



Of interest to other judges

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT JOHANNESBURG**

Case no: J 2501-18

In the matter between:

**GAVILON SOUTH AFRICA (PTY)
LTD**

Applicant

and

LEON LOTZ

First Respondent

TWK AGRI (PTY) LTD

Second Respondent

CONSTANTIA KUNSMIS (PTY) LTD

Third Respondent

Heard: 23 August 2018

Delivered: 28 August 2018

Summary: (Urgent – restraint of trade – three month duration – short duration not disentitling employer to relief – competitor – confidential information - protectable interests)

JUDGMENT

LAGRANGE J

Introduction

[1] This is an urgent application to enforce a restraint of trade agreement, which was launched on 26 July 2018 for hearing on 23 August 2018. The application is not opposed by the second and third respondents, namely Twk Agri (Pty) Ltd ('TWK') and Constantia Kunsmis (Pty) Ltd ('Constantia'). Answering and replying affidavits were filed, but no request or application was made by the first respondent, Mr L Lotz ('Lotz'), to file a supplementary affidavit as often occurs in this type of application.

[2] The relief sought on an urgent basis by the applicant ('Gavilon') is, in summary, to interdict Lotz from:

- 2.1 being concerned, associated, engaged, interested or employed by 2R or 3R, or any other competitor;
- 2.2 soliciting employees of the applicant to terminate their employment with it;
- 2.3 furnishing information, advice or using any other means designed to cause a customer, supplier or business associate of the applicant to terminate its association with the applicant or transfer its business to a third party,

and further

- 2.4 directing him to return or destroy confidential information of the applicant in his possession and
- 2.5 prohibiting him from disclosing information or using confidential information of the applicant for the benefit of third parties.

[3] Lotz was employed as the National sales manager of Gavilon having been employed with it since 15 March 2013. On 25 June 2018 he gave a somewhat cryptic notice of his resignation in an email in the following terms, under the heading 'Bedanking' (resignation):

Hiermee gee ek Gavilon kennis dat ek my dienste opskort.

Laat weet asb wat is die proses vorentoe

[translation: I herewith give Gavilon notice that I suspend my services
Please advise what the process is going forward]

- [4] There is a dispute whether this resignation took effect immediately or whether it was subject to one month's notice. Lotz agrees that clause 2.3 of his contract of employment with Gavilon required him to give one month's notice. Clause 2.4 of his contract states:

During any period of notice, the company shall be entitled to require the employee not to attend the company's premises and/or not to perform any work, and/or not to have any contact with all or any of the company's employees, customers, clients, distributors and suppliers, provided that during any such period the company shall continue to pay the employee's normal remuneration in the normal course.

- [5] In any event, Lotz took up employment with Constantia as early as 10 July 2018 as a marketing manager. Constantia is a wholly owned subsidiary of TWK.
- [6] Clause 16 of Lotz's contract imposed a restraint of trade, pertinent provisions of which are:

16.1 The employee shall not, for a period of 3 (three) months following termination of his employment with the company for any reason whatsoever and in South Africa, be interested or engaged, directly or indirectly, in any capacity (including but not limited to advisor, agent, consultant, director, employee, financier, manager, member of a close Corporation, member of a voluntary association, partner, proprietor, shareholder, trustee) in any company, firm, business, trade, undertaking or concern directly or indirectly engaged in any activity that is the same or similar to that of the company.

16.2 the employee further undertakes that neither the employee nor any company, firm, business, trade, undertaking or concern in or by which the employee are directly or indirectly interested or employed will, for a period of 3 (three) months following the termination of his employment with the company for any reason whatsoever, directly or indirectly:

16.2.1 encourage or entice or incite persuade or induce any other employee of the company, who was employed by the company as at the time of the termination of your employment, to terminate his employment by the company; or

16.2.2 furnishing any information or advice (whether oral) to any client, supplier business associate of the company or use any other means or take any other action which is directly or indirectly designed, or in the ordinary course of events calculated, to result in any such client, supplier business associate terminating its association with the company and/or transferring his business to any other person than the company, or attempt to do so.

- [7] Clause 15 of the contract dealt with confidentiality of Gavilon's information and *inter alia* provided that:

The employee shall not, either during the continuance of his employment under this agreement or at any time thereafter, use to the detriment prejudice of the company or, except in the proper course of the employee's duties, divulge to any person any confidential information concerning the business or affairs of the company or its holding or affiliated companies which may have come to the employees knowledge during his employment.

Confidential information was also defined in the agreement in wide terms.

Issues in dispute

- [8] The central issues in dispute between the parties are whether:

- 8.1 the application is urgent;
- 8.2 the restraint agreement expires on 25 September or 25 October 2018;
- 8.3 Lotz is in breach of the restraint agreement by taking up employment with Constantia, which principally concerns whether or not either Constantia or TWK is a competitor of Gavilon, and
- 8.4 if the proprietary interest of Gavilon in its confidential information is at risk by virtue of Lotz being employed by Constantia.

Lastly, the respective interests of the parties for and against upholding the restraint need to be evaluated if the above issues are determined in Gavilon's favour.

Urgency

[9] Prior to launching this application on 26 July 2018, within a fortnight of Lotz tendering his resignation, Gavilon sought undertakings from him to abide by the restraint provisions in his contract when it became aware of his engagement with the TWK group. He was unobtainable in early July owing to the fact that he had previously arranged to take leave. Although there is some dispute about what took place in the conversation between Lotz and Gavilon's managing director on 11 July 2018, it is common cause that Lotz did not confirm his employment by Constantia at that stage and undertook to revert to Gavilon, which he only did through his attorney on 16 July 2018. The application was launched within ten days thereafter, in circumstances where the founding affidavit had to be deposed to by Gavilon's managing director who was in Georgia, USA.

[10]

[11] Taking the above into account, I am satisfied that the applicant was not dilatory and did attempt to secure undertakings from Lotz in circumstances where Lotz would not, or could not, confirm his employment status with Constantia and had undertaken to revert to Gavilon. In my view, Gavilon proceeded with sufficient expedition in launching the application and gave Lotz ample time to respond to it.

Is Constantia a competitor of Gavilon?

[12] Pertinent facts that are not disputed in relation to this issue are the following:

12.1 Gavilon is an importer and supplier of a variety of fertiliser products to the agricultural industry and has a significant warehouse storage facility for its products in Durban, which is leased.

12.2 Gavilon imports most of its supplies and deals with ten international suppliers, four of which supply 60% of its imports and have long term supply agreements with Gavilon.

12.3 Gavilon has an extensive national customer base. The wholesale customer base consists of nationwide distributors, small blenders, agricultural cooperatives and large, buying groups. 50% of Gavilon's sales volume is sold wholesale to five large entities including TWK, Multi-Green. The remainder of its sales are in the retail market to more than 150 customers around the country.

12.4 Constantia and TWK both purchase fertiliser products from Gavilon and are also local suppliers of fertiliser products to the agricultural industry.

[13] Lotz admits TWK purchases fertilizer from the applicant, which is then stored and sometimes blended at Constantia depots before being sold to farmers in the retail market. However, he denies TWK can compete with Gavilon because it does not have the internal supply arrangements with any of the international suppliers that Gavilon has and would have to cease trading if it no longer supplied them. He goes further to state that the applicant has a wholesale monopoly over the supply of specialized fertilizer and fertilizer products which TWK and Constantia have to live with as buyers. He contends that the respondent companies are merely customers of Gavilon. In essence, Lotz tries to make out a case that Gavilon operates in the wholesale fertiliser market and the respondent companies, who are wholly dependent on it for supplies, operate in the retail market. Consequently, he contends that any increase in fertiliser sales by the respondent companies necessarily will also benefit Gavilon as the wholesale supplier because it will be supplying them with greater volumes of fertiliser.

[14] In reply, Gavilon provided greater detail of competition in the retail space. It also disputes Lotz's allegation that it has a monopoly of fertiliser supplies to the respondent companies. It points out that, fertilizer as a commodity is not specialized and is bought from various sources. More particularly, it states that it only supplies 20% of the volume of national fertiliser

consumption and the respondent companies in fact do purchase fertiliser from other local suppliers such as Foskor and Sasol Fertiliser Ltd as well as from Yara, an international producer. In addition there are other wholesale suppliers of fertiliser which compete with Gavilon, from which the respondent companies could purchase supplies. Consequently, they are not tied to Gavilon as a sole supplier. Moreover, Gavilon's sales to the respondent companies for the period April to July 2018 of 4000 MT shows a dramatic decline from the same period in 2016 and 2017 when Gavilon's sales to them amounted to 36,000 MT and 38,000 MT respectively.

[15] Lotz claims that Gavilon ought to have pleaded these details in its founding affidavit, but did not apply to strike them out of the replying affidavit nor did he seek to file a supplementary affidavit in reply. It is trite that an applicant cannot make out a case in reply. However, some of the additional material contained in the replying affidavit is a direct response to new issues raised by Lotz. For example, his claim that Gavilon is a monopoly supplier to the respondent companies necessitated evidence in rebuttal. In relation to the competitive space in which Gavilon and the respondent companies operate, it is clear that in the founding affidavit Gavilon identified both a retail and wholesale component to its market profile, which each account for approximately 50% of its national sales. Further, Lotz did not dispute the division of Gavilon's sales between the retail and wholesale market and it stands to reason that even if the respondent companies only operate in what might be called the retail market there is an overlap between their market and Gavilon's market even on the founding and answering affidavits. That is sufficient to establish them as competitors in at least one national market.

[16] Accordingly, even on his own papers, it is clear that his employment with Constantia is employment with a competitor of Gavilon and is in breach of clause 16.1 of his contract of employment.

Does Lotz's employment by Constantia pose a threat to Gavilon's proprietary interest in its confidential information and trade connections?

[17] Gavilon claims that Lotz as its National sales manager had built up significant and influential relationships with key customers. Further, it

claims he has significant knowledge of its customer base, the creditworthiness of different customers and the terms of their sale contracts.

[18] Importantly, though Lotz claimed credit for bringing some of these customers to Gavilon when he joined it (albeit that this is strictly irrelevant in a restraint of trade application), he does not dispute that he does have relationships with some of Gavilon's customers and that such relationships "could constitute protectable interests". However, he denies the value of such relationships to the respondent companies based on his claim that they were not competitors with Gavilon. In view of the discussion above that is an untenable claim and accordingly the relationships he developed do constitute a protectable interest of Gavilon.

[19] Lotz also argues that the creditworthiness of customers is something that can be obtained by other means by any interested third-party. The respondent concedes that credit checks are an alternative way of acquiring certain information about a customer's creditworthiness, it has further information about customers' records as reliable purchasers of fertiliser products, which is part of Gavilon's own confidential information about its customers and not in the public domain.

[20] Further, it is common cause that between 5 and 17 June 2018, a couple of weeks before he resigned, that Lotz forwarded various items of confidential information of Gavilon to his wife's email address, which included *inter alia*:

20.1 sales order information for the period April 2017 until May 2018;

20.2 budget information for the 2017 and 2018 fiscal years;

20.3 a detailed list of all Gavilon's customers and their information, and

20.4 details of Gavilon's pricing model relating to certain fertiliser products.

Lotz admits that even if he had not sent this information he was privy to it during his employment with Gavilon. He also agrees that the information is not publicly available except for the identity of customers. Once again, he disputed the value of this information to the respondent companies

because of his primary claim they were not competitors of Gavilon. Further, he claims that he was entitled to the information in question and had destroyed all hard copies of it and the emails in question he had deleted from his personal computer.

[21] In relation to the specific information mentioned, Lotz responded that:

21.1 the value of information about product pricing models was exaggerated because prices fluctuate regularly owing to a variable foreign exchange rate, and therefore the information loses its value when it is no longer current;

21.2 the detailed list of all customers was used by him to contact customers from his home office;

21.3 the budget information was required for measuring his own sales performance, and

21.4 similarly, he always received an update of sales done for previous months to measure his own performance.

[22] Gavilon disputes the need for Lotz to send all this valuable information to a personal email shortly before he resigned. It is telling that of 280 emails sent to his home email address since mid-August 2017, the only ones containing updates of sales done for previous months were the ones sent in June 2018. Moreover, the information contained not merely customer sales but also sales volumes, type of product, prices and delivery periods for the imminent peak season. They also included details of sales for which Lotz was not responsible. Further, the pricing model contained information about the operating costs and margins of Gavilon, which were not variable, and would be of value to a competitor.

[23] What emerges from the above is that, it is difficult to escape the conclusion, given the scale of the content and the timing of the emails, that Lotz sent information to a private email address not for the purpose of performing his current duties in the last couple of weeks of his employment with a capital Gavilon but more probably because that information would be of great interest to a potential competitor such as Constantia.

- [24] On this evidence alone, there is more than sufficient reason to believe that Gavilon's proprietary interest in that information would be threatened if Lotz worked for Constantia. It is trite law that, it is not necessary for an applicant in a restraint of trade application to prove that an employee has actually exploited its confidential information, but merely that there is a risk the employee might do so. In this case, there is even reason to believe that the information Lotz transmitted to a private email address indicated an intention to exploit the information, which is conduct the restraint agreement seeks to forestall occurring.
- [25] One of the more curious defences raised by Lotz was that given the short duration of the restraint, the trade connections he had developed would not vanish within three months and in so far as he had knowledge of customer profiles, that too would not be worthless after the restraint had ended. As a matter of logic, there is certainly some merit in that argument. However, despite his claim that the selling period for fertiliser is throughout the year, contrary to Gavilon's claim in its founding affidavit that the peak sales period is from August to November each year, the more detailed evidence provided in rebuttal confirms Gavilon's account. Accordingly, whatever the value of the three month restraint may be in protecting Gavilon's interests, it could not have a greater value than it has at present during the critical period when the bulk of the fertiliser market sales are in contention.

Does the restraint terminate in September or October 2018?

- [26] Lotz contends that his services terminated the day he gave notice, namely 25 June 2018. He claims that, contrary to clause 2.3 of his contract of employment requiring him to give a month's notice, his resignation was immediate as evidenced by his reference to 'suspending' his services in his resignation email. He maintains that the lack of response from Gavilon and its subsequent cancellation of his company credit card and the collection of his cell phone, laptop computer and other company property from his residence on 27 June 2018 was indicative of Gavilon accepting that his services had terminated. He also claims that the letter from his

attorney dated 16 July 2018 also made this clear. What that letter stated into alia was:

1. Our client indeed resigned on 25 June 2018. Upon resigning, our client requested confirmation from your client on the way forward.
2. In response, and on that same day, our client was told that his company credit card. It is immediate effect, and that he had to hand in his telephone, laptop computer and all your clients' property in his possession. All this property was collected from our client on 27 June 2018.
3. It was patently clear that your client did not want our client to work out his notice. Our client was also on pre—approved leave in the first week of July 2018, and never instructed to resume duties. Your client's allegations that client does took it upon himself to be absent from work after resigning is devoid of any truth, and any difficulty to contact our client was caused by client's conduct as aforesaid.
4. Your client's belated attempt, as contained in your letter to record that he is not required to work after 11 July 2018 is contrived, as this was already the case from 25 June 2018.

[27] The letter of 9 July 2018 from Gavilon's attorneys to which Lotz's attorney referred, asserted, amongst other things, that:

- 27.1 Lotz was still employed as the National sales manager.
- 27.2 He was required to give one month's notice and accordingly his service would only terminate on 25 July 2018 and he remained an employee of Gavilon until that time.
- 27.3 That he had absented himself from work even though he was only entitled to be on leave from 2 to 5 July 2018.
- 27.4 That he had advised Gavilon he would only be available after 10 July 2018.
- 27.5 He was reminded that he was still an employee of Gavilon and obliged to be remain in contact and to cooperate with it on work-related matters.

27.6 It would treat his absence from work until 10 July 2018 as annual leave and there after it invoked clause 2.4 of the contract which required him not to perform any work.

27.7 Despite invoking clause 2.4, he remained an employee and was obliged to act in the best interests of Gavilon, which included not taking up other employment.

27.8 He was further advised that he would be paid until 25 July 2018 on the normal monthly payroll.

[28] Ultimately, Lotz was not paid his salary for July, which he took as a further indication that Gavilon had accepted that his services had terminated on 25 June 2018. He further argues that because he was not required to work and not paid for any work one of the essentiality of a contract of employment was absent and accordingly, he could not have been employed during the purported notice period. Gavilon retorts that since Lotz was in breach of his employment obligations by taking up employment with Constantia during his notice period, it did not have reciprocal obligation to pay him for that time.

[29] There is no indication from Lotz that he was instructed to absent himself from 25 June until his leave commenced on 2 July 2018. In fact, it was he who “suspended” his services in his resignation email. Although he claims that, that message was the equivalent of a summary termination on his part, the use of the term ‘suspend’ is difficult to reconcile with an intention to end one’s service permanently forthwith. He claimed to seek directions from Gavilon on the way forward, but had unilaterally decided not to render his services with immediate effect for an indeterminate period. Under these circumstances, where his own intentions were not unambiguous, and given that he had withdrawn his services without warning, it does not follow in my view that he could just assume that retrieval of company property from him meant that Gavilon had interpreted his “suspension” of his services as an immediate termination of his employment and acquiesced to it.

[30] As a matter of law, Gavilon had an election how to respond to his action. It could have accepted it as a repudiation of his contract of employment. As

it is, it chose to enforce the notice requirement in his contract, which included an entitlement to require him to remain in its employment, but effectively in quarantine for the period of his notice. That included not having any contact with customers. It also did not relieve him of the obligation not to act against his employer's interests. In taking up employment with Constantia, he breached both of those obligations and Gavilon, having tendered to pay him for his notice period declined to on the basis that he had not performed his employment obligations. Somewhat paradoxically, those obligations, in the context of clause 2.4 of his contract, required him to render no productive service, but also not to have anything to do with the business or its customers and not to reach his common law obligation not to act contrary to its interests. Lotz could not say that there was an unequivocal act by Gavilon in response to his ambiguous resignation, which indicated it had tacitly accepted that his email amounted to an immediate resignation, which it accepted.

- [31] In the circumstances, I am satisfied that Gavilon was entitled to hold Lotz to his notice period, and did so. On the basis that he did not perform important, though limited, obligations, Gavilon did not pay him his July remuneration, rather than accept that non-performance as a repudiatory breach and cancel the contract summarily. The notice pay may be the subject matter of another dispute, but for present purposes what concerns the court is when his service terminated, which would have been 25 July 2018. Accordingly, the restraint runs for three months from that date until 25 October 2018.

Reasonableness of the restraint

- [32] The period of the restraint is very limited. Nonetheless, Gavilon clearly has a protectable interest in its customer connections and confidential information, which could be harmed by Lotz's employment by Constantia. While it is true that the restraint may not be enough to protect it against all harm its protectable interests might suffer because it is of such a short duration, it can at least protect those interest for the most active sales period of the year, which the restraint will cover most of. Just because the restraint might be less effective than it might have been if a more

extensive period had been agreed upon, does not dis-entitle Gavilon to the limited relief it can provide. It cannot be said that providing such relief at a critical juncture of the peak sales season is trivial or insignificant. By contrast, Lotz will only be prevented for a very limited time from pursuing employment in the very same line of work he was engaged in and will be free to work for a direct competitor shortly.

- [33] He also received a substantial bonus in excess of R 700,000 from Gavilon shortly before he gave notice, and gives no indication he will be facing any short term economic hardship that must be balanced against the harm that Gavilon might suffer if he was allowed to continue working for Constantia.
- [34] Weighed up qualitatively and quantitatively the interest of Gavilon should prevail against the limited period that Lotz might be economically inactive in the area he has chosen to make a living in. There are no other facets of public policy which are unrelated to the interests of the parties which lead me to a different conclusion.
- [35] There is no reason why costs should not follow the cause in this instance.

Order

- [1] Non-compliance with the forms and service provided for in the Rules of the Labour Court are dispensed with and the matter is disposed of as a matter of urgency in terms of rule 8 of the Labour Court Rules.
- [2] The First respondent is interdicted and restrained until 25 October 2018 within the territory of the Republic of South Africa from, directly or indirectly, in any capacity whatsoever:
- 2.1 being concerned, associated, engaged, interested in or employed by:
 - 2.1.1 the Second or Third respondent, or
 - 2.1.2 any other competitor of the Applicant;
 - 2.2 encouraging or enticing or inciting or persuading or inducing any other employee of the Applicant, who was employed by the Applicant time of the termination of his employment, to terminate his/her employment with the Applicant; or

2.3 furnishing any information or advice (whether oral or written) to any customer, supplier or business associate of the Applicant or using any other means or taking any other action which is directly or indirectly designed, or in the ordinary course of events calculated, to result in any such customer, supplier or business associate terminating its association with the Applicant and/or transferring its business to any person other than the Applicant, or attempting to do so.

- [3] The First respondent is directed to return or destroy any confidential information belonging to the Applicant which remains in his possession whether electronically or in hard copy.
- [4] The First respondent is interdicted and restrained from disclosing the confidential information of the Applicant to any third party including the Second and Third respondents, or attempting to do so.
- [5] The First respondent is interdicted and restrained from using the confidential information of the Applicant for the benefit of any third party, including the Second and Third respondents or attempting to do so.
- [6] The First respondent is ordered to pay the Applicant's Costs including the costs of one counsel

R Lagrange

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT: I Miltz SC instructed by Edward Nathan
Sonnenbergs Inc

FIRST RESPONDENT: R J C Orton of Snyman Attorneys