



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J4213/2018

In the matter between:

SERVEST (PTY) LTD t/a SERVEST CLEANING

Applicant

and

OELSCHIG PAUL ARNOLD

First Respondent

BIDVEST SERVICES (PTY) LTD t/a

BIDVEST PRESTIGE

Second Respondent

Heard: 13 & 19 December 2018

Delivered: 22 January 2019

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

- [1] The applicant seeks to enforce certain confidentiality and restraint of trade undertakings contained in the employment contract entered with the first respondent. These undertakings were made as per the first respondent's letter of appointment, and the Restraint of Trade and Confidentiality Agreement.
- [2] The application is opposed by the first respondent. At the first sitting of the proceedings, the Court had suggested to the parties to make attempts to

resolve the matter in the light of the limited issues that were placed in dispute. By way of background, it was common cause that;

- 2.1 The first respondent was employed by the applicant as a Key Accounts Executive in November 2013. He was subsequently promoted to the position of National Business Development Manager. He resigned from the applicant's employment on 3 September 2018.
- 2.2 Clause 2 of the first respondent's letter of appointment makes provision for undertakings in regards to the applicant's confidential information. More extensive provisions in that regard are to be found in clauses 3 and 4 of the parties' Restraint of Trade and Confidentiality Agreement. The duration of the restraint of trade and confidentiality agreement is 24 months, and is enforceable throughout the Republic of South Africa.
- 2.3 The first respondent is essentially restrained, whether for himself or as an agent of anyone else, from persuading, inducing, soliciting, encouraging or procuring any *current or prospective clients* of the applicant to be enticed away from it or the business of any of its *current or prospective clients*.
- 2.4 The restraint provisions however do not specifically prohibit the first respondent from joining a competitor.
- 2.5 The first respondent joined the second respondent, a competitor of the applicant, as Business Development Manager after his resignation.

[3] Central to the dispute insofar as certain undertakings have been made by the first respondent, and further in the light of the limited issues in dispute, is what is the appropriate order to be granted. On 13 December 2018, the parties presented two draft orders to the Court for its consideration. The difference appears to be in respect of a list of the applicant's clients, whether such a list should include both prospective and current clients, and where the list should be kept for the duration of the restraint period. A further fundamental difference related to the issue of which party ought to be burdened with the costs of this application.

- [4] An order was then made on 13 December 2018 in terms of which the matter was postponed to 19 December 2018 in order for the applicant to deliver a list of its actual and prospective customers, and further for the first respondent accompanied by his attorneys to inspect the list, but not to make copies. The parties had complied with the Court's order, but when the matter resumed on 19 December 2018, they still could not agree on the appropriate order to be granted having regard to the submitted list of actual and prospective customers and as further inspected by the first respondent.
- [5] The main area of contention was in regards to the list of clients (current and prospective), which was made available following the Court order of 13 December 2018, and where that list should be kept. The applicant sought an order in terms of which its attorneys were to retain the list in their possession, for a period of 12 months from 3 September 2018, whilst the first respondent on the other hand sought an order in terms of which his attorneys would be provided with that list.
- [6] The applicant had presented the Court with two draft orders in the light of the differences in approach and the appropriate order to be made. Having had regard to the two draft orders submitted on behalf of the applicant, and the initial draft order submitted on behalf of the first respondent, it is my view that given the similarities and differences in the draft orders, no purpose would be served by dealing extensively with the merits of the application.
- [7] In further coming to a conclusion as to which draft order should be made an order of court, it is taken into account that the only issue in dispute insofar as the restraint and confidentiality undertakings are concerned, pertains to whether there was in fact a breach of those undertakings, which issue I intend to deal with in the context of a determination of a costs order, which was also a contentious issue between the parties.
- [8] In the light of the above, of all the draft orders presented, the draft order submitted on behalf of the applicant marked "X" as attached to its written heads of argument, represents the restraint undertakings as contained in the first respondent's Letter of Appointment and the Restraint of Trade and

Confidentiality Agreement concluded between the parties, save for the duration of the restraint, which is now reduced to 12 months. In my view, that draft order ought to be made an order of court.

- [9] In regards to costs, it was common cause that following the filing and serving of this application, the first respondent had on 7 December 2018 made certain undertakings¹, with a view of amicably resolving the dispute. The applicant's response on 10 December 2018 was to reject the undertakings, further contending that the first respondent should provide undertakings as set out in prayer 2 of the Notice of Motion, which undertakings would be made an order of court, and to further tender its costs of the application. In his response of 10 December 2018, the first respondent had reiterated his tender and undertakings, other than disputing that the applicant was entitled to costs.
- [10] Central to the issue of costs as argued on behalf of the applicant is the issue of whether the first respondent was in breach of his confidentiality and restraint undertakings, necessitating this application. In this regard, the applicant's case was that the first respondent had on 31 October 2018, approached one of its clients, Kansai Plascon South Africa (Pty) Limited (Clayville site) in order to solicit business. Whilst the first respondent admitted that certain sites of Kansai Plascon are the applicant's customers, he nonetheless denied that Kansai Plascon as a group, and in particular, the Clayville site is a customer of the applicant.
- [11] Annexures 'RA3' to the applicant's replying affidavit is a '*Memorandum of Service and Supply Agreement*' entered into between the applicant and Kansai Plascon South Africa (Pty) Ltd on 2 February 2018. A further agreement was entered into between the parties in September 2018 in respect of services to be rendered by the applicant in certain parts of the Johannesburg area². In his answering affidavit, the first respondent conceded having dealt with Kansai Plascon South Africa Clayville site, but denied

¹ Annexure 'PA02'

² Annexure 'RA4' to the Replying Affidavit

having possessed any unfair advantage in dealing with that entity, which in any event was not the applicant's client³.

[12] To the extent that such a concession was made, this in my view, disposes of the arguments surrounding whether there was a breach of the restraint provisions or not, in the light of the agreements referred to elsewhere in this judgment, as entered into between the applicant and Kansai Plascon South Africa (Pty) Ltd. To this end, I am satisfied that the applicant has demonstrated that the first respondent had indeed acted in breach of his restraint undertakings, and accordingly, the considerations of law and fairness dictates that he be burdened with the costs of this application. I how do not deem it appropriate to make an order in respect of wasted costs occasioned by the adjournment of the proceedings on 13 December 2018.

[13] Accordingly, the following order is made;

Order:

1. This application is heard as one of urgency in terms of Rule 8 of the Rules of this Court.
2. For a period of twelve (12) months from 3 September 2018 and throughout the whole of the Republic of South Africa, the First Respondent is interdicted and restrained from:-
 - 2.1 Whether for himself or as an agent of anyone else:-
 - 2.1.1 Persuading, inducing, soliciting, encouraging or procuring any current or prospective clients of the Applicant to be enticed away from the applicant or the business of any current or prospective clients of the applicant to be enticed away from the Applicant;
 - 2.1.2 Marketing or selling any service, information including proprietary information and/or products which is in direct or indirect competition with the Applicant;

³ At para 25.6 of the Answering Affidavit

- 2.1.3 Utilising any relationship, either personal or professional, which was developed during his employment with the Applicant and/or utilising the Applicant's resources, in order to generate a profit or value at the prejudice or potential prejudice of the Applicant.
- 2.2 Utilising directly or indirectly or divulging or disclosing any of the Applicant's trade secrets.
3. The First Respondent is ordered to pay the costs of this application.

Edwin Tlhotlhemaje
Judge of the Labour Court of South Africa

APPEARANCES:

For the applicant:

Adv. L Hollander

Instructed by:

Mouyis Cohen Attorneys

For the First Respondent:

Adv. SM van Vuuren

Instructed by :

Weavind & Weavind INC

LABOUR COURT