


REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

 1/9/2016
 CASE NO: 16575/15

(1)	REPORTABLE: NO/YES
(2)	OF INTEREST TO OTHER JUDGES: NO/YES
(3)	REVISED.
(4)	<div style="display: flex; justify-content: space-between;"> <div>  Signature </div> <div> 01/09/2016 Date </div> </div>

MONTEGO PET NUTRITION (PTY) LTD

APPLICANT

and

ANDRIES MORNE BOUWER

FIRST RESPONDENT

SUPREME PET CC

SECOND RESPONDENT

 APPEAL - JUDGMENT

KHUMALO J

[1] In this Application, the Applicant is seeking an order interdicting and restraining the 1st Respondent, its erstwhile employee, Andries Morne Bouwer ("Bouwer"), from being employed by the 2nd Respondent until 28 February 2017, which is a period of twenty four months from the date of ("Bouwer") resignation from its employ on 27 February 2015.

[2] When the Application was heard the Andries Morne Bouwer ("Bouwer") was already in the employ of the 2nd Respondent for a period of five months. The Applicant had unsuccessfully launched an urgent application on 23 March 2015 to stop Bouwer from taking up his new employment on 2 March 2015.

[3] Bouwer's new employer, Supreme Pet CC, is cited as the 2nd Respondent as a party that might have potential interest in the matter. No relief is sought against it.

FACTUAL BACKGROUND

[4] During the tenor of Bouwer's employment the Applicant had converted from a Close Corporation called Montego Feeds CC to a private company in the Applicant's name "Montego Pet Nutrition". Bouwer remained in the employ of the Applicant.

[5] The Applicant carries on business as a producer and distributor of animal feed and related products. It operates a production plant in Graaf-Reinet and distributes to wholesalers and retailers throughout the Republic of South Africa and the neighboring countries making use of marketing representatives. It is as a result known as the market leader with many years of experience.

[6] Bouwer was employed by the Applicant as one of the marketing representatives for a period of five years, since 1 February 2010, until his resignation. His contract of employment constituted a confidentiality agreement that prohibited him from engaging in any form of trade or a business in competition with the Applicant.

[7] The Applicant alleges that Bouwer's work as a representative which included:

[7.1] liaising with and keeping contact with the Applicant's customers in order to promote and sell the Applicant's range of products;

[7.2] being familiar with the needs and requirements of customers, maintaining stock levels;

[7.3] maintaining customer relationships, building loyalty and support for the Applicant's range of products and the Applicant's brand and ensuring that the Applicant does "repeat business" with existing customers.

[7.4] identifying new customers and in this manner, to increase the Applicant's market share and the Applicant's brand and product range profile and identifying new and maturing opportunities.

[7.5] on a daily basis dealing closely and regularly with existing clients, to be able to keep in touch with client's needs and market trends and in which the Applicant is able to maintain service levels.

Which all of these has resulted in the Applicant developing a tremendous goodwill in the market and has secured for itself a place as a market leader and in the process the marketing representatives have:

[7.5.1] forged close, intimate relationships with clients, know names and addresses of clients and the identity of the contact persons, client's requirements which include stock levels required from time to time, products preferred by clients; payment patterns, clients expectations regarding lead times and delivery and problems experienced by clients, of whatever nature.

[7.5.2] attended the Applicant's annual indaba where the representatives were informed of the Applicant's immediate future plans and developments that were in the pipeline that includes identifying new and potential customers and opportunities in the market. They discussed and analyzed sale statistics and were presented with the Applicant's marketing plan, informed of new market messages to be used. They were also provided with a spreadsheet with sales and marketing strategies which includes advertising campaigns, new products, launch dates detailing the three new products the Applicant intends to launch in **2015**.

[8] The Applicant says all these constitutes confidential information in the nature of trade secrets, privy to and developed exclusively by and for the use of Applicant which they regard to be of great value and to constitute the basis and the very manner in which the Applicant brings its products to market and to secure and maintain for itself a competitive edge. Bouwer has had over the year's full and unfettered access to all this business information. The excel spreadsheets are sensitive and confidential and were to be made available subject to suitable confidentiality, undertakings and safeguards.

[9] The restraint of trade Bouwer signed was for 24 months after termination of his contract of employment, applicable in the geographic area known as Southern Africa.

[10] According to Applicant the 2nd Respondent is a direct competitor and rival trader of the Applicant rendering for all intents and purposes identical services and supplies a competing brand of a similar product. Bouwer's job description at 2nd Respondent includes those that he had whilst employed by the Applicant. In addition he will also be a brand manager responsible for developing the 2nd Respondent's marketing strategy from a managerial position. The 2nd Respondent will benefit from Bouwer's knowledge and understanding of inter alia, the Applicant's marketing strategies, campaigns and the like.

[11] The Applicant claims Bouwer is in breach of the restraint by being in the employ of a direct competitor within the area prohibited by the restraint, worst in a managerial position with no doubt that its confidential information will be imparted to and used for 2nd Respondent. Also, Bouwer's unlawful conduct poses the Applicant a significant and substantial threat. By virtue of what Bouwer knows, the 2nd Respondent now knows all the details necessary in order to compete for the custom of the Applicant's clients, without having to expend time, cost and energy towards establishing these relationships. All this indicate that the Applicant has satisfied the requirements for the interdict sought. Without the interdict the Applicant will be exposed to real and substantial harm, their apprehension being reasonable.

BOUWER'S ANSWERING AFFIDAVIT

[12] Bouwer raised a point *in limine*, challenging the Applicant's locus *standi* to bring up the application against him when he has signed his contract of employment with Montego Seeds CC a Closed Corporation that was converted to a private company and its name changed to the Applicant. The point was not persisted with during argument and lacked merit.

[13] He admits that the 2nd Respondent is one amongst many competitors in the dog and cat food industry of which Applicant is the market leader whilst the 2nd Respondent has a far smaller percentage of the market.

[14] He argues that:

[14.1] competition cannot be excluded in the market place, and is promoted by society, hence the creation of the Competition Act, Commercial Tribunal and Court.

[14.2] Applicant has failed to make out a case whatever that it has a protectable interest and the provisions of the restraint are not enforceable due to the fact that :

[14.2.1] **the period of the restraint is far too long;**

[14.2.2] **is too wide, as it excludes any competition on his part in the entire Southern Africa;**

[14.2.3] **it seeks to impose a penalty of R25 000.00 per month as "damages"**

[14.2.4] **infringes on his constitutional right to be economically active;**

[14.2.5] **Seeks to limit competition.**

[14.3] that he was not involved in the scientific formulation of the pet feed that the Applicant sells.

[14.4] the pet feed market, especially for dogs and cats is well established and states that his presence or not therein will not alter the competition that exists therein.

[14.5] he was an experienced marketer and sales representative prior to being employed with Montego Feeds CC in 2010 when he was employed as a sales representative for British American Tobacco Company throughout the Republic of South Africa.

[14.6] there is nothing specific or special to the sales of pet feed, that sales representatives of either the Applicant or the 2nd Respondent, or any of their competitors within the market would not know and he did not acquire any

specific knowledge or training that is so exclusive as to constitute a protectable interest. **The bringing out of new packaging or the bringing out of a new flavour of dog biscuit or pet nutrition does not constitute a protectable interest.**

[14.7] typical customers or clients of pet food or nutrition companies, are pet shops, vet shops and feed shops such as cooperatives in the rural areas. Such customers will have on their shelves pet foods of various competitors.

[14.8] The Applicant does not allege, and this did not happen in practice that pet shops sold the pet food of the Applicant exclusively.

[14.9] The new marketing details that were given were only expressed in broad terms without details. He only received limited information provided to him by his erstwhile employer. **The messages communicated six weeks in advance to the actual delivery of the products in question to the customers, and is thereafter known to all and the public at large.**

[14.10] He is not in possession of a spreadsheet and denies that it will be used by the 2nd Respondent and that it contains sensitive or confidential information also that the new product which includes a new flavor dog treat constitute a protectable interest.

[14.11] It is not his or the 2nd Respondent intention to duplicate and / or "counter" any marketing campaigns and the development of its products. He is not involved in the development of new products which he reckons takes many years.

[14.12] **The overlapping to an extent of his job description with the Applicant cannot be restrained and do not entitle the Applicant to the relief sought.** The marketing strategies and campaigns of all competitors in the market are well known and established and nothing he acquired within the employment context of the Applicant would alter or benefit the 2nd Respondent's position.

[14.13] Any member of the public can access, via the internet, yellow pages or the like, who would be the sellers to the members of the public of pet food, such as vets, pet shops and cooperatives. No specific industry related knowledge is required.

APPLICANT'S REPLYING AFFIDAVIT

[15] Applicant's response to that is that:

[15.1] the order sought will not interdict Bouwer from being economically active, or from being employed. It to the contrary seeks to interdict Bouwer from being employed by the 2nd Respondent, because in being employed by

the 2nd Respondent is in breach of the restraint. He is free to seek employment anywhere in the Republic, provided the restraint is not breached in the process. Many employers are not in competition with the Applicant.

[15.2] It does not seek to enforce the recovery of damages but to enforce compliance with the restraint only.

[15.3] It was agreed that the 1st Respondent would not be compensated for complying with the restraint, signing the agreement with no monetary quid pro quo). Bouwer was aware of this when he resigned.

[15.4] It is not its case that Bouwer was privy to or part of the technical and manufacturing processes. The relief sought is also not what is aimed at.

[15.5] The Applicants protectable interest lies in customer connections, business and confidential information and interest of this nature worthy of protection as any technical process.

[15.6] The knowledge of customers' areas of concern, their preferences, payment patterns, preferred products, names of contact persons and general requirements and the like being shared with a direct competitor entitles it to protection of these interests. A smaller undertaking like that of the 2nd Respondent will undoubtedly benefit from Bouwer's employment. Since the industry is small even with more competitors confidential information trade secrets in the hand of a competitor will cause the Applicant irreparable and unquantifiable.

ISSUES TO BE DETERMINED

[16] The issues to be determined are:

[16.1] Whether there is a protectable interest that warrants the enforcement of the restraint of trade.

[16.2] The reasonableness of the restraint ,(looking at the nature, area, and its duration)of trade.

[16.3] Whether or not the restraint infringes Bouwer's constitutional right to be economically active.

LEGAL FRAMEWORK

[17] The following guide has been established by the Appellate Division in the words of EM Grosskop JA in *Sunshine Records (Pty) Ltd v Frohling* 1990 4 SA 782 (A) 794B-E when he said:

"In determining whether a restriction on the freedom to trade or to practice 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 and unfair. The second consideration is that all persons should in the interest of society, be permitted as far as possible to engage in commerce or the professions or, expressing it 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.**" (my emphasis)

[18] In substantiating what was enunciated in *Sunshine*, Nienaber J in *Basson v Chilwan* 1993 (3) SA 742 (A) 767H-I crafted the following four questions that required to be answered in such issues:

- (a) Is daar 'n belang van die een party wat na afloop van die ooreenkoms beskerming verdien?
- (b) Word so belang deur die ander party in die gedrang gebring?
- © Indien wel, weeg sodanig belang kwalitatief en kwantitatief op teen die belang van die ander party dat hy ekonomies nie onaktief en onproduktief moet wees nie?
- (d) Is daar 'n ander faset van openbare belang wat met die verhouding tussen die partye niks te maak het nie maar wat verg dat die beperking gehandhaaf moet word, al dan nie?

So ver as die belang in © die belang in (a) oortref, is die berspreking in die reel onredelik en gevolglik onaf-dwingbaar. Dit is n kwessie van beoordeling wat van geval to geval kan wissel (*Sibex Engineering Sevices (Pty) Ltd v Van Wyk and Another* 1991 2 SA 482 (T) te 486H)

[19] With the dawn of our Constitution in a new democratic South Africa the endorsement of the requirements carried a constitutional context in *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) still in line with the four questions identified in *Basson* Malan AJA stated that:

"The four questions identified in *Basson* comprehend the considerations referred to in s 36 (1) [of the Constitution]. A fifth question, implied by question ©, which may be expressly added, vis **whether the restraint goes further than necessary to protect the interest**, corresponds with s 36 (1) (e) requiring consideration of less restrictive measures to achieve the purpose of the limitation. The value judgment required by *Basson* necessarily requires determining whether the restraint or limitation is **"reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom"**

[20] It has been long standing that a party who alleges that the enforcement of the restraint of trade against him would be contrary to the public interest must prove his contention: see *Magna Alloys* 893A-B 898C-D.

[21] The reasonableness include taking into account the positions of the contracting parties at the time the restraint of trade was concluded assessing

their bargaining strength and at the time of its enforcement, the nature of restraint (Whether or not a restraint regulates and promote or restricts or restrain trade thus injurious to [the public]' .

[22] In case of ex-employees, it is settled law that a clause in a contract of employment that prohibits competition per se by the employee after he left the employment is void; see *Supersafes (Pty) Ltd v Voulgarides* 1975 2 SA 783 (W). His skill is something that he cannot be prevented from taking away with him, even if acquired as a result of the employer's training, nor can he be prevented from using his stock or knowledge, skill and experience; see *Bonnet Schofield* 1989 2 SA 156. Christie in the Law of Contract in South Africa 6th Ed says that "To hold otherwise would place an unreasonable restriction on a person's freedom to earn his living in his chosen occupation." It is also insensitive to the right conferring the freedom of trade, occupation and profession embodied in s 22 of the Constitution.

[23] In relation to protectable interest, propriety interest that can be legitimately protected are trade secrets, including not only manufacturing processes but methods of operating and knowledge of business conditions, and trade connections including lists of customers or potential customers and the attachment formed between customers and employee as the individual with whom they had dealt in the employers business, provided that such attachment is such that it will probably enable the former employee to induce the customers to follow employee to his new employment or potential customers; see redy par 20: Supersafes.

[24] In the case of Bouwer, contrary to what is alleged by the Applicant the restraint of trade was signed by Bouwer when he was looking for employment with Applicant. It is clear that the Applicant being in a privileged position of power applied a very burdensome restraint. Its contemporary relevance is that Bouwer cannot be employed anywhere in South Africa by any company that carries on business of pet food. Since such business is deemed a direct competitor by the Applicant. Bouwer attempted to negotiate his exit, equal bargaining could neither be achieved nor expected. This is reflective of the unreasonableness of the restraint and the scope of area that it was to cover. A period of two years is a very long time especially for a restraint that covers the whole country in South Africa.

[25] The Applicant is not apologetic that what it tried to bring to the fore with the restraint was to avoid Bouwer being in a position of competition with their business. That is why the fact that he will be in a managerial position did not augur well with the Applicant who regards that as direct competition with a competitor. Ignoring that it obviously also stifles Bouwer's growth and being able to take advantage of available opportunities and in that way affect his constitutional right and freedom to participate in the economy, which is

contrary to public interest and constitute an unreasonable restriction on a person's freedom to trade." It is therefore so, that a restraint of trade designed to present competition *per se* is unreasonable; see *Basson* 771 E-F.

[26] Applicant's allegation that Bouwer employment as a manager will put him in a position where he will be able to use their trade secrets gained in its employ even better and effectively as a manager, cannot justify preventing him from putting into use his skills and knowledge in the industry, an opportunity presented by the higher position in a competing company albeit smaller. *Bonnet* has already ruled out the suppression of the usage of skills and knowledge gained from previous employment. Bouwer however denies that he acquires any specific knowledge or training that is so exclusive as to constitute a protectable interest.

[27] The Applicant has alleged that Bouwer is said to have been in a position where he gained access to vital and confidential information as a marketer claiming that its protectable interest lies in customer connections, business and confidential information and interest of this nature that is worthy of protection. The Applicant further reckons that the knowledge of customers' areas of concern, their preferences, payment patterns, preferred products, names of contact persons and general requirements and the like being shared with a direct competitor entitles it to protection of these interests.

[28] Mere customer connection and the like are insufficient to create a protectable interest. The Applicant has not alleged or raised any concern with regard to attachment formed between Bouwer and the customers as an individual with whom they had dealt with in Applicant's business, that such attachment is such that it will probably enable Bouwer to induce the customers to follow him to his new employment or potential customers; See *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at 541. Where the customers solely reliant on Bouwer?, And how personal was their relationship. Was such attachment such that they can be expected to be easy endues to change loyalty in a brand?, These been some of the issues Applicant should have dealt with to show a protectable interest.

[29] Bouwer has indicated that he joined the Applicant being a marketer already with vast marketing skills and knowledge and that he is not in possession of the spreadsheet that the Applicant is alleging has the sensitive and confidential information it regard as part of its protectable interest. Also that the marketing strategies were discussed in general terms at the indaba. Applicant in its Reply does not challenge Bouwer's denial. As a result this will be regarded as a valid statement. Hence absent such information there is nothing to protectable interest.

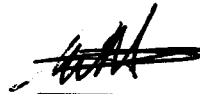
[30] Applicant contends that a smaller undertaking like that of the 2nd Respondent will undoubtable benefit from Bouwer's employment. Bouwer on the other hand indicates that the 2nd Respondent is a relatively very small company t it can hardly be regarded as a threat to the Applicant's business to such an extent that a restraint of such a wide scope would be necessary. The marketing strategies and companies of all competitors in the market are well known and established so nothing he acquired

within the employment contents of the applicant would alter or benefit the 2nd Respondent position. The manner in which marketing at Applicant's place has been described to take place by Bouwer indicates that after a certain period that information is no longer useful as a product would have been launched and known to the public. Therefore the set up does not amount to a protectable interest.

[31] Bouwer has successfully shown that the applicant has no interest to protect arising from his employment, and that the restraint of trade is contrary to public interest due to its unreasonableness.

[32] Under the circumstances:

[32.1] The Application is dismissed with costs



N V KHUMALO J

**JUDGE OF THE HIGH COURT
GAUTENG DIVISION: PRETORIA**

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