REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

C546/2022

In the matter between:

APPLE STEEL RULE AND DIE (PTY) LTD Applicant

and

LIEBENBERG, PAUL First Respondent

SUPREME ENGRAVERS SA (PTY) LTD Second Respondent

Heard: **17 November 2022**

Delivered: **21 November 2022 by means of email**

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application to enforce a restraint of trade which by its nature is urgent. The Notice of Motion in the proceedings sought the following relief:

"2. The First Respondent is interdicted and restrained, until 5 September 2023, and in the area of Cape Town from:

2.1 Being, directly or indirectly, interested in or employed by the Second Respondent;

2.2 Being, directly or indirectly, interested in or employed by any business which carries on business, manufactures, sells or supplies any commodity or goods, brokers or acts as agent in the sale or supply of any commodity or goods and/or performs or renders any service, in competition with or identical or similar or comparative to that carried on, sold, supplied, provided, brokered or performed by the Applicant;

2.3 From soliciting the custom of, or deal with, or in any was transact with, in competition to the Applicant, any business, company, firm, undertaking, association or person which during the period of (3) years preceding the date of termination of the contract of the employee has been a member, customer or supplier of the company in the territory; and

2.4 From directly or indirectly offering employment to, in any way cause to employ any person who was employed by the Applicant as at 5 September 2022 or at any time within a period of three years immediately preceding such termination.

3. The First respondent is interdicted and restrained from disclosing any of the Applicant's trade secrets, confidential documentation, technical specfications and data, formulaes, drawings, charts, system methods, software, processes, client lists, programs, marketing, and/or financial information to any undertaking, firm, company or person."

Is the second respondent a competitor?

[2] The respondents defend the application, inter alia, on the basis that the second respondent is not a competitor of the applicant. The applicant company manufactures and sells flexible dies, magnetic cylinders, and rotary dies which are used to manufacture various print products like wine labels. In its founding affidavit, it describes the second respondent as a direct competitor. In the answering papers, this is denied in terms, in that the second respondent, it is averred, does not deal with magnetic cylinders or rotary dies. However, what is

evident from the answering papers is that the owner of the second respondent has researched the manufacture of flexible dies over a long period and has assisted in the design of a machine for this purpose with a manufacturer in China. The machine was tested by the manufacturer before shipping to the second respondent. An invoice for same in the amount of 43,332 USD is annexed to the answering papers. The first respondent avers in his answering affidavit:

"I set out this history in order to make the point that Mr Meyer, the owner of the second respondent, has many years of experience and self-education of CNC technology and using that to make flexible dies."

[3] The first respondent avers that Mr Meyer is in the process of training him to operate the CNC machine in order to successfully manufacture and sell flexible dies in the coming months. It is submitted by the respondents that because it is not in the process of manufacturing and selling same at this juncture, a breach of the restraint has not been proved.

[4] The first respondent commenced employment with the applicant on the 2 October 2006 in terms of a written contract of employment containing restraint of trade provisions. In February 2022, he and all staff concluded updated written contracts which contained restraint of trade provisions. This contract was signed by the first respondent who worked as production manager of the applicant. The restraint of trade portion of the contract reads as follows:

"**26. RESTRAINT OF TRADE**

26.1 Specifically for the purposes of this particular clause, the following words shall have the following meaning(s):

26.1.1 "Business" shall mean any person, business, company, association, corporation, partnership, undertaking, trust, whether incorporated or not;

26.1.2 "Interest/Interested" shall mean interested or concerned, directly or indirectly, whether as proprietor, partner, shareholder, contractor, employee, agent, financier, shareholder or in any other capacity whatsoever, and/or permitting his/her name to used in connection with or in any manner relating thereto;

26.1.3 "The territory" shall mean Cape Town, South Africa;

26.2 All the provisions of this restraint of trade shall strictly apply to the employee in respect of all clients, activities, undertakings, business, operations and services of the company.

26.3 The employee records that he/she agrees to this restraint of trade in consideration of:

26.3.1 All benefits which has or will accrue to him/her from the company;

26.3.2 His/her knowledge of and/or access to the business methods, business secrets, technological information and data and/or manufacturing / service methods of the company, which are to be known to and which will be gained by him/her;

26.3.3 The goodwill factor and technological, manufacturing, service and sales expertise in a business and/or undertaking such as the business and/or undertaking of the company;

26.3.4 The confidential nature of the information, documentation and other data relating the members, customers and suppliers of the company, which are available to the employee.

26.4 In terms of this restraint of trade, the employee specifically undertakes and agrees to:

26.4.1 not to be interested in any business in the territory which carries on business, manufactures, sells or supplies any commodity or goods, brokers or acts as agent in the sale or supply of any commodity or goods and/or performs or renders any service, in competition with or identical or similar or comparative to that carried on, sold, supplied, provided, brokered or performed by the company, during the period of the engagement of the employee up to and including the termination of the contract of the employee; and

26.4.2 not to solicit the custom of or deal with or in any way transact with, in competition to the company, any business, company, firm, undertaking, association or person which during the period of 3 (three) years preceding the date of termination of the contract of the employee has been a member, customer or supplier of the company in the territory; and

26.4.3 not to directly or indirectly offer employment to or in any way cause to be employed any person who was employed by the company as at the termination of the contract of the employee or at any time within a period of 3 (three) years immediately preceding such termination.

26.5 Each and every restraint in this entire clause shall operate and be valid and binding for a period of 3 years in the territory, calculated from the date of termination of the contract of the employee in terms of this agreement. This restraint shall apply irrespective of what the cause or reason of such termination may be and whether the fairness of the termination of the employee's contract is challenged or not by the employee.

26.6 Each restraint in this entire clause shall be construed as being severable and divisible and applicable to the employee, whether that restraint is in respect of:

26.6.1 Nature of business or concern;
26.6.2 Area or territory;
26.6.3 Articles, commodities or goods sold and/or supplied;
26.6.4 Services performed or rendered;
26.6.5 Company or concern entitled to the benefit thereof.

26.7 Each restraint in this entire clause shall be deemed in respect of each part thereof to be separately enforceable in the widest sense possible from the other parts thereof, and the invalidity or unenforceability of any part thereof shall not in any way affect or taint the validity or enforceability of any other part of such restraints, or in fact any other terms of this agreement.

26.8 All restraints in this clause are for the sole benefit of the company.

26.9 The employee specifically acknowledges and agrees:

26.9.1 That he / she has carefully read and considered all the terms and provisions of this clause relating to the restraints applicable to him / her;

26.9.2 That this clause and/or all the restraints contained therein, after taking all circumstances into account, are fair and reasonable; and

26.9.3 That should he/she at any time dispute the reasonableness or fairness of any of the provisions of this clause and/or restraints, then and in such event he / she will have the onus to provide or prove such unreasonableness or unfairness.

26.9.4 In the event that the employee leaves the company and poaches any staff or clients of the company, the restraint of trade will become legally enforceable.

26.9.5 In the event that a staff member joined the company with his own Intellectual Property with
specific reference to knowledge of how to carry out his duty within the company then the above restraint will not apply however, if that specific Intellectual Property is used to directly compete with the company in any way, then the above restraint will apply and is enforceable."

[5] The first respondent sets out in his answering affidavit that the owner of the second respondent advertised for a production manager with experience:

"I applied for the position pursuant to the advertisement. Any suggestion that the Second Respondent or Mr Meyer recruited me in order to appropriate the

technical knowledge of the Applicant relating to the manufacture of flexible dies, is devoid of any truth. Mr Meyer had built up experience and knowledge over many years enabling him to re-enter the flexible die market. What he needed was a person with CNC and flexible die skills who could run the process that he has been installing."

[6] Thus on the respondents' own version at the time that Mr Meyer advertised the position, and before the first applicant accepted the position, Mr Meyer had already begun installing the process for manufacturing flexible dies. The CV of Mr Meyer annexed to these answering papers records as much citing flexible dies as the business of the second respondent. The submission that second respondent is not a competitor and there has been no breach of the restraint cannot be sustained on these facts. Nor can it be denied on the respondents' version, that the first respondent is to run the process of manufacturing flexible dies for the second respondent.

Legal principles

[7] It is apposite to set out the legal principles in an application of this sort at this point in my judgement. These were were well summarized by Mbha J (as he then was) in *Experian SA (Pty) Ltd v Haynes & another*[1] 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.

[1] (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."

Evaluation

[8] The respondents thus have the onus to prove that in the circumstances of this case it will be unreasonable to enforce the restraint in question. It is common cause that the restraint is restricted in area to the Western Cape. The duration of the restraint, while 3 years in length, is only sought to be enforced for a period of one year.

[9] The respondents did not take issue with the area or duration of the restraint. Essentially, they submit that that the applicant had no protectable interest at the time of launching this application because at that time the second respondent was not a competitor and not manufacturing flexible dies. I have found above on the respondents own version that this submission cannot be sustained. The respondents' submissions that no clear right exists for the interdict, cannot therefore be sustained.

[10] It is applicants case that first respondent had been solely responsible for the Applicant's entire manufacturing process including the flexible die manufacturing process for a period of approximately 15 years; that he exclusively dealt with the unique suppliers of material necessary to manufacture flexible dies, in that he was responsible for ordering such material. In addition, he was fully aware of the Applicant's unique pricing and margin formulas and knew who exactly the applicant's clients are and had built up close professional relationships with them - he continuously interacted with them over the past 15 years to provide technical advice and quotes etc.

[11] In answer, the first respondent doesn't deny his knowledge about prices and margins pertaining to the applicant but submits that any knowledge that he may

remember would not enable the second respondent to undercut the applicant's prices. He avers that nothing prevents the applicant being vigilant about market prices (in a situation in which a customer is offered a better price by the second respondent) and that being vigilant "barely weighs up against preventing me pursuing my career." As to customer relations, he says that the mere existence of a sound professional relationship with applicant's clients does not mean that he holds some kind of power to induce clients to follow him. He further avers that he was "not typically the first port of call" for enquiries for quotes. The sales coordinator of the applicant was. He avers that: "it was only in her absence that I was typically approached for quotes."

[12] Mr Rautenbach for the respondents submits that the first respondent has set out a 'convincing case' that the it would be unreasonable to uphold the restraint. in that the mere allegation of "close customer relationships because he continuously interacted with them over the past 15 years to provide technical advice and quotes etc, without explaining the mechanism whereby the first respondent would attract those customers to his new employer, is not enough". I have to disagree. The first respondent avers that customers for the flexible dyes will search the market for the best deal, that there may be situations where the second respondent may offer a better price, and that he is going to run the process of flexible dies for the second respondent. The denials of a threat to the applicant's proprietary interests including its customer relations, fall to be regarded as untenable and far-fetched on the respondents version.

[13] In view of all of the above, I find no public policy considerations that would militate against the upholding of the restraint of trade in this application. I have a general discretionary power to enforce a restraint partially in accordance with what I consider reasonable in the circumstances[2]. The one year duration of the restraint sought by the applicant is reasonable in my view. I therefore make the following order:

[2] Den Braven SA (ty) Ltd v Pillay and Another 2008 (6) SA 229 (D) at para 46 relying on Magna Alloys supra

Order

1. The First Respondent is interdicted and restrained, until 5 September 2023, and in the area of Cape Town from:

1.1 Being, directly or indirectly, interested in or employed by the Second Respondent;

1.2 Being, directly or indirectly, interested in or employed by any business which carries on business, manufactures, sells or supplies any commodity or goods, brokers or acts as agent in the sale or supply of any commodity or goods and/or performs or renders any service, in competition with or identical or similar or comparative to that carried on, sold, supplied, provided, brokered or performed by the Applicant;

1.3 Soliciting the custom of, or deal with, or in any was transact with, in competition to the Applicant, any business, company, firm, undertaking, association or person which during the period of (3) years preceding the date of termination of the contract of the employee has been a member, customer or supplier of the company in the territory; and

1.4 Directly or indirectly offering employment to, in any way cause to employ any person who was employed by the Applicant as at 5 September 2022 or at any time within a period of three years immediately preceding such termination.

2. The First respondent is interdicted and restrained from disclosing any of the Applicant's trade secrets, confidential documentation, technical specfications and data, formulaes, drawings, charts, system methods, software, processes, client lists, programs, marketing, and/or financial information to any undertaking, firm, company or person.

3. The respondents are to pay the costs of this application jointly and severally.

_____

H. Rabkin-Naicker

Judge of the Labour Court of South Africa

Appearances

Applicant: Snyman Attorneys

Respondents: Frans Rautenbach instructed by CK Attorneys