REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION, JOHANNESBURG)

Case number: 2021/37630

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

28/09/10 [signature]

Date signature

In the matter between:

CARGOCARE FREIGHT SERVICES (PTY) LTD **Applicant**

And

RAATH NADIA LAURA **Respondent**

Delivery: This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date for hand-down is deemed to be 28 September 2021.

Summary: Urgent application, restraint of trade interdict. The principle governing restraint of trade restated

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JUDGEMENT

Molahlehi J

Introduction

[1] The applicant," Cargocare Freight Service (Pty) Ltd, a company registered in terms of the South African company laws, seeks an urgent restraint of trade interdict against the respondent, Mrs Laura Nadia Raath. The order sought in terms of the notice of motion reads as follows:

1. 'The applicant's non-compliance with the Rules of this Honourable Court, to the extent necessary and directing that this application be heard as one of urgency, in terms of Rule 6(12), is condoned.
2. The respondent is ordered to comply with the provisions of Annexure "FA2", alternatively, "FA2.1" and "FA2.2".
3. The respondent is interdicted from:

   3.1. continuing her employment and/or business relationship with Cargo Compass SA (Pty) Ltd ("Cargo Compass"), including with any of its subsidiary companies, related companies, affiliates and/or associates and/or agents, for a period of 12 months from 30 July 2021, alternatively, 29 March 2021; and

   3.2.competing for, or soliciting the business of the applicant's clients or suppliers (whether in the name of the applicant, or otherwise) whose businesses are situate within the geographical are of Johannesburg, alternatively, within the geographical area which is 20 km from the applicant's principal place of business in Modderfontein at Unit 2, Westlake Park, 38 Avalon Road, Modderfontein, Germiston, 1614, for a period of 12 (twelve) months from 30 July 2021, alternatively 29 March 2021; and

   3.3. directly or indirectly, breaching the Confidentiality Clause in Annexure "FA2", alternatively, "FA2.1" and "FA2.2" to the Founding Affidavit, or divulging or disclosing to

any competitor of the applicant, any trade secrets as identified in the Confidentiality Clause and/or retaining any of the applicant's property as defined under the Confidentiality Clause, whether in electronic format and/or hard copies;

3.4. pursuing or attempting to pursue any persons employed by the applicant during the period of their employment with the applicant.

3.5. acting in unlawful competition with the applicant in relation to the Clearing and Forwarding Industry and/or any of the services offered by the applicant.

4. The respondent is ordered to pay the applicant's costs on the scale as between Attorney and Own Client.'

[2] The respondent, correctly, accepted that the matter is urgent but opposed the relief sought.

[3] The deponent to the founding affidavit in support of the application, Mr Methew Raath and the respondent are husband-and-wife currently involved in acrimonious divorce proceedings.

[4] It is common cause that the respondent is a former employee of the applicant. At the time of her resignation, she was employed as the freight executive. After her resignation, she instituted the proceedings in the CCMA alleging that she was constructively dismissed. Those proceedings have no bearing on the determination of the present matter.

The case of the applicant.

[5] The applicant's case is that the respondent is in breach of her employment contract relating to the restraint of trade provisions.

[6] In support of its claim that the respondent is in breach of the restraint of trade covenant the applicant relies on the terms of the employment contract and its policy provided for in annexures FA2, and FA 2.1, and FA 2.2 attached to the founding affidavit.

[7] Annexure FA2 is the letter of appointment dated 3 March 2017, and FA 2.1 is another letter of appointment dated 01 September 2015 and FA 2.2 is a policy document of the applicant, which amongst others provides as follows:

"The restraint territory shall be within the Magisterial Jurisdiction of Germiston, which is engaged in a business similar to that of Cargocare."

[8] The applicant further relies on the information it obtained from certain sources regarding the alleged breach of the restraint of trade. In this respect, the applicant relies on information obtained from Desire Ludick, it's forwarding manager, who in the confirmatory affidavit alleges that he received a phone call from Mr Van der Merwe, an employee of one of the clients of the applicant looking for the respondent. He took over the cell phone number previously used by the respondent whilst she was in the applicant's employ. Ludwick says Van der Merwe realised that the person who answered the phone was not the respondent and said he would phone the respondent at her number.

[9] Following the above advice from Ludick, the applicant noticed that it was losing clients. It then investigated the matter by contacting some clients who informed it that they were doing business with Compass Cargo. The applicant seems to infer from this information that the respondent was the cause of clients moving to Compass Cargo.

[10] The applicant's other information is from Charlene Meyer, who refutes the allegation that the respondent is unemployed in a confirmatory affidavit. She alleges that Compass Cargo employs the respondent, and she based this allegation on the business card and email addresses, reflecting that the respondent is employed at Cargo Compass.

[11] The other point made by the applicant in support of its case is that on 6 August 2021, it discovered that in February 2021 before her resignation the applicant copied customer lists and emailed it to herself.

The respondent's case

[12] In her opposition to the applicant's application, the respondent contends that the two documents the applicant relied on in support of its case have been manipulated and that the contents thereof do not represent those that she signed. She contends that even if the contents of the documents were to be accepted, they do not contain a restraint covenant restraining her from being employed by a business that competes with the applicant. According to her, the restraint is for one year, and it is merely against the use of confidential information and solicitation of applicant's employees and its clients. She

further contends that the restraints in the covenant are unreasonable because they are contradictory. For this reason, the provisions of the covenant, according to her, are unenforceable.

[13] The other defence raised by the respondent is that in terms of the applicant's policy document, the territorial limit of the restraint is confined to the magisterial district of Germiston.

[14] She further contends that if the Germiston geographic limitation was to be ignored, then it would mean the geographic restraint is unlimited and thus cover the whole country. It would, accordingly, mean that the restraint is unreasonable.

[15] About the alleged solicitation of the applicant's clients, the respondent refuted that and stated that the clients approached her because they were dissatisfied with the services provided by the applicant. She then directed them to Cargo Compass.

The legal principles

[16] It is trite that a restraint of trade clause in an employment contract restricts an employee's freedom to trade, practice his or her profession, or participate in business or economic activity. However, the covenant is regarded as enforceable against the employee because the public policy directs that contractual obligations bind on people based on the sanctity of contracts.

[17] A restraint of trade clause is unenforceable in a case where it is found that it unreasonably restricts an employee's freedom to trade because that would be contrary to public policy. In Basson v Chilwan,[1] the court had to determine the enforceability of a restraint of trade signed by an employee skilled in the art of building and designing buses. The contract restrained him from working for any similar business in the whole of Southern Africa for five years. The Court found that the restraint was unreasonable and thus unenforceable.

[18] The underlying purpose of the restraint of trade clause in an employment contract is to restrict an employee's freedom in the future to perform trade with a third party in the manner in which he or she may elect to do. The purpose of the restraint of trade was described as follows in Reefs v men field insurance Brokers:[2]

"The legitimate object of restraint is to protect the employer's good will and customer connections [or trade secret) and the restraint and accordingly remains effective for a specified period (which must remain reasonable) after the employment relationship has come to an end. The need for the protection exists therefore independently of the manner in which the contract of employment is terminated and even if this occurs, in consequence of a breach by the employer."

[19] The court may, however refuse to enforce a restraint covenant if it is unreasonable based on public policy considerations. The consideration of whether a covenant is unreasonable depends on the circumstances of each case.[3]

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[1] 1993 3 SA 742 (A).
[2] 1996 [3] SA 766 [A] at 772.

[3] J Louw and Co (Pty) Ltd v Ritcher and Others 1987 (2) SA 237 (N) at 243BD.

[20] The court will also not enforce a restraint of trade covenant unless the employer can show that the object of the covenant is to protect the confidential or trade secrets that the employee acquired during employment. The threshold of the status of confidentiality depends on the circumstances of each case and must satisfy the following:

a. it must be useful and applicable in the trade industry of the employer.

b. the information must not be public knowledge and public property and be restricted to a number of people.

c. It must be of economic value to the applicant.

d. the employer must show that objectively determined the information is confidential. [4]

[21] In Telefund Raiser v Isaacs,[5] the court held that for information to satisfy the confidentiality threshold, it must not be something that is public property or public knowledge.

[22] It is trite that in weighing the reasonableness of restraint of trade covenant for the purpose of enforcement, the court will take into account the duration of the restraint, the reasons for the restraint; the geographical area to which the restraint applies; the proprietary interest or capital asset that the employer seeks to protect.

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[4] See Alum-Phos (Pty) Ltd v Spatz [1997]1 B All SA 616 (W) at 623-4;

[5] 1998 (1) SA 521 CPD et 528 E-F.

Evaluation

[23] It is common cause in the present matter that the restraint of trade does not prohibit the respondent from accepting employment with any of the applicant's competitors. Although the respondent disputes having signed annexures FA2 and FA 2.1, considering the facts and the circumstances, it seems the most plausible version to accept is that of the applicant.

[24] In my view, the issue upon which this matter turns on is the alleged solicitation of the applicant's clients, and it's related issue of the geographic extent of the restraint. The respondent contends that she did not approach the applicant's clients, but instead, they came for assistance to her as they were dissatisfied with the applicant's service. This version does not seem farfetched and thus has to be accepted as the truth. That being the case, the enquiry is whether the approach by the clients in the circumstances amount to the solicitation. It should, however, be noted that there is no evidence from the clients confirming that the respondent had approached them to do business with Cargo Campus.

[25] The employment agreement as contained in either FA2 or FA2.1 do not define the word 'solicitation.' In its ordinary meaning, the word 'solicitation' comes from the word 'solicit', which means 'to request' or 'to entreat.' In the Oxford Combined Dictionary of Current and Modern English Usage, the word 'solicit' is defined as 'Ask repeatedly or invite.'

[26] On the facts stated above, it does not appear that the respondent approached the clients of the applicant and invited them to join or use the services of Cargo Campus. In my view, for this reason alone it cannot be said that the respondent breached the restraint clause in the employment contract.

[27] The applicant's case still stands to fail even if it was to be found that the respondent's advice to the applicant's clients to approach Cargo Campus for assistance amounted to solicitation. It would fail because it has not been disputed that all the clients that approached the respondent are based outside the magisterial district of Germiston contrary to what is envisaged in the applicant's policy set out in FA2.2, a policy document relied upon by the applicant in prayer 3.3 of the notice of motion.

[28] The applicant contends that the limitation to the Germiston magisterial district finds no application because there is no such provision made in FA2 and FA2.1. This does not assist the applicant's case because it would mean that there is no geographic limit to the application of the restrain covenant. In other words, it would mean that the restraint applies across the whole of the country or even outside the borders of South Africa. In that case, the restraint would be unreasonable and accordingly unenforceable.

[29] In light of the above I find that the applicant's case stands to fail.

Order

[30] In the premises the following order is made:

1. The application is treated as one of urgency and accordingly non-compliance with the time frames set out in the Rules is condoned
2. The application is dismissed with costs.

E Molahlehi

Judge of the High Court,

Gauteng Local Division,

Johannesburg.

Representation:

Counsel for the applicant: Adv M Nowitz

Instructed by: Nowitz Attorneys

Counsel for the respondent: Adv. George Kairinos SC

Instructed by: Steve Merchak Attorneys

Date for the hearing: 24 August 2021

Judgement delivered: 28 September 2021