REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 177/12

In the matter between:

EOH MTHOMBO (PTY) LTD **Applicant**

and

PRELENE BHEEKIE-ODHAV **Respondent**

Heard: **16 March 2012**

Delivered: **22 March 2012**

Summary: Restraint of trade

JUDGMENT

STEENKAMP J

Introduction

1] This is an urgent application to enforce a restraint of trade agreement between the applicant and the respondent, its former employee.

Relief sought

2] Like the shifting sands of the Kalahari, the relief sought by the applicant shifted remarkably from the time the application was launched on 8 March until oral argument was heard on 16 March 2012.

3] The relief sought in the notice of motion was phrased as follows (apart from an order that the matter is urgent):

> "That the respondent be restrained for a period of a year after the termination of her employment with the applicant until 1 March 2013[1] from:
>
> 3.1 for whatever reason, being directly or indirectly interested, engaged, concerned, associated with, be a member of, a shareholder in, a trustee of, a director, agent, consultant, financier, partner or employed by any client of the applicant with which the respondent had engaged whilst in the employ of the applicant;
>
> 3.2 in any manner whatsoever, either personally or through or on behalf of any third party persuading, inducing, encouraging or procuring any employee or contractor, sub-contracted and/or assigned by the applicant group from becoming directly or indirectly employed by or interested in any business that is carried on by the applicant;
>
> 3.3 whilst conducting a competitive activity and/or directly or indirectly interested or engaged, employed or interested in any capacity (including but not limited to advisor, agent, consultant, director, employee, financier, manager, member of a close corporation, member of a voluntary association, partner, proprietor, shareholder or trustee) with any competitor of the applicant causing any client of the applicant to terminate its association with the applicant to transfer its business to or accept the rendering of any services, including prospective services from the respondent or any competitor of the applicant with whom the respondent is directly or indirectly associated, engaged or concerned in any capacity whatsoever."

---

1 The notice of motion in fact referred to "1 March 2012." Mr *Ferreira*, for the applicant, sought leave to amend this date from the bar. As it is common cause that the restraint sought to be enforced would run for a period of one year from 1 March 2012, Mr *de Kock*, for the respondent, had no objection and I granted the amendment.

4] The language in which the notice of motion is couched is far from clear. It appears to have been culled from the language of the restraint of trade clause in the contract of employment between the parties. That contract is not a model of grammatical clarity either. The relevant clauses read as follows:[2]

> "7.2 You hereby undertake that, during your employment and for a period of 12 months calculated from the termination date of this Agreement with the Company and/or Group for whatever reason, you will not be directly or indirectly interested, engaged, concerned, associated with, be a member of, shareholder in, a trustee of, a director, agent, consultant, financier, partner or employed by any Client with which you have engaged whilst in the employ of the Company, without written consent of the Company first being obtained, which consent cannot be unreasonably withheld.
>
> 7.3 You undertake that, during your employment and for a period of 12 months calculated from the date of termination of your agreement with the Company and/or Group, you shall not, in any manner whatsoever, either personally or through or on behalf of any third party persuade, induce, encourage or procure any employee or contractor subcontracted and/or assigned by the Company and/or Group to become directly or indirectly employed by or interested in any business to that carried on by a Client and/or the Company/Group itself or to terminate your contract with the Company and/or Group.
>
> 7.4 You hereby undertake that, during your employment and for a period of 12 months calculated from the termination date of this contract with the Company and/or Group for whatever reason, whilst conducting a competitive activity and/or directly or indirectly interested or engaged, employed or interested in any capacity (including but not limited to advisor, agent, consultant, director, employee, financier, manager, member of a close corporation, member of a voluntary association, partner, proprietor, shareholder or trustee) with any competitor of the Company and/or Group, shall not attempt to entice, solicit or induce any of the Company and/or

2 Capitalisation as in original. Whereas some of the capitalised words are defined – e.g. 'Company' as 'EOH Mthombo (Pty) Ltd' – others, e.g. 'Group', are not.

Group's Clients or customers, whether for the Client's or customer's benefit or otherwise to terminate its association with the Company and/or Group or to transfer its business to or accept the rendering of any services, including prospective services from you and/or any competitor with whom you are directly or indirectly associated, engaged or concerned in any capacity whatsoever."

5] In short, the applicant sought to prevent the respondent from doing any of the following for a period of twelve months:

5.1 being employed by a client (or customer) of the applicant;

5.2 soliciting any of the applicant's employees;

5.3 causing an existing client or customer of the applicant to take its work to the respondent or her new employer.

6] There is no geographical limitation to the restraint of trade clause.

7] As will appear from the background facts, it is common cause that the respondent has taken up employment with a competitor (but not an existing client) of the applicant. There is no evidence that she has attempted to solicit any of its employees to join her, nor that she has caused any of the applicant's existing customers to take their work elsewhere.

8] At the end of oral argument, Mr *Ferreira* restricted the relief sought by the applicant to the following:

1. "The Respondent be restrained for a period of one year after the termination of her employment with the Applicant from 1 March 2012 to 28 February 2013 from:

    1.1. For whatever reason, being directly or indirectly interested, engaged, concerned, associated with, be a member of, a shareholder in, a trustee of, a director, agent, consultant, financier and/or partner employed by or placed at the City of Cape Town, directly or indirectly, through any third party.

1.2. In any manner whatsoever, either personally or through or on behalf of any third party persuading, inducing, encouraging or procuring any employee or contractor, sub-contracted and/or assigned by the Applicant Group from becoming directly or indirectly employed by or interested in any business to that carried on by the Applicant.

1.3. Whilst conducting a competitive activity and/or directly or indirectly interested or engaged, employed or interested in any capacity (including but not limited to advisor, agent, consultant, director, employee, financier, manager, member of a close corporation, member of a voluntary association, partner, proprietor, shareholder or trustee) with any competitor of the Applicant causing any client of the Applicant to terminate its association with the Applicant or to transfer its business to or accept the rendering of any services, including prospective services from the Respondent or any competitor of the Applicant with whom the Respondent is directly or indirectly associated, engaged or concerned in any capacity whatsoever."

Background facts

9] The respondent was initially employed by an entity known as Hetu Consulting cc as a "senior consultant". Hetu was sub-contracted to a contractor known as City Services Management (Pty) Ltd. Through this contract, Hetu deployed the respondent to the City of Cape Town on a project that was conducted for the City's Department of Strategic Development and Geographic Information Systems.

10] The applicant bought the business of Hetu Consulting as a going concern in May 2009. Although the respondent's contract of employment was transferred to the applicant in terms of s 197 of the Labour Relations Act[3], she was asked to – and did – sign a new contract of employment. That contract contained the restraint of trade clause quoted above.

3 Act 66 of 1998 ("the LRA").

11] On 1 February 2012 the respondent resigned on one month's notice. She took up employment with Melon Consulting (Pty) Ltd on 1 March 2012. Although the applicant attempted to cast some doubt on her evidence, I must accept on the basis of the affidavits before me and the rule in *Plascon-Evans (Pty) Ltd v Van Riebeeck Paints Ltd*[4] that the respondent approached Melon and sent her CV to them only in January 2012; i.e. that they had had no prior discussions about her joining Melon and that she approached Melon, and not the other way round.

12] It is common cause that Melon also provides services to the City of Cape Town. On the evidence before me, Melon was given the work after having engaged in an open tender before the respondent joined Melon. After having employed her, Melon deployed the respondent to the City's Corporate Business Improvement Unit.

13] The respondent was employed as a "senior consultant" by the applicant. The applicant did not provide any further detail in its founding affidavit of the exact work that the respondent did for it, other than to say that she had been deployed to the City and that the applicant "renders specific project related services to its clients".

14] In her answering affidavit, the respondent says that she has a B.A. degree in political science and public administration, as well as a postgraduate diploma in human resource management. Before joining Hetu, she worked as project manager, academic head and training manager for various other employers. Melon has now deployed her to the City's Corporate Business Improvement Unit; she points out that this is one of some 53 departments of the City and she says that it has entirely different decision-makers and officials to the department to which she had been deployed by the applicant.

15] The applicant seeks to enforce the restraint of trade clause on the basis that the respondent is doing work for the City, albeit through Melon as her employer; that she has intimate knowledge of the applicant's pricing and its contacts with the City; and that she can cause the applicant harm by

---

4 1984 (3) SA 623 (A).

using that information to its detriment.

Urgency

16] There is no doubt that the application is urgent, and Mr *de Kock* conceded as much. The applicant brought this application as soon as it became aware of the fact that the respondent had taken up employment with Melon and had been deployed to the City. She did not respond to the applicant's initial request for an undertaking along the lines of the relief sought in the notice of motion. The application was therefore dealt with on an urgent basis.

The applicable legal principles

17] I recently summarised the position with regard to restraints of trade in our law, having considered the position before and after the Constitutional dispensation, in *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronjé and Another*[5] and in *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes & another.*[6] I do not intend to repeat that extensive discussion. In summary, though, the position appears to me to be the following:

> "1 Covenants in restraint of trade are generally enforceable and valid. Like all other contractual stipulations, however, they are unenforceable when, and to the extent that, their enforcement would be contrary to public policy. It is against public policy to enforce a covenant which is unreasonable, i.e. one which unreasonably restricts the covenantor's freedom to trade or to work.
>
> 2 Insofar as it has that effect, the covenant will not be enforced. Whether it is indeed unreasonable must be determined with reference to the circumstances of the case.
>
> 3. Such circumstances are not limited to those that existed when the parties entered into the covenant. Account must also be taken of what has

5 (2011) 32 ILJ 601 (LC).

6 Case no J 2073/11 (unreported, Labour Court Johannesburg, 17 October 2011).

happened since then and, in particular, of the situation prevailing at the time the enforcement is sought.

4. Where the onus lies in a particular case is a consequence of substantive law on the issue.

5 What that calls for is a value judgement, rather than a determination of what facts have been proved, and the incidence of the onus accordingly plays no role.

6 A court must make a value judgement with two principal policy considerations in mind in determining the reasonableness of a restraint:

6.1 the first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim *pacta sunt servanda;*

6.2 the second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions.

Both considerations reflect not only common-law but also constitutional values. Contractual autonomy is part of freedom informing the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life. In this sense, freedom to contract is an integral part of the fundamental right referred to in s 22."[7]

A clear right?

18] The applicant is seeking relief in the form of a final interdict. Therefore, it has to show a clear right; the absence of an alternative remedy; and that, if the interdict should not be granted, it will suffer irreparable harm.

19] In order to establish a clear right, the court has to consider whether there is an interest deserving of protection; if so, whether the employee is in a position to threaten those interests; and if so, that must be weighed up against the interest of the employee not to be economically inactive and unproductive. The court must also consider whether any other facet of

7 *Esquire System Technology (supra)* at para [37].

public policy plays a role.[8]

Protectable interests?

20] What are the interests that the applicant seeks to protect, and are they indeed worthy of protection?

21] Mr *Ferreira* blithely stated in his heads of argument that the applicant has "trade secrets" worthy of protection, and that these secrets meet the three general requirements for a trade secret, i.e.:

21.1 it relates to and is capable of application in the trade or industry;

21.2 it is secret or confidential – it is only available and thus known to a restricted number of people or to a close circle, it is not in the public domain;

21.3 objectively viewed it is of economic or business value to the applicant.

22] When pressed in oral argument, though, he could point me to no clear evidence backing up these confident assertions. At best, there is a vague reference to "pricing", raised for the first time in the applicant's replying affidavit. The applicant says in argument that the respondent "continues to interact with various contacts that she has made whilst in the applicant's employ" at the City of Cape Town; but she denies this in her answering affidavit and the applicant provides no evidence for the allegation other than stating so in vague terms. But in any event, the respondent is not employed by the City, but by Melon. Mr *Ferreira* conceded in oral argument that the restraint does not prevent her from taking up employment with a competitor, but only with a client of the applicant. Melon is not such a client (or customer). Therefore, she is not in breach of the first part of the restraint (paragraph 1 of the notice of motion).

23] The second part of the notice of motion would prevent the respondent from soliciting any of the applicant's employees from joining Melon (or any

8 These questions were formulated in *Basson v Chilwan and Others* 1993 (3) SA 742 (A) 767 G-H.

other competitor). There is no evidence that the respondent has attempted or will attempt to do so. Quite simply, the applicant has not made out a case for the relief sought in this respect.

24] The same applies with regard to the third part of the relief sought. There is no evidence that the respondent has solicited any of the applicant's existing clients or customers to take their business elsewhere. The only evidence is that the City of Cape Town has put a component of the many services it procures, out on open tender; that Melon tendered for and was awarded that work; and that it happened before the respondent was employed by or even approached Melon for employment. The applicant has not shown a clear right to enforce this part of the restraint agreement either.

25] In short, with regard to the second question posed in *Basson v Chilwan*[9]*:* even if the applicant had shown that it had interests worthy of protection, there is no evidence that they are being threatened by the respondent.

26] In any event, I consider the restraint so broad as to be unreasonable. The applicant has implicitly conceded this by attempting to whittle down the relief it seeks. As it stands, the restraint clause would prevent its former employee from being employed by any of the applicant's customers anywhere in the world in any capacity for a period of 12 months. Whilst the period may not be unreasonable, the area and the breadth of the subject matter are so wide as to be contrary to public policy and thus unenforceable. This is one of those occasions where the restraint clause is so broadly worded that it militates against the right of the employee to choose her occupation freely, enshrined in s 22 of the Constitution.

27] The applicant's response to this difficulty is to point out that the respondent could have sought its consent which would not be "unreasonably withheld". But these very proceedings make it obvious that the applicant is not willing to grant the respondent consent to be employed by Melon and to be deployed to a different department in the City. Had the applicant granted that consent in these proceedings, it could have sought

---

9 *Supra* at 767G-H.

an appropriate costs order.

Conclusion

28] The applicant has not made out a clear right for the broad restraint it seeks to enforce. Insofar as it has belatedly offered to temper the breadth of the relief sought, our courts have remarked that it is undesirable to cut and trim an overbroad restraint at the behest of the party who drafted it.[10] In this case, the restraint is so broad as to be unenforceable; and in any event, the applicant has not established that the respondent is in breach of it. I am not satisfied that this is a case where a lesser restraint should be imposed on the respondent.

Costs

29] There is no reason in law or fairness why costs should not follow the result. The applicant sought to cast aspersions on the conduct of the respondent, in that she did not seek its consent to take up employment with Melon; but, as I have pointed out, the applicant has not been willing to grant its consent, hence this application. The applicant has also asked me to take into account that the respondent had resigned earlier on and then withdrawn her resignation; but there is nothing on the evidence before me to suggest that she had sinister motives in doing so.

Order

30] The application is dismissed with costs.

_____

Steenkamp J

10 *Henred Freuehauf (Pty) Ltd v Davel and others* (2011) 32 *ILJ* 618 (LC) para [22]; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) 16H-I; *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn and another* 2008 (2) SA 375 (C) paras [40] – [44]; *Esquire Technology (supra)* para [47].

APPLICANT:	A Ferreira
	Instructed by Botoulas Krause Inc, Johannesburg.
RESPONDENT:	C de Kock
	Instructed by VGV Inc, Bellville.