IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case number: 3579/2016

Date: 12 February 2016

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/~~NO~~
(2) OF INTEREST TO OTHERS JUDGES: ~~YES/NO~~
(3) REVISED

12/2/2016 .....
DATE ~~SIGNATURE~~

In the matter between:

ROLFES PWM (PTY) LTD

APPLICANT

And

ROBERT WILLIAM GOLDING

RESPONDENT

JUDGMENT

PRETORIUS J,

(1) This is an urgent application requesting the court to enforce a restraint

of trade agreement as follows:

"2. *Respondent is restrained from the following activities:*

2.1 *being interested in as trustee, proprietor, shareholder, member, manager, director, adviser, consultant, employee, financier or agent or for any person or entity which is directly or indirectly engaged in any activity which is similar to or competes with the business of Applicant;*

2.2 *enticing any of Applicant's customers, principals and suppliers away from it or to terminate its relations with Applicant or to change its contractual arrangements with Applicant;*

2.3 *encouraging or enticing any employees of Applicant to terminate its employment with Applicant;*

2.4 *doing any of the acts listed in clause 5 of Annexure "B" to the Founding Affidavit.*

3. *The aforesaid interdict will be effective for a period of two years commencing on 30 November 2015 within the province of Gauteng."*

(2) In **Sunshine Records (Pty) Ltd v Frohling and Others 1990(4) SA 782 (A) at 794 B-E** the court summarised the law applicable in restraint of trades as follows confirming the dictum in **Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984(4) SA 874 A:**

"For present purposes the effect of this judgment may be summarised as follows (vide at 893 - 4). In determining whether a restriction on the freedom to trade or to practise a profession is enforceable, a court should have regard to two main considerations. The first is that the public interest requires, in general, that parties should comply with their contractual obligations even if these are unreasonable or unfair. The second consideration is that all persons should, in the interests of society, be permitted as far as possible to engage in commerce or the professions or, expressing this differently, that it is detrimental to society if an unreasonable fetter is placed on a person's freedom of trade or to pursue a profession. In applying these two main considerations a court will obviously have regard to the circumstances of the case before it. In general, however, it will be contrary to the public interest to enforce an unreasonable restriction on a person's freedom to trade."

FACTS:

(3) From September 2011 until 30 November 2015 the respondent was employed by the applicant as regional manager in Gauteng. On 5 September 2011 the respondent signed a restraint of trade agreement. The respondent took up employment with the applicant's direct competitor, after resigning. On 12 January 2016 the applicant

ascertained that the respondent had made a proposal to one of the applicant's customers, namely First National Bank, Fairlands, in regards to an air conditioner for services normally supplied by the applicant. The applicant thereafter launched this application, alleging that the respondent is breaching the restraint of trade.

(4) It is common cause that the restraint of trade is only valid for twenty four (24) months and therefore the court is requested to find the application to be urgent. I did hear the matter as an urgent application.

(5) On 12 January 2016 one of applicant's regional managers paid a routine visit to one of the applicant's existing customers, FNB (Fairlands) to which the applicant renders services in relation to its air conditioning system, where he found the respondent's business card lying on the desk of the FNB representative. He was informed that G-Chem, where the respondent is presently employed, had done a representation for the customer and introduced G-Chem as a supplier who could deliver the same services as the applicant. FNB (Fairlands) was one of the customers which respondent attended to whilst working for the applicant and the respondent knows their needs, prices they pay and who to contact. Respondent was, whilst working for the applicant, the face of the applicant who interacted with the clients on a personal level.

OPPOSITION:

(6) The respondent opposes the application and alleges that the restraint is void due to vagueness in respect of the area of its intended operation; it is limited in its description of the type of business in respect of which it operates and the restraint is unreasonable in that it protects no proper interest and is too wide in respect of its duration the capacities of association with a competitive firm intended to be covered thereby.

VAGUENESS:

(7) The restraint provides the territory of the restraint as:

> *"...any region in which the Group conducts the Business as at the Termination Date or during the 12 (twelve) month precedent the Termination Date."*

It is clear that the restraint does not relate to specific defined areas. In the notice of motion the applicant requests the interdict to be operational for two years from 30 November 2015 in the province of Gauteng only, thus defining the area.

(8) In **National Chemsearch (SA) (Pty) Ltd v Borrowman and Another 1979(3) SA 1092 (T) at 1116 D** the Full Bench decided:

> *"The ratio of this approach I shall attempt to formulate as follows: when a restraint according to its terms as agreed upon is found to be unreasonably wide in its scope of operation,* ***the Court can, in a proper case, enforce the restraint partially,***

by issuing an order incorporating the addition of such limiting words to the restraint as agreed upon as are appropriate to restrict its scope of operation to what is found to be reasonable." (Court's emphasis)

(9) In **BHT Water Treatments (Pty) Ltd v Leslie 1993(1) SA 47 (W)** Marais J found at page 54:

"In this case, instead of seeking to defend against attack the prima facie enforceable restraint clause, the applicant has in effect said: 'I seek enforcement of my restraint clause subject to a limitation. To that extent I concede that the original clause was too wide.' This seems to me the only effect of the concession, whether made on the papers or in argument by counsel. In the present case it seems to me that the applicant is saying: 'My original restraint was in principle good and enforceable, save that it is geographically too wide and should be limited to certain territories.'...The applicant, properly making a concession that the restraint is geographically too wide, does not in my view concede that the restraint is otherwise unreasonable, and I am of the view that the onus of showing that enforcement of the cut down restraint is unreasonable, remains on the respondent."

(10) I find in the present instance that the above dictum is applicable. The applicant is only requesting a restraint in relation to the Gauteng province. There can thus no longer be any reliance on the scope of

the restraint being too vague in relation to the territory.

BUSINESS OF THE APPLICANT:

(11) *"Business"* is defined in the agreement as *"the business conducted by the Group, namely the business of supplying services, chemicals, equipment into water treatment, personal care and home care industries"*. The respondent alleges that the business of the applicant in this instance is limited and relates to only two clients.

(12) *"Prescribed customers"* are defined as *"any person with whom the Group conducted the Business, or any person with whom the Group held negotiations for the supply of* ***Prescribed Goods or Prescribed Services****, within 12 (twelve) months prior to the Termination Date."* (Court's emphasis)

(13) *"Prescribed services"* are defined as *"the services conducted by the Group, including the* ***business of supplying services****, chemicals, equipment into water treatment, personal care and home care industries."* (Court's emphasis)

(14) The respondent contends that if an end customer is not a player in the *"water treatment industry"* such a customer will fall outside the definition of *"Business"* and will thus not be part of the restraint. The definition sets out that the applicant will be *"supplying services"*.

(15) According to the respondent the restraint is confined to customers who conduct industries *"into water treatment, personal care and home care industries".*

(16) The applicant contends that the restraint does not only deal with customers *"in the water treatment industry"*, but also with customers who are supplied with services and chemicals relating to water treatment. The applicant's representative set out in the founding affidavit that the main business of the applicant is the supply of *"water treatment solutions"* to various industries. The applicant explains that, for example, should a client run a cooling tower, the applicant ensures via the treatment that the water used does not corrode a customer's equipment. The applicant conducts site visits on a monthly basis, where the water is tested and the relevant chemicals supplied, as necessary. It is thus clear that the applicant is supplying services as well.

(17) The respondent voluntarily agreed to the terms of the restraint agreement. It is common cause between the parties that, at the time of the respondent's resignation, he had paid weekly visits to the applicant's existing customers, which were approximately 150 in total; administered service representatives of the applicant for whom he was responsible and sourcing new customers. To the aforementioned customers the respondent was the face of the applicant, representing

the applicant. He had personal contact with the applicant's clients, they knew him as the representative of the applicant and dealt with him on a regular basis.

(18) In **Rawlins and Another v Caravantruck (Pty) Ltd 1993(1) SA 537 at 542 G-H** Nestadt JA found:

> *"Even though the persons to whom an employee sells and whom he canvasses were previously known to him and in this sense 'his customers', he may nevertheless during his employment, and because of it, form an attachment to and acquire an influence over them which he never had before.* ***Where this occurs, what I call the customer goodwill which is created or enhanced, is at least in part an asset of the employer. As such it becomes a trade connection of the employer which is capable of protection by means of a restraint of trade clause.***" (Court's emphasis)

(19) In **Rawlins and Another v Caravantruck (Pty) Ltd** (*supra*) it was held:

> *"Much will depend on the duties of the employees; his personality, the frequency and duration of the contact between him and the customers; where such contact takes place, what knowledge he gains of their requirements and business; the general nature of their relationships (including whether an attachment is formed between them, the extent to which customers rely on the employee and how personal their*

association is)"

This decision is applicable in the present situation, as the respondent had intimate knowledge of the business of the clients and interacted with the clients as the face of the applicant.

(20) These common cause facts put paid to the respondent's submission that there are only two clients who would be affected, as at the time of respondent's employment with the applicant, the respondent was responsible for 150 customers. I find that the respondent is incorrect when submitting that customers such as FNB (Fairlands) fall ouside the scope of the restraint. I find that the phrase *"supplying services etc into* (the) *water treatment industry"* does not mean that it must be a client in the water treatment industry, but that customers who use *"water treatment"* products are included regardless whether it is such a customer's principle business. It is found that the respondent was known to specific customers, knew the products they needed and the prices that they would pay and knew the price structures of the applicant to quote to the customers. I thus find that the applicant has a proprietary interest. The principles set out in the above *dictum* are applicable in these circumstances.

UNREASONABLENESS:

(21) The court has to take cognisance of the fact that the respondent resigned at the same time that his father and uncle had left the

company and their restraint had run out. They are now all involved in a new company which is in direct competition with the applicant and the respondent is an employee of the new company.

(22) There is no reason given as to why the respondent could not be employed in another province, by the new company. There is no reason for the respondent to be unemployed and economically inactive. He was a highly regarded employee of the applicant, who earned accolades and bonuses as a result of his good work. In **Den Braven SA (Pty) Ltd v Pillay and Another 2008(6) SA 229 (D)** at paragraph 50 Wallis AJ held:

> ***"The proper approach in my view is for the court to ask itself whether the conduct that the applicant seeks to restrain by way of an interdict is conduct that falls within the terms of the restraint agreement and from which the former employee agreed to abstain.*** *If the answer to that question is in the affirmative the court then moves to an analysis of whether it should, in accordance with the principles of public policy, enforce the agreement to that extent by granting relief to the applicant. It has no need in those circumstances to have regard to those portions of the agreement that are more extensive than the relief actually being sought."* (Court's emphasis)

(23) The respondent's submission that a two year period for the restraint is

too long cannot be justified as he had agreed to the restraint for such a period when he signed the agreement. I cannot find that it is against public policy for him to be restrained for a further twenty one and a half months.

(24) In **BHT Water Treatment (Pty) Ltd v Leslie 1993(1) SA 47 (W) at 57J – 58H** it was decided that a prejudice is met where an employee takes up employment with a direct competitor even if the person undertakes not to divulge confidential information to the new employer. No such guarantee was provided by the respondent in the present instance.

(25) In **Den Braven (*supra*)** it was decided at paragraph 32:

> *"In summary the approach of the Constitutional Court is that contractual obligations are enforceable unless they are contrary to public policy, which is to be discerned from the values embodied in the Constitution and in particular in the Bill of Rights. Where the enforcement of a contractual provision would be unreasonable and unfair in the light of those fundamental values it will be contrary to public policy to enforce the contract or the contractual term in question."*

And at p253 D-G Wallis AJ found:

> *"The person who sells a business and then seeks to make use of the trade connection that he sold will be interdicted from doing so even in the absence of a restraint of trade agreement.* ***The employee who seeks to turn their employer's***

confidential information, trade secrets or trade or customer connection to their own account for the benefit of themselves or a competitor of their employer acts in a no less reprehensible fashion and I can think of no good reason why our law should not afford a remedy to a business that seeks protection against this type of unfair competition. *Where the business has sought to protect itself by securing a restraint of trade undertaking from the employee there is no reason for the courts or the law to view this with disfavour. It is only where the bounds of public policy are overstepped that the court will withhold its assistance."* (Court's emphasis)

(26) I cannot find that the dictum in **Kelly Group Ltd v Capazorio and Others 2011 JDR 0221 GSJ at 36-41** applicable as the facts in the present matter differ.

(27) The respondent has joined a company in direct competition to the applicant's business. He voluntarily agreed to the terms of the restraint agreement. The applicant has conceded that the terms of the agreement are too wide in respect of the region or territory and seeks constraint only in respect of Gauteng. I can come to no other conclusion, but that although 24 months may seem too long, the respondent signed the agreement at the time, and never complained that the restraint was too wide. He is only complaining now that the

shoe is pinching. In any event two and a half months of the 24 months have already expired and the scope of the restraint has been curtailed to the province of Gauteng only.

(28) Therefor I make the following order:

1. The application is urgent in terms of Rule 6(12) and that non-compliance with ordinary time periods is condoned.
2. The Respondent is restrained from the following activities:
   2.1 being interested in as trustee, proprietor, shareholder, member, manager, director, adviser, consultant, employee, financier or agent or for any person or entity which is directly or indirectly engaged in any activity which is similar to or competes with the business of Applicant;
   2.2 enticing any of Applicant's customers, principals and suppliers away from it or to terminate its relations with Applicant or to change its contractual arrangements with Applicant;
   2.3 encouraging or enticing any employees of Applicant to terminate its employment with Applicant;
   2.4 doing any of the acts listed in clause 5 of Annexure "B" to the Founding Affidavit.
3. The aforesaid interdict will be effective for a period of two years commencing on 30 November 2015 within the province of Gauteng only.
4. The respondent is to pay the costs of this application.

Judge C Pretorius

Case number	: 3579/2016
Matter heard on	: 2 February 2016
For the Applicant	: Adv. FJ Erasmus
Instructed by	: VDT Incorporated
For the Respondent	: Adv. J Blou SC
Instructed by	: Cyril Ziman & Associates
Date of Judgment	: 12 February 2016