

IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO:

4359/2008

DATE:

19 MARCH 2008

5 In the matter between:

VALUE LOGISTICS LIMITED

APPLICANT

versus

K L DIPPENAAAR and ONE OTHER

10

JUDGMENT

CROWE, A J

15 This is an urgent application which is before me in the so-called fast lane, the applicant seeks to enforce a restraint of trade agreement, a provision in an employment agreement in the annexure SA2 to the founding affidavit. The clause in question is 13.2, which says that during your employment and for a period of two years after the termination of your employment for any reason, sub-paragraph 1:-

“You will not knowingly be directly or indirectly employed, have an interest or be engaged within a radius of 75 kilometres of any of the company’s business premises, with any company, firm or

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business which competes with the business of the company anywhere in South Africa.”

and sub-paragraph 2:-

“You will not solicit or tout for any clients of the company or suppliers or any other connections of the company, nor shall you seek to solicit, tout for or entice away any of the staff for the time being of the company or any of the company's clients.”

10 Sub-paragraph 13.3 reads:-

“Each of the restraints set out above shall be regarded as separate and severable. If any one or more of the restraints set out above are invalid or unenforceable for any reason, the validity of any of the other restraints shall not be affected. Each of the separate restraints set out above may, if it goes too far to be enforceable, nevertheless be enforced to such lesser extent as may be required by the company and shall be interpreted accordingly.”

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And those are the relevant provisions on which the claim is made.

The respondent, Ms Karen Leslie Dippenaar, was employed by the applicant and/or by an associated company at the Market

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Toyota Culemborg Cape Town office, and it is clear that this restraint applies to her in that employment.

At paragraph 15 of the founding affidavit it states that on 29 February 2008 the first respondent hand-delivered to the Cape Town human resources manager, Mr Basson, a letter addressed to one Smit, the national sales manager, based in Johannesburg, that is Annexure SA3, which reads:-

10 “Dear Dese

 This letter serves as my letter of resignation with one month notice, the last day being 31 March 2008. I would like to thank you for your support over the past three years. I have forwarded a signed copy of this letter to the HR Department in Cape Town.”

15 It is apparent from the papers that subsequent to this the first respondent had made arrangements to take up employment with a competitor who is the second respondent in this matter, and that such employment would be in breach of the restraint, and I am satisfied that it is appropriate in this matter to enforce the restraint.

25 The question that has entertained the discussion in this matter

is the duration of that restraint of two years.

The evidence on which the applicant relies is set out in paragraph 11 of the founding affidavit and which paragraph 5 deals with the confidential information acquired by the first respondent and it sets out several detailed sub-paragraphs dealing with this, and it is clear in my view that these relate largely to a period of one year. There is a national sales conference which was held in Johannesburg in January, a four 10 day conference, and substantial confidential information was allegedly imparted to the first respondent at such conference, including sales figures for the previous year, revenue for the previous year, revenue expected to be generated in the forthcoming year, strategies for the forthcoming year, 15 discussions regarding applicant's divisions which generated a profit or loss, how to remedy these problems in the applicant's divisions, there was also in-depth discussion on the strategies to be employed to ensure that the customers continued to place their business with the applicant, different strategies 20 were formulated in respect of different decision-makers at the customers, for example a specific strategy was formulated for a particular financial manager of a customer, whereas a different strategy was formulated in respect of an approach to the CEO of that same company. The third day of the 25 conference sales managers each gave presentations of their

area. There were weaknesses in applicant were extensively debated and how these could be improved upon. It was stated that this information would be extremely valuable to a competitor who could exploit those weaknesses. There were in-depth discussions concerning rumours in the marketplace concerning customers of other logistic companies which were said to be unhappy with the service they were receiving. These discussions sought to identify customers and means of soliciting their business away from those other logistic companies.

It is also stated that first respondent knows what rates are paid by each of applicant's customers in the Cape Town area, that the applicant's rates structures are not uniform and the rates charged to different clients are based on different criteria. Armed with this information, first respondent would be able to solicit such customers by undercutting applicant.

Further factors are mentioned there in the paragraph which I will not repeat. For example one is at 11.5 where it says:-

"The first respondent knows what new business has been brought into the applicant in the last few months which is not yet bedded down. She thus knows what new business could be targeted by a competitor before a firm relationship with the

applicant is established.”

And the point is made in paragraph 12 that:-

5 “All of the aforesaid information is not in the public domain and is confidential. The point is also made that the logistics business is extremely competitive and that it is categorised by the deponent as cut-throat and that this information would be invaluable to a competitor of the applicant, would enable such
10 competitor to compete unfairly with the applicant.”

Paragraph 13 of the founding affidavit deals with trade connections, as does the supporting affidavit of Mr Gottschalk, and it is principally on the ground of trade connections that the
15 applicant has submitted that a two year restraint should be enforced.

I have considered these provisions in the founding affidavit, as well as in the affidavit of Mr Gottschalk, and in my view those
20 considerations amount to opinion evidence, and as was rightly conceded by counsel before me, there cannot be a hard and fast line drawn.

In my view the Court is placed in a difficult situation balancing
25 two competing principles, the one being the enforcement of a

contract and the other being the first respondent's right to earn a living in the marketplace and use her skills in the marketplace.

5 I am not satisfied that the applicant has made out a case that it would be appropriate for this Court to enforce a two year period of restraint and on the evidence before me I consider that a period of one year would be appropriate. I have considered the submissions made by the applicant's counsel
10 carefully and I am not persuaded that it would serve justice to enforce a restraint of two years.

The submission was made that the Court could not interfere with the period of restraint unless it was manifestly clear or
15 uncertain. In my view, the difference between one year and two years is a substantial difference, and in the result I have decided to enforce the restraint only for a period of one year, and that relates both to the first and the second respondents.

20 As regards the second respondent, there is a letter before Court from their attorneys, it is dated 17 March, and it advises that:-

"Our client instructs us that it does not intend to
oppose the above application and that it will abide
25 the order of the Court in this matter, provided that

your client does not seek a costs order against our client."

This is, in my view, no indication that the second respondent
5 accepts that a two year restraint is applicable and that the respondent's attitude is simply that it does not wish to become embroiled in this litigation and that it will abide the Court's order.

10 In the circumstances I just wish to address the question of costs. The applicant seeks an order that the first respondent pay the costs of the applications, and on the application of the general principle that the costs follow the result, one would normally order a respondent to pay the costs of the
15 application. The first respondent appeared in person and it is plain that the first respondent is in a desperate situation in that she has found herself, through her own conduct, she accepted an appointment with a competitor in breach of the restraint and now that the restraint is being enforced, she is
20 not able to work in the industry where she had been working for some years. Mrs Dippenaar advised me from the bar that she has, including the three years at the applicant, a period of 18 years in the industry. It is plain that she was in a fairly senior position and that she will now have to, for a period of
25 one year at least, seek employment outside the logistics

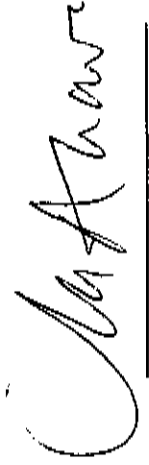
industry and that this is going to impact considerably on her financial situation. I canvassed with the parties the question of whether there was a prior demand, before the institution of these proceedings. The situation as I understand it is that the papers were served on the respondent on 14 March, which is last Friday, and that the matter is now before Court on 19th, on the following Wednesday. There was some attempt before coming to court by the respondent to contact the applicant to try and avoid coming to court. The Court has a discretion regarding costs and it seems to me that if there had been a prior demand, there may well have been an undertaking forthcoming which may have avoided the need to approach Court at all. On the other hand, the applicants have the right to approach Court as they have done. In my view justice would be therefore served if the first respondent were ordered to pay 50% of the costs of the application.

In the result, my judgment will then be that I grant an order in terms of the draft which was handed up to me by Mr Hoffman, I mark it X, I initial it. I am amending it as follows, in paragraphs 1.2, 1.3, 1.4 and 2, the reference to two years is replaced with one year. In paragraph 3, the order is amended to read:-

"The first respondent is ordered to pay 50% of the costs of the application."

and it is so ordered.

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A handwritten signature in cursive script, appearing to read "A. J. Crowe", positioned above a horizontal line.

CROWE, A J