IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT JOHANNESBURG)

CASE NO: JR 1514/09

In the matter between:

GLOBAL NETWORK SYSTEMS (PTY) LTD **Applicant**

and

MACK, THOMAS ROBER JAMES **Respondent**

JUDGMENT

LAGRANGE, J

Introduction

1. On 17 July 2009, the applicant launched an urgent application seeking interdictory relief against the applicant in the form of the enforcement of a restraint of trade agreement, which formed part of the respondent's contract of employment with the applicant.

2. The applicant is an information technology service provider. The application followed the termination of the respondent's employment with the applicant on 7 July 2009 in which capacity he had been employed as a 2nd line support filed service engineer.

3. On 24 July 2009, a rule nisi was issued by this court, returnable on 24 November 2009. For various reasons, which are not important for present purposes the matter was postponed until 26 January 2010.

4. The rule nisi interdicted the respondent from directly or indirectly

4.1. revealing or disclosing or in any way utilizing, whether for his or purposes or that of any third party, any of the applicant's confidential information, technical knowhow, systems, methods, processes, clients lists, marketing or financial information;

4.2. soliciting or accepting business or custom from, or dealing with, or supplying services to any existing or potential clients for a period of 12 months from 7 July 2009, and

4.3. from competing unlawfully with the applicant in breach of his restraint of trade.

5. By the time the matter came before the court on that date, the question of urgency was no longer an issue. At the hearing, the applicant also expressly abandoned a contempt application brought against the respondent in an effort to compel compliance with the interim order. The applicant's primary object in pursuing the application was to obtain an order confirming the rule with a view to pursuing a potential damages claim against the respondent.

6. The essence of the applicant's complaint is that the respondent had commenced employment with a client of the applicant, Civcon, after leaving the applicant's

employment and that he was providing the same services to Civcon that he provided on behalf of the applicant to the client.

7. The applicant had a service level agreement with Civcon for the provision of IT services, including acting as a internet service provider, providing electronic mailing facilities and on site assistance with its servers and IT infrastructure. Civcon paid the applicant a basic fee of R 4788-00 for the provision of IT support, up to 14 hours, and R 9576-45 for the hosting of ISP and web related services. The additional IT support before the applicant was employed by Civcon yielded fees for the applicant of approximately R 10,000-00 per month over and above the basic fee.

8. Since the respondent's employment by Civcon in August 2009, the hours of IT support rendered by the applicant have dwindled to insignificant amounts, at least as far as can be ascertained by the undisputed figures provided by the applicant for the period ending 17 September 2009, in response to the respondent's claim that by accepting employment with Civcon, he had no intention of soliciting the custom of Civcon at the applicant's expense or of harming the applicant's interests in the service level agreement with Civcon.

9. The restraint of trade provision in the respondent's employment contract with the applicant read:

> "16 Restraint of trade

16.1 The employee may not for a period of twelve (12) months from the date of termination of this contract, whether on his/her own behalf or on the behalf of any other person, close corporation, partnership or company solicit custom from, deal with or supply any person, close corporation or company with whom the employer dealt at any time during his/her employment.

16.2 Paragraph 16.1 also applies to potential clients in which the employer has shown an interest or with whom the employer was negotiating at the time of the employee's employment in the company.

16.3 This limitation of trade is restricted to the nature of the employer's business, products and services."

(emphasis added)

10. Another provision in the contract dealt with trade secrets and confidentiality binding the respondent *inter alia* not to disclose "trade secrets" or "information confidential to the employer's business". Although interim relief enforcing this provision was granted, the thrust of the applicant's argument on the return day focused on clause 16.1. Even so, on the averments of the respondent in his answering affidavit, taken together with those of the applicant, even if I also consider those in the replying affidavit, do not, in my view, make out a case supporting the applicant's contention that the applicant is revealing confidential information of the applicant to Civcon.

11. On the facts as they emerge on the papers, it seems clear that on his employment with Civcon, the respondent effectively rendered IT services as part of his employment obligations, which he had previously rendered to it as part of the services provided by the applicant under its IT support contract with Civcon. On the face of it, the drop in

hours of IT support provided by the applicant to Civcon was seems to correlate with the respondent's employment.

12. However, the figures supporting the contention of a loss of income were only contained in the applicant's replying affidavit which was filed late and the respondent submits that even if the late filing of the reply was condoned, I should disregard it to the extent that the applicant makes out a case in reply. Even if the replying affidavit is ignored, it is still not really in dispute that the respondent now performs services for Civcon, which include those he previously rendered on behalf of the applicant. In argument, the respondent's representative, Mr Kuhn, conceded that what the respondent does for Civcon was 'to a degree the same' as what he did for it when he worked for the applicant.

13. The respondent argued that as the IT service contract between the applicant and Civcon was still intact there was no prejudice to the respondent occasioned by his employment by Civcon and points out that the applicant was saving the cost of the applicant's salary since his employment by Civcon, being an amount of R 17000-00 per month. The respondent rejects this contention because it assumes the respondent will not have to replace the applicant, whose work consisted of more than just servicing the IT contract with Civcon. In any event, the question of prejudice suffered is secondary to determining the primary question, namely whether or not the respondent did breach the restraint provisions of his contract.

14. The respondent argues further that clause 16.1 cannot be construed as preventing him from taking up employment with a former customer of the applicant. The operative words used to describe the prohibition on the respondent's activities refer to soliciting custom from, dealing with, or supplying customers the applicant dealt with when the respondent was in its employment. I understand these activities to be

intended primarily to characterize the activity of a person who sets themselves up as an alternative provider of the services provided by the applicant, or alternatively assists a competitor of the applicant by the same means. The key issue is whether or not they also include the respondent's activities as an employee of Civcon. The respondent contends that on an ordinary interpretation of clause 16.1 these activities cannot be construed to include employment by a customer to service the same needs that the applicant previously provided to the customer.

15. In response, Mr Snyman to this, referred me to two cases namely ***Sibex Engineering Services (Pty) Ltd v Van Wyk & Another*** **1991 (2) SA 482 (T)** and ***Cinema City (Pty) Ltd v Morgenstern Family Estates (Pty) Ltd & Others*** **1980 (1) SA 796 (A)**. However, apart from the fact that the *Sibex* case decided that the protectable interest the restraint sought to protect in that case was the former employer's confidential information and not its trade interests,[1] the restraint clause under consideration there specifically prohibited the former employee from engaging in direct or indirect competition with the activities of the company '"…whether as principal, agent, or employee…**"** (emphasis added).[2] Accordingly there was no doubt that the prohibition was intended to include indirect competition by the covenantee as an employee of a third party. Moreover, in *Sibex* the former employee had gone to work for a competitor and not a former customer, as in this instance.

16. The allusion to the judgment in *Cinema City* was clearly a reference to those situations in which surrounding circumstances may be considered by a court in determining the meaning of terms of a contract. The Supreme Court of Appeal, has more recently in ***KPMG Chartered Accountants (SA) v Securefin Ltd & Another 2009 (4) SA 399 (SCA)*** abandoned the tenuous distinction between surrounding and background circumstances as classifications for determining the admissibility of

[1] At 488B-D of the judgment
[2] At 485B-C of the judgment

extrinsic evidence to interpret a contract, but nevertheless reaffirmed the importance of adhering to the parole evidence rule. Harms DP, writing for the court, restated the principle thus: "(T)o the extent that evidence may be admissible to contextualise the document (since 'context is everything') to establish its factual matrix or purpose or for purposes of identification, 'one must use it as conservatively as possible' (Delmas Milling Co Ltd v Du Plessis 1955 (3) SA 447 (A) at 455B - C)".[3]

17. The applicant notes that the respondent concedes he should not compete with the applicant, but contends his employment is enhancing rather than conflicting with the IT service agreement which the applicant has with Civcon. It submits that the fact is that the work the applicant performs as an employee of Civcon is in competition with the services provided by the applicant. Competition is what clause 16.1 was designed to prevent, and as an employee the applicant is 'acting on his own behalf'. The only ambiguous portion of the clause is whether the terms 'solicit', 'supply' or 'deal with' extend to the applicant's employment by Civcon, in terms of which part of what he does includes the services he formerly provided to it on behalf of the applicant.

18. The respondent argues that to interpret clause 16.1 of the respondent's contract as including his employment by a customer is not possible on the wording of the clause as its stands, and the applicant can effectively only succeed if it could make out a case for rectifying the contract.

19. On the evidence of the founding and replying affidavit and on the wording of clause 16.1 I do not think the clause was intended to cover a situation in which the respondent takes up employment with a former customer in terms of which he renders

[3] At 410, par [39] of the judgment

some services in-house which he previously provided as an agent of the applicant. I accept that his activity is in competition with the applicant's IT service agreement even if that contract had not been cancelled by Civcon, in the sense that work he performs which would previously have been part of the applicant's service to Civcon will necessarily reduce the hours that the applicant will be required to render the service to Civcon. However, the applicant has failed to establish on an ordinary interpretation of clause 16.1 that the restraint was clearly intended by both parties to cover his employment by Civcon, because it would unduly strain the meaning of the clause to include an employment relationship with a former customer of the applicant.

20. Accordingly, the respondent is not in breach of the restraint clause, even if regard is had to the replying affidavit, if I exclude those parts of it which amount to making out a case in reply.

Order

21. In the light of the above, the following order is made:

    21.1. the rule issued on 23 July 2009 and subsequently extended until 26 January 2010 is discharged, and

    21.2. the applicant is ordered to pay the respondent's costs of opposing the application and of opposing the contempt application.

ROBERT LAGRANGE
JUDGE OF THE LABOUR COURT

Date of hearing: 26 January 2010
Date of Judgment: 28 June 2010

Appearances:

For the Applicant:
Mr S Snyman of Snyman Attorneys

For the Respondent

Mr R Kuhn, Attorney