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

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

**30 March 2020**
DATE

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SIGNATURE

**CASE NO: 43240/2019**

In the matter between:

**COMPRESSOR VALVES AND ACCESSORIES (PTY) LIMITED** Applicant

and

**MACHE LOUISE THACKERAY** Respondent

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**JUDGMENT**

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**MIA, J**

[1] This is an application in which the applicant seeks to enforce a restraint of trade agreement it concluded with the respondent. The application is opposed on the basis that the restraint was not enforceable as there was no threat of immanent harm and the restraint was unreasonable as it was signed under duress. The orders sought in this application by the applicant are the following:

"2 The applicant seeks an order interdicting and restraining the respondent until 20 September 2020 being a period of twelve months from the date of the termination of employment with the applicant from:

2.1 Being concerned, engaged or interested in any business similar or competing with the business of the applicant in the field of compressors within the area known as Gauteng;

2.2 Directly or indirectly accepting any benefit, whether in money or otherwise, for any service the same or similar to any service provided by the applicant, supplied to any person, firm or corporation which is as at the date of termination of the respondent's employment, or at any time during the period of one year immediately preceding such date was a customer or client of the applicant;

2.3 To reveal to any person, firm or corporation any technical know- how or information concerning the organisation, functions, transactions or affairs of the applicant or any details of the customers or clients of the applicant and/or the requirements of the services or internal systems, and motivation techniques, provided to them by the applicant and from utilising or attempting to utilise any such information in any manner which may harm or cause loss either directly or indirectly to the applicant or may be liable to do so;

2.4 Directly or indirectly for herself or any other person approaching in any way any person, firm or corporation which the respondent had personally assisted during the course of his/her employment with the applicant at any time;

2.5 Directly or indirectly for herself or any other person approach in any way, any person, firm, or corporation which was a client of the applicant at the time;

2.6 Enticing or attempting to entice or encourage in any way any employee employed by the applicant from leaving the employ of the applicant or to take up employment with any business similar to or competing with the business of the applicant in the field of compressors;

2.7 Interdicting and restraining the respondent from

3.1Interfering with the applicant's customer relationships;

3.2 Utilising the applicant's confidential information including but not limited to the pin numbers and reset numbers in respect of Dalgakiran and Hertz compressors as disclosed to her by the applicant;

4. Alternatively to the aforegoing, granting the relief set out in 2 and 3 above as interim relief pending an action to be instituted within 30 days from the granting of this order."

[2] The applicant, Compressor Valves and Accessories (CVA), sells, rents and services compressors of all makes and manufacture and sells spare parts for such compressors. The respondent, Mache Louise Thackeray (Ms. Thackeray) was employed as a junior sales representative by CVA from February 2015 until September 2019. She visited CVA clients to check on their service requirements and to procure further sales. She handed in a letter of resignation in September 2019.

[3] The application was originally launched as an urgent application set down for 28 January 2020. The respondent filed an affidavit addressing the urgency. Upon hearing the matter on urgency the Court postponed the matter *sine die.* The respondent was granted leave to file a supplementary affidavit on or before 7 February 2020. The parties were granted leave to approach the Deputy Judge President for an expedited date to be allocated. The applicant was also ordered to pay the wasted costs of the postponement. A special allocation was granted by the Deputy Judge President for 16 March 2020.

[4] CVA have operated since 1987 and are the sole supplier of Dalgakiran and Hertz compressors within the Republic of South Africa. Their direct competitor Integrated Air Solutions sells Elgi compressors and also maintains and services compressors of all makes and manufacture of compressors.

[5] Ms. Thackeray was interviewed for the position of sales representative with CVA by Eddie Swart the owner and Mr. JP Van Vuuren (Mr. Van Vuuren), the Human Resource Manager. She requested a salary ranging between R8 000.00 and R10 000.00 and a commission on

sales of compressors. They discussed her salary, commission, medical aid cover and pension fund contribution during the interview. Mr. Swart informed her CVA would look at covering medical aid and a pension fund contribution after five years as she was entering in a junior position at that stage. She was informed to commence employment on 16 February 2015.

[6] When Mr. Van Vuuren presented her letter of appointment on 20 February 2015 she noticed her position was not inserted. Her commencing salary was R6000.00 per month, and was less than she requested. The commission percentage was less than they had discussed in respect of sales of compressors as well. A few days later on 24 February 2015 she was requested to sign a document with the heading “Restraint of Trade”. She informed Mr. Van Vuuren that the restraint of trade agreement was not discussed as part of the conditions of her employment. He informed her that she was required to sign it or leave the employment of CVA. She was not given an opportunity to read the document and feared losing her employment if she did not sign the document.

[7] Ms. Thackeray had little experience in the compressor sales industry prior to her employment with CVA, having trained as a cabin crew assistant with Qatar airlines. At CVA, she was trained on certain technical specifications of the compressors. These technical aspects related to the sale and service information required to sell compressors. She was introduced to CVA’s existing clientele. She had to visit clients to check on service requirements of existing compressors and engage clients to procure new sales. She initially used the “buyer’s car” and later was permitted the use of one of CVA’s vehicles to travel to clients. Her travel was tracked regularly and consistently.

[8] Ms. Thackeray asserts that Mr. Swart became abusive and aggressive after a medical operation and intimidated her by swearing and kicking the doors of the vehicle she used for travel purposes. On 6 September 2019 she handed in a resignation letter informing CVA she intended to

stop working for the company on 20 September 2019. She indicated to Mr. Swart that she was leaving in order to sell mushrooms as she was afraid of him. She refused to furnish a copy of her letter of appointment when requested by Mr. Swart. He sent her home to retrieve a copy. She left and did not return to CVA that day. He called later on the same day and was abusive to her. She handed the phone to her grandfather to deal with Mr. Swart. Ms. Thackeray did not return to the company thereafter. CVA sent an employee to collect the company vehicle later that same day.

[9] CVA asserted it was contacted by an employee from Option Springs on 15 October 2015, who indicated they had received a quotation from Integrated Air Solutions sent by Ms. Thackeray. CVA further asserted it received a call on the 18 September 2019 from an employee of Mpact, one of its clients, who forwarded a conversation between Ms. Thackeray and an employee of Mpact where Ms. Thackeray indicated she was fired and was badmouthing CVA. The WhatsApp message was not attached to the founding affidavit. A further client of CVA also indicated that they had received quotes from Ms. Thackeray but had not sent those through to CVA. CVA communicated by way of email with Ms. Thackeray and requested that she stop badmouthing CVA and refrain from contacting its clients.

[10] CVA then followed this communication with a cease and desist letter to prevent Ms. Thackeray from breaching the restraint of trade agreement. When no response was received, CVA contacted Integrated Air Solutions to determine whether Ms. Thackeray was employed there but were not successful in obtaining a positive response.

[11] Mr. Dobie, appearing for the applicant, argued that CVA was compelled to pursue this application to protect its proprietary interests with regard to their client connections and confidential information. Ms. Thackeray had a complete understanding of CVA's products as well as its pricing structures, strategies, strengths and weaknesses and could use this

information to compete unfairly with CVA whilst employed with its competitor. It was apparent that Ms. Thackeray had already breached the restraint of trade covenant by furnishing a quote to Option Springs, a client of CVA. CVA had also received information from other clients that Ms. Thackeray either spoke badly about the company or furnished competing quotations.

[12] He argued further that the restraint covenant is valid and enforceable[1] unless the respondent showed that it was unreasonable and contrary to public policy and should not be enforced. The restraint of trade agreement was signed at the commencement of the employment relationship on the 24 February 2015. Paragraphs 1.1.1 to 1.1.7 all record that the respondent would acquire knowledge and know-how of the company, it activities, clients, needs of clients, prospective clients, and will derive benefit from technical training and marketing experience. It acknowledged further that with that knowledge she will have influence over the company operations, business and clientele and customers and be responsible for maintaining goodwill built up. Therefore to protect the company she accepted it was necessary to sign the restraint of trade agreement.

[13] He argued further that Ms. Thackeray had the option of not accepting employment with CVA if she did not agree with the restraint of trade agreement. It was a term of employment negotiated at the outset of the contract and there could be no duress. The requirement that she sign the restraint was merely hard bargaining or commercial bargaining. He argued that she undertook to treat company information as confidential and that she was willing to accept company rules and disciplinary codes. She was thus bound by the CVA's requirement that she sign a restraint of trade agreement and the contents thereof. The onus was on Ms. Thackeray to prove that there was duress and that the restraint of trade agreement was unreasonable.

[14] Mr. Dobie argued that Ms. Thackeray's complaint that she was treated

[1] Magna Alloys Research v Ellis 1984(4) SA 874 (A)

badly is not a valid reason the restraint covenant should not be enforced. He argued further that her undertaking not to communicate with CVA's clients in future could not be accepted in good faith as her past conduct demonstrated that she did not uphold the agreement she signed. Her past conduct reflected her breach of the restraint of trade agreement she signed the first time when she accepted employment with a competitor of CVA and the second time when she referred CVA's client to her current employer for a competing quotation. He argued that it mattered not that Option Springs, accepted CVA's quote instead of Integrated Air Solutions, the fact was that Ms. Thackeray offered a competing quotation in breach of the restraint of trade agreement. If the quote were accepted it would have taken custom away from CVA and had the potential to cause harm by diminishing their profit and reducing their client base.

[15] He argued that CVA had a right to protect their proprietary interests and the restraint of trade provided for such protection. There was a clear breach by Ms. Thackeray. She held confidential information of CVA which included their client numbers, pricing and pin codes. She had approached Option Springs and other clients and there was every reason to believe she would approach more clients and would utilize CVA's confidential information. He argued that CVA could not show what losses had been incurred as it entailed involving clients in its disputes and was counter- productive. Ms. Thackeray could well secure financial information pertaining to its business and profit margins and it is well able to meet any damages claim Ms. Thackeray may be able to demonstrate. He argued further that she is able to mitigate her losses by finding another position or starting her own business. Mr. Dobie argued that CVA had made out a case for final relief however to the extent the Court was not inclined to grant a final order it should grant an interim order and refer issues in dispute to trial.

[16] Ms de Witt, appearing for the respondent argued that Ms. Thackeray did not deny being employed by Integrated Air Solutions. She denied

however that CVA had a proprietary interest to protect and challenged the enforceability of the restraint of trade agreement. She argued that Ms Thackeray as one of the most junior sales persons in the company, who did not receive a commission on many occasions could not have held important proprietary information as asserted by CVA as they admit that she was a minor role-player as a junior sales person.

[17] She argued further that when Ms. Thackeray commenced employment and signed a letter of appointment having discussed the terms and conditions, the restraint of trade agreement was never a part of the discussion. She was presented with the document by Mr Van Vuuren after she signed her letter of appointment. She was not given the option of negotiating it during the discussion concerning terms and conditions of her contract. She was informed she had to sign or leave. This situation was intimidating and she felt compelled to sign the agreement or lose her employment. She felt she had no option. Ms de Witt argued that there was no such practice as commercial bargaining or hard bargaining as suggested by Mr. Dobie and it was unconscionable to compel Ms Thackeray to sign such an agreement after she signed her letter of appointment. She was not afforded the opportunity to read the document before signing the agreement. The restraint was imposed on her after she signed the letter of appointment as a non-negotiable condition of her employment. It was signed under duress and is thus unenforceable.

[18] Ms de Witt argued further that Ms Thackeray denied that CVA had a proprietary interest in the form of any confidential information such as technical information, pricing, special codes or client information which required protection by way of an interdict. Ms de Witt argued that Ms Thackeray admitted to having some technical knowledge as she was taught to read the compressor meters. She however denied having the extent of the technical knowledge attributed to her by CVA. She would take photos of the screens on compressors, send them to the technical department. The technical team would then communicate with the client directly regarding the service requirements and the costs without

her input or involvement. She argued further that this limited knowledge did not encompass CVA's strategies or its strengths or weaknesses. Ms de Witt argued that CVA's clients were aware of their products and when they enquired about a product Ms Thackeray would go back and forth between the client and the technical team to relay information as the information was not known to her. Ms Thackeray thus did not have access to codes, to pricing or trade secrets and no opportunity to form relationships or attachments with clients

[19] Ms. de Witt argued further that CVA's proprietary interest could not be affected because Ms Thackeray had contact with its clients. Referring to the case of Walter *McNaughten (Pty) Ltd v Schwartz and Others* 2004(3) SA 381(C) she argued that Ms Thackeray's contact with CVA's clients was not of such a nature that she could easily induce them to follow her. CVA's clients had contacted her on her private cellphone when she referred them to her new employer. This was a single incident which would not be repeated, especially since her employer furnished her with an official phone for use. She argued further that CVA failed to provide proof of any other breach as they assert in their founding affidavit. They also fail to show a loss or decrease in profits and clients over the period of six months since Ms Thackeray's termination of employment which indicates they have not suffered any harm or immanent harm. During this period half of the period of restraint had passed. Consequently she argued that the balance of convenience favoured Ms Thackeray in the circumstances where there was duress, and on the one hand CVA proved no loss of profit or trade connections, they suffered no harm and on the other hand Ms Thackeray had the right to be economically active.

[20] CVA sought final relief and in the alternative interim relief. The relief if granted would amount to final relief in view of the remaining period of restraint being of such short duration. There were only six months left of the period that CVA required Ms Thackeray to be interdicted. In accordance with the principles laid down in *Plascon Evans Paints*

*Limited v Van Riebeeck Paints Limited (Pty) (Ltd)* 1984 (3) 623 (A), a final interdict may only be granted if "the facts as stated in the respondent's affidavit together with the admitted facts in the applicant's affidavit justify an order for final relief as sought". This test applies even where the *onus* is on the respondent to prove that a restraint is unreasonable and accordingly *contra bonis mores*.(see *Associated South African Bakers Pty Ltd v Oryx & Verenigte Backereien (Ply) Ltd & Andere* 1982 (3) SA 893 AD at 923 G-924 B.)

[21] In *Basson v Chilwan and Others* 1993(3) SA 742 (A), Botha JA in a separate judgment stated at p 776:

> "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…"

[22] In *Basson supra* the Court *per* Nienaber JA at 767 C-F[2] held that a convenant in a restraint of trade may be unenforceable *inter partes* if:

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[2] *Basson v Chilwan and Others* 1993(3) SA 742 (A) *per Nienaber 767C-F* ' Dit gaan hier, soos in die *Magna Alloys*-saak *passim* herhaaldelik beklemtoon word, om die afdwingbaarheid van 'n bepaling in 'n ooreenkoms wat andersins geldig is. 'n Ooreenkoms is in sy geheel of ten dele aanvegbaar as

‘This concerns, as repeatedly emphasized in the Magna Alloys matter *supra,* the enforceability of a provision in an agreement that is otherwise valid. An agreement is in whole or in part unenforceable if it harms the public interest or is conflict with the public interest. A provision of this nature which attempts to bind or restraint an employee or partner at the end of a contract- and that is all that needs to be had regard to here- violates the public interest if the effect of the restraint would be unreasonable. The reasonableness or lack of reasonableness of the restraint is determined having regard to the broader interests of the community on the one hand and those of the contracting parties on the other hand. Regarding the broader community there are two conflicting considerations: agreements should be maintained (even though it results in unproductivity or economic inactivity ); unproductivity or economic inactivity is most discouraged (even where it collapses the agreement)(see *Sunshine Records (Pty) Ltd v Frohling and Others* 1990 (4) SA 782 (A) te 794D-E). It hinders the one party from allowing the other to apply themselves in the trade and vocational world after the end of their contractual relationship, without efficiently protecting a proprietary

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dit die openbare belang skaad en aldus teen die openbare beleid indruis. 'n Bepaling van hierdie aard wat 'n werknemer of vennoot na beëindiging van die kontrak aan bande probeer lê - en dis al geval wat hier in oënskou geneem moet word - druis teen die openbare beleid in as die uitwerking van die belemmering onredelik sou wees. Die redelikheid al dan nie van die belemmering word beoordeel aan die hand van die breëre belange van die gemeenskap, enersyds, en van die kontrakterende partye self, andersyds. Wat die breëre gemeenskap betref is daar twee botsende oorwegings: ooreenkomste moet gehandhaaf word (al bevorder dit ook onproduktiwiteit); onproduktiwiteit moet ontmoedig word (al verongeluk dit ook 'n ooreenkoms) (vgl *Sunshine Records (Pty) Ltd v Frohling and Others* 1990 (4) SA 782 (A) te 794D-E). (D) it die een party verhinder om hom, na beëindiging van hul kontraktuele verhouding, vrylik in die handels- en beroepswêreld te laat geld, sonder dat 'n beskermingswaardige belang van die ander party na behore daardeur gedien word. So iets is op sigself strydig met die openbare beleid.' (Per Nienaber JA in Basson v Chilwan and Others 1993 (3) SA 742 (A) at 767E - F.)

> interest of the other party. This is in itself contrary to public policy." (loosely translated)

[23] CVA has proved an agreement was signed on 24 February 2015 and the onus falls on the respondent to show that it is unreasonable at the time of enforcement. I am required to examine the agreement and the circumstances to ascertain whether the enforcement of the agreement would be contrary to public policy, bearing in mind that agreements freely entered into must be honoured. I am also cognisant that everyone should be free to seek their opportunities in business and economic activity. (See *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874(A)) Thackeray's first defence was the unreasonableness of the restraint of trade agreement due to duress. The first principle in our law is that a contract willingly entered into must be upheld. This also supposes that the parties have contracted on an equal footing. Having regard to the circumstances and manner in which the agreement was presented to Ms Thackeray it is evident that the parties did not contract on an equal footing. when the employment contract was concluded. Ms. Thackeray was clearly the weaker party. It is not disputed that she was not afforded an opportunity to read the document she was expected to sign. This cannot be described as driving a hard bargain or commercial bargaining. When the document was presented after her employment had commenced as a further non-negotiable condition of employment on a take it or leave basis it was clearly not signed freely and voluntarily. On this basis it is not in the interests of public policy to uphold the agreement. This puts an end to the restraint agreement on the basis of duress. I express my views on the remainder of the arguments for the sake of completeness.

[24] Ms Thackeray bore the onus of proving that CVA had no proprietary interests worthy of protection. There was no reply to Ms Thackeray's denial that whilst she had some technical knowledge it was limited and she was not in possession of pin codes to enable her to service CVA's client's compressors. She denied having access to pricing structures

which were supplied by the technical department to CVA's clients directly. This is not disputed by CVA. As a junior sales person and given the nature of her work it is incomprehensible Ms Thackeray would have built up relationships with clients to be able to entice them to follow her. Her trips were in any event monitored by Mr Swart preventing her from going out to lunch or buying gifts to cement a relationship with a client. It is apparent that she poses no threat to CVA's proprietary interests in that she has no knowledge of pricing or codes. She had contacts of thirty clients. CVA has not shown that they have lost clients. An interdict would pose an unreasonable restriction on her freedom to be economically active and would also be contrary to public policy, should it be enforced.

[25] I am satisfied that Ms Thackeray has succeeded in discharging the onus in showing that, the agreement was concluded under duress and as such is unenforceable. Further she has discharged the onus in showing that she does not have knowledge of CVA's proprietary interests such as pricing and codes and enforcing the restraint of trade agreement would pose an unreasonable restriction on her freedom to be economically active and would also be contrary to public policy, should it be enforced. The applicant, in my view, has failed to make out a case for the relief that it sought.

**ORDER**

[26] I therefore grant the following order:

"The application is dismissed with costs."

**S C MIA**
**JUDGE OF THE HIGH COURT OF SOUTH AFRICA**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

**Appearances:**

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|---|---|---|
| On behalf of the applicant | : | Adv. JG Dobie |
| Instructed by | : | Dreyer & Niewoudt Attorneys<br>(jldreyer@tiscali.co.za) |
| On behalf of the respondent | : | Adv. C de Witt |
| Instructed by | : | Malherbe Rigg and Ranwell<br>jason@mrr.co.za<br>matt@jwlaw.co.za |
| Date of hearing | : | 16 March 2020 |
| Date of judgment | : | 30 March 2020 |