REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 536/15

In the matter between:

OASYS INNOVATIONS (PTY) LTD t/a GL EVENTS OASYS **Applicant**

And

BEULAH HENNING **First Respondent**

ASHLEIGH MASFEN **Second Respondent**

Heard: **4 September 2015**
Delivered: **10 September 2015**
Summary: Restraint of trade.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, an events management company, seeks to enforce an agreement in restraint of trade against two of its former employees, Ms Beulah Henning and Ms Ashleigh Masfen.

Background facts

[2] The applicant, Oasys, conducts the business of an infrastructure service provider to companies that present large scale events such as the Cape Wine Show, the Cape Town International Jazz Festival and the Mining Indaba. The respondents have worked for it for a considerable length of time – Ms Henning for 15 years and Ms Masfen for seven years. They both signed agreements in restraint of trade. At the time when they left the company, they were employed as "client liaison officer" and "key accounts manager" respectively.

[3] The agreements, as is so often the case, are not a model of clarity or of plain language drafting. The pertinent parts read as follows:

> "3 RESTRAINT
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> In consideration for the benefits in the executive will derive from his [*sic*] association with the company, the executive shall, for the period of his employment with the company and for a period of 24 months, reckoned from the termination date:
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> 3.1 in the event of the executive being employed or directly or indirectly having or holding any interest or position with or in any undertaking which is a company client, be restrained from procuring or in any way influencing the position such that the services provided to that company client, or any part thereof, be terminated or attended to by any undertaking (including the company client itself) other than the company;
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> 3.2 in the event of the executive acting as consultant to or being employed by any undertaking, or directly or indirectly acquiring or holding any interest or position whatsoever with or in any undertaking which at the time undertakes/enjoys patronage or clientele (in the form of services) from any undertaking which is a company client, be restrained from:

3.1.1 directly or indirectly attending to, assisting with or in any way being involved in/or performing services to or for such company client; and / or

3.2.2 directly or indirectly attending to, assisting with or in any way being involved in a pitch for any new business services to any company client;

3.3 in all cases, be restrained from directly or indirectly:

3.3.1 soliciting any business of a company client, for his own benefit or for the benefit of any undertaking other than the company itself; and/or

3.3.2 offering employment to or employ or cause to be employed or solicit for employment, during the period of the restraint, any employee of the company who:

3.3.2.1 is employed by it; or

3.3.2.2 was employed by it during the lessor [*sic*] of the following periods prior to the offer of employment, employment or solicitation for employment:

3.3.2.2.1 eighteen months; or

3.3.2.2.2 in the event of the executive's employment with the company terminating and that period of employment being less than the period referred to in 3.3.2.2.1, the actual period of the executive's employment with the company; and/or

3.3.3 divulges to any third person or in any other manner making use of (whether or not on his own behalf) any know-how, trade secrets or confidential information which is not information already forming part of the public domain."

[4] The term "company clients"[1] is defined as "any person for whom the company currently undertakes or has undertaken any services during… [the period of] 18 months preceding the termination date." The term "services" is meant to be defined as "the services listed on annexure 'A' hereto". Annexure "A" to the agreement is blank.

[5] Henning and Masfen both resigned on 1 May 2015 with one month's notice. The applicant alleged in its founding affidavit that Henning is employed by an undertaking called Big Show Stoppers that is run by a

[1] The applicant referred to "clients" instead of "customers" throughout, although it is not a professional services company.

former supplier of the applicant, Mr Philip Glasser. In response, Henning denies this. However, she does not explain why both she and Masfen used email addresses with the suffix "@bigshowstoppers.co.za" when corresponding with an entity called Gearhouse – a supplier used by the applicant – and Conferences et al – a long-standing customer of the applicant. It is only in her supplementary affidavit, delivered on 21 August 2015, that Henning says the following:

> "Mr Philip Glasser, a previous supplier of the applicant, approached us during or around March 2015 and offered for us to go into business with him.
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> …
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> We began the process of launching BSS (Big Show Stoppers) during or around the beginning of June 2015. At that time, however, BSS consisted more of ideas than anything else. As time progressed, email addresses and a temporary base to work from were established. This growth is typical of any start-up company. At the time I deposed to my affidavit, BSS was not even a registered company, in fact it was not even trading."

[6] The respondents' subterfuge does not end there. It appears from a CIPRO search by the applicant that the two respondents and Glasser are shareholders and directors of the company trading as Big Show Stoppers that was registered in May 2015 already.

[7] Gearhouse provides rigging services. A long-standing customer of the applicant, Ms Deidre Cloete of an entity known as Conferences et al, organises the annual Cape Wine exhibition. She contacted the respondents after they had resigned for assistance to secure rigging services for Cape Wine. They introduced her to Gearhouse to facilitate this. However, the respondents point out that Gearhouse is not the applicant's customer; Conferences et al is. Gearhouse is simply a supplier. Nevertheless, the respondents interacted with both and facilitated the services to be supplied to the Cape Wine show through Conferences et al.

[8] Mining Indaba LLC – the international company that organises the annual mining indaba in Cape Town --- is a longstanding customer of the applicant. The first respondent, Ms Henning, approached Mining Indaba to

solicit its custom for the Indaba to be held in February 2016. On 1 July 2015 Mr Tracy (or "Tray") Feinsilver sent the applicant a letter saying that it had decided to put the stand build for the 2016 mining indaba out to bid. (The applicant had done the work from 2010 to 2015). The applicant responded, thanked Feinsilver for his openness and transparency, and told him that it had instituted interdict proceedings against the respondents. Feinsilver replied on 2 July 2015 and said that Henning had indeed sent him a request to submit a bid for the 2016 Mining Indaba.

[9] In her supplementary answering affidavit, Henning says that the email correspondence between the applicant and Feinsilver "is not an accurate reflection of what actually transpired". However, other than claiming that the email correspondence "had been taken out of context" she does not explain what actually did transpire; and, most significantly, she does not deny that she did approach Feinsilver and ask him to bid for the 2016 Mining Indaba.

The relief sought

[10] On the day of the hearing, the applicant sought and was granted an amendment to its notice of motion. It seeks to interdict both respondents from the following for a period of 24 months from 30 May 2015:

10.1 "soliciting business for their own benefit, or the benefit of the person or entity that trades as Big Show Stoppers, or any undertaking other than the applicant itself, from any of the applicant's clients with whom it currently undertakes or has undertaken business, within an 18 month period calculated from 1 June 2015, including but not limited to the clients reflected in annexures 'A' and 'B' hereto;

10.2 employing or offering employment or causing employment to be offered or soliciting for employment any of the applicant's employees who were in or are currently in its employ or were in its employ within a period of 18 months calculated from 1 June 2015;

10.3 divulging to any third person or in any manner making use of (whether or not for their own benefit) any know-how, trade secrets, or

confidential information which is not information already in the public domain."

[11] The applicant also seeks the following relief:[2]

> "That the first and second respondents are interdicted and restrained in the event of them being employed or directly or indirectly having or holding any interest or position with or in an undertaking which is a company client whose name appears in annexure 'A' or 'B' to the applicant's notice of motion from procuring or in any way influencing the position such that the services provided to that company client, or any part thereof, be terminated or attended to by any undertaking (including the company client itself) other than the company."

[12] The relief sought in the second paragraph is far from clear, evidently because it has to parrot the wording of the restraint agreement. What it means, in effect, is that the respondents may work for any of the applicant's competitors. What they may not do, is to entice work away from a "company client" (i.e. one of applicant's customers); or influence such a customer to terminate its contract with the applicant and to go elsewhere. They may not use their interest in a competitor – and their knowledge of the applicant's business – as a springboard to attract the custom of the applicant's customers.

[13] The applicant says that the respondents have already breached the restraint; that they are in the position misuse its customer connections and confidential information for their own benefit; and that they should be prevented from doing so. The respondents deny that they are in breach. They also argue that the restraint is overbroad, unreasonable and thus unenforceable.

Evaluation / Analysis

[14] The principles on deciding disputes about restraints of trade are well known. As the SCA held in *Reddy v Siemens Telecommunications (Pty) Ltd*:[3]

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[2] Grammar *verbatim* as in notice of motion.

[3] 2007 (2) SA 486 (SCA) para [14].

> "Where the onus lies in a particular case is a consequence of the substantive law on the issue. I have pointed out that the substantive law as laid down in *Magna Alloys*[4] is that a restraint is enforceable unless it is shown to be unreasonable, which necessarily casts an onus on the person who seeks to escape it. But if the rule were to be reversed – to provide that the restraint is not enforceable unless it is shown that it is reasonable – which would necessarily cast an onus on the person seeking to enforce it to allege and prove that the restraint is reasonable the result in the present case would be the same. For in the present case the facts concerning the reasonableness or otherwise of the restraint have been fully explored in the evidence, and to the extent that any of those facts are in dispute that must be resolved in favour of Reddy (these being motion proceedings for final relief). If the facts disclosed in the affidavits, assessed in the manner that I have described, disclose that the restraint is reasonable, then Siemens must succeed: if, on the other hand, those facts disclosed that the restraint is unreasonable in Reddy must succeed. But that called for is a value judgement, rather than a determination of what facts have been proved, and incidence of the onus accordingly plays no role.
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> A court must make a value judgement with two principal policy considerations in mind in determining the reasonableness of the restraint. The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim *pacta servanda sunt*. 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."

[15] The test for determining the reasonableness or otherwise of an agreement in restraint of trade is also well known, and it remains that set out in *Basson v Chilwan*:[5]

15.1 Is there an interest of the one party which is deserving of protection at the termination of the agreement?

15.2 Is such interest being prejudiced by the other party?

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[4] *Magna Alloys and Research (SA) Pty Ltd v Ellis* 1984 (4) SA 874 (A).

[5] 1993 (3) SA 742 (A) 776H – 777B. See also *Esquire System Technology (Pty) Ltd v Nortje* (2011) 32 *ILJ* 601 (LC); *Pinnacle Technology Shared Management Services (Pty) Ltd v Venter* [2015] ZALCJHB 199 (14 July 2015).

15.3 If so, does such interest so weigh up qualitatively and quantitatively against the interest of the latter party that the letter should not be economically inactive and unproductive?

15.4 Is there another facet of public policy having nothing to do with the relationship between the parties, but which requires that the restraint should either be maintained or rejected?

[16] Before considering the reasonableness of the restraint, I shall consider whether there has been a breach.

Breach: Mining Indaba LLC

[17] The approach to Mr Feinsilver of Mining Indaba LLC is clearly in breach of the restraint of trade agreement. The respondents are restrained from "soliciting any business of a company client". They have, together with Big Show Stoppers, solicited the business of the Mining Indaba. And the prohibition on soliciting business includes a response to an invitation by a customer to submit a tender.[6] Nothing further need be said in this regard.

Restraint unreasonable?

[18] The first question to be asked is whether the applicant has an interest worthy of protection.

[19] The applicant relies on the respondents' customer connections and its trade secrets.

[20] The test with regard to customer connections has been set out by the SCA in *Rawlins v Caravantruck (Pty) Ltd*:[7]

> "The need of an employer to protect his trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he leaves the employer's service he could easily induce the customers to follow him to a new business (Joubert *General Principles of the Law of Contract* at 149). Heydon *The Restraint of Trade Doctrine* (1971) at 108, quoting an

[6] *Sellers v Eliovson* 1985 (1) SA 2013 (W).

[7] 1993 (1) SA 537 (A) at 541 D-I.

> American case, says that the 'customer contact' doctrine depends on the notion that
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> 'the employee, by contact with the customer, gets the customer so strongly attached to him that when the employee quits and joins arrival he automatically carries the customer with him in his pocket'.
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> …
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> Whether the criteria referred to are satisfied is essentially a question of fact in each case, and in many, one of degree. Much will depend on the duties of the employee; his personality, the frequency and duration of 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 relationship (including whether an attachment is formed between them, the extent to which customers rely on the employee and how personal their association is); how competitive the rival businesses are; in the case of a salesman, the type of product being sold; and whether there is evidence that customers were lost after the employee left."

[21] In this case, the respondents were employed as "client liaison officer" and "key accounts manager" respectively. It was their job to maintain contact with customers. They were in a prime position to carry those customers with them. And there have already solicited some of those customers, most notably Mining Indaba LLC. The respondents, through Big Show Stoppers, are already liaising with Conferences et al – one of the applicant's customers – to provide services for the Cape Wine expo that will take place next week, from 15-17 September 2015. They have intimate knowledge of the customers' requirements and business, built up over many years. And they have intimate knowledge of the applicant's pricing structures and incentives. They are the ones who provided quotes for services to the applicant's customers; for example, Henning quoted – on behalf of the applicant – for Cape Wine 2015 to Conferences et al shortly before she resigned. As the court pointed out in *Meter Systems Holdings Ltd v Venter*:[8]

> "Information relating to the prices at which one person has tendered competitively to do work for another is confidential in the hands of one who

[8] 1993 (1) SA 409 (W) at 430D.

stands in a fiduciary relationship to the tenderer: *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* 1998 (2) SA 54 (T) at 64D and 67F-68C."

[22] Having established that the applicant has a protectable interest, it is clear from the evidence that the respondents have prejudiced it and that there is a real likelihood that they will carry on doing so if not prevented.

[23] Enforcement of the restraint will not make the respondents economically inactive or unproductive. Firstly and importantly, they are not being prevented from working for a competitor. Secondly, the applicant has agreed that the restraint be restricted to the Western Cape. Although it is for a fairly lengthy period of two years, the respondents will be able to work in the same field in any other area for that period, such as Gauteng where many local and international conventions, conferences and exhibitions are held. And the period itself, although at the outside of what is generally considered reasonable, is not unreasonable in the context of this industry, as many conferences and conventions take place on an annual or even biennial basis.

[24] There is, in my view, no other aspect of public policy that militates against the restraint being enforced. The respondents are astute businesswomen who entered into the restraint agreements knowingly and willingly. They can pursue the same business elsewhere for two years, and thereafter in the Western Cape, should they so wish; and in any event, they are free to take up employment with the applicant's competitors, provided they do not target its existing customers for the next two years. It does not go further than necessary to protect the applicant's interests.[9]

Conclusion

[25] Against this background, I am satisfied that the respondents are in breach of the restraint of trade. I am also satisfied that, restricted to the geographical scope of the Western Cape, the restraint is reasonable and must be enforced.

[9] Cf Wunsh J in *Kwik Kopy SA (Pty) Ltd v Van Haarlem* 1999 (1) SA 472 (W).

Costs

[26] With regard to costs, I take into account the principles of both law and fairness.[10] The respondents have flagrantly breached the restraint of trade agreement and attempted to hide that fact in their answering affidavit. They should pay the applicant's costs, with one *caveat*: The applicant brought the application on an urgent basis. When it came before Rabkin-Naicker J on 31 July 2015, the applicant sought a postponement in order to file a supplementary affidavit. It proceeded to deliver an affidavit containing new material, necessitating yet further affidavits from the respondents. When the matter eventually served before me on 4 September, the parties had delivered seven sets of pleadings between them, instead of the usual three sets allowed in motion court proceedings. I allowed it, as the further information contained in those affidavits was relevant.[11] I also granted condonation for the late filing of the respondents' further answering affidavit to the applicant's supplementary replying affidavit; and the late filing of the respondents' heads of argument. But it would not be fair for the respondents to be held liable for those costs, given the delivery of further affidavits by the applicant.

Order

[27] I therefore make the following order:

27.1 The respondents are interdicted and restrained for a period of 24 months, calculated from 30 May 2015, and in the province of the Western Cape, from:

27.1.1 soliciting business for their own benefit, or the benefit of the person or entity that trades as Big Show Stoppers, or any undertaking other than the applicant itself, from any of the applicant's customers with whom it currently undertakes or has undertaken business within an 18 month period calculated from 1 June 2015;

[10] As this Court is enjoined to do by virtue of s 162 of the LRA. The parties have elected to litigate in this Court and not the High Court, both courts having concurrent jurisdiction.

[11] Applying the principles in *MISA / SAMWU v Madikor Drie (Pty) Ltd* [2006] 1 BLLR 12 (LC).

27.1.2 employing or offering employment, causing employment to be offered, or soliciting for employment any of the applicant's employees who were in or are currently in its employ or were in its employ within a period of 18 months calculated from 1 June 2015;

27.1.3 divulging to any third person or making use of any know-how, trade secrets, or confidential information which is not information already in the public domain;

27.1.4 procuring or in any way influencing their position with an undertaking such that the services provided to a company customer be terminated, or attended to by any undertaking other than the company. (This provision applies only if the respondents are employed by a company customer).

27.2 The respondents are ordered to pay the applicant's costs, jointly and severally, excluding the costs for 31 July 2015 and the costs associated with the pleadings filed between 31 July and 4 September 2015.

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Anton Steenkamp
Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Deborah Watson Instructed by Shepstone & Wylie.
RESPONDENTS:	Claire Cawood Instructed by Michael Ward attorneys.