IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT DURBAN)

CASE NO : D683/17

NOT REPORTABLE

In the matter between:

ARB ELECTRICAL WHOLESALERS (PTY) LIMITED Applicant

And

BHODRAJ, ASHLEY First Respondent

MOKSA ELECTRICAL (PTY) LTD Second Respondent

Heard: 22 June 2017

Delivered: 13 October 2017

Summary: Restraint of trade - An application to give effect to a restraint of trade is by its very nature somewhat urgent - An interdict may be an appropriate remedy to prevent a breach or threatened breach of contract - it may take the form of an order of court prohibiting the first respondent from doing whatever is specified in the order – the principles governing the issue of an interdict to enforce a promise not to do something and the issue of an interdict to protect any other right are fundamentally different – scope covered found to be unreasonable.

JUDGMENT

CELE J

Introduction

[1] This is an urgent application for final relief brought in terms of section 158 (1) (a) (ii) of the Labour Relations Act[1] where the order sought is couched in the following terms:

1. Dispensing with the forms and service provided for in the rules of this Court and disposing this matter in such manner and in accordance with such procedure as seems meet, in terms of rule 8 and permitting this matter to be dealt with as an urgent application.

2. Interdicting and restraining the first respondent until 31 December 2017 from being employed by the second respondent.

3. Interdicting and restraining the first respondent until 31 December 2017 within the Republic of South Africa and whether directly or indirectly as an employee, manager or agent for any person firm or body corporate from:

3.1 carrying on or assisting financially or otherwise being engaged with or concerned or interested in;

[11] Act Number 66 0f 1995, hereafter referred to as the Act or LRA.

3.2 being a Director, shareholder or member of;

3.3 acting as a consultant or advisor to;

any company, closed corporation or business which carries on business which is similar to or competes with the applicant.

4. Interdicting and restraining the first respondent from utilising and/or divulging and/or disclosing whether directly or indirectly any of the applicant's trade secrets to the second respondent or any other third party.

5. ordering the first respondent to pay the costs of this application, alternatively and in the event that the second respondent opposes this application ordering the first and the second respondents to pay the costs of this application jointly and severally, the one paying the other to be absolved.

6. Further and/or alternative relief.

[2] It is only the first respondent who opposed the application, acting in his capacity as the erstwhile employee of the applicant.

Factual Background

[3] The first respondent was employed by the applicant, initially on a fixed term contract and later on permanent basis from 2008 as an Internal Sales Personnel in the low voltage general electrical sales department. In that role, he was

responsible, *inter alia*, for: -

3.1 providing customer service knowledge and skills to ensure customer satisfaction;

3.2 generating tender pricing for the local electrical contractors;

3.3 generating quotations for customers on a variety of products;

3.4 generating purchase orders for non-stock and/or buy out items; and

3.5 providing internal support to external sales representatives when they called for pricing and/or stock availability.

[4] He dealt with the applicant's suppliers by virtue of which he knew which products could be sourced and from which supplier and at what price. Admittedly, he had previous knowledge and dealings with "all those entities" prior to his employment with the applicant. Moreover, from time to time he would assist with "buy-outs" which meant that if the applicant did not have stock of any particular item, the first respondent would contact the applicant's supplier, obtain the item at a price and then "on-sell" the item at a margin which he would determine within certain parameters. He however maintained that he did not obtain knowledge as to the applicant's future business operations and that he did not have intimate knowledge of the applicant's proposed future fixed fee arrangements or the profit margins in respect thereof.

[5] The applicant's business operations depended upon the protection of proprietary interests in confidential information. To this extent the applicant entered into a

restraint of trade agreement with the first applicant when he assumed his duties with the applicant. The restraint undertaking was incorporated in the contract of employment concluded between the first respondent and the applicant. The restraint of trade precluded the first respondent from taking up employment with any business in competition with that of the applicant whether directly or indirectly in South Africa for a period of 12 months.[2]

[6] On 5 December 2016 the first respondent resigned from the employment of the applicant with effect from 31 December 2016. In his exit interview the first respondent said that he was leaving the applicant to seek better employment opportunities, without disclosing where such better opportunities would be found. Sometime in February 2017, it came to the knowledge of the applicant that the first respondent had taken up employment with the second respondent as its Branch Manager. This was a starter–up business. In early March 2017 the applicant sought an undertaking from the first respondent that he would terminate his employment with the second respondent, as a violation of the restraint of trade agreement. The applicant regarded the practise of the second respondent as in competition with its business. When that demand could not be met, the applicant initiated the present application.

[7] The first respondent has conceded in his answering affidavit that he took up employment with the second respondent.[3] He also conceded that the business of the second respondent is in competition with that of the applicant.[4] The first respondent conceded, albeit indirectly, that there was a restraint of trade

[2] Clause 5:"You shall not, for a period of one (1) year after termination of your employment with the Company for any cause whatsoever, either solely or jointly or together with or as an employee, manager or agent for any person, firm or corporate or incorporate, directly or indirectly:

5.1 carry on or assist financially or otherwise be engaged or concerned or interested in;

5.2 be a director or shareholder directly or member of;

5.3 acts as a consultant or or advisor to Any company, closed corporation or business which carries on business in South Africa which is similar to or competes with or endeavors to compete with the business carried out by the company as at the date of termination of your employment with the Company."

[3] See paragraphs 1 (b) and 43 of the answering affidavit.

[4] See paragraph 44 of the answering affidavit.

prohibiting him from taking employment with any entity which operated in competition with the applicant. He was critical of the restraint of trade and its scope of operation. He said that this application failed to meet the requirements set for an interdict. No relief is sought against the second respondent which has indicated that it will abide with the decision of this Court.

[8] According to the applicant, it seeks contractual relief as framed in its notice of motion. It contends that there is no conceivable basis upon which the first respondent can aver that the applicant's "true cause of action" resides in a delictual claim for unlawful competition. The applicant seeks to enforce against the first respondent contractual undertakings not to compete and also contractual undertakings not to disclose confidential information.

[9] An interdict may be an appropriate remedy to prevent a breach or threatened breach of contract and may take the form of an order of court prohibiting the first respondent from doing whatever is specified in the order. The principles governing the issue of an interdict to enforce a promise not to do something and the issue of an interdict to protect any other right are fundamentally different.[5] I am persuaded by the applicant's submissions and I find that one way of breaching a contract is by doing something expressly or impliedly forbidden by the contract or inconsistent with the obligations imposed by the contract. An applicant who asks for an interdict to prohibit such a breach is in reality asking for specific performance in the negative form of non-performance of the forbidden or inconsistent act to ensure performance of the contract. Its entitlement to an interdict, subject only to the court's discretion, is therefore as unquestionable as in the case of an applicant who seeks specific performance in the positive form.

[10] Its entitlement is not subject to the requisites for an application for an interdict as set out by *Van Der Linden 3 1 4 7*. Reference to the context makes it clear that

[5] Christie, The Law of Contract in South Africa, 6th Edition, p554 – 5.

these requisites apply only to protect other rights and that *Van Der Linden* had nothing to say about interdicts to enforce specific performance. The consequence is therefore that the applicant is not required to prove that -

9.1 it would suffer injury or loss if the interdict were not granted, merely that the respondent is committing or threatening to commit a breach of the contract;

9.2 it has no other ordinary remedy, although the inadequacy of an alternative remedy may be relevant in persuading the court to exercise its discretion in favour of granting an interdict.

[11] In this latter regard, it is well accepted that the alternative remedy must be adequate in the circumstances, be ordinary and reasonable, be a legal remedy and must grant similar protection.[6] In deciding whether damages will provide an adequate alternative remedy the court will have regard to factors such as whether an action for damages will, in the circumstances provide ample compensation, whether the injury is one which is indeed capable of being estimated in money and whether a claim for damages does not in fact force the applicant, in the circumstances, to part with the right which the applicant is seeking to protect.[7]

<u>Restraint of trade: The Legal Principles</u>

<u>The onus</u>

[12] It is settled law that a party seeking to enforce a contract in restraint of trade is

[6] *Francis v Roberts* 1973 (1) SA 507 (RA) 512
[7] *Rivas v The Premier (Tvl) Diamond Mining Co Ltd* 1929 WLD 1 14-16, *Setlogelo* supra at 221-227

required only to invoke the restraint agreement and prove a breach thereof. Thereupon, a respondent who seeks to avoid the restraint bears an onus to demonstrate, if he can, on a balance of probabilities that the restraint agreement is unenforceable because it is unreasonable.[8] Accordingly, it is well established that the onus is on the respondent to prove the unreasonableness of the restraint.[9] While the applicant has the onus to invoke the restraint and prove a breach thereof, the onus then shifts to the respondent to establish that the restraint is unenforceable because it is unreasonable and is contrary to public policy. In these circumstances, the applicant's replying affidavit seeks to constitute, in effect, an answer to the respondent's case that the restraint is unenforceable.

Urgency

[13] An application to give effect to a restraint of trade is by its very nature somewhat urgent. Urgency will itself differ from case to case. It is often said that such of these applications are semi-urgent. The applicant cannot be held to blame for endeavouring to settle this matter outside court where this could reasonably have been achieved. A refusal by the first respondent not to co-operate could not render the application less urgent.

[14] Clause 5 of the employment contract containing the restraint of trade prohibits the first respondent directly or indirectly from:

- carry on or assist financially or otherwise be engaged or concerned or interested in;

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[8] *Experian South Africa (Pty) Ltd v Haynes and another* 2013 (1) SA 135; *Basson v Chilwan & Others* 1993 SA 742 (AD) at 7761I-J; *Magna Alloys and Research (SA) (Pty) Ltd* v Ellis 1984 4 (SA) 847 (SCA) at [10] to [14], pp 493E/F to 496D*; Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 406 (SCA*); Den Braven SA (Pty) Ltd v Pillay and another* 2008 (6) SA 229 (D)

[9] *Magna Alloys, supra; Basson v Chilwan*, supra.

- be a director or shareholder directly or member of;

- acts as a consultant or advisor to any company, closed corporation or business which carries on business in South Africa which is similar to or competes with or endeavors to compete with the business carried out by the company as at the date of termination of your employment with the Company.

[15] Surely, this restriction imposed on the first respondent has not been fine tuned to protect the applicant against the type of work which the first respondent rendered for the applicant. The scope of protection given to the applicant by the restraint casts a wider net than the type of job rendered by the first respondent. The risk inherent in this scope is that it could deny the first respondent access to jobs he was doing long before he joined the applicant. The ambit of the protection is too wide with no corresponding justification. This consideration makes the restraint unreasonable as it puts the first respondent out of the market in jobs which had no link with the work he did for the applicant. In a country which is notorious for its high rate of unemployment the restraint is against public policy. To this extent, the applicant may therefore not be entitled to a blanket protection as was designed in the restraint.

[16] The restraint was designed to cover the whole of the Republic Of South Africa. During the presentation of the application the ambit of operation was narrowed to the KwaZulu-Natal area. That was a clear concession that as it stood, the area covered by the restraint was unreasonably wide. This could not help the situation but demonstrated that the restraint was designed to make employees vulnerable to the desires of the employer. The first respondent worked for the applicant only in Durban but has been restricted to an area much wider than Durban. The second respondent operated its business only in Durban. The business competition between the applicant and the second respondent remains fair. In

my view, the geographic scope covered by the restraint was unreasonably wide, particularly when mind is had to the size of the business of the second respondent.

[17] Contrary to the submissions of the first respondent, I find that the period of 12 months was reasonable in the circumstances. If it was shorter, say 6 months, it could be so short as to render the relief the applicant could be entitled to academic. 6 months might expire before the whole litigation process, including judgment writing, is completed.

[18] The applicant has demonstrated that it is entitled to a protectable interest in relation to confidential information in the general electrical division of its business which forms the subject matter of this application. Admittedly, there is a challenge in according to the applicant's protection while he is to keep his job with the second respondent. Monitoring the first respondent is the real challenge. The challenge notwithstanding, contempt of court proceedings appear to be the only appropriate relief left for the applicant, having to follow from a restraining court order.

[19] In conclusion, the following order shall issue:

1. The order is granted as prayed for in paragraphs 1 and 4 of the notice of motion. Consequently:-

   1.1 This matter is heard as a semi-urgent application;

   1.2 The first respondent is Interdicted and restrained from utilising and/or divulging and/or disclosing whether directly or indirectly any of the applicant's trade secrets to the second respondent or any other third party.

2. The order sought in paragraphs 3 and 5 of the notice of motion is dismissed and therefore no costs order is made.

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Cele J.

Judge of the Labour Court of South Africa.

APPEARANCES:

FOR THE APPLICANT: Adv C Whitcutt

Instructed by Nicqui Galaktiou INC.

FOR THE FIRST RESPONDENT: Mr V Singh:

Instructed by AshleyBhodraj