IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 26039/17

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED.

28 July 2017 .....

DATE SIGNATURE

In the matter between:

PAM GOLDING PROPERTTIES (PTY) LTD Applicant

and

NEILLE, BRADFORD MORGAN Respondent

JUDGMENT

SPILG, J:

INTRODUCTION

1. This is an urgent application brought by Pam Golding Properties (Pty) Ltd ("PGP") to restrain the respondent, Mr Neille, from utilising in any manner whatsoever the applicant's confidential information and database. PGP also seeks an order preventing Neille from having any interest whatsoever in a competitor or being employed by such competitor within the Parkview,

Parkwood, Parktown North, Dunkeld West and Greenside East areas (known as *"the Parks"* areas) for a period of 6 months.

2. The applicant contends that it has a protectable interest in confidential information comprising property lists, property portfolios, details of buyers and sellers, property pricing strategies and commission arrangements. It also contends for a protectable interest in its customer connections. During argument *Adv. Cooke* for the applicant submitted that the protectable interest also included PGP's reputation which the respondent was able to exploit.

3. It is common cause that Neille was employed by PGP for a period of 12 years as a real estate agent. Until January 2016 he was active in the Sandton, Morningside and Gallo-Manor areas and since then has been engaged in the Parks area. The respondent resigned on 3 July 2017.

4. It is common cause that the matter is urgent. In dispute is whether the applicant has a protectable interest and if so for how long the restraint should endure. The applicant voluntarily reduced the area of the restraint from Gauteng to only the Parks area.

5. By way of a point *in limine* the respondent argued that his current employer should have been joined. Reliance was placed on *Eleon CC t/a Realnet Nilgers Surround v Nortjie and Another* 2013 (1) SA 525 (GNP) at paras 39- 44.

   In the present case I do not believe that it was necessary to formally join the current employer. It is evident that the employer is aware of the litigation and has effectively elected to abide by the court's decision. In most restraint cases the new employer adopts at least at face value a neutral position. From the papers it is evident that the new employer is aware of the litigation and has elected not to be overtly involved.

6. It is common cause that after terminating his agreement with PGP, the respondent was engaged by Tyson Properties, that Tyson Properties is a direct competitor of PGP in the Parks area and that Neille has approached sellers who have placed their residential property on the market with PGP.

7. Neille also admitted that he informed the clients of PGP that he had left the applicant and that he would always be available should they require his services in the future. Furthermore it is of relevance that the respondent admits to having accessed the applicant's database, which as stated earlier includes not only the list of sellers who are on PGP's books but also prospective purchasers.

   In this regard he had stated that PGP's data base was limited to some 35 sellers in the Parks area and that he had contacted all of them but none had moved over to him. This constitutes an admission of the breach of the restraint. That nothing came of it is irrelevant (see Reddy *v Siemens Telecommunications (Pty) Ltd* 2007(2) SA 486 (SCA) at para 2). In any the respondent overlooks the list of prospective buyers garnered by PGP and to which he had access.

CONFIDENTIAL INFORMATION, BUSINESS REPUTATION AND CUSTOMER CONNECTION

8. In *Reddy* the Supreme Court of Appeal at paras 16 and 17 identified the questions that must be asked when considering the reasonableness of a restraint. The first four are those identified by Nienaber JA in *Basson v Chilwan and others* 1993 (3) SA 742 (A) at 767G-H and the fifth is the one added by Wunch J in *Kwik Kopy (SA) (Pty) Ltd v Van Haarlem and Another* 1999 (1) SA 472 (W) at 484E which Malan AJA (at the time) identified as giving expression to the limitation provision in s 36(1) of the Constitution. The questions are:

a. Does the one party have an interest that deserves protection after termination of the agreement?

b. If so, is that interest threatened by the other party?

c. In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?

d. Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected?

e. Does the restraint go further than necessary to protect the interest

Malan AJA also noted at para 16 that in terms of *Basson* where "*the interest of the party sought to be restrained weighs more than the interest to be protected, the restraint is unreasonable and consequently unenforceable. The enquiry which is undertaken at the time of enforcement covers a wide field and includes the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests.*" And added at para 17 that: *"The value judgment required by Basson necessarily requires determining whether the restraint or limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.*

9. PGP enjoys a formidable business reputation. It is also evident that any agent would rely on the goodwill that is derived from being an appointed PGP agent. This case however brings out the difficulty that arises where the person sought to be restrained utilises the business reputation and name of the principal employer to obtain stock (which would be residential

property available for sale) while utilising his or her own unique skill and charisma as a real estate agent.

10. In my view, the starting point is that the individual agent in this industry requires the springboard of the name and reputation of the estate agency to procure stock. If this were not so then the agent would operate entirely for his or her own account or set up an independent estate agency.

11. Added to this is PGP's undisputed evidence that Neille had direct relationships with PGP's clients who had given them selling mandates. *Adv. Nel* for the respondent submitted that the only protectable interest PGP was confined to the sole mandate arrangements concluded with sellers. I disagree. Even if a seller had placed the property in question in the hands of a number of agencies the initial selection of agents by a property seller would be by reference to the agencies' reputation and standing.; and even if the reputation of the agency was identified by reference to the individual agent such reputation belonged to the agency itself at the time the seller would have mandated the agency.

    Accordingly, even if the individual agent drew property sellers or potential buyers to PGP by reason of his or her personality or expertise that was part of its goodwill and therefore an asset in its hands.

12. Straddling both confidential information and customer contacts is PGP's database comprising lists of sellers of residential property and also potential buyers within the Parks area which is accessible to its agents. The lists are compiled by PGP from referrals, enquiries and those who are prepared to provide their particulars to PGP's agent's at show-houses (which is the common experience of anyone who attends a show-day).

    Even if an individual agent was to hand out business cards at a shopping mall his or her relationship with the principal would render any contacts

made with prospective buyers or sellers the proprietary interest of the agency.

13. I am therefore satisfied that PGP has a protectable interest in the lists it compiles and updates for the benefit of all its individual agents, including Neille, of sellers and potential buyers of residential property who might show interest in purchasing a property in any specific suburb, or of a particular configuration, or in a particular price bracket. Moreover the flysheets of properties for sale would have been produced by PGP and it has a proprietary interest in their make-up, although not necessarily in all their content.

14. I am also satisfied that Neille poses a threat to PGP's protectable interests.

15. The public policy considerations involved in determining whether restraints are enforceable involve resolving the tension between the principles that agreements freely concluded should be respected and that it is in the interests of society that an individual has economic mobility. [1] The question of the reasonableness of the area and duration of the restraint tend to be confined to a secondary enquiry as to partial enforcement or divisibility of a restraint after the principal enquiry as to the existence of a protectable interest has been resolved. That is how both parties argued the matter before me.

16. However in confining the enquiry as to whether the restraint is overbroad the issues concerned with the reach of the restraint both geographically and as to duration become influenced by the finding already made of the existence of a protectable interest which has, so to speak, validated the restraint agreement subject to some judicial tinkering with locality and

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[1] *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at para 15 and *Sunshine Records (Pty) Ltd v Frohling and Others* 1990 (4) SA 782 (A) at 794C - E

time. As a consequence the premise, even if unarticulated, is that the parties should be held to their bargain as to the scope of a restraint once a protectable interest is found to exist which is threatened by the respondent.

17. Limiting myself to restraints involving customer contacts that may have a short life span or know-how that becomes obsolete within a short period it appears that the enquiry into a protectable interest is not one confined to the nature of the interest. It cannot be that one dimensional since intertwined must be the appreciation that by definition a protectable interest can have no value beyond its lifetime or geographic reach.

18. The relevance of this arises in the present case because the period of the restraint is six months and it is tempting to simply say that once there is a protectable interest enjoyed by PGP which is threatened by Neille then the parties should be held to their bargain, particularly as there is no suggestion of unequal bargaining power when the contract was concluded. This can readily be reinforced by reference to the onus, if it lies with the restrained party as is the current authority in this division: See Experian *South Africa (Pty) Ltd v Haynes and Another* 2013 (1) SA 135 (GSJ) which followed *Den Braven SA (Pty) Ltd v Pillay* 2008 (6) SA 229 (D). See Davis J's contrary position regarding onus *in Mozart Ice Cream Franchises (Pty) Ltd v Davidoff* 2009 (3) SA 78 (C) and the earlier case of *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel v Kuhn and Another* 2008 (2) SA 375 (C).

19. It however appears, as this case brings into focuses, that there certainly are many cases, if not most, where the enquiry into a protectable interest is multi-faceted and must involve considerations of content, locality and duration (nature, space and time).

20. The applicant already conceded that the area was too broad in relation to the nature of the interest it was protecting. Insofar as the period is concerned I take the following into account: The business relates to the sale of residential property, there are fewer exclusive mandates being signed by sellers and the period is relatively short; a seller would want to find a buyer within a short space of time failing which it will move on to other agencies; would-be buyers are also looking to tie up the purchase of a property within a short space of time.

21. This is therefore not a market with specific clients either on the supply or demand side and neither the sellers nor the buyers in the market are beholden to any one estate agent save in the case of a seller who has signed a sole mandate form. There is also evidence that if there are any restraints in the industry they are rarely enforced which appears directed more at the regular turnover of prospective purchasers and sellers whose individual activity within the residential property market is for a limited period rather than there being no justification for restraining a rain making agent who has taken advantage of the agency's resources including its data base.

22. In analysing the period and area of the restraint within the context of determining whether there exists a protectable interest at any moment in time, it may also make it unnecessary in many cases to resolve the ongoing debate of onus which in practice often rears its head on the issue of confining the reach of the restraint clause contracted for by the parties. It may come down to the burden of adducing evidence in rebuttal to support an issue of law as opposed to a full onus in the ordinary sense.

    The distinction was set out in *Pillay v Krishna and Another* 1946 AD 946 at 952-953 where the court in referring to onus said that in its true and original sense it means "... *the duty which is cast on a particular litigant , in order to be successful, of finally satisfying the court, that he is entitled to*

succeed on his claim, or defence, as the case may be, and not in the sense merely of his duty to adduce evidence to combat a prima facie case if his opponent."

See also the reasoning of van Niekerk AJ in *Mohunram and Another v National Director of Public Prosecutions and Another (Law Review Project as Amicus Curiae)* 2007 (4) SA 222 (CC) at para 75 which was a case requiring the application of a proportionality test (which distilling *Reddy v Siemens Telecommunications Pty Ltd* 2007 (2) SA 486 (SCA) at para 17 is a vital consideration[2]). See also Ponnan JA when referring to *Pillay* in *Centre for Child Law v Hoërskool Fochville and Another* 2016 (2) SA 121 (SCA) at para 18 ftn 7.

23. On the basis that there is an onus on the respondent I believe that it has been discharged and, whether applying the rationale for divisibility as considered in *Den Braven* and the cases cited there[3] or adopting the approach that there can be no protectable interest in the customer base beyond an extremely short period because of the nature of the industry, I

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[2] *Reddy* at para 17:

> A fifth question, implied by question (c), which may be expressly added, viz whether the restraint goes further than necessary to protect the interest, corresponds with s 36(1)(e) requiring a consideration of less restrictive measures to achieve the purpose of the limitation. The value judgment required by Basson necessarily requires determining whether the restraint or limitation is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. I agree with Rautenbach and Reinecke, albeit writing on s 33(1) of the interim Constitution, who remarked that
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> > 'dit moeilik [is] om in te sien hoe daar bloot deur die feite deur 'n konstitusionele bril te beoordeel, verbeter kan word aan die wyse waarop die howe ingevolge die gemenereg die private en openbare belange teenoor mekaar opweeg [ten opsigte van ooreenkomste ter beperking van handelsvryheid] . . .'.

Compare Davis J in *Advtech* (supra) at paras 34 and 45

[3] In particular Botha J in *National Chemsearch (SA) (Pty) Ltd v Borrowman and Another* 1979 (3) SA 1092 (T) at 1116D-G and Didcott J in *Roffey v Catterall Edwards & Goudré (Pty) Ltd* 1977 (4) SA 494 (N) at 1108D-G

am satisfied that the restraint is overbroad and should be limited to a period of three months.

ORDER

24. I accordingly order that:

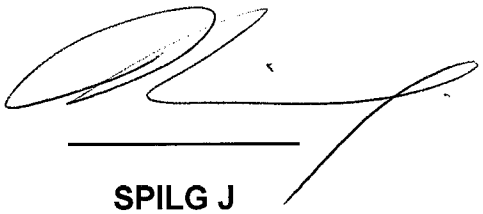
1. Respondent is interdicted until 3 October 2017 from:

1.1 Utilising and/or communicating to any other person or entity the applicant's confidential information and database, including, but not limited to, property lists, details and portfolios, seller and buyer lists and details, property pricing and commission arrangements, the applicant's methods, designs and techniques relating to its business;

1.2 Carrying on any business through or being interested in or engaged in or concerned with or being employed by or being a shareholder, partner, director or member of or acting as a consultant or advisor to any company, close corporation, undertaking or concern (in each case directly or indirectly) that trades or carries on business predominantly as a residential, commercial or rental estate agency, or any such company, close corporation, undertaking or concern that might reasonably be expected to so trade or carry on business within the areas of Parkview, Parkwood, Parktown North, Dunkeld West and Greenside East;

2. Respondent is ordered to return to the Applicant all of its proprietary confidential information as may be in his possession.

3. Respondent is liable for payment of the Applicant's costs.



SPILG J

DATE OF HEARING:	27 July 2017
DATE OF JUDGMENT:	28 July 2017
FOR APPLICANT:	Adv MJ Cooke MacGregor Stanford Kruger Inc. (Bembridge Minnaar Attorneys – correspondents)
FOR RESPONDENT:	Adv AJ Nel Dean Caro & Associates (Lee & McAdam Attorneys-correspondents)