IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, GRAHAMSTOWN

CASE NO: **624/2017**

Date heard: **2 March 2017**

Date delivered: **4 April 2017**

In the matter between:

UMLILO SAFARIS CC Applicant

and

JOHAN DANIEL PETZER Respondent

JUDGMENT

LOWE, J

Introduction:

[1] In this matter Applicant sought broad and wide ranging relief interdicting Respondent and restraining him up until 20 August 2021as follows:

> "1. That the Respondent be interdicted and restrained up to and including 20 August 2021 from:
>
> 1.1 Approaching or contacting in order to, directly or indirectly, solicit the custom of any person or entity who was a customer of the Applicant during the period 9 August 2016 to 201 August 2016;

1.2 Approaching or contacting in order to, directly or indirectly, solicit the custom of any person or entity whose acquaintance was made directly or indirectly through contact with any person or entity who was a customer of the Applicant during the period 9 August 2016 to 20 August 2016;

1.3 Maintaining contact, directly or indirectly, with any person or entity who was a customer of the Applicant during the period 9 August 2016 to 20 August 2016, or whose acquaintance was made directly or indirectly through contact with any person or entity who was a customer of the Applicant during the period 9 August 2016 to 20 August 2016, save with prior written consent of the Applicant;

1.4 Being directly or indirectly employed by or have an interest in, either as an employee, principal, agent, member, shareholder, director, partner, consultant, financier or advisor or in any other capacity in any concern or entity which has contact with any person or entity who was a customer of the Applicant during the period 9 August 2016 to 20 August 2016, save with prior written consent of the Applicant."

[2] The matter was moved as one of urgency a timeline being structured by the court in terms of the provisions relating to urgent applications.

[3] Right at the beginning, it should be said that the matter indeed has some degree of urgency.

[4] Applicant trades as a Hunting outfitter and Safari operation in and out of the Republic of South Africa predominantly in the international market, which I understand to mean that it draws its clientele internationally.

[5] To do so it invests considerable sums of money and time in the process of procuring international clients for its hunting operations in South Africa. It alleges, and it cannot be gainsaid, that as hunting occurs predominantly in the cooler winter months, advertising and the procurement of clients takes place between 6 and 18 months prior to hunt and safari actually occurring.

[6] The marketing occurs predominantly abroad and a trust relationship is built between a prospective client and the operator at considerable cost.

[7] Subsequent to a hunting safari having occurred it is common for such operators to maintain contact with the clients in the form of after sales service in the hope of attracting future business from the same clients and from referrals from satisfied clients.

[8] It is thus that an operator attempts to protect its contacts to ensure the maximum return on investment.

[9] It is explained that for the purposes of a hunt or safari it is necessary to use a professional hunter, so-called, usually on behalf of the operator, who transports clients to and from the hunt manages the clients, entertains the clients, supervising the hunt in accordance with the appropriate standard, seeing to the carcasses of animals shot and acting in the best interest of the outfitter on its behalf.

[10] On occasions these professional hunters are freelance professional hunters and are brought in for a particular hunt, as was the case in this matter, Respondent and Applicant contracting for the period from 9 to 20 August 2016 he to act as professional hunter in the context set out above.

[11] For the purposes of the hunt Applicant and Respondent signed an agreement, this most importantly for the purposes of this matter containing a restraint provision limiting the professional hunter's entitlement to maintain contact with the clients except through the offices of the Applicant for a period of 5 years subsequent to the hunt.

[12] It was contended that this five-year period was reasonable in the circumstances, it being conceded that this operated effectively worldwide wherever those hunters may be.

[13] In due course the hunt occurred with a number of clients some from Pakistan and another from the United Kingdom, it coming to Applicant's attention , after the hunt had occurred, that during January 2017 Respondent had, what Applicant contended was, direct contact with the clients, they annexing purported proof thereof. It should immediately be said that although

Respondent attempts to put this contact in context saying this eventuated from an invitation sent to him by one of the hunters to visit him in Pakistan, this followed his having been contacted by one SHAH who had also been on the hunt, inquiring how he was, having obtained his contact details from the photograph of the vehicle utilized by Respondent. He was subsequently contacted by some of the other hunters who invited him to Pakistan from 1 January 2017 to 16 January 2017, he accepting this invitation going to Pakistan and enjoying extensive contact with the hunters and others. The main point made by Respondent in this regard is that he did not initiate the contact, which was, it must be accepted, initiated by the former hunters, but conceding freely that he accepted this contact, communicated with them and indeed holidayed in Pakistan with them. He says also that the invitation to visit had been extended during the hunt and also to others.

[14] It is to this contact that Applicant objects and seeks a restraining order purportedly in terms of its agreement, whilst Respondent resists arguing that on a proper interpretation of the restraint clause it did not prevent the hunters from contacting him nor did it require him to ignore their overtures, as he puts it and that they are not entitled to the relief that they seek. He also says that the relief sought extends far beyond the scope of what is contained in the agreement and is in breach of his entitlement to work in the open market, that Applicant has no interest deserving of protection and that it cannot place reliance on its restraint of trade clause.

[15] This clause reads as follows:

> "Geen direkte kontak met Umlilo kliente na afloop van hul safari word toegelaat nie – PH mag slegs deur Umlilo kantoor met kliente kontak behou. PH se jagregister mag geensins agterna deur enige party buite Umlilo gebruik word om kliente te kontak nie."

[16] In the *Law of South Africa* volume 13 (1) the following appears as a summary of the position as it applies to restraint of trade clauses: "**221 Applicable principles** In deciding whether a clause in restraint of trade is valid or not a court will enquire into whether the prohibition on competition is contrary to the public interest or

not. The enquiry brings into conflict two basic principles, namely "the principle that everyone should have complete freedom to trade and earn a livelihood as, when and where he pleases; and the principle of sanctity of contracts which means that all contracts freely entered into by those of full age and competent understanding should be enforced". This conflict was brought to the fore in *Magna Alloys & Research (SA) (Pty) Ltd v Ellis,* where the Appeal Court accepted the approach followed in *Roffey v Catterall, Edwards & Goudré (Pty) Ltd.* However, the court placed a stronger emphasis on the role of public policy and propounded the following principles:

"(a) Agreements contrary to public policy or interest are not enforceable. An agreement that restricts a person's freedom of trade will be contrary to public policy and thus unenforceable if the circumstances of the case are such that the court is of the opinion that the enforcement of the agreement would harm the public interest.

(b) Although public policy requires that agreements freely entered into should be honoured, it also requires, generally, that everyone should be able to participate freely in the business and professional world.

(c) An unreasonable restriction of a person's freedom to trade would probably also be contrary to public policy.

(d) Acceptance that enforcement of an unreasonable restrictive provision is contrary to public interest means, when a party alleges that he or she is not bound by a restrictive condition to which he or she agreed, that:

(i) he or she bears the onus of proving that the enforcement of the condition would be contrary to public policy;

(ii) the court would have to consider the circumstances obtaining at the time when it was asked to enforce the restriction; and

(iii) the court would not be limited to a finding that the agreement is severable, but would be entitled to declare the agreement partially enforceable or unenforceable."

222 **The requirement of reasonableness** From the above it is clear that the essential criterion in determining whether a restraint of trade clause is contrary to public policy is that of reasonableness. In *Basson v Chilwan* and reformulated and expanded in *Nampesca* (*SA*) *Products* (*Pty*) *Ltd v Zaderer* it was stated that reasonableness must be determined with reference to the following considerations:

(a) Is there an interest deserving of protection ("protectable interest") at the termination of the agreement?
(b) Is that interest being prejudiced?
(c) If so, how does that interest weigh up qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?
(d) Is there another facet of public policy not having anything to do with the relationship between the parties which requires that the restraint should either be enforced or disallowed?
(e) Is the restraint wider than is necessary to protect the protectable interest?
(f) To the above the following question may be added, namely, whether the restraint is consistent with section 22 of the Constitution.

The onus of proving that a restraint of trade is unreasonable rests on the person who seeks to escape the application of the restraint on him or her. 1993 2 All SA 373 (A); 1993 3 SA 742 (AD). 1999 *ILJ* 549 (C).

See also *Aranda Textile Mills* (*Pty*) *Ltd v Hurn* 2000 4 All SA 183 (E) (requirements to determine reasonableness); *Tor Industries* (*Pty*) *Ltd v Gee-Six Superweld CC* 2001 *ILJ* 1327 (W); *Lifeguards Africa* (*Pty*) *Ltd v Raubenheimer* 2006 *ILJ* 2521 (D) (onus); *Reddy v Siemens Telecommunications* 2007 *ILJ* 317 (SCA) (value judgment); *North Safety Products* (*Africa*) *v Nicolay* 2007 *ILJ* 350 (C)."

[17] In this particular matter Applicant seeks final relief on the facts determined in accordance with the usual rules as set out below.

Proper Approach to Final Interdictory Relief:

[18] The requirements for a final interdict are: a clear right; injury actually committed or reasonably apprehended; no other suitable alternative remedy.

[19] Motion proceedings such as this are not designed to resolve factual disputes. Unless concerned with interim relief, such applications are all about the resolution of legal issues based on common cause facts. In the absence of special circumstances they are not used to resolving factual issues because they are not designed to determine probabilities.

[20] In *Plascon – Evans Paint Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623(A) 634-635, the rule was established that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in Applicant's affidavits, which have been admitted by the Respondent, together with the facts alleged by the latter, justify such order. It may be different if the Respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, farfetched, all so clearly untenable that the Court is justified in rejecting them merely on the papers. *National Director of Public Prosecutions v Zuma* 2009 (2) SA 279 SCA [26].

[21] It should be emphasized that whilst generally undesirable to attempt to decide an application on affidavit where there are material facts in dispute, it is equally undesirable for a court to take all disputes of fact at face value which would enable a Respondent to raise fictitious issues of fact in avoidance. It is necessary then to examine the alleged disputes and determine whether they are real or can be satisfactorily resolved without the aid of oral evidence.

[22] In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) [13] the following was said: "A real genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing

the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial, the court would generally have difficulty in finding that the test is satisfied. I say generally because factual averments seldom stand apart from a broader matrix of circumstances, all of which need to be borne in mind when arriving at a decision. A litigant may not necessarily recognize or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them."

[23] As in this matter neither party sought the referral of disputes (such as they were) to oral evidence. I am entitled to deal with the application on the undisputed facts. Thus if notwithstanding that there are facts in dispute, I am satisfied that Applicant is entitled to relief in view of the facts stated by Respondent together with the facts in Applicants' affidavits, which are admitted or have not been denied, I am entitled to make an order giving effect to such finding. The onus plays no role in this. In so doing a robust approach may be taken in certain circumstances to decide the issues on the affidavits. This must be cautiously adopted as the disputes on affidavit in an application should not be settled on the probabilities solely. In practice a robust approach is adopted only where the allegations on one or other side, are so clearly false or intrinsically improbable that a court could say that an oral hearing would not disturb the balance of probabilities. *Civil Procedure in the Supreme Court: Harms* B56-B-64.

[24] In opposing the application Respondent argued that: Applicant was impermissibly seeking to restrain him from unlawfully competing with it; that Applicant had no interest deserving of protection; that Respondent did not breach the terms of the agreement; that in the event of my finding that Applicant did have an interest deserving of protection and that Respondent had threatened this interest then and in that event restraint operating for a period of 5 years was unreasonable; that it was not open to Applicant to seek

to expand upon the terms of the restraint agreement as per the Notice of Motion.

[25] In my view, on the appropriate test, the following are the relevant facts upon which I must decide the matter: Applicant and Respondent concluded the contract with the relevant clause quoted above; pursuant to the agreement Respondent acted as a freelance independent professional hunter for Applicant from 9 to 20 August 2016; the persons referred to in the application were present at the hunt, in this instance particularly 3 of them; Respondent indeed had contact with those 3 subsequent to the hunt, this not being initiated by Respondent but in which he willingly participated to the extent set out above.

[26] Whatever may be said about Respondent having not initiated contact with individuals present at the hunt, which I accept, he was nevertheless in contact with them, I accept at the instance of same, and being invited to visit Pakistan accepted that invitation. In my view, the argument advanced on behalf of Respondent that this did not constitute a breach of the clause concerned, which it accepted was a restraint provision, can carry no weight at all, inasmuch as it is perfectly clear from the agreement itself properly construed in the context of the remainder thereof and in accordance with the proper approach to interpretation in the appropriate context, that the restraint provisions prohibiting Respondent from subsequent contact with clients clearly included the manner in which he had such contact, in this instance, it being irrelevant that the contact was not initiated by Respondent, he accepting same in pursuing this to the extent of holidaying in Pakistan with those concerned. *KPMG Chartered Accountants (SA) v SECURFIN Ltd* 2009 (4) SA 399 (SCA) at [39]

[27] I am further more than persuaded, having heard argument from both counsel, that having regard to the extreme importance of protecting one's clients base as a professional hunting outfitter, there can be no doubt that Applicant , in the context of this matter, possessed an interest deserving of protection subsequent to the expiration of the contract term.

[28] I am further satisfied that the said protectable interest was being prejudiced by Respondent's contact with the former hunters and that this interest weighed up qualitatively and quantitatively against the interests of Respondent not to be economically inactive and unproductive, such as to overtake same.

[29] There is in my view no other facet of public policy, not having anything to do with the relationship between the parties, which requires that the restraint should be disallowed.

[30] This brings me to the crux of the reason for my decision and that is whether the restraint is wider than necessary to protect the protectable interest.

[31] It is trite that the reasonableness of a restraint is tested as at the time it was agreed.

[32] When the reasonableness of the restraint does not hinge on its nature alone, as in this matter, it may hinge on its area or time or operation or on all three thereof taken together or two, for example in combination. Such an inquiry turns in each case on its own facts entirely. The restraint in this matter is effectively worldwide extending to all areas where the hunters affected may reside, which, having regard to the nature of the restraint, and its purpose seems to me to be perfectly reasonable. The question then remains whether the five-year restraint period may of its own be so unreasonable as to derail the entire clause. This must be judged against the nature of the business, the protectable interest and all other relevant factors. In my view, and against the background of the hunting industry set out in the papers, it is manifestly unreasonable to restrain Respondent for a period of 5 years. As I understood the argument, Applicant's counsel attempted to persuade me that having regard to the turnaround time relevant to these kind of clients, 5 years may nevertheless be said to have been reasonable. Respondent's counsel argued that a period of 18 months, but no more, would have been reasonable having regard to the nature and background of the relationship, and that as the relief sought was to restrain Respondent for a five-year period, the application should be dismissed for this reason alone.

[33] In attempting to resist this argument, counsel for Applicant did not seek to amend the Notice of Motion in this regard, and persisted in the relief sought. This attitude was in all probability inevitable having regard to the fact that the papers on Applicant's case did not concede that the five-year period was too lengthy making the case for a limitation thereof but pursued the claimed relief. In this regard, in referring to the issues relevant to severability and restriction, it was accepted in *National Chemsearch (SA) (Pty) Ltd v Borrowman* 1979 (3) SA 1092 (T) that when a restraint according to its terms as agreed upon is found to be unreasonably wide in its scope of operation, the court can, in a proper case, enforce the restraint partially, by issuing an order incorporating the addition of some limiting words to the restraint agreed upon as appropriate to restricted scope of operation relevant to what is found to be reasonable. This approach having been approved in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 of Synthesis* (4) SA 874 (A) at 896A - E, the court said that a party who wishes to rely on less than the complete contract must "raise this pertinently as an issue to be dealt with in evidence and argument". 795 I. Commenting on this passage the court said in *BHT Water Treatment (Pty) Limited v Leslie* 1993 (1) SA 47 (W) at 53 a that: "this does not necessarily mean that in suitable circumstances, and where the issues have been adequately canvassed, the court will not mero motu at the invitation of one of the parties, cut down a restraint and enforce it in its truncated form."

[34] In this matter Applicant stuck vigorously to its guns and made no alteration to its Notice of Motion nor did it at any time seek that if the restraint were otherwise found to be in order, but in the event that the restraint was unreasonably long, I should exercise a discretion in this regard and reduce the restraint to a lesser period. This was perhaps inevitable having regard to the fact that it did not accept in its papers neither in the Founding Affidavits nor in reply that the restraint, if unreasonable, could be curtailed failing to suggest facts and circumstance to justify a lesser period.

[35] In the result, and on all the facts and circumstances in this matter, I find the restraint to be unreasonable having regard to the length of period over to

which it was to apply, and accordingly, it must be struck down and declared unenforceable.

[36] I should mention, although it is effectively irrelevant having regard to the conclusion that I have reached that the contents of much of the Notice of Motion and the relief sought would in any event have been dismissed even had I found the restraint to be unenforceable, Applicant having gone far outside any entitlement that even it contended for.

[37] Insofar as costs are concerned I can see no reason for costs not to follow the event, these to include the reserved costs of the postponement on 14 February 2017.

[38] In the circumstances the following order issues:

The application is dismissed with costs, such costs to include the cost of the postponement on 14 February 2017.

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M.J LOWE

JUDGE OF THE HIGH COURT

Obo the Applicant:	Adv. Le Roux
Instructed by:	Nolte Smith Attorneys
	115 High Street
	Grahamstown

Obo of Respondent:	Adv. Beard
Instructed by:	Huxtable Attorneys
	22 Somerset Street
	Grahamstown