IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION – EAST LONDON

EL: 1129/14
ECD: 2429/14
Date Heard: 19/09/14
Date Delivered: 30/09/14

In the matter between:

NRG OFFICE SOLUTIONS (PROPRIETARY) LTD **APPLICANT**

AND

JULIET JOHNSON (nee GOWER) **1ST RESPONDENT**

FUSION OFFICE AUTOMATION EAST LONDON (PTY) LTD **2ND RESPONDENT**

JUDGMENT

SMITH J:

Introduction

[1] This matter concerns the enforceability of a restraint of trade agreement. The applicant seeks confirmation of the rule nisi and interim interdict granted by Tshiki J on 4 September 2014, in terms whereof the first respondent is, *inter alia*, restrained from approaching or soliciting the custom of any of the applicant's customers, and from taking up employment with any entity that operates in competition with it. The second respondent has also been interdicted from employing the first respondent until the expiration of the restraint period on 1 January 2015. The restraint of trade endures for a period of two years from the date of the termination of the first respondent's employment, and covers the entire Eastern Cape Province. In addition, the applicant also seeks an order

interdicting the first respondent from disclosing any of its trade secrets or confidential information, for a period of 10 years from the date of the latter's resignation.

[2] The applicant avers that the first respondent has been employed by the second respondent, and has solicited the patronage of its customers, in breach of the restraint agreement. The first respondent opposed the application, while the second respondent gave notice that it will abide the decision of the court.

[3] The applicant supplies and maintains office automation equipment such as printers and copiers, and also sells related consumable products and stationery. Its customers are mainly state departments, educational institutions and municipalities.

[4] The first respondent was, until her resignation on 14 January 2014, employed by the applicant as a Consumables Manager. She serviced clients within a radius of 150 kilometers from East London, and her duties included the management of the applicant's consumables division as well as the enforcement and monitoring of various goals set for staff in that division. She was also required to meet customers and suppliers on a regular basis, prepare and submit tenders, and compile and distribute updated price lists. She earned a commission based on a percentage of gross profit and achievement of the targets set for staff in the Consumables Division.

[5] The first respondent was initially employed by the applicant's predecessor, Gestetner Border, in June 1992, but resigned in 1995 and thereafter took up

employment with Xerox, trading as Aloe Office Equipment. She again took up employment with Gestetner Border in 1998 as Data Clerk and Girl Friday, when she was head-hunted by its manager, Martin Toll. Her employment with Gestetner Border was also subject to a restraint of trade agreement.

[6] During 2001 Gestetner Border was incorporated under the name of NRG Office Solution (Pty) LTD (the applicant), and the first respondent was officially employed by the new entity with effect from August 2003. She signed a contract of employment which contained a restraint of trade agreement in terms of which she was effectively restrained, for a period of 24 months after the termination of her employment, from taking up employment with, or having any interest in, any entity that trades in competition with the applicant within the Eastern Cape Province. She was, in addition, also restrained from disclosing or using any of the applicant's confidential information or trade secrets, for a period of 10 years from the date of the termination of her employment. In the event of a breach of any of these obligations by the first respondent, the applicant would, in addition to its other contractual remedies, also be entitled to claim liquidated damages in the amount of R20 000. These provisions are substantially the same as those contained in the employment contract concluded by the first respondent and Gestetner Border.

The applicant's version

[7] The applicant avers that the first respondent has, during the course of her employment, acquired extensive knowledge of its business operations, customer base, as well as its contractual arrangements with customers. It contends that she has already used her intimate knowledge of various facets of its business

strategies to solicit its customers for the benefit of her new employer, and is in a position to do so in the future.

[8] The first respondent initially took up employment with the second respondent as a "Consumables Account Consultant" on 15 January 2013. The applicant took immediate steps to enforce the restraint agreement, and on 17 January 2013 its attorneys, Kirchmanns Incorporated, wrote to the first respondent, stating *inter alia,* that it had come to the applicant's attention that she has been employed by the second respondent, and had solicited the applicant's customers in breach of the restraint of trade agreement. They also threatened to launch urgent legal proceedings if she did not terminate her employment with the second respondent. A similar letter was also addressed to the second respondent. The first respondent heeded the warning and terminated her employment with the second respondent. She thereafter took up employment with a company which was not in competition with the applicant.

[9] During August 2014, however, the applicant again became aware that the first respondent had resumed her employment with the second respondent. Its attorneys then wrote to the second respondent's attorneys, Russels Incorporated, who responded on 22 August 2014, effectively denying that she had been employed by the second respondent. The applicant contends that that denial is disingenuous and points to the fact that the first respondent had submitted a quotation on the second respondent's letter-head for the supply of "basic office requirements" to one of the applicant's customers, namely the Great Kei Municipality, on 27 August 2014. It is apparent from the quotation that she had issued it in her capacity as "Consumables Sales Consultant".

[10] The applicant thus contends that the first respondent's employment with the second respondent is in breach of the restraint of trade agreement, and that she is actively marketing the latter's products and services to its customers.

First respondent's version

[11] The first respondent opposes the application on the following grounds:

(a) the applicant has not been able to establish that it has a commercial interest worthy of protection;

(b) the geographical extent of the restraint is unreasonable and not necessary to protect any proprietary interest which the applicant may be able to establish;

(c) the periods of the restraint, namely 2 and 10 years respectively, are unreasonable in the circumstances;

(d) the first respondent has not been employed by the second respondent, but by one of its related companies; and

(e) the applicant has an alternative remedy, namely to claim damages which have been predetermined in terms of the employment contract.

[12] The first respondent is a 41 year-old divorcee and mother of two daughters, aged 12 and 15 years, respectively. She receives maintenance for the children in the amount of R2 500 per month. She claims that she is struggling to make ends meet, does not own a vehicle, and currently lives with her mother because she cannot afford a place of her own.

[13] She claims that when she left Gestetner Border to take up employment with Xerox, the former did not enforce the restraint of trade agreement, even though Xerox was trading in competition with it. During her time at Xerox she received extensive training, and was involved in every facet of the office automation business.

[14] After resuming employment with Gestetner Border in 1998, she effectively only performed the duties of a Debtors Clerk. She thus became bored and frustrated, and after discussions with the owner, was transferred to the stores department. She thereafter took the initiative to approach customers and offered to sell office equipment and consumables. It was as results of these initiatives that her employer realized that consumables were a viable and marketable commodity. During 1999 (or 2000) she was placed in charge of sales and marketing of consumables. She, however, never received any training in this regard from either Gestetner Border or the applicant.

[15] When the applicant's financial director, Petrus Johannes Marx ("Marx"), presented the new contract of employment to her during August 2003, he told her that its purpose was to formalize her appointment as Consumables Manager of the new entity. When reading the contract, she thus focused mainly on those portions dealing with her remuneration and commission structure. In regard to the restraint of trade clause, she avers that she had only noticed that it appeared to have been substantially the same as the one applicable to her employment with Gestetner Border. She did, however, not notice that the period of the restraint which prohibits disclosure of trade secrets and confidential

information had been reduced to 10 years, and that the area of its scope had been considerably increased.

[16] She claims that her decision to terminate her employment with the applicant was primarily caused by Marx's offensive demeanor. She avers that he was authoritarian, intimidated staff members with threats to enforce the restraint of trade should they leave the company, and has made several crude and unwanted sexual advances towards her. He also refused to allow her reasonable sick leave when she and her child suffered ill-health.

[17] It appears, however, that her decision to resign had rather been precipitated by the fact that she was not promoted to the more senior position of Sales Manager. She states that the introduction of one Allan Grant as the new Sales Manager, was *"the final straw that broke the camel's back",* since she had aspirations "*of achieving senior management status with financial benefits"*.

[18] During February 2013 she lodged an unfair dismissal complaint with the Commission for Conciliation, Mediation and Arbitration ("CCMA"). She, however, subsequently withdrew the complaint for financial reasons, and also because of the emotional strain caused by the fact that she was constrained to testify in Marx's presence. She avers that the enforcement of the restraint agreement by the applicant is nothing more than a personal vendetta against her by Marx, who was obviously aggrieved by the fact that she had hauled him before the CCMA on serious allegations of sexual harassment.

[19] She claims that she sought employment from the second respondent out of sheer desperation. She has not been able to secure alternative employment despite the fact that she had lodged her CV with various employment agencies in East London. She contends that employment outside of the Eastern Cape Province is not a viable option, since relocation will disrupt her children's schooling, and it would be traumatic for them to be separated from her mother.

[20] Regarding the applicant's assertion that she has extensive knowledge of its customer base, she avers that while she remembers *"vaguely that the company's clients may have included state departments, municipalities, public enterprises, schools and educational institutions in the Eastern Cape",* she does not know who those entities are, whom to contact, or what their requirements may be. She claims that these institutions are in any event constrained to procure services and goods through prescribed competitive bidding procedures, thus any knowledge that she may have of the applicant's business will not be of any use to her new employer.

[21] She also avers that the office automation industry is competitive and customers are "fickle". They therefore tend to approach those suppliers who can offer the best prices. She has no knowledge of the applicant's present range of products, its pricing structures, contractual arrangements with customers, or its strategies to attract and retain customers. She contends furthermore that, in any event, the second respondent has been appointed as the designated Ricoh dealer for the East London area. This product was previously offered to the applicant, but it had taken a business decision to instead source a new supplier, namely Kyocera. In addition, she points to the fact that the applicant did not

enforce the restraint of trade against seven staff members who have all left it to join various competitors.

[22] She contends furthermore that it is unreasonable for the applicant to seek enforcement of the restraint throughout the Eastern Cape Province, whereas her area of operation as manager of the consumables division had been confined to a radius of 150 kilometers from East London. In addition, by the time that she had left the applicant's employ she was no longer a manager, and her duties had been considerably reduced, to the extent that she only serviced between 5 and 10 East London based clients.

[23] She claims that she is in fact not employed by the second respondent but by one of its related companies, namely Copycat (Pty) Ltd. When it had become apparent that the applicant was intent on enforcing the restraint, the second respondent offered her employment in the latter company. Copycat had been formed for the sole purpose of importing consumables directly from Japan for sale only to the second respondent and its related companies.

[24] She also denies that she attempted to market the second respondent's products and services to the Great Kei Municipality. She explained that her name had merely been mentioned to that municipality by one of the second respondent's sales representatives as a person who would be able to assist with quotations in respect of consumables. The sales representative was, however, not aware of the fact that she had been employed by Copycat. She also contends that the applicant has an alternative remedy, namely to claim the predetermined contractual damages.

Application to Strike Out

[25] The applicant applied to strike out some 96 paragraphs of the first respondent's answering affidavit on the grounds that they are irrelevant, vexatious, or amount to inadmissible hearsay evidence.

[26] The paragraphs which the applicant contends are irrelevant contain allegations regarding the first respondent's personal circumstances, her financial difficulties, the reasons for her resignation, the alleged unfair treatment by the applicant's management, and sexual harassment by the applicant's financial director, Marx. In my view these are all issues which could have some impact on the decision whether or not the enforcement of the restraint would be unreasonable or against public policy. The applicant's contention that they fall to be expunged can accordingly not be upheld.

[27] Those portions which the applicant allege contain inadmissible hearsay evidence relate, *inter alia*, to the first respondent's assertion that she did not receive any training while in the applicant's employ, her impression of the staff's dissatisfaction with Marx's alleged unfair conduct, the latter's repeated threats to enforce the restraint should staff members resign, her attempts to obtain alternative employment, and the reports made to her by a sales representatives employed by the second respondent, namely Sizwe Mabandla. In my view the applicant's contentions in this regard are also untenable. The averments made by the first respondent are all based on her own observations of fellow staff members' conduct, and therefore do not constitute hearsay evidence. In regard to the report made to her by Sizwe Mabandla, the latter has duly filed a

confirmatory affidavit. There is accordingly, in my view, no merit in the applicant's contention that these paragraphs constitute inadmissible hearsay evidence.

[28] The contended vexatious matter relate mainly to the allegations in respect of Marx's intimidating conduct and the unwanted sexual advances. The first respondent has proffered this evidence in support of her contention that she had been constructively dismissed, and that the enforcement of the restraint would under these circumstances be against public policy. In my view the reasons for the termination of the employment relationship may well be relevant in the enquiry as to whether or not the enforcement of the restraint would be unreasonable or against public policy. It is not difficult to conceive of circumstances where the conduct of an employer may well be so egregious that the enforcement of a restraint agreement would be unreasonable or against public policy. These are thus factors which a Court would be entitled to consider in appropriate cases, together with other relevant circumstances. In my view the applicant has also not been able to establish grounds for the striking out of these paragraphs. In the result the application to strike out must fail.

The Law

[29] Restraint of trade agreements are in principle valid and enforceable in our law, unless their enforcement would be unreasonable or contrary to public policy. All that is consequently required from an applicant seeking to enforce a restraint agreement is to invoke it and prove a breach thereof. (*Magna Alloys and Research SA (Pty) v Ellis* 1984 (2) SA 784 (A) at 791-792)

[30] The onus is on the respondent who seeks to resist the enforcement of a restraint agreement to prove, on a balance of probabilities, that its enforcement would be unreasonable or against public policy. In determining this question the Court will also have regard to the circumstances prevailing at the time when the enforcement is being sought. (*Basson v Chilwans and Others* 1993 (3) SA 742 (A) at 776I-J; J. *Louw and Co (Pty) Ltd v Richter and Others* 1987 (2) SA 237 (NPD) at 243B-D)

[31] In determining the reasonableness of a restraint of trade agreement the Court makes a value judgment, and must consider the following questions:

(a) Is there an interest of the other party which is deserving of protection after the termination of the agreement?

(b) Is such an interest being prejudiced by the other party?

(c) If so, does such interest weigh up quantitatively and qualitatively against the interest of the other party to be economically active and productive?

(d) Is there another facet of public policy, having nothing to do with the relationship between the parties, but which requires that the restraint should either be enforced or struck down?

(*Basson v Chilwans and Others* (supra))

[32] It is with these legal principles in mind that I now turn to consider the grounds on which the first respondent seeks to resist the enforcement of the restraint agreement.

Discussion

[33] Mr *Schultz*, who appeared on behalf of the first respondent, argued that the applicant has failed to establish that it has a commercial interest worthy of protection. In this regard the applicant relies on the fact that the first respondent was employed in a position where she had regular contact with customers and had access to their contractual arrangements. In *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A), the Court held that information relating to an employer's customer base and pricing structures are proprietary interests which can be protected by restraint of trade agreements. Nestadt JA said the following in this regard, at 541C-D:

> "The need of an employer to protect his trade connections arises where the employee has access to customers and is in a position to build up a 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."

[34] There can be little doubt that the first respondent was, in her capacity as manager of the applicant's consumables division, in a position where she would have formed such relationships with customers. Her duties entailed regular contact with customers and suppliers, addressing their needs, and compiling and distributing updated price lists. Her protestations to the effect that she could not remember who those customers were, are unconvincing and in my view disingenuous. In addition, being mainly public entities, the applicant's customers are spread out all over the province, and it therefore matters not that her own area of responsibility as manager of the applicant's consumables division was limited to a radius of 150km from East London.

[35] I am also not swayed by her attempts to downplay the extent of her responsibilities as manager of the applicant's consumables division. It is clear that her responsibilities were important in the context of the applicant's business

model, and she herself had aspirations for appointment in a more senior position. The fact that she may have attracted customers through her own initiative and skills (which she had allegedly acquired elsewhere), can also not enure to her advantage in her attempt to resist the enforcement of the restraint. In *Den Braven SA (Pty) Ltd v Pillay and Another* 2008 (6) SA 229 (D) Wallace AJ, as he then was, held that a sales representative was precluded from resisting the enforcement of a restraint of trade agreement on the basis that all the customer connection were established due to his own efforts. The learned judge said the following in this regard at 238A-B:

> "Indeed, the fact that he was able of his own volition to identify new customers, approach them and secure their custom for the applicant is indicative of the type of trade connection that is protectable."

[36] The applicant has proffered compelling evidence to the effect that the first respondent is in breach of the restraint. Ms *Mostert,* who appeared for the applicant, correctly submitted that the first respondent's assertion that she is in fact not employed by the second respondent is unconvincing and, on her own version, manifestly contrived. It is clear from her averments in this regard that her purported employment by the second respondent's sister company, Copycat (Pty) Ltd, has been nothing more than a stratagem to circumvent the consequences of the restraint. In any event, it is clear that her duties overlapped with those performed by the second respondent's other employees, hence her admitted collaboration with Sizwe Mabandla. The quotation presented to the Kei Municipality constitutes almost incontrovertible evidence to the effect that she had in fact solicited one of the applicant's customers. Her explanation as to how it came about that her name and designation were appended to the quotation was implausible and contrived. In my view her explanation is so improbable and

uncreditworthy that it falls to be rejected out of hand. In any event, I am satisfied that the applicant has established that the first respondent has, while being in its employ, acquired information which it could use to the applicant's detriment. The risk of serious financial prejudice to the applicant, if the first respondent were allowed to take up employment with one of its competitors, is self-evident. (*BHT Water Treatment (Pty) Ltd v Leslie and Another 1993 (1) SA 47 (W) at 58H-59A*)

[37] The first respondent's contention that the enforcement of the restraint would be unreasonable is based mainly on her personal circumstances, and in particular, her dire financial situation. I am, however, not convinced that these are so substantial that they outweigh the right of the applicant to protect its commercial interest. The immutable principle of *pacta servanda sunt* weighs heavily with Courts in these types of matters. It is, for various obvious reasons, vitally important to compel parties to honour their contractual commitments, no matter how onerous they may be perceived to be. Against this important legal imperative should be weighed the right of persons to be productively engaged in trade and commerce. What weighs heavily with me in this regard in this matter, is the fact that the first respondent has, since being challenged by the applicant after taking up employment with the second respondent in January 2013, abstained from employment in breach of the restraint for some 19 months. In fact there are only five months of the restraint period left. She had also been able to secure employment in compliance with the restraint for a considerable period after her resignation. I am consequently not convinced that the enforcement of the restraint of trade would be unreasonable under the circumstances.

[38] For her assertion that the enforcement of the restraint would be against public policy, the first respondent relied mainly on allegations of unfair conduct on the part of applicant's management and sexual harassment by Marx. She contends that her position had thus become untenable and she was consequently forced to resign. She also avers that the enforcement of the restraint is a *mala fide* attempt by Marx to avenge the fact that she had hauled him before the CCMA on serious allegations of sexual misconduct.

[39] On a reasonable reading of the papers, however, it appears that her resignation was precipitated by the fact that she was not appointed in a more senior position. She had an opportunity to pursue the allegations of sexual misconduct against Marx in the CCMA, but elected to withdraw those proceedings. In the event, the reasons for the termination of the first respondent's employment have no bearing on the applicant's right to enforce the restraint of trade. In *Reeves and Another v Marfield Insurance Brokers CC and Another* 1996(3) SA 766 (SCA), the court held, at 772F-G, that:

> "The legitimate object of a restraint is to protect the employer's goodwill and customer connections (or trade secrets) and the restraint accordingly remains effective for a specified period (which must be reasonable) after the employment relationship has come to an end. The need for protection exists therefore independently of the manner in which the contract of employment is terminated and even if this occurs in consequence of a breach by the employer."

[40] I am mindful of the fact that the circumstances under which a contract of employment terminated may well have some relevance (together with other factors), in the enquiry whether or not the enforcement of a restraint agreement would be unreasonable or against public policy. I am, however, not

convinced that in the circumstances of this matter they can have any bearing on my decision in this regard.

[41] Regarding the period of the restraint, namely 2 years, I am of the view that the first respondent has not been able to establish that it is unreasonable. Having regard to the nature of the applicant's business and the commercial interest that it seeks to protect, I am of the view that the period is indeed reasonable. I am, however, not convinced that the prohibition against the disclosure of trade secrets or confidential information for a period of 10 years can be justified. The contractual definitions of these concepts are wide and include virtually all information that the first respondent would have acquired during her employment with the applicant. While one can understand the need for extended periods of protection against divulgence of trade secrets such as patents, knowledge of designs, manufacturing and other processes, the applicant's case was based entirely on the assertion that it is the first respondent's knowledge of its customer base, contractual arrangements and price structuring which could be used to its detriment. In addition, in my view these definitions are so wide that, should the prohibition be allowed to endure beyond the two year period, the enforcement of the restraint for such a long period may well impact negatively on the first respondent's employability. I am not satisfied that the applicant has made out a case for its enforcement beyond the two year period, and I am accordingly of the view that the period of ten years is unreasonable.

[42] The first respondent's contention that the applicant has an alternative remedy, namely to claim the predetermined contractual damages, can in my

view also not be upheld. Clause 2.4.6 of the agreement explicitly provides that the applicant's right to claim damages is "*without prejudice to any other rights it may have at law"*, and, in the event, the enforcement of the restraint agreement is aimed at preventing unquantifiable future financial losses and other inevitable harm that the applicant's business may suffer if the first respondent were allowed to solicit its customers in contravention of the restraint. A damages claim would therefore not constitute an effective alternative remedy in these circumstances.

[43] I am accordingly satisfied that the applicant has been able to establish a commercial interest that deserves to be protected after the termination of the first respondent's employment, that such interest had been threatened by the respondents, and that, under the circumstances, the applicant's interest outweighs the first respondent's right to be economically active.

[44] In the result I make the following order:

(a) The application to strike out is dismissed with costs.

(b) The *rule nisi* is confirmed with costs, save that paragraph 2.1.4 thereof is amended to read as follows:

"Disclosing the trade secrets and confidential information of the applicant, and from directly or indirectly using, disclosing, divulging or making known such trade secrets or confidential information;"

J.E SMITH

JUDGE OF THE HIGH COURT

Appearances

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