IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Reportable

CASE NO: 8714/2016

In the matter between:

THE VELVET CAKE COMPANY (PTY) LTD Applicant

and

ROELANDE NIEHAUS First Respondent
BLONDIES AND BROWNIES BAKERY CC Second Respondent

JUDGMENT: 12 September 2016

DAVIS J

Introduction

[1] Agreements in restraints of trade trigger the invocation of two values or freedoms which conflict when the legality of a contract in restraint of trade is placed in issue: freedom of trade and freedom of contract. It is said that a restraint of trade should be construed in terms of a positive protection of an economic interest but, where the sole aim thereof is to eliminate competition, the restraint will be construed as being contrary to public policy. See *Rautenbach and Reinecke* 1995 THIRHR 561.

[2] But what is the meaning of 'to eliminate competition'? If competition is defined as the promotion of a competitive process, the purpose of which is to maximise consumer welfare, then it may be that a wide range of contracts which provide for a restraint of trade achieve precisely the opposite result. If the

argument in support of a justification of a restraint is the protection of a proprietary interest, then does this interest give way to a broader consideration of the consequences of competition for the relevant market? If the justification for a restraint of trade is that freedom of contract trumps all other values so that the consequences of the exercise of this freedom must be safeguarded by the courts 'come what may', then if competition is the sole lens through which a restraint of trade should be perceived, this approach could result in a conflation of the value of freedom of contract with the promotion of competition. In turn, this would necessitate a sustained enquiry as to the autonomy of the contracting parties so that both can be said to have acted freely and voluntarily, an enquiry which would necessitate a sustained analysis of the concept of autonomy within the context of parties exercising their freedom to conclude a contract. For a rare attempt to engage with this critical question in our contract literature, see Deeksha Bhana 2015 (26) *Stellenbosch Law Review 3.* Without an interrogation of the meaning of 'freedom' within the context of the value of freedom of contract, it is difficult to divine an adequate justification for its iconic status in our law of contract. Given the context of competition, the concept of abuse of dominance may prove useful in the development of a sufficiently nuanced concept of contractual freedom which would be fit for purpose.

[3] Unfortunately, none of these concepts are properly analysed in South African law. The jurisprudence with regard to an agreement in restraint of trade has been determined in general by way of a poorly reasoned adherence to the concept to the sanctity of contract which represents more of a ritual incantation of a jurisprudential war cry then it does a sustained intellectually interrogated enquiry as to the meaning of the sanctity of contract and its value insofar as a

competitive economy is concerned. There is little more than assertion as to why the concept of freedom of trade holds out less of a possibility of a greater measure of competitive process and hence does not 'vibrate nearly as strongly through our jurisprudence'. See *Roffey v Cattrall Edwards Goudre (Pty) Ltd* 1977 (4) SA 494 (N) at 505 F which theory found favour in *Magna Alloys and Research (SA) (Pty) (Ltd) v Ellis* 1984 (4) SA 874 (A) 890-891.

[4] Alas, the precedent which confronts me in the determination of this matter hardly deals with the meaning of the concept of competition. It is correct, as Van der Merwe *et al* General Principles of Contract (4th ed) at 186 remark 'a restriction intended to exclude competition as such without also protecting some legitimate interest will normally be against the public interest.' See *Magna Alloys* at 904-905; *Basson v Chilwan* 1993 (3) SA 742 (A) at 771. But what conception of competition is envisaged and how that is then evaluated against other so called legitimate interests is not made clear in any of our jurisprudence. For this reason, our jurisprudence dictates that freedom of contract is a preferred value and that patrimonial interests such as business and trade connections, clientele and trade secrets are to be protected and hence these considerations must trump any claim to freedom of trade.

[5] Accordingly, and notwithstanding the pressing need to investigate the core concepts which underline these enquiries, I am bound by precedent and accordingly am required to determine this application to enforce the restraint of trade within the framework of this precedent.

[6] Suffice to say that, were I sitting as a Court with a free jurisprudential hand of an appellate court, questions of competition and its determining features and

implications insofar as unlocking the problem of the enforceability of a restraint of trade agreement are concerned would be an exercise to be undertaken. Nonetheless, certain of these issues do emerge from the present dispute and will be treated accordingly, but within the framework of the precedent which I am obliged to follow.

The present dispute

[7] Applicant seeks to interdict first respondent from entering into any employment agreement that is in direct competition with the applicant's business within a 100km from the Cape Town Central Business District for a period ending on 24 March 2018. Applicant employed first respondent initially as a bakery manager and first respondent took up employment with applicant on 25 March 2015. Much of the tasks which first respondent was mandated to perform are set out in email and appear to be designed to ensure that first respondent ensured that the applicant's staff perform their respective duties.

[8] First respondent signed an agreement including a restrain clause on 10 November 2015 which agreement was backdated 25 March 2015. On 27 August 2015 first respondent signed a second restraint of trade agreement and shortly thereafter on 27 November 2015 a third restraint of trade agreement was concluded between applicant and first respondent.

[9] During December 2015 first respondent was removed from the bakery and transferred to the administrative department of applicant as an administration assistant. It appears that on 24 March 2016 first respondent was retrenched and left the employ of applicant.

The key agreement

[10] The agreement entered into on 10 December 2015 provided, insofar as it is relevant for the present dispute, as follows:

> 'The parties accordingly agree that the employer is entitled to protect against unlawful use of its confidential information and the competition of the employee after the termination of this agreement.
>
> It is therefore agreed that upon termination of employment with the employer for whatever reason the employee will be restrained, for a period of 2 (two) years and for a radius of 100km from the Cape Town Central Business District (CBD) from being either directly and/or indirectly associated with and/or employed by and/or contracted in any way to any business and/or undertaking which competes and/or intend to compete and/or which has the potential to compete with the employer's confidential information in any way and/or which could benefit from the coaching, motivation and/or training to the employee by the employer.
>
> The employee further acknowledges that eh employer will suffer considerable loss should any of the terms of this restraint of trade be breached. Accordingly and immediately upon such breach, the employer shall be entitled to enforce the restraint of trade and in addition thereto, the employer shall recover from the employee, as agreed to this restraint of trade and/or all damages to an amount not less than 25% of the employee's total turnover generated during the employment period of the employee with the employer. The employer shall be entitled, if necessary, to set off such damages against any money which is due and/or may become due by the employer to the Employee.'

[11] The retrenchment agreement concluded on 23 March 2016 is also of considerable significance as it contains the following clauses:

> 'The employee undertakes not to make any of the employer's trade secrets and/or any other business knowledge available to competitors and/or clients.
>
> ...
>
> This agreement is entered into freely and voluntarily by the employee and of her own desire and accord. It is recorded that the employee was not in any manner forced or coerced in concluding this agreement.'

It is upon these clauses that applicant relies in order to justify the relief sought in the notice of motion.

Applicant's case

[12] Applicant contends that when first respondent was employed as a bakery manager, she came into contact with applicant's recipes, ideas, techniques, pricelists, suppliers, marketing research and marketing strategies which were employed by applicant in its business. Applicant avers that these can be described as part of its trade secrets and trade connections. In particular, Ms van Zyl, the sole director of applicant, claims that the vision and mission for applicant's business is to provide unique products to the public of a very high standard and quality; that is she contends that the success of the business can be ascribed to applicant's products being innovative and 'out of the ordinary'. Ms van Zyl, in her replying affidavit, states that the business was valued at approximately R 7 m in April 2016, a significant growth rate for a business commenced in April 2012. She also annexed to her papers a series of

favourable press reports which emphasise the unique quality of applicant's product.

[13] Applicant contends that first respondent is in breach of the restraint, in that she is now employed by second respondent which conducts business in direct competition with applicant, that second respondent's business premises are less than 10 km from applicant's business premises and that she is now baking cakes for second respondent, employing the same naming, terms and cake toppers as does applicant. Attached to the papers are a set of colour photographs which applicant suggests show proof of imitation and/or copying of applicant's products. Applicant contends further that the restraint clause does not prevent first respondent from working as a manager, as she is only restrained from working in any capacity in a bakery related business and/or entity.

Respondent's case

[14] Ms Gaum, on behalf of respondent, contested that applicant has shown that it has a protectable proprietary interest arising from trade secrets, goodwill, confidential information regarding cakes and other relevant products which would justify the applicantion of the restraint clause. She further submitted that the customers in the area and industry are not exclusive to the applicant and that the applicant has failed to provide any evidence that it has exclusive customers in the industries nor has it made any averment that its customers are exclusive to applicant. Furthermore, Ms Gaum contended that first respondent never had any contact with any of the clients of the applicant and that as stated in first respondent's answering affidavit, 'applicant's clients is the general public (sic)

that makes use of the internet to search for what they need and walk in customers at the applicant's shop'.

[15] First respondent also denies that she was provided with any list of applicant's customers and that an examination of the duties which she was required to perform as a bakery manager and thereafter as an administrative assistant supports her contention that neither did she come into contact with the clients not did she gain knowledge thereof.

[16] Turning to the main complaint, namely that the cakes of first and second respondent reveal a marked similarity to the products of applicant, Ms Gaum submitted that applicant utilised the internet to obtain ideas for decorating its products and that as stated by first respondent, 'applicant's cake are mere adaptations of knowledge obtained from general accessible public sources adapted by using elements of general accessible recipes which are commonly available by in the public domain'. (first respondent's further affidavit)

[17] In this affidavit, first respondent contends that whatever know how she acquired in relation to this business was gained during her employment at Checkers and Pick n Pay, where she created structures and processes for operating this kind of business. For these reasons, Ms Gaum submitted that applicants never disclosed the nature of the confidential information which requires protection pursuant to the restraint clause, and therefore applicant has shown no clear right for the relief so sought.

The relevant law

[18] In *Basson v Chilwan and others* 1993 (3) SA 742 (A) at 767 Nienaber JA, for the majority stated, set out an approach to the evaluation of the legality of restraint clauses as follows:

> ''n Bepaling van hierdie aard wat 'n werknemer of vennoot na beëindiging van die kontrak aan bande probeer lê-en dis al geval wat hier in oënskou geneem moet word-druis teen die openbare belied in as die utiwerking van die belemmering onredelik sou wees. Die redelikhied sal dan nie van die belemmering word beoordeel aan die hand van die breëre belange van die gemeenskap, enersyds, en van die kontrakterende partye self, andersyds. Wat die breëre gemeenskap betref is daar twee botsende oorwegings: ooreenkoms moet gehandhaaf word (al bevorder dit ook onproduktiwiteit); onproduktiwiteit moet ontmoedig word (al verongeluk dit ook 'n ooreenkoms) (vgl. *Sunshine Records (Pty) Ltd v Frohling and others* 1990 (4) SA 782(A) te 794 D-E). Wat die partye self betref, is 'n verbod onredelik as dit die een party verhinder on hom, na beëindiging van hul kontraktuele verhouding, vryelik in die handels- en beroepswêreld te laat geld, sonder dat 'n beskermingswaardige belang van die ander party na behore daardeur gedien word. So iets is op sigself strydig met die openbare belied.'

[19] The court then identified four key principles which require an answer in order to determine when a restraint is unreasonable.

1. Is there an interest of the one party deserving of protection at the termination of the agreement?
2. Is this interest being threatened by the other party?

3. If so does the interest, assessed both qualitatively and quantatively against the interests of the other party, result in a consequence that the latter should not be economically active and thus unproductive?
4. Is there another facet of public policy which does not necessarily have application to the relationship between the parties but which requires the restraint should be maintained or the impact not?

See 767 G- H

[20] In turn these four questions were honed by Malan AJA (as he then was) in *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at 496 where the following is stated:

> '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 interest 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. Contractual autonomy is part of freedom informing the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life.'

[21] In *Reddy's* case, Malan AJA said, with reference to the facts of the case, that Reddy was in possession of a confidential information in respect of which the risk of disclosure by his employment with a competitor, assessed objectively, "is obvious". The loyalty which Reddy showed to his new employers and the opportunity to disclose confidential information which was at his disposal,

whether deliberately or not, would clearly exist. Accordingly, 'the restraint was intended to relieve Siemens precisely of this risk of disclosure'. (para 20) In these circumstances the restraint was neither unreasonable nor contrary to public policy.' (at para 20) Malan AJA concluded thus:

> 'Public policy requires contracts to be enforced. This is consistent with the constitutional values of dignity and autonomy. The restraint agreement in this matter is not against public policy and should be enforced. Its terms are reasonable. What Reddy is required to do is to honour the agreement he entered into voluntarily and in the exercise of his own freedom of contract. While it is correct that his employment with Ericsson will be restricted, it remains a breach of his contractual undertaking. It follows that it is no answer to suggest that an undertaking would be sufficient to protect Siemens' interests and that less restrictive means could therefore achieve the same purpose as enforcing the restraint.' (at para 21)

[22] To return to my initial remarks, this case illustrates precisely the problem as to whether the dispute is to determined in terms of traditional jurisprudence relating to a restraint of trade or some residual principle of unlawful competition. After all, where a competitor steals or, in some other way or manner, obtains information from a competitor, which information is secret and confidential, and has been developed by the competitor's skill and industry, the former commits a wrongful act, if he, she or it uses the information in his, her or its business to the detriment of the rival. See Van Heerden and Neethling *Unlawful Competition* at 229 ff. It is possible that a trader may rely on an implied term of a contract of service against the prejudicial use of confidential information by an employee or director. A trader is entitled to protection from unlawful competition brought

about by the use of confidential information which is now conveyed to a rival trader by the employee or a director. See Van Heerden and Neethling at 234 – 234 and cases which are cited therein.

Evaluation

[23] In the present case, much of the defence rests on the first respondent contending that the information which applicant relies upon in order to justify a proprietary interest is in the public domain. The case is therefore less about the knowledge, experience and skill of first respondent prior to entering into the employment relationship with applicant, although there is a set of averments in the papers regarding expertise which first respondent gained during her employment with Checkers and Pick n Pay, and more about whether there is a protectable interest to justify the relief so sought.

[24] In summary, first respondent states the following, in her further affidavit:

> 'All the products listed by applicant is very traditional cakes and not unique or exclusive to applicant. Again any of these cakes is available at most bakeries, retails shops etc. Just to name one example Checkers and Pick and Pay both sell milk tart cupcakes. Cheesecake combinations are especially popular at most coffee shops and freely available in the open public and public property.'

She continues:

> 'Applicant's cakes are mere adaptations of knowledge obtain from generally accessible public sources, adapted by using elements of generally accessible recipes which are commonly available in the public domain.

A good example hereof is applicant's cake it baked of an upside down ice-cream cone. Applicant search the internet for an idea and decided on a cake with an upside down cone on top of the cake.'

[25] This case illustrates the difficulty alluded to by Cachalia AJA, namely the interrogation of own skill v employment of confidential information. In *Automotive Tooling Systems (Pty) Ltd v Wilkins and others* 2007 (2) SA 271 (SCA), Cachalia AJA (as he then was) added to the analysis of a restraint agreement when he said:

'In practice, the dividing line between the use by an employee of his own skill, knowledge and experience which he cannot be restrained from using, and the use of his employer's trade secrets or confidential information or other interest which he may not disclose if bound by a restraint, is notoriously difficult to define. Similarly it is difficult to determine whether the process by which a machine is built depends, in the main, for its success on the utility of the steps of the process or on the skill and discretion of the operator. If the former, knowledge of the process is protectable (provided it is sufficiently secret). If it depends on the latter for its success, it is likely that the employer has no secret process; he has only a skilled employee whose skill he cannot restrain from utilising after the termination of the employment. Where the line is to be drawn is often one of degree.' (para 10)

[26] It is exceedingly difficult to examine the various photographs provided by the parties to determine with any precision whether the products produced by first respondent are so similar to those which one can observed on the internet so as to conclude that there is nothing deserving of protection. As Stegmann J

said in *Meter Systems Holdings Ltd v Venter and another* 1993 (1) SA 409 (W) at 429 C, information which although in the public domain (i.e. freely accessible to all members of the public) is nevertheless protected as confidential when skill and labour have been expended in gathering and compiling it in a useful form and when the compiler has kept its useful compilation confidential or has distributed it upon a confidential basis". This can be regarded as information which the law recognises as deserving of protection. Similarly, information relating to the specifications of a product or a process of manufacture which has been arrived at by the expenditure of skill of a party is deserving of protection. See *Meter Systems Holdings* at 429 G and the cases cited therein.

[27] There does not appear to be any dispute that many of the cakes and cupcakes which first respondent posted on the Facebook page of second respondent look exactly the same as the cakes and cupcakes which applicant sells and which had been created by Ms van Zyl. First respondent insists that these are derived from recipes which appear on the internet or in standard cookbooks.

[28] From the various articles and reports attached by Ms van Zyl in her founding affidavit, it does appear that the business image which applicant has developed is of a concern which produces a series of unique cakes. As she states; 'The applicant pride itself (sic) in offering a big range of classic cakes with a modern twist. I create innovative cakes and novel food experiences.' Ms van Zyl avers that from concept to final product, will equate to 'three months hard work'.

[29] Accordingly, as Ms Auret who appeared on behalf of the applicant noted, whether the basis of these products is sourced in the internet is not the critical

issue; the critical issue is whether applicant has developed a business which has sufficiently adapted from standard recipes to produce products which are deserving of protection. The value of the development of these products was clearly in the mind of the parties when a series of restraint of trade agreements were concluded.

[30] As support for this, Ms Auret referred to the first agreement which was concluded between the parties, and where the following appears:

> 'Velvet possesses certain Confidential information relating to recipes used for making of Velvet's products, including but not limited to cakes, quiches, tarts, cupcakes and muffins.
>
> Velvet has agreed to disclose certain of this Confidential information to the employee subject to the employee agreeing to the terms of confidentiality set out in this agreement.'

[31] This agreement was entered into on 27 August 2015. Further contractual obligations in respect of non disclosure of trade secrets are expressly contained in clause 25 of the agreement entered into on 27 November 2015 and again on 10 December 2015, in terms of the agreement to which I have already made earlier reference. To the extent that there is any doubt this is removed by the further retrenchment agreement of 23 March 2016.

[32] It is clear that first respondent is now employed by the second respondent which conducts a business as a bakery. It is further so that second respondent competes with the business of applicant and that, in terms of a series of

contractual agreements entered into between applicant and first respondent, first respondent is not entitled to do so.

[33] In my view, applicant has provided sufficient basis to justify her claim to confidential information which falls within the scope of the restraint. Furthermore, on the papers, enough has been said by the applicant to show that, even if actual harm has not been shown, first respondent is potentially able to exploit confidential information which she gained while in the employment of applicant and this suffices for the purposes of this application. See *Reddy supra* at 499 G – 500 E; *Lano Prop CC t/a Rawson Properties v Hanlie's Properties Paarl CC and another* (unreported judgment of WCC: Case No 23701/2015 at para 33)

[34] In the circumstances, I find that applicant has shown a clear right, further that applicant has shown that an injury to its business is reasonably apprehended, that there is no other satisfactory remedy in the circumstances to protect applicant's proprietary interest, the invasion of which clearly causes economic harm to the business of applicant.

[35] The only issue which then concerns me in this case is the duration of the prohibition, a point raised by Ms Gaum. The court is entitled to interrogate the reasonableness of the period of the restraint. To see whether period supports the legitimate purpose of the restraint see *Ntsanwisi v Mbomvi* 2004 (3) SA 58 (T) at 63-64.

[36] From a description of the business which appears in the detailed replying affidavit of applicant, it is clear that this business is not a static one and that innovation is an important component to success of the business. In short, that which is produced this year may well not be particularly conducive to the tastes

of the market in the next year or the year thereafter. For this reason, it appears to me that, taking all of the competing interests into, account, namely the proprietary interest shown to exist by applicant, first respondent's desire to continue her baking interests and the promotion of competition as a whole, while protecting the value of ensuring that contracts voluntarily entered into are protected, I am of the view that a twelve month prohibition would protect the interest which has been shown to exist from these papers; that is twelve months from the time that the application for interim relief was heard in the court, being 3 June 2016.

Order

1. The first respondent is interdicted and restrained, from being either directly and/or indirectly associated with and/or employed by and/or contracted in any way to any business and/or undertaking which competes and/or intend to compete and/or which has the potential to compete with the employer's confidential information in any way and/or which could benefit from the coaching, motivation and/or training furnished to the employee by the employer, in:

1.1 Baking and/or supplying and/or marketing and/or selling any cakes, cupcakes and quiches;

1.2 Being employed and/or associated in any capacity with second respondent and/or being employed and or associated in any capacity in a bakery- related business and/or entity;

1.3 Conducting her business through the name and style of second respondent.

2. The provisions of sub-paragraph (a) hereof shall operate.

2.1 During the period terminating on 3 June 2017.

2.2 Within a radius of 100km from the Cape Town Central Business District (CBD).

3. The first respondent is interdicted and restrained, whether directly or indirectly and whether for her own benefit or the benefit of any other person whatsoever, from competing unlawfully and unfairly with the applicant.

4. Without the generality of the contents of all the above, the first respondent is interdicted and restrained, whether directly or indirectly and whether for her own benefit or the benefit of any other person whatsoever from;

4.1 Disclosing any trade secrets and confidential information of the applicant to any person whatsoever;

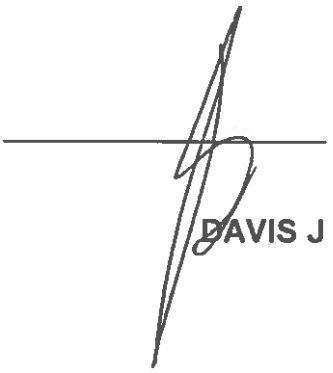
4.2 Using any trade secrets and confidential information of the applicant;

4.3 Canvassing for or soliciting any business form existing clients of the applicant.

5. All references to trade secrets and confidential information of the applicant referred to herein shall include, but not be limited to the applicant's customer base, recipes, marketing methods, decorating methods and

techniques and product names and the particulars contained therein concerning and/or related to any of such customers.

6. First and second respondent are ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved.



DAVIS J