REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: J 2494/2012

In the matter between:

STEINER HYGIENE (PTY) LTD	**Applicant**
and	
BROWN MARGARET STERIKLEEN (PTY) LTD	**First Respondent**
VAN DER MERWE SUZZETE	**Second Respondent**
STERKLEEN (PTY) LTD	**Third Respondent**

Heard: **04 October 2012**

Delivered: **25 October 2012**

Summary: Enforcement of in restraint of trade agreement - dispute of facts- Applicant of PlasconEvans in restraint of trade

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JUDGMENT

MOLAHLEHI J

Introduction

[1] The applicant in this matter seeks an urgent relief to enforce the restraint of trade clauses in terms of the agreements it has with the first and second respondents interchangeably referred to hereinafter as the two "respondents". The essence of the order sought by the applicant is to interdict the two respondents from engaging in any form of competition, soliciting or accepting business from its existing or potential customers or clients for a period of 12 months from termination of the employment relation between the parties. The respondents are also to be interdicted from being employed with any business or entity or person which conducts business which is similar to or competing with that of the applicant for a period of 12 months. The respondents are in particular to be interdicted from continuing their employment with the third respondent.

Background facts

[2] It is common cause that the applicant is the market leader in the provision of hygiene, deep clean and pest control solutions which it sells to customers across South Africa. The products which the applicant provides are listed in the founding affidavit.

[3] It is further common cause that the third respondent provides similar products and services to those of the applicant and is a direct competitor of the applicant. The third respondent also conducts business across the entire South Africa, with offices located in Johannesburg, Bloemfontein, Cape Town and Durban.

[4] The first respondent was employed by the applicant as a hygiene consultant with effect from 1 February 2010 and was based in the Sandton branch of the applicant. From 1 August 2004, the first respondent was employed as a sales consultant of hygiene and pest control services at Specialized Property Solutions (Pty) limited, a sister company to the applicant. That company was later incorporated into the applicant.

[5] The second respondent was employed by the applicant as a hygiene consultant with effect from 2 March 2009 and was based at the Aeroport branch (Kempton Park) of the applicant.

[6] There is also no dispute about the fact that the two respondents signed therestrained of trade agreement including theconfidentiality agreement with the applicant. Both respondents were after terminating their employment with the applicant employed by the third respondent.

[7] The second respondent informed the applicant at the time of her resignation that she intended taking employment with the third respondent during September 2012.On 6 August 2012 the applicant sent a letter to the second respondent, reminding her of the restraint of trade and warning her that it would be enforced.

[8] The applicant came to know about the employment relationship between the second respondent and the third respondent during August 2012.

[9] On 31 August 2012 the applicant sent a letter to the first respondent, reminding her of the restraint and calling on her to give an undertaking by 12:00 on 4 September 2012 that she would terminate her services with the third respondent. The same was done with the second respondent on 3 September 2012calling on her to give an undertaking by 17:00 on 5 September 2012 that she would terminate her service with third respondent.

[10] On 5 September 2012, the third respondent sent a letter to the applicant, recording that it did not intend to violate any of applicant's intellectual property rights and undertaking to abide by the undertaking which the respondents had made to the applicant.

[11] In responding to the ultimatum given to them by the applicant regarding their relationship with the third respondent, the respondents contacted the applicant and requested an extension until the 10 September 2012, to make final decision regarding the applicant's letters of demand. Thereafter and on 10 September

2012, the first and second respondents indicated to the applicant that they stood by what the third respondent conveyed in its letter of 5 September 2012.

[12] The parties were not able to reach any consensus on the matter and that is the reason for the current proceedings.

[13] The applicant has raised two points *in limine*. The first point related to lack of authority to institute these proceedings. That point was abandoned at the hearing of this matter when the applicant produced that resolution to institute the proceedings.

[14] The second point concerns the issue of urgency. As concerning this point the respondents argued that the applicant failed to give reasons why it required urgent relief and it could not obtain adequate protection in the normal course of litigation. The respondents further contend that the applicant does not in its founding affidavit show that it will suffer prejudice if the relief was not granted on an urgent basis. In support of their contention the respondents rely on the judgment in *Jiba v Minister: Department of Justice and Constitutional Developmentand Others*[1] where the court held that Rule 8 of the rules of the Labour Court requires a party seeking urgent relief to set out the reasons for urgency, and why urgent relief is necessary.

[15] The applicant deals with the issue of urgency in about six paragraphs most of which are related to the chronology of events from the time each of the respondents resigned to the time it placed all the respondents on terms regardingrequiring them to comply with the provisions of the restraint of trade agreement.The applicant deals also with the request by the first and second respondents for time to consider its demand that they should comply with the restraint of trade agreement.

[1](2010) 31 ILJ 112(LC).

[16] I agree with the respondents that except for explaining the steps it took since becoming aware of the alleged breach of the provisions of the restraint of trade, it does not provide reasons as to why it requires urgent relief and also why it could not obtain adequate protection in ordinary course of litigation. It is however, apparent from the reading of the applicant's papers in their totality that despite the failure to deal expressly with these two questions, the matter is indeed urgent and is accordingly dealt with in that manner. I do not belief that it would be fair to say that urgency is self-created because the applicant took about 8 days after it became clear as to the stand of the two respondents.

The legal principles

[17] It is trite that agreements in restraint of trade are valid and enforceable in our law unless, they amongst other things impose an unreasonable restriction on a person's freedom to trade, in which case that will probably be held to be against public policy and therefore illegal and unenforceable. The restrained of trade agreements are enforceable on the bases of the sanctity of contracts:*pactasuntservanda.* In *Magna Alloys and Research (SA) (Pty) v Ellis,*[2] the court in dealing with the issue of in restraint of trade held amongst others:

> 'Since the sanctity of contracts had greater precedence in our law, agreements in restraint of trade were prima facie valid and enforceable unless the party seeking to avoid its obligations in terms of the agreements could show that the restraint was against the interest of the public under the circumstances'.

[18] In upholding and or enforcing in restraint of trade agreement the court has to strike a balance between the interests of both the employer and the employee. The balancing act which the court has to undertake in considering the enforceability or otherwise of the in restraint of trade is that of having to weigh between avoidance of stifling healthy competition which is the fundamental principle of a capitalist free market society like South Africa and the sanctity of contracts.

[2]1984 (4) SA 874 (A).

The general approach to be adopted when dealing with in restraint of trade is summarised by Steenkamp J in two judgments, *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronje and Another* (2011) 32 ILJ 601 (LC) and soon to be published, *Continuous Oxygen Suppliers (Pty) Ltd v Elizabeth MeintjiesEcomed (Pty) Ltd* (case number J2073/11, as follows:

> '1 Covenants in restraint of trade are generally enforceable and valid. Like all other contractual stipulations, however, they are unenforceable when, and to the extent that, their enforcement would be contrary to public policy. It is against public policy to enforce a covenant which is unreasonable, i.e. one which unreasonably restricts the covenantor's freedom to trade or to work.
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> 2 Insofar as it has that effect, the covenant will not be enforced. Whether it is indeed unreasonable must be determined with reference to the circumstances of the case.
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> 3. Such circumstances are not limited to those that existed when the parties entered into the covenant. Account must also be taken of what has happened since then and, in particular, of the situation prevailing at the time the enforcement is sought.
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> 4. Where the onus lies in a particular case is a consequence of substantive law on the issue.
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> 5 What that calls for is a value judgement, rather than a determination of what facts have been proved, and the incidence of the onus accordingly plays no role.
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> 6 A court must make a value judgement with two principal policy considerations in mind in determining the reasonableness of a restraint:
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> 6.1 the first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim *pactasuntservanda;*
>
> 6.2 the second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions.

> Both considerations reflect not only common-law but also constitutional values. Contractual 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.'

[19] In order to succeed in seeking the enforcement of restraint covenant, the party seeking such enforcement has to show that there is a proprietary interest that justifies protection. As stated in Continuous Oxygen Suppliers those interests are usually in the form of trade secrets, knowledge, pricing or customer connection. An employer would succeed in enforcing restraint of trade if he or she can show that he or she has a protectable interest. An employer would for instance succeed if he or she was to show that the employee who has taken employment with a competitor has acquired confidential information relating to customers whom he or she may use to the advantage of the competitor and to the detriment of his or her previous employer.

In *Den Braven S.A. (Pty) Limited v Pillay and Another,*[3] the court in dealing with the issue protectable interest in the context of customer connection observed:

> 'In considering the facts of a particular case it must always be borne in mind that a protectable interest in the form of customer connections does not come into being simply because the former employee had contact with the employer's customers in the course of their work. The connection between the former employee and the customer must be such that it will probably enable the former employee to induce the customer to follow him or her to a new business.'

[20] In the present instance the applicant's case is based largely on the contention that the two respondents have built a close relationship with its clients. In this respect the applicant contends that the two respondents acquired knowledge and information regarding the names and the contact persons of its customers including the products they ordered, its pricing of the products and the prices

[3] 2008 (6) SA 229 (D); [2008] 3 All SA 518 (D) at para 6.

quoted to the customers. The applicant has placed all these in dispute and thus a dispute of fact has arisen.

[21] It is trite that the onus to show that the restraint is unreasonable and should therefore not be enforced rests with the employees.The applicant's duty as concerning the enforcement of the in restraint of trade is to show the existence of the contract and that there has been a breach thereof.[4]

[22] In the present instance the existence of in restraint of trade agreement is common cause. However, there are disputes of facts relating to the extent of the knowledge the respondents acquired in relation to the confidential information regarding the contact persons of the applicant's customers, the product that ordered, the pricing by the applicant, the prices quoted to the customers and the services provided to the customers. The respondents dispute having had access to all this information as alleged by the applicant and in the manner alleged to warrant protection.

[23] Mr Snyman for the applicant argued that the approach when dealing with dispute of facts in cases of this nature is (because the incidence of onus) is different to that which applies in the general motions proceedings. The applicable test to apply in the event of dispute of facts is that which is set out in *Plascon Evans*. Mr Snyman argued that because of the dispute of facts [5]the version set out in the applicant's papers ought to prevail. Indeed if this court was to determine the matter on the basis of the papers before it then of cause the matter would have to be determined on the basis of the applicant's papers.

[24] In my view however it would not on the basis of the facts and circumstances of this case do justice to determine the matter on the papers. The issue of the extent of the knowledge and information which the respondents are alleged to have acquired whilst in the employment of the applicant which they could use is, in my view, fundamental to the question of the proprietary interest of the

[4]*Magna Alloys and Research (SA) Ltd v Ellis* 1984 (4) SA 874 (A) at 891B-Cand *Basson v Chilwan and Others*1993 (3) SA 742 (AD).
[5]*Plascon-Evans Paints Ltd v Van Riebeeck Paints*(Pty) Ltd 1984 (3) SA 623 (A).

applicant and can at best be determined by oral evidence. It is for this reason that I belief that the matter ought to be referred to trial to determine the enforceability of the restraint of trade agreement between the parties. I do not however belief that acost order should in the circumstances of this case be made to follow the results.

Order

[25] In the premises the matter is referred to hearing of oral evidence and accordingly the Registrar is directed to enrol the matter for trial for consideration of the following issues:

1. Whether the applicant has a protectable interest that might legitimately be part of the restraint of trade agreement of the parties.

2. Whether the employment of the first and second respondents by the third respondent poses a risk of harm to any of the protected interest as was envisaged in the restraint of trade agreement of the parties.

3. The papers filed in the motion proceedings shall serve as the trial pleadings

4. The costs are reserved.

MOLAHLEHI J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

APPEARANCES:

FOR THE APPLICANT: Mr Snyman of Snyman Attorneys

FOR THE RESPONDENT: Mr R Venter of Bornman&MostertInc