

IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case No: D 276-22

Not Reportable

In the matter between:

DYNAMIC FIBRE MOULDING (PTY) LTD

Applicant

And

CLINTON FRANCIS REDDY

First Respondent

HUHTAMAKI SOUTH AFRICA (PTY) LTD

Second Respondent

Application heard: 23 June 2022 (via Zoom)

Delivered: 28 June 2022 (Electronically)

JUDGMENT

WHITCHER J

[1] The applicant applies urgently for an interdict against Reddy to enforce a restraint of trade pending the outcome of the final determination of the matter. I am satisfied on the facts and the nature of the application that the matter is urgent.

[2] The applicant and the second respondent are major egg tray manufacturing companies, with the applicant supplying about 40% and the second respondent 50% of eggs trays into the South African market. The applicant operates from KwaZulu-Natal while the second respondent, which historically operated from sites in Gauteng and Cape Town, will soon be opening a third operation in KwaZulu-Natal. It follows that the second respondent is a major competitor.

[3] Reddy commenced employment with the applicant in 2011. He was promoted on two occasions: on 1 September 2017 to Production Manager and on 2 August 2021 to Operations Manager. Before he was employed by the applicant, he had gained extensive knowledge of the textile manufacturing industry, from his previous 18 years of working experience.

[4] It is not disputed that Reddy intends to commence employment with the second respondent on 1 July 2022 at its KwaZulu-Natal operation.

[5] The main and real dispute lies in the wording of the restraint of trade provision in his contract of employment:

Restraint of trade agreement: *You are not to join or form a company that uses the same or similar technology or give out any information regarding the manufacturing process of this company for at least two years after leaving this company.*

[6] Reddy contends that the restraint of trade clause as drafted, is not a valid restraint as it does not record the interest/s that the applicant seeks to protect.

[7] The applicant contends that in line with a purposive approach, it covers all confidential information about the applicant.

[8] I disagree with both submissions. Interpreted in line with its plain meaning and logic, the clause restrains Reddy from disclosing confidential information, but only confidential information about the applicant's manufacturing process.¹ And, I emphasise the word "process".

[9] Since the applicant agreed that there is nothing unique or secret about the production/manufacturing process of egg trays and boxes, as described in the papers,² the only facts relevant to the restraint concern those about the applicant's

¹ The stage of applying a purposive approach arrives only after a plain meaning has been given to the words of the instrument and the same leads to absurdity, injustice or anomaly. The plain meaning does not lead to absurdity. Moreover, it would be unjust to read further implied limitations into such contracts, the nature of which is to limit an employee's right to work in a profession he chooses.

² A search on Google and YouTube shows the process is common public knowledge.

project for design modifications of its 2 x 6 egg boxes. Indeed, the applicant states that their “*greatest concern is the current project in the modification of its 2 x6 egg trays*”.

[10] Before I deal with this, it is necessary to deal with certain rules in motion proceedings. I do not agree with Reddy’s submissions that I should disregard the replying affidavit because it introduces a substantial amount of new evidence. In ordinary motion court proceedings, the primary purpose of a replying affidavit is to put up facts that refute the respondent's case.

[11] According to the founding statement by the applicant’s managing director, Reddy was essentially his right-hand-man and second-in-charge at the applicant (a fact recorded in Reddy’s CV to the second respondent but denied by him in his opposing affidavit) and they discussed everything. In order to improve the applicant’s market share, they decided to launch an improved design for the applicant’s 2X6 egg box. Reddy was directly involved in its design and liaising with the tooling department, of which he was in charge. Crucially, the project is not yet complete and inside knowledge of it will be an advantage to a competitor, especially the second respondent which has substantial resources.

[12] Reddy’s version is that the applicant’s previous Operations Manager, Vic Ollerman was solely involved in the research, development, and production of the new 2X6 box and on his retirement, the function passed to the applicant’s Engineering Mechanical Foreman, Mr Klebb. In any event, the boxes are already on sale and any competitor of the applicant could purchase and copy it if they desire.

[13] In rebuttal, the managing director contends that Reddy’s version falls to be rejected for the following reasons: Reddy was actively involved in the project before his promotion, as indicated by the minutes of a management meeting he chaired; he was Ollerman’s replacement; the applicant’s organogram demonstrates that Klebb reported to Reddy; as an engineering mechanical foreman, Klebb’s involvement was limited to accessing drawing and checking dimensions; it was Reddy who took over the project and provided advice and instruction on the design and functionality of the product and this much is made clear from the attached emails. While it is correct that

the 2x6 product is on sale, the changes and improvements to that product are not yet in production – and it is these changes and improvements with which Reddy was intimately involved.

[14] At section 10 of the above mentioned minutes, described as “Products or new products”, it was Reddy who informed the meeting that the applicant was “currently in the process of developing a new 2x6 clamp to replace the 2x6 High Post Clamp” and the responsibility for doing so was “Clinton/Vic/Production” in that order.

[15] The applicant referred the court to emails exchanged between Reddy and other employees of the applicant between October 2021 and May 2022, dealing with queries from customers about the manufacture of certain items and whether the applicant could produce them. Specifically, the applicant says, in his email of 18 October 2021, Reddy confirms that he is involved in the testing of the applicant’s machines, making modifications and so on.

[16] The applicant also referred the court to “a sample of Corrective Action Requests”, which are forms for when a customer raises a complaint. On both requests, Reddy records that the applicant is developing new tools.

[17] The applicant contends that its version should be accepted given Reddy’s lack of candour in other and related matters, including the fact that he was second-in-charge of the business, as substantiated by the attached documents.

[18] In order to decide whether a restraint of trade is enforceable, the Court conducts a value judgment, balancing the interests of the former employer to protect its proprietary interest against the rights of the former employee to freely carry on his or her occupation or trade and the interests of society for persons to be productive. The outcome of this value judgment is not necessarily determined by where the onus lies.³

³*Reddy v Siemens Telecommunication (Pty) Ltd* 2007 (2) SA (SCA) paragraphs 14 – 15.

[19] Even in cases where the former employer has a protectable interest, the restraint of trade will not be enforced if it is unreasonable. In *Basson v Chilwan and Others*,⁴ the Court held that the following four questions should be asked:

19.1 Does the one party have an interest that deserves protection after termination of the agreement?

19.2 If so, is that interest threatened by the other party?

19.3 In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?

19.4 Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected on?

[20] The Court in *Automotive Tooling Systems (Pty) Ltd v Wilkens and Others*⁵ stated in the context of that case, that:

“The mere assertion by the appellant that the processes and methodologies in the design, manufacture and commissioning of customized marking machines are confidential does not make it so. The appellant does not identify any part of the process or method which is unique nor point to any other reason why such process or method is deserving of protection. There is no indication on the papers that the first and second respondents were placed in possession of any formulae or designs or special methods of manufacturing relating to the processes and methodologies which, if done on a confidential basis, would have amounted to an interest worthy of protection.”

⁴ 1993 (3) SA 740 (A).

⁵ Supra note 7.

[21] Skills which an employee acquired in the course of developing his or her trade, even if they are of a specialised nature, do not constitute a protectable interest in the hands of the former employer.⁶

[22] Bearing in mind the test set in *Basson* and the distinction between generic knowledge skills on the one hand and unique knowledge and methods raised in *Automotive Tooling*, I am satisfied that the applicant moves to secure a protectable interest. Its claim does not rest on the Reddy merely leaving with skills gathered during his career. Rather, he seeks to leave with a form of intellectual property about the applicant's tools, moulds, machines, designs and, importantly, the industrial processes by which these items are arranged to create a new product, specifically to *modify its 2 x6 egg trays*. This modification involves new tools and production processes which the applicant thought it was developing under the cover of a restraint of trade agreement concluded with Reddy. The applicant most certainly enjoys a protectable interest in keeping the specific knowledge of these processes possessed by Reddy away from the eyes of competitors.

[23] In so finding, I reject as disingenuous Reddy's attempts to minimise his knowledge of the production processes (and the tools and designs involved therein) in modifying the 2x6 egg trays. He probably did enjoy intimate knowledge of the applicant's unique proprietary production processes of these trays. The parties contracted that Reddy would be restrained from joining or forming a company that uses the same or similar technology or give out any information regarding its manufacturing process. By joining the second respondent, the rights the applicant secured by means of the restraint agreement will quite obviously be threatened.

[24] Reddy obviously has an interest in being economically active. However, he signed a restraint of trade agreement and contracts must be honoured, barring manifest injustice or gross exploitation. If this is not so, the wheels of commerce will come off and contracts will eventually not be worth the paper they are signed on. In my view, the applicant's interests in shielding, for a period of time, its specific egg tray production processes (incorporating the designs and tools implicated in these

⁶ *Automotive Tooling Systems (Pty) Ltd v Wilkens and Others* 2007 (2) SA 271 (SCA) at paragraph 20.

processes) outweighs Reddy's period of inactivity should he be unable to secure any other manufacturing work but with a competitor of his former employer.

[25] The application for an interim order thus succeeds. Prima facie the period of restraint far exceeds the scope of protection strictly necessary to protect the applicant's interests, but that issue falls to be determined in the final determination of this case in the event the applicant succeeds there in establishing a protectable interest.

Order

1. An order in terms of prayers 2 and 3 of the Notice of Motion is granted pending the return date of 29 July 2022.

Whitcher J

Judge of the Labour Court of South Africa

APPEARANCES

FOR APPLICANT: W Shapiro S.C., instructed by Maraj Incorporated.

FOR FIRST RESPONDENT: Mr Denny of Norton Rose Fulbright South Africa Inc