IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) NOT REVISED.

09/11/2020
DATE

SIGNATURE

CASE NO: 27224/2020

In the matter between:

KALEX FLAVOURS & FRANGRANCES (PTY) LIMITED First Applicant

KALEX MARKETING (PTY) LIMITED Second Applicant

PROMIGEN (PTY) LIMITED Third Applicant

and

KENT ALISTAIR MULLER Respondent

JUDGMENT

YACOOB J:

1. The applicants approach this court on an urgent basis for an order enforcing a restraint of trade agreement. The enforcement is opposed by the respondent, who

also made a with prejudice tender to the applicants, which I will deal with in due course.

2. I am satisfied that the application is urgent. The applicants allowed the respondent sufficient time to respond to the application and he has put up a more than competent defence. Restraint applications are inherently urgent, taking into account that they seek to protect interests in a time sensitive manner.

3. The respondent was employed by the first applicant for nine years as a salesman. His employment was terminated because he was in breach of a restraint of trade obligation that was applicable during his employment. It is common cause that the respondent was selling products to customers of the first applicant, through a third party company (Ryke Trading (Pty) Ltd ("*Ryke*")) of which a friend of his was a director, as substitutes for products that the customers would have bought from the first applicant, also through the respondent as salesman.

4. The respondent used the first applicant's laptop and cellphone that were issued to him to facilitate these sales. His actions were discovered when the laptop and cellphone were returned to the first applicant after similar conduct was separately discovered. In addition to the information about sales, there was other information discovered which showed that the respondent had taken note of information about product formulations, and that he had absolutely no qualms in undercutting and doing the applicants out of their business.

5. The respondent in his answering affidavit alleges that he is not currently employed by Ryke and does not currently have a financial interest in Ryke. He does not offer any explanation of his earlier conduct, and does not deny it. He does not suggest that he has no connection with Ryke and its members. He does not allege that he has never been employed by Ryke or has never had a financial interest in Ryke, nor does he allege that he will not in the future, the future being any time after the answering affidavit was signed. The respondent's answering affidavit is such that, while it technically rebuts the applicants' case, it does not provide a version. The manner in which it deals with issues raises more questions than it provides answers, and the respondent's *bona fides* are less than evident. At best for the respondent, it amounts to a bare denial.

6. There is no need for me to reject the respondent's version, because he does not provide me with one.

7. The argument on the respondent's behalf was that, although there is a valid restraint of trade agreement, the applicants have not proved a breach of the restraint clause after the respondent's employment was ended and in any event the restraint is unreasonable in its scope.

8. The law on restraints is well settled. The applicants must allege and prove the obligation and its breach, and the respondent bears the onus to prove, if he wishes, that the restraint is unreasonable and unenforceable.[1]

9. The existence of the restraint is common cause. It is also common cause that the respondent has, before his employment was terminated, breached the restraint that was imposed on him during his employment.

10. The respondent contends that the applicants must prove an actual breach of the restraint after the employment was terminated. This is because the restraint clause which applied before termination is a different one to that which is relied upon now, and the fact that the respondent breached one termination clause has no bearing, so the argument goes, on whether he has breached the other.

11. The applicants referred me in this regard to *IIR South Africa BV (incorporated in the Netherlands) t/a Institute for International Research v Hall (aka Baghas) and Another*,[2] a decision of the full court, in which it was held that the former employer only has to show that the former employee could use confidential information, not that he has in fact done so.[3] This was confirmed by the Supreme Court of Appeal in *Reccy v Siemens Telecommunications (Pty) Ltd*.[4]

[1] See in this regard *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 776I-J; *Experian South Africa (Pty) Ltd v Haynes and Another* 2013 (1) SA 135 (GSJ) at [14].
[2] 2004 (4) SA 174 (W)
[3] At [13.4.1]
[4] i997(2) SA 486 (SCA)

12. Although these cases referred specifically to confidential information, there is no reason why the principle should not apply to protect any proprietary interest worth of protection. In *Experian Sa v Haynes*[5] this court pointed out that

> [17] It is well-established that the proprietary interests that can be protected by a restraint agreement are essentially of two kinds, namely:
>
> [17.1] The first kind consists of the relationships with customers, potential customers, suppliers and others that go to make up the business, being an important aspect of its incorporeal property known as goodwill.
>
> [17.2] The second kind consists of all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him, to gain a relative competitive advantage. Such confidential material is sometimes compendiously referred to as 'trade secrets'.

13. It is common cause that the respondent has established relationships with the applicants' customers, not only as the applicants' salesman, but also in his capacity as agent or representative (in however informal a manner) for Ryke.

14. The respondent sought to convince the court that the confidential information to which he had access, and which he had obtained on the quiet, which fits into the second category, was not of the sort which he could use as he is not a chemist. He also contends that since the first applicant is the sole agent of the supplier, the information is of no use to him. However at the same time he contends that some of the product with which he supplied the applicants' customers was not in breach of his restraint as it was not or could not be supplied by the applicants.

[5] 2013 (1) SA 135 (GSJ)

15. The respondent has a special knowledge of customers' requirements and what the applicants can provide to customers, as well as what alternatives may be acceptable and what the gaps are, which a competitor can fill. He also has relationships with the customers which he has established over the years, and which he has already exploited to his own advantage.

16. I am satisfied, therefore, that the respondent threatens both types of proprietary interest which the applicants are entitled to protect, and that the applicants have made out a case for the enforcement of the restraint.

17. The next question to be determined is whether the restraint is reasonable and if not, what a reasonable period and or ambit of the restraint would be.

18. The respondent tendered with prejudice that he be restrained for six months from 11 August 2020 from taking up employment with any competitor in South Africa, and that after that six months has expired, he would not be restrained except with regard to two customers of the applicant, Kingsley Beverages and Halewood Breweries, with whom he would undertake not to do business for two years from 11 August 2020.

19. The applicants rejected this tender but contended that at the very least that was the relief that should be granted.

20. The respondent contended that, taking into account that the restraint applied in the whole of South Africa, and that six months is sufficient time to build relationships with customers, the restraint should be six months.

21. However, the respondent's relationships were developed over a period of ten years. The communications he had with customers which were disclosed showed a relatively close relationship. I am not satisfied that six months would be sufficient to guard against the risk presented by the respondent, his relationships with clients, and what he offers them.

22. The respondent does not contend that his skills cannot be applied in any field in which he does not compete with the applicant. He is a salesman with well developed personal skills. There is no reason why he would not be able to find employment as a salesman in a different industry, nor does he suggest he would not be able to. He alleges that he is currently unemployed, but not that he has been unable to find work elsewhere, or even that he has sought work elsewhere.

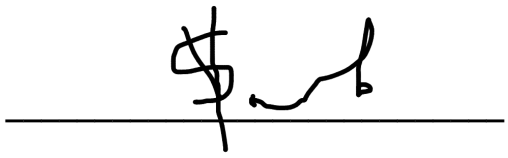
23. Taking into account everything that has been placed before the court, it is my view that between twelve and eighteen months would be necessary and appropriate to protect the interest of the applicants. Since the prejudice to the respondent appears to be relatively little, I am satisfied that eighteen months is appropriate.

24. There is no reason why costs should not follow the result. The applicants have been substantially successful and therefore the respondent should bear the costs.

25. For these reasons I make the following order:

25.1. The respondent is interdicted and restrained for a period of 18 months from 11 August 2020, whether as proprietor, partner, director, shareholder, member, employee, consultant, contractor, financier, agent, representative, assistant, trustee or beneficiary of a trust or otherwise and whether for reward or not from directly or indirectly carrying on or being interested or engaged in or concerned with or employed by any company, close corporation, firm, undertaking or concern which carries on business in the Republic of South Africa which sells any products worked on or dealt in by the applicants or renders the services provided by the applicants as at 11 August 2020.

25.2. The respondent it to pay the costs of this application.



S. YACOOB

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for the applicants:	A Bishop
Instructed by:	Dewy Hertzberg Levy Inc

Counsel for the respondent:	C de Witt
Instructed by:	DMO Incorporated

Date of hearing:	08 October 2020
Date of judgment:	09 November 2020