REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

3/10/2018
DATE

SIGNATURE

CASE NO: **7756/2018**

In the matter between:

AJM ENGINEERING SERVICES (PTY) LTD	Applicant
And	
RICHARD TSHABALALA	1st Respondent
KHULA CRANES (PTY) LTD	2nd Respondent
LESIBA HEZEKIAL MAGONGOA	3rd Respondent
NKULULEKO DHLAMINI	4th Respondent

JUDGMENT

INGRID OPPERMAN J

INTRODUCTION

[1] The applicant seeks to enforce a contractual restraint of trade and confidentiality agreement against the first respondent arising out of an employment

contract and to interdict the first and second respondents from unlawfully competing with the applicant. Although the notice of motion does not provide for it expressly, the applicant, during argument and relying on the alternative relief prayer in the notice of motion, also sought relief against the third and fourth respondents in the form of an interdict preventing them from unlawfully competing with the applicant.

[2] The core facts are not disputed. The first respondent was a branch manager of the applicant. He dealt closely with the applicant's customers and was intimately acquainted with the applicant's pricing strategies. Before resigning from the applicant's employ, the first respondent agreed to take up shares in the second respondent and become a director of the second respondent. The applicant found substantial information on his work laptop showing that he had acquired shares and was actively involved in the second respondent by no later than 29 August 2017. The first respondent describes this evidence as "*inconsequential*" and says that he can "*see no reason why the court should be burdened with this hogwash*."

[3] The first respondent resigned from the applicant's employ on 31 October 2017. He did so without notice. According to the first respondent, the circumstances of his resignation "*have no relevance to the relief sought. Whether I planned the resignation or it happened in the spur of the moment makes for no difference.*"

[4] The first respondent does not dispute that he is a shareholder and director of the second respondent in direct competition with the applicant.

CONTRACTUAL RESTRAINT

[5] The first respondent was initially employed as a sales consultant in terms of a fixed term contract. He was subsequently employed on a permanent basis as branch manager.

[6] Both contracts contained identical restraint of trade and confidentiality clauses. Reliance is placed on the latest agreement. The respondents do not dispute the conclusion of the agreements or the restraint and confidentiality clauses. Rather, they challenge the enforceability of the clauses.

[7] A restraint of trade is enforceable unless the respondents can show that:

> *". . . at the time the enforcement is sought, the restraint is directed solely to the restriction of fair competition with the ex-employer (the covenantee); and that the restraint is not at that time reasonably necessary for the legitimate protection of the covenantee's protectable proprietary interest, being his goodwill in the form of trade connection, and his trade secrets."*[1]

The test 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 termination 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?'[2]

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[1] *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) at 503A

[2] *Experian South Africa (Pty) Ltd v Haynes and Another* 2013 (1) SA 135 (GSJ) at para 15 applying *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 767 G - H

[8] Accordingly, the restraint will be enforced if it protects a proprietary interest of the applicant. '*Such interest may take the form of trade secrets or confidential information or goodwill or trade connections*'.[3]

[9] In considering such a defence, the Court must make a value judgment with two principle policy considerations in mind. The first is the public interest which requires parties to comply with their contractual obligations. The second is that all persons should, in the interests of society, be permitted to engage in trade and commerce. Where the protectable interest is the risk of harm to the applicant's trade connections and, in particular, its connections with its customers, the test is whether the employee had access to customers and was in a position to build up a particular relationship with the customers so that, when he left the employer's service, he could easily induce the customers to follow him to a new business.[4]

[10] The applicant does not have to show that the first respondent is in fact utilising the confidential information or his customer connection. It need only show that the first respondent could do so.[5]

[11] The first respondent signed two contracts. He signed the contracts and thereby undertook to comply with these provisions. He should be held to his contractual undertakings unless he can show that the enforcement of these clauses in the context of this case, is unreasonable.

[12] The circumstances of the first respondents planned resignation, despite his protestations to the contrary, are relevant, perhaps not to the relief sought in this application, but more about that later. The first respondent cynically executed his resignation without notice. It had been planned and was not a spur of the moment

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[3] *Townsend Productions (Pty) Ltd v Leech* 2001 (4) SA 33 (C) at 48B
[4] *Den Braven SA (Pty) Ltd v Pillay* 2008 (6) SA 229 (D) at 236 D - E
[5] *Experian South Africa (Pty) Ltd v Haynes and Another*, *supra* at para 22

decision. His inappropriate language and callousness in the answering affidavit do not assist his case. In the answering affidavit, the first respondent says that he only worked for the applicant for a short period of time. He in fact worked for AJM from February 2016 to October 2017. This is a period of 20 months. It is not a very short period of time.

[13] The first respondent was the Pretoria branch manager. The respondents do not dispute that the Pretoria branch's largest customer is Transnet Koedoespoort (Transnet's largest depot and manufacturing plant). The first respondent contends that although his relationship with key personnel at Transnet Koedoespoort was maintained during his employment with the applicant, it had already been established whilst with his previous employer, a competitor of the applicant.

[14] Much reliance was placed on the fact that the first respondent was responsible for compiling tenders for the applicant and was privy to the applicant's price lists and pricing strategy. The existing contract with Transnet came to an end in April 2018. Transnet being a state owned entity will be obliged to invite and accept tenders which comply with regulations on public procurement. There will be nothing to prevent the applicant from submitting a fresh bid for consideration. It is not entitled to, in the context of the current factual matrix, prevent the second respondent from tendering for such work.

[15] Even if the respondents were restrained, the Applicant will not necessarily be awarded the Transnet tenders because those contracts require an objectively scrutinized tender process and as such the presence or absence of the Respondent/s should not sway the award of the tender in one or other direction. The best man for the job will have to get it. Thus even if there is a proprietary right (which

I shall assume to be established) the applicant has not shown that it is being prejudiced as per the second requirement of *Sibex* [6] and it is not in my opinion of the policy considerations worthy of protection through enforcement of the restraint clause. The enforcement of the restraint will thus only serve to stifle and sterilize the first respondent from practicing his trade without in any way protecting any right of the Applicant.

DELICTUAL WRONG – UNLAWFUL COMPETITION

[16] Froneman J recently reiterated that our law is not a law of torts but a law of delict based on the Aquilian action.[7] He said:

> "The development of the law of unlawful competition must thus be accomplished in terms of the general principles of Aquilian liability. In general this involves conduct in the form of an unlawful and culpable act or omission that causes damage in the form of economic loss to another. It is not the conduct itself that establishes unlawfulness, but its harmful result. In the case of an interdict, as here, actual loss need not necessarily be shown, only potential impending or continuing harm. There is no general right not to be caused pure economic loss, but in unlawful competition cases, as this one is, our courts have recognised that the loss may lie in the infringement of a right to goodwill or in the legal duty to respect the right to goodwill."[8]

[17] It is not disputed that:

17.1. The applicant's price list disappeared.

17.2. After the first respondent had been allocated shares and while his appointment as a director was being formalised, the second respondent submitted an application for credit to the applicant. It did

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[6] Footnote 1 *supra*
[7] *Masstores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd* 2017 (1) SA 613 (CC) at para 21
[8] *Masstores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd, supra*, at para 30

not disclose the first respondent's involvement despite the fact that this was obviously relevant.

17.3. Shortly after the first respondent's resignation, it received an enquiry from PRASA relating to its failure to submit a bid for a substantial contract. The applicant was not aware of the bid despite PRASA having sent all the documentation to the first respondent. The applicant avers that the first respondent was obliged to either prepare and submit the bid himself or refer this to senior management. Instead, he simply appears to have ignored the invitation to submit a bid. The bid documentation could not be located in the first respondent's former office. The applicant called upon the respondents to provide a proper explanation for the aforegoing, including whether the first respondent informed the second respondent of the possible contract; and whether the second respondent submitted a bid for this contract and, if so, who prepared the bid documentation. No explanation was received.

[18] The aforegoing conduct could well found a cause of action for a claim for damages. However, it is past conduct, all of which occurred when the first respondent was in the employ of the applicant. There exists no threat of future conduct which could form the basis for interdictory relief, but even if I were wrong, there is little future for the restraint left. The applicant has, both in respect of the relief relating to the restraint of trade, and the unlawful competition, limited its application to relief which would interdict the respondents only until 1 November 2018. Interdictory relief is discretionary. Had I found that there was a proprietary interest being threatened

and worthy of protection, I would have exercised my discretion against the granting of the interdictory relief by virtue of the limited duration during which it would operate.

COSTS

[19] It would seem that the respondents' conduct might have been unlawful, though an interdict is not the appropriate remedy. The first respondent's dismissive attitude to his duties as an employee would tend to demonstrate a wrongful state of mind potentially deserving of damages against himself and his fellow wrongdoers.

[20] The applicant has plainly been wronged but has not qualified for a remedy given the effluxion of time and the nature of the remedy chosen. The respondents have been dismissive of the applicant's rights and have not conducted themselves in the manner that ordinary people of business would consider fair. They have thus disqualified themselves from the benefit of the usual rule relating to costs.

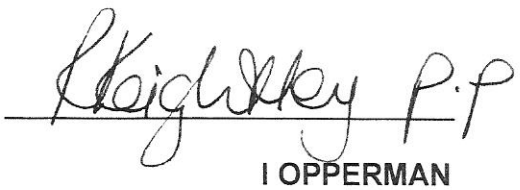
[21] Each party shall bear its own costs of this application.

ORDER

[22] In the circumstances, I grant the following order:

22.1. The application is dismissed.

22.2. Each party shall bear its own costs.



I OPPERMAN
Judge of the High Court
Gauteng Local Division, Johannesburg

Heard: 21 August 2018
Further heads of argument received: 22 and 23 August 2018
Judgment delivered: 3 October 2018
Appearances:
For Applicant: Adv S Vivian SC
Instructed by: Guiseppe Fizzoti Attorney
For Respondent: Adv I Mureriwa
Instructed by: Moila Fhatu Inc Attorneys