REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 26987/2015

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

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SIGNATURE **DATE**

DATE SIGNATURE

In the matter between:

MABY CORPORATE CLOTHING (PTY) LTD	First Applicant
J GROSS & COMPANY (PTY) LTD	Second Applicant
AND	
VAN EEGHAM, GEORGE	First Respondent
VAN EEGHAM, KIM	Second Respondent
SAFRICS CREATIONS CORPORATE INTERNATIONAL (PTY) LTD	Third Respondent
WK AGENCIES CC	Fourth Respondent

JUDGMENT

STRAUSS, AJ:

INTRODUCTION

1. The applicants seek final relief to enforce a contractual restraint of trade in favour of the applicants given by the second respondent. The applicants seek enforcement of the restraint from date of notice of the urgent application on 11 August 2015, for a period of 24 months thereafter or until the finalisation of the matter, if an interim order is granted, and seeks such restraint throughout the Republic of South Africa against the first to fourth respondents.

2. The first, second and fourth respondent opposes the application, the third respondent abiding by the Court's decision.

3. The respondents defences are as follows:

   a. Neither the first, third and fourth respondent signed any restraint and are not parties thereto they can therefore not be bound by an interdict since the basis of the interdict is an alleged restraint of trade undertaking given only by the second respondent.

   b. No case has been out against any of the respondents for alleged unlawful competition and/or contravening any confidentiality undertakings given and or contravening the restraint of trade.

   c. The applicants failed to meet the requirements for a final interdict having a clear right, an injury actually committed or reasonably apprehended and/or the absence of similar protection by another remedy.

d. The signed restraint agreement included in the service contract, by the 2nd respondent, is not binding on her as she on signature thereof did not have a meeting of the minds and consensus in regard to the terms thereof.

e. It is denied that there was any breach of the restraint agreement by the 1st and 2nd respondents.

f. The applicants did not show a protectable interest and in the event that the Court find that there was such a protectable interest, it is extremely limited and cannot endure for more than a few months.

g. The applicants have also not asked for reduction of the period of 24 months for the restraint of trade to be more reasonable and they can currently not seek a lesser period.

h. Further, if an interest is shown to be protectable, it is clear that such interest does not weigh up qualitatively and/or quantitatively against the interest of the second respondent to be economically active and productive.

FACTUAL BACKGROUND

4. The third respondent and first applicant entered into a sale of business agreement concluded on 3 January 2015 in terms whereof the third respondent sold its business assets, right, title and interest in the assets set out in annexure “A”, the take-over contract as set out in annexure “B”, and all of the third respondent’s trademarks, trading names, logo’s,

devices, product names and branding and get-up, as well as the customer list also set out in annexure “B”, to the applicants.

5. The suspensive condition of the sale of the business agreement was that the second respondent had to sign a 24 month service contract with the applicants in accordance with mutually agreeable terms.

6. The purchase price for the business assets of the third respondent was an amount of R2 million excluding VAT and interest to be charged by payment of equal monthly instalments paid over a period of 24 months. The purchase price would be paid from the proceeds of the client’s appearing in annexure “B”. Thus the sale was not costing the applicants money in real terms.

7. Neither the first, second or fourth respondent were parties to the business sale agreement and did not sign for or on behalf of the third respondent.

8. Second respondent had at all times since 1980 developed and expanded the business of Safrics, which was sold to a company known as Cyndara 247 (Pty) Ltd as part of a share transaction with a competing company known as Kevro (Pty) Ltd during 2012 - 2013. The change of shareholding occurred in the Kevro business with another Ethos Private Equity company becoming the 70% shareholder and the view was formed that the Safrics business had to be disposed of. As a result Kevro wanted to offload the business of Cyndara in which it held 50.1% interest of the shares.

9. Kevro, however, appreciated that such a transaction could not be possible without the concurrence of the second respondent. It was thus essential that the second respondent would be employed by the purchaser company for her to continue with the business of corporate clothing.

10. Kevro started negotiations with the applicants to purchase the business of Safrics in 2013. The negotiations to sell the business were protracted and endured initially from July to December 2013, they were revived in January 2014. Eventually on or about 17 February 2014 an agreement had been reached setting out a basis upon which the second respondent would be employed by the applicants in a broader business unit, which would include the third respondent's business that it was to buy from Cyndara.

11. The agreement consisted of an offer letter dated 6 February 2014 from the applicants to the second respondent and a further addendum to the offer of employment letter, dated 17 February 2014. She was employed by both the applicants as Divisional Director: Sales Operations.

12. Based on the appointment letter the second respondent was employed by the applicants from 1 March 2014. On 11 June 2014 the second respondent concluded a written employment contract, termed the service and restraint of trade agreement with both of the applicants. The restraint is embodied in this agreement in paragraph 12 therein.

13. The restraint of trade agreements signed together with the employment contract by the second respondent made provision therefor in paragraph

12 that she would not be directly or indirectly interested as trustee, proprietor, shareholder, member, managing director, adviser, employee or financier or agent in or for any person or entity which is directly or indirectly engaged, interested or concerning any competitive activity anywhere in the territory.

14. Further, she would not encourage, entice, insight, persuade, induce, solicit or canvass any of the prescribed customers away from the applicants, or to terminate their relations with the applicants, or to change their contractual arrangements with the company, or prescribe suppliers away from the company, or to terminate its relations with the company, or to cease supplying the company, or to change its contractual or supply arrangements with the company, or be engaged in any capacity whatsoever for any personal entity which is directly or indirectly engaged, interested or concerned in providing any of the prescribed services to any of the prescribed customers anywhere in the territory, or to encourage, entice, persuade or canvass any employee of the company to terminate his employment with the company.

15. It is not in dispute that the entire transaction between the applicants and third respondent or Kevro would be dependent on the second respondent being able to negotiate a new employment agreement with the applicants on terms and conditions as set out in the business sale agreement in accordance with mutually agreeable terms.

16. The service agreement and restraint was signed to accord with the conclusion of sale of business agreement between the first applicant and

third respondent and the business sale agreement so concluded was conditional upon the second respondent signing a 24 month service contract with the first applicant in accordance with mutually agreeable terms.

17. It was therefore an integral part of the business sale agreement that the second respondent concludes a contract of employment with the first applicant and the business sale agreement incorporated the sale of asset takeover, contracts, trademarks and intellectual property rights including the name of Safrics.

18. The restraint period as set out in the definition of the period is for a period of 24 months from termination date of the executive's service, and the area of such restraint would be the Republic of South Africa.

19. On 23 June 2015, the applicants gave the second respondent a notification of suspension and notice to attend a disciplinary enquiry and the second respondent was immediately suspended from employment with full pay.

20. The disciplinary hearing related to allegations of gross misconduct or dishonesty involving a material intention by the second respondent regarding the calculation of her commission structure and bonus in respect of the third respondent's business which was purchased by the first applicant.

21. A further count was added later in that a payment was wrongly made to the third respondent by a client and the second respondent made a payment fraudulently withholding an amount of R3, 999.48.

22. After a disciplinary enquiry that continued up until July 2015 the second respondent was found guilty on three charges relating to elements of trust and loyalty and the second respondent was dismissed on 24 July 2015 by the first applicant.

23. Prior to this on 1 July 2015, the applicants obtained an Anton Pillar order against the first and second respondent to be executed at their residential address at which address the applicants assumed the respondents had intellectual property and confidential information of the first and second applicants.

24. The Anton Pillar order was served and the items found at the residence of the first and second respondent were annexed to the papers described in an inventory. Factually, most of the documents found in possession of the first and second respondents are documents relating to presentations and/or documents prior to the date the second respondent became employed by the first applicant.

25. In regard to the first respondent. On 21 April 2015 the first applicant concluded a written consultancy agreement with the first respondent in terms whereof the first respondent would provide services to the applicants as a marketing manager on a month to month basis at a fee of R30, 000.00 per month. In such consulting agreement the first respondent gives an undertaking not to disclose any trade or professional

secrets or confidential methods of the operation of clientele of the applicants, nor use such secrets or information for his advantage, or for the advantage of any third person or business enterprise.

26. On 22 June 2015, the applicants also gave the first respondent written notice of termination of the consultancy contract with one month's pay.

27. The Anton Pillar order was mainly obtained due to an incident of which the applicants became shortly before such application. The applicants were told that the 1st respondent had on 15 June 2015, asked a co-designer, Mrs C Meyer, to assist him in copying certain presentation files containing the design of corporate clothing for a customer's specific needs. The applicants state that this information may be used in the marketing and sale of the applicants' products. This was a so-called "Sisanda PC Folder".

28. It became clear on 15 June 2015 to the 1st respondent and Mrs Meyer that it was impossible to copy the folder onto an 8 megabyte memory stick. The 1st respondent advised Ms Meyer that he and the 2nd respondent would be coming into the office on 16 June 2015 and the 1st respondent would then advise him of which specific folders she required.

29. When this incident was relayed to the applicant they drew an inference from it that the 1st and 2nd respondents attended to the applicants' premises on 16 June 2015, and procured such information. They state that such information is confidential to the applicants including, but not limited to, the information contained in the Sisanda PC Folder described in the papers.

30. It is clear that the Anton Pillar order did not deliver the said Sisanda information set out in the papers, but other information as previously indicated.

31. To prove the breach of the confidentiality undertakings and/or restraint of trade obligations by the respondents the applicant set out in their papers two incidents.

32. The first being that the applicants found out in beginning of July 2015, that the 1st and 2nd respondent had met with Mr Gary Bisset, a divisional director of operations for the City Lodge Group, during June 2015 with a view to conduct business with them. The applicant's state that on this occasion Mr Bisset was informed by the first respondent that they would have a new company trading as Safrics and the parting of their ways with applicants. Mr Bisset apparently confirmed that the respondents would be supported in their new venture.

33. No confirmatory affidavit was attached to the papers confirming this hearsay and it seems that the deponent in the founding papers setting out what was discussed also does so on hearsay as he was not at the meeting held with Mr Bisset in July 2015.

34. The applicant advance that Mr Bisset when he spoke to the respondents did not know that the second respondent was bound by a restraint and the first respondent by a confidentiality undertaking, nor that the second respondent had been suspended from employment and that a disciplinary hearing had been in progress at the time.

35. The second breach is set out in regards to the client Comair, Slow Lounge Division in that Cindy van den Heuvel, the General Manager, sent an e-mail to the applicants' Commercial Manager, stating that she would like to request that the production for the re-issue of the Slow uniforms is placed on hold until the issue between Maby (first applicant) and Kim (second respondent) is finalised.

36. The applicants on the strength of the restraint of trade and the breach committed by the first and second respondent, launched an urgent application on 24 July 2015, which was to be heard on the urgent roll of 11 August 2015. I was not to privy to why, but on 14 August 2015 the application was struck off the roll with costs.

37. On 21 August 2015 the applicants and first, second and fourth respondents agreed by order of court that the third respondent would abide by an order that the application would be postponed to the opposed motion roll for hearing on 5 October 2015 and it also made provision for the filing of affidavits and heads of argument and that urgency remained in dispute between the parties. Costs were reserved. This matter therefore came before me on the opposed motion roll for the week of 5 October 2015.

LEGAL PRINCIPLES APPLICABLE TO AGREEMENTS IN RESTRAINT OF TRADE

38. The *locus classicus* on the subject is Magna Alloys & Research SA (Pty) Ltd v Ellis 1984 (4) SA 874 (A) at 897F – 898E where Rabie, CJ summarised the legal position, inter alia, as follows:

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

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:

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 a commercial and professional world: In our law the enforceability of a restraint should be determined by asking whether enforcement will prejudice the public interest: When someone alleges that he is not bound by a restraint to which he had accented in a contract he bears the onus of proving that the enforcement of the restraint is contrary to the public interest.

These principles have been reaffirmed in other decisions of our Courts 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 any other civil case in general. The effect of it in practical terms is this: The convenantee seeking to enforce the restraint need to do no more than to invoke the provisions of the contract and prove the breach. The convenantor 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 convenantor is burdened with the onus because public policy requires that people should be bound by their contractual undertakings. The convenantor is not so bound, however if the restraint is unreasonable because public policy discountenances unreasonable restriction 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 convenantor; it has no further role to play thereafter when the reasonableness or otherwise of the restraint is being enquired into. 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.

39. I was also referred by the applicants to the matter of *Ready v Siemens Telecommunications (Pty) Ltd 2007 (2) SA 486 (SCA) at 493*. Malan, AJA dealt extensively with the law on restraint of trade, which is a seminal judgment consolidating the law of restraint and deals with and confirmed various prior judgments on restraint of trade.

40. It is also so that the applicants seek final relief of an interdict and the three requirements are a clear right, an injury actually committed or reasonably apprehended and the absence of similar protection by any other remedy.

41. When final relief is sought the principle in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623A at 634E – F* apply. The court must deal with the matter on the basis of the respondents' version coupled with the facts in the applicants' papers admitted by the respondents. The test applies no matter where the onus lies.

42. In motion proceedings such as this for final relief, it is inappropriate for a court drawing inference and trying to decide matters on probability. This was set out in *National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA)* at paragraph 25 to 27.

43. It is also so to make out a case on affidavit that mere conclusions are insufficient, the facts need to be asserted as set out in *Swissborough Diamond Mines (Pty) Ltd v Government of the RSA 1999 (2) SA 279 (T)* at 324D – F and also at 323G – 324A.

"*The parties must know the case that must be met and in respect of which they must adduce evidence in the affidavits."*

44. In *Heart v Pinetown Drive-In Cinema (Pty) Ltd 1972 (1) SA 464D* it was stated at 469C – E that:

"*Where proceedings are brought by way of application, the petition is not the equivalent of the declaration in proceedings by way of action. What*

might be sufficient in a declaration to foil an exception, would not necessarily, in a petition be sufficient to resist an objection that a case has not been adequately made out. The petition takes the place not only of the declaration, but also of the essential evidence which would be led at trial and if there are absent from the petition such facts as would be necessary for determination of the issue in the petitioner's favour, an objection that he does not relief the support claimed is sound. An application must accordingly raise the issue upon which it would seek to rely in the founding affidavit. It must do so by defining the relevant issues and by setting out the evidence upon which it relies to discharge the onus of proof resting on it in respect thereof.'

45. I do not intend to deal with all the defences by the respondents tendered therein nor all the case law. On the defence that no restraint of trade agreement existed due to a lack of consensus between the parties, the 2nd respondent states that appointment letters dated in February 2014 ruled the relationship between her and the applicants and not the employment contract. She says so because she was told that by the applicant's Mr Le Roux she could affect amendments to the contract after signing such contract, and that she in fact directed an e-mail in regard to the contract to effect the necessary amendments. This is also confirmed by an email from Le Roux, that amendments could be made. However none of the parties ever effected any amendments in a period of 12 months.

46. The 2nd respondent argues that the business sale agreement was conditional upon her signing a 24 month service contract with the

applicant in accordance with mutually agreed terms. She essentially argues that there were never mutually agreeable terms mainly due to her commission structure that differed in the letters of appointment and in the contract.

47. On the facts of this case and having regard to certain hand-written amendments made on the employment contract and restraint of trade, I cannot find that the amendments were of such a nature that the 2nd respondent can claim that she was not aware of the specific restraint of trade agreement she was signing with the applicants.

48. She, knew at all times that the purpose and cause for her to sign the employment contract and restraint of trade was in fact to support the sale of the business agreement, which was only finalised in January 2015.

49. The restraint agreement in the contract would have been applicable from date of termination of the services of the 2nd applicant, the parties envisaged a 24 month contract which would expire on February 2016. But the 2nd respondent services were terminated prior to this period running out. The respondents therefore argue that if any restraint is applicable it should only be in effect for a 24 month period from employment of the 2nd respondent, thus until February 2016.

50. The relief sought by the applicants in the notice of motion is clearly that the respondents are interdicted for a period of 24 months from date of bringing the application, dated 11 August 2015, from being employed or contracting directly or indirectly with any company or persons or entity

which carries on the business of the design, manufacture and distribution of Bespoke Corporate Garments, being the first applicant's business.

51. Clearly the restraint of trade sets out the period of 24 months from termination date, which termination date is set out in the employment contract as the date upon which the executives employment by the company ceases or is terminated for any reason. The executive, being the 2nd respondent's employment was terminated by the applicants during July 2015.

52. I thus find that the applicants' relief is not based on the restraint of trade, but on some other period not set out in the founding papers. The second respondent argued that any envisaged restraint would only be applicable up until February 2016. Coupled with this the 2nd respondent has throughout given an undertaking that during the period of this application and also up until February 2016 she would not engage any of the clients sold by the third respondent to the first applicant appearing in annexure "B" of the sale of business agreement.

53. If I were to accept that the applicants invoked the restraint of trade I can only accept that the restraint of trade would be applicable from date of termination of the second respondent's employment for a period of 24 months thereafter.

54. On the facts I find that even though the second respondent might have had certain amendments effected to the employment contract the restraint of trade in regard to the 24 months currently in dispute between the parties was sufficiently accepted by her due to the fact that she knew

that she was guaranteed employment with the applicants for a period of 24 months coupled with the restraint of trade, in that all the clients taken over by the applicants were clients that she had a relationship with for several years and she would be the only person who would be able to provide the same service to them as she had previously done, before the third respondent's business was sold to the applicants.

55. I thus find that there was an enforceable restraint of trade against the 2nd respondent and the applicants could invoke it. I also find that the interest of the third respondent contained in annexure "B" sold to the first applicant was a protectable interest which they could prevent the 2nd respondent from exercising on within the period of the restraint.

56. After finding that a restraint was invoked the applicants had to prove breach of such a restraint. I find, after having regard to the facts and the two incidents described by the applicants of the breach taking place, which the applicants seek in this application for the court to make inferences from the facts and have not proven these facts.

57. The 2nd respondent has set out in detail what occurred at the meeting with Mr Bisset, her explanation is in direct conflict with the hearsay evidence tendered by the applicants. Also further when taken up with counsel it became clear that at the time they had a meeting with Bisset they were still both employed with the applicants and there was nothing untoward in them meeting with Bisset.

58. The email of Van Der Heuvel is explained under oath by her personally and she places the matter and the conversation with the 1st respondent in

context and the court cannot and will not make an inference against the respondents, as from the horse mouth so to say, no such breach by the respondents is confirmed by the client herself.

59. I therefore find that there are such disputes of fact and having regard to the inherent probabilities the applicants cannot on these facts obtain relief. They have not shown an injury actually committed or reasonably apprehended. They have further not shown that a breach of the restraint of trade was actually committed by the second and/or first and/or fourth respondent.

60. During argument, it was conceded by counsel for the applicant that the fourth respondent is not a party to this dispute and that no restraint and/or relief can be claimed from it.

61. The first respondent was also simply never a party and/or signatory to the restraint of trade agreement and it can therefore not be invoked against him despite arguments to the contrary by counsel for the applicants of the first respondent's fiduciary duties owed to the applicants. Those fiduciary duties ended when his consultancy agreement was terminated.

62. Having found that no breach has occurred I will not endeavour to make findings on the further requisite questions as set out in the case law, besides to find that the interest of the applicants do not weigh up qualitatively and quantitatively against the interest of the second respondent to be economically inactive and unproductive.

63. The second respondent's business has always been the manufacturing in an interest for 25 years and that she unlikely to obtain employment in any other field earning a remote income to which her and her family have become accustomed.

I therefore make the following order:

a. The Applicant's application against the first to fourth respondents are dismissed with costs, such costs to include the costs of the urgent application on 11 August 2015.

b. The second respondent undertaking not to solicit any clients appearing in annexure "B", the client list of the third respondent, is made an order of court up until 31 December 2015.

c. In regards to the Anton Pillar application no order as to costs is made.

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STRAUSS AJ
ACTING JUDGE OF THE HIGH COURT OFSOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

COUNSEL FOR THE APPLICANTS: ADV L FRIEDMAN

INSTRUCTED BY: MARK HARRIS ATTORNEYS INC

COUNSEL FOR THE RESPONDENTS: ADV AC BOTHA

INSTRUCTED BY: VAN WYK VAN DEVENTER INC

MATTER HEARD ON: 5 OCTOBER 2015

DATE OF JUDGMENT: 9 OCTOBER 2015