REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 13340/2013

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

5/8/13
DATE

SIGNATURE

In the matter between

KOPANO COPIER COMPANY (PTY) LTD t/a NASHUA KOPANO	**Applicant**
and	
ADRIAN COWAN GIBSON	**First Respondent**
CBC OFFICE EQUIPMENT JOHANNESBURG (PTY) LTD t/a CANON BUSINESS CENTRE JOHANNESBURG	**Second Respondent**

JUDGMENT

MADIMA, AJ

Introduction

1. The applicant seeks a final order interdicting the first respondent from acting in breach of a restraint of trade agreement, by taking up employment with the second respondent. First respondent is, according to second respondent, not employed by

them, but rather by OEP Office Equipment Products (Pty) Ltd t/a Smart Office ("Smart Office"). This was a fact not known to applicant at the launch of its application. Applicant had assumed that second respondent was the employer because the offers of employment made to first respondent, dated 30 January 2013 and 5 February 2013, were made by second respondent. Further first respondent has himself stated in an e-mail of 20 March 2013 that he has "*decided to accept the Canon offer*". Further still, first respondent's email signature reflects his employer as second respondent, and his email address is adriang@cbcfusion.co.za. It therefore appears that the applicant's assumptions in this regard are reasonable.

2. Smart Office has not sought to be joined to these proceedings and its director has deposed to a supporting affidavit to first respondent's answering affidavit and abides the decision of this court. Despite no relief being sought against second respondent, it has however opposed the relief sought against first respondent. For these reasons, and those referred to in paragraph (1), above, I am persuaded that second respondent and Smart Office are conjoined and I accept the proposition that the two cannot be separated from each other.

3. The applicant also made an application for the amendment of the notice of motion to reflect that the restraint of trade be within the Republic of South Africa. After submissions by both counsel for the parties, I reserved judgment on this application which I undertook to decide upon after hearing the parties on the merits.

First respondent's employment with applicant

4. Although first respondent had been in the employ of applicant for a number of years, it was only in 2004 that he commenced to engage in strategic sales for applicant. His duties included customer relations, information and database of customers.

5. In June 2012 first respondent was promoted to the position of Corporate Sales Manager. He reported directly to the Managing Director, and subsequently to the General Manager of Sales and Key Accounts. Upon acceptance of the position, first respondent signed a restraint of trade agreement with applicant. The restraint of trade agreement, which formed part of his letter of appointment reads thus:

9. RESTRIANT

9.1 you hereby agree that the proprietary interest of the Company and or any of its franchises in the trade secrets and confidential information will be prejudiced if you take up employment or become interested in any concern that competes with the Company and or any of its franchises. It is accordingly agreed that, in order to protect such proprietary interest, you bind yourself during the period of your employment and for twenty four (24) months after the termination thereof, to the following restraints:

9.1.1 you will not directly or indirectly encourage, assist, persuade, induce, incite or procure any employee of the Company and any of its franchises to become employed by or be interested in any concern whatsoever nature which carries on as part of as the whole of its undertaking or business, the same business or a business similar to or alike the busuiness of the Company and or any of its franchises.

9.1.2 save in the proper execution of your duties as an employee of the Company, you will not approach, advise or contact in order to, either directly or indirectly solicit the custom or any person or entity who was a customer with whom or to whom, either on behalf of the company or any of its franchises, negotiations, discussions or representations were entered into made during the period of your employment with the Company.

9.1.3 you will not either directly or indirectly be employed by or have an interest in, either as an employee, principal agent, member, director, shareholder, partner, consultant, financier or advisor or in any other like capacity in any concern or entity which carries on the same business or a business similar to or alike the business of the Company and or any of its franchises.

9.1.4 you hereby acknowledge that the restraints imposed on you in terms of this contract are reasonable in all respects and are reasonably required by the Company to protect and maintain the proprietary interest in the Company as set out in clause 9.1 and may be enforced against you by the Company.

9.2 the provisions of the restraint above are severable as to each of the undertakings set out therein, each of the business and each of the exclusive franchise areas of the franchises of the Company.

9.3 in the event of you committing a breach of any or all the restraints and undertakings set out in clause 9, and without prejudice to any other rights which the Company may have legally. The Company will be entitled to claim payment of the amount of Twenty Thousand Rand (R20 000.00) from you being the agreed, predetermined and liquidated damages that the Company will suffer, alternatively, to claim from you the actual damages, which will be suffered by the Company.

6. In this new position in corporate sales the first respondent is to be responsible for managing the applicant's corporate accounts and identified and targeted new business

and key clients. He delivered value propositions to clients and developed strategy. He managed print services and developed tailor-made packages with input from clients. He concluded financial leases of products on behalf of applicant and provided various professional consultancy services to the client.

7. First respondent's customers prior to his promotion to Corporate Sales Manager, included, Anglo Platinum, Anglo Thermal Coal, Liberty Life, Stanlib, Transnet, Rand Merchant Bank, Fisrt Rand/First National Bank and Afgri Operations. These companies operate throughout South Africa. In this position, first respondent had access to high-level management within these customers.

8. First respondent worked for a period of approximately 8 months until his resignation on 15 February 2013. Despite its good efforts, the applicant was not able to persuade the first respondent to stay. Neither a salary increase to R800 000.00 nor a position in Nashua Limited could. In desperation, applicant threatened to invoke the restraint agreement. This also did not deter the first respondent. First respondent instead informed the applicant on 20 March 2013 that he had decided to accept second respondent's offer of employment.

9. It is common cause that applicant and second respondent are competitors. It is no secret that the resignation of first respondent from second respondent's employ is of grave concern to applicant. Applicant is particularly concerned that first respondent acquired significant knowledge of the business and proprietary and confidential information, which was only raised in reply by applicant, during his tenure with applicant. Applicant does not wish him to use this knowledge in his new job.

First respondent's responsibilities at Smart Office

10. Smart Office is in partnership with Canoa and Business Connection (Pty) Ltd ("BCX"). BCX is a 51% shareholder of Smart Office. BCX conducts business exclusively in the IT industry and possesses a substantial customer database. Smart Office markets MPS to BCX customers. A typical work model in this regard is such that MPS agreements would be concluded between BCX and the customer concerned and Smart Office would then be responsible for servicing the hardware and maintenance of the software. The hardware is supplied by second respondent.

11. In his new job, first respondent is responsible for the management of sales representatives. Their jobs it is to market and sell MPS to the BCX customers. First respondent would not be responsible for the sourcing clients or call on customers directly without sales representative being present. He further states in his answering affidavit that he would not be in a position to influence any of the applicant's current customers to sever ties with applicant and move over to Smart Office. He further denies that he would be in a position to influence the outcome of tender processes in favour of his new employer and its associated companies.

12. More importantly, first respondent has also undertaken not to approach any of the applicant's existing customers for the remaining period of the restraint. This undertaking was first made to the applicant before the launch of this application. I must say that the refusal by applicant to accept the undertaking appears rather odd. As already stated above, the customers referred to are Anglo Platinum, Anglo Thermal

Coal, Liberty Life, Stanlib, Transnet, Rand Merchant Bank, Fisrt Rand/First National Bank and Afgri Operations. Another important factor in this regard is the fact that the respondents agree to be interdicted and restrained until March 2014 from approaching, advising or contacting these companies. Applicant's refusal of this offer is irrational in my view.

13. Another factor that I was alerted to by the first respondent is that two of his predecessors had also left the employ of applicant and although they had signed restraint agreements, applicant, following a response to the demand, did not proceed to invoke it. The submission by applicant's counsel in this regard was not persuasive.

The breach of the restraint of trade agreement

14. I am greatly indebted to counsel (Mr Craig Watt-Pringle SC and Ms K McLean for the applicant and Mr C Witcutt SC and Mr D Williams for the respondents) for their comprehensive heads. I must confess that I have been aided to a greater extent and have used them liberally in arriving at my decision. It is trite that a party that seeks to enforce a contract in restraint of trade must invoke the contract and prove the breach thereof. The onus is then on a respondent who seeks to avoid the restraint to demonstrate, on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable. *Magna Alloys & Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (SCA) at 892I – 893E;; Basson v Chilwan & Others 1993 (3) SA 742 (A); Reddy v Siemens; Telecommunications (Pty) Ltd 2007 (2) SA 486 (SCA) [10] at 493E-Fff; [14-16] at 495E-497F; Den Braven SA (Pty) Ltd v Pillay & Another 2008 (6) SA 229 (D) at 234B.*

15. Our Courts have observed that-"*The circumstances to which regard may be had cover a wide field and include typically those pertaining to the nature, extent and duration of the restraint and the legitimate interests of the respective parties in relation thereto...Even factors such as the equality or otherwise of the bargaining power of the respective parties may be taken into account.*" *Reeves & Another v Marfield Insurance Brokers CC & Another 1996 (3) SA 766 (A) at 776E-F; Rectron (Pty) Ltd v Govender & Another [2006] 2 All SA 301 (D)*, see also *Advtech Resourcing (Pty) Ltd t/a the Communication Personnel Group v Kuhn and another 2008 (2) SA 375 (C) at paragraph [17] p382* (own emphasis)

16. It appears that the main relief sought by the applicant against the first respondent is to interdict the first respondent from working for second and/or third respondent. These respondents are competitors of applicant and from -"*approaching, advising or contacting, whether directly or indirectly any person or entity who is or was a customer of the applicant or with whom the applicant negotiated or had entered into discussions with or had made representations to during the course of his employment with the applicant.*" I am thus perplexed by applicant's refusal to accept the respondents' undertaking that first respondent shall not approach or advise any person or entity that have been referred to above. The question of how this would be enforced is a separate issue.

17. There is little doubt that applicant's primary concern also lies with the clients that the first respondent serviced as an accounts manager (prior to his promotion) who are identified above. However in reply the applicant raises the issue of proprietary interest in confidential information. It is trite that an applicant must set out his/her case in his/her founding affidavit. This has not been applicant's case.

18. I agree completely with Mr Whitcutt's submission that if the information that the applicant asserts is confidential, is in fact confidential, the applicant would seek relief interdicting the first respondent from disclosing its confidential information and further seek an interdict against the first respondent's employer preventing it from using such information. (my emphasis). This is apparently not applicant's case.

19. I agree further that the fact that the first respondent has taken up employment with Smart Office does not in itself entitle the applicant to any relief if all he will be doing is applying his skills and knowledge acquired while in the employ of the applicant. It is only if the restriction on his activities serves to protect a recognisable proprietary interest relied on by the applicant that the first respondent would be in breach of his contractual obligations. *Automotive Tooling Systems (Pty) Ltd v Wilkens and Others 2007 (2) SA 271 (SCA) at 279.* This also does not appear to be the applicant's case in its founding papers.

Is the restraint reasonable

20. There are a plethora of cases that were decided by our courts in the determination of whether or not an agreement in restraint of trade was enforceable. The courts held on numerous occasions that such an agreement would be enforceable unless it is unreasonable. *Den Braven SA (Pty) Ltd v Pillay & Another 2008 (6) SA 229 (D) at 234A; Rectron (Pty) Ltd v Govender & Another [2006] 2 All SA 301 (D)Automotive Tooling Systems (Pty) Ltd v Wilkens & Others 2007 (2) SA 271 (SCA) at [8], p277G; Magna Alloys & Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (SCA) at 898A-B; Basson v Chilwan & Others 1993 (3) SA 742 (A) at 767A-D; Reddy v Siemens; Telecommunications (Pty) Ltd 2007 (2) SA 486 (SCA) [10] at 493E-Fff; [14-16] at 495E-497F.* (my emphasis) The question then

becomes whether it is reasonable to restraint first respondent for a period of one year and throughout the Republic of South Africa, from using his knowledge and skill in the job market. I have grave doubts that this should be so in the present case. The second question is whether this applicant should be protected against fair competition in the market place. The answer must be a resounding no.

21. It is generally accepted that a restraint will be considered to be unreasonable, and thus contrary to public policy, and therefore unenforceable, if it does not protect some legally recognisable interest of the employer but merely seeks to exclude or eliminate competition. *Automotive Tooling, supra, at [8] 277G-H - 278A.* (my emphasis).

22. The test for the determination of the reasonableness or otherwise of a restraint of trade provision is set out in *Basson* (supra) at 767C-H and was applied in *inter alia, Rectron (Pty) Ltd v Govender & Another supra; Den Braven SA (Pty) Ltd v Pillay & Another (supra)* as follows -

(a) is there an interest of the one party which is deserving of protection at the termination of the agreement?

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

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

(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 maintained or rejected?

23. There is no doubt that the applicant on the whole relies, in his papers, albeit in reply and during submissions by counsel, regrettably in reply, on a protectable interest in a customer connection. It is trite that this cause of action should have been set out in full in the founding affidavit. This was not the case. There is further no doubt that the first respondent has acquired certain knowledge and skill whilst in the employ of applicant. It is unrealistic to expect him to un(learn) or pretend not to have such knowledge when he changes jobs. It would be further unreasonable to expect him not to work in the same industry in competition with applicant.

24. The rationale for the protection of an individual's knowledge and skill was eloquently expressed by Kroon J in *Aranda Textile Mills (Pty) Ltd v Hurn [2000] 4 All SA 183 in para [33]* where it was stated that:

> "*A man's skills and abilities are a part of himself and he cannot ordinarily be precluded from making use of them by a contract in restraint of trade. An employer who has been to the trouble and expense of training a workman in an established field of work, and who has thereby provided the workman with knowledge and skills in the public domain, which the workman might not otherwise have gained, has an obvious interest in retaining the services of the workman. In the eye of the law, however, such an interest is not in the nature of property in the hands of the employer. It affords the employer no proprietary interest in the workman, his know-how or skills. Such know-how and skills in the public domain become attributes of the workman himself, do not belong in*

any way to the employer and the use thereof cannot be subjected to restriction by way of a restraint of trade provision. Such a restriction, impinging as it would on the workman's ability to compete freely and fairly in the market place, is unreasonable and contrary to public policy."

25. I am in total agreement with Mr Whitcutt in his submission that the applicant's attempt to restrain the first respondent from using his aptitude and proficiency, knowledge and skill that he acquired during his employ with applicant is contra *bonos mores*. The proposition that the first respondent's skills do not belong to the applicant is correct. Applicant's attempt to prevent him from using them for a period of one year is clearly intended to eliminate competition. I have already stated above that applicant's refusal to accept the respondents' undertakings not to approach its customers is unreasonable.

26. There is little doubt that the customer connection and the competition which the applicant seeks to protect must be unlawful. The undertaking made by the first respondent will prevent the mischief the applicant fears. The respondents claim that the undertaking is policeable.

27. Of importance is also the fact that all of the customers of applicant that first respondent serviced are tied in long term contracts that shall live beyond the constraint duration.

28. The applicant values its proprietary interest at R20 000.00. There has been no explanation why applicant does not seek to enforce the it and walk away. There has

also been no explanation why the restraint on first applicant is for 12 months when the contract itself makes for a provision of 24 months.

29. There are of course instances when a restraint would be held to be reasonable and therefore enforceable. The Court in *Den Braven's* case (supra) was called upon to determine the reasonableness or otherwise of a restraint which sought to protect trade connections. Wallis J (as he then was) held that the restraint was reasonable and enforceable against the former employee – a salesman. The instant application is distinguishable from *Den Braven* in that:

(a) *The employee in Den Braven, one Pillay ("Pillay") was a salesman, fulfilling the functions one would expect a salesman to fulfil. The first respondent in this case is no longer a salesman;*

(b) *Pillay had in the 8 years of his employment with the applicant played a significant role in building up the business and establishing and maintaining its relationship with its customers.*

(c) *The applicant acquired its customers from Nashua Limited. The customer connection was already in place acquired and secured through a tender process which is largely neutral and cannot be influenced;*

(d) *The customers would be tied up contractually for 3 – 5 years. This would be long after the life of the restraint agreement between the parties.*

30. The learned Judge held that in that case, the applicant's trade connections, many of which were indisputably established by Pillay, did constitute a proprietary interest which was deserving of protection. In coming to this conclusion the Court held that: "*the fact that [Pillay] was able of his own volition to identify new customers, approach*

them and secure their custom for the applicant is indicative of the existence of the type of trade connection that is protectable".

31. This is not the case with first respondent. While the first respondent has worked for the applicant for a period of approximately 8 years his contact with customers significantly decreased following his promotion almost a year ago. He is no longer an accounts manager who is at the coal face and has not been an accounts manager since his promotion and his contact with the applicant's customers had become significantly less than that described in *Den Braven*. Moreover, the applicant retains accounts managers whose responsibilities first and foremost related to servicing and calling upon customers. Over and above all of that first respondent has made an undertaking that he will not contact any of applicant's customers.

32. The applicant would have averted this unnecessary litigation by accepting the undertaking made by first respondent. Applicant also did not set out its case in its founding affidavit. It sought to do so in reply. This proved to be fatal. The Applicant has struggled to convince this court that the balance of convenience is in its favour and that it should be granted the final interdict.

Application for amendment of the notice of motion.

33. I have had occasion to consider the amendment application made by counsel for applicant. I would perhaps have held differently if applicant had not sought to invoke the restraint in the whole of the Republic of South Africa. To restrain any employee throughout the vast area that is the RSA is indeed unreasonable. The application

therefore should fail on this. It would appear that my granting of the application for amendment has proven fatal for applicant in that I am not inclined to interdict the first respondent from employment in the whole of South Africa.

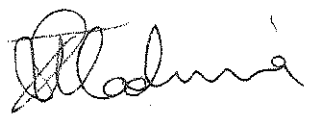
Order

34. I am accordingly satisfied that the application should fail. And my order is as follows:

42.1 The application for amendment of the notice of motion is granted.

42.2 The application is dismissed.

42.3 The Applicant to pay the cost of this application, cost to include the cost of two counsel.



TS MADIMA: AJ

ACTING JUDGE OF THE HIGH COURT

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Dates of Hearing:	27-28 May 2013
Date of Judgment:	31 July 2013