



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
CASE No: J 2882/18

In the matter between:

SCOTT BADER (PTY) LTD

Applicant

and

CHARL BRINK

First Respondent

JUSHI SINOSIA SOUTH AFRICA (PTY) LTD

Second Respondent

SINOSIA SA COMPOSITE SOLUTIONS (PTY) LTD

Third Respondent

Heard: 11 October 2018

Delivered: 23 November 2018

Summary: Restraint of trade

JUDGMENT

MABASO, AJ

Introduction

[1] On 29 August 2018 the applicant approached this court on urgent basis seeking an order in the following terms:

1. That the first respondent be interdicted from directly or indirectly being employed by or have an interest in or in any way a representative, agent or officer to the Second or Third Respondent for a period of 1 (one) year anywhere Republic of South Africa calculated from 08 September 2018;
2. The Second and Third Respondent be interdicted and restrained from employing the first respondent, or in any way being associated with the First Respondent, in breach of the restraint of trade covenant of the First respondent with the applicant.”¹

[2] Following the delivery of the answering affidavit by the first and second respondents, deposed to by the first respondent, which raised *inter alia* that the applicant was not employed by the second respondent but by an entity called Sinosia SA Composite Solutions (Pty) Ltd (hereinafter referred to as the employer), On 04 October 2018 the applicant delivered an application for joinder, in terms Rule 22 of the Labour Court Rules, asking that the employer be joined as a party in these proceedings. The latter application is unopposed. I have taken into account the nature of the dispute and the reason behind the joinder of the employer and am satisfied that the applicant has made out a case in respect of joinder which is therefore granted.

[3] The applicant is Scott Bader (Pty) Ltd, the first respondent is Mr Charl Brink, the second respondent is Jushi Sinosia South Africa (Pty) Ltd, and Sinosia SA Composite Solutions (Pty) Ltd is the third respondent.

¹ This is in terms of the replying affidavit wherein the applicant asked that the notice of motion should read in this way, following the joinder application.

Brief Background

[4] On 5 January 2009 the applicant and the first respondent entered into an employment contract, whereby the former was employed as a Technical Sales Representative. On 17 July 2014, they entered into a restraint of trade agreement, which is the subject matter herein.

[5] In the latter agreement it was agreed between the parties that during the course of his employment with the applicant, the first respondent will *inter alia* acquire knowledge of the applicant's confidential information and other private intelligence, will learn the identity of customers and suppliers of the applicant and will forge personal links with such customers and suppliers and will acquire confidential information which is used by the applicant during the course of the business. He then agreed to be restrained for a period of 12 months, in case of resignation from the applicant, within the Republic of South Africa, whether directly or indirectly. The relevant clause reads as follows:

*"s/he will not become employed by, have an interest in, or in any way act as representative, agent or officer of the competitor of the Employer, whether for the employee's benefit or not"*²

[6] The applicant asserts that it has protectable interests and as a result of the employment relationship with the first respondent, the latter acquired "*a great knowledge, know-how, customer connections, information relating to the Applicant*". As a result of the first respondent's association with the second respondent, who is the applicant's direct competitor, there are a potentially harmful consequences for it as the first respondent has developed extensive and close relationships with its customers as well as knowing who is its suppliers and the costing and pricing strategies and have assisted the applicant to remain competitive within the small market.

[7] The first respondent, on or about 8 August 2018, tendered his resignation from the applicant and when the latter's commercial director enquired from the

² Clause 3.3.3 of the restraint of trade.

first respondent as to where he was going, the first respondent advised that he would be joining the second respondent herein.

- [8] Parties are in agreement that as a result of the employment relationship between the applicant and the first respondent the latter's duties among other things involved promoting and maintaining the image of the applicant to the marketplace, increase sales to the existing customer base, actively seeking new opportunities to promote sales of the applicant's products and services, provide technical support at shop floor level, to report to the relevant regional business manager custom activities and movements in the marketplace.
- [9] The applicant asserts that as a result of the tasks of the first respondent he acquired an intimate knowledge of the applicants business including production, suppliers and its customers. He was in regular contact with the applicant's customers, built a relationship with them as a result, and was the *"face of the Applicants business at its customers"*. The first respondent, however,, asserted that the product base of the applicant is available on the Internet. The first respondent's response to this is found in paragraph 18.1 to 18.4 of the answering affidavit which reads thus, which was not denied by the applicant:

"18.1 I specifically deny that I acquired intimate knowledge of production and suppliers. As far as production is concerned, I have no knowledge of the detailed of the process associated with the Applicant's products.

18.2 As far as knowledge of the applicant's business is concerned; its unclear what the allegation in that regard is aimed at. Any casual search on the Internet would reveal the nature and extent of Scott Bader's business and the products/services it provides.

18.3 I did not attend to all Scott Bader's customers in the Gauteng region. I had a limited number of customers I attended to in that regard. As stated, I did not attend to this customers alone, but was regularly escorted by Scott Bader's afore-mentioned Regional Business Manager and Commercial Director. The reminder of Scott Bader's

customers in the Gauteng region, was attended to by inter alia Mrs Hofmeyer, ... Although she accompanied me on visits to clients I attended to in the said province, I did not accompany her on visits to clients that I was not required to attend to. Consequently, I only attended (together with the Manager), to approximately 55% of [the applicant's] customers Gauteng."

[10] Among other things, the applicant alleges that the first respondent was responsible for pricing in order to maintain and achieve target margins, therefore, he knows what the applicant mark-ups and what its profit margins are. This is disputed by the first respondent. In the replying affidavit, the applicant has not provided any persuasive reply to this.

[11] The applicant alleged that the first respondent had access to confidential information through the applicant's ERP information system M3/DAN, accolade Project development system, 8D Complaint System, SUGAR CRM System and through general correspondence, meetings and training. This is denied by the first respondent, and he further states that he never had the M3 system. In respect of the DAN system, he avers that he only had access to clients that he attended to. In respect of the accolade Project development system, he avers that a special code was required which he did not have. In respect of 8D complaint system, he had no access. However, he accepts that he had access to the SUGAR CRM but denies that the information on that system could be considered confidential information. Moreover, he says the applicant failed to substantiate on the actual confidential information that it claims is in his possession.

[12] It is common cause between the parties that close customer relations are crucial in this type of business. However, the first respondent presented the following undisputed evidence about customers relationship: they are supported and assisted by a technical team, and as a result of such, the technical team is acquainted with customer specific requirements and needs, and that forms a relationship with such customers, and this leads to customers becoming so well acquainted with members of the technical team,

and therefore customers would request the assistance of the specific members of the team.

- [13] The first respondent in the answering affidavit asserts that his employer is part of the Jushi Group of Companies which is structured as follows: China Jushi Co Ltd is the biggest manufacturer of fibreglass in the world, Sinosia SA Composite Solutions (Pty) Ltd is the sole importer of Jushi China fibreglass products in the Republic of South Africa, and the Sinosia SA Composite Solutions (Pty) Ltd is the sole accredited sub-distributor of the Jushi Group SA Sinosia Composite Materials Co (Pty) Ltd fibreglass in South Africa.

Law and application thereof

- [15] The applicant's case is based on the covenant in the restraint of trade, which the applicant says is imposed by virtue of the agreement entered into between it and the first respondent. It is a well-known principle that restraint of trade agreements are valid and enforceable unless they impose an unreasonable restriction *inter alia* in a person's freedom of trade and profession. Under those circumstances, a party who is a party to such an agreement, and who seeks to avoid it, has to show that such restraint is against public policy and therefore unenforceable.³
- [16] Courts, if approached, firstly are required to determine as to whether, based on the facts before them, such restraints of trade protect the proprietary interest of a party. There is no specific definition of what is a proprietary interest. However, this may include confidential information and customer connections. *Wallis J, in Den Braven S.A. (Pty) Limited v Pillay and Another*,⁴ when summarising the principle of customer connections, held that :

“In considering the facts of a particular case, it must always be borne in mind that a protectable interest in the form of customer connections does not come

³ See: *Afrox Healthcare BPK v Strydom* 2002 (6) SA 21 (SCA) at para 8 and *Ball v Bambalela Bolts (Pty) Ltd and Another* [2013] 9 BLLR 843 (LAC).

⁴ 2008 (6) SA 229 (D).

into being simply because the former employee had contact with the employer's customers in the course of their work. **The connection between the former employee and the customer must be such that it will probably enable the former employee to induce the customer to follow him or her to a new business.**"⁵

The defunct AD in the matter of *Rawlins and Another v Caravantruck (Pty) Ltd*⁶, held the following in respect of customer connections,

"the need of an employer to protect his trade connection arises where an employee has access to customers and is in a position to build up particular relationship with the customers so that when he leaves the employer's service he could **easily induce** the customers to follow him to a new business" ⁷
(Own emphasis)

In essence, one has to determine whether such an employee, at the time when he was employed by the employer concerned, based on the evidence presented before the Court, has established a particular relationship with such customers which might "*easily induce*" them to follow him in joining the new employer.

[17] For information to be confidential, the Court in *Walter McNaughton (Pty) Ltd v Schwartz & Others*⁸ held:

"For information to be confidential, it must (a) be capable of application in trade or industry, that is, it must be useful; not be public knowledge and property; (b) it must be known only to a restricted number of people or a closed circle, and (c) be of economic value to the person seeking to protect it."

⁵ *Den Braven (supra)* at para 6. Emphasis added.

⁶ 1993 (1) SA 537.

⁷ *Id* at page 541 C – D. Emphasis added.

⁸ 2004 (3) SA 381 (C) at page 388 J – 389 A.

[18] The Supreme Court of Appeal (SCA), in *Reddy v Siemens Telecommunications (Pty) Ltd*⁹ set out the following questions to be asked in restraint of trade matters:

“Moreover, a restraint which is reasonable as between the parties may for some other reason be contrary to the public interest. In *Basson v Chilwan and others* Nienaber JA identified four questions that should be asked when considering the reasonableness of a restraint:

- (a) Does the one party have an interest that deserves protection after termination of the agreement?
- (b) If so, is that interest threatened by the other party?
- (c) In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?
- (d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected? Where the interest of the party sought to be restrained weighs more than the interest to be protected, the restraint is unreasonable and consequently unenforceable. The enquiry which is undertaken at the time of enforcement covers a wide field and includes the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests.

...

A fifth question, implied by question (c), which may be expressly added, viz whether the restraint goes further than necessary to protect the interest.¹⁰”

[19] The SCA in the matter of *Automotive Tooling Systems (Pty) Ltd v Wilkens and Others*¹¹ when discussing the issue of the skill that an employee concerned acquired during the period of his employment with the employer concerned, it held that:

⁹ 2007 (2) SA 486 (SCA).

¹⁰ *Ibid* at para 16 and 17.

¹¹ 2007 (2) SA 271 (SCA). The LAC in *Labournet's* judgment summarised it as follows: “Even though it is acknowledged that it is difficult to distinguish between the employee’s use of his or her own knowledge, skill and experience, and the use of his or her employer’s trade secrets, it is accepted that an employee cannot be prevented from using what is in his, or her, head.”

“In my view, the facts establish that the know-how for which the appellant seeks protection is nothing other than skills in manufacturing machines albeit it that they are specialised skills. These skills have been acquired by the first and second respondents in the course of developing their trade and do not belong to the employer – they do not constitute a proprietary interest vesting in the employer – but accrue to the first and second respondents as part of their general stock of skill and knowledge which they may not be prevented from exploiting. As such the appellant has no proprietary interest that might legitimately be protected. The restraint is therefore inimical to public policy and unenforceable.”¹²

- [20] Competition is allowed in a country like ours. Whatever restraint, where it “*seeks to exclude or eliminate competition*,”¹³ is considered to be unreasonable and in this way contrary to public policy, and would, therefore, be unenforceable .
- [21] There are three issues in *casu*, namely that the first respondent has acquired skill during his employment with the applicant, has confidential information, and that he has a connection with the customers of the applicant.
- [22] As indicated above, the parties agree that close customer relations are crucial in this type of business. Without any doubt indeed this is an interest that deserves protection. However, is that interest *threatened* by the first respondent association with further respondents?
- [23] The applicant explained in paragraphs 24 to 24.8 of the supporting affidavit as to the tasks that the first respondent was doing. Clearly, the first respondent in executing these tasks he was doing what the applicant required him to do, and by doing so he acquired skill and knowledge which he may not be prevented from using same with any prospective employer if will not prejudice the applicant. The burden to show the nexus between acquired knowledge/skill with the prejudice (actual or potential) to be suffered by the

¹² Ibid at para 20.

¹³ *Automotive Tooling Systems* supra.

applicant is on the applicant. Inter alia, the first respondent, as a result of these tasks, denied that he had any intimate knowledge of production and suppliers as he says he has no details of the process associated with the applicant's products.

- [24] Moreover, where it is stated that the first respondent had access to all of the applicant's basic product formalities to enable him to understand what was best suited for customer application, the costing and pricing, the first respondent denies these and says he does not have the knowledge attributed to him by the applicant. The first respondent says he made reference to the readily available data sheets whenever he needed understanding of a particular product and as soon as the client required technical knowledge and support, the assistance of a technical team was to be called in.
- [25] In respect of customers, he says he attended to a limited number of customers of the applicant and was regularly escorted by the Regional Business Manager and Commercial Director. Some of the meetings he was not even allowed to accompany the Regional Business Manager and states that he only attended to approximately 55% of the applicant's customers in Gauteng. It must be emphasised that in the papers the applicant has not alleged that the first respondent attended to its customers outside Gauteng, meaning in other areas of the country. Based on this, it is my view that the relationship that the first respondent had with the customers of the applicant was too remote to lead to him to "easily induce" them to follow him to the employer and/ or to the second respondent. This conclusion is also being supported by the fact that the first respondent asserts that a technical team intervention was necessary as stated in paragraph 12 above. I have also taken into account that in the application for joinder, delivered almost two months after the first respondent resigned, there are no allegations that he has lured some of the customers to second and/or third respondents.
- [26] In respect of competition, the first respondent denies that he is employed by the second respondent, the assertion that the employer is the sole accredited

sub-distributor fibreglass. The first respondent acknowledges in respect of product that the applicant and the first respondent are not exactly the same as he says “*the two companies manufacture and specialise in different products, and to the extent that they engaged in each other’s markets from time to time, they supplied but a fraction of either resting of fibreglass to their customers respectively*”. Therefore, taking into account that the first respondent is not employed by the second respondent but by the employer which is the sole accredited sub-distributor of fibreglass in South Africa whereas the applicant is generally regarded as the manufacturer and distributor of specialised polyester resin systems in South Africa. In paragraph 13 of the founding affidavit, the applicant states “*also imports and supplies fibreglass as part of its product range when selling its resin, gel coat and release agent products*”. The first respondent says the applicant supplies fibreglass as a secondary supplier, but the third respondent is “*the sole accredited sub-distributor of the aforementioned Jushi Group SA Sinasia Composite Materials Co (Pty) Ltd fibreglass, in South Africa*”. In passing it must be mentioned that the Jushi Group SA Sinasia Composite Materials Co (Pty) Ltd is not joined as a party in these proceedings.

- [27] Taking into account the aforementioned facts, I conclude the applicant is attempting to eliminate competition and unfairly preventing the first respondent to be economically active, and to use his skill.
- [28] I am unable to ascertain how the applicant is “threatened” by the relationship between the first respondent and his new employer taking into account *inter alia* that the applicant’s averment that the first respondent is privy to its confidential information such as pricing is denied by the first respondent and considering what is contained in paragraphs 18.1 to 18.3 of the answering affidavit, as set out above.
- [29] In respect of confidential information, the first respondent indicated that some information is available on the Internet which is not disputed by the applicant. Moreover, the applicant has not substantiated what it means by confidential information and that information as mentioned in paragraph 11 above is

denied by the first respondent, I conclude that no protectable interests has been shown by the applicant in respect of confidential information.

[30] Wherefore I make the following order:

Order

1. The application is heard as one of urgency;
2. The application for joinder is granted;
3. The application for restraint is dismissed;
4. There is no order as to costs.

S Mabaso

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicants: Snyman Attorneys

Instructed by: Mr A Posthuma

For the Respondents: Deale Attorneys

Instructed by: Advocate C Goosen