THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not reportable

CASE NO: J1448/18

In the matter between:

PROFIBRE PRODUCTS (PTY) LTD **Applicant**

and

ALLEN GOVINDSAMI **Respondent**

Application heard: 1 June 2018

Judgment delivered: 5 June 2018

JUDGMENT

VAN NIEKERK J

[1] This is an application to enforce restraint undertakings furnished by the respondent to the applicant in terms of a contract of employment.

[2] The respondent was employed on 15 December 2005 as a quality and product support manager. In 2011, he was appointed to the position of key accounts executive, the position he held at the time of his resignation on 6 March 2018.

[3] It is not disputed that as the key accounts executive, the respondent was responsible for managing sales activities, spearheading sales growth, ensuring that monthly targets were met, managing customer relations and needs, and the like. The respondent does not dispute that he had built up sound professional relationships with the applicant's clients, and that it was his responsibility to secure new clients and take care of the applicant's existing clients. He was, in short, integrally involved with the applicant's business.

[4] The applicant avers that during the latter part of 2018, it is to engage in a tender process, and that the respondent's knowledge of its business model and his relationship with its existing clients threatens to undermine its business.

[5] The respondent does not deny that while he was in the employ of the applicant, he had access to strategic information that included product costs methodology, customer price lists, customer information and price lists, details pertaining to new and prospective customers, product development and costing and profitability.

[6] Clause 25.1 of the contract provides that the respondent is not for a period of three years after the termination of his employment to be employed by or consult for any other concern that trades in competition with the applicant. Clause 25.2 provides that the respondent shall not disclose any trade secrets or confidential information to third parties. These are the provisions that the applicant seeks to enforce.

[7] When he resigned, the applicant advised the respondent's manager that he intended to provide consulting services for his own account. The applicant sought undertakings to comply with the restraint, which were not forthcoming. During April 2018, the respondent was observed at the premises of Fibre Panels.

It is not disputed that the respondent has since been employed by Fibre Panels. It is also not in dispute that Fibre Panels competes directly with the applicant.

[8] The principles applicable to onus in disputes such as the present are well-established. A party seeking to enforce a contract in restraint of trade need only invoke the contract and prove a breach of its terms. Thereafter, any respondent who seeks to avoid the restraint bears an onus to demonstrate, on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable (see *Basson V Chilwan* 1993 (3) SA 742 (A); *Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA)).

[9] The starting point is that public policy requires that parties should comply with contractual obligations that have been freely and voluntarily undertaken (often referred to as the freedom of contract doctrine or expressed by the maxim *pacta sunt servanda*). Essential to this doctrine is the idea that individuals should be left free to conclude contracts and that the role of the courts is merely to enforce contracts and that judicial intervention should be kept to a minimum. That notwithstanding, it is generally accepted that a restraint will be considered to be unreasonable (and thus contrary to public policy and unenforceable), if it does not protect some legally recognisable interest of the employer but merely seeks to exclude or eliminate competition. Ordinarily, a restraint will be unenforceable if it does not protect a trade connection and/or confidential information to which the ex-employee was exposed. (For a recent summary of the relevant principles, see the judgment of the Labour Appeal Court in *Labournet (Pty) Ltd v Jankielson & another* (2017) 38 *ILJ* 1302 (LAC) at paragraphs 39 to 45.)

[10] It warrants emphasis that all an applicant in an application such as the present need do is show that there is confidential information to which the employee had access and which he or she could transmit if so inclined. It is not necessary to show that the employee has in fact used information confidential to the applicant. Similarly, in relation to customer connections, it is necessary to do no more than show that trade connections through customer connections exist,

and that they could be exploited by the former employee if employed by a competitor (see *Den Braven SA (Pty) ltd v Pillay and Another* 2008 (6) SA 229 (D) at 240H).

[11] In *Basson v Chilwan* (*supra*) the court held that to determine the reasonableness or otherwise of a restraint of trade provision, the following questions should be asked:-

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

[12] The proprietary interests that can legitimately be protected by a restraint agreement, generally speaking, fall into two categories. The first is confidential information which is useful for the carrying on of the business and which could be used by a competitor, if it were to be disclosed to that competitor, to gain a relative competitive advantage (sometimes referred to as 'trade secrets'). The second is relationships with customers, potential customers, suppliers and others that go to make up what is sometimes referred to as the 'trade connection' of the business, this being an important aspect of its incorporeal property known as goodwill.

[13] Whether information constitutes a trade secret is a question of fact (see *Mossgas (Pty) Ltd v Sasol Technology (Pty) Ltd* [1999] 3 All SA 321 (W) at 333), *Walter McNaughten (Pty) Ltd v Schwartz & others* 2004 (3) SA (C)). For information to be confidential, it must be capable of application in trade or industry, i.e. it must be useful and not public knowledge and property; secondly, it must be known to

a restricted number of people or a close circle; and thirdly, it must be of economic value to the person seeking to protect it (see *Townsend Productions (Pty) Ltd v Leech & others* 2001 (4) SA 33 (C) *Walter McNaughten (Pty) Ltd v Schwartz & others* (supra)).

[14] The need by an employer to protect trade connections arises where an employee has access to customers or suppliers and is in a position to build up a particular relationship with them so that when the employee leaves the service of the employer, he or she could easily induce the employer's customers and suppliers to follow him or her to a new business. Again, this is a question of fact, and often one of degree.

[15] It is incumbent on the employee under restraint to establish that he or she had no access to confidential information and never acquired any significant personal knowledge of confidential information or influence over the applicant's customers while in the applicant's employ (see *Rawlins* supra at 542F-543A). In other words, it is enough for the party seeking to enforce a restraint to show that trade connections through customer or supplier contact exist, and that they can be exploited if the employee was to be employed by a competitor or compete with the business of the applicant. It is not for the applicant to have to run the risk of the employee communicating its trade secrets or utilising its customer connections to the advantage of a competitor. It is also not incumbent on an applicant to enquire into the *bona fides* of the employee or to demonstrate that he or she is *mala fides* before it is entitled to enforce a contractually agreed restraint. The holder of the restraint also does not have to show that the employee in fact utilised information confidential to it – it is enough that the employee could do so. As Marais J stated in *BHT Water treatment (Pty) Ltd v Leslie and another* 1993 (1) SA 47 (W) at 57J-58D:

> In my view, all that the applicant can do is to show that there is secret information to which the respondent had access, and which in theory the first respondent could transmit to the second respondent should he desire to do so. The very purpose of the restraint agreement was that the applicant did not wish to have to

> rely on the bona fides or lack of retained knowledge on the part of the first respondent, of the secret formulae. In my view, it cannot be unreasonable for the applicant in the circumstances to enforce the bargain it has exacted to protect itself. Indeed, the very ratio underlying the bargain was that the applicant should not have to content itself with crossing its fingers and hoping that the first respondent would act honourably or abide by the undertakings that he has given.

[16] Turning to the first leg of the enquiry, the respondent contends that there is no restraint by which he is bound. He concedes having signed the contract of employment referred to above (and with it the restraint) but, as I understand the argument, he submits that when he was promoted from the post of quality assurance manager the restraint (and indeed the entire contract) was no longer binding. There is manifestly no merit in this submission. The contract of employment signed by the respondent at the commencement of his employment remained intact and enforceable until the respondent terminated the contract by way of his resignation. There is simply no conceptual basis on which it could be otherwise. The respondent continued to reap the benefits of the contract after his promotion in 2011, by way of remuneration and other benefits. There is no reason why he should not continue to be bound by the obligations imposed on him by the contract, including the restraint.

[17] The applicant relies mainly on the averment that a former factory manager, Swart left the applicant's employ in March 2014 and is currently employed by Fibre Panels. In reply, the applicant states that Swart joined Fibre Panels two years and four months after having left the applicant's employ, and that it would not have ben economical for the applicant to enforce the remaining eight months of his restraint. Le Roux left the applicant to join a customer – that was not a breach of his restrain and indeed, was to the applicant's advantage. Ramsunder left the applicant to join a competitor, but the applicant took the view that he did not possess sufficient knowledge of a confidential nature so as to compromise the applicant's proprietary interests, and elected not to enforce the restraint. Inconsistency is not in itself a basis on which a restraint might be considered unreasonable, at most, it is indicative of the absence of any proprietary interest

worthy of protection. Each case must necessarily be determined on its own merits.

[18] To the extent that the applicant's right to seek a paring down of the restraint is the subject of challenge, the respondent relies on the judgment by the High Court in *Kelly Group Ltd v Capazorio & others*, the court stated that if a court is asked to read down an agreement so as to make it reasonable, this is an issue that must be pertinently raised on the papers and the facts in support of any severance set out. In *New Just Fun Group (Pty) Ltd v Turner and others* (J786/14, unreported) this 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….

[19] By way of reply, the applicant states that the information acquired by the respondent would be outdated in 18 months, a period during which new product models for existing and new clients will be developed, and during which the contact lines between the respondent and the applicant's customers would no longer be available to him.

[20] To the extent that the respondent seeks to have this evidence disregarded on account of the fact that it is proffered by way of reply, this submission ignores that application of the onus in restraint disputes and the manner in which they are ordinarily litigated in this court. As I have indicated above, an applicant need do no more than assert the retardant and establish a breach of it. It is then for the respondent to establish that the restraint is unreasonable. More often than not, the response to that case is by way of reply, and for that reason, this court has never objected to the filing of a fourth set. In the present instance, for reasons that are not apparent, the respondent has not done so. In these circumstances, it is not open to the respondent to contend that the applicant's averments in relation to the paring down of the restraint should be disregarded. In my view, a case has been made to pare down the temporal component of the restraint to a period of 18 months.

[21] There is no other facet of public policy that militates against the enforcement of the restraint. The respondent remains able, for the period of the restraint, to seek employment with parties that are not in direct competition with the applicant. He has the skills to do so, on his own version. In his answering affidavit, the respondent denies having been trained to establish personal relationships with clients, he states that he 'was born with that ability generally.' Further, the fact that the applicant had retrenched a number of employees recently (a factor that the applicant states he took into account when deciding to resign) is not relevant. Concerns about security of employment do not in themselves raise issues of public policy that serve to outweigh the rule that parties ought to be bound by agreements into which they freely enter. For all of the above reasons, the applicant has made out a case for the enforcement of the restraint and confidentiality undertakings.

[22] In relation to costs, the 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. The respondent has partially succeeded, at least to the extent that the temporal

element of the restraint has been halved. In these circumstances, the interests of the law and fairness are best satisfied by each party bearing its own costs.

I make the following order:

1. The respondent is interdicted and restrained, for a period of 18 months from 6 March 2018, anywhere in the Republic of South Africa, from advising, consulting to, being employed by or having any interest in, any concern that trades in competition with the applicant.
2. The respondent is interdicted and restrained from disclosing to any unauthorised third party any trade secrets or confidential information of the applicant.
3. There is no order as to costs.

André van Niekerk

Judge

REPRESENTATION

For the applicant: Ms. P Govender, Macgregor Erasmus Attorneys

For the respondent: S Tlou, Mosomane Inc