IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN

CASE NO.: 14585/2010

In the matter between

PEPKOR RETAIL LIMITED Applicant

and

NWABISA CALENI First Respondent
WOOLWORTHS (PTY) LTD Second Respondent

JUDGMENT DELIVERED ON 6 SEPTEMBER 2010

SAMELA, AJ

[1] On the 9th July 2010 the Applicant brought an urgent application against the First and Second Respondents, inter alia, seeking to enforce restraint of trade agreement and an order interdicting the First Respondent for a period of six months, commencing from 30 June 2010, from directly or indirectly soliciting custom or business or trade from any person or entity which was a supplier of Ackermans for a period of twelve months prior to 30 June 2010.

[2] On the 12th July 2010, by agreement between the parties, the matter was postponed to 4 August 2010 on the semi urgent roll for hearing.

[3] The First Respondent opposed the relief sought on the basis that it is far too wide, unreasonable and unenforceable.

[4] The facts in this matter are largely common cause. The First Respondent was employed by the Applicant during March 2004, and in

January 2006 was appointed as the Ladies' Activewear Buyer after receiving some training. During October 2006, the First Respondent signed the restraint agreement. The provisions of the restraint agreement provided, amongst other things, that for a period of six months from the date of termination of First Respondent's employment, she would not be employed by either a competitor of the Applicant or any other entity involved in the business of clothing retail. Secondly, for the same period (i.e. six months), First Respondent would not provide the very same services or services of the same nature or kind which she rendered to the Applicant. Thirdly, the First Respondent agreed that the restraints were both reasonable and necessary to protect the proprietary interests of the Applicant. Fourthly, the First Respondent entered into the restraint agreement voluntarily and with full appreciation of its consequences. The First Respondent was paid R102 000.00, being equivalent of a year's salary, in four equal instalments, in consideration of the agreement. The First Respondent is now employed by the Second Respondent (namely Woolworths) as from 1 July 2010, after leaving Applicant's employment on the 30th June 2010.

[5] The basis for the relief sought by the Applicant is that in terms of the restraint agreement the First Respondent undertook, amongst other things, not to work for Applicant's competitor within six months period stipulated in the agreement after the termination of her service with the Applicant. Furthermore, she received a sum of R102 000.00, in consideration of the agreement.

[6] The First Respondent opposed the application on various grounds.

[7] Firstly, the First Respondent alleges that she did not acquire any confidential and protectable information whilst in the employ of the Applicant.

[8] Secondly, the restraint of trade agreement is far too wide and unreasonable, in so far as it extends well beyond what is required to safeguard any legitimate protectable interests that the Applicant might have.

[9] Thirdly, the Applicant's suppliers' identity is hardly a secret.

[10] Fourthly, the First Respondent was under the impression that if she did not agree to sign the restraint agreement, she would not be offered employment by the Applicant.

[11] The only dispute is whether the restraint of trade entered into between the Applicant and the First Respondent is reasonable and enforceable. The First Respondent tendered to pay to the Applicant the R102 000.00 which she received in consideration of the restraint agreement which the Applicant has rejected.

[12] The court is required to determine whether:

(i) the restraint agreement is reasonable and enforceable; and

(ii) to grant or not an interdict against the First Respondent.

[13] Section 22 of the Constitution provides:

> "*Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.*"

[14] It is trite law that four questions have to be addressed to determine whether the restraint of trade is reasonable or not between the parties, see **Basson v Chilwan & Others** 1993 (3) SA 742 (A) at 767G, where the court addressed the following questions:

(a) Is there an interest of the one party which is deserving of protection at the termination of the agreement?

(b) Is such interest being prejudiced by the other party?

(c) If so, does such interest so weigh up qualitatively and quantitatively against the interest of the other party that the latter should not be economically inactive and unproductive?

(d) Is there another fact 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?

[15] At 762 C-H the court clarified the public policy issue and by doing so made reference to considerations of reasonableness, when it said:

> "*The public interest must be the touchstone for deciding whether the Courts will enforce the restraint clause or not. The party seeking to avoid the contractual obligation to which he had solemnly agreed should therefore be required to prove that the public interest would be detrimentally affected by the enforcement of the clause (at 892I-893D). The mere fact that the clause may be unreasonable* inter partes *is not normally a ground for attacking its validity, since the public interest demands that parties to a contract beheld to the terms of their agreement (at 893H-I). A second consideration however, is this: that it is also generally accepted that a person should be free to engage in useful economic activity and to contribute to the welfare of society by the exercise of the skills to which he has been trained. Any unreasonable restriction on such freedom would generally be regarded as contrary to public policy. In deciding on the enforceability of a restraint clause the Court would be required to consider both these aspects in the light of the circumstances of each particular case (at 894B-E). Where public interest is the touchstone, and where public interest may change from time to time, there can be no* numerus clausus *of the circumstances in which a Court would consider a restraint on the freedom to trade as being unreasonable. There can be no justification, therefore, in the ordinary course, for limiting the concept of reasonableness to cases where a party has knowledge of trade secrets or trade connections or the established customers of a firm. With the public interest as the touchstone the Court will be called upon to decide whether in all the circumstances of the case it has been shown that the restraint clause should properly be regarded as unreasonable.*"

[16] In **Reddy v Siemens Telecommunications (Pty) Ltd** 2007 (2) SA 486 (SCA) at 496 (para 15) and 497 (para 16) the court had this to say:

> "*[15] A court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint. The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim* pacta servanda sunt. *The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions. Both considerations reflect not only common-law but also constitutional values.*"
>
> *[16] In applying these two principal considerations, the particular interests must be examined. A restraint would be unenforceable if it prevents a party after termination of his or her employment from partaking in trade or commerce without a corresponding interest of the other party deserving of protection. Such a restraint is not in the public interest.*"

[17] In **Automotive Tooling Systems (Pty) Ltd v Wilkens & Others** (2007) (2) SALR 271 (SCA) the court outlines what qualifies as a "proprietary interest" and had this to say at 277-278:

> *"An agreement in restraint of trade is enforceable unless it is unreasonable. It is generally accepted that a restraint will be considered unreasonable, and this contrary to public policy, and therefore unenforceable, if it does not protect some legally recognizable interest of the employer but merely seeks to exclude or eliminate competition."*

[18] In **Walter McNaughton (Pty) Ltd v Schwartz & Others** 2003 (1) ALLSA 770 (C) at 777 the court outlined the requirements to be met in order for the information to be classified as confidential, when it said:

> *"For information to be "confidential it must (a) be capable of application in trade or industry, that is it must be useful, not be public knowledge and property, (b) be known to only a restricted number of people or a closed circle, and (c) be of economic value to the person seeking to protect it."*

[19] The requirements for the granting of final interdict are well known, namely: a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy, see **Setlogelo v Setlogelo** 1914 AD 221 at 227.

[20] Mr Schippers SC who appeared on behalf of the Applicant submitted that the First Respondent, by virtue of her employment position as senior employee whilst in the Applicant's employment, gained access to strategic information, trade secrets, financial information and commercial practice regarding the Applicant's business activities. This information is referred to as the confidential information, which can be utilised by the First Respondent in clothing and homeware against the Applicant's competitor, in this matter, Woolworths.

[21] Mr Manca SC on behalf of the First Respondent submitted that the First Respondent was not a senior employee whilst employed by the Applicant and that "there is no genuinely confidential or protectable information or trade secrets" which she acquired during her employment with the Applicant.

[22] Having regard to the evidence of the Applicant I am satisfied that the First Respondent was employed in a senior position for the following reasons:

(a) as a Ladies Activewear Buyer, the First Respondent was required to select and determine merchandise for all Applicant's stores countrywide;

(b) she travelled overseas to determine trends on active wear;

(c) the merchandise selected, determined and bought by her was sold in all Applicant's stores countrywide;

(d) she was required to source and deliver merchandise for sales in the order of R54 million per year;

(e) she was also a part of the Applicant's buying team; and

(f) had access to confidential information as she signed on 3 March 2004 the annexed document marked "ML10" (Ackermans Ltd Code of Good Conduct:Confidentiality).

[23] The next issue is to determine whether the information, strategies and identities of the Applicant suppliers are in the public domain.

[24] It is clear from the document "ML 15(1)" and "ML 15(2)" that the Applicant's supplier was not in public domain because the Applicant's answering affidavit say in 2006, the Applicant established its own International Sourcing Office (ISO) in Shanghai, China. The First Respondent had access to it and utilized it to find unique suppliers or factories for the Applicant only and obtained prices therefrom.

[25] Mr Manca countered Mr Schippers' argument by submitting that the identity of the Applicant's suppliers was not a secret, and since taking up employment with Woolworths, First Respondent never had contact with suppliers in relation to any homeware products supplied by the Applicant.

[26] I agree with Mr Schippers' submissions because it is clear from the documentary evidence presented by the Applicant by way of annexures (ML2, ML10, ML15(1) and ML15(2)) that the information is confidential for the

following reasons - (a) it is useful and capable of application in trade; (b) it is not public knowledge and property; (c) known only to restricted people namely, the SBU (Small Business Unit) including the First Respondent; and (d) is of economic value to the Applicant.

[27] The next question is whether the restraint in question is in the public interest.

[28] Mr Schippers submitted that the restraint is reasonable and enforceable, in that it seeks to protect the Applicant's proprietary interests, and is not against public interest, which requires the parties to comply with their contractual obligations even if it is unproductive.

[29] In reply, Mr Manca submitted that a restraint which seeks to prevent competition is contrary to public policy and therefore unenforceable. He submitted that the Applicant has not shown that protected interest justifies such enforcement.

[30] I disagree with Mr Manca's contention. In my view the restraint of trade is reasonable because it is for a very short period of time, namely six months. Although it operated throughout the Republic of South Africa, it is reasonable in that she bought the goods not for a specific store but for all the Applicant's stores throughout the Republic of South Arica. She also received compensation, namely a year's salary in consideration of the restraint. In these circumstances I am of the view that the restraint agreement is reasonable and enforceable and not against the public policy. See **Basson's** case (supra) at 762; **Reddy's** (supra) at 496 para 15 and 497 para 16 and **Automotive Tooling Systems** (supra) at 277-278.

[31] There is no doubt that the First Respondent voluntarily signed the restraint agreement on 25 October 2006 (ten months later as she was appointed on 1 January 2006) without any undue influence and was fully aware of the legal consequences flowing from the agreement. The suggestion by the First Respondent that she was under the impression that if

she did not sign the restraint agreement she would not be employed as a buyer, is rejected. She was given the opportunity to read the restraint agreement before signing it, and there is no basis for her to say that she misunderstood the restraint agreement.

[32] By accepting employment with the Second Respondent, she breached the restraint agreement. The undertaking given by the First Respondent is not enough to protect the Applicant's interests because it will be difficult to enforce it. I therefore find that the First Respondent has not discharged the onus of showing that the restraint of trade agreement is unreasonable.

[33] In the circumstances I find that the Applicant has established a clear right, that is, Applicant's proprietary and business interest. The Applicant has furthermore established that there is a real likelihood that the First Respondent could use the confidential information which will cause the Applicant to suffer serious proprietary and business interests. There is no alternative or appropriate remedy available to the Applicant, because a claim for damages against the First Respondent will be difficult to quantify.

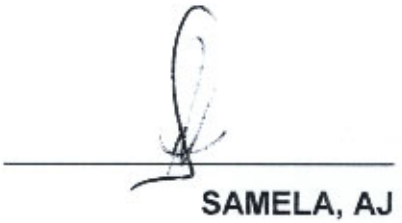
[34] In the result, the following order is made:

(i) The First Respondent shall terminate her employment as a buyer with Woolworths on 20 September 2010; and is interdicted from being engaged, retained, employed, interested or involved, financially or otherwise, in or with a competitor of Ackermans or any other entity involved in the business of clothing retail, wholesale and/or clothing purchasing and/or any company or entity formally or commercially associated with these companies or entities, throughout the Republic of South Africa, for a period of six months with effect from 21 September 2010, in accordance with the provisions of the restraint of trade agreement entered into on 25 October 2006, between Ackermans, a division of the Applicant, and the First Respondent.

(ii) The First Respondent is interdicted for a period of six months, commencing from 21 September 2010, from providing any type of services identical or similar to the nature of the services which she had performed on behalf of Ackermans whilst in its employ, to or on behalf of any competitor of Ackermans, which had been such a competitor or other entity at any time during a period of 12 months prior to 30 June 2010.

(iii) The First Respondent is interdicted for a period of six months, commencing from 21 September 2010, from directly or indirectly soliciting custom or business or trade from any person or entity which was a supplier of Ackermans for a period of 12 months prior to 30 June 2010.

(iv) First Respondent to pay the costs.



SAMELA, AJ