REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

C119/2023

In the matter between:

SPUR GROUP (PTY) LIMITED Applicant

and

RUDOLPH ARTHUR MONTGOMERY First Respondent

BOSSA CAFÉ (PTY) LTD Second Respondent

Date heard: 5 May 2023

Delivered: 10 May 2023 by means of email

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed application to enforce a restraint of trade agreement on an urgent basis. The second respondent abides the decision of the Court. The applicant prays for the following relief *inter alia*:

" 2. Interdicting and restraining the first respondent, until the 31 May 2024 from:

2.1 directly or indirectly being engaged or concerned or interested in, or employed by, or soliciting business for, or rendering any service to, the second respondent in any capacity listed in clause 16.2.1 of the Employment Agreement entered into between the applicant and the first respondent on or about 1 March 2010 ("the Employment Agreement")

2.2 acting in breach of clauses 14 and 16 of the Employment Agreement…"

[2] At the hearing of the matter, certain preliminary issues were argued. The first respondent sought admission of a fourth affidavit which the applicant opposed. I have exercised my discretion to admit the fourth set of affidavits. This is not unusual in restraint applications as is trite.

[3] The first respondent also sought the admission of what were termed "confirmatory affidavits". The first affidavit was deposed to by a Mr. Farrelly, former COO of the applicant, and now a Director of second respondent. It was only handed up duly signed on the day of the hearing, although the unsigned version was served on the applicant at an earlier stage. The said affidavit did not aver that the deponent had read the contents of the first respondent's answering affidavit. Its' purported aim was described as being to provide context to the averments in the answering papers relating to Farrelly, and to provide the Court with information which "may be relevant to the disputes between the applicant and the first respondent." No reference had been made to this 'confirmatory affidavit' in the answering affidavit.

[4] The second affidavit for which the first respondent sought admission was one deposed to by a Mr Braam Swart, a Director of the Second Respondent and was handed up to Court and to the applicant on the day of the hearing. It reads in material part as follows:

" 2. Although the Second Respondent, not being a party to the restraint of trade agreement between the Applicant and the First Respondent, filed a notice to abide, the Second Respondent's election not to formally participate in the above proceedings should not be seen as an admission of any of the averments contained in Applicant's papers.

3. I have read the founding papers deposed to on behalf of the Applicant as well as the answering affidavit deposed to by the First Respondent, and the confirmatory affidavit deposed to by Mark Farrelly ("Farelly").

4. The Second Respondent confirms the correctness of the affidavits in the affidavits of the First Respondent and Farrelly insofar as it related to Second Respondent and its operations."

[5] The admission of both affidavits was opposed by the applicant. The applicant was of the view that the last minute handing up of a signed affidavit by Farrelly without a formal application being made, was fatal to its admission. Its contents reflected that Farrelly appeared to have written the affidavit on his own behalf. He did not claim any authorization to do so, and it could not be considered as confirmatory.

[6] The second respondent was not before Court, despite an averment by Mr Braam Swart that he was duly authorised by it, to depose to the affidavit. It was submitted by Mr Leslie for the applicant, that its admission would cause clear prejudice to the applicant. The applicant had labelled the first respondent's evidence on the operations of the second respondent as hearsay given that he has not taken up employment with it as yet. In addition, Swart himself does not aver that he has personal knowledge of the dispute. Nor does he state who authorised him to depose to the affidavit in the second respondent. The attempt to admit same was an attempt by the second respondent to get through the back door and avoid a costs order, it was submitted. Mr Aggenbach for the first respondent confirmed he did not appear for the second respondent and submitted that the affidavits could provide context for the Court.

[7] In the Court's view, the confirmatory affidavits cannot be admitted given there was no application before Court to do so, and taking into account the prejudice that may be occasioned by the last minute admission of these (deposed to by two directors of the second respondent), given that the second respondent is not before Court. I turn now to deal with the merits of the main application.

[8] The Employment Agreement entered into in between the parties in 2010 contained a restraint of trade provision, the territory of which is the whole of South Africa and with a duration of 24 months. The following undertakings, contained in Clause 16 of the Agreement, are material:

> *"16.2 The Employee hereby undertakes to and in favour of the Company that:*
>
> *16.2.1 he shall not, for the Restraint period* [defined in clause 2.1.7 as 24 months] *with effect from the Termination Date, directly or indirectly:*
>
> *16.2.1.1 carry on or otherwise be engaged or concerned or interested in or employed by;*
>
> *16.2.1.2 solicit business for;*
>
> *16.2.1.3 be a proprietor of, director, shareholder, member or partner in;*
>
> *16.2.1.4 act as a consultant, trustee, manager, employee, agent, exclusive financier, principal, consultant, contractor, administrator, representative, partner, advisor, officer or in any other capacity to;*
>
> *16.2.1.5 render any service (gratuitously or otherwise) to;*
>
> *16.2.1.6 lend or advance, or bind himself as surety for, any sum of money or assist financially;*
>
> *Any person, company, close corporation, partnership, trust, business, body corporate, association or other legal entity or business entity (incorporated or unincorporated) which (wholly or partially) owns, conducts, licences, franchises or carries on any restaurant, business or establishment which within the Territory ;*
>
> *16.2.1.7 sells steak and/or burgers (including hamburgers) (whether for consumption on or off the premises); and/or*

16.2.1.8 sells pizzas or pastas (whether for consumption on or of the premises); and/or

16.2.1.9 sells fish or seafood (whether for consumption on or off the premises); and/or

16.2.1.10 conducts business in competition with or which has a same or similar appearance, image, format, design, layout, décor, colour scheme, recipe or menu to any Spur Steak Ranch Restaurant or Kelsey's Grill Restaurant or Panarotti's Restaurant or John Dory's Restaurant in operation or under construction as at the Termination Date; and/or

16.2.1.11 is similar in design or uses methods similar to, or is likely to cause confusion or create the impression of, a Spur Steak Ranch Restaurant or Kelsey's Grill Restaurant or Panarorotti's Restaurant or John Dory's Restaurant or that of a restaurant which is affiliated to or associated with the Spur Steak Ranch Franchise or Kelsey's Grill franchise or Panarotti's Franchise or John Dory's Restaurant (whether for consumption on or off the premises); and/or

16.2.1.12 conducts any business catering for the quick service or fast food or family sit-down restaurant market, which business predominantly specialises in the sale of burgers and/or steaks and/or pizzas and/or pastas and/or fish;

16.2.1.13 conducts business under the style of Pizza Hut, St Elmo's, Mike's Kitchen, Porterhouse, Longhorn, Steers, MacRib, Squires Loft, Nando's, Mochachos, Black Steer, RJ's, Guiseppe's, McDonalds, Burger King, Wendy's, T.G.I. Fridays, Late Night Al's, Chicken Licken, Kentucky Fried Chicken, Church's Chicken, Saddles, Golden Egg and Wimpy (or their successors in title); and/or

16.2.1.14 conducts any business which is the same as or in competition with any business (or part thereof) conducted by the Company as at the Termination Date (irrespective of whether any such business is conducted by the Company as at the date of signature of this Agreement).

16.2.3 he shall not, at any time during the currency of this Agreement or at any time after the Termination Date, either himself utilise and/or directly or indirectly divulge or disclose to others any of the Trade Secrets and Know-How[3] of the Company."

[9] In clause 16.3 it was recorded that the restraint covenants were deemed to be severable and separately enforceable in the widest sense from the other parts thereof and:

"16.3.2 without limiting the generality of clause 16.3.1, each of the restraint covenants shall constitute separate, independent, and severable restraints in respect of:

16.3.2.1 the Company and the Spur Group;[4]

16.3.2.2 each of the months falling within the Restraint Period;

16.3.2.3 each of the provinces falling within the Territory and each of the magisterial districts within each of such provinces;

16.3.2.4 each of the activities and businesses referred to in this clause 16;

16.3.2.5 every capacity in which and every activity of which the Employee is restrained in terms of this clause 16."

[10] In clause 16.4, first respondent acknowledged and agreed that he had given careful consideration to the restraints undertaken by him and that the said restraints were fair, reasonable and justifiable and went no further than was reasonably necessary to protect the proprietary interests of the Company (the applicant)

[11] In clause 16.6 of the Employment Agreement the following was recorded:

> *"If the Employee breaches any of his obligations under clause 16.2 or is ordered by a court of competent jurisdiction to comply with such obligations, then the Restraint Period will be deemed, at the instance and in the discretion of the Company, to be extended by the balance of the Restraint Period remaining when the breach first took place, commencing on the date the Employee ceases such breach or the date upon which a court makes the order contemplated above, whichever is the later."*

The factual matrix

[12] The first respondent commenced employment with the applicant as an Area Manager on 1 March 2010. In February 2012, he was promoted to the position of Development Manager, chiefly responsible for the applicant's Panarottis Pizza Pasta and Casa Bella brands. The common cause and undisputed facts as set out in the founding and answering affidavit have been succinctly recorded in applicant's submissions *inter alia* follows:

12.1 The applicant carries on business predominantly as a multi-brand restaurant franchisor of well-established casual dining and family restaurant brands;

12.2 The applicant's group currently has seven brands: Spur steak Ranches, Panarottis Pizza, John Dory's Fish Grill /sushi, RocoMamas, the Hussar Grill, Casa Bella and Nikos Coalgrill Greek.

12.3 The market in which the applicant operates is highly competitive;

12.4 The applicant's development teams are engaged in constantly identifying prospective new sites for restaurants throughout the country.

12.5 The applicant's development teams support existing franchisees, on an ongoing basis by assisting in site refurbishments and relocations.

12.6 In his capacity as Development Manager for Panarottis and Casa Bella brands since 2012, the first respondent was involved in every aspect of

the applicant's business development process, including managing and leading development projects, developing feasibility studies, franchisee recruitment, assessment and approval and negotiating with landlords on leases.

12.7 On 3 May 2022, the first respondent tendered his resignation, effective 31 May 2022. He intends to take up employment with, or to render consultancy services to, the second respondent.

12.8 The second respondent is a restaurant franchisor in the casual dining/ family restaurant market and a direct competitor.

12.9 The second respondent was established in 2002 and operates 17 restaurants. It is aiming to "aggressively expand its franchise operations".

12.10 During the course of his employment, the first respondent had access to the applicant's internal server which included, inter alia, the business cases for all existing and prospective restaurants; business plans; franchise applications (successful and unsuccessful) cash flows; rental negotiation correspondence; landlord rental spreadsheets; leases and lease schedules; and potential sites for new (or relocating) stores.

12.11 Since resigning from his employment, the first respondent has bought an independent pub and grill in Nigel (the E&A Car Bar), which is coupled with a carwash.

[13] It is applicant's evidence in paragraph 45 of its founding affidavit, that the Panarottis folder on the server contains a "Development" sub-folder which was maintained by the first respondent. This sub-folder contains the business cases for all existing and prospective Panarottis restaurants; business plans; franchise applications (successful and unsuccessful); cash flows; rental negotiation correspondence; landlord rental spreadsheets; leases and lease schedules; and potential sites for new (or relocating stores). The first respondent refers to paragraph 45 in answer, generally accepting it is correct, but denies that there is anything confidential or secret and proprietary to the applicant. He avers that it is also not uncommon for competitors in the casual

dining industry to use the same business methodology and even use the same suppliers and/or service providers. He avers that:

"To the extent that my competence and experience in the industry has given me a feel for where and how to set up a specific restaurant – this is more a skill that I have developed and carry in my head than a discrete piece of knowledge I have purloined from the Applicant's cabinet of trade secrets, or its one central database, as it alleges. This ability, however, has a value without reference to any of the Applicant's so-called secrets. It is an ability to strategically apply general technical knowledge and experience to the advantage of any employer such as Bossa and, as stated above, does not belong to the Applicant."

[14] The applicant has averred in 11.2 of the replying affidavit as follows:

"Given the second respondent's stated desire to aggressively expand its franchise operation, the first respondent's detailed knowledge concerning the applicant's operations in the areas into which the second respondent intends to expand, as well as the first respondents in-depth knowledge relating to the establishment of franchise operations, are of obvious commercial benefit to the second respondent That information would include for example, (a) the performance of the applicant's outlets in the vicinity of any proposed new franchise locations the second respondent may seek to explore; (b) the methods the applicant employs to assess the feasibility of a new site; and (c) the applicant's methods for identifying, assessing and recruiting franchisees."

[15] There is no specific answer to these allegations in applicant's supplementary answering affidavit, but the first respondent relies on the general proposition that he was not privy to confidential information worthy of protection and that given it is nine months since he left the applicant whatever information he had is now 'stale'.

[16] The first respondent also seeks to rely on the fact that the applicant has not enforced restraint of trade covenants against former employees in the past – including Farelly. It was submitted on behalf of applicant that this type of 'waiver' argument is without merit. Further, that the applicant's decision whether to enforce a restraint is evaluated on a case-by-case basis

depending on the nature of the information to which the employee had access, and the risk posed by his or her employment by a competitor. The applicant replies to the cases of former employees and the facts giving rise to their decision not to enforce the restraints. Applicant also makes mention that it has a new management team in place since Farelly left the applicant.

Legal Principles

[17] The general principles to be applied in cases such as this were set out in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 897F – 898E, as follows[1]:

"[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.

[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."

[18] 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.

[1] As succinctly summarized Experian SA (Pty) Ltd v Haynes & another 2013 (1) SA 135 (GSJ)

[19] The test set out in *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 767G – H for determining the reasonableness or otherwise of the restraint of trade provision, is the following:

[19.1] Is there an interest of the one party which is deserving of protection at the determination of the agreement?

[19.2] Is such interest being prejudiced by the other party?

[19.3] 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?

[19.4] 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?

[20] Proprietary interests generally considered to be of two kinds, “trade connections” and “trade secrets”. These consist of: “…the relationships with customers, potential customers, suppliers and others that go to make up what is compendiously referred to as the "trade connection" of the business, being an important aspect of its incorporeal property known as goodwill. The second kind consisted of all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him, to gain a relative competitive advantage. Such confidential material is sometimes compendiously referred to as "trade secrets". [2]

Evaluation

[21] The applicant predominantly relies on trade secrets in this application and submits that the evidence before Court establishes that the first respondent was privy to trade secrets worthy of protection. I am in agreement with submissions made by the applicant that the extensive information which the first respondent has conceded he had access to, is self evidentially confidential, and will be of competitive advantage to the second respondent when it selects locations for its expansion plans. The notion proffered by the first respondent that his expertise and talent is somehow unrelated to the

[2] Sibex Engineering Services (Pty) Ltd v Van Wyk and Another 1991 (2) SA 482 (T) at 502 C to G

confidential information he obtained in his position at the second respondent over many years, is unconvincing, and without serious substantiation.

[22] Further, on the papers, the argument that first respondent's knowledge of the workings of the applicant is now 'stale' after nine months, is not substantiated by him. He has not explained why the information concerning the performance of applicant's outlets, including lease terms, could have become stale since May 2022. The applicant has averred in reply to such allegations that the first respondent already had access to the advanced draft of the applicant's 2022/2023 strategic plan before he left its employ. A bare denial is advanced in the supplementary answering affidavit to this averment.

[23] What is unusual in this application, is that the first respondent has not pertinently alleged that the area or period of the restraint he signed is unreasonable *per se*. The high water mark of his case appears to be the inconsistent enforcement of the restraint provision by the applicant as against other employees. However no legal basis is argued for the relevance of this issue to the case before me which concerns the breach of the Employment Agreement between the applicant and first respondent.

[24] A further prong of the first respondent's case was an attempt to distinguish the second respondent from the applicant's various outlets. The evidence for this was flimsy on the papers before me. Both the second respondent and applicant are in the casual family dining market. The first respondent denied that that the parties had 'precisely the same customer'. However, the website of the second respondent mentions that it is "kid friendly" and its menu includes similar food to applicant's other outlets, including pizzas, amongst others.

[25] On the issue of public policy it is averred by the first respondent that his business (the grill and car wash) is doing badly and he will be severely prejudiced if he is unable to take up second respondent's offer. However, this was only raised in his supplementary answering affidavit. Furthermore, no supporting information was put up to give credence to the averment. The first respondent made no mention of any attempt to obtain employment in a non-competitive area.

[26] In all the above circumstances, I am satisfied that the applicant's proprietary interests are directly and substantially prejudiced by the first respondent's intended employment by the second respondent. The first respondent has not established that he will suffer any significant prejudice if the restraint is upheld. The applicant submits that it has brought these proceedings because of the threat which the second respondent poses to its business, and goes as far as to argue that if the first respondent had taken up employment with another player in the market that does not that does not pose such a threat, he would likely be able to do so, without facing the enforcement of the restraint against him. In other words, there is no question that first respondent has skills that allow for him to take up gainful employment in a non-competitive area, and not be economically unproductive.

[27] In view of the above, the first respondent has not discharged his onus to prove the enforcement of his restraint agreement is unreasonable or contrary to public policy. The application therefore stands to be upheld. The parties did not ask that costs should follow the result as is the norm in these matters. I therefore make the following order:

Order

1. The first respondent is interdicted and restrained until the 31 May 2024 from:

1.1 directly or indirectly being engaged or concerned or interested in, or employed by, or soliciting business for, or rendering any service to, the second respondent in any capacity listed in clause 16.2.1 of the Employment Agreement entered into between the applicant and the first respondent on or about 1 March 2010 ("the Employment Agreement");

1.2 acting in breach of clauses 14 and 16 of the Employment Agreement.

2. There is no order as to costs.

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H.Rabkin-Naicker

Judge of the Labour Court

Appearances

Applicant: Graham Leslie SC with Grant Quixley instructed by Benard Vukic Potash & Getz Attorneys

First Respondent: Morne Aggenbach instructed by De Waal Boschoff Inc