REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 22222/12

(1) REPORTABLE: ~~YES~~/ NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

7 September 2012
DATE

SIGNATURE

In the matter between:

STRATA MINING SUPPLIES CC Applicant

and

WILLEM JACOBUS FOURIE First Respondent

MULTOTEC (PTY) LTD Second Respondent

MATO PRODUCTS (PTY) LTD Third Respondent

J U D G M E N T

MBHA, J:

INTRODUCTION

[1] The applicant seeks an order against the first, second and third respondents in terms of a number of prayers set out in the notice of motion dated 15 June 2012. Essentially, the applicant seeks to enforce a restraint of trade agreement against the first respondent and prevent him from being employed by the second and/or third respondent. The second and third respondents do not oppose the application and will abide the decision of this Court.

[2] This court has also been called upon to adjudicate the first respondent's application to dismiss the application on the ground that the founding affidavit does not disclose a cause of action, and to strike out certain paragraphs in the replying affidavit as vexatious and/or irrelevant and/or hearsay and/or as matter which ought to have been contained in the founding affidavit.

FACTUAL MATRIX AND THE ISSUES

[3] The background facts of this case are as follows:

3.1 The applicant carries on the business of the provision, supply and maintenance of conveyor belts and related items including conveyor belting, mining belting, mining belt fasteners, belt scrappers, industrial belt fasteners, lacing pins and consulting in relation to mining supplies. The applicant operates mainly in the mining industry.

3.2 The second and third respondents are in a joint association and/or partnership and/or joint venture. As the first respondent's current employment is specifically with the third respondent, there will be reference to such third respondent only in this judgment.

3.3 It is common cause that the applicant and the third respondent are competitors and provide similar products in the mining industry. They also share or service the same clients, for example SASOL.

3.4 The first respondent was employed by the applicant as a sales representative in terms of a contract of employment concluded on 28 June 2006. Further to the employment contract, the first respondent and the applicant entered into a restraint of trade agreement (the restraint), which is the subject matter of this dispute. The restraint provides *inter alia*, that the first respondent shall not, within the entire Republic of South Africa and for a period of 24 months after termination of his employment with the applicant, whether as proprietor, director, shareholder, member or employee, and whether for reward or not, directly or indirectly carry on or be interested or engaged in or employed by any company, close corporation, undertaking or concern which conducts or carries on whether wholly or partially,

a business which competes with or endeavours to compete with the applicant.

3.5 The first respondent terminated his employment with the applicant by resigning on 15 May 2012. On 13 June 2012 he took up employment as a sales representative, with the third respondent.

[4] The applicant avers that the restraint is a reasonable, valid and lawful agreement entered into between the parties, and that by taking up employment with the third respondent, the first respondent is in breach thereof. The applicant avers further, that:

4.1 The first respondent was a senior employee of the applicant and would during the course of his employment gain access to very sensitive and confidential information belonging to the applicant namely, names of customers and suppliers, the know-how of the marketing and sales methodology and the opportunity to develop relationships with customers and suppliers, being privy to price lists and acquiring trade secrets related to the applicant's business and its operations; and

4.2 all of this was protectable interest worthy of protection and the first respondent acknowledged specifically in clause 3.9 of the

restraint, that the applicant would suffer financial loss if he breached the agreement.

[5] The first respondent contends that he was one of three sales representatives during his tenure of employment with the applicant, and denies that he was a senior employee and that he was privy to any sensitive and confidential information. He contends further that his current employer, the third respondent, has had an ongoing contract with SASOL – its main client – going back 25 years which is continually negotiated by the third respondent's management and which makes provision for price increases on an annual basis and which are calculated in accordance with a set formula. As such, he has no control over any prices and is thus not privy to any sensitive or confidential information pertaining thereto.

[6] The first respondent contends further that he worked for the third respondent as a salesman for approximately ten years from 1991 until January 2000, and that the customer connections he has with SASOL and various other clients were built up long before he took up employment with the applicant. He accordingly submits that the customer connections, know-how and skills he has are attributes he acquired through his endeavours and hard work over his working career and that these do not belong to the applicant.

[7] The first respondent submits that even though he signed the restraint the applicant does not, in the circumstances of this case, have any interest worthy of protection. In the alternative, the applicant contends that

considering his advanced age and the fact that he has no other skills except those of being a salesperson in the mining industry, any prohibition on him exercising these personal skills would effectively mean that he was no longer employable, meaning that if the restraint was enforced he would have to face the prospect of being unemployed for the remainder of his working life. He contends accordingly, that enforcing the restraint would in the circumstances of this case be against public policy.

THE LAW

[8] In *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 897F-898E, the court summarized the principles relating to agreements in restraint of trade as follows:

'1. There is nothing in our common law which states that a restraint of trade agreement is invalid or unenforceable.

2. It is a principle of our law that agreements which are contrary to the public interest are unenforceable. Accordingly, an agreement in restraint of trade is unenforceable if the circumstances of the particular case are such, in the court's view, as to render enforcement of the restraint prejudicial to the public interest.

3. It is in the public interest that agreements entered into freely should be honoured and that everyone should, as far as possible, be able to operate freely in the commercial and professional world.

4. In our law the enforceability of a restraint should be determined by asking whether enforcement will prejudice the public interest.

5. When someone alleges that he is not bound by a restraint to which he had assented in a contract, he bears the *onus* of proving that enforcement of the restraint is contrary to the public interest.'

[9] These principles have been applied in a number of decisions. In *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 776H-J to 777A-B, Botha JA stated that:

'The incidence of the *onus* in a case concerning the enforceability of a contractual provision in restraint of trade does not appear to me in principle to entail any greater or more significant consequences than in any other civil case in general. The effect of it in practical terms is this: the covenantee seeking to enforce the restraint need do no more than to invoke the provisions of the contract and prove the breach; the covenantor seeking to avert enforcement is required to prove on a preponderance of probability that in all the circumstances of the particular case it will be unreasonable to enforce the restraint; if the court is unable to make up its mind on the point, the restraint will be enforced. The covenantor is burdened with the *onus* because public policy requires that people should be bound by their contractual undertakings. The covenantor is not so bound, however, if the restraint is unreasonable, because public policy discountenances unreasonable restrictions on people's freedom of trade.'

[10] The court set out the test for determining the reasonableness or otherwise of the restraint as follows (at 767G-H):

10.1 Is there an interest of the one party, which is deserving of protection at the determination of the agreement?

10.2 Secondly, is such interest being prejudiced by the other party?

10.3 If so, does such interest so weigh up qualitatively and quantitatively against the interest of the latter party that the latter should not be economically inactive and unproductive?

10.4 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 maintained or rejected?

[11] An additional enquiry is whether or not the restraint goes further than is necessary to protect the interest. See *Kwik Kopy (SA) (Pty) Ltd v van Haarlem and Another* 1999 (1) SA 472 (W) at 484E.

[12] It is well-established that the proprietary interests protectable by an agreement in restraint of trade are essentially of two kinds, namely:

12.1 the trade connection of the business which is an important aspect of its incorporeal property known as goodwill and which is made up of relationships with customers, potential customers, suppliers and so forth; and

12.2 trade secrets consisting of all confidential matters which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him, to gain a relative competitive advantage. See *Sibex Engineering Services*

(Pty) Ltd v Van Wyk and Another 1991 (2) SA 482 (T) at 502D-F.

DOES THE APPLICANT HAVE AN INTEREST WORTHY OF PROTECTION?

[13] In my view, the applicant has merely made a bald allegation that the first respondent had access to sensitive and confidential information in terms of price lists, client information and marketing and sales knowledge. No further facts or information have been provided by the applicant from which it can be deduced that the first respondent indeed had access to the applicant's sensitive and confidential information, a fact vehemently denied by the first respondent. In reply, the applicant states that the first respondent had knowledge pertaining to the applicant's product. This in my view, can hardly amount to sensitive and confidential information as it relates to a product which is sold in the open market. Significantly, the applicant has stated that its product is superior and accordingly different to that of the third respondent. It therefore defies logic that the applicant can turn around and contend that its prices are a confidential matter which the first respondent can use to the applicant's detriment. In any event, the first respondent avers that prices for the products that are sold by both the applicant and the third respondent are set in contractual terms and are allocated to an item when the client orders the item through the computer system which has been set up between the seller and the client. Furthermore, he had no knowledge of the prices charged nor did he have any input with clients with regard to prices.

[14] This important averment is not denied in reply by the applicant save that the first respondent was exposed to the product specification, pricing, product differentiation and that the first respondent acknowledged, in clause 3.2 of the restraint, that the applicant had a protectable interest.

[15] The applicant also contends that the first respondent had access to its confidential information by virtue of being a senior employee of the applicant and that the first respondent's responsibilities were "*far greater and wide-reaching than the description of simply a sales representative*". Again no facts or details have been furnished to back the claim that the first respondent was a senior employee and that his responsibilities were greater and wide-reaching than those simply of a sales representative. To the contrary, the first respondent states that he was one of three sales representatives that were employed by the applicant and whose main duty was to supply support services to the personnel of clients who have bought the seller's products and ensure that they were satisfied with the levels of service offered by the seller in relation to the equipment supplied.

[16] I am accordingly not persuaded that the third respondent was a senior employee with wider responsibilities of those of a normal salesperson, and that he had any access to sensitive and confidential information that belonged to the applicant. I need at this point distinguish this aspect of the first respondent's position with the applicant, from the type of the position of the

first respondent in *Experian South Africa (Pty) Ltd v Haynes & Another* Case No. 48711/2011 (South Gauteng High Court) dated 18 May 2012 on which the applicant sought to rely. The first respondent in that case was a member of the executive board and headed an entire sales department consisting of some 52 members. By virtue of the seniority of his position, he was clearly privy and had access to sensitive and confidential information of the applicant.

[17] The applicant avers that the first respondent was exposed to the applicant's client base and was responsible for the managing of sales and client relationships with the applicant's biggest clients, including SASOL in the Secunda area, and that the first respondent is now exploiting his erstwhile position of trust with the applicant and is using the very customer connections that were established and maintained during his employ with the applicant, to the third respondent's advantage. In substantiation of this claim, the applicant avers that after the first respondent left the applicant's employ, orders from the Secunda area started dropping dramatically.

[18] The first respondent states that the third respondent has been servicing SASOL for over 25 years, that he has worked with SASOL and other clients also serviced by the applicant since he took up employment with the third respondent in 1991, and that the customer connections he has with these customers were built up long before he took up employment with the applicant. He avers further that these customer connections represent part of his own skills and are attributable to his own endeavours and hard work. The

applicant's response in reply, is to say the least, bewildering. I quote in full para 28.2 of the replying affidavit:

'It is denied that the first respondent enjoyed customer connections with SASOL before the applicant employed him. The first respondent may have personal connections with various representatives of SASOL, but in order to have "customer connection" the first respondent is required to have a company's product to sell, a company's interest to promote, a commercial relationship to establish. The first respondent cannot have customer connections, without customers, and cannot have customers without a product to sell. The first respondent's argument is nonsensical.'

[19] As can be seen this clearly flies in the face of the common cause factor that for a period of 10 years before joining applicant's employ, the first respondent worked for the third respondent as a sales representative servicing the latter's clients including SASOL, who had purchased the third respondent's products. To even suggest that the first respondent had no product to sell is illogical and does not make any sense at all.

[20] In light of the fact that the first respondent worked for the third respondent for ten years as a salesperson, prior to joining the applicant, I am satisfied firstly, that the skills which he acquired as a salesperson during this decade with the third respondent do not belong to the applicant and came into being prior to his employment with the applicant and secondly, the customer connections, know-how and skills which he has built up over his working career are attributes of the first respondent himself and do not belong to the applicant.

[21] In any event, it is trite that customer connections are only capable of protection if the influence that enables an employee to induce customers to follow him to a new business had not existed before but came into being with his employment with the employer seeking to enforce the restraint. See *Walter McNaughtan (Pty) Ltd v Schwartz and Others* 2004 (3) SA 381 (C) at 391.

[22] In an attempt to show that the applicant's orders in the Secunda area declined dramatically after and as a result of first respondent's termination of employment, applicant relies on a letter from its auditors dated 6 July 2012. However, this letter merely states that for the one month period ended 30 June 2012, there was a 65% drop in sales in all the SASOL mines. In my view this is meaningless and does not assist the applicant as the auditors do not claim that this is attributable to the first respondent.

[23] In light of all the aforegoing, I find that the applicant has not succeeded in proving that it has any interest worthy of protection in terms of the agreement in restraint of trade. Furthermore, inasmuch as the applicant seeks to rely on the first respondent's acknowledgement of the supposed reasonableness of the restraint in the agreement itself, I am of the view that such an acknowledgement is not decisive of the matter. The court is duty bound despite such acknowledgement, to still probe and determine the reasonableness of the restraint. See *Basson (supra)* at 768B-G.

[24] In case I am wrong in my conclusion that the applicant has not shown that it has an interest worthy of protection, I am in any event of the view that upholding the restraint would not be in the public interest. The applicant is 58 years old and he has no other skill save that of being a sales representative within the mining sector. The restraint itself operates within the entire Republic of South Africa and will operate for two years from May 2012 until May 2014 by which time the applicant will have reached the age of 60. In the circumstances I am of the opinion that upholding the restraint will have the effect of prohibiting the first respondent from exercising his personal skills as a salesperson and he would have to face the prospect of remaining unemployed for the remainder of his working life. I accordingly find that even if the applicant has any interest worthy of protection, this is outweighted by the first respondent's right to be economically active and productive and there is nothing in public policy which requires that the restraint should be maintained in the face of the first respondent's age and skills.

THE APPLICATION TO DISMISS THIS APPLICATION AND TO STRIKE OUT THE REPLYING AFFIDAVIT

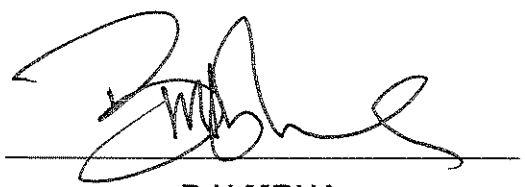
[25] The first respondent seeks an order dismissing the application on the basis that the applicant failed to make out a sufficient case in its founding papers by delivering a skeleton founding affidavit which does not set out a cause of action. I do not agree with this contention. It bears mention that the matter initially served before the urgent court on 16 June 2012 where it was struck off the roll for want of urgency.

[26] The founding affidavit and answering affidavit alone demonstrate the common cause fact that a restraint of trade agreement is in existence and was lawfully concluded. Furthermore, a cause of action is clearly alleged in the founding affidavit that the applicant had a protectable interest worthy of protection. In the circumstances, the application to dismiss on the basis that the founding affidavit does not disclose a cause of action cannot succeed.

[27] I have perused the replying affidavit and have also referred to it when considering this entire application. In my view, the applicant has not pleaded to any new facts, save for the facts which only came to light after the founding affidavit had already been delivered. The replying affidavit merely contains a substantiation of the allegations averred in the founding affidavit. Similarly, the application to strike out cannot succeed.

[28] In the circumstances, I make the following order.

1. The application is dismissed.
2. The first respondent's application to dismiss the application and to strike out the replying affidavit is dismissed with costs.
3. The applicant is ordered to pay the costs of this application.



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JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG