REPUBLIC OF SOUTH AFRICA

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

Case No: 44197/2019

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

SIGNATURE 25/06/2020 DATE

In the matter between:

COMBUSTION TECHNOLOGY (PTY) LTD **Applicant**

and

MOEGAMAD AMIER PECK **First Respondent**

BURNER TECHNICAL SOLUTIONS (PTY) LTD **Second Respondent**

This judgment was handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 10h00 on 26 June 2020.

JUDGMENT

INGRID OPPERMAN J

Introduction

[1] This is an application to enforce a covenant in restraint of trade entered into by the first respondent in favour of the applicant during his erstwhile employment with the applicant.

Common cause facts

[2] The applicant's business was established by its founding member, Mr Grant Renecle, in Cape Town during 1987. The applicant was incorporated during 2000 and thereafter utilised as the vehicle by means of which Mr Renecle further conducted the business. The applicant is currently one of the market leaders in oil and gas burner and boiler installations, sales and service in South Africa and its business extends to all of sub-Saharan Africa and the Indian Ocean islands.

[3] The applicant has its main or head offices in Cape Town, with further offices in Johannesburg and an extensive dealer network that stretches throughout South Africa. This infrastructure and support system positions the applicant well to service its large and established customer base throughout South Africa as well as in sub-Saharan Africa and the Indian Ocean islands.

[4] The applicant has secured the rights of exclusive distribution for various international branded products such as Riello Burners, Unical Boilers, IVAR Boilers, Limpsfield Burners and Autoflame Combustion Management Systems.

[5] The applicant's services include servicing, upgrading and repairing all makes of burners and boilers.

[6] The first respondent was initially taken in by the applicant as a student engineer during December 2006, at which time he had only a matric and an S3 (mechanical engineering) level education and no practical experience or further training. He started working in the applicant's service department and later in the contracts department, which is the department that concludes sales and after sales services agreements with the applicant's customers.

[7] On 10 February 2010 the first respondent signed a document in terms of which he acknowledged that the applicant's price lists form part of its trade secrets and as such, would be a valuable tool for any competitor to gain a commercial advantage against the applicant; acknowledged that he would, during his employment with the applicant, have access to the applicant's price lists and undertook not to divulge, distribute, or circulate the applicant's price lists to any person. The applicant thereupon proceeded to grant the first respondent access to its price lists during February 2010.

[8] On 28 May 2012 the applicant and the first respondent concluded a further written fixed term employment contract in terms of which the applicant employed the first respondent as a service engineer for two years (until 28 May 2014) and the first respondent undertook amongst other things not to be engaged in any other business in competition with the applicant's business (whether directly or indirectly) within South Africa for a period of two years after the termination of his employment with

the applicant. He further agreed that in the event that he should breach the 'first restraint', the applicant would suffer damages amounting to R50 000 per month for every month during which he did so, which monies the applicant would be entitled to recover from him.

[9] On 13 August 2012 the applicant and the first respondent concluded an addendum to the 29 May 2012 agreement which served to remind the first respondent of his covenant in restraint of trade.

[10] On 1 July 2013 the first respondent signed a further addendum to his employment contract that, once more, served to remind him of his covenant in restraint of trade.

[11] On 4 February 2016 the first respondent signed a further acknowledgement and undertaking regarding the applicant's price lists that served to reconfirm what had already been acknowledged and undertaken by him in terms of his 10 February 2010 undertaking.

[12] On 26 February 2016 the applicant and the first respondent concluded a final permanent employment contract in terms of which the first respondent was permanently employed by the applicant as a service engineer ('*the employment contract*').

[13] The employment contract provides in clause 13 that the first respondent is required to keep confidential and not to disclose any of the applicant's trade secrets, confidential documentation, technical know-how and data, drawings, systems, chemical formulae, methods, software, processes, client lists, programmes, marketing and/or financial information to any person other than to persons employed and/or authorised by the applicant who are required to know such secrets or

information for the purpose of his employment and/or association with the applicant, both during and after the first respondent's employment by the applicant.

[14] The employment contract contains a provision in clause 15.1, in terms of which the first respondent undertook not to be engaged in any other business in competition with the applicant's business, be it direct or indirect or in any capacity, within South Africa for two years after termination of the employment agreement (*'the restraint'*). A provision in clause 15.2 acknowledges that the restraint is fair, reasonable and necessary for the applicant's protection and clause 15.3 acknowledges that if the first respondent should breach the restraint the applicant will suffer agreed damages of R50 000 per month for every month during which such breach endures and will be entitled to recover same from the first respondent.

[15] During the course of the first respondent's employment with the applicant, the applicant provided him with extensive further training both in South Africa and in the United Kingdom, all at the applicants expense of over R100 000.

[16] On 30 November 2018 the first respondent wrote a letter to the applicants Human Resources manageress which served to inform the applicant that he wished to resign from his position as service technician with effect 30 November 2018, so that his last day in the applicant's employ would be 31 January 2019.

[17] Following discussions between the first respondent and the applicant's, Mr van Biljon the first respondent withdrew his resignation on 13 December 2018, only to resubmit it approximately 2 months later on 11 February 2019 (effective the same day).

[18] During late July 2019 it came to the applicant's attention that the first respondent had taken up employment with the second respondent. As a result the applicant instructed its attorneys to write to the first respondent to remind him of his

covenants in restraint of trade, to demand that he abide thereby and to further demand that he pay the applicant the agreed R50 000 per month in pre-estimated liquidated damages for each month that he had been in breach thereof.

[19] On 24 July 2019 the applicant's attorneys received a letter from Messrs Senekal Simmonds attorneys confirming that they acted for the first respondent and further requesting a copy of the first respondent's employment contract and "*an explanation of what your client believes to be its protectable interest*".

[20] The applicant's attorneys replied on the same day indentifying that the applicant's protectable interests comprise its client lists, connections and relationships; its supplier lists; its processes and methods; its designs; its marketing strategies and its pricing lists and strategies. The applicant's attorneys therein further pointed out that the applicant's protectable interests fall into the two broad categories of trade secrets and trade connections, that the first respondent was privy to all such protectable information whilst in the applicant's employ and that his own letter of resignation serves to confirm the knowledge he gained from the applicant regarding customer service and the boiler and burner industry.

[21] On the same day (24 July 2019) the applicant's attorneys wrote a further letter to the second respondent wherein they informed the second respondent of the first respondent's covenant in restraint of trade and of the applicant's protectable interests and demanded that it be respected.

[22] Messrs Senekal Simmonds replied by means of a letter dated 29 July 2019 wherein they confirmed that they acted for the second respondent as well and further placed on record that the first respondent is free to utilise his own skills to earn an income and would continue to utilise these skills to assist the second respondent to service its customers; the first respondent is employed by the second respondent as

a technician to service the second respondent's customers and the first respondent is not employed by the second respondent in any capacity which could result in the second respondent being in a position to unfairly compete with the applicant (*'the undertaking'*).

[23] The applicant accepted the undertaking that the first respondent would simply be employed as a technician utilising his own stock of skill and knowledge to assist the second respondent to service its customers and that he would not be employed or operate in any capacity which could result in his being in a position to unfairly compete with the applicant and decided not to take the matter any further at that point.

Sustainable Heating and the Site Report

[24] The applicant's distributor in Port Elizabeth, East Cape Combustion (Pty) Ltd (*'East Cape Combustion'*), had sold and installed a certain boiler and burner system to an entity called Sustainable Heating. The applicant learnt that the second respondent had sent the first respondent to perform some work on such boiler and burner system. East Cape Combustion had been requested to do the work because the system had been supplied by the applicant but they had declined to do so because Sustainable Heating still owed East Cape Combustion money for the original installation.

[25] The applicant came to be possessed of a site report dated 22 September 2019 (*'the Site Report'*), it is unclear when or how this occurred, which Site Report prompted this application.

[26] The applicant contends that the Site Report reveals that the first respondent attended on Sustainable Heating's premises and did not simply service the boiler and burner as a technician using his stock of knowledge and skill would, but in fact also sold a certain Mk 7 burner controller (*'the burner controller'*) to Sustainable Heating for R 58 000. The balance of his services consisted of labour (to install the burner controller), flights (to and from Port Elizabeth), accommodation, car hire and consumables amounting, in the aggregate, to only R15 200.

[27] The applicant points out that it is significant that the first respondent was only able to sell the burner controller and to perform the balance of the work on this particular unit for Sustainable Heating because of the training that the applicant provided for him. Applicant argues that it is accordingly clear that what the first respondent went to Port Elizabeth to do was primarily to sell the burner controller to Sustainable Heating, being a customer of the applicant and/or its agent/distributor. This, so the argument continues, the first respondent could not have done but for his knowledge of the applicant's products and pricing structures as well as his existing connections with the applicant's customers (including Sustainable Heating), all of which was acquired from the applicant and form part of its protectable interests.

[28] To add insult to injury the applicant points out that the burner controller which the first respondent so sold to Sustainable Heating is an Autoflame product, for which the applicant has the exclusive importation and distribution rights in Sub-Saharan Africa. These are the products that the applicant specifically sent the first respondent to the UK to receive training on, at its own cost, to enable him to serve customers who have purchased these products on the applicant's behalf. The burner controller that the first respondent so sold to Sustainable Heating appeared to belong to the applicant (in that the applicant acquired it but has no record of ever having

sold it to anyone) and to have been stolen from it. The applicant laid criminal charges against the second respondent in this regard which charges are currently in the process of being investigated by the Police.

[29] The first respondent described his duties with the second respondent and their interaction with clients as follows:

> '25. As a service technician, my primary responsibility is to inspect, repair, service and/or install and commission boilers. Current, or prospective clients will contact the second respondent's offices and report a fault. The second respondent will then instruct me to attend at the client's premises to inspect the fault and thereafter make recommendation to remedy the fault. The second respondent will generate a quote for the client. The client will then pay 50% deposit before I start the repairs. Once completed, I will prepare a site report and an invoice will be generated for final payment. At all material times, the second respondent determines all pricing and quoting. I have no authority to determine and/or authorise pricing of products, or hourly rates.' (emphasis provided)

[30] He also explained that during his employment he was under the direct supervision of Mr Ronald Mavunda ('*Mr Mavunda*'), who deposed to a confirmatory affidavit, who, he explained, deals with the clients, the pricing structures and sets his hourly rate. He said that he attends to Mr Mavunda's instruction and reports back with his findings.

[31] He confirmed that he had at all times abided by the undertaking.

[32] In respect of the sale and installation of the burner controller he explains as follows: On the 19th of September 2019, Mr Thomlinson, an independent contractor of the second respondent, had contacted Mr Mavunda and advised him that one of their clients, Sustainable Heating, was experiencing a problem with their burner. Mr Mavunda had explained the nature of the problem to the first respondent who had

formed the view that the burner controller had to be replaced. The second respondent had a burner controller in its spares inventory.

Much was made of the burner controller which was an Autoflame product, one of the brands to which the applicant has the exclusive importation and distribution rights in sub-Saharan Africa. I thus interpose this narrative to explain what the confirmatory affidavit of Mr Daniel Steyn, a service level manager employed as such at Danone South Africa (*'Danone'*) reveals: During 2013, the second respondent had undertaken work at Danone Boksburg. Danone had purchased the burner controller but it was not fit for Danone's purpose. The second respondent had provided the correct burner controller whereafter the incorrect burner controller purchased by Danone, was sold to the second respondent in the form of a parts exchange. He thus confirmed that the burner controller sold by the second respondent to Sustainable Heating during September 2019, had been in the second respondent's possession for about 7 years prior to such sale.

[33] The first respondent explained that he and Mr Mavunda had then prepared a quotation which was sent to Sustainable Heating, who paid a 50% deposit. He then attended to the repairs and thereafter prepared the Site Report. Thereafter an invoice was provided to Sustainable Heating and the outstanding amount was settled.

[34] The first respondent concluded as follows:

'33. This entire instance was nothing more than me carrying out my normal duties as an employee of the second respondent, whilst honouring any obligations I may have to the applicant. At all material times hereto, no information regarding the applicant's business, including its pricing, have been divulged by me.'

Relevant legal principles

[35] Restraint-of-trade agreements are, in principle, enforceable and a party wishing to enforce such an agreement need only prove the agreement and its breach by the respondent.

[36] An ex-employer who seeks to enforce against an ex-employee a protectable interest recorded in a restraint does not have to show that the ex-employee used confidential information – only that the ex-employee could do so. While the relief ordinarily sought is an interdict, damages for breach of the provision in the agreement may also be claimed.

[37] A party wishing to be absolved from a restraint-of-trade agreement must allege and prove that the enforcement of the restrictive condition would be contrary to public policy[1]. The factual basis for this allegation must then be set out[2].

[38] In determining whether the agreement should be enforced, regard is had to the circumstances then present – not to those obtaining when the agreement was entered. The conflicting considerations are, on the one hand, that agreements ought to be honoured and, on the other hand, that everyone ought to be free to seek fulfilment in her or his business or profession and that the right to freedom of trade should be protected[3].

[39] A restraint directed solely at the restriction of fair competition with the ex-employer that is not, at the time of enforcement, reasonably necessary for the

---

[1] See *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) p. 893 and *Den Braven SA (Pty) Limited v Pillay* 2008 (6) SA 229 (D)

[2] *Sibex Engineering Services (Pty) Ltd v Van Wyk* 1991 (2) SA 482 (T)

[3] *Basson v Chilwan* 1993 (3) SA 742 (A); *Townsend Productions (Pty) Ltd v Leech* 2001 (4) SA 33 (C) and *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA)

legitimate protection of the ex-employer's protectable proprietary interests (goodwill or trade secrets) is against the public interest[4].

[40] That interest may take the form of trade secrets, confidential information, goodwill or trade connections. Liability involves a fourfold test:[5] Is there an interest of the ex-employer which, pursuant to the agreement, warrants protection? Is that interest threatened by the ex-employee? If it is threatened, does that interest weigh qualitatively and quantitatively against the interest of the other so that he or she will be economically inactive and unproductive? Is there another aspect of public interest that does not affect the parties but requires that the restraint not be invoked?

[41] This means that employees cannot be restrained from using their own skill, knowledge and experience. The dividing line between what the ex-employee cannot be restrained from using and the employer's trade secrets or confidential information or other interest is notoriously difficult to define.[6]

The Evaluation of the Sustainable Heating sale

[42] It is for the applicant to prove the breach of the employment contract.[7] The breach relied upon by the applicant is to be found exclusively in the transaction with Sustainable Heating. Applicant contends that had the first respondent simply serviced the boiler and burner as a technician using his stock of knowledge and skill, he would not have breached his contractual obligations towards the applicant. It is the sale of the burner controller by the first respondent, which caused him to cross the line.

---

[4] *Super Safes (Pty) Ltd v Voulgarides* 1975 (2) SA 783 (W); *Digicore Fleet Management v Steyn* [2009] 1 All SA 442 (SCA); *Value Logistics Limited v Smit and another* [2013] 4 All SA 213 (GSJ)

[5] *Basson v Chilwan (supra); Digicore Fleet Management v Steyn (supra)*

[6] *Automotive Tooling Systems (Pty) Ltd v Wilkens* 2007 (2) SA 271 (SCA)

[7] *Basson v Chilwan (supra)* at 776I

[43] The first respondent denies having been involved in the pricing of the burner controller or the sale thereof.

[44] The applicant relies on the content of the Site Report together with the first respondent's version in his answering affidavit to the effect that he and Mr Mavunda had prepared the quotation for Sustainable Heating, for its contention that it was the first respondent who sold the burner controller and it was he who had priced it.

[45] As the applicant is seeking final relief, I am to determine this issue by applying the principles set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [8].

[46] The Site Report bears a description of the work performed and then itemises the total charge to Sustainable Heating. Nothing in the document contradicts the version given by the first respondent under oath. When the first respondent says that he and Mr Mavunda had prepared the quote, I understand that to mean that he, as the service technician, had estimated how many hours he would need to install the burner controller. Mr Mavunda had confirmed, under oath, that he was the interface between clients and the second respondent. The first respondent stated expressly that '*The price provided to Sustainable Heating for the burner controller was negotiated by Mavunda and Sustainable Heating. I had no involvement in this*'. This statement is, significantly, not denied in the replying affidavit.

[47] I therefore, and applying the *Plascon Evans* test, accept that the first respondent did not have any involvement in the pricing or sale of the burner controller to Sustainable Heating.

[48] Applying the same principle, I also accept the version proffered as to how the second respondent came to be possessed of the burner controller as explained by Danone's employee Mr Daniel Steyn. This was an item in the possession of the

---

[8] 1984 (3) SA 623 (A) at 634E – 635D

second respondent for 7 years by the time it was sold to Sustainable Heating. The second respondent would have been the party with the knowledge of the value of the parts exchange transaction which occurred whilst the first respondent was not employed by it and not the first respondent. This supports the conclusion that the first respondent did not have any involvement in the pricing of the burner controller.

[49] That being so, I am driven to conclude that the applicant has failed to prove a breach of the employment contract.

Protectable interest

[50] Although the aforegoing issue, in my view, is dispositive of the application, there are other considerations which would move me to refuse the relief sought.

[51] In my view, the applicant has failed to show that it has a protectable interest as far as Sustainable Heating is concerned: Firstly, Sustainable Heating is not a client of the applicant but rather of East Cape Combustion. Secondly, East Cape Combustion had been offered the work but declined to do it because Sustainable Heating still owed it money for the original installation. If, as the applicant contends, East Cape Combustion was simply the applicant's agent, it was the applicant (the principal) which had declined to do the work and the second respondent performed the work after the applicant had elected not to. Thirdly, the instruction in respect of Sustainable Heating was a new instruction and came from an independent contractor.

[52] Crucially, the applicant's prices are not secret but can be ascertained by phoning the offices of the applicant. Relying on the following dictum in *Van Castricum v Theunissen and Another*[9]:

---

[9] 1993 (2) SA 726 (T) at 371F-H

> "What is clear from the aforesaid, is that someone who saves himself the trouble of going through the process of compilation of the document, even where it is compiled from information which is available to anybody, such a person would be interdicted if that information had been obtained in confidence. The reason is simply that confidential information may not be used as a springboard for activities detrimental to the person who made the confidential information available. It would remain a springboard even when all the features have been published or can be ascertained by actual inspection by any member of the public",

the applicant's counsel sought to persuade this court that the price the burner controller was sold for was provided to the first respondent in confidence. There is simply no evidence before this court as to what the 7 year old burner controller was priced at in 2013 (when Danone concluded the parts exchange with the second respondent) or 2019 (when Sustainable Heating purchased it from the second respondent) and how the price of R58 000 compares with the prices disclosed to the first respondent in confidence during his tenure with the applicant.

[53] The Applicant contended that its protectable interest falls into two broad categories of trade secrets and trade connections such as the applicant's client lists, connections, and relationships, supplier lists, processes and methods, designs, marketing strategies, pricing lists and strategies.

[54] The applicant failed to set out facts in its founding affidavit that the proprietary interest it contends it has, requires protection. The mere *ipse dixit* of a party does not make information confidential. As Olivier AJ noted in: *Viamedia (Pty) Ltd v Sessa:*[10]

> "Information does not become confidential and a process or practice does not become secret merely because Viamedia contends that they do – or perhaps, even if Mr Sessa believed them to be so. It does not suffice for Viamedia to say it has confidential information or trade secrets. It must set out what they are and when

[10] Unreported CPD case. Case No: 8679/08

> and how Mr Sessa was exposed to them. It must set up the facts from which the conclusion could be drawn that something is indeed confidential or secret."

[55] It is incumbent upon an applicant to place facts before the Court from which it may be inferred that the information alleged to be secret is indeed secret. Therefore, where there is nothing unique about the way an applicant is doing business or nothing unique about its sales methods, and its methods are those generally adopted in a particular trade or industry, such methods cannot be considered confidential and therefore protectable.

[56] In *Esquire Systems Technology (Pty) Ltd t/a Esquire Technologies v Ilse Cronje' and Another*[11] the appellant fell into the trap of not giving sufficient particularity of the confidential information it sought to protect. Steenkamp J set out the applicant's case as follows:

> "The applicant's legal representative glibly states in his heads of argument that 'it clearly had an interest worthy of protection'. He goes on to say that the employee had access 'to all the applicant's trade secrets, customer particulars, pricing and all other confidential operational information.'
>
> On the other hand:
>
> The employee says that, employed as she was in the relatively junior position of sales assistant, she does not have knowledge of the applicant's trade secrets and confidential information .... In her new employment, she will not compete with the applicant or deal with its customer base. She has no documentation setting out the applicant's sales margins or pricing of products."

[57] The Court came to the conclusion that, on the evidence of the employee, it did not appear as if the applicant had any interest worthy of protection that was threatened by the employee.

---

[11] (2001) 32 ILJ 601 (LC)

[58] It is not sufficient for a party to merely state that it has "intellectual property", "know how", *"modus operandi"* or that certain aspects of its business are secret and confidential.[12] The facts leading to the conclusion that the information in question is confidential must be set out in the founding affidavit.

[59] A protectable interest in the form of customer connections does not come into being merely by the employee's having contact with an employer's customers.[13] The connection between the former employee and the customer must be such that it will probably enable the former employee to induce the customer to follow him or her to a new business.[14]

[60] The first respondent was employed by the applicant as a boiler technician. His duties involved being able to service and repair boilers and burners, and he gained experience in the contracts department. As a service technician employed by the second respondent, the first respondent's primary responsibility was to inspect, repair, service and/or install and commission boilers. Current or prospective clients would contact the second respondent and report a fault, whereafter the first respondent would inspect the fault and make recommendations to remedy the fault. The first respondent worked under the supervision of Mr Mavunda, who provided the first respondent with the instructions and after the first respondent's report of his findings, Mr Mavunda would prepare a quote. At all material times, the second respondent would determine pricing and quoting, not the first respondent.

[61] As the applicant has failed to show a breach of the restraint of trade, I do not consider it necessary to deal with the reasonableness of the clause itself.

---

[12] *Baraka Enterprise Consulting (Pty) Ltd v Reddy* 2013 JDR 0461 (GNP)
Automotive Tooling Systems (Pty) Ltd v Wilkens 2007 (2) SA 271 SCA at 281B - D

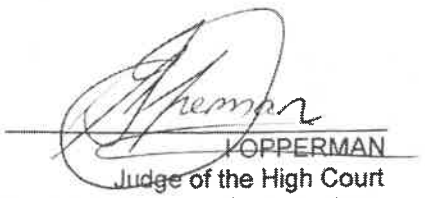
[13] *Walter McNaughten (Pty) Ltd v Schwartz* [2003] All SA 770 (C) 778i

[14] *Longfields Trading CC v Bradfield* [2011] JOL 28113 (KZD) at paragraph 15

Order

[62] I accordingly make the following order:

The application is dismissed with costs.



KOPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Counsel for the applicant: Adv A Newton
Instructed by: Abrahams & Gross – Cape Town; Swanepoel Attorneys - Jhb
Counsel for the first and second respondents. Adv V Vergano
Instructed by: Senekal Simmonds Inc
Date of hearing: 28 May 2020
Date of Judgment: 26 June 2020