

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 32581/15

(1)	<u>REPORTABLE: YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES: YES/NO</u>
(3)	<u>REVISED.</u>
.....
DATE	SIGNATURE

In the matter between:

POWER TRUCK HIRE (PTY) LIMITED

Applicant

And

DUANE FOURIE

First Respondent

VALUE TRUCK RRENTAL

Second Respondent

J U D G M E N T

MAKUME, J:

BACKGROUND FACTS

[1] This matter served before me in the urgent court on the 30th September 2015 and in view of time constraints I reserved judgment.

[2] In the application the Applicant seeks an order interdicting and prohibiting the First Respondent until the 30th June 2017 from being employed by the Second Respondent.

[3] The Applicant further seeks an order interdicting and prohibiting the Second Respondent from employing the First Respondent.

[4] The Applicant conducts business in the renting out of vehicles and drivers to the corporate industrial business. It is not in dispute that the Second Respondent is a competitor and conducts the same type of business as the Applicant.

[5] It is common cause that on the 31st August 2011 the First Respondent signed a Service, Confidentiality and Restraint Agreement with the Applicant in terms of which he took up employment with the Applicant as an executive director with effect the 1st September 2011.

[6] The relevant clauses of the Restraint of Trade and Confidentiality Agreement which the First Respondent agreed to recorded *inter alia* that:

- 6.1 during the course of his employment with the Applicant First Respondent has acquired/will acquire considerable knowledge and know-how in and will learn of the Applicant's techniques relating to its business;

- 6.2 he will have access to the names of clients with whom the Applicant does business as well as to the trade secrets, strategic plans and other confidential information pertaining to the Applicant;
- 6.3 he acknowledged that the only effective and reasonable manner in which the Applicant's rights in respect of the business secrets and client connections can be protected is by means of a restraint of trade covenant imposed on him;
- 6.4 he undertook that he will not while employed by the Applicant and for a period of 24 (twenty-four) months after the termination of his employment either for himself or as an agent of anyone else persuade, induce, solicit, encourage or procure any employee of the Applicant to:
 - 6.4.1 become employed by or interested in any manner whether in any business, firm undertaking, company, close corporation or other entity or association of persons directly or indirectly in competition with the business carried on by the Applicant.
- 6.5 The restraint was reasonable in its duration, area and scope of operation for the protection of the direct and indirect proprietary interests of the Applicant.

[7] On the 1st day of September 2013 the First Respondent entered into a contract of employment with a company called Spartan Truck Hire (Pty) Ltd (STH) as a sales and marketing director. During September 2011 STH had purchased and become a 100% owner of all the shares in the Applicant (Power Truck Hire (PTH)).

[8] The contract of employment that the First Respondent concluded with Spartan Truck Hire whilst it contained a confidentiality clause, no restraint of trade agreement was concluded. The confidentiality clause is located in clause 13.2 and reads as follows:

“13.2 For this reason in particular you shall not while employed by the company or at any time after the termination of your employment with the company without the written consent of the director disclose or divulge or cause to be disclosed or divulged to any third person nor use for gain for yourself and shall use your best endeavours to prevent the disclosure or publication of.”

[9] On the 1st of June 2015 the First Respondent addressed a letter “*To whom it may concern*” which reads as follows:

“I Duane Fourie herewith tender my resignation as Managing Director of Power Truck Hire as from 1st June 2015.”

[10] It is common cause that the First Respondent's last working day was the 30th June 2015. On the 2nd September 2015 the First Respondent

commenced employment with the Second Respondent a competitor of the Applicant.

[11] On the 4th September 2015 Applicant's attorneys addressed a letter to both the Respondents calling upon the First Respondent to stop working for the Second Respondent and likewise that the Second Respondent should terminate the employment of the First Respondent.

[12] In reply the Respondents' attorneys wrote to the Applicant's attorneys on the 7th September 2015 and said the following:

"4. On

4.1 31 August 2011 Duane signed a Service, Confidentiality and Restraint Agreement with Power Truck (the restraint agreement).

4.2 31 August 2013 Duane left the employ of Power Truck (Pty) Ltd and joined Spartan Truck Hire (Pty) Limited (Spartan Truck) and enclose a copy of the agreement and refer you in particular to paragraphs 7, 12, 18 and 22 which reads:

Place of Work

The usual place of work will be the company offices Spartan but you may be requested within reason to work elsewhere from time to time. Your acceptance of employment with the company shall constitute your agreement to work at any of the company operations or the operations of its associated company."

"6. Duane had very little to do with Power Truck rather than in a supervisory capacity although he remained a director he had relinquished control. During or about August 2014 Duane was called into the office of Arnold Friedman who is de facto the managing director of both Spartan Truck and Power Truck and he informed Duane that Duane was required to return to the business of Power Truck. In September 2014 Duane took up

employment with Power Truck as managing director and was paid by Power Truck.”

“13. *From what is stated above and without debating the validity of the restraint which you client seeks to enforce we record:*

13.1 there is no restraint of trade.”

PRINCIPAL SUBMISSIONS

[13] The Applicant submits that the First Respondent is still bound by the Services, Confidentiality and Restraint of Trade Agreement that he signed on the 31st August 2011 despite the fact that he took up employment with Spartan Truck on the 1st September 2013.

[14] The First Respondent argues that when he entered into agreement of employment with Spartan Truck Hire on 1st September 2013 this resulted in the termination of his contractual obligation with the Applicant and accordingly that when he took up employment with the Second Respondent on the 2nd September 2015 a period of 24 months as envisaged in clause 13.3.3 of the restraint agreement had lapsed and that accordingly he was free to take up employment with any competitor of the Applicant.

THE ISSUES

[15] In the view that I hold what is in issue before me is whether the restraint of trade agreement that the First Respondent signed on the 31st August 2011 was operative as on the 1st June 2015 or the 2nd September

2015. A finding that the restraint agreement seized operating against the First Respondent in September 2013 will be dispositive of all the issues in this application.

THE LEGAL PRINCIPLES

[16] It is trite law that principles applicable to the determination of final relief sought on motion are well established that is that motion proceedings are principally for the resolution of legal issues and are not geared to deal with factual disputes (see *Cadac (Pty) Ltd v Webber Stephen Products* 2011 All SA Reports 343 (SCA)).

[17] The dispute in this application is to be found in the fact that the Applicant contends that the First Respondent's employment continued in terms of the service agreement until the 30th June 2015. This is disputed by the First Respondent. This dispute is incapable of being resolved on the papers. On that basis alone the Applicant's application should be dismissed.

[18] There are two employment agreements in issue in this matter. The Applicant contends that during September in the year 2013 the First Respondent became employed as a director of both STH and the Applicant until October 2014 when he the First Respondent returned to his previous employment with the Applicant.

[19] The First Respondent says that when he was recalled to the Applicant's employment after having spent 13 months with STH his employment was not governed by any written agreement.

[20] There are two clauses in the agreement entered into between the Applicant and the First Respondent during August 2011 that are worth considering in determining whether the employment was terminated when First Respondent entered into a new agreement with STH. I deal with them hereunder.

CLAUSE 11 TERMINATION

"11.1 Notwithstanding 10 or any other provisions of this agreement this agreement (and the employment relationship embodied herein) may be terminated summarily by the company:-

11.2 In any circumstances justifying such termination at common law."

CLAUSE 17 GENERAL

"17.1 This agreement constitutes the sole record of the agreement between the parties in regard to the subject matter thereof and supersedes, overrides and replaces all prior agreements.

17.2 Neither party shall be bound by any express or implied term, representation, warranty, promise or the like not recorded herein."

[21] In this matter the Applicant and the First Respondent in agreeing to First Respondent taking up new employment with Spartan Truck Hire (STH) acted within the perimeters of clause 11.2 of their agreement and brought

about a termination of that agreement under circumstances justifying such termination at common law. My conclusion in this regard is informed by what is contained in paragraph 7 of the founding affidavit wherein the Applicant says the following:

“7.7 The Applicant grew at a rapid pace and we saw the First Respondent as an integrated part of the group with massive sales and marketing.

7.8 As a result First Respondent was given a further directorship in the STH on the basis of his outstanding performance. He became director of sales and marketing for STH and the Applicant. I emphasise that the First Respondent was employed as a director of both STH and the Applicant. His directorship of STH commenced in September 2013.”

[22] Clause 17 of the agreement is in conflict with and does not support what the Applicant says in paragraph 7.8 wherein it is said that the First Respondent was employed as a director of both STH and the Applicant. This allegation is not in writing as required in section 17.

[23] A reading of the letter of appointment addressed to the First Respondent dated the 1st September 2013 sets out in clear terms the First Respondent's duties and terms of his new position. There is nowhere in that agreement or letter of appointment where it is stated that the First Respondent is appointed in dual capacities as a Sales and Marketing Director of STH as well as the Applicant and in my view in the absence of such appointment not being in writing it is null and void.

[24] When the First Respondent accepted his appointment as a Sales and Marketing Director of STH it was added that the letter of appointment supersedes any other verbal or written agreement entered into. This clause could only refer to the agreement signed in August 2011.

[25] When the First Respondent took up appointment with STH it was at a higher remuneration than what he was being paid whilst in the employment of the Applicant. Annexure "AA2" on page 220 of the papers indicates further that the First Respondent became engaged by STH on the 1st September 2013.

[26] When the time came to recall the First Respondent from STH back to the Applicant's employment this was done verbally there was no indication or evidence that when he returned to Applicant's employment it was specifically agreed to revive the terms of the 2011 agreement and in the absence of which it is my conclusion that that agreement lapsed in August 2013 when the First Respondent signed a new agreement with STH.

[27] In view of my findings I do not deem it necessary to deal with the rest of the issues raised in the affidavits as I regard this finding as being dispositive of the application.

[28] I accordingly make the following order:

1. The application is dismissed.

2. The Applicant is ordered to pay the costs of this application which shall include the costs consequent upon the employment of senior counsel.

DATED at JOHANNESBURG on this the 21st day of OCTOBER 2015.

M A MAKUME
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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DATE OF HEARING	30 th September 2015
DATE OF JUDGMENT	21 st October 2015