

IN THE HIGH COURT OF SOUTH AFRICA /ES
(TRANSCAAL PROVINCIAL DIVISION)

DATE: 15/4/2005

CASE NO: 1431/2005

not reportable

IN THE MATTER BETWEEN:

MICHELSEN'S IMPORT/EXPORT AGENCY (SA) (PTY) LTD APPLICANT

AND

WILLEM HENDRIK PRINSLOO

RESPONDENT

JUDGMENT

MALULEKE, J

Introduction

[1] This is an application brought by way of urgency in terms of rule 6(12)(a). The applicant seeks a final order interdicting and restraining the respondent:

- (a) from approaching or soliciting any client (whether actual or prospective as at 30 November 2004) of the applicant with a view to selling to such client any coffee or tea product or any related equipment, product or accessories until 30 November 2005;

(b) from either using or directly or indirectly divulging or disclosing to any third party any of the applicant's trade secrets including but without limiting the generality of the foregoing, the following confidential matters:

- (1) sales processes and techniques;
- (2) knowledge of and influence over the applicant's clients (existing or prospective as at 30 November 2004);
- (3) the contractual arrangements between the applicant and its customers (existing or prospective as at 1 November 2004);
- (4) the financial details of the applicant's relationship with its customers (existing and prospective as at 1 November 2004);
- (5) the financial details (including credit and discount terms) relating to the applicant's customers;
- (6) the names of prospective customers and their requirements;
- (7) details of the applicant's financial structure and its requirements.

[2] The application is opposed. When the matter came before HARTZENBERG, ADJP in the urgent court on 22 February 2005 the respondent indicated his intention to argue urgency and also sought an opportunity to file a further set of affidavits in the light of what it contended were new matters contained in the replying affidavit of the applicant. By agreement between the parties the matter

was postponed for hearing on the opposed roll on 10 March 2005 without arguing the question of urgency.

Urgency

- [3] Mr Whitcutt for the applicant contends that the applicant seeks relief which is based on the contravention of a restraint of trade agreement and if the relief is not obtained as a matter of urgency, applicant will continue to suffer harm. He contends further that the respondent has had an opportunity to file answering affidavits and there is consequently no prejudice to him. The reasons for urgency advanced by applicant are not in themselves sufficient. However, in view of the absence of material prejudice to respondent regarding the time periods for filing the necessary answering affidavits, it is my view that it is in the interest of justice that the merits be argued and a decision on the urgency be made at the conclusion of the hearing.

Opposition to fourth affidavit

- [4] Mr Whitcutt contends that the fourth affidavit be disallowed. The replying affidavit introduces a number of new matters and annexed several new documents in evidence. In my view Mr Van der Berg, for respondent, correctly argued that by reason of the fact that the application has been brought by way of urgency, the respondent had to file the answering affidavit to a lengthy and substantial founding affidavit in a hurry. The answering affidavit, the replying affidavit as well as the fourth affidavit are all lengthy documents and each contains much

factual evidence. It is not unreasonable that some of the necessary evidence may not have been immediately available to the respondent. There are cogent reasons why the fourth affidavit should be allowed. There is no prejudice to the applicant if the respondent's fourth affidavit is allowed. It is in the interests of a just decision of the matter that a conspectus of all the relevant matters in dispute should be available to the court. See *Dawood v Mahomed* 1979 2 SA 361 (D).

Common cause issues

[5] The following are the common cause issues relevant to the consideration of the matter:

- (a) Michielsen's Import/Export Agency CC employed the respondent initially as a salesman and later as a sales manager in terms of a written employment contract dated 4 March 1996 which contained a restraint of trade clause under paragraph 4.1.1 which reads as follows:

"Termination of this agreement by either party shall be on one calendar month written notice, unless varied by mutual consent. Prinsloo [the respondent] specifically agrees that for a period of one year after termination of service with the agency [Michielsen's CC], he will not approach any client of the agency with a view to attempting to sell to that client any product similar to the agency's current or future products. Failure to abide by this restraint of trade shall entitle the agency to damages against Prinsloo equivalent to the last known yearly business sales of such

client with the agency, as well as the legal costs of such recovery on an attorney and client scale ... The parties also agree to utmost confidentiality in all business and office activities, particularly in relation to dealings with clients."

- (b) On 1 March 2002 Michielsens's Import/Export CC entered into a contract of sale with Michielsens's Import/Export (Pty) Ltd (the applicant) in terms whereof the latter purchased from Michielsens CC the business as a going concern.
- (c) The *merx* that was acquired by the applicant was the business of import and export of coffee and related products, the assets of the business, the goodwill and the right to trade under the name and style of "Michielsens's" with effect from 1 March 2002.
- (d) Respondent remained in the employment of applicant until he gave notice of his resignation on 1 October 2004 and effectively his employment was terminated on 30 November 2004. Efforts to conclude a written employment contract with a revised restraint of trade agreement were unsuccessful. Consequently the applicant's case is based on the written employment contract between Michielsens's CC and respondent dated 4 March 1996.

The merits

[6] In order to determine whether the applicant has established each of the elements required for the final interdict it seeks, the following quotation from *The Law of South Africa* by Joubert, first re-issue, vol 11 paragraphs 307-309 and 311 at pages 288-289 is instructive:

"307. Definition: An interdict is final if the court order is based upon a final determination of the rights of the parties to the litigation.

308. Procedure: The normal way to apply for the grant of a final interdict is by way of an action. A final interdict may, however, be granted on application if no *bona fide* factual dispute exists. [See *Plascon-Evans* test after *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 3 SA 623 (A).]

309. Requirements for a final interdict.

The requirements for the right to claim a final interdict are:

- (a) a clear right;
- (b) an injury actually committed or reasonably apprehended;
- and
- (c) the absence of similar protection by any other ordinary remedy.

...

"311. Second requisite : Injury

The second requisite for a final interdict is an injury actually committed or reasonably apprehended. The term injury should be understood to mean infringement of the right which has been established and resultant prejudice. Prejudice is not synonymous with damages and it is sufficient to establish potential prejudice. A reasonable apprehension is one which a reasonable man might entertain on being faced with the facts. The test is thus objective, and the applicant need not establish on a balance of probabilities that injury will follow."

The sale of the business

[7] Mr Whitcutt relied heavily on the *ratio decidendi* in the matter of *Botha and Another v Carapax Shadeports (Pty) Ltd* 1992 1 SA 202 (A) for his contention that the sale transaction by which the business and goodwill of Michielsen's CC ("the seller") were sold to the applicant ("the purchaser") *a fortiori* transferred to the applicant whatever contractual rights the seller had in the restraint of trade agreement with the respondent which rights were not personal to the seller but were incidental to the business. The transfer of such right took place by way of a cession. This was held as a general proposition which could be varied by, for instance, the terms of the restraint of sale agreement and/or the terms of the sale agreement. In this judgment BOTHA, JA after accepting that "the components of

the *merx* in a sale of a business are to be ascertained from the contract of sale", opined at p213A-B:

"These remarks apply equally to the goodwill of a business, and to the sale of the goodwill. What is comprised in the sale of the goodwill of a business in a particular case is essentially a question of fact, not law. There is no fixed or invariable rule by which the benefit of an agreement in restraint of trade passes to the purchaser of the goodwill of a business. For instance, such an agreement may in terms confer a purely personal benefit on the owner of the business only; in such a case, the benefit of it does not enure to the advantage of the business, it is not part of the goodwill, and it will not pass to the purchaser."

- [8] There is merit in the contention by Mr Van der Berg that the extraordinary lengths to which the applicant's representatives went to coerce or persuade respondent to conclude a new contract of employment with a revised or updated restraint of trade provision in favour of the applicant leads to the inference that in the mind of the applicant there was no intention or belief that the restraint of trade rights were transferred to the applicant at the sale of the business, alternatively there appears to be a *bona fide* dispute as to whether the benefit of the restraint agreement did pass to the applicant. The respondent disputes that the rights to the restraint of trade agreement passed to the purchaser as part of the goodwill. On the basis of the *Plascon-Evans* test (*supra*) the facts stated by the respondent do not justify the granting of the order sought by applicant.

[9] I find merit in the arguments by Mr Van der Berg that the restraint of trade clause and consequently also the interdict sought are too wide, imprecise, unreasonable and against public policy. For instance:

- (a) "Any client of the agency" – it is not clear whether this prohibition relates to current clients only and/or clients who are in the lists or books of the applicant.
- (b) "Prospective clients" – these are not specifically included in the restraint of trade clause. The order sought goes beyond the provisions of the restraint. This is clearly impermissible.
- (c) "Any products similar to the agency's current or future products" – the order sought is to restrain the respondent from selling "any coffee or tea products or any related equipment, product or accessories".

"Future products" are not defined in the restraint clause. The order sought goes beyond the restraint clause which makes no reference to "equipment and accessories". There is no clarity as to whether reference is to equipment and accessories actually produced by applicant.
- (d) The restraint clause is not restricted geographically – it is for the whole country.

Mr Whitcutt contended that the order sought could be redrawn *inter alia* to exclude "the prospective clients", and to restrict it to "existing clients as at 30 November 2004"; lists of such clients to be furnished to applicant's attorneys to be retained by them until 30 November 2005 and "if respondent is in doubt as to whether a client is an existing or prospective client to whom this order relates, the respondent is ordered to establish that fact by enquiry to the applicant's attorneys of record for determination with reference to the customer list" as provided. Whilst there may be understanding for the applicant's reluctance to reveal its customer lists, the respondent would for the twelve months be uncertain who he should avoid dealing with or whether the person he is accused of dealing with was truly in the customer list of the applicant. Already in this application there is a real dispute as to whether Seafood Terrace or Bruno or Maxi's were in the clients lists of applicant.

- [10] I agree with Mr Van der Berg that such redrafting of the order as now proposed by Mr Whitcutt would constitute a substantial and drastic amendment of the orders sought on the founding papers and this would constitute substantial prejudice to the respondent. Such an amendment would result in "a partial restraint" if the applicant should rely on less than the complete contract. The amendments contended for by Mr Whitcutt are too far-reaching and would amount to altering the restraint of trade contract itself.

[11] In its version the applicant has approximately five hundred customers located throughout South Africa, which excludes the areas of KwaZulu Natal, Mpumalanga, North Province and the Garden Route. The respondent's area of responsibility was Gauteng and Cape Town which accounted for 75% of applicant's clients. The applicant's clients or business amounted to 3% of the total national coffee and tea market. The restraint that is sought should in fact be for Gauteng and Cape Town only. That then, could be reasonable, but the restraint agreement as it stands provides for something different. The restraint as per the agreement is fundamentally unreasonable in not specifying the areas to which the restraint extends. The ambit of the interdict sought will remain too wide and too vague.

GROSSKOPF, JA stated the position as follows regarding attempts to effect changes to the restraint agreement in order to make it reasonable:

"Without wishing to define with exactitude what degree of plastic surgery would be permissible, I am inclined to think that the amendments suggested by the appellant in the present case are so far-reaching that a court would not have been prepared to enforce such a materially altered contract under any circumstances."

Sunshine Records (Pty) Ltd v Frohling & Others 1990 4 SA 782 (AD) at 796C-D.

[12] The amendments to the prayers as proposed by Mr Whitcutt do not avail the applicant. Even with these amendments the orders remain inconsistent with the restraint clause and too wide and unreasonable and contrary to public policy for the reasons already stated. The following *dictum* from *Weber-Stephan Products Co v Alrite Engineering (Pty) Ltd* 1990 2 SA 716 at 724H-I eloquently state the principle that is applicable in a situation such as the present:

"In the meantime, I call attention to the desirability of defining with reasonable precision in a prayer for an interdict those activities which infringe or threaten to infringe the rights of the applicant and which are to be restrained by the interdict; and of avoiding the use of vague or general language which will tend to leave the ambit of the interdict vague. An interdict in terms which leave the person restrained uncertain as to what he may or may not do, may in some cases secure an unjustifiable advantage for the applicant; and in others such as the present case, it fails to resolve the dispute between the parties and results in further litigation."

(My underlining for emphasis.)

Infringement or breach of a legal right

[13] Mr Whitcutt correctly argues at paragraph 19 of his heads of argument that "a party seeking to enforce a contract in restraint of trade is required only to invoke the restraint agreement and prove the breach thereof. Thereupon a respondent in seeking to avoid the restraint, bears the *onus* to demonstrate on a

balance of probabilities that the restraint agreement is unenforceable because it is unreasonable." Even though I have already expressed the view that the restraint agreement requires "drastic plastic surgery" to make it reasonable and enforceable, it still is necessary to consider the alleged grounds of infringement or breach the applicant relies upon, which are as follows:

(a) Sea Food Terrace Highveld Park

Dewald Roos, the general manager of Seafood Terrace Highveld Park and Wierda Park, confirms under oath that Seafood Terrace Highveld Park has been a client of the applicant since it started trading on 12 October 2004. On 5 December 2004 respondent approached Lynette van der Merwe of Seafood Terrace with the view to selling coffee products and filter paper which are distributed by a direct competitor of the applicant. Although the respondent has consistently challenged the existence of a restraint in favour of the applicant, he has repeatedly undertaken to honour the restraint contained in the original contract of employment dated 4 March 1996 by not doing business with the clients of the applicant on "moral and ethical" grounds. Mr Whitcutt contends that the test for breach in this case is: the respondent has agreed or undertaken not to approach applicant's clients, he has in fact done so, it is irrelevant that he may not have known that Seafood Terrace Highveld Park was a client of the applicant. I do not agree that this should be the test in this case. Whether respondent knew that he was approaching a client of the applicant is highly relevant. This

client commenced business on 12 October 2004 when according to applicant it became a client of applicant. Respondent resigned the employment with applicant on 1 November 2004 and on 7 November 2004 he was told not to report for work anymore and on 15 November 2004 he was ordered "to leave the services of the company with immediate effect" (annexure "FA.8" p92). According to respondent, he only became aware of transactions with clients of the company when the "end of the month sales figures" were made available to him on the succeeding month. In view of his resignation he did not have access to the October 2004 figures. He then could not have known of clients who did business with applicant in October. Evidently the respondent did not pursue to do business with Lynette van der Merwe as soon as she had advised him of her relationship with applicant. The determination of whether a breach has been committed or the existence of a reasonable apprehension that a breach may be committed, is a matter of fact, not law. Respondent denies that Seafood Terrace Highveld was a client of applicant at the time when his employment was terminated alternatively he could have known if it were so. There is merit in Mr Van der Berg's argument that an adverse inference should be drawn on the failure by applicant to produce documentary evidence of such invoices or a client's contract or end of month sales figures to corroborate its version that Seafood was indeed a client and that respondent knew this, particularly in the light of the denial by respondent in the answering affidavit. Applicant

has not, in my view, established on a balance of probability that respondent breached the restraint agreement or undertaking.

(b) Maxi's

Maxi's has never been and is not and has no intention to be a client of the applicant. This much is common cause. Mr Whitcutt argues that since respondent on behalf of applicant submitted quotations to Maxi's at the time when respondent was still employed by applicant, Maxi's is a "prospective client" of applicant. This argument is advanced in the face of an affidavit by Maxi's to the effect that they have never done and do not propose to do business with applicant nor with the respondent for that matter. This argument is tenuous. It does no credit to applicant's case for a final order on the basis of a breach or reasonable apprehended breach. The applicant sees respondent's vehicle parked outside Maxi's during December 2004 and rushes to court on an urgent basis for a restraint order on evidence which is clearly flimsy and unsustainable.

(c) Bruno

Applicant's claim for interference or breach is based on a report made by Ruthven to applicant on what Mariana Bruno allegedly told him about a business transaction between Bruno and respondent. Bruno has made two affidavits wherein he categorically refutes what Ruthven reported to applicant that Bruno had said. I agree with Mr Van der Berg that

Ruthven's report to applicant is hearsay and falls to be struck out. Alternatively there is such a dispute of fact that a final order cannot be made on the basis of the applicant's version.

Bruno confirms that the Espress Café at the Wits University Campus belongs to Tine Georgiades. This outlet commenced trading on 2 February 2005 and has never been a client of applicant. Bruno denies ever having been in control of this outlet. Respondent was approached by Tine Georgiades on 13 January 2005 to conclude a contract to supply her with coffee. Mr Whitcutt argues that applicant has a relationship with Bruno in his capacity as a shareholder or key decision-maker in six of his outlets in Johannesburg and Cape Town and for this reason "any other outlet or entity of which Bruno is the shareholder or key decision-maker" has a relationship with the applicant is, to say the least, ingenious. The argument is, however, not relevant in the face of the evidence of M Bruno, T Georgiades and the respondent on the ownership of the outlet in question. The applicant has failed to show on a balance of probabilities that the Wits outlet was a client of the applicant at the relevant time or at any other time. The applicant has, on all three instances, failed to discharge the *onus* upon it to demonstrate that the respondent is in breach of the restraint undertaking or that there is a reasonable apprehension that the respondent will contravene the undertaking. The application for the

restraint order based on the alleged breach of contract falls to be dismissed.

- [14] Mr Whitcutt contends that the applicant has demonstrated that it has proprietary rights which are entitled to protection. The proprietary rights, so the argument goes, consist in customer connection throughout South Africa and confidential information or trade secrets which could be used by a competitor to gain unfair advantage over the business interests of the applicant. There is no inventory or catalogue of such trade secrets or confidential information that has been compiled and kept secret by the applicant. It is also not the applicant's case that the respondent has wrongfully and unlawfully taken or acquired such trade secrets. The protection that applicant seeks is that which is afforded by the common law. The respondent, as already stated above, has repeatedly undertaken not to infringe the common law restraint of trade rights of the applicant. There is no acceptable evidence that he has not kept to this undertaking. The respondent would infringe the proprietary rights of the applicant if he were to make use or threaten to make use of the information which he has obtained in confidence whilst in the applicant's employ. As was held in the English case of *Wessex Dairies Ltd v Smith* (1935) 2 KB at 89 and was quoted with approval in *Meyer Systems Holdings Ltd v Venter and Another* 1993 1 SA 409 (WLD) at 431:

"Another thing to be borne in mind is that although a servant is not entitled to make use of information which he has obtained in confidence in

his master's service, he is entitled to make use of the knowledge and skill which he acquired while in that service including the knowledge and skill directly obtained from the master in teaching him his business."

[15] In the absence of proof that the respondent has infringed or threatened to infringe the proprietary interests of the applicant, there is no reason for the restraint order that is sought, at common law. No useful purpose will be served by scrutinising which of the information qualifies as protectable trade secrets for the reason that the applicant has failed to demonstrate a breach of the right or a ground for a reasonable apprehension that the respondent might disclose or use such information to the prejudice of the applicant.

[16] In the light of the conclusions I have arrived at, it is not necessary to deal with the third requirement for a final interdict, viz the absence of any other satisfactory remedy or protection by other remedy. It suffices to mention that in the restraint agreement relied upon by applicant, this provision is made for the remedy in the event of breach:

"Failure to abide by this restraint of trade condition shall entitle the agency (applicant) to damages against Prinsloo (respondent) equivalent to the last known yearly business sales of such a client with the agency as well as the legal costs of such recovery on an attorney and client scale."

There is then a remedy prescribed and agreed to in the agreement relied upon by applicant.

[17] In the result it is my considered finding that the applicant has not established a case for the relief sought on the papers. The application is dismissed with costs.

G S S MALULEKE
JUDGE OF THE HIGH COURT

1431-2005

HEARD ON:
FOR THE APPLICANT:
INSTRUCTED BY:
FOR THE RESPONDENT:
INSTRUCTED BY:
HEARD ON: