SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 35019/2012

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

22/2/2013

In the matter between:

YALE LIFTING SOLUTIONS (PTY) LTD — Applicant

and

SERFONTEIN, WIHELM SERFONTEIN — First Respondent

MAN-DIRK (PTY) LTD — Second Respondent

JUDGMENT

SPILG, J:

INTRODUCTION

1. By way of an urgent application launched on 14 September 2012 the applicant sought an urgent interdict the effect of which was to restrain its erstwhile employee, the first respondent, from directly or indirectly being involved in a business operating in the same or similar industry as it for a period of 12 months as from 10 May 2012, or to entice employees to

leave the applicant , or to furnish any information to a client of the applicant which may result in the client terminating its association with the applicant. The applicant also sought to interdict the first respondent from soliciting business from its clients or from selling or supplying any services to its clients and from using or disclosing any confidential information relating the applicant's *"techniques and practices, pricing, suppliers, customers, operating systems, accounting and control systems, finances and remuneration packages"*,

2. The applicant is involved in the supply of lifting equipment such as chain blocks, hoists, slings and jacks that are used *inter alia* in the mining, agricultural and manufacturing industries. It is common cause that the first respondent was the primary point of contact between certain of the applicant's clients.

3. The matter was set down and argued during the first week of October 2012. The following issues were raised by the first respondent;

    a. The employment contract containing the restraint agreement was a backdated document intended for another purposes and was created sometime after the first respondent commenced employment; and

    b. The applicant cannot demonstrate a protectable interest.

THE RESTRAINT AGREEMENT

4. The first respondent set up a scenario to explain how the employment contract containing the restraint came to be signed. He explained that he had been appointed during mid-2010 but in order to overcome issues raised by the union he was advised that it was imperative to sign a new employment contract which was then backdated in order to create the impression that he had always been treated as a sales representative.

5. I am satisfies that the first respondent's version can be rejected on paper. Firstly the reason advanced for backdating the letter is not supported by the document he signed. It does not describe him as a sales representative, but as an onsite-supervisor which was his previous position. Moreover the first respondent could only have been appointed a sales representative/ key accounts representative in July 2011 when the previous occupant of that position resigned and when his own position of on-site supervisor was filled by a trainee. Moreover the first respondent's payslip reflects that in July 2010 he was an Inspection and Testing Supervisor, a position he had occupied since July 2009. The August payslip reflects his change to on-site supervisor and is consistent with the date of the employment contract. These objective facts also negate the explanation for back-dating, as it would have been a pointless exercise.

6. The first respondent said that in addition he did not read the contract, but that is based on the version he tendered that there was no need to because it was a backdated document serving another purpose. If the basis is rejected then it follows that the defence of being lulled into believing that it was unnecessary to look at the document must also fail. Moreover the defence is dependent on their being no pre-existing restraint binding the first respondent. The first respondent claimed that his initial contract of 2009 did not contain a restraint. The document was located and in reply was attached. It contains a restraint clause.

7. I am satisfied that even on the *Plascon Evans* test the first respondent's version can be rejected and that he knowingly signed the contact containing the restrain and he is bound by its terms. See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H to 635B.

PROTECTABLE INTEREST

8. The first respondent contends that he was only involved with a limited number of the applicant's clients and did not have access to nor was he involved with the applicant's price lists, or quotations, or what was described as a "*chain sling calculator*".

9. The evidence produced by the applicant against the first respondent's denial is as follows;

a. A number of permits and fitness reports demonstrated that he had been on the site of a number of other large business client's of the applicant. These however go back to 2009, save for one document which was an entry into a client's plant after termination of his employment;

b. A number of confidential price lists and other notifications which would indicate that the first respondent was at least on a mailing list. The lists did not appear to be for general distribution;

c. A number of documents reflecting that the first respondent had requested the preparation of quotes and had submitted a quote on behalf of the applicant directly to a large client ,although in another he was a co-signatory. They also covered a recent period prior to the first respondent resigning.

10. The first respondent however went further and explained that the 'chain sling calculator is only available on the applicant's main frame and requires access via a password in order to gain access. The first respondent also confirms that he requested others to prepare the quotes. He however claimed not to have been involved in the preparation of any quote.

11. In my view on the evidence that can be accepted at this stage there is not enough to gainsay the first respondent's contention that although he had been involved in presenting quotes he did not know the basis upon

which they were calculated or what reductions may have been determined at any particular time. Moreover his position did not appear to be sufficiently senior to affect the customer relationship. On the contrary he was earning R18 000 per month and certain allowances which he had previously enjoyed were curtailed in January 2012. Nor is it suggested that the attributes of the equipment itself are not generally known to the industry. Indeed the focus of the application was the first respondent's alleged access to the determination of pricing. In my view the only aspect that may be considered to be a protectable interest is pricing. See generally *Basson v Chilwan & Others* 1993 (3) SA 742 (A) at 767G to H.

12. The difficulty with the applicant's case is that it does not suggest that the pricing remains constant. In the face of the first respondent's denial that he is privy to the methodology adopted all the court has is some information that even the general pricing lists change and that price lists are prepared for specific clients. In argument the applicant contended that they appeared to be annual pricings. However that is not set out in the papers.

13. The main relief is to interdict the first respondent at the time the application was heard. If the relief was final then in my view a clear right has not been established on paper in the face of the first respondent's denials on this aspect. I am not prepared to find that the rejection of his version regarding the signing of the agreement permits a court to reject

the facts he asserts regarding the protectable interest issue as not being *bona fide*.

14. Even if the lower threshold was the establishment of a *prima facie* case the applicant would then still have to demonstrate that the balance of convenience favours it and that it has no other remedy.

15. Assuming that the applicant cannot be faulted for only discovering in August 2012 that the first respondent was employed by the second respondent, nonetheless by the time it came to court at the beginning of October the restraint had already run five of the twelve months. Furthermore the restraint covered a radius of 300 kilometres *"from the Company premises or your allocated sales territory"*. The sales territory of the first respondent while working for the applicant was Witbank, which is more than 300 kilometres from where he now works. However it is within the radius of the applicant's main offices. There is no additional indication that this proximity creates prejudice sufficient to tip the balance of convenience in favour of the applicant.

16. The effect of this decision does not preclude the applicant from pursuing an action for damages for breach of restraint if so minded. I have only decided that there is not enough on motion to entitle the applicant to an interdict. It also follows that there is not enough on motion to entitle the applicant to any of the final or declaratory relief sought.

17. The application is consequently dismissed with costs.