2.1 Is Marx in breach of the restraint of trade agreement insofar as it relates to his operation of the ring-fenced stores described in clause 11 of the MOU?

8.2.2 Does the Meat Spot butchery in the new location compete with Mikeva's butchery?

8.3 Does the applicant have legitimate protectable interests worthy of protection and, if so, are the provisions of the restraint too extensive to preserve the applicants' protected interests?

Urgency

[9] It is trite that enforcement of restraint of trade agreement is generally a matter of urgency, because the primary object of a restraint agreement is to enforce the provisions in the agreement, rather than to lay a basis for a damages claim. The fact that the employer may also pursue a damages claim, is not a reason for denying the covenantee the right to enforce the undertakings made in its favour by the former employee by seeking an order of specific performance. Because every month which passes during which a former employee is in breach of a restraint limits the efficacy of the restraint, it is important if meaningful relief is to be obtained that a restraint application should be determined before the period of the restraint has expired.

[10] Nonetheless, an applicant wishing to enforce restraint must act with reasonable expedition once it is aware that the former employee seems to be acting in breach of the restraint. See e.g. ***Ecolab (Pty) Ltd v R Thoabala & another.***[1] In that instance, it appears that the employee had taken up employment with a competitor more than three months before the applicant launched urgent proceedings to enforce the restraint. If an applicant in the face of a breach is slow to take steps to enforce the agreement, it only has itself to blame if a court is not sympathetic to its claim that the application is urgent.

[1] Labour Court judgment (J 1716/17, dated 23/8/17) at paras [16] to [20].

[11] In this case, Marx left the applicant's employment at the end of April 2017. However, it was only on 25 September 2017 that he opened new butchery premises approximately 200 metres from Mikeva's store. The applicant contends that it is both a wholesale and a retail outlet. Correspondence between the applicant and Marx's attorney initially concerned the fact that a company which he owned had leased premises to a fruit and vegetable business, which would compete with the applicant's activities. Mikeva sought a specific undertaking in relation to that business from Marx but became aware in early September that Marx was intending to open a butchery business on the same premises. Accordingly, when it received a response to its initial request to him that he would abide by the restraints he had entered into, the applicant specifically raised a concern that the letter from Marx's attorney dated 6 September made no mention of the butchery business which he had intimated to staff of the applicant that he intended opening. In a letter dated 12 September, the applicant called on Marx to give certain undertakings by 18 September, failing which it might approach the appropriate high court for relief.

[12] The deadline was extended by the applicant to 21 September when Marx had failed to respond by 19 September. This elicited a response from his attorney in which the submission was made that Marx was entitled to operate the butchery business as one of the ring fenced stores in the MOU. He also claimed in that letter that the respondent had been aware of his intention to move one of the ring fenced businesses to the new premises as early as March 2017. The matter was then referred to the applicant's current attorneys of record who sent a follow-up letter on 5 October 2017 seeking clarity on which of the two retail stores mentioned in the memorandum of understanding he intended to operate at the new premises and the nature of that business. Marx responded on 10 October without providing further detail and stood by his earlier responses.

[13] The application was launched on 23 October approximately a fortnight after this last response. Apart from the fact that the prior knowledge of Marx's intentions on the part of the applicants is a matter of considerable dispute, I do not think that the applicants can be blamed for not launching the application before Marx had taken unequivocal action to open the

store in the new location and before they had given him a reasonable opportunity to reconsider his position. In my view the applicants moved reasonably expeditiously to assert their rights and did not unduly delay in bringing the application. Accordingly, it is justifiable to deal with the application as one of urgency.

<u>Breach</u>

[14] There are two issues relating to the opening of the store close to the premises of Mikeva. The first issue is whether Marx was entitled to move either of the ring fenced stores to any new location in terms of the memorandum of understanding, without affecting their 'protected' status. The second issue is whether the butchery operating at the new location competes with the butchery of Mikeva.

[15] When the declaration of interest was signed by Marx as an employee of Mikeva, he described the two Meat Spot entities as being located in "town CBD" and "Danova" which were located 3.6 km and 1.7 km from Mikeva's premises. The latter store was closed at the end of August 2015 and then "reopened" at the new premises at 4 Mossel Street in September 2017, a location a mere 500 metres from Mikeva's premises. It trades under the name Hyper Meat t/a The Meat Spot.

[16] If one has regard to the memorandum of understanding, the critical provision is the description of the two ring fenced businesses in the following terms:

> "Mikeva consents to J A MARX holding his <u>current interest</u> in <u>two retail stores</u>, known as Meat spot, <u>in which he presently holds</u> an interest."

[17] The essential issue which arises is whether that description of the stores extended to any location in which the stores were situated. If the location of the stores were irrelevant, then nothing would prevent Marx from opening a store opposite Mikeva's premises, should space become available. It seems inconceivable that when the parties concluded the memorandum of understanding they intended that the ring fenced businesses which he was allowed to retain an interest in could be located

anywhere, including on the doorstep of Mikeva's premises. It seems far more likely that the reference to his current interests was a reference to the existing stores at the time of concluding the memorandum of understanding. It is also noteworthy that the memorandum described them as 'stores' rather than 'businesses', which is more indicative of businesses conducted at particular premises. Moreover, it is difficult to see how Marx's current interest in the Danova store could be preserved despite that store being closed for two years, and consequently being non-existent, and then resurrected in different premises.

[18] This also raises the question of the nature of the business. It is common cause that both the original Meat spot stores were retail outlets selling pre-packaged meats. By contrast, the Ultra Meats butchery sold to Mikeva was a wholesale and retail butchery. Marx does not dispute that the previous meat spot stores did not have the cutting and packaging equipment to produce pre-packaged meat products including band saws, strip cutters, slicers, mincers, vacuum packing machines et cetera. Marx also does not dispute that new outlet in Mossel Street has two band saws, a mincer, a sausage filler, a polony slicer, a steamer, and a smokehouse which are all indicative of an enterprise that can operate as a wholesale butchery. However, whether the new store is a retail or wholesale butchery outlet or a mixture of both, either activity clearly falls within the scope of "competitive activity" which is defined in the Service Agreement as "any activity which is the same or similar to or directly competitive with the businesses and/or activity of the company at the termination date." 'Businesses' are defined to mean "the Butchery and Fruit and Vegetable businesses, previously conducted by RA Meat CC and Ritima CC, respectively, which have been purchased by, and transferred to, the Company" (full capitalisation omitted).

[19] In summary, it is difficult to escape the conclusion that Marx is in breach of the restraint agreement in the Service Agreement by virtue of engaging in competitive activity in opening the new store in Mossel Street which is not covered by the exception created in clause 11.3 of the MOU.

<u>The existence of a protectable interest</u>

[20] Marx claims that he is not in possession of any confidential information about Mikeva's butchery business and that, in effect, nobody in the meat industry has an interest in keeping prices confidential, including suppliers to the butchery sector. Further, there are only a few suppliers in the sector and their identity is not secret. In addition, his knowledge of current prices when he left Mikeva is of transient value and can become irrelevant in a matter of weeks. As to customers, his clientele in the Mossel Street store are all walk-in customers and the identity of Mikeva's customers is not a matter of confidential knowledge.

[21] Against those considerations must be weighed Marx's admission that he knew Mikeva's clients and key contact persons of those clients, though he suggests that this was knowledge he acquired when he operated RA Meats previously. He also admits to certain, albeit limited, personal links he forged with clients when he started working for Mikeva in 2014. However, his pre-existing knowledge of clients and the relationships he developed in the business he sold to Mikeva were part of the goodwill that he sold to Mikeva. That did not revert to him when he left Mikeva. Similarly, any relationships developed with customers during his employment by Mikeva were for the benefit of Mikeva and not for him to take with him when he left. Mikeva is entitled to protect the investment which it made in acquiring that goodwill when it acquired Marx's business.

[22] Is the 24 month, 200 kilometer scope of the restraint necessary to protect that interest? Marx is not without means to restart his former business. He clearly has extensive experience and also has the capital to enter into competition with Mikeva, even if on a smaller scale. Mikeva purchased his interest in the business for a considerable sum. Under other circumstances, if he had merely been an employee and had not sold his business to Mikeva and was going to work for an existing competitor, it might be debatable whether two years is reasonably justified. However, given that he had sold the goodwill and that he clearly intends to set up a competing business in much closer proximity to Mikeva than either of the ring-fenced retail businesses.

[23] The reasonableness of the 200 kilometer restraint is more difficult to justify. If one has regard to the fact that the applicants did not feel that Marx's existing meat spot stores a few kilometres away posed any meaningful threat to their interests even in the retail trade, it is difficult to understand what legitimate interest would be served by preventing Marx from operating in the butchery trade in an area so vast that it would include George, Knysna and Oudtshoorn, the nearest of which is close to 50 kilometers away. There was no evidence of any other stores of the applicants that would be threatened by Marx trading outside of Mossel Bay. Further, insofar as the restraint sought to preserve Mikeva's legitimate economic interest in the business it had purchased from Marx, there is nothing to suggest that interest extended beyond the wholesale meat market in Mossel Bay at best. In the circumstances, I am satisfied that the geographic scope of the restraint is unnecessarily wide and goes the protection of any demonstrable legitimate interests of the applicants.

[24] A couple of other points that need to be made about the relief sought by the applicants. The restraint provisions of the various documents binding the parties which purportedly entitle the applicants to prevent Marx from dealing with suppliers would prevent him from dealing with suppliers even in respect of the remaining ring fenced store in the Mossel Bay CBD and in respect of any butchery interests he has outside the geographical area of the restraint. Such provisions go beyond what the protectable interests of the applicants require and no relief should be granted in that respect. Secondly, clause 11.3.2 of the Service Agreement which prevents Marx from doing "anything referred to in clause 11.3.1 outside of the prescribed area which has the effect of causing the company prejudice in the prescribed area", is simply another way of extending the geographical scope of the restraint and any relief in that regard should not be entertained. Lastly, the provisions in the Service Agreement designed to prevent the enticement of the applicants staff also purport to include "prospective employee(s)" of the applicants. Such a class of person includes anyone in the labour market who might apply for a job with the applicants and the applicants cannot lay claim to any contractual

relationship with such persons which requires protection. Accordingly, the relief cannot be extended to apply to that class of individuals.

Appropriate seat of the court

[25] An issue which arose in this matter was whether this application should have been launched at the Johannesburg seat of the Labour Court, when both the first applicant and the respondent were located in Mossel Bay, which is roughly equidistant from the Port Elizabeth and Cape Town Labour Courts both of which are about one third of the distance from Mossel Bay to Johannesburg. I was given the impression before the matter was heard that there had been agreement the matter could be heard in Johannesburg, but it became clear I had been misinformed.

[26] It is true that the Labour Court is a national court with national jurisdiction, but in my view it is an abuse of process to put respondents to the inconvenience of having to defend a matter in the seat of the Labour Court that is furthest away from where the respondent is situated and where the dispute arose. Had I not been under the wrong impression prior to the matter been heard, I would have directed that it should be transferred either to the Labour Court in Port Elizabeth or Cape Town. Since the matter did proceed in Johannesburg, it is at least appropriate that the respondent should not have to pay any travel and accommodation costs incurred as a result of the application being set down in Johannesburg.

Costs

[27] In relation to the other legal fees incurred by the parties, the applicants were largely successful, even though the geographical extent of the restraint requires variation. As a matter of law and fairness, it is therefore right that the respondent should pay the bulk of the applicant’s costs.

Order

[1] The matter is heard as one of urgency and any non-compliance with the forms and service provided for in the Labour Court rules is condoned.

[2] The respondent is interdicted and restrained until 30 April 2019 (‘the restraint period’) and within the municipal area Mossel Bay (‘the prescribed area’) from being engaged or obtaining business interests, whether directly or indirectly, in any capacity whatsoever in:

2.1 the business conducted under the name and style of Hyper Meats t/a The Meat Spot situated at the premises located at 4 Mossel Street, Mossel Bay, Western Cape province;

2.2 any business which is the same as or similar to or competitive with the business of the first applicant.

[3] During the restraint period the respondent is interdicted within the prescribed area from directly or indirectly:

3.1 soliciting orders from prescribed customers of the applicants, as defined in the fixed term agreement concluded between the 1st applicant and the respondent on 16 April 2 014 (‘ the agreement’) for prescribed goods and/or prescribed services as defined in the agreement;

3.2 canvassing business in respect of prescribed goods and/or prescribed services, as defined in the agreement, from prescribed customers of the applicants as defined in the agreement;

3.3 selling or otherwise supplying prescribed goods and/or prescribed services, as defined in the agreement, to prescribed customers of the applicants as defined in the agreement;

3.4 rendering any prescribed services, as defined in the agreement, to prescribed customers as defined in the agreement;

3.5 encouraging, enticing, inciting or persuading any manager or employee of the applicants to terminate his or her employment with the applicants;

3.6 furnishing any information or advice to any manager or employee of the applicants or using any other means, whether directly or indirectly designed, or in the ordinary course of events calculated to result in such manager or employee terminating his or her employment by the applicants and/or becoming employed more directly or indirectly interested in or associated with any other company, close Corporation, firm, undertaking or concern.

[4] The respondent is interdicted and restrained from using any confidential information of the applicants or disclosing it to any third party including the entity trading under the name and style of hyper meat t/a the Meat Spot.

[5] The respondent must pay two thirds of the applicants' costs.

[6] The applicant must pay the travel and accommodation costs incurred by the respondent as a result of the matter being set down in Johannesburg.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	P Bosman instructed by ENS Inc.
RESPONDENT:	J Moorcroft instructed by Viljoen-French & Chester Inc.