



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

C355/2022

In the matter between:

HG MOLENAAR & CO (PTY) LTD

Applicant

and

DILLON WIGGILL

First Respondent

REA SA (PTY) LTD

Second Respondent

Heard: 26 August 2022

Delivered: 2 September 2022 by email; deemed received at 10.00hr on 5 September 2022.

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application to enforce a restraint of trade. It was initially set down for hearing on the 10 August 2022, when interim relief was sought, and postponed by agreement to the 26 August 2022. The matter was heard as a

final application with four affidavits filed of record. The Notice of Motion in the proceedings sought the following relief:

- “1. Dispensing with the usual forms of service and process provided for by the Rules of Court and permitting this application to be heard as one of urgency pursuant to the provisions of Rule 8.
2. That a rule *nisi*, operative as an interim interdict and *mandamus*, be issued in the terms set forth in paragraph 3 below, pending a further and fuller hearing by the above Honorable Court on a date allocated by the Registrar of the above Honourable Court:
3. Interdicting and restraining the First Respondent at any time prior to 31 July 2023 from rendering services in any capacity, including as an employee, to the Second Respondent anywhere in the Western Cape or Northern Cape regions;
- 3.1. Alternatively, interdicting and restraining the First Respondent from disclosing any confidential information about the customers of the Applicant, including their identity, technical needs or any other service and/or maintenance related information to the Second Respondent;
- 3.2. Alternatively, interdicting and restraining the First Respondent at any time prior to 31 July 2023 from approaching, soliciting, providing services or quotes, referrals or advice to any customer of the Applicant within the Western Cape or Northern Cape regions in any capacity whatsoever.
4. Interdicting and restraining the Second Respondent from: -
- 4.1. Employing or otherwise securing the services of the First Respondent at any time prior to 31 July 2023;
- 4.2. Using any confidential information belonging to the Applicant that it acquired from any person whatsoever, including the Applicant's customer list and any other information about the Applicant's technical needs or requirements.
5. Directing that the costs of this application is paid by any Respondent opposing this application.”

- [2] The applicant company is part of a global group. Its business includes the distribution, maintenance and repair of Videojet printers, and the sale of consumables associated with these. This is a small part of its overall business. Videojet printers are designed and manufactured in the USA and distributed in South Africa by the applicant. The Videojet printers are industrial and are used mainly in production lines to code products with information, such as batch codes sell-by dates or production dates. Due to the high level of printing, the printers have to be serviced regularly and any faults or breakdowns need to be repaired. Consumables, such as ink are also supplied to applicant's customers.
- [3] The applicant employs 6 Field Service Technicians in the Western and Northern Cape and one of these was the first respondent (Wiggell). The technicians serve 409 customers in the Western Cape and 32 customers in the Northern Cape. The applicant avers that it is a requirement that Field Service Technicians should be directly contactable by customers and they are expected to build and maintain excellent relationships with them.
- [4] A further averment by the applicant is that while it does have a Sales Department, a considerable amount of the supply of new printers and consumables is driven by the Field Service Technicians. It is stated that Wiggell generated 434 field service notes during the period 6 January 2020 and 27 July 2022. He thus provided on average 14.5 customer visits each month.
- [5] Wiggell was employed by the applicant on 13 April 2015 as a Learner Technician. Since then he was promoted to Workshop Technician and then to Field Service Technician in May 2018. He was earning in the amount of R18 000.00 a month when he resigned from the applicant on 5 July 2022. He informed the applicant that he had accepted a position at the second respondent as a Technician and asked to be released from the restraint agreement he and all other employees of the applicant had signed.
- [6] It is averred by the Technical Manager that he advised Wiggell that the applicant could not release him as this would impact on its installation base comprised of its customers. The reason proffered for this refusal is that Wiggell had established excellent relationships with these customers over the previous four

years and “is in a position to strongly influence their purchasing decisions going forward”.

- [7] The restraint relied upon is entitled the “Intellectual Property Protection Agreement” (IPPA) and reads as follows:

“INTELLECTUAL PROPERTY PROTECTION AGREEMENT

between

HG MOLENAAR & CO (Pty) Ltd

and

Dillon Wiggill

1. Acknowledgement of access to information

By signing this letter you are acknowledging that you will be in close personal contact with the organization, clients, potential clients and suppliers, and will be expected to establish the necessary rapport with those clients and colleagues for the purposes of conducting HG Molenaar’s business. In this capacity you will have access to all HG Molenaar’s operations, its clients and potential clients as well as its designs and manufacturing information and all the confidential information relating thereto.

2. Acknowledgement of likelihood of dissemination of information and consequences thereof

Furthermore you acknowledge that whether during or after the termination, for whatsoever reason, of this Employment Contract, between you and this company, if you were to join or perform independent services for any competitor of HG Molenaar, then the benefit of the confidential information and skill acquired, would inevitably become available to the competitor and enable it to compete unfairly with HG Molenaar.

3. Acknowledgement of consequences of information dissemination and agreement to protect intellectual property

Furthermore you acknowledge that if a competitor of HG Molenaar were to utilize your services, HG Molenaar could be prejudiced. Therefore, you agree that after the termination of this contract for whatsoever reason, you will not have any further dealings with any competitor of this company for a period of 12 (twelve) months, unless written permission is received from HG Molenaar. Such written permission shall not be unreasonably withheld.

Agreement to Protect Intellectual property

You further agree that you will not approach, solicit, provide services or quotes, referrals or advice, that does or could prove damaging to HG Molenaar, to any of its competitors in the province in which you were active while at HG Molenaar, be it directly or indirectly, whether as Director, Manager, Employee, Agent, Contractor, Consultant or in any other capacity, in any concern or business other than that of HG Molenaar, for a period of 12 (twelve) months after termination of this contract for whatever reason, unless written permission is received from HG Molenaar. Such written permission shall not be unreasonably withheld.

5.

Non-solicitation

Please note that while it is our Customer's responsibility not to directly solicit any of HG Molenaar's employees, it is in your interests to be aware of and understand this non-solicitation agreement. No customer may during the term of their lease and less than two (2) years after termination or expiration of their lease, solicit any HG Molenaar employee and vice versa.

6.

HG Molenaar & Co Pty Ltd acknowledges that this Intellectual Property Protection agreement applies only if the employee whose name appears hereon does indeed have possession of confidential information which could prove damaging to HG Molenaar & Co. If there is patently no sensitive and confidential information involved, then this Intellectual Property Protection contract is not enforceable.

7.

If any provision of this Agreement shall be held to be invalid, illegal, unenforceable or in conflict with the law, the validity, legality and enforceability of the remaining provisions shall not in any way be affected or impaired thereby.

By signing this letter you will be attesting that you agree and you have read and understood the above Intellectual Property Protection Agreement and that it is in your opinion fair and reasonable in its entirety.

Kindly acknowledge receipt and acceptance of this letter by signing and returning a copy to the Human Resource Division.

Yours sincerely

HG Molenaar & CO (PTY) LTD”

[8] It is applicant's case that the purpose of the IPPA is to protect the applicant's intellectual property, specifically its confidential information and customer relationships (referred to in paragraph 1 of the IPPA). It submits that paragraph 6 of the IPPA prevents it from applying the IPPA to every employee blindly. Wigill was not required to sign it until he was promoted to Field Service Technician. In joining the second respondent, the applicant submits that Wigill has breached the restraint.

[9] On the facts of Wigill's employment with the applicant, the answering affidavit denies that he has established and maintained relationships with the applicant's customers worthy of protection in law. Wigill avers that he was one of six technicians employed by the applicant to render maintenance and repair services on industrial printers, which were sold by a dedicated sales team of the applicant, whose job it is to establish and maintain customer relationships for that purpose. He was the second most junior of the 6 technicians, all of whom have relationships with applicant's customers similar to those he had. The head of the technicians is still employed by the applicant.

[10] In answer, it is pointed out that Wigill as a technician deals with the blue collar workers on the factory floor or manufacturing plant to render repair and maintenance services. These blue collar workers are not tasked with the responsibility to decide whether a new industrial printer would be purchased, and if so, from whom and at what price. In general this is done by the procurement department of customers after consulting the production manager, who would consult the maintenance manager. Wigill avers that he had no relationship with the procurement department of any of the applicant's

customers. That is the job of the applicant's sales team. Wiggill further emphasizes that he only visited a customer's premises about once a month for about two hours and has not visited all of the applicant's customers.

- [11] In as far as the business of the second respondent is concerned, it does not sell Videojet printers or repair or maintain them. It sells and supplies REA printers and consumables. The second respondent also provides repair and maintenance services in relation to REA printers. As a distribution agent of REA Globa, the second respondent is not permitted to distribute, service or repair products that the applicant distributes. Wiggill also relies on the fact that Videojet printers have a lifespan of 5 years and longer. The applicant has failed to allege that any of its client's printers will come to an end of their lifespan during the period of the restraint.
- [12] Wiggill insists that he is not in possession of anything relating to the applicant which could conceivably fall within the ambit of 'confidential or sensitive information'. Nor does he have access to its customer base or any influence over any customer. The notion that he could influence the buying of an industrial printer which can cost in the region of R90,000 is described as preposterous by him. He acknowledges that applicant and the second respondent do share some common customers. The applicant in reply has confirmed this, and stated that these number eight (8).
- [13] The applicant has annexed a number of emails to its replying papers in order to demonstrate the extent of Wiggills rapport with its customers. The customers names are redacted on the emails and the deponent to applicant's affidavits is neither the author or recipient of same. None of the emails are addressed by the deponent with a point of substance. Nevertheless, in the fourth affidavit Wiggill attempts to the best of his ability, given various redactions contained in them, to deal with these. He avers that the emails reflect that he was sometimes a conduit between customers and applicant's sales department and provide no basis for substantiating that he had a rapport with applicant's customers at a level higher than his maintenance duties. In dealing with an annexure that was included to show that in five instances he was able to successfully refer business to applicant's sales team in an 8 month period (when such commission was applicable) he avers that: "the total commission earned by me

in respect thereof was R850. Only one of these transactions related to a printer, whilst the others related to a 'wheelbase' or a 'wash station'. The incentive in respect of the printer amounted to R350."

The IPPA

[14] It is necessary to consider the IPPA and its construction. For the respondents, Advocate Roux submitted that the golden thread running through the agreement is the protection of confidential information. This is reflected in the title to the agreement and the headings to the clauses of the agreement which are acknowledgements of access to information, consequences of dissemination of information, agreement to protect intellectual property and most importantly the acknowledgement that the agreement only applies if the particular employee indeed has in his or her possession confidential information which could prove damaging to the applicant.

[15] The applicant submits that the intellectual property which the applicant seeks to protect in this agreement covers all aspects of the applicant's business, not only the Videofet department. In other parts of the applicant's business, which are not relevant to this application, there are designs and manufacturing information which is also protected by the IPPA. However, it is argued, that part of the intellectual property protected by the agreement, are client relationships and confidential information about clients. Confidential information referred to in the agreement, it submits, includes the relationships (rapport) with clients and their information.

[16] Applicant refers to the first paragraph of the restraint in the above regard and avers in reply that it relies on paragraph 4 of the IPPA, which reads: "You further agree that you will not approach, solicit, provide services or quotes, referrals or advice, that does or could prove damaging to HG Molenaar, to any of its competitors in the province in which you were active while at HG Molenaar, be it directly or indirectly, whether as Director, Manager, Employee, Agent, Contractor, Consultant or in any other capacity, in any concern or business other than that of HG Molenaar, for a period of 12 (twelve) months after termination of this contract for whatever reason, unless written permission

is received from HG Molenaar. Such written permission shall not be unreasonably withheld.”

Evaluation

[17] The high watermark of the notion that Wiggil should be considered in breach

of the IPCC relied on by applicant, is that he may be in a position to sell REA printers to replace the Videojel printers in use by customers of the applicant. In other words, that he would have the influence to convince applicant's customers to change their printers and to then to sell machines that cost in the region of R1 million to customers of the Applicant, when he is employed as a technician by second respondent. This is in a situation in which the commission he earned in an instance where he was able to refer a customer to applicants sales department, earned him R350. This he may do, the applicant suggests at the premises of the 8 customers (out of more than 400) that the applicant and the second respondent share. This is how the averment is worded in reply:

“Bearing in mind that Wiggil's loyalty will have shifted to the second respondent, he will be in the perfect position to advise the customer that it is time for an upgrade, and then to recommend to the customer that the Videojel printer should be replaced with a REA printer. This is the benefit that the second respondent will derive from the employment of Wiggil”.

[18] The above averment is made in the context where applicant will still be servicing the said notional printer, and its technicians will be responsible for any advice as to when an upgrade will be necessary. In the Court's view, the applicant is clutching at straws in its efforts to find a benefit that may accrue to the second respondent as against the applicant, from the employment of Wiggil.

[19] It is also averred by the applicant that where there are no shared customers, Wiggil will still know which customers have Videojel printers “and it will be very easy for him to simply pop in and offer a quote on the second respondent's printers to upgrade/replace the existing printers”. This assertion amounts to conjecture, based on an assumption that on top of doing his work as a technician for the second respondent, Wiggil will be acting as a trouble shooter for that company's sale team and ‘popping into’ applicant's clients. Further I note that there is no suggestion that Wiggil is in possession of a physical list of

the applicant's clients. As submitted on behalf of the respondents, there is a

distinction between confidential information and what an employee carries away in his head. As Davis J put it in *Advtech Resourcing (Pty) Ltd ta*

*Communicate Personnel Group v Kuhn*¹ :

[20] There is a need to distinguish between the risk of disclosure of that which is secret or confidential and the attempt to preclude a person from making use of his or her own skills and abilities on the other. Certain principles appear to be reasonably well settled. Thus in *Basson* (supra) at 778D Botha JA said: 'A man's skills and abilities are part of himself and he cannot ordinarily be precluded from making use of them by a contract in restraint of trade.' Even if the employer has expended time and money on the training of the employee 'it affords the employer no proprietary interest in the workman or in his knowledge or skills'. (*Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) at H 487G - I, 507E - F.) Not all information obtained in the course of employment is secret or confidential. If information is of such a nature that 'it is inevitably carried away in the employee's head after the employment has ended' the employee may use the information for himself or herself, subject of course to a duty of good faith while being employed. (See *Knox D'Arcy Ltd and Others v Jamieson and Others* 1992 (3) SA 520 (W) ([1996] 3 All SA 669) at 527F - H (SA)).

[20]

The respondents argue that on a proper interpretation the IPPA is an agreement that serves to protect sensitive and confidential information. Advocate Roux further emphasized that Clause 6 identifies the nature of the information sought to be protected. The Clause bears recording once more:

"HG Molenaar & Co Pty Ltd acknowledges that this Intellectual Property Protection agreement applies only if the employee whose name appears hereon does indeed have possession of confidential information which could prove damaging to HG Molenaar & Co. If there is patently no sensitive and confidential information involved, then this Intellectual Property Protection contract is not enforceable."

[21] The IPFA also contains its own limitations which are repeated in both Clauses

3 and 4 of the restraint. These provide that where an employee seeks release from the restraint, as Wigfill did, this should not be unreasonably withheld. This internal limitation is contained in Clause 4 of the IPFA, headed 'Agreement to Protect Intellectual Property' on which applicant relies. The internal limitation supports applicant's own case that the agreement is applied to many employees of the business, a small part of which is that of distribution and maintaining printers. The inclusion of such clauses reflects that the applicant recognised that in drafting the IPFA, there would be employees that are not bound by it. The respondents argue that Wigfills was not privy to the type of information that the agreement seeks to protect, did not therefore breach the agreement, and that it was unreasonable for the applicant not to release him.

[22] While I am persuaded that these submissions may well be correct, it is not necessary for me to find that they are. This is because even should I find as the applicant insists, that there was a breach of the IPFA, this would not lead the Court to conclude that the restraint is enforceable on the facts as contained in the affidavits. The legal principles applicable to agreements in restraint of trade were well summarized by Mbha J (as he then was) in *Experian SA (Pty) Ltd v Haynes & another*² as follows:

"[12] The locus classicus on this subject is *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 897F-898E, where Rabie CJ summarized the legal position, inter alia, as follows:

12.1 There is nothing in our common law which states that a restraint of trade agreement is invalid or unenforceable.

12.2 It is a principle of our law that agreements which are contrary to the public interest are unenforceable. Accordingly, an agreement in restraint of trade is unenforceable if the circumstances of the particular case are such, in the court's view, as to render enforcement of the restraint prejudicial to the public interest.

12.3 It is in the public interest that agreements entered into freely should be honoured and that everyone should, as far as possible, be able to operate freely in the commercial and professional world.

² (2013) 34 ILJ 529 (GSJ)

12.4 In our law the enforceability of a restraint should be determined by asking whether enforcement will prejudice the public interest.

12.5 When someone alleges that he is not bound by a restraint to which he had assented in a contract, he bears the onus of proving that enforcement of the restraint is contrary to the public interest.

See also John Saner *Agreements in Restraint of Trade in SA Law* (issue 13 October 2011) at 3-5, 3-6.

[13] These principles have been reaffirmed in other decisions of our courts. In *Basson v Chilwan & others* 1993 (3) SA 742 (A) at 776H-J to 777A-B, Botha JA stated, in a separate judgment, that:

'The incidence of the onus in a case concerning the enforceability of a contractual provision in restraint of trade does not appear to me in principle to entail any greater or more significant consequences than in any other civil case in general. The effect of it in practical terms is this: the covenantee seeking to enforce the restraint need do no more than to invoke the provisions of the contract and prove the breach; the covenantor seeking to avert enforcement is required to prove on a preponderance of probability that in all the circumstances of the particular case it will be unreasonable to enforce the restraint; if the Court is unable to make up its mind on the point, the restraint will be enforced. The covenantor is burdened with the onus because public policy requires that people should be bound by their contractual undertakings. The covenantor is not so bound, however, if the restraint is unreasonable, because public policy discountenances unreasonable restrictions on people's freedom of trade. In regard to these two opposing considerations of public policy, it seems to me that the operation of the former is exhausted by the placing of the onus on the covenantor; it has no further role to play thereafter, when the reasonableness or otherwise of the restraint is being enquired into.'

[14] The position in our law is, therefore, that a party seeking to enforce a contract in restraint of trade is required only to invoke the restraint agreement and prove a breach thereof. Thereupon, a party who seeks to avoid the restraint, bears the onus to demonstrate on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable.

[15] The test set out in *Basson v Chilwan & others* at 767G-H, for determining the reasonableness or otherwise of the restraint of trade provision, is the following:

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

15.2 Is such interest being prejudiced by the other party?

15.3 If so, does such interest so weigh up qualitatively and quantitatively against the interest of the latter party that the latter 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] In *Kwik Kopy (SA) (Pty) Ltd v Van Haarlem & another* 1999 (1) SA 472 (W) at 484E, Wunsh J added a further enquiry, namely whether the restraint goes further than is necessary to protect the interest."

[23] The facts as set out in the affidavits before me, as referred to above, assessed with the *Plascon Evans* principles in mind, do not establish that Wigill poses a threat to the interest the applicant relies on, i.e. the threat of his persuading the customer base in its printer distribution section, to buy printers from second respondent. As a result, I find that there is no prejudice to the applicant's interests in this respect. In addition, given the level of remuneration that Wigill earned with the applicant (and noting the quantum of the incentive he earned once in relation to the sale of a printer), there are in addition, public policy reasons, why the restraint should not be upheld as reasonable. I find that the respondents have met their onus in demonstrating that the restraint in question is unreasonable in as far as it has been applied to Wigill.

[24] It seems to me that the content of the Notice of Motion, in that it seeks certain alternative relief (short of enforcing the restraint against employment with the second respondent), may well reflect the applicant's appreciation of the ambiguity in the purpose of the IPPA. Neither counsel dealt with this unusual feature of the Notice of Motion. Be that as it may, I have found that the IPPA cannot be enforced against Wigill, as set out above. In all the circumstances, I make the following order:

Order

1. The application is dismissed with costs.

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

LABOUR COURT

Appearances

Applicant: L. Myburgh instructed by Bagraims Attorneys

Respondents: HJO (Wallis) Roux instructed by Pagdens Attorneys