



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN
JUDGMENT

Case Number: C586/2023

Not Reportable

In the matter between:

DOTSURE LIMITED

Applicant

And

CHARNE ROUX

First Respondent

FAMILY & HOME (PTY) LTD

Second Respondent

Date Heard: 28 November 2023

Date Delivered: 7 December 2023 by means of email; deemed received on the 8 December of 10.00hr.

JUDGMENT

RABKIN-NAICKER J

[1] The Applicant (Dotsure) seeks to enforce a restraint of trade and confidentiality undertakings. In terms of the Notice of Motion, it prays for an order interdicting

the first respondent (Roux) until 11 August 2025, throughout South Africa, from directly or indirectly:

- 1.1 being connected with or employed by the second respondent (Family . And Home);
- 1.2 being connected with or employed by any entity which carries on business in the sale of short-term insurance products; and
- 1.3 divulging Dotsure's trade connections and/or confidential information to any of its competitors, alternatively utilizing Dotsure's trade connections and confidential information in any manner.

[2] Both Respondents oppose the application. The application was brought on an urgent basis and I exercise my discretion to treat it as such. It is not disputed that:

- 2.1 Roux signed a restraint of trade and a confidentiality agreement in favour of Dotsure and undertook, inter alia, that she would not for a period of two years after the termination of her employment and within the Republic of South Africa, compete or be employed, concerned, associated, engaged or interested in any business that was similar to, or which competes with, the business of Dotsure. She also undertook that she would not use or disclose the confidential information or trade secrets of Dotsure and that she would not poach its employees or solicit its customers or suppliers.
- 2.2 Roux resigned from her employment on the 10 August 2023 having been summoned to appear at a disciplinary enquiry.
- 2.3 Following the termination of the employment relationship with Dotsure she took up with Family and Home which company sells inter alia motor vehicle insurance.

[3] A breach of the restraint is thus proven. The legal enquiry the Court needs to undertake is usefully summarized in the recent LAC judgment of **Sadan and**

Another v Workforce Staffing (Pty) Ltd (JA88/23) [2023] ZALAC 14 at paragraphs 17-21:

“In our law, restraints of trade agreements are valid, binding, and enforceable, unless their enforcement would be unreasonable.¹ The test for determining the reasonableness of a restraint of trade agreement was set out in *Basson v Chilwan and Others*², where Nienaber JA postulated the following considerations: (a) Does one party have an interest that deserves protection after termination of the agreement? (b) Is that interest threatened or being prejudiced by the other party? (c) If so, does that interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive? (d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected?

In *Reddy v Siemens Telecommunications (Pty) Ltd*³ (Reddy), the Supreme Court of Appeal (SCA) posited a fifth consideration, namely whether the restraint goes further than necessary to protect the interest. The Court held that this consideration corresponds with s 36(1)(e) of the Constitution, requiring a consideration of less restrictive measures to achieve the purpose of the limitation and that “[t]he value judgment required by *Basson* necessarily requires determining whether the restraint or limitation is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”⁴.

Once the party seeking to enforce a restraint of trade agreement has established an interest worthy of protection and that the other party is threatening that interest, the onus is on the party resisting the enforcement of the agreement to prove that it would be unreasonable.⁵ The appellants thus bore the onus of proving that the enforcement of the restraint will be unreasonable, both in respect of its territorial operation and duration.

¹ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) (*Magna Alloys*).

² 1993 (3) SA 742 (A) at 767G-H.

³ 2007 (2) SA (SCA).

⁴ *Reddy* at para 17.

⁵ *Reddy* at para 10.

In deciding whether or not it would be reasonable to enforce a restraint of trade, the court must make a value judgment, mindful of the following policy considerations: (a) that public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim *pacta servanda sunt*, and (b) all persons should, in the interests of society, be productive and permitted to engage in trade and commerce or their professions. Both considerations reflect not only common law but also constitutional values. In *Reddy*, the court held that: “[c]ontractual autonomy is part of freedom informing the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life. In this sense freedom to contract is an integral part of the fundamental right referred to in s 22”⁶. In *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*⁷, Rabie CJ held that a court may, in the public interest, order that either the whole or only a part of the restraint on trade be enforced.”

Does a Protectable Interest exist and is it threatened?

- [4] Dotsure submits that it has a proprietary interest to protect, which it avers are the trade connections in the base of car dealers that Roux established in her employment as an account handler. It emphasizes that Roux developed these relationships over a four-year period and when she left the company her base of dealers was generating 600 ‘leads’ a month and an amount of R2.5 million in sales for the first half of 2023. Dotsure explains in its founding papers that:

“29. Dotsure is predominately a direct marketer which means that it sells its products directly to customers. It also sells its products through intermediaries or brokers. Dotsure depends on potential insurance leads (“leads”) obtained from various role players within, inter alia, the motor vehicle sales industry, in order to identify potential customers which it can then approach via its call centres to offer the products and services and to conclude various short-term insurance agreements with them.

30. Dotsure conducts its business through two channels. Customers are either

⁶ *Reddy* at para 15.

⁷ *Magna Alloys supra* at 896A-E.

served directly through call centres where agents make contact with customers and potential customers by way of a “cold call” to market insurance products and service to them directly. Dotsure also sells car insurance to customers through leads which are generated and provided to it and which are then followed up by its call centre.

31. In the case of its motor vehicle insurance business, these leads are supplied to Dotsure by national and local car dealerships.”

- [5] Dotsure sets out the ways in which it obtains leads through motor dealerships, one of which is through developing relationships with salespeople or independent dealers “such that these salespeople/ independent dealers refer leads to Dotsure”. Dotsure also seeks to become a preferred insurance provider by approaching financial and Intermediary consultants who are used by a motor dealership to procure finance and insurance related products, and develops relationships with them. It also develops relationships with dealerships as such to become a preferred insurance provider.
- [6] The leg of Roux’s case which I shall deal with first, is that no threat exists to the proprietary interest sought to be protected by Dotsure. It is submitted that dealership salespeople who she predominantly dealt, cannot be considered ‘customers’ who can be induced to follow Roux to her new employer. The said salespeople have already been referred to a new handler within Dotsure. They will not follow Roux because, it is averred, Family and Home does not offer incentives to dealership employees in exchange for leads. It trades under the Discovery’s FSP license and can only make use of leads (contact information in respect of prospective clients) which has been obtained from Discovery approved lead suppliers.
- [7] It is averred in reply that enforcing the restraint does not turn on whether Family and Home use different lead strategies. The purpose of the restraint it is stated, is to prevent Ms Roux and /or a competitor from leveraging Ms Roux’s trade connections in any way that may be to the detriment of Dotsure. It is further averred that:

“Even if Ms Roux does not currently deal with dealerships, nothing prevents

Family and Home from leveraging the trade connections of Dotsure that Ms Roux has established to benefit Family and Home's business.....the restraint should be enforced where it is not possible to police the use of those trade connections."

- [8] Dotsure furthermore suggests in reply that it is not impossible that Family and Home may change its method of business in the future. In the Court's view, Roux's response in respect of the different business model used by Family and Home does effectively answer the allegation that she will take her valuable and lucrative dealer base with her to a competitor. The purported threat and/or prejudice to Dotsure appears remote even on the version put up in the replying papers.
- [9] It is so, as Dotsure argues, that it will take a period of time for a new dealer to build up the close and trusting relationship that Roux enjoyed with her salesperson base. It makes that argument in acknowledging that the restraint itself was too broad (offering in its submissions a 12 month restraint relating only to vehicle insurance). The departure of Roux in any circumstances would be detrimental to her former employer in the short term. She was a high performing, albeit junior employee. However, she now works in an operation that does not utilize individual salespersons as leads in the manner that Dotsure does. There is no incentive for the 'business connections' to follow her.
- [10] In view of the above, I cannot find on the papers before me, and applying the Plascon Evans rule as I must, that Dotsure has a protectable interest that is being threatened or prejudiced by Roux's taking up employment with Family and Home. The need of an employer to protect his trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with a customer so that when he leaves the employer's service, he could easily induce the customers to follow him to a new business.⁸ The issue of different business models puts pay to the question as to whether Dotsure's proprietary interest (its business connections) deserve protection the wake of the breach of the restraint agreement.

⁸ *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at 541C-D.

- [11] There is therefore no need for me to decide Roux's primary attack on the notion that Dotsure has a proprietary interest worthy of protection. I do briefly traverse same however. An allegation is made in the answering affidavit that Roux has, after leaving her employment 'since been advised', that Dotsure's method in obtaining leads is illegal and constitutes corruption as defined by section 3 of the Prevention and Combatting of Corrupt Activities Act, 2004 (POCCA). Secondly, the method also according to the advice given to her, contravenes the Protection of Personal Information Act 4 of 2013(POPIA).
- [12] The allegations of criminality and unlawfulness if decided in this application may have far reaching implications for Dotsure and possibly for Roux herself, given that she acted as agent *qua* employee, in facilitating the impugned method. Ms Harvey for Roux suggested that this Court read the legislation in question in order to decide the unlawfulness issue. The issue was addressed and denied in reply. In my view, it would be most imprudent on these papers for the Court to make findings in this respect. In any event it has become unnecessary to do so in view of my finding above.

Confidential Information

- [13] The confidential information that Roux had access to is dealt with in the founding affidavit and focusses primarily on her knowledge of the composition of lead sources and the terms of commercial agreements reached between these sources both at national and regional level. This includes the knowledge of fees paid to them.
- [14] In answer, Roux denies, *inter alia*, that the knowledge she has about such agreements is of any commercial value to her new employer mainly because it does not operate on the same model as Dotsure. Roux also emphasizes that her access to the Dotsure Softsure System was only a level One access which was very limited. She avers that it was only Senior Managers and the Client Care Team who had access to view all client information. She learnt and used the system only to make calls to dealerships.
- [15] Clause 4 of the Confidentiality Agreement signed by Roux and Dotsure is headed "Trade Secrets and Confidential Information" and provides as follows:

“4. TRADE SECRETS AND CONFIDENTIAL INFORMATION

By virtue of the Employee's employment, he/she will have access to the Group's trade

secrets and confidential information, including (but without limitation) the following matters (collectively referred to herein as **“the trade secrets”** or **“the confidential information”**):

4.1 Knowledge of and influence, in whatever form, over the Group's clients and/or business associates; and/or

4.11 Marketing techniques, strategies and arrangements, mailing lists, purchasing information, pricing policies, quoting procedures, financial information, client names and requirements, dealer and dealership names and their requirements, the Employee, client, supplier, dealer and distributorship data and other materials and information relating to the Group's business and activities and the manner in which the Group does business;

4.12 Knowledge of the Group's strategic plans;

4.13 Pricing and quoting methodology and formulae, rating structures and methodology as well as methods, frequency and extent of any variations thereto;

4.14 Any other materials or information related to the business or activities of the Group, not generally known to others engaged in similar businesses or activities;

4.15 All ideas which are derived from or relate to the Employee's access to or knowledge or any of the above enumerated materials and information;

4.16 The financial details of the Group, relationships with its customers, clients, suppliers, dealers and dealerships;”

[16] It was submitted by Mr Loots on behalf of Dotsure that given no confidential affidavits were handed up in Court in answer to this application, that Roux had already breached her obligations in terms of the Confidentiality Agreement

given the content of her answering papers and annexures thereto. In reply, this was evidenced by the fact that Dotsure annexed a schedule of Ms Roux's base of dealers. In the courts view, and as emphasized by Dotsure, the 'confidentiality horse' has bolted.

[17] In all of the above circumstances and having found that Roux has met her onus in respect of establishing that the proprietary interest of Dotsure is not threatened or prejudiced by her new employment, I will not grant the restraint as prayed for, or as narrowed. However, costs will not follow the result in this application. As indicated, Roux had no qualms as to the confidentiality agreement she had signed in taking up employment with Dotsure. Her no-holes barred approach does not merit a cost order in her favour. I make the following order:

Order

1. The application is dismissed.
2. There is no order as to costs.

H.Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: JH Loots SC and VS Bruinders instructed by ENS

Respondents: Suzanna Harvey instructed by Keith Sutcliffe & Associates Inc

LABOUR COURT