THE REPUBLIC OF SOUTH AFRICA

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

CASE NO: 10752/2011

In the matter between:

BOVIDAE INVESTMENTS (PTY) LIMITED t/a NASHUA WINELANDS	First Applicant
HYBRICODE (PTY) LIMITED t/a NASHUA BREEDE VALLEY	Second Applicant
PWC OFFICE AUTOMATION (PTY) LIMITED t/a NASHUA PAARL AND WEST COAST	Third Applicant
JUST JASMINE INVESTMENTS 201 (PTY) LIMITED t/a NASHUA TYGERBERG	Fourth Applicant
and	
HENRY KINGHORN	Respondent

JUDGEMENT: 11 JUNE 2011

VELDHUIZEN J:

[1] The applicants apply for a final order, pending the advent of 25 February 2013, interdicting and restraining the respondent:

(a) from directly or indirectly utilising, disclosing, divulging or making known the trade secrets and confidential information of the applicants;

(b) from approaching, advising or contacting in order to either directly or indirectly solicit the custom or any person or entity who was a customer with whom or to whom either on behalf of the applicants negotiations, discussions or representations were entered into or made during the period of the respondent's employ with the applicant;

(c) either directly or indirectly being employed by or having an interest in either as employee, principal, agent, worker, director, shareholder, partner, consultant, financier or advisor in or in any other like capacity in any concern or entity which carries on the same business or a business similar to or alike the business of the applicants within the exclusive area of the franchise of the applicants as depicted within the geographical boundaries of the map annexed to the Notice of Motion and which area includes the towns and suburbs reflected on the list annexed to the Notice of Motion.

[2] It is common cause that the respondent and the first applicant on 22 June 2006 entered into a written agreement in terms whereof the first applicant employed the respondent as a sales executive. The parties furthermore agree that this agreement contained a binding restraint of trade clause.

[3] The respondent left the first applicant's service on 20 July 2010. It came to the attention of the first applicant that the respondent was acting

in breach of the restraint provision and it launched an urgent application for an interdict to enforce the restraint of trade provisions of the agreement. After launching the application the respondent approached the applicant and the parties entered into a settlement agreement which was made an order of court. The result was that the respondent was re-employed by the applicant and on 1 September 2010 the parties entered into a second agreement in terms whereof the respondent was employed as a sales executive. This second agreement also contained a restraint of trade clause which for all practical purposes was identical to that contained in the first agreement. In terms of this clause the respondent bound himself: '. . . for 24 (twenty four) months after the termination [of his employment] to the following restraints

15.4.1 . . .

15.4.2 . . .

15.4.3 You will not either directly or indirectly be employed by or have an interest in, either a employee, principal, agent, member, director, shareholder, partner, consultant, financier, or advisor or in any other like capacity in any concern or entity which carries on the same business or a business similar to or alike the business of Nashua or any of its franchisees.'

It is not disputed that the restraint is a valid one and, in my view, rightly so. It has been enforced in a number of decisions in this division.

[4] During February 2011 the applicant entered into a written agreement in terms of which it sold different parts of its business and assets to the second, third and fourth applicants. The effective date of the agreement

was 1 February 2011. A portion of the business which operated in the Worcester area was sold to the second applicant. Clause 19.3.2 of this agreement states that section 197(2) of the Labour Relations Act, No 66 of 1995 applies to the contracts of employment of all employees. Ss (2) and (3) of s197 of this Act reads:

'(2) If a transfer of a business takes place, unless otherwise in terms of subsection(6)-

(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;

(b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;

(c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and

(d) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer.

(3)(a) The new employer complies with subsection (2) if that employer employs transferred employees on terms and conditions that are on the whole not less favourable to the employees than those on which they were employed by the old employer.'

[5] The respondent left the employ of the second applicant on or about 25 February 2011. The respondent states that he has 'set up my business with a view to canvassing new business in the Boland/Overberg area.

This I do by targeting new customers currently served by other players in the market, to wit Toshiba, Xerox, Ricoh and others.' It is common cause that the players in the market mentioned by the respondent carry on the same business as the applicants and are competitors of the applicants. It is also clear that the area within which the respondent is operating falls within the area covered by the restraint of trade clause referred to above.

[6] The respondent opposes the applicants' application on the ground that the second applicant breached the agreement by requiring him to sign a new agreement which differed in material terms from those of the existing agreement and which was less favourable to him. The respondent states that towards the end of January 2011 and during February 2011 the divisional manager of the second respondent, mr Louis Botha, requested him to sign the new agreement. He was at one stage told that if he did not sign the new agreement then there would be no work for him. The respondent refused to sign the new agreement. The request was repeated on a number of subsequent occasions and the respondent steadfastly refused to sign it and eventually left the employ of the second applicant on 25 February 2011.

[7] The respondent lists a number of respects in which the proposed new agreement differed from the existing agreement which he had with the first applicant. He states as follows:

'27. I point out the following fundamental distinctions between the First Applicant's contract and that of the Second Applicant:

27.1 Clause 6.4 of the Second Applicant's contract makes provision for the deduction of monies from my salary, which is not contained in the First Applicant's contract.

27.2 In terms of the Second Applicant's contract I was to be appointed in terms of a probationary period of 3 months from signature of the new contract, whereas in terms of the First Applicant's contract I had served for a period of 6 years and had long moved past the probationary period. This meant that the Second Applicant did not recognise my years of service with the First Applicant.

27.3 During the probationary period, a short notice period applied.

27.4 In terms of clause 15.4 of the Second Applicant's contract, the restraint of trade agreement applies for a period of 2 years thereafter, notwithstanding the termination of the contract for any reason whatsoever, whilst the First Applicant's contract contains no such qualification. A similar provision is contained in clause 15.6.

27.5 As pointed out above, the commission structure of the Second Applicant could be amended unilaterally without notice to employees, whereas the same provision did not apply in the First Applicant's contract.'

[8] Mr Louis Pieter Botha, on behalf of the second applicant, denied that the second applicant's contract of employment differed in material respect from that of the first applicant. He states:

'2.2.2 . . . I notice that the Respondent has conveniently omitted to include in his answering papers the content of a further email I sent to the Respondent that same day. I attach hereto as annexure "LB 7" an email I sent to the Respondent on 28 January 2011 wherein I offered the Respondent a position as team leader. This would be a promotion for the Respondent and a promotion which would be accompanied with a more lucrative salary.'

He goes on to state that all employees knew that commission structures change regularly without consulting them and that this depends on various factors such as the increase in productivity, the increase in sales, staff morale and external factors. He denies that there was any obligation on the first applicant to consult the respondent before amending the commission structure. He submits that the respondent would in any event, on the whole, have been in a better position if he had signed the second applicant's agreement than he was whilst in the employ of the first applicant.

[9] I am prepared to accept that the second agreement differs in some respects from the respondent service agreement with the first applicant. It is submitted that the second applicant acted in breach of the respondent's contract with the first applicant and that the second applicant adopted an unfair labour practice. It is further submitted that the applicants, having wrongfully caused the termination of the agreement, should not be allowed to rely upon the continued existence of a restraint of trade clause

contained in the agreement. This is really the only issue which I need to decide.

[10] In *Drewtons (Pty) Ltd v Carlie* 1981(4) SA 305(C) Watermeyer JP held at 308E 'An employer cannot repudiate his obligations under the contract of employment and at the same time claim to enforce the restraint clause (*vide General Billposting Co Ltd v Atkinson* 1909 AC 118).' In *Capecan (Pty) Ltd v Van Nimwegen and Another* 1988(2) SA 454 (C) Van den Heever J (as she then was), after referring to this statement of the law, said at 460C:

'The italicised passage is, with respect, too widely stated, and the case quoted questionable authority for the proposition postulated. There the employee argued the "true construction" of the agreement in issue to have this effect. The terms of the agreement in *Drewton's* case do not permit of any such "true construction" since it contained a provision similar to that in the present contract, that the restraint was to be operative upon termination *for whatever reason*.'

[11] In *Info DB Computers v Newby and Another* 1996(1) SA 105(W) Goldblatt J referred to the *General Billposting* case as well as Heydon *The Restraint of Trade Doctrine* (1971) and stated at 108H-I:

'I am persuaded, both on the ordinary principles of our law and the strong English and American authorities, that, unless there are terms to the contrary, a party who has wrongfully caused the termination of a contract

of employment cannot rely upon the continued existence of a restraint of trade clause forming an integral part of such contract.'

[12] In *Reeves and Another v Marfield Insurance Brokers CC and Another* 1996(3) SA 766(A) a restraint of trade clause in the appellant's service agreement stated that it would apply should the employee cease to be employed 'for any reason whatsoever'. Scott JA referred to both the *Drewtons* and *Info DB Computers* decisions. These decisions were criticised by the learned judge:

'But whatever its basis in England, the rule is not one which can be easily explained in terms of the principles underlying our law. Indeed, Mr Lang did not suggest that it was an application of the *exception non adimpleti contractus* and disavowed any attempt to rely on the *exceptio* (cf *Chubb Fire Security (Pty) Ltd v Greaves* [1993(4) SA 358(W)] where Du Plessis J sought to explain the rule on this basis). There would also seem to be little justification for importing such a hard and fast rule into our law. As indicated above, the refusal to enforce a restraint because of a breach on the part of the employer, depending on the circumstances, could result in a situation which is wholly inequitable. The wronged employee, on the other hand, will have his action for damages. Furthermore, as I shall show in due course, the absence of such a rule would not mean that the manner in which the contract of employment comes to an end is of no consequence.' (p 773 G-I).

The learned judge also criticised the rationale adopted in the *Info DB Computers* case.

The learned judge, however, later in the judgment continues:

'Even if the existence in our law or the rule in the *General Billposting* case were to be accepted, I fail to see on what basis it could be applied once it is found that the parties were in agreement that the restraint was to operate in circumstances where the employer himself wrongfully terminated the contract of service.

For the purpose of the present case it is unnecessary to go further than to decide that the rule can have no application in such a case. Whether there is room for the application of the rule in the absence of such a provision in the restraint clause is a question which need not be decided at this stage and I accordingly refrain from doing so.' (pp 774 I – 775 A).

[13] The restraint clause in the present matter does not contain a provision, like the one in the *Reeves* case, to the effect that the restraint would operate if the agreement terminated 'for whatever reason'. I, therefore, have to decide whether the respondent is bound by the restraint despite the second applicant's breach of the agreement.

[14] Van den Heever J in the *Capecan* decision said at 461D 'A restraint clause is usually better classified as a collateral agreement since in cases such as we are dealing with it is intended to have an existence independent of the contract of employment and to continue to be operative after the latter has ceased.' In my view, this is so whether the restraint clause contains a provision that it will operate if the agreement terminates 'for whatever reason' or not.

[15] Contracts of employment can come to an end in any of a number of ways: firstly the contract may be for a fixed period and its time has run out; secondly the parties may, in terms of the contract, give notice of termination; thirdly the parties may mutually agree to end the agreement; fourthly the employee may breach the agreement; and in the last instance the employer may breach the agreement. It is clear that a valid restraint of trade provision in such a contract will, in the absence of a severance agreement to the contrary, be enforceable in the first four instances mentioned. Whatever form the termination may take the employer's need for protection remains after the contract has come to an end.

[16] Does the fact that the employer has breached the agreement make a difference? It is, in my view, clear that the *exceptio non adimpleti contractus* does not find application in this case. If the court were to refuse to enforce an otherwise valid restraint of trade clause where the employer has wrongfully terminated the employee's service, then it must be on the ground that, having regard to the circumstances prevailing at the relevant time, it would be contrary to public interests to do so. The onus to prove that this is so rests on the employee.

[17] In the present case there can be no question of fraud or *mala fides* on the part of the second applicant. The second applicant was of the view that the needs of the second applicant required that new service agreements be entered into with all the employees. This is

understandable. There was no intention to prejudice the employees, including the respondent. The differences between the respondent's agreement with the first applicant and the one offered by the second applicant are on the whole not significant. In any event, there was still an opportunity for negotiation. The respondent, however, failed to avail himself of this opportunity. Keeping these facts in mind, I do not consider that it would be contrary to public interests to enforce the restraint in the present case.

[16] In the result I conclude that the applicants are entitled to the relief sought and I grant an order in terms of prayers 2.1 and 2.2 of the Notice of Motion . The respondent is ordered to pay the applicants' costs of suit.

A.H. VELDHUIZEN
JUDGE OF THE HIGH COURT