



IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: J 1658-18

Not Reportable

In the matter between:

MASSCASH PROPRIETARY LIMITED

Applicant

and

ANDREW LUDEN

First Respondent

H & W DISTRIBUTORS (PTY) LTD

Second Respondent

Heard: 7 June 2018

Delivered: 21 June 2018

Restraint of trade – balancing of interests – restraint shortened

JUDGMENT

WHITCHER J

- [1] This judgment provides the reasoning for the ruling sought from this court on an urgent application to enforce a restraint of trade. I do not set out the factual background of the matter in any more detail than is necessary to make a ruling. This background is comprehensively set out in the pleadings.

- [2] Briefly, Mr Luden, the first respondent, worked as a store manager in Uppington at MassCash, the applicant. He resigned on 23 March 2018 and informed MassCash on 11 April 2018 that he intended working for its main competitor in Uppington, H&W. Indeed, he was to become a member of H&W. This was despite the provisions of restraint of trade in his employment contract that prevented him from working for any competitor within a radius of 200kms of Uppington for a period of 12 months after leaving MassCash's employ.
- [3] There was some argument about whether MassCash inordinately delayed launching these proceedings given that Mr. Luden first ventured joining their competitor, H&W, a month and eleven days before this application was launched on 22 May 2018. In the circumstances, noting also the eight (8) days the respondent had to file answering papers and given the inherently urgent and complex nature of restraint applications, this is not a kind of self-created urgency this court should censure by refusing to hear the matter.
- [4] There is no dispute that a valid restraint of trade provision is to be found in the contract of employment between Mr. Luden and MassCash. There is further no dispute that Mr. Luden is in breach of that provision of the contract which, if enforced, would prevent him from taking up employment at the second respondent, H & W, for twelve (12) months after he resigned from his employ at MassCash on 23 March 2018.
- [5] Importantly, once the applicant has established these facts, the onus shifts to Mr. Luden to show that the contractual provision in question is unreasonable if he wishes to escape its enforcement by this court.
- [6] It is trite that in considering the reasonableness of the restraint agreement, the following four questions have to be addressed: Does one party have an interest that deserves protection after termination of the agreement? If so, is that interest threatened by the other party? In that case, does such interest

weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive? And, is there an aspect of public policy, having nothing to do with relationship between the parties, that require the restraint be maintained or rejected?

- [7] The court may also have regard, as a fifth consideration, to whether the restraint goes further than is necessary to protect the interest in question.
- [8] There are two protectable interests recognised in our law, trade secrets and customer connections. In this matter, the former predominates as wholesale custom is won or retained, I accept, overwhelmingly through price and not sentiment.
- [9] Mr. Luden did not seriously dispute that the information he gained into MassCash's pricing and sales while working there were confidential. It was common cause that MassCash and H&W contended for the business of the same 20 top customers in and around Upington. Knowledge about rebates, discounts and special settlement conditions offered to particular wholesale clients would obviously be useful to a competitor such as H&W. In this regard, I note that Mr. Luden did not credibly dispute that pricing for certain products offered for sale in MassCash's Upington store was determined by deals struck with local suppliers. As a store manager, it had been Mr. Luden's role, partly, to negotiate these supplier agreements. That he could use this micro-level knowledge garnered at the applicant at H&W to undercut his former employer is, to me, obvious.
- [10] Other confidential information to which Mr. Luden was privy may also reasonably possibly damage his former employer's business. I speak of information about advertising bonuses, gross profits, markups, and prescheduled promotions.

- [11] Mr. Luden has, in my view, failed to show that MassCash's interests in keeping these trade secrets from its main competitor *do not* deserve protection. Should he join H&W as a manager, member or both, it is likely that H&W will obtain and act upon this knowledge.
- [12] Mr. Luden's main argument centred on the staleness of the confidential pricing and supplier information he possessed. He argued that prices fluctuate significantly as market conditions change. In other words, by the time this matter came to court his knowledge of MassCash's pricing was not still useful? If it was not useful anymore, this information could not serve as trade secrets.
- [13] Once again, Mr. Luden bore the onus to prove that price fluctuations render MassCash's enforcement of the restraint unreasonable. He has, in my view, failed completely to do so. MassCash asserted that, at least some of its agreements with suppliers are negotiated annually. While I accept that certain products such as fuel are subject to price volatility, meaning that supplier agreements are perhaps of a short duration, I am not persuaded, nor was such a case made out, that this is the situation for all of MassCash's products.
- [14] The submission that Mr. Luden cannot unlawfully compete by negotiating with certain suppliers because the decision on the price they sell to a wholesaler resides with the supplier does not impress. One or two suppliers may have a uniform price but, for the rest, it fails to take account of the fact that, by knowing what rebates and other terms on volume MassCash offers these suppliers, a competitor can tailor its own offer to a supplier which has the effect of lowering the selling price in its store.
- [15] The last redoubt for Mr. Luden then is how MassCash's interests weigh qualitatively and quantitatively against his interest not to be economically inactive and unproductive. It is likely, as contended by the first respondent, that some of the information he has is dated or will be before twelve months is

up. Price fluctuation owing to market conditions would lessen the usefulness of Mr. Luden's knowledge in some instances. As for the longer-term agreements affecting price already in place, although the onus lay with Mr. Luden to show that these agreements were for a period shorter than the twelve-month period of restraint that MassCash sought to hold him to, I take note that in terms of the applicant's own supporting documentation to its affidavit, end November 2018 was the latest date that Mr. Luden had specific knowledge of actionable trade secrets.

[16] I would imagine further that an organisation as large and sophisticated as MassCash has the strategic resources and business flexibility to relatively simply mitigate the harm that might flow from the deployment of some of the information Mr. Luden possesses. His knowledge of markups, for example, could be rendered stale well before twelve months is up by MassCash altering the markup applicable during his tenure. To this the question may be posed: but why should MassCash have to reduce its profit to deal with a covenant-breaking employee? The answer is, whether Mr. Luden works for H&W or not, it should be obvious to the applicant, through H&W's approach to Mr. Luden, that their competitor has entered into a heightened stage of an existing price-war with them. As such, business principles would dictate the need to adjust their markups and thus prices in any event. The same would apply to their deal-making with short-term suppliers as far as rebates, discounts and special settlement conditions are concerned. While Mr. Luden's refusal to honour his contractual obligation not to compete with MassCash is, in general terms, deplorable, whether he moves to H&W or not, trading conditions in Uppington are likely to become even more competitive in the next few months anyway.

[17] In weighing up the competing interests, nothing much is to be made of the fact that Mr. Luden once took up farming for 2 years. He has no other meaningful way of providing for himself, his two minor children and his wife at their current standard of living other than employment as a manager in the wholesale business.

[18] When measured against all of the above-mentioned factors, a period of restraint of one year therefore appears to be too long. While the sanctity of contract is something the courts should not hesitate to enforce, a sense of proportion must be maintained. To deprive Mr. Luden of the opportunity to earn a living in a familiar town and industry for a full year appears unreasonable. Striking a healthy balance between the protectable interests of MassCash and the rights of Mr Luden is the real issue between the parties in this matter. In my view, the period up until the end of October 2018 is a reasonable period in the circumstances of this matter for the operation of the restraint.

Order

[19] In the premises, I order as follows:

1. The first respondent is interdicted and restrained until 30 October 2018 and within a radius 200kms of the applicant's store situated in Upington from being interested or engaged, whether directly or indirectly in any capacity whatsoever in the business of the second respondent and any business which competes with the business of the applicant in the wholesale of food.
2. The first respondent is interdicted and restrained from using confidential information of the applicant or disclosing it to any third party including the second respondent.
3. Each party to pay their own costs.

B Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: P Bosman, instructed by Edward Nathan Sonnenbergs
Inc

For the Respondents: C D Pienaar, instructed by Goldberg Attorneys

Labour Court