



REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Not reportable

Case no: J2312/2013

**OMNIRAPID MINING AND INDUSTRIAL
 SUPPLIES (PTY) LTD**

Applicant

and

VENETIA ENGELBRECHT

Respondent

Heard: 22 October 2013

Delivered: 31 October 2013

Summary: Application for interdictory relief to enforce restraint of trade agreement

JUDGMENT

RABKIN-NAICKER J

- [1] This application was entertained as urgent and was brought for an order interdicting and restraining the respondent, for the period 1 October 2013 to 30 September 2014, from:

- 1.1 carrying on either solely or jointly with, or as an agent or employee of any other person, firm or company, any business within the Republic of South Africa which competes with the business of the applicant;
- 1.2 being employed in any capacity by any person, firm or company which carries on business within the Republic of South Africa, which competes with the business of the applicant;
- 1.3 being directly or indirectly engaged, concerned or interested in any capacity in any business within the Republic of South Africa, which involves or which otherwise competes with the business of the applicant;
- 1.4 using the knowledge obtained during the course of her employment with the applicant for the benefit of herself or any third party;
- 1.5 enticing any employee of the applicant from being employed or directly or indirectly interested in any manner whatsoever in any business which is in competition with the business of the applicant;
- 1.6 enticing any employee of the applicant to terminate his or her employment with the applicant;
- 1.7 enticing any employee of the applicant to furnish any information or advice, acquired by the employee as a result of his or her employment with the applicant, to any unauthorized person;
- 1.8 inducing any client, potential client, supplier or potential supplier of the applicant, as set out in annexure "A" and "B" attached hereto, not to do business with the applicant, alternatively to advise the aforementioned persons to do business with a third party;"

[2] The actual or potential clients and/or suppliers listed in annexures 'A' and 'B' are in the region of 668 in number.

[3] The relief sought is derived from a restraint of trade contained in the employment contract of the respondent. The relevant part of the restraint is that headed 'Restraint after Termination':

“23.1 Upon termination of the employee’s employment, the employee undertakes that for a period of 12 (Twelve) months after he/she ceases to be employed by the Company, he/she shall not:

23.1.1 Carry on either solely or jointly with, or as agent or employee of any other person, firm or company, any business within Republic of South Africa which competes with the business of the Company.

23.1.2 Be employed by any person, firm or company which carries on business with the territory as referred to in paragraph 23.1.1 *supra*, which competes with the business of the company;

23.1.2.1 In any capacity;

23.1.2.2 In any capacity which is similar to or the same as that in which he/she is employed by the Company;

23.1.2.3 In any capacity in which the employee’s knowledge of the matters set forth in clause 23.1.1 hereof may be used by him/her for the benefit of the person, firm or company by whom he/she is employed.

23.1.3 Be directly or indirectly engaged, concerned or interested in any business within territory as referred to in paragraph 23.1.2 *supra*, which involved, or which otherwise competes with the business of the Company and where such competing business is that of a company, whether as shareholder, director or employee in any of their capacities set out in paragraph 23.1.2 above.

23.1.4 Entice any fellow employee employed by the Company to:

23.1.4.1 Become employed by, or interested directly or indirectly in any manner whatsoever, in any business which is in competition with the business carried on by the Company; or

23.1.4.2 To terminate his/her employment with the Company; or

23.1.4.3 To furnish any information or advice, acquired by that employee as a result of his/her employment by the Company, to any unauthorized person.

23.2 The employee agrees that the restraints set out in this clause are reasonable as to subject matter, geographical area and duration, and that they are reasonably necessary to preserve and to protect the proprietary interests of the Company.”

Background

- [4] The parties signed an employment contract during March 2011. The respondent had previously been employed by Umzantsi Africa Pumps and Valves (Pty) Ltd, a former subsidiary of the applicant's holding company, PSV Holdings Limited, for the period of March 2004 to 29 May 2009. She then worked for a company, Sureseal SA (Pty) Ltd, until her employment with the applicant as a sales manager. By virtue of her new appointment her remuneration increased by some 200%.
- [5] According to the founding papers, the respondent had complete access to the applicant's full range of products and its pricing structure. She also had unfettered access to the suppliers of the respondent and knowledge of the prices which the applicant was able to obtain from these suppliers.
- [6] The respondent tendered her resignation on 30 August 2013 with effect from 30 September 2013. The applicant avers that almost immediately after the respondent left its employ, information was received that she was acting in contravention of the restraint of trade. The respondent had rented office space from a supplier and the applicant believed she was seeking to compete with it.
- [7] It is undisputed that the respondent has started a business 'Vee Valves' with the aim of procuring and supplying valves to customers. She has 20 years' experience in the valves sales industry. In her answering papers respondent avers that she started her business a few weeks ago and at present it

consists of herself and her daughter working from a borrowed office at the back of three premises of a valve supply company with which she has had a long standing relationship. She has had only three orders to procure valves to date, the total value of which is approximately R5,300.00.

- [8] On the 18 October 2013 the respondent's attorney of record sent a 'with prejudice tender' to the applicant in the following terms:

"4.1 For the duration of the restraint period (1 October 2013 to 30 September 2014) our client undertakes not to compete in any way with your client's business relating to the sale of valves of any type, or any advertising, marketing or customer contact in furtherance of such sales. This undertaking is limited to the following customers (identified by way of customer number in Annexure 'A' to the notice of motion):

4.1.1 No. 13 – AngloGold Ashanti

4.1.2 No. 47 – Citland International

4.1.3 No's. 77 & 78 – ENRC Management SA (this appears to be the same entity)

4.1.4 No. 132 – Katanga Mining Services

4.1.5 No. 234 – SNC-Lavalin (Pty) Ltd

4.2 Our client also undertakes not to solicit or employ any of your client's employees for the duration of the restraint period."

- [9] The rationale for such a tender is alleged to be that the valve sales business forms a tiny part of the applicant's business, approximately 10 per cent. According to the respondent the companies listed in the tender above make up at least 90% of applicants business. The respondent does not specifically deal with these allegations in reply but states as follows in paragraph 19 of the replying papers:

"19.1 The business of the applicant is diversified. That does not have the consequence that the respondent is entitled to set up business in

competition with it and to solicit its customers in the face of the restraint.

19.2 Not all orders are large and the applicant has a number of what the respondent might view as smaller customers. These customers are as important to the applicant as the larger clients. They obtain the same service and attention and respect as our larger ones. I dare say that from their ranks will emerge customers who have grown and will in future be able to place larger and larger orders.”

- [10] In a ‘with prejudice’ tender made by the applicant at the hearing of the matter the company allows that “the respondent under her own name or as Vee Valves be permitted to trade with the suppliers as set out in annexure B to the notice of motion” for the restraint period. However in respect of customers of the applicant no concessions are made and the remainder of the relief in the notice of motion is still sought.

Evaluation

- [11] It was submitted on behalf of the respondent that this court is required to exercise a value judgment as to how best to balance the importance of enforcing contracts against the fundamental rights of an individual to the dignity of work, and the freedom to work in the trade or profession of her choice. I am required to decide whether in the particular circumstances of this matter, and on the current facts, whether the restraint sought to be imposed by the applicant is fair and reasonable. There has been a development of the law in regard to restraints of trade and enforceability with the advent of our Constitution. In particular the question of who bears the onus in such matters, and whether indeed an onus as such is applicable, has been examined.
- [12] In **Experian SA (Pty) Ltd v Haynes & another** (2013) 34 ILJ 529 (GSJ) the court summarized the law on restraints of trade as follows:

“[12] The locus classicus on this subject is *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 897F-898E, where Rabie CJ summarized the legal position, inter alia, as follows:

12.1 There is nothing in our common law which states that a restraint of trade agreement is invalid or unenforceable.

12.2 It is a principle of our law that agreements which are contrary to the public interest are unenforceable. Accordingly, an agreement in restraint of trade is unenforceable if the circumstances of the particular case are such, in the court's view, as to render enforcement of the restraint prejudicial to the public interest.

12.3 It is in the public interest that agreements entered into freely should be honoured and that everyone should, as far as possible, be able to operate freely in the commercial and professional world.

12.4 In our law the enforceability of a restraint should be determined asking whether enforcement will prejudice the public interest.

12.5 When someone alleges that he is not bound by a restraint to which he had assented in a contract, he bears the onus of proving that enforcement of the restraint is contrary to the public interest.

See also John Saner *Agreements in Restraint of Trade in SA Law* (issue 13 October 2011) at 3-5, 3-6.

[13]In *Basson v Chilwan & others* 1993 (3) SA 742 (A) at 776H-J to 777A-B, Botha JA stated, in a separate judgment, that:

'The incidence of the onus in a case concerning the enforceability of a contractual provision in restraint of trade does not appear to me in principle to entail any greater or more significant consequences than in any other civil case in general. The effect of it in practical terms is this: the covenantee seeking to enforce the restraint need do no more than to invoke the provisions of the contract and prove the breach; the covenantor seeking to avert enforcement is required to prove on a preponderance of probability that in all the circumstances of the particular case it will be unreasonable to enforce the restraint; if the Court is unable to make up its mind on the point, the restraint will be enforced. The covenantor is burdened with the onus because public

policy requires that people should be bound by their contractual undertakings. The covenantor is not so bound, however, if the restraint is unreasonable, because public policy discountenances unreasonable restrictions on people's freedom of trade. In regard to these two opposing considerations of public policy, it seems to me that the operation of the former is exhausted by the placing of the onus on the covenantor; it has no further role to play thereafter, when the reasonableness or otherwise of the restraint is being enquired into.'

[14] The position in our law is, therefore, that a party seeking to enforce a contract in restraint of trade is required only to invoke the restraint agreement and prove a breach thereof. Thereupon, a party who seeks to avoid the restraint, bears the onus to demonstrate on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable.

[15] The test set out in *Basson v Chilwan & others* at 767G-H, for determining the reasonableness or otherwise of the restraint of trade provision, is the following:

15.1 Is there an interest of the one party, which is deserving of protection at the determination of the agreement?

15.2 Is such interest being prejudiced by the other party?

15.3 If so, does such interest so weigh up qualitatively and quantitatively against the interest of the latter party that the latter should not be economically inactive and unproductive?

15.4 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?

[16] In *Kwik Kopy (SA) (Pty) Ltd v Van Haarlem & another* 1999 (1) SA 472 (W) at 484E, Wunsh J added a further enquiry, namely whether the restraint goes further than is necessary to protect the interest.

[17] It is well established that the proprietary interests that can be protected by a restraint agreement, are essentially of two kinds, namely:

The first kind consists of the relationships with customers, potential customers, suppliers and others that go to make up what is compendiously referred to as the "trade connection" of the business, being an important aspect of its incorporeal property known as goodwill. The second kind consists of all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him, to gain a relative competitive advantage. Such confidential material is sometimes compendiously referred to as "trade secrets".¹

See *Sibex Engineering Services (Pty) Ltd v Van Wyk & another* 1991 (2) SA 482 (T) at 502D-F."

- [13] In **Barkhuizen v Napier**¹ the Constitutional Court held that public policy had to be determined with reference to the Constitution, so that a contractual term that violated the Constitution was by definition contrary to public policy and therefore unenforceable.² The effect of this finding was considered by Harms DP in **Bredakamp and Others v Standard Bank of South Africa Ltd**³ as follows:

"[47] This all means that, as I understand the judgment, if a contract is prima facie contrary to constitutional values, questions of enforcement would not arise. However, enforcement of a prima facie innocent contract may implicate an identified constitutional value. If the value is unjustifiably affected, the term will not be enforced. An example would be where a lease provides for the right to sublease with the consent of the landlord. Such a term is prima facie innocent. Should the landlord attempt to use it to prevent the property being sublet in circumstances

¹ 2007 (5) SA 323 (CC)

² At paragraph 29

³ 2010(4)SA 468 (SCA)

amounting to discrimination under the equality clause, the term will not be enforced.

[48] Similarly, if the value is subject to limitation, such as the right of access to courts or to practice a trade or profession, and was 'reasonably' limited within the meaning of s 36, the court must assess at the time of enforcement whether the limitation is still fair and reasonable in the circumstances.

[49] It is evident from the judgment that if evidence is required to determine whether a contract is in conflict with public policy or whether its enforcement would be so, the party who attacks the clause at either stage must establish the facts (paras 66, 84 - 85 and 93)."

[14] This court is thus required to decide whether the restraint of trade is enforceable on a consideration of the facts of this case, or whether it unreasonably limits the respondent's right to practice a trade or profession of her choice. In **Reddy v Siemans Telecommunications (Pty) Ltd**,⁴ the SCA held that the assessment of the reasonableness of the restraint in question required a value judgment, and the incidence of the onus played no role in that assessment. Moreover, that value judgment comprehended the considerations referred to in s 36(1) of the Constitution since it necessarily required determining whether the restraint was 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'.⁵

[15] It was submitted on behalf of the respondent that the restraint is overbroad and oppressive in scope and furthermore that it has not been read-down in the prayers sought in this application. It was argued that given the potential overlap between the respondent's business and the protection provided by the respondent's tender, it seems unreasonable and unfair to restrict the respondent from doing any work whatsoever in the only field she has ever

⁴ 2007 (2) SA 486 (SCA)

⁵ Paragraphs [14] and [17]

worked in. The restraint, it was submitted was disproportionate in the extreme when measured against its actual protectable interests.

- [16] Against this, the applicant has called into question the *bona fides* of the respondent in breaching the restraint and in her further conduct of setting up her business and insists that there is a real apprehension of harm to the respondent should she persist with her conduct. Her good faith in making the undertaking she has, is also doubted.
- [17] A reading of the terms of the restraint reveals that these terms are excessive in their scope. The applicant has been unable to convince the court in reply as to the fairness or reasonableness of its stance that the respondent should not do business with its small customers.⁶ Given that the restraint is for 12 months, it is difficult to fathom what protectable interest can weigh against the respondent's right to pursue her trade of choice, with applicant's small customers who make up only about 10 per cent of the applicant's valve sale business, which in turn amounts to only 10 per cent of applicants business as a whole. Applicant's speculation that these customers may emerge to be larger in the future takes their case no further. The future of the restraint is less than one year. I further do not accept applicant's submissions that because respondent is a sales manager she could work in any other industry.
- [18] While accepting the fact that applicant has a protectable interest in this case and that the respondent is in breach of the restraint (both rightly conceded on behalf of the respondent), I do not consider the restraint to be enforceable in its present form. Nor do I consider the 'with prejudice tender' of the applicant to be a tender which cures the oppressive nature of the restraint.
- [19] A value judgment by a court embraces all the relevant facts and involves what is reasonable and, in the view of the court, consistent with the common

⁶ "These customers are as important to the applicant as the larger clients. They obtain the same service and attention and respect as our larger ones. I dare say that from their ranks will emerge customers who have grown and will in future be able to place larger and larger orders."

convictions of society.⁷ In my judgment on the facts before me, the restraint in its present form cannot be enforced. Its enforcement disproportionately impacts on the respondent's right to pursue her occupation of choice. I do however consider that this court should make an order which recognizes the right of the applicant to ensure that the respondent does not use her knowledge to undercut the prices it quotes with its major customers during the term of the restraint.

[19] I therefore make the following order:

1. The application for interdictory relief is dismissed;
2. The respondent is ordered for the duration of the restraint period (1 October 2013 to 30 September 2014) not to compete in any way with the applicant's business relating to the sale of valves of any type, or any advertising, marketing or customer contact in furtherance of such sales in respect of the following customers identified by way of customer number in Annexure 'A' to the notice of motion:
 - 2.1 No. 13 – AngloGold Ashanti
 - 2.2 No. 47 – Citland International
 - 2.3 No's. 77 & 78 – ENRC Management SA
 - 2.4 No. 132 – Katanga Mining Services
 - 2.5 No. 234 – SNC-Lavalin (Pty) Ltd
3. The respondent is ordered not to solicit or employ any of applicants' employees for the duration of the restraint period.

Rabkin Naicker J
Judge of the Labour Court

⁷ Steenkamp NO v Provincial tender Board, Eastern Cape 2007 (3) SA 121 (CC) at paragraph 29

APPEARANCES:

For the Applicant: Adv MA Lenox instructed by Mahons Attorneys.

For the Respondent: Adv G Fourie instructed by Twala Attorneys.

LABOUR COURT