IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: D8163/2024

In the matter between:

IXIA TRADING 616 (PTY) LIMITED **APPLICANT**

and

ELIZABETH VON MALTITZ **FIRST RESPONDENT**

ALEXANDER CO (PTY) LIMITED T/A
TERRA BELLA **SECOND RESPONDENT**

ORDER

Accordingly, I make the following order:

1. The first respondent is interdicted and restrained pending the final outcome of the application, in the geographical area of Sub-Saharan Africa, Mauritius, Madagascar, Zanzibar, Maldives and Reunion from, directly or indirectly,

either as principal, agent, partner, representative, shareholder, director, trustee, beneficiary or employee:

(a) Encouraging, enticing, inciting or persuading or inducing any employee of the applicant to terminate his or her employment with the applicant, or to attempt to do so;

(b) Soliciting orders from any other supplier of similar or competing products and services as those of the applicant;

(c) canvassing for business in respect of similar or competing products and services with customers of the applicant and any new or prospective customers;

(d) canvassing for business in respect of similar or competing products and services or with any other supplier, distributor, reseller, agent or the like as those of the applicant;

(e) holding any direct or indirect interest in any business, entity, trust or person who competes with the applicant, such interest to include but not be limited to employment, advisor, contractor, financier, owner, shareholder or consultant;

(f) unlawfully competing with the applicant in the sandstone sector;

(g) providing any third party with any confidential information or customer base of the applicant;

(h) disclosing to the second respondent, the applicant's pricing structure, quotation formulae and confidential information; and

(i) coaxing any of the applicant's employees to take up employment with the second respondent, alternatively with any business associated with the first respondent and in competition with the applicant's business.

2. The application is referred to oral evidence on a date to be allocated by the registrar of this court, on the following issues:

(a) Whether or not a restraint of trade agreement is in existence between the applicant and the first respondent (including whether or not it has been waived by the applicant);

(b) If so, whether or not the applicant has a reasonable apprehension that the first respondent has breached or will breach the restraint of trade agreement.

3. The affidavits delivered by the parties (and in the case of confirmatory affidavits, together with the affidavits incorporated by reference) shall constitute the evidence in chief of the witnesses who deposed thereto and the parties shall present these witnesses for cross-examination at the hearing of oral evidence.
4. The parties shall only be entitled to call additional witnesses if leave thereto is granted by the court.
5. The first respondent shall pay the costs of the application for interim relief, including the costs of counsel on scale C.
6. The costs of the application for final relief shall be determined by the court hearing the oral evidence.

JUDGMENT

Sibisi AJ

[1] This is an urgent application[1] for an interdict enforcing a restraint of trade agreement[2] entered into between the applicant and the first respondent.[3] No relief is sought against the second respondent and it has filed a notice to abide.

[2] The notice of motion reveals that the applicant intended to obtain interdictory relief on 30 July 2024.[4] On 30 July 2024, the first respondent was directed to deliver her heads of argument, practice note and list of authorities on or before 2 August 2024 and this matter was then adjourned to 6 August 2024. The parties were given leave to approach the Senior Civil Judge in order to ask for preference on 6 August 2024 which was granted. The papers were exchanged including an answering affidavit, replying affidavit and heads of argument.

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[1] Rule 6(12) of the Uniform Rules.
[2] *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA); (2007) 28 ILJ 317 (SCA); see also *Basson v Chilwan and Others* 1993 (3) SA 742 (A); see also *Da Silva v Janowski* 1982 (3) SA 205 A.
[3] *Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W).
[4] See notice of motion dated 12 July 2024.

[3] The applicant conducts business as a supplier of sandstone, quartzite, slate tiles and related products under the name and style of The Sandstone Story and it is based at Unit […], B[…] Bars, 2 Moffit Drive, Ballito, KwaZulu-Natal. The first respondent's husband, Eugen Von Maltitz ("Eugen") was the 100 per cent shareholder in the applicant. In December 2023, Eugen sold his shares in an agreement which included the sale of shares, restraints of trade[5] and ancillary agreements. The shares were sold to Moore Lake Enterprises (Pty) Ltd ("Moore Lake") for an amount equal to R4 750 000. According to the applicant, the first respondent concluded a restraint of trade agreement with the applicant. The first respondent played a crucial role in the business operations of the applicant before the sale of shares by Eugen. Even though the applicant had Eugen as its sole director and 100 per cent shareholder, the first respondent was involved in its establishment and in the conduct of the business from day one and they regarded it as a family business.

[4] The applicant's business involved the sourcing and supplying of natural stone products, including cladding and tiling, to the construction industry. It initially started off its operations within the borders of the Republic of South Africa and it expanded to other countries, including but not limited to Mauritius, Madagascar, Zanzibar, Maldives, Reunion and Namibia. There were various trademarks of the applicant's business that were registered in the name of Gisela Elizabeth von Maltitz, the daughter of Eugen and the first respondent who was also employed in the business which grew substantially and traded profitably. Eugen and his family decided to leave the applicant's business because of age, intended to semi-retire and focus their attention on their other business interests which were less demanding on their time. Consequently, they sold the business and Eugen's shareholding in the applicant.

[5] It is common cause that the first respondent signed a restraint of trade agreement but its validity is contested. The agreement was meant to protect the rights and interests of the applicant with regards to the activities of its business by

[5] It is in dispute whether the restraints of trade were properly concluded.

imposing a restriction on the first respondent upon the sale of the shares to Moore Lake.

[6] The applicant submits that the first respondent breached the restraint undertakings and that this has left the applicant with no option but to protect its rights by enforcing the undertakings given by the first respondent in terms of the agreement.

[7] The first respondent submits that the applicant seeks an order that would effectively have the effect of a final relief and that it has failed to establish the requirements for an interim interdict. The first respondent wants this court to find that the effect of the relief is final in nature and that the dispute of facts be dealt with in accordance with the principles laid down in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd.*[6] According to the first respondent, this court is compelled to only grant the order if the facts stated by the first respondent's answering affidavit together with the admitted facts in the applicant's founding affidavit justify such an order.

[8] The first respondent admits that she signed and concluded a restraint of trade agreement with the applicant. However, she contends that the applicant's attachment of an unsigned copy of the agreement in its founding affidavit, followed by the subsequent production of a fully signed copy, signed on behalf of the applicant, indicates that the contract was not validly executed between the parties. The applicant denies this allegation.

[9] The applicant contends that the relief that it is seeking is interim in nature. The applicant acknowledges that there are disputes of fact, and submits that the balance of convenience favours it, and that there is a reasonable apprehension of harm. According to the applicant, it has a *prima facie* right that has to be protected. The applicant further argues that it is not open to the first respondent to deny that a restraint of trade agreement was validly entered into and points out the contents of

[6] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

the letter dated 3 April 2024 emanating from the first respondent's attorneys and addressed to the applicant's attorneys with *inter alia,* the following contents:

"…In view of the fact that your client is not complying with the contract after being afforded the opportunity to remedy its breach, all our client's rights remain reserved. Unless we receive confirmation from you by close of business on Friday, 5 April 2024, that your client has complied with its obligations, our client will take its lead from your client and not comply with their restraint of trades until such time as your client complies with their obligations in terms of the Agreement…"

[10] The letter referred to above was sent after the date that appears on the disputed restraint of trade agreement. The applicant invited this court to consider whether there appears to be a restraint of trade agreement, whether it is at a risk of being breached and consider the question of reasonable apprehension of harm. Another letter dated 19 July 2024, after service of the application papers reads:

"…that unless confirmation is received by close of business on **5 APRIL 2024** that your client has complied with its obligations, our client will take its lead from your client and not comply with their restraint of trade until such time as your client complies with their obligations in terms of the Agreement…"

[11] In argument, the applicant dealt with the period between 5 April to 19 July 2024. On 27 June 2024, Ms. Marlene Timm ("Timm"), a private investigator with Coast to Coast Special Investigators employed by the applicant, contacted the first respondent to request quotations as a potential supplier and installer of stone cladding for a 'company' known as JSI Services. The first respondent is said to have given Timm the assurance that she could supply all sandstone cladding for future projects. According to the applicant, the first respondent interacted with Timm and sent an email with address *'sales@[…]'* and also sent a message to Timm confirming that the first respondent was Terra Bella. The second respondent is a company that is in direct competition with the applicant. The applicant also pointed out that it received an invoice for an entity that transports stone which was intended for the first respondent where she asked the transportation company to move certain items at the premises of the second respondent.

[12] In dealing with the question of waiver that was previously raised by the first respondent, the applicant's counsel made reference to clause 16 of the settlement

agreement and pointed out that there cannot be any waiver if not reduced to writing and signed by both parties. This point, was not vigorously argued by the first respondent, same applies to the question of joinder and clause 2.1 of the same agreement. Furthermore, the applicant argues that clause 6.3.1 of the settlement agreement dealing with delivery of the restraint of trade agreements[7] was fully complied with.

[13] The applicant argued that the first respondent concluded a restraint of trade agreement in favour of the applicant, as evidenced by a written communication in April 2024 confirming the existence of such an agreement and containing a threat of non-compliance.

[14] On the first respondent's point of non-joinder, the applicant submits that there was no need to join the other parties who are party to the settlement agreement. [8]

[15] The applicant argues that there is a protectable interest and made reference to the settlement agreement and in particular, clause 2 of the restraint of trade agreement:

"2.1. The Restricted party acknowledges that in the course of his/her direct or indirect association with the Company:

2.1.1. he/she will gain access to the information;

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[7] *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) para 80 states that: "The conclusion reached in paragraph 79 above is in accordance with common law principles regarding waiver of rights. Waiver is first and foremost a matter of intention; the test to determine intention to waive is objective, the alleged intention being judged by its outward manifestations adjudicated from the perspective of the other party, as a reasonable person. Our courts take cognisance of the fact that persons do not as a rule lightly abandon their rights. Waiver is not presumed; it must be alleged and proved; not only must the acts allegedly constituting the wavier be shown to have occurred, but it must also appear clearly and unequivocally from those facts or otherwise that there was an intention to waive. The onus is strictly on the party asserting waiver; it must be shown that the other party with full knowledge of the right decided to abandon it, whether expressly or by conduct plainly inconsistent with the intention to enforce it. Waiver is a question of fact and is difficult to establish."

[8] In DE van Loggerenberg & E Bertelsmann *Erasmus: Superior Court Practice* 2023: 'The mere fact that a party may have an interest in the outcome of the litigation does not warrant a non-joinder plea. The rule is that any person is a necessary party and should be joined if such person has a direct substantial interest in any order the Court might make, or such an order cannot be sustained or carried into effect without prejudicing that party, unless the Court is satisfied that he has waived his rights to be joined'. Erasmus Superior Court Practice and See Rule 10 of the Uniform Rules of Court.

2.1.2. he/she acquired considerable know-how concerning, inter alia, the supply, marketing, design, manufacture, packaging, application and sale of the products and services of the Company;

2.1.3. he/she will have had the opportunity of forging close relationships with customers of the Company;

2.1.4. he/she will generally will have had the opportunity of learning and acquiring trade secrets, business connections and other information pertaining to the business of the Company;

2.1.5. the Information is of significant value to the Company and, accordingly, that it is of the utmost importance to the Company that it remains confidential, and is not divulged to or used by any person other than the Company; and

2.1.6. that the only effective and reasonable manner in which the rights of the Company in respect of its trade secrets, know-how business concern, economic activity, industry advantages, business challenges, business opportunities, business connections and other information can be protected is in terms of the restraints imposed upon him/her in terms of this Agreement…"

[16] The applicant points out that the first respondent's family established the business and registered certain trademarks. According to the applicant, this demonstrates that there is a protectible interest and that the applicant has a right to protect it.

[17] The applicant seeks an order that is interim in nature and asked that the other issues be matters that are dealt with via oral evidence or that the matter be referred to trial.

[18] The first respondent contends that the applicant's application is presented as interim relief but is, in fact, final in nature. The first respondent also argues that the alternative draft orders submitted by the applicant do not alter this fact. It is because of the effect of the order (final in nature) that the first respondent argues the relief sought should be looked at and it must meet the requirements for a final interdict. Furthermore, the first respondent argues that in following that approach, the

questions of whether there was a restraint of trade and breach, should be looked at applying the principles of *Plascon-Evans.*[9]

[19] The first respondent points out that when the applicant instituted these proceedings, it relied on a restraint of trade agreement that was not signed by it.[10] The second respondent relies on the fact that the founding affidavit attaches the restraint of trade agreement that was not signed by the applicant and argues therefore that it is invalid.[11] The first respondent sought adverse inferences to be drawn against the applicant because of this discrepancy.

[20] The first respondent highlights what she perceives as inconsistencies in the applicant's case. It is also the contention of the first respondent that the conditions in terms of the sale agreement were not fulfilled in order for a restraint of trade to come into effect and that the applicant created a difficulty for itself. The first respondent contends that the applicant's explanation of the circumstances under which the agreement was signed cannot be true. It is argued by the first respondent that the applicant has not made its case in the founding affidavit, and thus, the court must rely on the version of the first respondent and find that the restraint of trade agreement was not concluded.

[21] In her supplementary affidavit,[12] the first respondent denies the allegations made against her and states, *inter alia,* as follows:

"…

5.11 The averments that whilst allegedly at my house, Mr Masondo noticed certain stone products which the Applicant also sells are absolutely untrue. I suspect that such averments were fabricated by **ADAM** to try and convince the Court that I am in some way conducting business in opposition to the Applicant, much the same way that Adam has fabricated a version of how the restraint of trade agreements were signed by him on behalf of the applicant.

5.12 I do not make these allegations lightly, but until such time as I received the founding affidavit in these proceedings, I had laboured under the assumption that the

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[9] *Plascon-Evans* above fn 6.

[10] See para 20.5 at 10 of bundle 1: "Such restraint of trade agreement is, in fact, reflected as an attachment to the Sale Agreement on page 53 thereof, headed '*Restraint of Trade Agreement'* between Lila and the Applicant."

[11] See bundle 2 at 107.

[12] See bundle 6 at 506-512.

> restraints of trade had been counter-signed by Adam on behalf of the applicant, after we left the meeting at the business premises of the applicant, in December 2023. When I received the founding papers in these proceedings, it became apparent that the restraint of trade agreements had not been signed and I raised the issue."

[22] It was argued on behalf of the first respondent that the letter dated 3 April 2024 has some contents that can be referred to as "tongue in cheek". This letter suggests that because the applicant is yet to comply with certain obligations, the first respondent will take its lead from the applicant and not comply with their restraint of trades until such time as the applicant complies with its obligations in terms of the agreement. According to the first respondent, the specific comments that can be regarded as being in "tongue in cheek" are the following:

"…you refer to our client's failures, refusals, breaches and unauthorized conduct, harmful actions and omissions and apart from mentioning culpable homicide and murder, a third party reading your letter would believe that our client is in serious breach of the Agreement…"

[23] The first respondent maintains that the letter of 3 April 2024 does not establish the existence of a restraint of trade. Furthermore, she argues that the applicant has failed to prove the existence of a protectible interest.[13] It was reiterated on behalf of the first respondent that this application should be treated as one for final relief. It is the first respondent's case that there is no evidence suggesting that an injury has been suffered or is reasonably apprehended.

[24] It was contended on behalf of the first respondent that the applicant has not proven that the first respondent has taken up employment with the second respondent or is acting as a front. It was submitted that her version cannot be regarded as being farfetched.

[25] The first respondent points out that there are unsubstantiated allegations made by the applicant suggesting that the first respondent has done work at different sites, 6[…] M[…] Crescent, Brettenwood, 1[…] P[…] Road, Palm Lakes, Thanda

[13] *Super Safes (Pty) Ltd and Others v Voulgarides and Others* 1975 (2) SA 783 (W).

Game Reserve, Lot 42 and that there is no proof of the allegations and no confirmatory affidavits in this regard. It is the submission of the first respondent that her version cannot be regarded as untenable. The first respondent also argued that the applicant's case is replete with unsubstantiated allegations and that no case has been made at an interim relief level to support the allegation of the injury sustained or reasonably apprehended.[14]

[26] It was also argued on behalf of the first respondent that in the event that the interim relief is granted in favour of the applicant, the further issues that require determination will probably be best resolved by referring the matter to trial as opposed to the hearing of oral evidence and ask that this application be dismissed with costs alternatively, in the event interim relief is granted, that the costs be reserved or further alternatively be costs in the cause.

[27] Restraint of trade agreements are not special contracts when compared to any other type of contract. Such agreements give effect to a wide range of circumstances. The court had the following to say in *Den Braven SA (Pty) Ltd v Pillay and Another:*[15]

'…spanning the spectrum from the hugely successful businessperson who sells the business that he or she has built up for massive amounts of money and is required to sign a restraint of trade agreement in order that the purchaser may protect its investment, to relatively humble employees who may be required to sign such an agreement as a matter of rote and possibly *in terrorem* to deter them from seeking a more advantageous position…'

[28] The court also stated that where a business seeks to protect itself against the use by its former employee of confidential information, trade secrets and/or customer connections, that there is no reason for the courts to view this with disfavour, unless the bounds of public policy are overstepped in which case the court will withhold its assistance.

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[14] *Swissborough Diamond Mines (Pty) Ltd and Others v Government of The Republic of South Africa and Others* 1999 (2) SA 279 (T); *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA).

[15] *Den Braven SA (Pty) Ltd v Pillay and Another* 2008 (6) SA 229 (D) para 35.

[29] The approach in *Basson v Chilwan and Others*[16] should be followed in adjudicating a dispute relating to restraint of trade. Four questions were identified that should be asked to consider the reasonableness of a restraint of trade:

'(a) Is there an interest of the one party which is deserving of protection at the termination of the agreement? *(b)* Is such interest being prejudiced by the other party? *(c)* If so, does such interest so weigh up qualitatively and quantitatively against the interest of the other party that the latter should not be economically inactive and unproductive? (d) 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?'

[30] Despite suggestions by the first respondent that the restraint of trade agreement was not properly concluded, correspondence from her attorneys and a copy that was produced by the applicant suggests that there was a valid agreement that was concluded.

[31] There is no doubt that a protectable interest exists because at the time of sale, the parties involved decided that, amongst others, restraint of trades were going to be part of the agreement. There is goodwill attached to the applicant because of the number of years the Maltitz's have been involved in the business and having caused various trademarks to be registered. The very nature and purpose of concluding restraint of trade agreements is to ensure that owners of new businesses are able to be protected from competition by the sellers of the same business.[17]

[32] The first respondent appears to have been involved in the business activities of the second respondent, after the conclusion of the restraint of trade agreement. Nonetheless, one of the reasons the first respondent's family chose to sell their shares in the applicant was their desire to exit the industry due to age and other business interests. Therefore, should interim relief be granted, there cannot be any

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[16] *Basson* above fn 2 at 767: (Original Afrikaans version): "Vier vrae moet in dié verband gestel word:
(a) Is daar 'n belang van die een party wat na afloop van die ooreenkoms beskerming verdien?
(b) Word so 'n belang deur die ander party in gedrang gebring?
(c) Indien wel, weeg sodanige belang kwalitatief en kwantitatief op teen die belang van die ander party dat hy ekonomies nie onaktief en onproduktief moet wees nie?
(d) Is daar 'n ander faset van openbare belang wat met die verhouding tussen die partye niks te make het nie maar wat verg dat die beperking gehandhaaf moet word, al dan nie? (Laasgenoemde vraag kom nie hier ter sprake nie.)"

[17] *Magna Alloys and Research (SA) (Pty) Ltd. v Ellis* 1984 (4) SA 847 (A).

prejudice to the first respondent if she is genuinely not part of the activities in competition with the applicant.

[33] It is strange that the first respondent has chosen to oppose the interim relief sought by the applicant. It is noteworthy that the first respondent has chosen to oppose a matter which, in her own words, cannot adversely affect her because according to her, she does not have any interest in the industry that she was previously involved in when she was part of the applicant.

[34] The argument that the order sought has the effect of final relief cannot be sustained. Whilst it might be understandable why the first respondent adopted this approach, the first respondent should not have opposed the interim relief. There is no indication that the applicant waived the restraint of trade. Based on the facts underpinning this application, I am not convinced that other parties should have been joined in this application.[18]

[35] The applicant has succeeded in demonstrating that it has a legitimate protectable interest which deserves protection.

[36] With regards to the other issues that cannot be dealt with at this stage, the applicant seeks that the matter referred to oral evidence as opposed to trial. I am inclined to refer this matter to oral evidence.

[37] I am satisfied that the applicant has met the requirements for interim relief.

Order

[38] In the result, the following order is made:

1. The first respondent is interdicted and restrained pending the final outcome of the application, in the geographical area of Sub-Saharan Africa, Mauritius, Madagascar, Zanzibar, Maldives and Reunion from, directly or indirectly,

[18] *Webster v Mitchell* 1948 (1) SA 1186 (W).

either as principal, agent, partner, representative, shareholder, director, trustee, beneficiary or employee:

(a) Encouraging, enticing, inciting or persuading or inducing any employee of the applicant to terminate his or her employment with the applicant, or to attempt to do so;

(b) Soliciting orders from any other supplier of similar or competing products and services as those of the applicant;

(c) canvassing for business in respect of similar or competing products and services with customers of the applicant and any new or prospective customers;

(d) canvassing for business in respect of similar or competing products and services or with any other supplier, distributor, reseller, agent or the like as those of the applicant;

(e) holding any direct or indirect interest in any business, entity, trust or person who competes with the applicant, such interest to include but not be limited to employment, advisor, contractor, financier, owner, shareholder or consultant;

(f) unlawfully competing with the applicant in the sandstone sector;

(g) providing any third party with any confidential information or customer base of the applicant;

(h) disclosing to the second respondent, the applicant's pricing structure, quotation formulae and confidential information; and

(i) coaxing any of the applicant's employees to take up employment with the second respondent, alternatively with any business associated with the first respondent and in competition with the applicant's business.

2. The application is referred to oral evidence on a date to be allocated by the registrar of this court, on the following issues:

(a) Whether or not a restraint of trade agreement is in existence between the applicant and the first respondent (including whether or not it has been waived by the applicant);

(b) If so, whether or not the applicant has a reasonable apprehension that the first respondent has breached or will breach the restraint of trade agreement.

3. The affidavits delivered by the parties (and in the case of confirmatory affidavits, together with the affidavits incorporated by reference) shall constitute the evidence in chief of the witnesses who deposed thereto and the parties shall present these witnesses for cross-examination at the hearing of oral evidence.
4. The parties shall only be entitled to call additional witnesses if leave thereto is granted by the court.
5. The first respondent shall pay the costs of the application for interim relief, including the costs of counsel on scale C.
6. The costs of the application for final relief shall be determined by the court hearing the oral evidence.

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SIBISI AJ

Date of hearing: 18 September 2024

Date of judgment: 18 October 2024

Appearances

For applicant:	A.V. Voormolen SC
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