REPUBLIC OF SOUTH AFRICA

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

CASE NO: 2023-063944

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO

22/10/24
DATE

[redacted]
SIGNATURE

In the matter between:

Merchant West Specialised Finance (Pty) Ltd	Applicant
And	
Jonathan Le Grange	1st Respondent
Pieter De La Porte	2nd Respondent

REASONS FOR ORDER

Raubenheimer AJ:

Order

[1] In this matter I make the following order:

a. The application is dismissed with costs on scale B

[2] The reasons for the order follow below.

Introduction

[3] The matter came before me on 18 June 2024 in the urgent court only in respect of the relief against the First Respondent as the dispute with the Second Respondent had become settled.

[4] The relief claimed was that the First Respondent be interdicted and restrained, for the period from 18 June 2024 to 17 June 2025 from:

4.1 Soliciting orders from the Applicant's customers for similar or any competing services, from canvassing business in respect of the Applicant's services or competing services from the Applicant's customers or any competitors.

4.2 Rendering any service or competing services to any of the Applicant's customers or any competitors.

4.3 Soliciting appointments as a distributor, licensee, agent, employee or representative or any of the Applicant's suppliers in respect of services on behalf of or for the benefit of a supplier.

4.4 Encouraging or enticing employees of the Applicant to leave the employment of the Applicant or be either employed or engaged by another entity in any capacity whatsoever.

4.5 Encouraging or enticing customers and/or suppliers of the Applicant to transfer their business to another entity.

4.6 Anywhere in the Republic of South Africa, whether as a proprietor, partner, director, shareholder, employee, consultant, contractor, financier, agent, representative, assistant or member of, or holding or whatsoever in relation to any person and whether for its direct or indirect benefit or for reward or otherwise, from, directly or indirectly, being interested or engaged in, concerned with, or employed by Cetrafin (Pty) Ltd or any other competitor, whether directly or indirectly, of the Applicant.

4.7 Disclosing, in any manner whatsoever, the know-how, process or invention, any marketing or business technique which is carried on or used by the Applicant, and secret and confidential information including, but not limited to information pertaining to the Applicant's clients/customers, the Applicant's know-how, trade secrets, artistic works, designs, drawings, sketches, plans, technical know-how and data, systems, software, processes, methods, client/customer lists and marketing and financial information; and any programme or programming developed by or for the Applicant, contracts and personal introductions at all levels, and inventions, patents, trademarks and copyrights.

[5] I dismissed the application after hearing both parties as I was not persuaded that there was indeed a protectable interest.

[6] The applicant requested reasons in terms of Rule 49(3). These are the reasons for the order.

The parties

[7] The applicant operates in the financial industry providing specialised financial solutions and advisory services to business entities and high net worth individuals. It has been in operation since 1998.

[8] The services provided by the applicant entails asset finance, working capital solutions, fleet, investment, treasury solutions, property finance, private wealth and specialised finance tailor made lending, wealth and asset management and transactional solutions to the mentioned clientele.

[9] Apart from operating offices in some of the major commercial hubs in South Africa such as Johannesburg, Cape Town, Pretoria, George, Durban, Mbombela, Gqeberha, it also has offices in Namibia, Botswana and North Carolina.

[10] The applicant employed the first respondent, initially as a junior credit analyst since April 2021, the corporate credit department and eventually the administration department in 2023.

The restraint of trade agreement

[11] The applicant and the first respondent concluded an employment contract of which the relevant clauses are as follows:

> 11.1 The First Respondent would render services generally associated with his position as more fully described in the agreement;
>
> 11.2 On termination by either party the First Respondent is required to work notice periods ranging from 1 week to 4 weeks depending on the duration of the employment
>
> 11.3 The First Respondent would in the scope of performing his duties acquire consideration(*sic)* know-how, trade secrets, business connections, confidential information, techniques and business information of the Applicant;
>
> 11.4 The First Respondent shall have access to the customer information of the Applicant;
>
> 11.5 The First Respondent undertook for a period of twelve months after

terminating his employment with the Applicant not to:

11.5.1 Solicit orders from the customers of the Applicant for similar or competing services;

11.5.2 Canvas business from the Applicant's customers for the services of the Applicant or competing services;

11.5.3 Render any service or competing service to the customers of the Applicant;

11.5.4 Solicit appointment as a distributor, licensee, agent, employee or representative of the suppliers of the Applicant in respect of services including on behalf of or for the benefit of a supplier;

11.5.5 Encourage or entice employees of the Applicant to leave its employment or be employed or engaged by another entity in any capacity whatsoever;

11.5.6 Encourage or entice customers and/or suppliers of the Applicant to transfer their business to another entity.

Chronology

[12] The First Respondent responded to an advertisement on LinkedIn of a position in which he was interested.

[13] He applied for the position in March 2024 and was requested to send in his curriculum vitae which he did on 2 April 2024.

[14] On 15 May 2024 he was informed that his application was successful and submitted his resignation to the Applicant on 20 May 2024.

[15] The Applicant reminded him of his restraint of trade via a letter on 21 May

and he attended a meeting with the management of the Applicant on 22 May to discuss the possibility of a relaxation of the restraint of trade. Nothing came of the meeting and the management of the Applicant did not respond to his request.

[16] The First Respondent was hospitalised and subsequently on sick leave from 25 May to 1 June. During his absence, his laptop was swept, and it was confirmed that no confidential information was shared.

[17] The First Respondent was served with the current application on 11 June 2024.

[18] At the time of the launching of the application the First Respondent had not yet commenced employment with the alleged competitor.

The alleged competitor

[19] The alleged competitor has been in business for the past 22 years. It specialises in a niche market of equipment financing in the office automation, security and surveillance, audio visual, manufacturing equipment, material handling equipment and plant equipment.

[20] It is not involved in wealth management and does not deal with high net worth individuals.

[21] The Applicant in its founding affidavit suggested that the First Respondent's mere taking up of employment with an entity which the Applicant deems to be a direct competitor, in and of itself, constitutes a breach of the restraint of trade agreement.

[22] The First Respondent, in his answering affidavit materially challenged the Applicant's contention that Centrafin (Pty) Ltd (hereafter "Centrafin") is indeed a direct competitor of the Applicant. The business of Centrafin, even on the version of the Applicant, is focussed on asset finance specific to

business equipment.

[23] Even if a case was made out by the Applicant in its papers that Centrafin is a competitor of the Applicant in certain areas of business relating to asset finance for business equipment, the Applicant made no factual averments that the Respondent attempted to breach his obligations as set out in paragraph 14.2 (subparagraphs 14.2.1 to 14.2.6 thereof) of his contract of employment.

[24] The First Respondent on the other hand specifically denied that his new employer is a direct competitor of the Applicant.

The protectable interest

[25] To be successful in the enforcement of a restraint of trade application the Applicant has to make out a case in its Founding Affidavit for the existence of a protectable interest.[1]

[26] Although protectable interests are not limited to a closed group[2], such interests comprises in essence the following two types[3]

[27] 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 the important aspect of its incorporeal property known as goodwill[4]

[28] 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 commonly referred to as "trade secrets".

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[1] Interpark (South Africa) Ltd v Joubert and Another (09/29946) [2010] ZAGPJHC 39 (17 May 2010), Magna-Alloys and Research SA (Pty) Ltd v Ellis 1984(4) SA 874 (A).

[2] Labournet (Pty) Ltd v Jankielsohn and Another (2017) 38 ILJ 1302 (LAC)

[3] Sibex Engineering Services (Pty(Ltd v Van Wyk and Another 1991 (2) SA 482 (T); Experian South Africa (Pty) Ltd v Haynes and Another 2013 (1) SA 135 GSJ; Venter and Others v Twenty Four Motors CC ta Ford Ermelo (JA34/2024) [2024] ZALAC 32 (28 June 2024), Voltex (Pty) Ltd v Jackson (5110/2024) [2024] ZAFSHC 311 (30 September 2024))

[4] Morris (Herbert) Ltd Saxelby (1916) 1 AC 88 (HL)

[29] Confidential information must not be in the public domain and must objectively be worthy of protection and must have a value.[5]

[30] Such information is classified as information:[6]

30.1 received by an employee about business opportunities available to an employer;

30.2 that is useful or potentially useful to a competitor, who would find value in it;

30.3 relating to proposals, marketing or submissions made to procure business;

30.4 relating to price and/or pricing arrangements, not generally available to third parties;

30.5 that has actual economic value to the person seeking to protect it;

30.6 in respect of customer data, details and particulars;

30.7 the employee is contractually, regulatory or statutory required to keep confidential;

30.8 relating to the specifications of a product, or a process of manufacture, either of which has been arrived at by the expenditure of skill and industry which is kept confidential; and

30.9 information relating to know-how, technology or method that is unique and peculiar to a business.

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[5] Dot Activ (Pty) Ltd v Daubinet and Another (2023) 44 ILJ 785 (LC)

[6] Dickenson Holdings Group (Pty) Ltd and Others v Du Plessis and Others 1 All SA 583 (D);
Jonsson Workwear (Pty) Ltd v Williamson and Another (2014) ILJ 712 (LC);
David Crouch Marketing CC v Du Plessis (2009) ILJ 1828 (LC);
Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronje and Another (2011) 32 ILJ 601(LC)

[31] The protection of trade connections arises where the particular employee not only has access to customers but is also in a position to establish a relationship of such nature[7] that he would with ease be able to induce or persuade the customers to follow him to the new employer when he leaves the employment of the current employer.[8]

[32] For a relationship such as this to develop the employee would have to be in a position where he 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" [9]

[33] Determining whether this threshold has been attained is a factual question and depends on the following factors:[10]

33.1 The duties of the employee;

33.2 The personality of the employee;

33.3 The frequency and duration of the contact between the employee and the customers;

33.4 Where the contact occurred;

33.5 What knowledge the employee obtains about the business and requirements of the customers;

33.6 The general nature of the relationship between the employee and the customer;

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[7] Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronje and Another (2011) 32 ILJ 601(LC).
[8] Rawlins and Another v Caravan Truck (Pty) Ltd [1992] ZASCA 204; 1993 (1) SA 537 (A).
[9] Morris (Herbert) Ltd Saxelby (n 4 above) Recycling Industries (Pty) Ltd v Mohammed and Another 1981(3) SA 250 (E).
[10] Drewtons (Pty) Ltd v Carlie 1981 (4) SA 305 (C), FMW Admin Services CC v Stander and Others (2015) 36 ILJ 1051 (LC).

33.7 The extent of reliance on the employee by the customer;

33.8 The degree of personal involvement of the relationship;

33.9 Whether the position occupied by the employee would provide him access to customer and customer information[11]

[34] The mere allegation that there are protectable interests does not suffice.[12]

[35] The Applicant has not only to allege facts from which the conclusion can be reached that the information is confidential and that the trade connections is indeed protectable but furthermore when and how the employee was exposed to them.[13]

[36] The existence and essence of the protectable interest should be disclosed in such detail to afford the court with evidence as to the existence of such a protectable interest in accordance with the general principles applicable to motion proceedings.[14]

Application

[37] The following aspects will be dealt with in this section:

37.1 Whether the Applicant has a protectable interest;

37.2 Whether there was a breach of the restraint agreement.

[38] The Applicant deals scantily with the protectable interest and dedicates a mere six paragraphs to this aspect.

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[11] Pest Control (Central Africa) Ltd v Martin and Another 1955 (3) SA 609 (SR), Dickenson Holdings (Group) (n 6 above)

[12] Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidov and Another (2009) 30 ILJ 1750 (C), Viamedia (Pty) Ltd v Sessa (unreported judgement of CPD case no 8679/2008)

[13] Mozart Ice Cream Classic Franchises (n 12 above)

[14] Esquire Technologies (n 7above) Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)

[39] There are extraordinarily little facts dealing with the confidential information and even less dealing with the trade connections.

[40] The mere provision of financial advice in respect of the provision of credit and the calculation of a credit score is not sufficient evidence of the existence of a protectable interest.

[41] The Applicant specifically stated that it will not disclose its unique products and methodologies in much detail.

[42] Although it is not required that the Applicant disclose its trade secrets or confidential information it still has to provide sufficient evidence for a court to determine whether the interests are protectable.[15]

[43] Credit scores are calculated across the financial services industry on a regular basis.

[44] The Applicant did not indicate any uniqueness in the methodology, its uses or the factors or combination of factors taken into consideration in conducting its risk assessment or calculating its credit score.

[45] The Applicant similarly did not elaborate on its use of any software or databases that it uses and whether the First Respondent had any involvement in the development, upgrading or maintenance of the software. Neither did the Applicant indicate whether the software was off the shelf, customised or custom developed for its purposes.

[46] The First Respondent was employed in a junior position in three departments over the course of his employment with the Applicant. He ended up in the office administration department that had nothing to do with

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[15] Mozart Ice Cream Classic Franchises (n 12 above)

office automation.

[47] He was never elevated to a senior position where he could have had access to client data or establish a relationship with customers of such nature that he would be able to induce or persuade them to follow him to his new employer.

[48] At some stage, his access to specific modules of the software programmes were revoked or limited.

[49] He worked at the corporate credit department for a noticeably brief period of time of approximately one month, whereafter he was transferred to the administration department and where his access and exposure to data, software and other information was severely limited.

[50] The First Respondent was throughout his employment period limited as to the inner workings of the Applicant and not only had a limited understanding but also limited exposure to the trade secrets of the Applicant.

[51] The restraint provisions of the contract of employment prohibits the First Respondent from rendering "any service or competing service to the customers of the Applicant." There is not a singular averment made in the Applicant's affidavit that the First Respondent ad indeed breached or attempted to breach such provision.

[52] This prohibition as it is defined in clause 14.2 of the contract of employment in any event seems to be limited to a "contract of services" (*location conductio operis)* and then only in respect of such services being offered by the First Respondent personally and then again limited only to the customers of the Applicant.

[53] Taking up employment with a different employer amounts to a contract of employment (*location conductio operarum)* and does not amount to the rendering of services to a customer of the Applicant. There is no allegation

that the new employer is, or was a customer of the Applicant.

[54] There is no provision in the restraint clause that prohibits the First Respondent from taking up employment with a different employer. In fact, the restraint clause does not expressly prohibit the Applicant form taking up employment with a competitor of the Applicant.

[55] Consequently, there was no breach of the restraint clause of the contract of employment.

Conclusion

[56] For the reasons set out above I conclude that the Applicant has not succeeded in proving the existence of a protectable interest. Neither has the Applicant proven that there occurred a breach of the restraint. For these reasons, the application was dismissed.

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
JOHANNESBURG

Electronically submitted

Delivered: This judgement was prepared and authored by the Acting Judge whose name is reflected and is handed down electronically by circulation to the Parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date of the judgment is deemed to be **22 October 2024**

Counsel for the Applicant: Adv McTurk

Instructed By:	Uys Matyeka Schwartz Attorneys
Counsel for the Respondent:	Adv Botha
Instructed By:	Herman Vermaak Attorneys
Date of Argument:	18 June 2024
Date of Judgment:	22 October 2024