IN THE HIGH COURT OF SOUTH AFRICA
[GAUTENG DIVISION, PRETORIA]

89843/15

•DELETE WHICHEVER IS NOT APPLICABLE

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

31/03/2016 DATE ..... SIGNATURE

CASE NO: 8984A/2015

In the matter between:

WORD FOR WORD MARKETING (PTY) LTD Applicant

and

1/4/2016

LASEA CHRISTINA VAN RIET Respondent

JUDGMENT

SKOSANA AJ

[1] In this matter, the applicant seeks the following relief against the respondent:

[1.1] An interdict restraining the respondent, for a period of 12 months starting from 15 October 2015, from acting in contravention or in breach of the restraint of trade contained in the employment agreement concluded between the applicant

and the respondent, the details of which are set out in paragraphs 2 and 3 of the applicant's notice of motion;

[1.2] An order that the respondent pay to the applicant a sum of R913 263-35 together with interest thereon at a rate of 9% per annum *a tempore morae* from the date of the service of the application to the date of payment;

[1.3] An order declaring the respondent to be a delinquent director in terms of section 162 of the Companies Act no. 71 of 2008 ("the Companies Act").

[1.4] A declarator that the respondent is liable to the applicant for the damages as may be determined on a later trial action to be instituted by the applicant. The trial action will only determine the quantum of the damages.

[1.5] Costs of the application on a scale between attorney and own client.

[2] The respondent has fully opposed the application. The parties were ably represented by counsel, namely Adv AM Nowitz for the applicant and Adv RR Du Plessis SC for the respondent.

[3] The application was initially brought on urgent basis but could not be dealt with by the urgent court then due to its voluminous nature. Upon approach of the

Deputy Judge President the parties were granted a preferential date before this third court.

[4] The applicant is a private marketing company specializing in marketing and ancillary product services in relation to commercial properties, particularly shopping centres and malls. It conducts its business throughout South Africa and parts of the African continent including Morocco and Kenya.

[5] The applicant was established by the respondent and was purchased by Hyprop Investment Limited ("Hyprop") in September 2011 and subsequently became a wholly owned subsidiary of Hyprop as its sole shareholder. In the purchase of the applicant, the respondent received an amount of about R9 million and was also given a contract of employment to continue as the Managing Director of the applicant.

[6] The contract of employment concluded between the applicant and the respondent (annexure "KE2" to the applicant's founding affidavit) is undated but provides within itself that the respondent's employment as the Managing Director of the applicant commenced on 01 October 2007, which would be prior to the purchase of the applicant's business by Hyprop in September 2011.

[7] In terms of such contract of employment, the respondent earned a monthly salary of R65 000-00 as well as an annual bonus of 22,5% of the net

profit of the applicant before tax for the financial period concerned. The restraint of trade in question is contained in clause 14 of the contract.

[8] The applicant further alleges that during July 2014 the applicant's board of directors discovered the existence of a certain loan account, referred to as Kristi control account. There were unusual and concerning transactions in regard to the Kristi control account to such an extent that the applicant's board of directors instructed that a forensic investigation be conducted. Such forensic investigation culminated in the forensic report which is attached to the applicant's founding affidavit. The forensic report concluded that the respondent's conduct came short of the conduct expected from a managing director in terms of the Companies Act and that the respondent owes to the applicant the amount of R913 263-25.

[9] The same forensic report is also used to support the relief sought against the respondent to declare her as a delinquent director in terms of section 162 of the Companies Act. It is also alleged that the conduct of the respondent has resulted in damages being suffered by the applicant both as a result of the breach of the restraint of trade clause and the manner in which she conducted the affairs of the applicant especially with regard to the Kristi control account.

[10] It is also common cause that during September 2015, Hyprop terminated all its marketing agreements with the applicant with effect from 01 November

2015 and transferred employment contracts of a number of employees of the applicant to itself as its marketing function had been moved in-house.

[11] **RESTRAINT OF TRADE**

The restraint of trade clause is contained in paragraph 14 of the employment agreement and reads:

"14 Trade restrictions

The employee hereby undertake in favour of the employer that she shall not, for the period of 12 months after the date on which she is no longer employed by the employer, whether directly or indirectly and either solely or jointly:

(a) carry on of engaged consent or interested in or employed by;

(b) solicit business from;

(c) Be a proprietor of or director, shareholder, member or partner in;

(d) act as a consultant, trustee, manager, employee, agent, representative, partner, advisor, officer or in any other capacity or render any service to; and/or

(e) lend or advance or bind herself as surety for, any such money or otherwise assist financially any business, person, company, close corporation, partnership, trust, body corporate or incorporate, association or other legal entity with which, within the Republic of South Africa owns, conducts or carries on, whether wholly or partially, the business that competes (or is endeavoring to compete) with the business conducted by the employer or any part thereof or any business similar thereto as at the date on which the employee ceases to be employed by the employer;

(f) canvass, influence or try to persuade any customer of the employer to take his/its custom elsewhere and/or to obtain the services or product offered by the employer from any person or entity other than the employer; and/or

(g) do business or attempt to do business with any customer of the employer; and/or

(h) encourage, entice, persuade or induce any supplier of the employer to supply any other business or cease from doing business with the employer; and/or

(i) encourage or entice, persuade, induce or in any way offer employment to or employ or cause to be employed, any person employed by the employer on a

date that the employee ceases to be employed by the employer or at any time prior thereto."

[12] Mr Nowitz, who appeared for the applicant, submits that clause (a) to (e) of this restraint of trade is limited to South Africa in its operation. It restricts the respondent from competing with the business of the applicant within the Republic of South Africa. In other words, the respondent could directly or indirectly compete with the applicant's business beyond South Africa.

[13] However, he submits further that paragraph (f) to (i) forbids the respondent from taking or poaching the applicant's clients in and outside the Republic of South Africa.

[14] I agree that this is the import of this paragraph. From the plain reading of these paragraphs it is clear that the phrase "*within the Republic of South Africa ... a business that competes (or is endeavouring to compete) with the business conducted by the employer or any part thereof or any business similar thereto as at the date on which the employee ceases to be employed by the employer*" is applicable to the contents of paragraph (a) to (d) as well as the rest of sub-paragraph (e) of this clause. In any event, I did not hear any counter argument from the respondent's counsel on this aspect. I therefore agree with the submission made by the applicant in this regard.

[15] I proceed to deal with the reasonableness or otherwise of this restraint. In this regard, Mr Nowitz made the following submissions:

[15.1] That it is common cause that the contract of employment was drafted by the respondent herself and she saw it proper to restrict herself out of the business for 12 months on the date of termination;

[15.2] That, according to the founding affidavit, the applicant operates throughout South Africa and also in Africa including Kenya, Morocco and other African countries;

[15.3] That the restraint only extends over a period of 12 months from 15 October 2015, to the date of termination of the respondent's employment and that at least about 4 months of the period of the restraint have already been consumed.

[16] On the other hand, Mr Du Plessis contends that, while paragraphs (a) to (e) restrict the respondent in respect of the whole of the country, the applicant only operates and has contacts or clients within Gauteng. He therefore submits that the constraint is too wide as it should have been limited to Gauteng. He further submits that as there is no area designated for the restraint contained in paragraphs (f) to (i) of clause 14, the restraint is too wide and unreasonable in that regard. He submits that, once a restraint is found to be too wide and

unreasonable, the court cannot write into the agreement an applicable area for the applicant[1].

[17] In reply, Mr Nowitz submits that the allegations contained in paragraph 9 of the applicant's founding affidavit are not disputed by the respondent, which read *"the applicant operates throughout South Africa and in much of the African continent as well, including inter alia, Morocco, Kenya, etc. In amplication of the aforegoing, I refer this Honourable Court to what is set forth hereunder."* The respondent did not dispute this allegation in her answering affidavit.

[18] While I accept that the applicant operates within the whole of South Africa in accordance with the pleadings, it has not been alleged that the applicant has clients all over the world. Paragraph 9 only mentions South Africa and much of the African continent as the areas within which the applicant operates. However, it is clear that clause (f) to (g) of this restraint is absolutely unlimited as to the area of its operation. In other words, it goes further than the African continent. There is no proof that the applicant operates or has clients outside the African continent as well.

[19] There is a conflicting body of case law as to the applicability of the principle of severity to restraints of trade. However, the weight of authority seems to be to the effect that the court should have a general discretionary power to

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[1] Concept Factory v Heyl 1994 (2) SA 105T; Forwarding African Transport Services v Manika Africa 2004(4) All SA 527 (D) at 534 D-I; Coin Sekerhuit Groep (Edms) Bpk v Kruger EN Aner 1993 (3) SA 564 (T)

enforce a restraint partially in accordance with what it considers to be reasonable even without resorting to the necessity of formal rules relating to severability[2].

[20] In this case although the contract of employment of the respondent does not make provision for severability, a clear distinction between the portion of the restrained that applies to South Africa and the one that applies beyond, is drawn. As stated earlier, paragraph (a) to (e) of Clause 14 relates to competition within South Africa while the rest of the clause go beyond South Africa. From the admissions made in the pleadings as referred to above, the applicant operates its business within South Africa and in some parts of the African continent.

[21] In my view, the restraint in respect of sub-paragraphs (f) to (i) is unreasonable as it does not contain bounds within which it operates, whereas it is clear that the applicant does not necessarily have clients all over the world but only in some parts of the African continent. As to sub-paragraphs (a) to (e) the argument by Mr Du Plessis that it has to be applicable only to the Gauteng area, is unpersuasive especially in the light of the admission made in the answering affidavit. I therefore conclude that the restraint contained in sub-paragraphs (a) to (e) is reasonable as to the area of its operation.

[22] As to whether the applicant had protectable interest at a time of the termination of the respondent's employment contract, it was conceded on behalf

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[2] See National Chem Serach (SA) (Pty) Ltd v Borrowman & Another 1979 (3) SA & 92 (T) at 114-115 and the authorities cited therein

of the respondent that the marketing contracts of Hyprop constituted only 40% of the applicant's business. From this concession, it can be assumed that the applicant still remains with 60% of its business after the removal of the marketing contracts of Hyprop. It is therefore my view that the applicant still retains protectable interest post the termination of Hyprop's marketing contracts. Although Hyprop had expressed an intention to sell the business of the applicant, they had not done so at a time when the respondent terminated her employment and there is no indication that such a sale has already taken place.

[23] The applicant endeavoured to demonstrate the conduct of the respondent which is in breach of the restraint. This appears when regard is had to the following:

[23.1] Paragraph 12 of the founding affidavit contains allegations as to the services that the applicant provides to its clients and which form part of its confidential information. This is not disputed in the respondent's answering affidavit.

[23.2] Immediately after terminating her employment contract with the applicant, the respondent established a company called Kristi Maree & Associates (Pty) Ltd t/a KMA Media, which the applicant believes it will be utilized to unlawfully compete in breach of the restraint. All that the respondent says in the answering

affidavit is that there was a repudiation on the part of the applicant and then barely denies the rest of the allegations.

[23.3] The respondent has also sought to secure the services of one Zandre van den Berg and informed her of the intent to solicit the business of two of the applicant's big clients, namely Hub Kenya and Anfaplace Morocco. Apparently Anfaplace Morocco has already given notice to the applicant to terminate its business with the applicant.

[23.4] In addition it is alleged that the respondent has been trying to find a way to do business with Icads, which is the supplier of the applicant as appears from a series of e-mails attached to the applicant's founding affidavit.

[24] The above mentioned instances alleged by the applicant are not really disputed by the respondent. The respondent essentially persists that there has been a repudiation of his contract of employment by the applicant when the marketing contracts of Hyprop were taken away from the applicant.

[25] I am well aware that two of the instances mentioned by the applicant relate to attempts by the respondent to take the applicant's clients who are situated outside of South Africa. I have already expressed my view that the restraint clause is too wide in so far as it is applicable outside South Africa and to the world, i.e. paragraph 14 (f) to (i).

[26] However, the company that the respondent has admittedly formed is a South African company which is engaged, concerned or interested in, solicits business or owns, conducts or carries on business that competes or is endeavouring to compete with the business conducted by the applicant or any part thereof. In my view, the first part of the restraint (sub-paragraph (a) to (e)) is wide enough to preclude the formation of this company by the respondent. In any event, these are not the only instances of business that the respondent intends to be involved in nor does she states that her new company is only dealing with clients from outside South Africa and the African continent.

[27] The applicant has expressly stated that the instances mentioned are "*just a tip of an ice berg*" and the respondent has again not denied this. There is therefore a real possibility, if not a reality, that the respondent and her company will continue to breach the first part of the restraint in South Africa.

[28] It must also be noted that the applicant does not have to prove the actual breach of the restraint of trade. In the **Reddy v Siemens Telecommunication (Pty) Ltd 2007 (2) SA 486 SCA** at para [20], Malan AJA had the following to say:

"Reddy is in possession of confidential information in respect of which the risk of disclosure by his employment with a competitor, assessed objectively, is obvious. It is not that the mere possession of knowledge is sufficient, and this is not what was suggested by Marais J in BHT Water: Reddy will be employed by Ericsson,

a 'concern which carries on the same business as [Siemens]' in a position similar to the one he occupied with Siemens. His loyalty will be to his new employers and the opportunity to disclose confidential information at his disposal, whether deliberately or not, will exist. The restraint was intended to relieve Siemens precisely of this risk of disclosure. In these circumstances the restraint is neither unreasonable nor contrary to public policy. I agree with the remarks of Marais J in BHT Water:

'In my view, all that the applicant can do is to show that there is secret information to which the respondent had access, and which in theory the first respondent could transmit to the second respondent should he desire to do so. The very purpose of the restraint agreement was that the applicant did not wish to have to rely on the bona fides or lack of retained knowledge on the part of the first respondent, of the secret formulae. In my view, it cannot be unreasonable for the applicant in these circumstances to enforce the bargain it has exacted to protect itself. Indeed, the very ratio underlying the bargain was that the applicant should not have to content itself with crossing its fingers and hoping that the first respondent would act honourably or abide by the undertakings he has given. In my view, an ex-employee bound by a restraint, the purpose of which is to protect the existing confidential information of his former employer, cannot defeat an application to enforce such a restraint by giving an undertaking that he will not divulge the information if he is allowed, contrary to the restraint, to enter the employment of a competitor of the applicant Nor, in my view, can the ex-employee defeat the restraint by saying that he does not remember the

confidential information to which it is common cause that he has had access. This would be the more so where the ex-employee, as is the case here, has already breached the terms of the restraint by entering the services of a competitor.'"

[29] I am satisfied that, even if the actual breach has not been proved, the respondent is in possession of confidential information the disclosure of which to a competitor poses a risk to the applicant. This suffices to entitle the applicant to the interdict sought.

[30] I am not persuaded by the argument of the respondent that there was repudiation on the part of the applicant when the Hyprop Marketing contracts were withdrawn. It suffices to say that it is Hyprop who decided to take away those contracts as a client and not necessarily the two directors who were part of the applicant's board. The actions of Hyprop do not and cannot constitute a breach or repudiation of an agreement between the applicant and the respondent. Consequently, this submission on the part of the respondent is rejected. The applicant is entitled to the restraint sought.

[31] **Kristi account of R913 263-35**

The computation of this claim is essentially contained in annexure "KE4" to the applicant's founding affidavit as well as the report by grant Thornton.

[32] The respondent in its answering affidavit did not refute in detail with the contents of this report and particularly with regard to the computation of this claim. Notwithstanding that the respondent had participated in this forensic investigation by being interviewed or consulted with, she did very little to controvert this computation. The respondent contented herself with the allegation that the termination of the marketing contracts by Hyprop constituted a repudiation and that some of the amounts included in the account were company related expenses. She has to date not dealt with the detailed contents of this claim.

[33] I am of the view that the respondent's opposition of this part of the claim is spurious and cannot be upheld. The principles applicable to motion proceedings in this regard are trite. A genuine dispute of fact comes into being only when the respondent in his answering affidavit put up facts which controvert the allegation made by the applicant[3]. This is not the position in the present case. The applicant had very little choice in bringing these proceedings in the form of motion proceedings. I consequently find that the applicant has succeeded to prove this claim.

[3] Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA); Room hire v Jeppe Street Mansions 1949 (3) SA 1155 (T) at 1163-5

[34] **Delinquent director**

This claim is based on section 162 of the Companies Act no. 71 of 2008. The application to declare a director delinquent may be brought by a company against a person who is a director of that company or was a director of that company within the preceding 4 months. The circumstances of this case satisfy this requirement.

[35] Section 162(5)(c), which is apparently being relied upon by the applicant in this case, reads:

"(5) A court must make an order declaring a person to be a delinquent director if the person-

(c) while a director-

(i) grossly abused the position of director;

(ii) took personal advantage of information or an opportunity, contrary to section 76 (2) (a);

(iii) intentionally, or by gross negligence, inflicted harm upon the company or a subsidiary of the company, contrary to section 76 (2) (a);

(iv) acted in a manner-

(aa) that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of the director's functions within, and duties to, the company; or

(bb) contemplated in section 77 (3) (a), (b) or (c);"

[36] The applicant relies for this portion of the claim on paragraphs 17 to 38 of the findings by Thornton (annexure "KE39" to the applicant's founding affidavit). The applicant relies on the whole of sub-paragraph 3 of sub-section 5 of section 162.

[37] The respondent submits that the forensic report constitutes hearsay evidence and since this part of the claim is based thereon, it ought to be rejected. I disagree. There is an affidavit filed, though belatedly, by one Vernon Naidoo confirming the forensic investigation report and the respondent did not take up the hearsay issue in her answering affidavit.

[38] It is clear that the respondent was at least a director of the applicant immediately 24 months preceding the application as contemplated in section 162(2)(a) of the Act. The facts set out in paragraph 17 to 38 of annexure "KE39" of the founding affidavit establish in my view that the respondent has contravened all the prohibitions contained in section 162(5)(c) of the Act when she:

[38.1] failed to disclose her personal interest in the control account and her association with Just marketing and other enterprises to the applicant; and

[38.2] she misused the applicant's information for her own personal benefit, that is when she tried to solicit the business of Hub Kenya and Anfaplace Morocco.

[38.3] I am satisfied that the applicant has made out a case to declare the respondent as a delinquent director as contemplated in section 162 of the Act.

[39] **Damages claimed**

My findings above makes it clear that the respondent should be held liable for any damages that may be proven to have arisen out of her deliberate or negligent conduct. I agree with the applicant's submission made on the basis of **Cadac (Pty) Ltd v Weber-Stephen Products Co. & Others 2011 (3) SA 570 (SCA)** to the effect that there is no reason why the practice of separating the merits and the qualification of a claim or damages should not be allowed in motion proceedings. The fact that I have found the respondent to have breached the restraint of trade and to have acted contrary to the provisions of the Act, necessarily implies that there may be damages that may have arisen out of her conduct. I therefore find that the respondent is liable to the applicant for such damages which may be determined at the trial to be instituted by the applicant at a later stage.

[40] **Costs**

The costs should follow the result in this case. However, I do not agree that such costs should be on a punitive scale. I do not see any frivolity in the conduct of the respondent's defence in this case.

[41] In the result, I make the following order:

[41.1] The respondent is hereby interdicted and restrained, for a period of 12 months from 15 October 2015, whether directly or indirectly and either solely or jointly from:

[41.1.1] carrying on, being engaged, concerned or interested in or employed by;

[41.1.2] soliciting business for;

[41.1.3] being a proprietor of or director, shareholder, member or partner in;

[41.1.4] acting as a consultant, trustee, manager, employee, agent, representative, partner, advisor, officer or in any other capacity or rendering any service to; and/or

[41.1.5] lending or advancing or binding herself as surety for, any such money or otherwise assisting financially, any business, person, company, close corporation, partnership, trust, body corporate or incorporate, association or other legal entity which, within the Republic of South Africa owns, conducts or carries on, whether wholly or partially, the business that competes (or is endeavouring to compete) with the business conducted by the Applicant or any part thereof or any business similar thereto as at the date on which the respondent ceases to be employed by the Applicant, i.e. 15 October 2015.

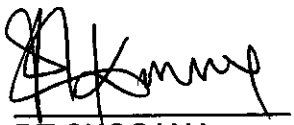
[41.2] The respondent is to pay to the applicant a sum of R913 263-15 together with interest thereon at a rate of 9% per annum *a temporae morae* from the date of service of this application to the date of payment.

[41.3] The respondent is declared to be a delinquent director in terms of section 162 of the Companies Act no. 71 of 2008.

[41.4] The respondent is declared liable to the applicant for the damages in such an amount as may be proven and/or determined in a trial action to be instituted by the applicant against the respondent within 30 days of the date of the granting of this order.

[41.5] The determination of the quantum of damages suffered by the applicant shall be dealt with reference to the contents of the applicant's founding affidavit and further papers as may be supplemented by the parties at such trial action.

[41.6] The respondent is ordered to pay the costs of this application on a scale as between party and party.



DT SKOSANA
Acting Judge of the High Court