

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

CASE NO: 2022/11789

REPORTABLE: No

OF INTEREST TO OTHER JUDGES: No

REVISED.

26 APRIL 2022

In the application of -

BSSC RADIATORS

First Applicant

and

ASHLEIGH TANEAL BAWDEN

First Respondent

P & R EARTHMOVING (PTY) LTD

Second Respondent

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date for hand-down is deemed to be 26 April 2022.

Summary:

JUDGEMENT

Molahlehi J

Introduction

[1] This is an opposed urgent application in which the applicant, BSSC radiators (Pty) Ltd, seeks to enforce a restraint of trade agreement concluded with the first respondent, Ms Bawden. The interdict also seeks to restrain Ms Bawden from engaging in any business or employment relationship with the second respondent, P & R Earthmoving (Pty) Ltd (P & R). The restraint of trade agreement was concluded on 26 May 2021.

[2] The applicant's case in brief is that Ms Bawden undertook in a restraint trade contract not work for any company that is in opposition to it when she leaves its employment. She has, according to the applicant, breached that undertaking by

entering into a relationship with P & R. Her conduct has placed the applicant at the risk of its business opportunities being unfairly transferred to P & R.

[3] In the restraint of the trade agreement, the parties agreed, amongst others, as follows:

"8.1 The parties place on record that the employee is restrained from working for any opposition in terms of a written restraint of trade agreement.

8.2 The parties agree that the terms of the agreement will remain in full force and effect after termination of the employment relationship, except that the restraint period will be reduced from 1 year to five months from 1 February 2022."

[4] The case of Ms Bawden is that the applicant and P & R are not in competition with each other because of the different nature of their businesses. For this reason, P&R is not in a position to use the applicant's business opportunities. There is also, according to her, no evidence that the applicant and P&R share clients.

Background facts

[5] According to the deponent to the founding affidavit, the applicant is involved in the following business activities:

"12.1. Manufacturing, reconditioning, repairs and re-coring for trucks, earthmoving equipment, locomotives, industrial applications and Ldv's, and

12.2. manufacture radiator cores, removable tube type radiators, heat exchangers and oil coolers, transmission and hydraulic, for those vehicles."

[6] The applicant's customers are mainly involved in the mining, earthmoving, agricultural, real, industrial, and transportation industries. P&R, on the other hand, is a global company involved in procuring certain items for supplies to the mining and construction industries. It procures from the applicant some of the products manufactured by the applicant, including enlisting the servicing of radiators.

[7] The dispute concerning the restraint of trade between the parties arose after the termination of the employment relationship between Ms Bawden and the applicant. Although there is evidence that the parties were involved in disciplinary proceedings before the termination of the employment contract, the relationship was ultimately terminated on the grounds of a retrenchment. It is a common cause in this respect that Ms Bawden received a severance package from the applicant for the termination of her employment.

[8] The applicant contends in the founding affidavit that whilst employed as a sales representative Ms Bawden was responsible for the following tasks which made her privy to its private and confidential information:

- (a) establishing a permanent customer base for sustainable monthly income;
- (b) regularly follow up and service customers;
- (c) launched various marketing strategies and to follow through on these ideas and strategies;
- (d) make follow ups on sales procedures and policies of the applicant from time to time;
- (e) meet sales targets which were adjusted from time to;
- (f) do the normal work as could be expected from a sales representative.
- (g) forged relationships with customers to enable her to generate sales.
- (h) liaised and negotiated directly with the customer regarding prices and delivery times and would obtain the purchase order from the customer.
- (i) She attended training and acquired all her knowledge and skills regarding the technical aspects of the business.

[9] The applicant further contends that whilst in its employment, Ms Bawden had access to private and confidential information belonging to it, which it sought to protect with the restraint of the trade agreement. It is alleged in this respect that Ms Bawden had unrestricted access to the pricing structures, price lists, costing models, project folders, policies, procedures, customer accounts, and profiles. She is also alleged to have handled the applicant's tenders and quotations throughout South Africa.

Urgency

[10] It is trite that by their nature, restraint of trade disputes requires urgent attention by the court. However, that does not detract from complying with the requirements of urgency. This means in an urgent application an applicant has to explicitly show that the matter is urgent and that the applicant will not be able to obtain substantial redress thereafter if the matter is not treated as one of urgency.

[11] In the present matter, whilst noting the respondent's complaint regarding the applicant's alleged failure to comply with the requirements of urgency, it seems to me that the dictates of the interest of justice require that the matter be treated as urgent. It is also in the parties' interest that the dispute between them be finalized at this stage. In other words, it would, in the circumstances of this case, not be in the interests of the administration of justice to struck the matter of the roll for lack of urgency only for it to be re-enrol for hearing at a later stage. For this reason, I propose to treat the matter as urgent.

The general principles and analysis

[12] It is trite that a restraint of trade agreement is enforceable unless it is unreasonable.¹ The reasonableness or otherwise of a restraint of trade is generally determined by the proprietary interest of the party seeking to enforce the restraint of trade.

[13] In an employment relationship, the objective of a restraint of trade clause is to protect an employer's economic interest after the termination of the employment contract. A party that resists enforcement of a restraint of trade agreement has to show that the restraint is not enforceable on a balance of probabilities because it is unreasonable. In *Megna Alloys Ltd v Ellis*,² the Appellate Division held that a contract in restraint of trade is valid and enforceable unless the employee who resists its enforcement can show that it is contrary to public policy.

¹ See *Megna Alloys Ltd v Ellis*, 1984 [4] SA. 874 [A].

² *Ibid.*

[14] It is trite that in resolving a dispute about the enforcement of a restraint of trade agreement, the court has to strike a balance between the sanctity of the contract and the freedom of an employee's ability to trade his or her labour, occupation, and professional skills whose protection is provided for in section 22 of the Constitution. The freedom of an employee to freely participate in selling his or her labour in the labour market is restricted and superseded by the freedom and sanctity of the contract.

[15] The questions to answer in conducting the inquiry into the enforceability of a restraint of trade agreement as set out in *Basson v Chilwan and Others*,³ are; whether the party seeking the restraint has a protectable interest, and whether it is being prejudiced by the other party. Having established the existence of the interest the next is to weigh up, qualitatively and quantitatively, that interest against the interest of the other party to be economically active and productive. The other question to answer to consider is whether there are public policy considerations that support the enforcement of the restraint. Should it be found that the interest of the party against whom the restraint is sought outweighs that of the complaining party then the restraint would be regarded as unreasonable and unenforceable.

[18] In weighing the reasonableness of the restraint of trade contract, the court considers the duration of the restraint, the reasons for the restraint, the geographical area to which the restraint applies, and the proprietary interest that the restraint seeks to protect.

[17] In the present matter clause 3.3 of the restraint of trade agreement provides that the agreement shall operate "for 12 months subsequent to the Termination Date and anywhere within South Africa (area). . ." In other words, the prohibition from taking employment with any employer that competes with the applicant applies across South Africa.

[18] The above restriction on Ms Bawden is, in my view, unreasonable and renders the restraint of trade agreement between the parties unenforceable. In the circumstances, the applicant's application stands to fail.

³ 1993 [3] SA742 (A).

Order

[19]In the premises the following order is made:

1. This matter is treated as one of urgency.
2. The applicant's application is dismissed with costs.

E MOLAHLEHI J

Judge of the High Court of South Africa, Johannesburg

Representation

For the applicant:

Adv. D Whittington

Instructed by:

Lindeque van Heeden Attorneys

For the respondent:

Adv. Leonie Pretorious

Instructed by:

Turkers Attorneys

Hearing date:

30 March 2022

Delivered:

26 April 2022