

In the KwaZulu-Natal High Court, Durban
Republic of South Africa

Case No : 8121/2013

In the matter between :

CCI Call Centres (Pty) Ltd

Applicant

and

Laron-Shaun Sequeira

First Respondent

Coracall (Pty) Ltd

Second Respondent

Judgment

Lopes J

[1] The applicant, CCI Call Centres (Pty) Ltd seeks an order interdicting and restraining the first respondent for a period of twelve months calculated from the 1st July 2013 from being employed by the second respondent and from carrying on business in the call centre industry, together with certain other relief.

[2] The relief is sought pursuant to a restraint of trade agreement which was contained in an employment contract signed by the applicant and the first respondent. The relevant history of the relationship between the parties is as follows :

- (a) the applicant is part of an international call centre business registered in Mauritius. It has been incorporated in South Africa since September 2009, operates only from Durban, and has 2 000 employees;
- (b) the applicant provides what are referred to as 'Inbound Services' and 'Outbound Services' to its clients. 'Inbound Services' involve call centre operators fielding queries from the applicant's clients' customers relating to those clients' products. 'Outbound Services' involve call centre operators calling prospective customers of the applicant's clients to persuade them to part with information about themselves to be used for marketing purposes, or to sell them the applicant's clients' products;
- (c) the first respondent was employed by the second largest client of the applicant from March 2004 to March 2007 as a district sales manager;
- (d) from April 2007 to January 2012 he was employed by the applicant's largest client ('TT') as an account manager;
- (e) in 2010 the first respondent was seconded to work at the applicant where his function was to manage the applicant's 'inbound sales campaign' for TT;
- (f) having been made redundant by TT in 2012, the first respondent was thereafter employed by the applicant as campaign manager for the 'outbound campaign' for TT. He was later put in charge of the TT 'Web Chat' campaign whereby customers could have a live feed with sales agents. He also worked

on a campaign called 'Correspondence' where customer queries are dealt with through email correspondence;

- (g) on the 15th March 2013, after the first respondent had been working for the applicant for approximately fourteen and a half months, he was asked to sign an employment contract. In the employment contract, at paragraph 18, is what is commonly referred to as a restraint of trade clause. The clause is headed 'Confidentiality Non-Solicitation and Restraint' and covers some ten typewritten pages. It is common cause that the first respondent was asked to sign the employment contract 'for audit purposes'. The first respondent avers, and it is not disputed, that he did not read the document;
- (h) on the 1st April 2013, some two weeks after he had signed that document, the first respondent resigned from his employment with the applicant;
- (i) he left the employment of the applicant on the 1st July 2013;
- (j) thereafter the first respondent was employed by the second respondent;
- (k) the second respondent, Coracall (Pty) Ltd, against whom the applicant seeks no relief, is a competitor of the applicant and is also engaged in the call centre industry.

[3] On the 31st July 2013 I granted an order by consent between the parties setting dates for the delivery of affidavits and heads of argument, and recording an undertaking that the first respondent would not be employed by the second respondent pending the outcome of this application, and that the applicant would continue to pay the first respondent's salary during that period. The matter was then heard as an opposed application on the 20th August 2013.

[4] Mr *Pammenter* SC who appeared for the applicant submitted that I was to apply the test for final relief in motion proceedings as set out in *Plascon-Evans Paints Ltd v van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) – i.e. I was to grant an order only if the facts as stated by the respondent together with the admitted facts in the applicant's affidavit justify the order, unless I am of the view that a denial by the first respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact because it is clearly untenable.

[5] Mr *Pammenter* submitted that once that test in *Plascon-Evans* was satisfied I should then consider whether the restraint imposed was reasonable. He referred to the tension which is always evident in these cases between the right of the first respondent to be allowed to carry on his employment, and the right of the applicant to protect its relationship with its customers and its confidential information.

[6] With regard to the question of onus and the approach of the courts generally to restraint of trade agreements, I have been referred to, and have considered *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA); *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn and Another* 2008 (2) SA 375 (C); *Dickinson Holdings (Group) (Pty) Ltd and Others v Du Plessis and Another* 2008 (4) SA 214 (N); *Den Braven SA (Pty) Ltd v Pillay and Another* 2008 (6) SA 229 (D); *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another* 2009 (3) SA 78 (C) and *Experian South Africa (Pty) Ltd v Haynes and Another* 2013 (1) SA 135 (GSJ).

[7] The applicant's case is set out in a wordy affidavit filled with phrases which are typical of the marketing industry. The result is a very confusing affidavit and it is necessary to sift through these phrases in order to be able to summarise the applicant's complaints as follows :

- (a) the first respondent is one of the applicant's 'longest standing high-ranking officials';
- (b) during his employment with the applicant, the first respondent has had access to, and used, 'state of the art telephony and information technology systems and programmes and a mix of local and UK based management structures';
- (c) these 'sophisticated IT systems and programmes' are unique to the applicant's business;
- (d) the applicant has 'developed specific and valued relationships with identified suppliers and human resources, telephony and IT industries' and 'the applicant has been able to develop practical methodologies (sic) for maintaining data and other clients lists for statistical reporting to our clients on their customers' requirements and for gathering information relating to potential customers.';
- (e) 'the names and requirements and capabilities of these suppliers and clients is confidential in that the Applicant has retained confidential relationships with them since the suppliers provide services to the Applicant at negotiated rates and also provide highly confidential (and prized) programmes. These programmes are developed for us and are not freely available. They are both trade secrets and confidential information'

- (f) 'A competitor armed with the negotiated rates of these suppliers may be able to bring pressure to bear on such supplier thereby achieving a preferred rate for itself, to the detriment of the Applicant's profitability and competitive edge.'

[8] The first respondent disputes much of what the applicant alleges both in relation to his standing and position in the company, the degree to which he has access to confidential information, and the extent to which knowledge of the applicant's customer base and the processes used by the applicant are confidential or constitute trade secrets.

[9] As far as the first respondent himself is concerned, he records that :

- (a) he is 31 years of age having matriculated in 1999 without a university entrance pass;
- (b) he was thereafter employed in positions as a waiter, a barman, and then a clerk in a micro-lending company, whereafter he worked as a driver delivering motor vehicle parts and progressed to the position of a counter assistant in the parts department at a Volkswagen dealership in Boksburg;
- (c) in 2004 he went to the United Kingdom where he began working in the cellphone industry as a call centre operator;
- (d) he was eventually promoted to the position of an 'assistant team manager' i.e. a person who helps others to man the telephones, and he was subsequently promoted to a management position in Carphone Warehouse where he supervised twelve members of staff as an account manager;

(e) at the time he left the applicant's employ, he supervised approximately 110 people in the applicant's call centre;

(f) since 2004 the first respondent has only worked in call centres and it is only in this field that he has the expertise to maintain his lifestyle.

[10] Mr *Pammenter* submitted that it was sufficient for the applicant to show that the first respondent had access to confidential information of the applicant and could have imparted it to his new employer. It was not necessary for the applicant to demonstrate that the first respondent had in fact done so. In this regard reliance was placed on *BHT Water Treatment (Pty) Ltd v Leslie and Another* 1993 (1) SA 47 (W). In that case the applicant sought to interdict the disclosure of chemical formulae which were highly confidential. They were the product of research and development by the applicant's associated company throughout the world, and the applicant paid royalties to use the formulae. They were confidential to the applicant and the use by competing companies would have caused financial prejudice. Although there was no evidence before the court that the formulae had been copied or memorised, the applicant did not have to rely upon undertakings given by its employee not to disclose the information, and interdict was granted.

[11] Mr *Pammenter* placed emphasis upon the fact that the second respondent was engaged in a similar business to that of the applicant. He stressed that although it is alleged that the second respondent did not carry on precisely the same functions as the applicant, it advertised to the world at large that it was able to do so. Mr *Pammenter* referred to the confidential information sought to be protected by the

applicant as including customer lists that were kept confidential for the purpose of the applicant's business, and information which, although in the public domain, is protected as confidential information because skill and labour have been expended in gathering and compiling it in a useful form.

[12] Mr *Pammenter* also pointed to the fact that the first respondent had told the applicant's representatives that he was resigning because he wished to return to the United Kingdom in order to pursue his employment there. He subsequently did not do so.

[13] Mr *Collingwood*, who appeared for the first respondent submitted that there was no dispute on the papers with regard to the first respondent's lack of qualifications, and that the applicant could not be prejudiced if the first respondent was to continue to be employed by the second respondent. He submitted that the only way in which the first respondent had earned an income since 2004 was by being involved in the call centre industry.

[14] Mr *Collingwood* submitted that the involvement of the first respondent in the applicant's business was not at the level of :

'one of the longest standing high-ranking officials of the Applicant ...'

as suggested in the applicant's founding affidavit. This is evidenced by the first respondent's earnings, his lack of any formal education and the lack of access to confidential information which was afforded to the first respondent.

[15] With regard to the suggestion that the first respondent misled the applicant with regard to his reasons for leaving the applicant's employment, Mr *Collingwood* submitted that this is fully explained in the first respondent's affidavits where he sets out that his intention at the time he resigned was to relocate to the United Kingdom, but between conveying that intention to the applicant's employees and beginning his employment with the second respondent, he had been advised that he could fulfil his primary intention of returning to the United Kingdom – to comply with visa requirements – by being employed by the second respondent. It is not disputed that the first respondent had no employment at the time he resigned from the applicant.

Confidential information

[16] In setting out the applicant's case concerning confidential information, the deponent to the applicant's founding affidavit, one Carlos Santana, states that he will not 'disclose actual data, programs, technological systems and the like but will refer to them in a general manner.'

[17] The applicant is not expected to disclose in court documents all its confidential information in a manner which will enable any reader to copy or replicate them. It is, however, necessary for the applicant to explain in sufficient detail what

these are, in order for this court to be able to understand the importance of them, and why it is necessary for them to be protected by a court order. With regard to confidential information and trade secrets, Davis J remarked in *Mozart Ice Cream* at page 87 A that “

‘It is clear, however, given the nature of the *Plascon-Evans* rule, that the mere *ipse dixit* of the applicant cannot suffice on its own to establish these proprietary interests. As Olivier AJ noted in *Viamedia (Pty) Ltd v Sessa* (unreported, CPD case No 8679/2008) :

“Information does not become confidential and a process or practice does not become secret merely because Viamedia contends that they do – or, perhaps, even if Mr Sessa subjectively believed them to be so. It does not suffice for Viamedia to say that it has confidential information or trade secrets. It must set out what they are and when and how Mr Sessa was exposed to them. It must set up the facts from which the conclusion could be drawn that something is indeed confidential or secret.”

See also *Automotive Trading System (Pty) Ltd v Wilkens and Others* 2007 (2) SA 271 (SCA) [2007] 4 All SA 1073 at 281 B – D.’

[18] Santana explains in some detail the functions performed by the applicant. The references, however, to the fact that the equipment used is ‘state of the art’, a ‘mix of local and UK based management structures’ and that ‘All of this has been developed over time at great cost’ is vague and most unhelpful in enabling this court to understand what it is that is so special about these matters that they warrant protection.

[19] The vague and generalised nature of the allegations with regard to the information to which the first respondent had access makes it impossible for me to

conclude that this was information which the first respondent not only had access to, but could have fully understood and conveyed to others. There is no suggestion whatsoever that the first respondent could have, or has, memorised any confidential information.

[20] I have no doubt that any well-run call centre relies on the latest technology and the best management systems they are able to provide, using 'highly trained professionals'. The underlying technology is, however, in the main provided by telephonic and computer systems providers available to those who are prepared to pay for them. Even the fact that the applicant has created 'a customised program that will handle a realistically projected call volume' and that they use 'sophisticated IT systems and programs unique to our business' does not of itself create a protectable interest. It is necessary for a court to be able to understand why these systems are so special that they warrant protection. These are not in the same category as, for example, a chemical formula, which a chemist could understand and memorise, and pass on to a competitor.

[21] With regard to the apparently confidential information which was found on the first respondent's computer, there is no dispute on the papers that the information was given to him so that he could work out the basis of his compensation. The fact that he then kept it, can hardly be conclusive of an intention to behave in a mala fide manner in conveying that information to the second respondent or any other person. That information in any event only related to the applicant's operations in June of 2013, and appears to have no use thereafter. The first respondent kept that

information in order to be able to determine precisely what compensation would be due to him. The need for him to do so was demonstrated by the fact that the applicant has refused to pay the first respondent the bonuses to which he claims to be entitled. Once again, however, there is no demonstration in the founding affidavit of what this information, is save for the vague and confusing generalisations referred to above.

Customer Connections :

[22] With regard to the first respondent's ability to influence the clients of the applicant, there is no evidence that the first respondent was in any position to harm the trade connections of the applicant by alienating its customers. As pointed out by Mr *Collingwood* the applicant and the second respondent shared customers in some instances because it was the practice of companies wishing to use the services of a call centre to use more than one call centre in order to protect their position, and the possibility of poor service from one of the call centres. Both of the parties know the customers of the other.

Alienation of staff

[23] Santana also relies upon the fact that 'The Applicant's most valuable asset is its human resources'. He complains that, because certain members of staff left the employ of the applicant after the first respondent did, that 'the inescapable conclusion is therefore that the Second Respondent is utilising the Confidential

Information of the Applicant and influence of the First Respondent and actively recruiting the Applicant's staff to mirror the Applicant'.

[24] Other than conjecture and speculation on the part of Santana there is nothing which establishes any factual basis that the first respondent is seeking to entice employees of the applicant to join the second respondent. Indeed, the papers demonstrate only that the applicant has sought to entice employees of the second respondent to leave, by handing out leaflets offering employment with the applicant, and doing so outside the premises of the second respondent.

[25] Nor is it helpful for Santana to refer to 'the vast training and resources which the Applicant has expended on growing its workforce'. I fail to understand how the fact that 'Our call centre management applications are developed and maintained by highly experienced professionals' is helpful in this regard.

Geographical area of the restraint :

[26] With regard to the geographical area within which the applicant seeks to restrain the first respondent from being employed, it is clear from the papers that the first respondent could as easily be employed by an entity competing with the applicant from, for example, the UK, the business of call centres not being hampered by the physical restraints imposed upon other businesses, and the clients of the applicant notionally being located anywhere in the world. In those circumstances there seems to be no purpose in the applicant seeking to impose a geographical

restriction on the area within which the first respondent could be employed by a competitor, other than to hamper the first respondent in his choice of a place of residence and work.

[27] Mr *Pammenter* submitted that in the event that I was not inclined to grant the applicant the relief which it seeks in its notice of motion, that the matter should be referred for the hearing of oral evidence in order to determine the disputes between the parties. In this regard he pointed out the fact that the first respondent could not complain of any prejudice because the applicant had undertaken, in the interim, and pending the outcome of the relief in this application, to pay the first respondent's salary. The first respondent would not therefore find himself in the position that he was unemployed with no income.

[28] In my view the disputes of fact are not such that they create a bar to this application being resolved on the papers. The applicant has failed to make out a proper case for the relief which it seeks because it has not demonstrated that the first respondent was in a position where he was in possession of confidential and protectable information which he could pass on to the second respondent and thereby prejudice the applicant's business. In addition the applicant has not established that there were customer connections which were under the influence of the first respondent to the extent that he could easily influence them to change their allegiance to the second respondent at the expense of the applicant.

[29] In the circumstances the application is dismissed with costs.

Date of hearing : 20th August 2013

Date of judgment : 13th September 2013

Counsel for the Applicant : C J Pammenter SC (instructed by Andrew Inc)

Counsel for the Respondents : A D Collingwood (instructed by Garlicke & Bousfield)