



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

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

SIGNATURE

DATE: 23 January 2023

Case No. 2022/059634

In the matter between:

ASI CAPITAL (PTY) LTD

Applicant

and

CHERE MANN

First Respondent

SMARTFIT PROPERTIES (PTY) LTD

Second Respondent

JUDGMENT

WILSON J:

- 1 The applicant, ASI, is, amongst other things, a property management company. On 10 January 2023, I issued an order restraining the first respondent, Ms. Mann, from competing with ASI within the province of Gauteng for a period of three years. I restrained Ms. Mann from soliciting ASI's

clients. I also ordered her to terminate her employment with the second respondent, Smartfit (Pty) Ltd, which operates a property management company within Gauteng Province. I directed Ms. Mann to pay the costs of the application. I indicated that my reasons for making that order would be given in due course. These are my reasons.

The sale agreement

- 2 On 24 June 2021, Ms. Mann sold her property management company, TMS, to ASI. The sale agreement came into effect on 1 July 2021. ASI purchased TMS lock, stock and barrel. The sale agreement entitles ASI to all of TMS' goodwill, equity and future income. It was also a requirement of the sale agreement that Ms. Mann enter into a restraint of trade agreement, in terms of which she would not compete with ASI for five years. That agreement was eventually signed on 28 August 2022.
- 3 The plan was that Ms. Mann would work for ASI, apparently doing substantially the same work she did for TMS. The agreement is a common one amongst individuals who have worked hard to establish a successful business, and who wish to realise the equity they have built up by doing so. Ms. Mann was bought-out by a company keen to enter or expand its presence in the market in which she operated. ASI increased its market share and acquired a new income stream. Ms. Mann cashed-in on her hard work to the tune of R3 million. She also got to continue to do what she was good at, albeit on behalf of ASI. But it was a condition of all this that Ms. Mann would not, at least for a specified period, seek to compete with ASI, thereby potentially reducing the value of what it had purchased from her.

- 4 It is also common for arrangements of this nature to sour, as free-spirited entrepreneurs sometimes chafe against newly imposed corporate constraints. Although it is not clear on the papers exactly when and how ASI and Ms. Mann fell out, by the second half of 2022 Ms. Mann was not happy with how things were going.
- 5 On 22 November 2022, Ms. Mann purported to cancel the sale agreement. She referred to what she considered to be ASI's "numerous breaches" of the agreement. Numerous though those breaches may have been, Ms. Mann's papers do not identify them with any particularity. There was some suggestion during argument that ASI had dragged its feet in paying Ms. Mann the amounts to which she was entitled under the sale agreement, but it was accepted by Mr. Marais, who appeared for Ms. Mann, that Ms. Mann's pre-cancellation notice did not say that. Nor did it set out any facts from which the nature and extent of the breach Ms. Mann alleged could be inferred.
- 6 After Ms. Mann purported to cancel the sale agreement, she joined the second respondent, Smartfit, and began, on Smartfit's behalf, to solicit the business of the clients she had serviced with ASI and TMS.
- 7 ASI took this as a repudiation of the sale agreement. It chose not to accept that repudiation. It instead sought, by bringing this application, to hold Ms. Mann to the agreement and, critically, to the restraint of trade attendant upon it.
- 8 When the matter was called before me on 10 January 2023, it was agreed that there were three issues to determine. The first was whether the matter had been properly placed on the urgent roll. The second was whether the sale

agreement had been validly cancelled. The third was whether the restraint to which ASI sought to hold Ms. Mann was enforceable. I address each of these issues in turn.

Urgency

- 9 There was ultimately no serious dispute that the matter was urgent. In her papers, Ms. Mann criticised ASI for the delay in launching its urgent application, which was instituted on 14 December 2022. This was just over three weeks after Ms. Mann purported to cancel the agreement. The argument appears to have been that ASI's delay had allowed its urgency to dissipate.
- 10 If that was the suggestion, I cannot accept it. Any significant delay between the events giving rise to the urgency claimed and the institution of an urgent application will naturally have to be explained. But both the delay and the explanation for it must always be evaluated in context. There are degrees of urgency. The question will always be whether, in the specific context in which an urgent application is brought, the period that elapsed between the triggering events and the institution of the application was both reasonable and consistent with a party acting promptly to protect itself from imminent or ongoing harm.
- 11 In this case, there are two critical facts that weighed in favour of treating the matter as urgent. The first was that the full extent of Ms. Mann's departure from the terms of the sale agreement, and accordingly the severity of the harm done to ASI's interests, took some time to emerge. ASI could not have anticipated at the time it received the notice of cancellation that Ms. Mann would embark on a systematic effort to take back all of the business that she

had sold to ASI. But there is no serious dispute that this is what she did. The days following the purported cancellation saw the unfolding of a clear strategy on Ms. Mann's part to deprive ASI of the value that it had bargained for. Ms. Mann's attempts to take back the clients whose business she had sold to ASI were also undertaken without any suggestion that she would tender the portion of the purchase price she had already been paid back to ASI. In these circumstances, ASI can be forgiven for taking some time to work out what was going on.

12 The second critical fact is that, once ASI acquainted itself fully with Ms. Mann's intent, it sought, through correspondence, to engage with Ms. Mann and to seek compliance with the sale agreement. It is well-established that a party retains a claim for urgency even if it takes a short but reasonable period to pursue, in good faith, the resolution of an emergent dispute through engagement, before approaching the urgent court (see *South African Informal Traders Forum v City of Johannesburg* 2014 (4) SA 371 (CC), paragraph 37). This is what ASI did. In the totality of the circumstances, I cannot criticise it for taking three weeks to assess the position, engage with Ms. Mann, and then, when that failed, to approach this court on a reasonable timetable for the exchange of affidavits.

13 There was no dispute that, having transmitted her notice of cancellation, Ms. Mann acted with alacrity to deprive ASI of the value of its purchase under the sale agreement. ASI's fear was clearly that Ms. Mann would be so successful that her efforts would overtake the capacity of a Judge to provide effective relief in the ordinary course.

- 14 The application was obviously urgent. The real question in this case was whether Ms. Mann was legally entitled to act as she did. That is the question to which I now turn.

The purported cancellation of the sale agreement

- 15 The papers are unclear on why Ms. Mann sought to bring the sale agreement to an end, but there can be little doubt that the manner in which she did so was at odds with the provisions of the sale agreement that regulated that possibility. There is nothing in the agreement that permits a termination on notice, and such a clause would make no sense in the context of the agreement as a whole.
- 16 Ms. Mann could accordingly only have brought the sale agreement to an end by cancelling it on breach. In her cancellation notice, dated 22 November 2022, Ms. Mann referred to what she considered to be the “very explicit” cancellation clause in the agreement. Notwithstanding that characterisation of the clause, Ms. Mann’s conduct was plainly at odds with what it said.
- 17 Clause 7 of the sale agreement provides for cancellation on breach, provided that the aggrieved party gives seven days’ notice to cure the breach they allege, or two days’ notice in the event of the breach of a payment obligation. Ms. Mann’s pre-cancellation notice, dated 18 November 2022, referred to an “ongoing breach” of “the payment clause, good will [sic] and operational clauses alike”. Ms. Mann gave ASI 48 hours to rectify these breaches, which indicates Ms. Mann’s real complaint was about an alleged failure to honour a payment obligation. She would not have been entitled to cancel on two days’ notice for any other type of breach.

- 18 Other than this, ASI was left in the dark about the respects in which it was said to be in breach of its obligations, and exactly what it was supposed to do to remedy the breach alleged. This was critical. It is trite that the purpose of a notice of breach is to effectively communicate the nature of the breach to the defaulting party, giving that party a reasonable opportunity to remedy any breach. If the breach is not effectively identified, then the defaulting party is deprived of a reasonable opportunity to rectify it. The briefer the period afforded to the defaulting party to rectify their breach, the more important an unambiguous characterisation of the breach is.
- 19 In this case, Ms. Mann’s vague reference to a “failure to honour the payment clause” was nowhere near specific enough. Mr. Marais argued that, in the context of this case, it must have been obvious to all involved that Ms. Mann was complaining about the late payment of part of the purchase consideration that she bargained for in the sale agreement. Mr. Marais accepted, however, that this case is not made out in Ms. Mann’s answering affidavit. Mr. Marais also accepted that Ms. Mann had not set out the facts necessary to support the inference Mr. Marais pressed. In any event, if the breach was so obvious, then Ms. Mann would have had little difficulty in encapsulating it in the notice of breach the sale agreement required. Her failure to do so casts some doubt on the proposition that there was any material breach at all.
- 20 If follows from all of this that the pre-cancellation notice of 18 November 2022 was not the notice of breach necessary to activate Ms. Mann’s right to cancel in terms of clause 7 of the sale agreement. That being so, Ms. Mann’s notice of cancellation was plainly invalid.

Restraint of trade

- 21 ASI was accordingly right to characterise Ms. Mann's conduct as a repudiation of the sale agreement. ASI was entitled to reject that repudiation, and to hold Ms. Mann to the sale agreement.
- 22 Part of that agreement was the restraint of trade ASI now seeks to enforce. Every restraint of trade embodies a tension between two principles of public policy. The first is that, where it has been freely agreed, a restraint of trade is, just like any other contract, enforceable even if it results in some unfairness. The second is that individuals should generally be free to choose their trade or occupation. Both these principles enjoy at least some constitutional recognition. Freedom of contract – and accordingly the importance of enforcing contracts freely entered into – is an incident of the right to dignity (see *Brisley v Drotsky* 2002 (4) SA 1 (SCA), paragraph 94). The right to choose a trade or profession is entrenched in section 22 of the Constitution, 1996.
- 23 The enforcement of every restraint of trade requires the reconciliation of these two principles in the context of a particular case (*Sunshine Records (Pty) Ltd v Frohling* ("Sunshine Records") 1990 (4) SA 782 (A) 794C-E). The starting point is to identify any inequality of bargaining power between the parties to the restraint, before moving on to consider the consequences of enforcing the restraint for the party seeking to escape it, together with the consequences of declining to enforce the restraint for the party that seeks to rely on it. The central question is the extent to which a restraint is reasonable in the context in which it is to be enforced. A court is entitled to enforce the restraint only to

the extent that it is reasonable to do so, and to ameliorate the restraint to the extent necessary to render it consistent with public policy (*Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A)). Where it is alleged that a restraint will operate too harshly on the party to whom it applies, that party bears the onus of demonstrating this on the facts (*Sunshine Records*, 795G-H).

24 In this case, I cannot find that there was any inherent inequality of bargaining power between the parties. Ms. Mann is shrewd businessperson who saw the opportunity to sell her business. She must have known that the value of what she had to sell lay in the goodwill and equity she had built up, the income stream that flowed from her client base and, to some extent, her continued participation in the business. Knowing this, she withdrew the equity she had built up in her business by selling it to ASI. The restraint of trade, though entered into some time after the sale agreement was concluded, was an essential part of the bargain.

25 The facts of this case are accordingly far removed from those classically associated with an abusive restraint. This was not a case of an employee forced to surrender their ability to compete on the labour market just to keep their job. It was a hard-nosed business deal, where the restraint Ms. Mann agreed to was an integral part of the value of the thing she sold. There is no reason why she should not be held to her bargain, unless to do so would be unreasonable.

26 Ms. Man elected not to set out any facts that would allow me to draw the conclusion that the restraint she signed up to was unreasonable. However, it

seems to me that the restraint is only justified to the extent necessary to protect the value of what ASI bargained for. The business ASI bought was a property management company that operated in Gauteng, and nowhere else. Its contracts with the bodies corporate it serviced were statutorily limited to three years' duration (See Management Rule 28 (7), made under section 10 (2) (a) of the Sectional Title Schemes Management Act 8 of 2011).

27 The restraint originally pressed, however, sought to prevent Ms. Mann from undertaking any property management work anywhere in South Africa for a period of 5 years. That obviously extends further than is necessary to protect ASI's interests in the sale agreement. During argument, Mr. Morrison, who appeared, together with Ms. Mitchell, for ASI, conceded that the restraint of trade went further than was necessary to protect the value of what ASI had purchased from Ms. Mann. He asked only for an order restraining Ms. Mann from competing with ASI for three years in the province of Gauteng. He also asked for an order directing Ms. Mann to terminate her employment with Smartfit.

28 For the reasons I have given, these orders were reasonable, proportionate to the interests ASI sought to protect, and consistent with public policy.



S D J WILSON
Judge of the High Court

This judgment was prepared and authored by Judge Wilson. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 23 January 2023.

HEARD ON: 10 January 2023

DECIDED ON: 10 January 2023

REASONS: 23 January 2023

For the Applicant: L Morrison SC
K Mitchell
Instructed by Smit Sewgoolam Inc

For the Respondents: HB Marais SC
Instructed by McCarthy Cruywagen