IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***NO***
(2) OF INTEREST TO OTHER JUDGES: ***NO***
(3) REVISED:

Date: ***12th September 2019*** Signature: _____

CASE NO: 2019/30649

DATE: 12TH SEPTEMBER 2019

In the matter between:

VALUE LOGISTICS LIMITED Applicant

and

DA COSTA ROSARIO, QUINAL First Respondent

RTT GROUP (PTY) LIMITED Third Respondent

JUDGMENT

Adams J:

[1]. This is an opposed urgent application by the applicant primarily against the first respondent for interdictory relief. The applicant applies *inter alia* for an order interdicting and restraining the first respondent for a period of two years from being employed by any business concern (including the second respondent) which conducts the same or simirlar business to that of the

applicant. The applicant also applies for an order interdicting and restraining the first respondent from in any way utilizing any of the applicant's confidential information contained in documents listed by the applicant in its affidavit.

[2]. The first respondent was employed by the applicant as a sales representative from the 8th January 2018 to the 2nd of September 2019. Whilst so employed by the applicant, there was in place an employment contract between the applicant and the first respondent, which incorporated by reference the applicant's confidentiality policy. In terms of this policy the first respondent agreed and undertook that she would keep confidential the applicant's confidential information. She also undertook not to use the confidential information of the applicant for purposes other than in the course of her employment with the applicant. In terms of the contract of employment concluded between the applicant and the first respondent on the 18th of December 2017, there was also a restraint of trade agreement applicable between them for a period of twenty four months following the termination of the first respondent's employment with the applicant. The area in which the restraint of trade was to apply was defined as being within a radius of 75 kilometres of any of the premises of the applicant in South Africa and Namibia.

[3]. It is contended by the applicant that the first respondent has unlawfully appropriated its confidential information and intends utilizing this information to compete with it. The applicant also contends that, in breach of the restraint of trade agreement, the first respondent has now taken up employment with the second respondent, which is a direct competitor of the applicant. The first respondent acknowledges that the restraint of trade covenant and the confidentiality agreement were concluded between her and the applicant during December 2017. However, the first respondent opposes the application on the basis that she has no intention and never had the intention to utilise the confidential information of the applicant for purposes of soliciting business from clients. The first respondent also challenges the lawfulness of the restraint of trade clause in her contract of employment with the applicant, alleging that in time and space the restraint is unreasonable.

[4]. The applicant contends that the application is urgent due to the fact that the first respondent commenced her employment with a direct competitor on 6 September 2019 and it is crucial that this application be heard at the earliest opportunity. The longer that the first respondent remains in the employ of the second respondent, the more harm she can do to the applicant by utilising its confidential information to the detriment of the applicant and for the benefit of the second respondent. I agree with the applicant's contention. In my judgment matters involving restraint of trade agreements and unlawful competition by their very nature more often than not are urgent. I am therefore of the view that this application should be heard as one of urgency.

[5]. The first respondent has also raised a point *in limine* relating to *locus standi in iudicio*. The basis for this legal point is that, so the first respondent contends, there is no substantiation for the averment by the deponent to the founding affidavit that he had been duly authorised by the applicant to institute and prosecute the urgent motion court proceedings on behalf of the applicant.

[6]. In the founding affidavit the deponent states as follows:

'I am duly mandated to instruct attorneys, depose to affidavits, and generally to do all things necessary to prosecute this application to finalization on the applicant's behalf'.

[7]. This, the first respondent contends, is not sufficient. Also, the resolution by the directors, which was attached to the applicant's replying affidavit, was only produced on the 5th of September 2019 as a knee-jerk reaction to the first respondent's answering affidavit, in which the authority to institute these proceedings was disputed. This resolution was irregularly backdated to the 29th of August 2019. Therefore, so it was submitted on behalf of the first respondent that the urgent application should be dismissed on the basis that the proceedings have not been authorised by the applicant.

[8]. There is no merit in this point *in limine*. That is so for the simple reason that objectively speaking and, having regard to the evidence before me, these proceedings have clearly been approved by the applicant. Secondly, in *Ganes and Another v Telecom Namibia Limited* 2004 (3) SA 615 held as follows:

'There is no merit in the contention that Oosthuizen AJ erred in finding that the proceedings were duly authorized. In the founding affidavit filed on behalf of the respondent Hanke said that he was duly authorized to depose to the affidavit. In his answering affidavit the first appellant stated that he had no knowledge as to whether Hanke was duly authorized to depose to the founding affidavit on behalf of the respondent, that he did not admit that Hanke was so authorized and that he put the respondent to the proof thereof. In my view, it is irrelevant whether Hanke had been authorized to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorized by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorized. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged by the appellants. It must, therefore, be accepted that the institution of the proceedings was duly authorized. In any event, rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided. (See *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705C-J.).'

[9]. On the basis of these principles, the point in limine stands to be dismisses.

[10]. It is the case of the applicant that the first respondent has breached the covenant in restraint of trade by taking up employment with a direct competitor of the applicant, that being the second respondent. The applicant also alleges that the first respondent emailed to herself confidential information belonging to the applicant and thereafter deleted such confidential information in order to hide the fact that she had done so. This is not disputed by the first respondent, who explains that she emailed the information to herself so that she would be able to complete her income tax returns for which purpose she would require the emailed information.

[11]. The applicant does business in the logistics industry, which is a highly competitive industry. Should any of the applicant's customers or potential customers be solicited by the first respondent and take away their business from the applicant, it would have a severe impact on the profit earned by the applicant. If that should happen the prejudice to the applicant would be immense.

[12]. The second respondent, with whom the first respondent took up employment, commencing on the 6th of September 2019, is a direct competitor of the applicant. The first respondent had bound herself to the applicant in a covenant in restraint of trade. Having regard to the papers before me, it is common cause that the first respondent has breached the covenant in restraint of trade as well as the confidentiality agreement she concluded with the applicant.

[13]. The first respondent was employed by the applicant as a sales representative and at the second respondent she would be employed as a key accounts manager. These positions are simirlar and impose the same duties and responsibilities on the first respondent.

[14]. On the 1st of August 2019 the first respondent emailed to herself the following confidential information: Documentation relating to a freight audit; a list of first respondent's existing customers and potential customers furnished to her by the applicant; leads for new business generated by another employee when that employee and the first respondent attended at a store of a retailer to obtain information regarding products and suppliers of such products; applicant's supply chain services report ('the SCS report), which contains information relating to applicant's meetings with clients, detailed notes from such meetings and any complaints from clients; and the minutes of a meeting held between the applicant and one of its customers, Servest.

[15]. The first respondent accepts that these documents are confidential, that they do not belong in the public eye and, in the event that they be seen by the second respondent or any other person, it is likely to cause the applicant severe prejudice.

[16]. As I indicated above, the first respondent challenges the clauses in her employment contract and the confidentiality policy relating of the applicant on the basis that it restricts her from possessing documentation required by her for submission to statutory bodies such as South African Revenue Services.

[17]. The first respondent contends that the restraint of trade is not valid on the basis that same is contrary to public policy and it goes beyond what is necessary to protect the interests of the applicant.

The Law and its application *in casu*

[18]. A party seeking to enforce a covenant in restraint of trade is required only to invoke the restraint agreement and prove a breach thereof. Thereupon, a respondent who seeks to avoid the restraint bears an onus to demonstrate on a balance of probabilities that the restraint agreement is unenforceable because it is unreasonable. See *Basson v Chilwan & Others*, 1993 (SA) 742 (A) at 776I - J; *Magna Alloys & Research (SA) (Pty) Limited v Ellis* 1984 (4) SA 874 (A) at 892I to 893E; *Reddy v Siemens Telecommunications (Pty) Limited* 2007 (2) SA 486 (SCA) at paras 10 to 14.

[19]. In *Reddy v Siemens Telecommunications (Pty) Ltd* (supra), the Supreme Court of Appeal per Malan AJA emphasised that the constitutional values underlay not only a respondent's freedom to engage in economic activity, but also the applicant's corresponding right. At par 15 Malan JA had this to say:

'[15] 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 interests 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. In this sense, freedom to contract is an integral part of the fundamental right referred to in s 22'.

[20]. The onus is on the first respondent to prove the unreasonableness of the restraint. She must establish that she had no access to confidential information

and that she never acquired any significant personal knowledge of or influence over the applicant's customers whilst in their employ. This the first respondent has not done, in fact, she admits that the information she took from the applicant is its confidential information. She says however that she does not intend using same. That being the case and since it has been demonstrated that the prospective new employer is a competitor of the applicant, the risk of harm to the applicant if its former employee were to take up employment becomes apparent.

[21]. The applicant had put in place certain safeguards to protect itself against the risk of the first respondent, or any other of its other employees, communicating its trade secrets to, or utilising its customer connection on behalf of a rival concern. This the applicant did by imposing a restraint on the first respondent, which prevented her from being employed by a competitor. This means that it is not necessary for the applicant to have to run after the first respondent and neither is it incumbent upon the applicant to inquire into the *bona fides* of the first respondent and to demonstrate that she is *mala fide* before being allowed to enforce its contractually agreed right to restrain the first respondent from entering the employ of a direct competitor.

[22]. All that the applicant is required to demonstrate is that there is secret and confidential information to which the first respondent had access, and which in theory the first respondent could transmit to the new employer should she desire to do so. This the applicant has clearly done. The first respondent admits that she is in a position to disseminate the confidential information presently in her possession, but, so she alleges, she has chosen not to do so.

[23]. It is not necessary for the applicant to show that the first respondent has in fact utilised the confidential information. Applicant only has to show that the first respondent could do so. The very purpose of the restraint agreement is that the applicant does not have to rely on the *bona fides* or lack of retained knowledge on the part of the first respondent of the confidential information. It cannot be unreasonable for the applicant in these circumstances to enforce the bargain it has exacted to protect itself. The applicant should not have to content

itself with crossing its fingers and hoping that the first respondent would act honourably or abide by the undertakings that she has given. It does not lie in the mouth of the first respondent, who has breached a restraint agreement by taking up employment with a competitor, to say to the applicant 'trust me: I will not breach the restraint further than I have already been proved to have done.' (*Reddy v Siemens Telecommunications* (supra) at pg 499-500, para 20).

[24]. The first respondent's explanation for emailing the applicant's confidential information to herself was that she intended using it to complete her SARS Income Tax returns. She also indicated that her intention in deleting the information from her computer after emailing it to her was aimed at creating storage space on the system. These explanations, all things considered, ring hollow. These explanations are so far – fetched that, in my view, they can be rejected on the papers.

[25]. I am accordingly of the view that the first respondent has failed to demonstrate on a balance of probabilities that the restraint agreement is unenforceable because it is unreasonable. The restraint therefore should be enforced.

[26]. The applicant's information, which it wants to protect, is not just useful, it is critical to the survival of an entity conducting business in the logistics arena – it is by all accounts a tool of the trade. The first respondent admits that all of the aforementioned details are not public knowledge and / or in the public domain. This information has to be unearthed by employing people at considerable expense to the applicant to acquire and collate this information.

[27]. There can be no doubt, as it follows as matter of logic, that the applicant will suffer damages, because any business diverted away from the applicant to the second respondent, by utilising the applicant's confidential information, would result in pecuniary loss being suffered by the applicant.

[28]. In the circumstances, the applicant is entitled to the protection of its confidential information by way of the granting of the interdict which it seeks in this application.

[29]. In the *Waste Products Utilisation (Pty) Ltd v Wilkes & Another,* 2003 (2) SA 515 (WLD), the court, dealing with the requirement to establish misuse of confidential information (namely improper possession or use of that information, whether as a springboard or otherwise), held as follows at 582E-H:

'It has already been established that the defendants used the confidential information obtained about the plaintiff's plant and processes. It is useful, nonetheless, to consider also the concept of springboarding, since the same conduct may constitute both unlawful use of confidential information and the use of that information to gain a springboard in order to compete.

> "Springboarding" entails not starting at the beginning in developing a technique, process, piece of equipment or product, but using as the starting point the fruits of someone else's labour. Although the springboard concept applies in regard to confidential information, the misuse of the fruits of someone else's labour may be regarded in a suitable case as unlawful even where the information copied is not confidential. This was the case in Schultz v Butt, 1986 (3) SA 667 (A), where the boat hull designed by the plaintiff and copied by the defendant was found not to be confidential because it was in the public domain. But the copying of it, as a springboard, was regarded as unlawful.'

[30]. The court continued at 583F-G:

'In terms of the springboard doctrine, an interdict against the use of confidential information may be limited by the duration of the advantage obtained, or the time saved, by reason of having had access to the confidential information.'

[31]. The issue for consideration is how the applicant's interest weighs qualitatively and quantitatively against the interest of the first respondent to be economically active and productive.

[32]. In my view, the first respondent had every intention of using the applicant's information. I endorse this finding with the dictum in In *Experian South Africa (Pty) Ltd v Haynes and Another,* [2012] ZAGPJHC 105; 2013 (1) SA 135 (GSJ); (2013) 34 ILJ 529 (GSJ). At para 18-20 of this judgment, the following is said:

'The ex-employer seeking to enforce against his ex-employee a protectable interest recorded in a restraint, does not have to show that the ex-employee has in fact utilised information confidential to it. It need merely show that the ex-employee could do so.

The very purpose of the restraint agreement is to relieve the applicant from having to show bona fides or lack of retained knowledge on the part of the respondent concerning the confidential information. In these circumstances, it is reasonable for the applicant to enforce the bargain it has exacted to protect itself. Indeed, the very ratio underlying the bargain is that the applicant should not have to contend itself with crossing his fingers and hoping that the respondent would act honourably or abide by the undertakings that he has given. It does not lie in the mouth of the ex-employee, who has breached a restraint agreement by taking up employment with a competitor to say to the ex-employer "Trust me: I will not breach the restraint further than I have already been proved to have done".

Final Relief

[33]. It is trite that in order to obtain final relief by way of an interdict an applicant must demonstrate that it has a clear right, that it has suffered actual harm or reasonably apprehends that it will suffer harm, and that there is no other satisfactory remedy available to the applicant other than an interdict.

[34]. The requisites for a final interdict were stated in *Setlogelo v Setlogelo*, 1914 AD 221, as follows:

'The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.'

[35]. An employee has an obligation not to disclose the confidential information of his employer to any third party. The employer has a right to protect its confidential information. During the course of his employment if an employee discloses such information this would amount to a breach of the employment contract.

[36]. If the employee is privy to confidential information during the course of his employment he is also bound not to disclose that information to third parties after termination of his employment because 'it is unlawful for a servant to take his master's confidential information or documents and use them to compete with the master'. If he does so he is liable in delict.

[37]. Unlawful competition arises from wrongful interference with another trader's rights resulting in loss. The misuse of a party's confidential information

in order to advance one's own business interests and activities at the expense of a competitor's is wrongful if it would be contrary to the *boni mores* of the community to allow such conduct.

[38]. The first respondent is in possession of the applicant's confidential information which in the hands of a competitor is of significant economic value as it enables a competitor such as the second respondent to tailor its pricing and other customer offerings to undercut or otherwise outbid the applicant. First respondent knew, or ought to have known, by virtue of having signed the confidentiality agreement, that the applicant's information is confidential. As such she had a duty not to disclose such information to any third party. The respondents therefore obtained the confidential information of the applicant in an improper manner.

[39]. The first respondent has clearly engaged in conduct that is calculated unlawfully to undermine the applicant's business. The applicant's confidential information in the hands of the first respondent presents an ongoing threat of further harm to the applicant since she may entice the applicant's clients to trade with the second respondent. If the applicant were to institute a damages claim this would not stop the first respondent's unlawful conduct.

[40]. The very purpose of the applicant concluding a confidentiality agreement and a restraint of trade covenant with first respondent was to endeavour to ensure that she would not take the applicant's confidential information and use it to the detriment of the applicant's business.

[41]. I am satisfied that the applicant has established that ongoing harm is reasonably apprehended for the future. The applicant has no other satisfactory remedy. Even though the applicant may be able to sue for damages, the difficulty faced by it is how its damages claim could ever be properly quantified, let alone proven.

[42]. In the circumstances, I am of the view that the applicant is entitled to the relief sought in the notice of motion.

Costs

[43]. The applicant has asked that cost on the scale as between attorney and client should be awarded in its favour. I have had regard to the oft quoted decision: *In re: Alluvial Creek Ltd*, 1929 CPD 532 in which case the principle is laid down that, in its discretion to award a punitive costs order, the court should have regard to the proceedings by a party which are vexatious in that they put the other side to unnecessary trouble and expense which the other side ought not to bear.

[44]. I am not persuaded that in the circumstances of this matter a punitive cost order is warranted, and in the exercise of my discretion I intend awarding cost on the ordinary scale as between the party and party.

Order

Accordingly, I make the following order:-

(1) The first respondent is interdicted and restrained for a period of two years from the 2nd of September 2019 from being employed by any business concern, including the second respondent, which conducts the business of rendering logistical services to customers requiring such services, within a 75 km radius of any of the applicant's business premises throughout the Republic of South Africa and Namibia.

(2) The first respondent is interdicted and restrained from in any way utilising the information set out in the applicant's confidentiality affidavit.

(3) The first respondent shall pay the applicant's costs of this urgent application.

L R ADAMS
Judge of the High Court
Gauteng Local Division, Johannesburg

.HEARD ON:	10th September 2019
JUDGMENT DATE:	12th September 2019
FOR THE APPLICANT:	Adv J L Kaplan, together with Adv L Franck
INSTRUCTED BY:	Ian Levitt Attorneys
FOR THE FIRST RESPONDENT:	Attorney Stefan Scheepers
INSTRUCTED BY:	Scheepers Incorporated
FOR THE SECOND RESPONDENT:	No appearance