IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO: J91/2010

In the matter between

HENRED FREUHOF (PTY) LTD **1st Applicant**

and

DAVEL, DONOVAN **1st Respondent**

JMR TRAILERS (CC) **2nd Respondent**

JUDGMENT

LAGRANGE, J

Introduction

1. This is an urgent application to enforce a contract in restraint of trade. The applicant seeks to prevent the first respondent from directly or indirectly:

    1.1. competing with its business for a period of three years, starting from the 31 December 2009;
    1.2. soliciting or accepting any business or custom from any existing customers or clients, or
    1.3. taking employment with any business or entity conducting business similar to, or competing with, that of the applicant.

Background.

2. The first respondent was employed on 29 April 2006. He worked as a sales representative,

and his principal duty was to obtain sales of spare parts for vehicle trailers, which were either manufactured or distributed by the applicant.

3. On 3 August 2006, at the same time that he was employed permanently, he signed a restraint of trade agreement in which he agreed not to be interested in any way whatsoever including employment in any competing business in the whole of the country.

4. The restraint was to operate for a period of three years commencing on the date of the applicant's termination of employment.

5. The restraint agreement also provided that each undertaking in the agreement was independent, separate and divisible and that should a court of law find that any restraint in the agreement was unenforceable, it would not lapse but would be regarded as having been amended to the extent necessary to render it enforceable in terms of the court's judgment.

6. On 1 December 2009, the first respondent resigned from his employment with the applicant. The applicant alleges that on 11 January 2010 it received information that the first respondent had taken up employment with the second respondent. The second respondent, JMR trailers, is a Vryheid based business selling trailer parts including ones manufactured by the applicant. The respondent denies that the applicant only had knowledge of his employment with the second respondent as late as January 2010. In support of this, he attaches a letter from the applicant to JMR Trailers, dated 3 December 2009, warning it against its possible employment of him. Thus it appears that the applicant did indeed have information about the prospective employment of the first respondent by the second respondent in early December, though it would seem that it was only in January 2010 that this prospect became a reality.

7. The first respondent worked for the applicant in Vryheid until the end of March 2009, after which he was transferred to work in the same capacity in Durban where he remained until the termination of his services in December 2009.

8. The applicant portrayed its business as a very specialized and unique one, which was very

capital intensive and an undertaking of an extensive nature. It further claimed that the industry in which it operates is very specialized with only a handful of undertakings operating as manufacturers and distributors of such truck trailers. On this basis, it asserts that it operates in an extremely competitive sector. The first respondent doesn't dispute the capital intensive nature of the industry but disputes the uniqueness of the applicant's products. According to him, the trailer parts manufactured or imported by the applicant are also used on other trailers it does not make.

9. The applicant further claimed that it was only through long-term operation in the industry that contacts were established with customers and potential customers, in order to service its customer base. The first respondent, by contrast, claims that a knowledge of the various spare parts that trailers need can be acquired in a very short period of time. The spare parts that trailers require are wearing parts, and there is nothing specialised about knowledge of such parts: any person in the transport business would know what the wearing parts of a trailer are. According to the first respondent's experience, he would be phoned by a customer requesting a price on a particular part and would then be told that the client could obtain the part at a cheaper price from another supplier. After obtaining the necessary authority he could then offer the client a discount. The price of the applicant's products can be obtained merely by a phone call to the applicant.

10. The applicant claimed that the sales staff are required to have "a detailed knowledge of and relationship with such customers" and that in order to expand the applicants business the sales staff needed to have intimate knowledge of the pricing products and operational activities in of the business and in particular its margins. The first respondent denied that he had any knowledge of the applicant's margins. The applicant claimed that possession of this knowledge is the very basis of its business and having it would confer a competitive advantage in the industry on the holder.

Urgency.

11. The original application was launched on 27 January 2010 and set down for a hearing at

10h00 the following day. On 28 January 2010, the hearing was adjourned in order to permit the filing of answering and replying affidavits. The issue of a cost order was reserved. In this regard, it should be mentioned that the application was launched at the Johannesburg seat of this court and not in Durban. The Durban court would have been a more accessible venue for the respondents, as both are based in Vryheid. Although it is true that this is a court of national jurisdiction, and in principle, a party is not confined to launching proceedings at the seat of the court closest to the location of the respondent, if a party does choose to initiate proceedings at a more remote seat of the court, which is more inconvenient for the respondent, this may be a consideration when it comes to determining an award of costs. The court might also in the management of its own proceedings, direct that the matter be heard at the seat of the court which it considers to be the most convenient.

12. The first respondent attacks the contention that the application motion. I accept that the applicant may have had intimations that the first respondent was going to take up employment with the second respondent as early as 3 December 2009, but there is nothing to contradict the applicant's assertion that it only became aware that he had taken up employment with the second respondent by 11 January 2010. When it first became aware of the possibility that the first respondent might take up employment with the second respondent it immediately warned the second respondent against doing so. Once it was aware that this had in fact occurred. It acted with reasonable speed. Had the matter not been adjourned on 28 January 2010, the notice to the first respondent would undoubtedly have been to short to warrant an interdict been granted on that date. However, the first respondent then had ample opportunity to respond because of the adjournment, and any inconvenience it might have suffered as a result of the original short notice was cured by the adjournment.

13. In the result, I am satisfied that urgency was justified, and the respondents were not ultimately prejudiced in their ability to deal with the allegations in the founding papers.

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14. As both parties filed comprehensive affidavits, and had an opportunity to prepare for

argument on the matter by the time it was third on 25 February 2010, there is no reason why a final order could not have been determined at that stage, but the matter was not before me on that basis.

15. The general principles governing the enforcement of the restraint of trade were set out in ***Basson v Chilwan*** **(1993) 3 SA 742 (A)** at 767 G-H. The four issues, which were identified in that judgment as central to the enforceability of a restraint of trade agreement were: [a] Does the one party have an interest that deserves protection after the termination of the agreement? [b] If so, is that interest threatened by the other party? [c] If there is a protectable interest which is threatened, how does that interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive? [d] Is there any aspect or public policy having nothing to do with the relationship between the parties that requires the restraint be upheld or not?

16. On the first issue, the applicant contends that it clearly had an interest worthy of protection on the basis that the industry is specialised, there was fierce competition and therefore a long-standing and close business relationship between the applicant, its sales personnel, and the applicant's customers. It further elaborates that "as a sales representative, the first respondent in fact has intimate knowledge of all the applicant's customers, their requirements and needs, and the pricing and margins of the applicant's products." On the evidence before me, I am not persuaded that this is in fact the case. It would appear that knowledge of the spare parts component of the applicant's business is something that can be acquired in a relatively short period. The first respondent had no demonstrable knowledge of the applicant's margins, and the information about the applicant's prices appears to have been something that was freely available. There was nothing to suggest that the market for trailer parts is one that requires specialist technical skills and access to confidential information in order to pursue a successful sales strategy.

17. In so far as the first respondent might have been acquainted with the applicant's customers in the Vryheid area, there was nothing to suggest that his prior relationship with those customers was something to which much value could be attached by the applicant, when

typical sales transaction, as outlined by the first respondent, is considered. The customer would typically phone to find out the price of a particular part, and if the price offered was higher than the price offered by another competitor, the sales person would be asked if they could obtain a discount, which could only be authorized by a supervisor. It is difficult to see how any customer goodwill was intrinsically generated by such elementary transactions. Such goodwill that might have been generated is more likely to have been a consequence of the personality of the salesperson than the nature of the service provided by the applicant, or the salesperson's intimate knowledge of the applicant's product line. There was also no evidence that the applicant's relationship with customers was one in which knowledge of the customers needs, could only be acquired after extensive dealings with that customer, or that an extensive training was needed before a salesperson could deal directly with customers on their own.

18. On this basis, I believe that the applicant has failed to establish a protectable interest.

19. On the question of whether or not the applicant's interests were threatened by the first respondent taking up employment with a competitor, there was no evidence that the applicant had actively solicited any of the applicant's customers in the Vryheid area. I accept that the first respondent had been employed by a competitor of the applicant contrary to the restraint of trade agreement, but merely because the agreement had been breached does not mean that the first respondent had encroached on the legitimate protectable interests of the applicant. Moreover, a feature of this case is that the second respondent not only supplied spare trailer parts produced by other manufacturers, but also sold the applicant’s own parts as part of its sales line. It is by no means clear, that the first respondent's prior engagement by the applicant would have meant that his employment by the second respondent would probably have caused a loss of sales to the applicant in the Vryheid area.

20. On the third question, assuming that the applicant did have a protectable interest, did that outweigh the interest of the first respondent in not being allowed to use these skills he had acquired as a salesperson in the industry? The first respondent was engaged by a competing supplier in an area where he had previously acquired some knowledge of the applicant's

customers in that region. However, for a period of nine months, he had no dealings with those customers on behalf of the applicant, which could only have been handled by someone else. The applicant makes no allegation that when the first respondent was transferred to work in Durban, it suffered a drop in sales in the Vryheid area, which might have been expected if the first respondent's knowledge of the applicant's customers in the area was crucial to its sales success. There is accordingly no reason to believe that customers would then switch readily to the second respondent's business simply because the first respondent had moved there. Against this, must be weighed the restraint imposed on the first respondent, which effectively sought to bar him from employment in the industry throughout the country for a period of three years.

21. At the hearing on the matter, Mr Snyman for the applicant, submitted that the applicant would be content if the restraint were to be imposed for a period of only 12 months in the Durban and Vryheid regions. If the restraint with a modified in this fashion, the first respondent would still be required to relocate if he wished to pursue employment in the industry. Given the slender nature of any protectable interests that the applicant might have, even a more circumscribed restraint would not justify the limitations placed on the first respondent's ability to work in the industry.

22. Moreover, the practice of cutting and trimming a manifestly over-broad restraint at the behest of the party which drafted it, is not a practice the court should encourage.[1] It would be wrong to promote the practice of drafting wide ranging restraints, which are only reformulated into more reasonable prohibitions when the matter comes to court, whereas up to that point the sweeping scope of the provision hangs over the employee like an exaggerated sword of Damocles.

23. On the last question, it is not necessary in the light of the discussion above to make a finding on this issue in order to determine the success or otherwise of the application.

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1 ***Sasfin (Pty) Ltd v Beukes*** **1989 (1) SA 1 (A)** at 16H-I and ***Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn and Another*** **2008 (2) SA 375 (C)** at 392-393, [40] – [44]

Conclusion.

24. In the circumstances, I conclude that the applicant has failed to demonstrate it has an interest worthy of protection. Even if such an interest might have been established, the applicant failed to demonstrate a reasonable apprehension that its sales in the Vryheid area would be negatively affected by the first respondent's employment with the second respondent. In the light of this, there can hardly be a reason for denying the first respondent the right to remain employed with the second respondent.

Order

25. In the circumstances, the urgent application is dismissed, and the applicant must pay the first respondent's costs including any disbursements for transport incurred by the first respondent or his legal representatives in preparing for the application.

ROBERT LAGRANGE

JUDGE OF THE LABOUR COURT

Date of hearing : 25 February 2010

Date of judgment: 14 September 2010

Appearances:

For the Applicant

Snyman Attorneys Inc.

For the First Respondent

Mr M Van As

Instructed by G J Vonkeman Attorneys