REPUBLIC OF SOUTH AFRICA

Not reportable
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THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 335/14

In the matter between:

ARB ELECTRICAL WHOLESALERS (PTY) LTD	**Applicant**
and	
TEXAN GROVE	**First respondent**
DANE UPTON	**Second respondent**
AFRICAN POWER TRADING (PTY) LTD	**Third respondent**

Heard: 30 May 2014
Delivered: 3 June 2014
Summary: Restraint of trade.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant seeks to enforce restraint of trade agreements against two former employees and their new employer.

[2] The respondents take issue with the urgency of the application. They also raise two further preliminary points. Before dealing with the preliminary points, I will sketch the context by setting out the background to the dispute.

Background facts

[3] The applicant (ARB) sells and distributes electrical products to a range of customers, including Eskom, municipalities and private electrical contractors throughout South Africa and the SADC region. It categorises its offerings as follows:

(a) power and instrumentation cables (comprising approximately 50% of its turnover);

(b) overhead line (OHL) equipment and conductors (comprising approximately 25% of its turnover); and

(c) general electrical contracting material, such as light fittings, switchgear and wiring accessories (comprising approximately 25% of its turnover).

[4] The first and second respondents are former employees of ARB. The first respondent revels in the name of Texan Grove.[1] He has been employed by ARB since 2006, initially as a trainee sales person. He rose through the ranks. When he resigned in December 2013 he held the position of "senior external sales representative". The second respondent, Dane Upton, held the position of "senior internal cable sales person" when he, too, resigned in January 2014. Immediately after they had resigned, both of them took up employment with the third respondent, African Power Trading (Pty) Ltd (APT).

[5] ABR and APT are competitors. Both employees were bound by restraint undertakings. The question is whether, by taking up employment with APT; they have breached those undertakings; and if so, whether the undertakings are reasonable and should be enforced.

[1] Counsel assured me that his surname is Grove and not Grové. The image of a cowboy on horseback riding through a lane of oranges is heard to dispel.

First point *in limine:* Upton's restraint

[6] The respondents (i.e. Grove, Upton and APT) have raised a preliminary question whether Upton is bound by a restraint of trade agreement at all. That is because the relevant part of his employment contract is worded differently to that of Grove – due mainly to bad drafting, it would appear.

[7] Although Grove's restraint of trade clause is not a model of clarity either, it does make sense once one cuts through the clutter. The relevant paragraphs read as follows:

"**Restraint**

1. You shall not during your employment with the company[2] or at any time thereafter, either personally or in the capacity as a director or shareholder or member of a juristic person, utilise and/or directly or indirectly divulge and/or disclose to others (except as required by the terms and nature of your employment of the company) any of the company's trade secrets which have come to your knowledge prior to or during your employment with the company.

…

3. You shall not within a period of one (1) year after the termination of your employment with the company for any cause whatsoever, in connection with any business which carries on business in South Africa and which is similar to compete with or endeavors [*sic*] to compete with the business of the company directly or indirectly offer employment to or employ or cause to be employed any person who is employed by the company at the date of the termination of your employment with the company for any cause whatsoever or within any time within six (6) months immediately preceding such termination.

4. You shall not, for a period of one (1) year after termination of your employment with the company for any cause what so ever [*sic*], either solely or jointly or together with or as an employee, manager or agent for any person firm or body corporate or incorporate, directly or indirectly:

4.1 carry on or assist financially or otherwise be engaged or concerned or interested in;

4.2 be a director o[r] shareholder directly or member of;

4.3 act as a consultant or ad visor [*sic*] to:

[2] "The company" is not defined. One presumes it is meant to refer to ARB; although, in the first paragraph of the contract of employment, it is stated that ARB Electrical Wholesalers (Proprietary) Limited is "hereafter referred to as ARB".

any company, closed [*sic*] corporation or business which carries on business in South Africa which is similar to or competes with or endeavors [*sic*] to compete with the business carried on by the company as at the date of termination of your employment with the company."

[8] The contract continues to explain what is included in "trade secrets", including knowledge of and influence over the company's finances and clients, customers and suppliers.

[9] Stripped down to its intention, it is clear that clause 3 is meant to act as a non-solicitation clause and clause 4 as a restraint of trade, both valid for a period of 12 months.

[10] Upton's restraint clause is to a large extent a mirror image, except that it appears that some clauses have been left out, rendering the subclauses to clause 4 grammatically nonsensical. The relevant portions of Upton's restraint read as follows:

"**Restraint, Confidentiality and Documents**

4. You shall not within a period of one (1) year after the termination of your employment with the company for any cause whatsoever, in connection with any business which carries on business in South Africa and which is similar to or competes with or endeavors [*sic*] to compete with the business of the company directly or indirectly offer employment to or employ or cause to be employed any person who is employed by the company at the date of the termination of your employment with the company for any cause whatsoever or within any time within six months immediately preceding such termination

4.1 carry on or assist financially or otherwise be engaged or concerned or interested in;

4.2 be a director or shareholder directly or member of,

4.3 act as a consultant or ad visor [*sic*] to:

any company, closed [*sic*] corporation or business which carries on business in South Africa which is similar to or competes with or endeavors [*sic*] to compete with the business carried on by the company as at the date of termination of your employment with the company."

[11] It is plain from a comparison of the two contracts of employment that the same flawed restraint of trade clause has been copied and pasted into both

contracts, warts and all. However, the subclauses to clause 4 in Upton's contract do not follow logically from the main clause.

[12] This court had the unfortunate task of making some sense of this unappetising matzah pudding. In order to do so, I had regard to the principles of contractual interpretation that were recently summarised by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality*[3]:

"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence.

Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose for which it is directed and the material known to those responsible for its production.

Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective.

A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.

The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

All this is consistent with the 'emerging trend in statutory construction'. It clearly adopts as the proper approach to the interpretation of documents the second of the two possible approaches mentioned by Schreiner JA in *Jaga v Dönges and Another; Bhana v Dönges and Another*, namely that from the outset one considers the context and the language together, with neither predominating over the other. This is the approach that courts in South Africa should now follow…"

[13] One has to discern a sensible meaning from clause 4 of Upton's contract. The context is described by the heading: "restraint, confidentiality and documents". It is clearly meant to deal with a restraint of trade. And although the main clause in clause 4 deals with non-solicitation, meaning must be attributed

[3] 2012 (4) SA 593 (SCA) paras 18-19.

to clause 4.1. In my view, the only way in which that can be done is to read it as follows:

"You shall not within a period of one (1) year after the termination of your employment with the company ...

carry on or assist financially or otherwise be engaged or concerned or interested in ...

any company, close corporation or business which carries on business in South Africa which is similar to or competes with or endeavours to compete with the business carried on by the company as at the date of termination of your employment with the company."

Or, in an attempt to put it in plain language:

"You may not, for 12 months after leaving ARB, work for a competitor in South Africa."

[14] It is for these reasons that I ruled *in limine* that Upton's contract did contain a restraint clause that would prevent him from working for APT. Whether it is reasonable, is a different question.

Second point *in limine*: urgency

[15] Grove gave one month's notice on 29 November 2013. He left ARB at the end of December 2013. Upton gave notice at the end of December and left on 31 January 2014. ARB launched this application on 5 May 2014, more than three months after Upton left and five months after Grove gave notice. Understandably, the respondents raise the point that the urgency in the matter has been self-created.

[16] In order to decide whether this is so, the circumstances have to be scrutinised rather more closely.

[17] When Grove gave notice, he disclosed that he would be joining a competitor. But he did not say who it would be or what he would be doing. It is only when a representative of ARB attended a site inspection at one of its customers in April 2014 that it realised that Grove had joined APT and was dealing exclusively with an existing ABR customer called Prime Electrical.

[18] Upton did disclose in his exit interview that he was joining APT. But at that stage, ARB did not know that Upton would be doing the same job at APT,

namely selling cables. It only realised that in April 2014 when it saw an APT quote to another customer, VE Reticulation.

[19] On 17 April 2014, as soon as these facts came to hand, ARB's attorneys wrote to Grove and Upton respectively. They pointed out that both employees were in breach of their restraint agreements; and asked for a written undertaking by 22 April 2014 that they would leave APT. The attorneys also wrote to APT asking for a similar undertaking. None was forthcoming. Instead, APT's attorneys responded on 23 April 2014 and denied that APT "has acted unlawfully in any manner in employing Mr Grove and Mr Upton and accordingly does not intend on complying with your client's demand." ARB launched the application a week after that.

[20] The restraint is for a period of 12 months, of which almost half has already passed. The application is, almost by its very nature, urgent. For every day that Grove and Upton remain with APT, they are able to exploit the customer connections they built up with ARB, as will become apparent later. Although it may have appeared at first blush that that urgency has been self-created, I am satisfied that that is not the case. Once it became clear that its interests are indeed threatened, ARB acted as expeditiously as possible. And, as Davis J noted in *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff*[4], breaches of restraint of trade have an inherent quality of urgency.

Third point *in limine*: admissibility of further pleadings

[21] This application was initially set down on the urgent roll before Lagrange J last week, on Thursday 23 May 2014. ARB had filed a replying affidavit on Tuesday, 21 May 2014. On the day of the hearing APT requested an opportunity to file a fourth set of pleadings in order to replicate to what it termed new matter raised in reply. It did so, and ARB filed a fifth set of pleadings responding to it. ARB did so without prejudice and Mr *Gordon* reserve the right to argue that the fourth set of pleadings filed by APT should not be allowed. He argued that point when the matter came before me a week later, on Friday, 30 May 2014.

[4] 2009 (3) SA 78 (C) 89A.

[22] The general rule, of course, is that the court will not ordinarily receive more than three sets of affidavits.[5] But the court retains a discretion to grant a party an indulgence to file a further set of pleadings. That includes instances where an applicant raises something new in its replying affidavit.

[23] There has been much argument whether the replying affidavit does, in fact, introduce new matter. It is perhaps a matter of degree; but I am satisfied that the additional information provided in the replying affidavit did call for a response. It is in the interests of justice for further information to be placed before the court in order to provide it with a fuller picture. I have therefore exercised my discretion to allow the filing of the fourth and fifth set of pleadings.

The applicable legal principles : restraints of trade

[24] Despite some earlier skirmishes about the principles applicable to restraints of trade in a constitutional era, those principles are now well settled. This court discussed them at length in *Esquire*[6] and Van Niekerk J summarised them as recently as two weeks ago in *New Justfun Group*.[7]

[25] In short, an agreement in restraint of trade is enforceable unless it is unreasonable. It will generally be considered unreasonable, and thus contrary to public policy, if it does not protect some legally recognisable interest of the party seeking to enforce it, but merely seeks to eliminate competition.[8]

[26] A party seeking to enforce a restraint must invoke the restraint agreement and prove its breach. A respondent who seeks to avoid the restraint bears an onus to demonstrate, on a balance of probabilities, that the restraint is unenforceable because it is unreasonable.[9]

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[5] *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) 375G – 376C.

[6] *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronjé & ano* (2011) 32 *ILJ* 661 (LC).

[7] *New Justfun Group (Pty) Ltd v Turner & ors* [2014] LALCJHB 177 (14 May 2014).

[8] *Automotive Tooling Systems (Pty) Ltd v Wilkens & ors* 2007 (2) SA 271 (SCA); *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 406 (SCA); *Den Braven v Pillay & ano* 2008 (6) SA 229 (D).

[9] *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874 (A); *Experian South Africa (Pty) Ltd v Haynes & ano* 2013 (1) SA 135 (GSJ), (2013) 34 *ILJ* 529 (SCA).

[27] The well-know test set out in *Basson v Chilwan*[10] for determining the reasonableness of a restraint has stood the test of time and constitutionality. The following questions must be asked:

(a) Is there an interest of the one-party which is deserving of protection?

(b) Is that interest prejudiced by the other party?

(c) If so, does that interest weigh up qualitatively and quantitatively against the interest of the latter party that he or she should not be economically inactive and unproductive?

(d) Is there another facet of public policy that requires that the restraint should be maintained or rejected?

[28] Proprietary interests that are worthy of protection are essentially of two kinds, namely:

(a) confidential matter that could be used by a competitor to gain a competitive advantage, usually referred to as 'trade secrets'; and

(b) relationships with customers, potential customers, suppliers and others that go to make up what is referred to as the 'trade connections' of the business.[11]

[29] The need of an employer to protect its trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with the customer. It is sufficient for the applicant to show that the customer contacts exist and that they can be exploited by the former employee. Once the conclusion has been reached that the former employee could easily induce customers to follow him to a new business, and the new employer is a competitor of the applicant, the risk of harm is apparent.[12]

[30] The onus is on the respondent to prove the unreasonableness of the restraint.[13] Once the applicant has shown that there is confidential information to which the employee had access and which he could transmit to his new

[10] 1993 (2) SA 742 (A).

[11] *Sibex Engineering Services (Pty) Ltd v Van Wyk* 1991 (2) SA 482 (T).

[12] *Rawlins v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) 541 C-D.

[13] Cf *Reddy v Siemens (supra).*

employer, the applicant is entitled to the protection afforded by the restraint. The applicant should not have to content itself with crossing its fingers and hoping that the former employee will not breach the restraint.[14]

Application to the facts

[31] In this case, Grove had close contact with and influence over ARB's customers. He was a senior external salesperson and had been in sales at ARB for more than seven years. He assisted customers with their tendering process and he had created a master file which recorded each customer's pricing and the details applicable to each quote. He managed customers' tenders once those tenders had been awarded.

[32] One of the customers that Grove serviced was Prime Electrical. That company contributed to one third of Grove's sales in the last year of his employment with ARB. Grove now deals primarily with Prime Electrical as a customer for APT. It is quite clear that Grove had customer connections that could induce customers like Prime Electrical to take more of the business to Grove's new employer. Indeed, it appears that sales to Prime Electrical had dropped off significantly since Grove left ARB and that APT has benefited; but the figures are not conclusive. That does not matter. It is enough of that Grove could potentially, in breach of his restraint agreement, induce customers like Prime Electrical to move the rest of their business to APT.

[33] Upton was employed as a senior internal cable salesperson at ARB. He was the most senior member of its cable sales department under the direct manager and branch manager. He was responsible for ensuring that customers' orders, consisting of large quantities of different varieties of cables that had to be delivered at different times of the different sides, ball satisfactorily executed. He had ongoing interaction with ARB's customers and was privy to its confidential information.

[34] APT also services the cabling market. The risk of Upton divulging confidential information relating to cable sales to his new employer is self-evident. For example, Upton is dealing with a company called VE Reticulation, an ARB customer that is now doing business with APT.

[14] *BHT Water Treeatment (Pty) Ltd v Leslie & ano* 1993 (1) SA 47 (W) 57J – 58D.

[35] It is evident that both Grove and Upton were privy to confidential information relating to pricing; and that they had extensive customer connections with ARB. They are uniquely positioned to use this information for the benefit of APT. They are clearly in breach of their restraint of trade agreements.

[36] In weighing up the respective interests of ARB and the two employees, I am not persuaded that the effect on their freedom to work is disproportionate. They can work for any employer anywhere, provided they do not breach the restraint clauses for a period of 12 months. Only seven and eight months, respectively, of that period remains. After that, they are free to take up employment with APT or any other competitor again. In my view, the restraint is not unreasonable.

[37] ARB has established a clear right for the relief it seeks. The respondents have committed and continue to commit an injury, as demonstrated above. The remaining question is whether ARB has another satisfactory remedy.[15]

[38] The theoretical remedy of a damages claim in due course is cold comfort to ARB. A damages claim in these circumstances is difficult to quantify and does not protect its rights at this stage. ARB has satisfied the requirements for a final interdict.

Conclusion

[39] ARB is entitled to the relief it seeks. The relief sought in the notice of motion, though, is cast in the same wide terms as the restraint of trade clause. In my view, the actual relief can be simplified without detracting from the relief due to ARB. I intend formulating the order in simpler terms.

Costs

[40] Both parties have asked for costs to follow the result. However, Mr *Gordon* submitted that the complexity of the matter did not necessitate the use of senior and junior counsel by ARB. As he pointed out, he was able to represent all three respondents very competently as a single counsel with the assistance of

[15] *Setlogelo v Setlogelo* 1914 AD 221.

his attorney. I agree. Although restraint of trade disputes are never simple, this dispute did not raise any new legal questions or any matters of such factual complexity that it necessitated the use of two counsel.

Order

[41] I therefore order that:

(a) The first and second respondents, Grove and Upton, are interdicted and restrained until 31 December 2014 and 30 January 2015 respectively, and within the Republic of South Africa:

(i) from employing, offering employment to or causing to be employed by a competitor anyone who was employed by ARB in the period from June 2013;

(ii) from working for or otherwise being engaged in the business of the third respondent, APT, or any other competitor of ARB.

(b) Grove and Upton are interdicted from disclosing any of ARB's trade secrets to any third party.

(c) The respondents are ordered to pay the costs of this application – including the postponement on 22 May 2014 -- jointly and severally, the one paying, the other to be absolved, including the costs of one counsel.

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Anton J Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Christopher Whitcutt SC (with him Claire de Witt) Instructed by Brian Kahn, Johannesburg.
RESPONDENTS:	Roy Gordon Instructed by DLA Cliffe Dekker Hofmeyr, Cape Town.