



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: J4349/18

In the matter between:

APOLLO 21 USED TRUCKS AND SPARES (PTY) LTD

Applicant

And

MARIO SWART

First Respondent

POWERTRAIN TRUCK SPARES (PTY) LTD

Second Respondent

Heard: 12 December 2018

Delivered: 08 January 2019

Summary: Restraint of trade

JUDGMENT

MABASO, AJ

Introduction

- [1] The applicant is Apollo 21 Used Trucks and Spares (Pty) Ltd (the applicant), the first respondent is Mario Swart (the employee), and the second

respondent is Powertrain Truck Spares (Pty) Ltd (the current employer). The applicant approached this court seeking an order in the following terms:

- “2. That the first respondent be interdicted and restrained until 30 September 2019, and within the area of the province of Gauteng:
- 2.1 from being directly or indirectly, personally or through any nominee, engaged as proprietor, partner, member of the syndicate, employee, contractor, shareholder or director, financier, advisor, representative, or howsoever in any firm, business, undertaking or company which carries on business in competition with the applicant or any of its divisions or affiliates;
 - 2.2 from acting as a representative, agent or advisor to or in any way to assist in the trading or other activities of any firm, business, undertaking or company which carries on business in competition with the applicant or any of its divisions or affiliates,
 - 2.3 from performing any work of any firm, business, undertaking or company which carries on business in competition with the applicant or any of its divisions or affiliates;
 - 2.4 from directly or indirectly, personally or through any nominee, solicit orders, customs of business in competition to the business of the applicant or any of its divisions or affiliates;
 - 2.5 fronting directly or indirectly, personally or through any nominee, engaged as proprietor, partner, member of the syndicate all employees contractor shareholder or director financial adviser representative or howsoever in any form business undertaking or company which is a client potential client or former client of the applicant or which have approached the applicant for business purposes of which have been approved by the applicant for business purposes;
 - 2.6 from acting as a preventative, agent or adviser to or in any way to assist in the trading or other activities of any firm, business, undertaking or company which is a client, potential client or former client of the applicant or which have approached the

applicant for business purposes for which have been approached by the applicant for business purposes;

- 2.7 from performing any work for any firm, business, undertaking or company which is a client, potential client or former client of the applicant or which have approached the applicant for business purposes of which have been approved by the applicant for business purposes;
- 2.8 from directly or indirectly personally or through any nominee, solicit orders, customs of business in competition to the business of the applicant or any of its departments from a client, potential client or former client of the applicant or which have approached the applicant for business purposes of which have been approved by the applicant for business purposes.

3. That the first respondent be ordered to forthwith terminate his employment with the second respondent,
4. That the first respondent be interdicted and restrained from using or disclosing diverging to any person or entity any confidential information of the applicant which information shall include but not limited to the names of the principles agents are clients of the applicant, the contractual arrangements between the applicant and its principles, clients, agents and or other parties, the financial details of the applicants relationship with its principles, clients, agents and or other parties, discount structures, the names of the clients of prospective clients of the applicant and the requirements, know-how ideas trade secrets, suppliers principles customs and trade connections of the applicant.”

[2] Gleaning from these prayers, there are three interrelated issues raised herein, namely the confidentiality of information, the customer connections, and competition. The applicant’s representative, during argument, submitted that the issue is not about preventing the employee from using his skill/knowledge somewhere else. Under the circumstances, I proceed to look at the issues by applying the applicable principles thereof. I must confess that in deciding

issues of this nature, which involves allegations of unlawful competition, it is not easy to separate the issue of unlawful competition from what the applicant's representative says is not the issue herein.¹

- [3] It is common cause that the applicant and the employee entered into a restraint of trade agreement which governs such a relationship during and after the employment relationship. In matters like in *casu*, the following questions are yardsticks in determining whether or not an existing restraint of trade agreement between parties is unreasonable and contrary to public policy and therefore unenforceable. The *onus* is on the employee who is resisting the enforcement, taking into account that restraint of trade agreements are valid and enforceable unless they impose an unreasonable restriction on the party's freedom of trade:

- “(a) Does the one party have an interest that deserves protection after termination of the agreement? **(Question A)**
- (b) If so, is that interest threatened by the other party? **(Question B)**
- (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? **(Question C)**
- (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. **(Question D)**

A fifth question, implied by question (c), which may be expressly added, viz whether the restraint goes further than necessary to protect the interest.”²**(Question E)**

¹ "I am not the first nor will I be the last to lament upon the difficulty of determining the dividing line between lawful and unlawful interference with that of another" (*Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd & others* 1981 (2) SA 173 (T)).

² *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA), at paras 16 and 17.

Confidential information*The applicant's assertions*

- [4] Confidential information falls under the description of protectable interest,³ however, in order for the Court to determine as to whether or not there is any confidential information, the party alleging such has a burden to show it, when it is in dispute. 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.⁴
- [5] During argument, the applicant's representative said the issue is about unlawful competition as in its heads of argument contends that *"the applicant cannot and does not claim these clients as exclusive clients, but that is not the point"*. The applicant in paragraphs 40 to 45, and 49 of the founding affidavit avers that: the employee had access to its database containing names of existing clients, names and contact details of contact persons at a particular client, and the credit limit of the client. This information is confidential, and only salespersons employed by the applicant, including the employee, had access to it. The employee had access to the statement enquiry of each and every active client on the data base showing all transactions by the clients.
- [6] The information on that system could easily be downloaded by a limited number of people having access thereto and could be easily stored on a removable storage device or printed and stored in hard copy. The employee in executing his duties was actively involved in the preparation of the quotes for the applicant's clients⁵. It further submitted that the employee also attended sales meetings with management and other staff of the applicant where strategic techniques relating to marketing, pricing structures, discount

³ *Den Braven S.A. (Pty) Limited v Pillay and Another* [2008] 3 All SA 518 (D).

⁴ *Walter McNaughton (Pty) Ltd v Schwartz & Others* 2004 (3) SA 381 (C) at 390 C-D.

⁵ See Annexure FA3.

structures and profit margins were discussed. Those clients who were targeted were discussed during these meetings. The applicant further asserts that this information is not publicly known and is only known to a restricted number of persons including the employee.

- [7] This Court is advised that as a result of the employee's excellence in building relationships and maintaining same with the applicant's clients, and the confidential information obtained during his employ with the applicant, he is in a position to influence the clients decisions in respect of taking their business from the applicant to a competitor, which in this case is the second respondent. It, therefore, avers that as a result of the existing restraint of trade it is *"reasonably necessary for the protection of the applicant's legitimate and protectable interests in the form of confidential information and customer connections."*

The Respondents' assertions

- [8] The employee does not deny that he excelled in building relationships with the clients, but avers that such relationships were established when he was working for the new employer (back in 2009) before joining the applicant. As examples, he mentioned Gecko Gearbox & Diff Repairs, and Gearbox Centre. In support of these, he attached annexures MS1 and MS2 which are letters from both these companies. As the applicant has indicated that the clients are not its exclusive clients. He denies taking with him any records of the applicant and downloading any information that belonged to the applicant (says he did not even know that such information could be downloaded).
- [9] The information that he is currently using belongs to the second respondent's system and depends on the relationships that the new employer built over the years with the clients. In respect of annexure FA3, says it is not the previous invoices and quotes, and according to him this is the first time viewing a document of this nature which reflects payments and transfers however he says the system that he used while he was working for the applicant was similar in format and did not contain any trade secrets or intimate information.

- [10] The employee asserts that the applicant has failed to show that the selling of truck spares is confidential or secretive, in that the cost price of all spares from all suppliers are not secret, as the applicant and the second respondent have the same modus and the system will reflect the cost price and the lowest selling price the sale representative is allowed to go to. In respect of potential clients and the target markets, he says this is publicly known. As this is a motion application, I am compelled to apply the *Plascon-Evans* rule as summarised by Harms DP in *National Director of Prosecutions v Zuma (Mbeki and another intervening)*⁶ where he said:

“Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant’s (Mr Zuma’s) affidavits, which have been admitted by the respondent (the NDPP), together with the facts alleged by the latter, justify such order.”

- [11] The applicant is asking for a final interdict, and the employee has not placed before this Court a bare denial to the applicant’s assertions but support such by documents, MS1 and MS2 mentioned in paragraph 8 above. The applicant in the replying affidavit and in its heads of argument stated that the clients are not exclusive clients. Further in respect of prospective clients, the respondents say this is public knowledge. Being guided by the *Plascon-Evans* rule I accept that the clients information herein cannot be classified as confidential information. Further under the facts and circumstances of this matter the employee did not, for the first time as alluded by the applicant, built a connection with those clients to enable him to induce them to follow

⁶ [2009] 2 All SA 243 (SCA) at para 26.

him to the new employer.⁷ I accept the version of the employee in this issue that there is no customer connection's case that has been established.

- [12] However, in respect of the applicant's assertion that sales meetings, attended by the employee with management and other staff of the applicant, in respect of its business techniques, marketing strategies, and costs structures remain conclave, which aspect is dealt with in paragraphs 42⁸ and 57⁹ of the founding affidavit, and the respondents in paragraphs 68 to 68.8 of the answering do not seriously deny this particular issue. The Supreme Court of Appeal in *Zuma* (supra) continued in the same paragraph and said:

*"It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers."*¹⁰

- [13] On this aspect, without any doubt, the applicants' sales meetings, attended by the employee with management and other staff of the applicant, in respect of its business techniques (such as marketing strategies,) remain confidential information, like in all other businesses; therefore they cannot be regarded as public knowledge. I, therefore, conclude that the applicant has proved that it has confidential information relating to business techniques and marketing strategies, discussed during the meetings, and that these are protectable interests.

- [14] However, the findings in the preceding paragraph are not the end of the inquiry as for to the second question to be determined is whether the protected interests of the applicant is "threatened" by the employee working for the second respondent? Put simply, can the employment relationship between the employee and the current employer be ordered to be terminated because the applicant attended meetings where these issues were

⁷ Id fn 3.

⁸ Founding affidavit.

⁹ Replying affidavit.

¹⁰ Court's emphasis.

discussed? In my view, when deciding this question, sometimes questions C – E are not avoidable. One has to take into account that restraint of trade is a common law principle and when courts apply them they will have to take into account that they must not encroach on the right to free trade and security of employment. The answer to this question is no. My reasoning is thus: the second respondent is a business that is owned by the employee's uncle, therefore it is a family business. Whether or not the employee is employed by the second respondent logic dictates that if he has such information in his possession, it could be easily transmitted to his uncle's business, which is the current employer.

- [15] However, one has to look at the prayers (specifically prayer 4) in the notice of motion. In this prayer, it is asked that such trade tools, which are protectable interests, should not be disclosed in whatever manner. I note that there are no specific business techniques and marketing strategies that have been detailed in the affidavit. In asking the applicant to detail such information would be absurd taking into account *inter alia* that confidential information is in discussion and the minute it is disclosed it loses its sweetness, and further that it is not disputed by the employee. I, therefore, reject the employee's contention that the applicants' case is entirely based on mere conjecture but conclude that the applicant should *partly* succeed in respect of prayer 4.

Unlawful competition

- [16] The applicant asserts that the employee excelled in building relationships and maintaining a very good relationship with its clients. As a result of the departure of the employee, the applicant has appointed another salesperson in the employee's position, and this Court is advised that he will have to rebuild and strengthen the client relationships formed and/or maintained by the employee. Moreover, restraint places the applicant in the position to maintain and strengthen the relationship with its clients without interference by the current employer.

- [17] The applicant further asserts that after the resignation of the employee one of its sales representatives visited one of the clients that were serviced by the employee, Biddulphs International, and learned that the applicant had dropped off a catalogue of the new employer and he had offered to open an account for this client with the new employer. The applicant further contends that the employee approached clients such as KL Engineering, Electronic Transmission Services, Gecko Gearbox & Diff, Pro Gearbox & Diff and Mohammed's Hardware and asked that he be given an *"opportunity to quote for them as he would provide them with a very competitive prices."* There are no confirmatory affidavits from such clients, to confirm these allegations. In disputing these allegations, the employee says he did not approach Gecco Gearbox, but it approached him. He attached customer sales trends held by the new employer for Gecko Gearbox, KL Engineering and Electronic Transmission Services showing that these clients have been purchasing spares from the second respondent as far back as March 2017 while the employee was still employed by the applicant.
- [18] The applicant further asserts that the second respondent sold to KL Engineering a specialist part at a lesser price after the employee joined which resulted in it adjusting its price. The employee in responding to this averment *inter alia* says that the way this business is run is that *"the client is to obtain quotes from all the competitors and negotiate for a lower price. This is how the industry runs and has been and remains an open industry"*. This part of the evidence is not seriously disputed by the applicant.
- [16] In *Phumelela Gaming and Leisure Ltd v Gründlingh and Others*¹¹, Langa CJ said:

"[32] Fundamental to a determination of whether competition is unlawful is the boni mores or reasonableness criterion. This is a test for wrongfulness which has evolved over the years... The Bill of Rights ...also promotes and protects other freedoms, notably in this case, the

¹¹ 2006 (8) BCLR 883 (CC) at para 32.

right to freedom of trade.¹²The consequence of the right to freedom of trade is competition.

[34] *The question is whether, according to the legal convictions of the community, the competition or the infringement on the goodwill is reasonable or fair when seen through the prism of the spirit, purport and objects of the Bill of Rights. Several factors are relevant and must be taken into account and evaluated. These factors include the honesty and fairness of the conduct involved, the morals of the trade sector involved, the protection that positive law already affords, the importance of competition in our economic system, the question whether the parties are competitors, conventions with other countries and the motive of the actor.”*

[19] In executing his duties, on behalf of the new employer, the employee will be using his knowledge/skill acquired at the time when he was with the applicant, which I have to admit is not easy to deduce such skill/knowledge from the tricks/strategies acquired at the time of employment with the former employer, which is the applicant. As it was reiterated by the Labour Appeal Court in the matter of *Labournet* (supra) where it said:

“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.”

[20] Competition is allowed in South Africa based on the provisions of the constitution of the Republic of South Africa¹³. All parties herein have acknowledged that there are competitors in this industry. Taking into account the confirmation by the applicant that at the time the employee was employed by it, he was an excellent employee, then obviously as is the nature of any business, that when you lose your best performer your business or your department where he was working in would be affected. I have also taken into

¹² See: *Labournet (Pty) Ltd v Jankielsohn & another* (2017) 38 ILJ 1302 (LAC) at para 39.

¹³ Act 108 of 1996.

account the applicant's assertion that the employee, using both his capacity in building and maintaining good relationships with the clients and the alleged confidential information, could easily convince the applicant's clients to move to the competitor. Applying the principle, in the preceding paragraph, the applicant cannot be prevented from doing that in this nature of the business. Moreover, the applicant does not claim exclusivity of the clients as stated in paragraph 41 of the heads of argument. The applicant provided a plausible explanation in respect of the arranged price for the sale of Voith retarder seal kit when he says clients obtain quotations from all competitors and negotiate for a lower price. The applicant has to allow the consequences of competitions herein, and preventing the employee from working for the new employer will be unreasonable under the circumstances. I am of the view that there is no unlawful competition herein.

[21] In respect of costs, I am of the view that fairness calls for each party to pay its own costs.

[22] Wherefore the following order is made:

Order

1. The application is heard as urgent;
2. The first respondent is interdicted and restrained from disclosing to any person or entity any confidential information relating to business techniques, and marketing strategies of the applicant, which such information was acquired during strategic meetings of the applicant;
3. The remaining prayers of the notice of motion are dismissed;
4. There is no order as to costs.

S Mabaso

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicants: Adv R Grundlingh

Instructed by: *Bester & Rhodie Attorneys*

For the Respondent: Adv Naidoo

Instructed by : Nishlan Moodley Attorneys

LABOUR COURT