REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Not Reportable

C112/2023

In the matter between:

AFRICAN SALES COMPANY (PTY) LTD Applicant

and

ESPERANZ NORTJE First Respondent

PRESTIGE COMETICS GROUP (PTY) LTD Second Respondent

Date heard: 14 March 2023; 17 March 2023
Delivered: 23 March 2023 by means of email

JUDGMENT

RABKIN-NAICKER J

[1] The applicant seeks to uphold a restraint of trade agreement and asks for the following order to be granted on an urgent basis:

"2. DECLARING that:

2.1 The First Respondent is in breach of her restraint of trade agreement concluded with the Applicant on 18 December 2020.

2.2 The employment of the First Respondent by the Second Respondent is in breach of the restraint of trade agreement concluded between the Applicant and the First Respondent.

3. INTEDICTING the First Respondent from directly or indirectly using, revealing, disclosing, or in any way utilizing for the First Respondent's own purposes, or for the purposes of any third party, including the Second Respondent, any of the Applicant's confidential information.

4. INTERDICTING AND RESTRAINING THE First Respondent in accordance with the provisions of the restraint of trade agreement for a period of one year ending on the 12 March 2024, and in the Republic of South Africa, or any further territory where the Applicant operated, from:

4.1 Remaining in the employ of the Second Respondent or any other competitor of the Applicant;

4.2 Whether as a proprietor, principal, member, agent, broker, partner, representative, shareholder, director, manager, executive, consultant, adviser, financier, administrator and/or any other like capacity;

4.3 Being directly or indirectly associated and/or concerned with, interested and/or engaged in and/or interested herself in any firm, business, company, close corporation or other association ("entity") which is a competitor of the Applicant.

4.4 Rendering services to any person or business which is a competitor of the Applicant and in particular the Second Respondent;

4.5 Conducting, accepting, soliciting, canvassing or discussing business or mandates in respect of any of te services rendered by the Applicant in the ordinary course of business with/from any Principal, supplier or client of the Applicant;

4.6 Encouraging or enticing to persuade any Principal, supplier or client of the Applicant to terminate their relationship with the Applicant.

5. INTERDICTING AND RESTRAINING the Second Respondent from employing or being associated with the First Respondent in breach of the restraint of trade agreement between the Applicant and the First Respondent.

6. DIRECTING that any Respondent that opposes this application and the relief sought, be ordered to pay the costs of the application, jointly and/or severally."

[2] The Second Respondent has given notice that it abides the decision of this Court.

Factual Matrix

[3] The Applicant is a distributor of fine fragrance and cosmetic brands into Southern and Sub-Saharan Africa supplied by international affiliates. It distributes products from principal suppliers to retail outlets. It has what it describes as 'a complex distribution network across Southern Africa' with its Head Office in Johannesburg and multiple regional offices in Durban, Cape Town, Gqeberha, Namibia , Harare, Zambia, Kenya, Nigeria and Angola.

[4] The Second Respondent is also a distributor working in the same market and provides similar services. It has offices in Johannesburg, Durban and Cape Town. It is undisputed that the companies are competitors. It is averred by the Applicant that the 'beauty category' in which it and Second Respondent operate is highly competitive. The retention of distribution agreements from Brand Owners or Licensees is integral to business sustainability.

[5] On the 18 December 2020, the First Respondent (Nortje) was appointed by the Applicant to the position of Divisional Manager and signed her contract of employment. It contained a confidentiality clause and a restraint agreement. She resigned from Applicant's employ on the 27 January 2023 and the employment relationship terminated on 13 March 2023, in terms of her notice period. She informed the Applicant that she had been offered a position with Second Respondent and asked that her restraint agreement be waived. Prior to her employment with the Applicant, Nortje was employed in the retail industry for about 24 years.

[6] The confidentiality clause in her appointment contract provided that:

"On acceptance of the terms and conditions of this letter of appointment and commencement of employment with the Company, you agree, undertake, and expressly bind yourself not to disclose at any time, to any company, firm or person, any transactions of the company or its customers nor any information concerning the business or affairs of the Company or of its customers nor any information concerning the business or affairs of the Company or of its customers, unless required to do so by the Company or by a Court of Law (sic), whether during the currency of your employment or after its termination."

[7] On the same day, Nortje signed a restraint of trade agreement (the Restraint Agreement). The material terms of the Restraint Agreement are that:

[8] In terms of clause 3, Nortje irrevocably undertook to refrain from, *inter alia*, taking employment with a direct or indirect competitor for a period of one (1) year following the termination of the contract of employment. In this regard, clause 3 prevented the Nortje from taking employment with a direct competitor such as the Second Respondent or an indirect competitor such as CAVI Brands (Pty) Ltd or a related company.

[9] In terms of clause 1, she agreed that by virtue of her employment with the Applicant, she would be exposed to and acquire "*considerable knowledge and know-how relating to the Company, its suppliers and contracts, and its clients*". It is worth noting that this factually occurred by virtue of the Applicant's position as Division General Manager: ASCO Select.

[10] Clause 2 provides that: "*The Employee acknowledges and agrees that, if the Employee is not restricted from competing with the Company as provided for herein, the Company could or will potentially suffer considerable economic prejudice including loss of Clients, customers and goodwill. Accordingly, it is essential in order to protect the Company's interests that the Employee agrees to a restraint of trade undertakings in favour of the Company to ensure that the Employee will be precluded from carrying on certain activities which would be harmful to the business of the Company*."

[11] Clause 3, provides as follows: "*In order to protect the proprietary interests of the Company, the Employee irrevocably and unconditionally undertakes in favour of the Company that the Employee shall not:*

At any time while the Employee is an Employee of the Company, and for a period of one (1) year from the date upon which the Employee ceases to be an Employee of the Company for any reason, whichever is the later

Anywhere in the Republic of South Africa or any further territory where the Company operates during the period referred to in 3.1; and

Whether as a proprietor, principal, member, agent, broker, partner, representative, shareholder, director, manager, executive, consultant, adviser, financier, administrator and/or in any other like capacity;

Be directly or indirectly associated and/or concerned with, interested and/or engaged in and/or interest them self in any firm, business, company, close corporation or other association (entity") which is a competitor of the Company; or

Render services to any person or business which is a competitor of the Company; or

Conduct, accept, solicit, canvass or discuss business or mandates in respect of any of the services rendered by the Company in the ordinary course of business with/from any Principal, supplier, or client of the company; or

Encourage or entice or incite or persuade any Principal, supplier or client of the Company to terminate their relationship with the Company."

[12] Additionally, in clause 4.1, the restraint provides that: "*The Employee acknowledges and agrees that… the restraints imposed upon the Employee in terms of clause 3 are reasonable as to subject matter, area and duration, and are reasonable necessary to protect the proprietary interests of the Company, its successors-in-title and assigns in the Company's business and* assets".

[13] It is undisputed that Nortje reported directly to the CEO of the Applicant and was a member of its Management Committee. She accepts on the papers

before me that while employed by Applicant, her primary responsibilities included accountability for strategically developing and managing sales, marketing, demand planning, visual merchandising, and training objectives of assigned business units. In her new position with the Second Respondent, the title of which contained in an employment contract attached to the replying papers[1], Nortje is appointed to the position of Marketing Executive for the Prestige Cosmetics Group. She does not dispute that the key performance areas of her role with Applicant were business planning and reporting, marketing management, sales management, customer and supplier relationship management and management of human resources. She does not deny her knowledge of price structures of the brand principals in her portfolio but suggests that such knowledge is vague and of no benefit to the Second Respondent. In addition, she admits that her had meetings with area managers of international brand principals on a monthly, quarterly or biannual basis. She describes her function with Second Respondent as to be 'purely related to marketing and sell in sales (wholesale sales to retailer)'.

[14] Nortje and the Second Respondent made a number of undertakings to the Applicant in respect of the confidentiality agreement, in an attempt to avoid coming to Court. However, the Applicant avers that the undertakings set out in a letter on behalf of Nortje did not satisfy its demands. In particular, that the undertakings did not include all the material entities and brands associated with the Applicant, with which Nortje had contact during and by virtue of her employment with the Applicant.

[15] Nortje has emphasized that the 20 brands she gave undertakings about formed part of her brand portfolio. The only brand she avers that was not included in the list was L'Occitane. She explains it was omitted due to the fact that both Applicant and the Second Respondent were requested by the brand to pitch for it distribution rights in South Africa as there is an upcoming sale of certain of its business, including its local brand owned retail store business, and the wholesale distribution rights. She denies any involvement with the pitch. She does state elsewhere in her affidavit that during her employment

[1] Although given time by the Court to answer this reply by means of a fourth affidavit, Nortje did not; nor did her legal representatives apply for any parts of it to be struck out.

with Applicant she was involved in the business plans for contracts for a limited number of brands, namely seven, including L'Occitane.

[16] The Applicant has denied in reply that Nortje had limited information pertaining to L'Occitane alleging that by virtue of her position she was uniquely able to establish relationships and that she obtained significant information on L'Occitane's operations, which would make the Applicant competitive in its bid. Her employment with Second Respondent would provide it "with an undue competitive advantage."

[17] While admitting that the Applicant and the Second Respondent operate in the exact same market and that they are direct competitors, Nortje avers that the brands that she will be responsible for in her prospective employment with the second respondent are 'distinct from those that I had overseen with the applicant'. It is evident from the papers that the Applicant and the Second Respondent did try and find a way of settling the dispute with their respective owners meeting in an effort to do so. Nortje states that she believes that:

" ..my potential shift in employment from the applicant to the respondent is a sensitive and possibly ego driven issue for the owner of the applicant, which would explain the applicant's unwillingness to accept the undertakings given by myself and the second respondent and its readiness to resort to litigation in this matter despite the reasonable alternatives."

[18] It is evident from Nortje's answering affidavit that the pitch to L'Occitane has not yet taken place. She avers that:

"If the applicant succeeds with its pitch to L'Occitane, then my potential employment with the second respondent poses no risk to it as distribution agreements with brands are for a period 3 to 5 years. If the applicant fails, then it has no rights to L'Occitane's business. In either scenario, my potential employment with the second respondent poses no risk to the applicant."

Legal principles

[19] The legal principles to be applied in this type of matter 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.

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

[2] (2013) 34 ILJ 529 (GSJ)

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

[20] It is evident that the Applicant has proved the terms of the restraint and the breach thereof. The Court is bound therefore to determine the reasonableness leg of the enquiry. First, is there a protectable interest at stake which is being threatened by Nortje taking up employment with the second respondent? The Applicant avers that it has a legitimate proprietary interest worthy of protection as Nortje had access and was privy to Applicant's proprietary and confidential information, including its pricing strategies, contracts with Principals, terms of arrangements and future arrangements

with Principals, client lists and databases, processes, know-how and trade secrets, and was privy to numerous discussions where such information was disclosed and discussed.

[21] Nortje insists that her undertakings and those of second respondent regarding the use of alleged 'intellectual property and crucial insider information' and 'informed approaches to critical staff and other stakeholders' have been so extensive that possible risk exposure would be negligible. It would appear to the Court that the critical stumbling block in efforts to resolve the dispute was the upcoming L'Occitane pitch. On Nortje's own version she was involved with the business plan for this brand, and she avers that in general, business plans involve proposed price structure, projected sales and distribution in the market. While she states that she has not been involved with the pitch for the sale thus far, she makes no undertaking that she will not be involved in assisting the second respondent in what is an upcoming bid. Given her acknowledgment that she has not included the brand in her undertakings, a reasonable inference can be drawn that she will be assisting the second respondent with the bid should she be able to take up employment with it. The Applicant clearly has a proprietary interest worthy of protection in relation to the upcoming bid for L'Occitane. More generally, Nortje has not disputed her high level knowledge of the strategy and business methods of the Applicant, as well as her interaction with the Area Managers of the principal brands (its customer connections).

[22] On the issue of the reasonableness of the restraint and its breadth, the answering affidavit states that: "..at the time I signed the letter of appointment ("the LOS") and the restraint agreement I was not on an equal footing with the applicant rendering the restraint of trade unreasonable". Nortje had been retrenched and was in urgent need of employment, and was not paid a consideration for entering into the restraint. These factors cannot *per se* render a restraint unreasonable. As the LAC has stated, an employee is not forced to accept the terms of their contract in a manner akin to coercion[3]. I note that the Nortje's remuneration in terms of her appointment with the Applicant was for an amount over R1 Million per annum. Her 25 years of

[3] Ball v Bambalela Bolts (Pty) Ltd and another (2013) 34 ILJ 2821 (LAC) @ para 19

experience in retail and obvious abilities clearly commanded such a salary. There is nothing more in the papers to support the notion that the restraint was unreasonable in length or area (although submissions were made from the bar on her behalf in this respect).

[23] In any event, attached to the replying papers was the employment contract that the Nortje has signed with the Second Respondent which itself contains a similar restraint for a period of 24 rather than 12 months within the territory of any country forming part of Sub-Saharan Africa. The applicant had set out why her personal circumstances and family responsibilities require her to be in Cape Town, averring that: 'the second respondent is based in Cape Town'. She did not explicitly state that she would be based in Cape Town on taking up employment with the Second Respondent in her answering affidavit. Clause 3.5 of the Contract with Second Respondent reads:

" the Employee shall be obliged from time to time to travel to the premises of all subsidiaries, branches, stores, and offices during the course of their employment, however, the Employee's regular place of work shall be considered the Employer's premises in Johannesburg The Employee agrees to travel if required, both across all the provinces of South Africa and beyond the borders of South Africa in accordance with the Employer's operational requirements."

[24] Although the Court postponed the hearing on the 14 March 2023, in order for Nortje to give instructions to her legal team regarding the replying papers which were only filed on that day, the opportunity was not taken to file a fourth affidavit. The Court expressly provided that same could be filed. While in a restraint matter where a final order is sought, any disputes of fact stand to be resolved by the application of the *Plascon-Evans* rule, the court is inclined, broadly speaking, to treat the replying affidavit as a supplementary founding affidavit and the fourth set affidavit as a supplementary answering affidavit. Due to the fact that the onus rests on different parties in respect of different issues, a set of three affidavits is not always appropriate in restraint matters[4].

[4] Alcon Laboratories SA (Pty) Ltd v Potgieter & Others (2020) 41 ILJ 1689 (LC) at paragraph 7

[25] In *Labournet (Pty) Ltd v Jankielsohn & another*[5] the LAC underlined that essentially the reasonableness of the restraint is a policy issue:

> [40] In *Reddy*, the Supreme Court of Appeal preferred not to become embroiled in the issue of onus and adopted a pragmatic approach which, according to it, was consistent with an approach where there was a direct application of the Constitution to restraint agreements. This approach was specifically adopted in respect of motion proceedings for the enforcement of restraints where the issue for determination was the reasonableness of the restraint. In terms of that approach, where the facts, concerning the reasonableness, had been canvassed in the affidavits, genuine disputes of fact are to be resolved in favour of the party sought to be restrained by applying the so-called Plascon-Evans rule. If the accepted facts show that the restraint is reasonable, then the applicant must succeed, but if they show that the restraint is unreasonable then the respondent in those proceedings must succeed.
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> [41] The enquiry into the reasonableness of the restraint is essentially a value judgment that encompasses a consideration of two policies, namely the duty on parties to comply with their contractual obligations and the right to freely choose and practice a trade, occupation or profession. A restraint is only reasonable and enforceable if it serves to protect an interest, which, in terms of the law, requires and deserves protection. The list of such interests is not closed, but confidential information (or trade secrets) and customer (or trade) connections are recognised as being such interests. To seek to enforce a restraint merely in order to prevent an employee from competing with an employer is not reasonable."

[26] As set out above, I find that a case has been made out that protectable interests are at stake in this matter taking into account Nortje's senior role and functions at the Applicant, the highly competitive market in which the applicant and Second Respondent operate, and the undisputed facts on the set of affidavits before me. The basis for the allegation that the restraint was

[5] (2017) 38 ILJ 1302 (LAC)

unreasonable set out in the answering affidavit is not persuasive. There was no application to strike out portions of the replying affidavit and the content of Nortje's contract of employment, including an even more extensive restraint agreement, with the second respondent, served before me. Nor was an additional affidavit filed. This did not assist Nortje's case. In all the circumstances, I make the following order:

Order

1. The First Respondent is in breach of her restraint of trade agreement concluded with the Applicant on 18 December 2020.

2. The employment of the First Respondent by the Second Respondent is in breach of the restraint of trade agreement concluded between the Applicant and the First Respondent.

3. The First Respondent is interdicted from directly or indirectly using, revealing, disclosing, or in any way utilizing for the First Respondent's own purposes, or for the purposes of any third party, including the Second Respondent, any of the Applicant's confidential information.

4. The First Respondent is interdicted and restrained in accordance with the provisions of the restraint of trade agreement for a period of one year ending on the 12 March 2024, and in the Republic of South Africa, or any further territory where the Applicant operated, from:

4.1 Remaining in the employ of the Second Respondent or any other competitor of the Applicant;

4.2 Whether as a proprietor, principal, member, agent, broker, partner, representative, shareholder, director, manager, executive, consultant, adviser, financier, administrator and/or any other like capacity;

4.3 Being directly or indirectly associated and/or concerned with, interested and/or engaged in and/or interested herself in any firm, business, company, close corporation or other association ("entity") which is a competitor of the Applicant.

4.4 Rendering services to any person or business which is a competitor of the Applicant and in particular the Second Respondent;

4.5 Conducting, accepting, soliciting, canvassing or discussing business or mandates in respect of any of the services rendered by the Applicant in the ordinary course of business with/from any Principal, supplier or client of the Applicant;

4.6 Encouraging or enticing to persuade any Principal, supplier or client of the Applicant to terminate their relationship with the Applicant.

5. The Second Respondent is interdicted and restrained from employing or being associated with the First Respondent in breach of the restraint of trade agreement between the Applicant and the First Respondent.

6. Costs of the application are to be paid by the first respondent.

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H.Rabkin-Naicker

Judge of the Labour Court

Appearances

Applicant: ZM Navsa instructed by Bowman Gilfillan Inc

First Respondent: J.K. Felix instructed by C.A. Friedlander Inc. (Cape Town)