REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 19/06422

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
(4) DATE: 15 MARCH 2019
(5) SIGNATURE:

In the matter between:

HANDICO (PTY) LTD t/a HARDWARE CENTRE Applicant

and

KANIALAL GANDA VALLABH First Respondent

STRAND HARDWARE CC Second Respondent

J U D G M E N T

MAHALELO, J:

INTRODUCTION

[1] This is an application brought on urgency for the following relief, that the first respondent:

1. ... be interdicted and restrained from being directly or indirectly interested, engaged or concerned whether as principal, agent, partner, representative, shareholder, director, employee, consultant, adviser, financier, administrator or in any other like capacity in the business of the second respondent, more particularly the business conducted by the second respondent at Unit 5, Commercial City, corner Malibongwe and Tungsten Road (17Tungsten Road), Strydom Park, Randburg.

[2] The application is launched in two parts. In part A, the applicant primarily seeks an interim relief pending the adjudication of part B wherein he seeks an order to enforce a contractual restraint of trade and confidentiality undertakings given by the first respondent in favour of the applicant.

The respondents oppose the relief sought. The second respondent filed opposing papers and the first respondent filed a confirmatory affidavit. Urgency in the application was conceded by the respondents.

FACTUAL BACKGROUND

[3] The applicant and the second respondent operate hardware stores that provide specialised woodworking tools and equipment. They are commercial competitors and reciprocal suppliers to each other of certain equipment that each holds exclusive rights over. The first respondent, an adult man of 70 years old was employed by the applicant as a Sales Manager from

September 2015 until his retirement on 31 May 2018 but has been attached to the business purchased by the applicant since 1972.

[4] The applicant and the first respondent concluded a contract of employment which contained a restraint clause. In terms of the restraint agreement the first respondent undertook not to be involved in any capacity with a competitor of the applicant for a period of two years after terminating his employment with the applicant. The relevant clauses are found in Annexure "C" to the contract of employment and read as follows:

> "*1. Restraint*
>
> *1.1 For the purpose of this restraint Kaniala Ganda Vallabh identity number 500715 5628 08 4 will be referred to as the 'restrainee' and the business of retailer of machinery, accessories and consumables as well as the repair of machinery as carried on at the two outlets known as Hardware Centre in Randburg and Cape Town will be referred to as 'the business'.*
>
> *1.2 The restrainee acknowledges that by virtue of his past association with the Business he has become possessed of its trade secrets and confidential information.*
>
> *1.3 If after leaving the employment of Handico (Pty) Ltd t/a Hardware Centre, the restrainee take up employment or otherwise become associated with or interested in a competitor of the Business, the Business's proprietary interest in its trade secrets and the goodwill of the Business will be prejudiced.*
>
> *1.4 Having regard to the facts recorded in clauses 1.2 and 1.3 above, the restrainee undertake that he will not for a period of two years from the date of leaving the employment of Handico (Pty) Ltd Trading as Hardware Centre be directly or indirectly be interested, engaged or concerned whether as principal, agent, partner, representative, shareholder, director, employee*

consultant, advisor financier, administrator or in any other like capacity in any competitive business carried on in the Republic of South Africa.

1.5 The restrainee acknowledges that the restraint imposed upon him in terms of clause 1.4 are reasonable as to subject matter, area and duration, and is reasonably required by the Business to protect and maintain the goodwill of the Business.

1.6 The restrainee acknowledges that the Business will suffer financial harm and loss should the restrainee breach any of the restraints or undertaking given by him in terms of the agreement.

1.7 The Business shall be entitled to enforce the above restraint and/or alternatively shall be entitled to claim and recover from the restrainee respectively such damages as the Business may have sustained as a consequence of any such breach.

[5] The first respondent was retired and out of employment with the applicant from 31 May 2018. When the second respondent opened a new hardware store located in close proximity to the applicant's store (about 800 meters from where the applicant's business is) it employed the first respondent as a Counter Salesman. Because of his age, the first respondent would be in the employ of the second respondent for as long as he feels healthy enough to do so.

[6] The applicant seeks to interdict the respondents and enforce its restraint agreement. The applicant alleges that the first respondent has its trade secrets and full knowledge of its suppliers, customers, customer connections as well as its pricing formula. It is the applicant's case that by virtue of the first respondent's employment with it, the first respondent has formed an attachment with the applicant's customers over the years, that he

LEGAL PRINCIPLES APPLICABLE TO AGREEMENTS IN RESTRAINT OF TRADE

[9] The law applicable to restraint of trade agreements was laid down by the Appellate Division in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) as follows:

> *"in South African law, an agreement in restraint of trade is, on the face of it, valid – and hence enforceable – and will only be invalid and unenforceable if it is contrary to public policy on account of it unreasonably restricting a person's right to trade or to work"*

[10] These principles have been reaffirmed in other decisions of our courts. In *Basson v Chilwan and Others* [1993] ZASCA 61; 1993 (3) SA 742 (A) at 776H-J to 777A-B, Botha JA stated, in a separate judgment, that:

'*The incidence of the onus in a case concerning the enforceability of a contractual provision in restraint of trade does not appear to me in principle to entail any greater or more significant consequences than in any other civil case in general. The effect of it in practical terms is this: the covenantee seeking to enforce the restraint need do no more than to invoke the provisions of the contract and prove the breach; the covenantor seeking to avert enforcement is required to prove on a preponderance of probability that in all the circumstances of the particular case it will be unreasonable to enforce the restraint; if the Court is unable to make up its mind on the point, the restraint will be enforced. The covenantor is burdened with the onus because public policy requires that people should be bound by their contractual undertakings. The covenantor is*

not so bound, however, if the restraint is unreasonable, because public policy discountenances unreasonable restrictions on people's freedom of trade. In regard to these two opposing considerations of public policy, it seems to me that the operation of the former is exhausted by the placing of the onus on the covenantor; it has no further role to play thereafter, when the reasonableness or otherwise of the restraint is being enquired into.'

[11] The test set out in *Basson v Chilwan and Others (supra)* at 767G-H for determining the reasonableness or otherwise of the restraint of trade provision, is the following:

1. *Is there an interest of the one party, which is deserving of protection at the determination of the agreement?*
2. *Is such interest being prejudiced by the other party?*
3. *If so, does such interest so weigh up qualitatively and quantitatively against the interest of the latter party that the latter should not be economically inactive and unproductive?*
4. *Is there another facet of public policy having nothing to do with the relationship between the parties but which requires that the restraint should either be maintained or rejected?'*

[12] In *Kwik Kopy (SA) (Pty) Ltd v Van Haarlem and Another* 1999 (1) SA 472 (W) at 484E, Wunsh J added a further enquiry, namely whether the restraint goes further than is necessary to protect the interest.

[13] In *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) at 502D-F it was held that : " *It is well established that the proprietary interests that can be protected by a restraint agreement, are essentially of two kinds, namely:*

> ' *The first kind consists of the relationships with customers, potential customers, suppliers and others that go to make up what is compendiously referred to as the "trade connection" of the business, being an important aspect of its incorporeal property known as goodwill; The second kind consists of all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him, to gain a relative competitive advantage. Such confidential material is sometimes compendiously referred to as "trade secrets".'*

[14] The employer has the onus to show that it has a protectable interest to protect in the restraint agreement which may be in the form of trade secrets, pricing or customer connections. It will suffice if the employer can show that the acquisition of such protectable knowledge or interest prevailed during the term of employment of the respondent and that it had the potential to be used or has been used in competition against him. The employee bears the onus on the other hand, to show on a balance of probabilities that the restraint was unreasonable, with reference to the circumstances that prevailed when the agreement was concluded and what occurred during the term of employment, in particular the events that caused the application to be launched. The protectable interest had to be in existence when the application was launched.

For information to be classified as confidential it must meet the following requirements:

(i) *"it must involve and be capable of application in trade or industry i.e it must be useful,*

(ii) *it must not be public knowledge and public property,*

(iii) *the information objectively determined must be of economic value to the person seeking to protect it".*

See Alum-Phos (Proprietary) Limited v Spatz and Another [1997] 1 All SA (WLD).

[15] In the founding affidavit the applicant states that the first respondent has been employed by it as a Sales Manager and he had a number of salesmen working under him. He would give advice to the salesmen under him as to what percentage discounts could be given and he would also advise a salesman as to where to find a product if a particular customer require a particular machine. According to applicant, the first respondent knew who the applicant's suppliers were and also ordered stock from them. He was able to negotiate very favourable prices from the suppliers as a result of the close relationship that he has built with them over the years.

[16] The applicant alleges that an important aspect of its business is its customers and customer connections. Over the years the first respondent has built a strong relationship with its customers to an extent that when a customer would come into the applicant's business; the customer would request to be served by the first respondent. The first respondent has extensive knowledge of the applicant's business, trade secrets, suppliers and customers.

[17] In the answering affidavit the respondents deny that the applicant is possessed of any trade secrets. They assert that the applicant and the

second respondent retail power tools and that the body of knowledge which the first respondent has built over many years pertains to the tools that the applicant and the second respondent both retail. They further deny that the first respondent is in possession of any customer list, supplier list or any confidential information of the applicant as he did not maintain a list of customers or suppliers when he retired from the applicant. The respondents further contend that the applicant does not have any trade secrets; proprietary or legitimate interests' worthy of any protection. It is the respondents' argument that there is no aspect of the applicant's business that is seriously identified as a trade secret as information or how to match a tool to a particular job is not a trade secret. This, according to respondents, is information which is available to the public which is published by the manufacturers of the different tools for use by the prospective purchasers of the tools.

[18] The respondents argued further that, the applicant's suppliers are publicly known, furthermore, its customers, given the retail space that it operates in, do not offer information to the applicant that is objectively of value to it and there is no aspect of a system of pricing that the applicant claims is unique to it. In fact, the respondents argue that the information which the first respondent has acquired over his years of service as a Counter Salesman with the applicant resides in his head and is not something that the applicant has any right or interest in protecting. The second respondent submits that, in any event, it is aligned with the Servitor/Builders Express group and is in most instances a price taker from them therefore, none of the knowledge that the

first respondent may have about the applicant's business is of any worth to him and he has not employed him for that purpose.

[19] It is common cause that the first respondent has been employed in the hard ware business of the applicant for over 40 years. It is common cause that during this period, he developed skill and knowledge and managed to serve applicant's clients' with distinction. First respondent alleges that he did not receive any training from the applicant. He contends that through his interaction with their customers, or based on such interactions he improved his skill and knowledge. He asserts that his reputation and personality in this regard gave him the ability to render good service to applicant's customers. The respondents contend therefore that the applicant has failed to show that it had any specific policies, strategies and targets of a kind that had to be protected as confidential information and there is no suggestion that the applicant has compiled a list of its customers or suppliers, and kept it confidential. The second respondent contends that information about the applicant's suppliers is public knowledge.

[20] The legal position where an employer seeks to enforce a restraint of trade agreement on the basis of risk of harm to its trade connections and in particular its connection with its customers has been authoritatively set out in *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 SA 537 (A) at follows:

> "*The need of an employer to protect his trade connections arise where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he leaves the employer's service he could easily induce the customers to follow him*

to a new business (Joubert General Principles of the Law of Contract at 149). Haydon. The Restraint of Trade Doctrine (1971) at 108, quoting an American case, says that the 'customer contract' doctrine depends on the notion that 'the employee, by contract with the customer, gets the customer so strongly attached to him that when the employee quits and joins a rival he automatically carries the customer with him in his pocket'. In Morris (Herbett) Ltd v Saxelby [1916] 1 AC 688 (HL) at 709 it was said that the relationship must be such that the employee acquires 'such personal knowledge of an influence over the customers of his employer ... as would enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer's trade connections ...'"

[21] This statement has been applied in our courts (for example, by Eksteen J, in *Recycling Industries (Pty) Ltd v Mahommed and Another* 1981 (3) SA 250 (E). Whether the criteria referred to are satisfied is essentially a question of fact in each case, and in many, one of degree. Much will depend on the duties of the employee, his personality, the frequency and duration of contact between him and the customers, where such contact takes place, what knowledge he gains of their requirements and business, the general nature of their relationship including whether an attachment is formed between them, the extent to which customers rely on the employee and how personal their association is, how competitive the rival businesses are, in the case of a salesman, the type of product being sold, and whether there is evidence that customers were lost after the employee left.

[22] The learned judge in Rawlins *supra* referred to Heydon *The Restraint of Trade Doctrine* (1971) at 108, where it is stated that the "*customer contact*" doctrine depended on the notion that:

"*the employee, by contact with the customer, gets the customer so*

strongly attached to him that when the employee quits and joins a rival he automatically carries the customer with him in his pocket".

[23] In *Morris (Herbert) Ltd Saxelby* (1916) 1 AC 88 (HL) at 709, it was held that the relationship must be such that the employee acquires:

"... *such personal knowledge of and influence over the customers of his employer ... as would enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer's trade connection ...*".

[24] In considering the facts of the present matter I bear in mind that a protectable interest in the form of customer connection does not come into being simply because the former employee had contact with the employer's customers in the course of his work. The connection between the former employee and the employer's customers should be such that it will probably enable the former employee to induce the customers to follow him to his new business. See *Walter McNaughton (Pty) Ltd v Schwartz and Another* 2004 (3) SA 381 (C)

[25] The type of information alone does not necessarily establish its confidentiality. All relevant circumstances must be considered. Confidentiality is not always absolute, nor is the protection always permanently available.

[26] Whilst the law prohibits an employee from taking his employer's customer list or deliberately commit its contents to memory, it nevertheless

recognises that on termination of an employee's employment, some knowledge of his former employer's customers will inevitably remain in the employee's memory and it leaves the employee free to use and disclose such recollected knowledge in his own interests, or in the interest of anyone else including the new employer who competes with the old one. See *Meter Systems Holdings Ltd v Venter and Another* 1993 (1) SA 409 (W). In *Motion Transfer & precision Roll Grinding CC v Carsten* [1998] 4 All SA 168 N at 175. the following was stated:

"As regards the alleged unlawful misappropriation of the applicant's goodwill, flowing from the first respondent's relationship with the applicant's clients built up during the course of his employment, it is obvious that every employee occupied in the field of customer relations must become acquainted with and build up a relationship with his employer's customers. It would be totally unrealistic to expect him after termination of his employment to shun all such customers."

[27] In my view these remarks apply with equal force *in casu*. This appears to be the case with first respondent. There is no evidence that he has applicant's trade secrets. The information he has is either in the public domain or of general application in the industry. He does not have client lists. He might be knowing them through his longstanding interaction with them, through which he honed his skills in the hardware industry. It is my view that the first respondent can hardly be said to be riding on the crest of applicant's good will. If anything, his reputation *albeit* gained during his employment with the applicant, placed him in good stead. It cannot be expected that the first respondent having worked in the hardware industry for over 40 years will come out with no skill and knowledge. Such cannot without more from the applicant be protectable interests of the applicant.

[28] In addition to the above, it is common cause that the first applicant has been out of the market for 9 months since retiring from the applicant. There is no evidence that he has maintained any contact with any customers or suppliers of the applicant. In my view this period is more than sufficient to permit the applicant to strengthen its customer and supplier connections.

[29] For the aforegoing reasons I am not persuaded that the applicant has made out a case for the relief he seeks.

ORDER

1. The application is dismissed with costs.

B MAHALELO
JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

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