

IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA
JOHANNESBURG

CASE NO: 28033/2011

DATE: 2011-08-18

In the matter between

10BERND TRIEBIGER (PTY) LTD

t/a BT ENTERPRISES

Applicant

and

ELIZABETH CATHARINE MARKAY

First Respondent

MARILLLE SYSTEMS (PTY) LTD

Second Respondent

J U D G M E N T

WILLIS, J:

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[1] This is an application to enforce the restraint of trade agreement which, it is common cause, was entered into between the applicant and the first respondent.

[2] It is clear that the applicant and the second respondent are engaged in intense competition with one another. I can quite understand why the

applicant is seriously aggrieved that its former employee, the first respondent is now employed by the second respondent.

[3] Courts having to hear these applications to enforce agreements in restraint of trade have to perform a fine balancing act. On the one hand, contracts entered into between parties should normally be enforced. This is the *pacta sunt servanda* principle, On the other no court, wish to deprive a person of the opportunity reasonably to earn a living. The applicant came to court by way of urgency. I understand why. If one looks at the notice of motion, the first prayer deals with the question of urgency with which I need not be concerned at the moment.

[4] The second prayer deals with the intended prohibition on the first respondent working for the second respondent for a period of 12 months. The third prayer seeks to restrain the first respondent from disclosing confidential information which it may have gained from the applicant during employment with it. Mr *van der Merwe*, who appears for the respondents, fairly and correctly conceded that relief sought in the third prayer amounts to no more than a restatement of law. Of course, the applicant is entitled to that relief. The first respondent may not act in breach of the requirements of law.

[5] As I already indicated, the court must perform a fine balancing act. A court would not want to deprive the first respondent of an opportunity to earn a living. It therefore seems to me that what I should do is grant an order in terms of prayer three, postpone *sine die* the relief sought in prayer two, and give the applicant a right to approach the court again in the event that there is clear evidence of the first respondent having acted in breach of the relief which shall be ordered in respect of prayer three. I shall postpone the

question of costs for 12 months in order to enable a court to make an appropriate decision later in the light of the information available to it then. I refer, in particular, to the question of whether or not the first respondent has complied with this order.

[6] Accordingly, the following is the order of the court:

1. The relief sought in prayer 2 of the Notice of Motion dated 24 July 2011 is postponed *sine die*.
2. The applicant is given leave to approach the court again to reconsider the relief sought in prayer 2 of the Notice of Motion, upon the filing of a further supplementary affidavit to which the respondents would have a right to answer.
3. An order is granted in terms of prayer 3 (including 3.1 to 3.5 thereof) of the Notice of Motion dated 24 July 2011.
4. Until further order, the issue of costs is postponed for at least 12 months from today.

Counsel for the applicant: Adv J M Heher

Attorneys for the applicant: Horn Attorneys

Counsel for the respondents: Adv C van der Merwe

Attorneys for the respondents: Hartman Attorneys

Date of hearing and judgment: 18 August 2011