REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTEND LOCAL DIVISION, JOHANNESBURG

CASE NO: 15214/2019

[1] REPORTABLE: NO

[2] OF INTEREST TO OTHER JUDGES: NO

[3] REVISED.

07 JUNE 2019

Date: **MB MAHALELO**

In the matter between:

HARD HAT EQUIPMENT HIRE PTY LTD Applicant

And

GEORGE MCLEAN First Respondent

PERFORMANCE PLANT HIRE Second Respondent

JUDGMENT

MAHALELO, J:

[1] The applicant brought urgent motion proceedings against the respondents for a final order interdicting and restraining the first respondent for a period of six months (from 12 April 2019) and in the areas of Gauteng, Mpumalanga, Limpopo and North West from:

(i) *being involved or engaged in any capacity, directly or indirectly in any business which competes with the business of the applicant;*

(ii) *being employed by the second respondent;*

(iii) *communicating with any employee of the applicant or any employee of the supplier to or a customer of the applicant for purposes of inducing such employee to leave the employ of the applicant and from employing or offering to employ or causing employment to be offered to such employee save in the event that such employee is retrenched by the applicant;*

(iv) *communicating with any supplier to or customer or potential customer of the applicant for the direct or indirect purpose of inducing such supplier or customer or potential customer of any similar or competing business from*

contracting, offering to contract with or causing any contract to be offered to such supplier or customer without written consent of the applicant;

(v) *attempting to, directly or indirectly for reward or not, for himself or as agent of anyone else, persuading, inducing, soliciting, encouraging, procuring or accepting any approach from any employee of the applicant to become employed by or interested in, any manner whatsoever in any business, firm, undertaking, company or concern which carries on business directly or indirectly in competition with the applicant or to terminate their employment and from furnishing any information or advice to anyone or any other means which is directly or indirectly designed to result in any employee of the applicant terminating his/her employment with the applicant and becoming employed with the competitor;*

(vi) *from rendering, or attempting to do so directly or indirectly any service which is rendered by the applicant during the period of twelve calendar months after termination of employment with the applicant to or for the benefit of any customer of the applicant or soliciting, interfering with, enticing or attempting to entice away from the applicant any such customer;*

(vii) *directly or indirectly using or disclosing any information of whatever nature in respect of or concerning the applicant, unless such disclosure is legally required by law or by the rules of a recognised stock exchange.*

[2] The applicant seeks enforcement of written restraint clauses contained in a written contract of employment concluded between the parties and in a separate restraint agreement concluded on 12 October 2018.

[3] The applicant relies on a breach thereof by the first respondent in:

(i) taking up employment with Performance Plant Hire (Pty) Ltd, a direct competitor of the applicant;

(ii) soliciting customers of the applicant by contacting them with the view of acquiring their business for the second respondent; and

(iii) Communicating with the employees of the applicant for purposes of inducing them to leave the employ of the applicant and take up employment with a competitor.

[4] The second respondent is the first respondent's new employer. It is joined to the proceedings in so far as it may have an interest in the relief sought in this application, however, no substantive relief is sought against it.

[5] The respondents oppose the application on five grounds namely;

(I) the applicant has failed to make out a case for urgency.

(II) the applicant cannot enforce a restraint of trade agreement (restraint) that is against public policy and therefore unreasonable.

(III) the applicant has failed to show that it has any protectable interests worthy of any protection.

(IV) the clients or customers which the applicant aims to interdict and restrain the first respondent from contacting are existing and long standing clients of the second respondent.

(V) the applicant has placed insufficient evidence before court to establish a protectable interest or to establish that any protectable interest the applicant may have in relation to its employees is threatened.

BACKGROUND

[6] The applicant conducts business as a supplier (hirer) and repairer of plant and tool equipment to the construction and related industries. The applicant has been in business since 2008 and operates from branches situated at Edenvale, Honeydew, Pretoria, Klerksdorp, Cape Town and Centurion. Its head office is situated in Gauteng.

[7] The first respondent commenced employment with the applicant on 15 October 2018 as a Branch Manager of the applicant's branch located in Centurion (Centurion branch).

[8] The first respondent was employed to establish the Centurion branch, however, as there were no physical premises at the Centurion branch, the first respondent was initially based at the applicant's Honeydew branch and only started at the Centurion branch on 6 January 2019.

[9] On 12 October 2018 the applicant and the first respondent concluded a written contract of employment which incorporated restraints of trade clauses, non-solicitation and confidentiality clauses in favour of the applicant in terms of which the respondent is, *inter alia*, prohibited from directly or indirectly taking up employment in or be involved with any similar or competing business to the applicant for a period of six months following the termination of the first respondent's employment with the applicant.

[10] On 8 April 2019 the first respondent resigned from his employment at the applicant with effect from 12 April 2019.

[11] The applicant accepted the first respondent's resignation on 9 April 2019 and directed him not to report for duty between 9 and 12 April 2019. On or about 9 April 2019 the applicant served the first respondent with a letter whereupon the first respondent was called upon to adhere to the restraint of trade and confidentiality undertakings in the contract of employment. The first respondent then signed a document headed "confirmation of non-possession and confidential and other information" in which he confirmed that he was not in possession of any information belonging to the applicant nor has he copied or stored any such information at any place or on any device other than his allocated laptop or cell phone.

[12] Although the date on which the first respondent started his employment at the second respondent is not stated, the facts indicate that he has been in employment at the second respondent at least since 9 October 2018, according to the applicant as a sales manager or branch manager. On 12 April 2019, the applicant served the first respondent with a letter of demand wherein, *inter alia,* various undertakings were sought from the first respondent in relation to him abiding by the terms of the restraint of trade provisions. According to the applicant the second respondent is a direct competitor of the applicant. It operates in exactly the same market with the applicant and offers the same services to its customers, predominantly the same products as the applicant and does so from its branches situated at Boksburg and Centurion and taking up employment with the second respondent, the first respondent is acting in breach of the restraint of trade provisions.

[13] On 3 April 2019 the first respondent sent to the second respondent an action plan based on the applicant's action plan. On 9 April 2019 the first respondent emailed to his personal email address a spread sheet of the names of the applicant's customer and its March 2019 monthly report. On 11 April the second respondent sent correspondence to a customer of the applicant, Zanecebo, copied the first respondent enclosing a quotation for equipment rental marginally lower than the price the applicant had offered this customer. All this came to light on 12 April 2019 and further correspondence was exchanged between the parties with a view to resolve the disputes. On 18 April 2019 the first respondent served the applicant with a letter wherein its wrongful conduct in having misappropriated the applicant's confidential information wads acknowledged and tendered the return thereof. In the letter, the first and second respondents undertook not to engage or solicit the applicant's customers who are not common customers for a period of six months. Subsequently it became apparent that the undertaking given was of no comfort to the applicant and the applicant launched this application on 29 April 2019.

URGENCY

[14] The respondents oppose the hearing of the matter on the basis of a lack of urgency. It is common cause that the first respondent signed a restraint of trade agreement in favour of the applicant which became operative upon his resignation from the applicant's employment on 12 April 2019. The restraint is for a limited period of six months. When a restraint is of such a limited duration and it is clear that substantial redress will not be afforded to the applicant should the matter be heard in the normal course, then such a matter deserved to be treated as a matter of urgency. See *Waste*

Group (Pty) Ltd v Brereton and Others 31390/19 [2017] ZAYPPHC 291 (23 June 2017).

[15] In any event "*... breaches of restraint of trade have an inherent quality of urgency ....*" *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff* 2009 (3) SA 78 (C).

[16] Had the application been brought in the normal course, it is more likely that the period of the restraint would have expired by the time the matter was heard thereby leaving the applicant without recourse to seek protection against an ongoing breach of its contractual rights. In my view the applicant has made out a proper case for urgency on paper hence I entertained a hearing of the matter on the merits.

[17] Before dealing with the facts and the issues that arise in this matter, I will set out the legal principles applicable to the disputes concerning restraint of trade agreements.

RELEVANT LEGAL PRINCIPLES

[18] The first respondent does not dispute the conclusion of the restraint agreement. Rather, he challenges the enforceability of the clauses. In our law, an agreement in restraint of trade is, on the face of it enforceable unless the respondent can show, at the time that enforcement is sought, that the restraint is directed solely to the restriction of fair competition with the ex-employer 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 connections and trade secrets. See *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T).

[19] In *Basson v Chilwana and Others* 1993 (3) SA 742 (A) the court identified four questions that should be asked when considering the reasonableness of the enforcement of a restraint being:

> *".....(I) does the one party have an interest that deserves protection after termination of the agreement?*
>
> *(II) Is that interest threatened by the other party?*
>
> *(iii) In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?*
>
> *(iv) does the restraint go further than is necessary to protect the interest sought to be protected?*
>
> *(v) Is there an aspect of public policy having nothing to do with the relationship between the parties but which requires that the restraint be maintained or rejected?"*

[20] In determining the reasonableness of the restraint covenants two competing policy considerations come into play. The first is whether it is in the public interest that people should be held to their agreements and secondly whether it is also in the public interest that people should be free to engage in economic activity. See *Magna Alloys* (109/84) [1984] ZASCA 116.

[21] It is trite that the law endows confidential information with protection. Whether information constitutes a trade secret is a factual question. For information to be confidential it must be useful, in the sense that it must be capable of use or application

in trade and industry; it must, objectively, not be public knowledge or public property, but known only to a restricted number of persons; and it must be of economic value to the plaintiff .See *Waste Products Utilisation (Pty) Ltd* v *Wilkes and Another* 2003 (2) SA 515 (WLD).

[22] All that the applicant needs to show is that there is secrete information to which the first respondent had access, and which the first respondent could transmit to the second respondent should he desire to do so. See *BTH Water Treatment Pty Ltd* 1993 (1) SA 47. Knowledge of a customer base and pricing structures constitutes proprietary information which can be protected by restraint of trade clause.

[23] In *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at 541D-H Nestadt JA outlined the type of evidence required in order to establish a case for the protection of customer connections as follows:

> "*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 the customer so that when he leaves the employer's service he could easily induce a customer to follow him to a new business (Joubert General Principles of the Law of Contract at 149). Heydom The Restraint of Trade Doctrine (1971) at 108 quoting an American case, says that the 'customer contact' doctrine depends on the notion that the employee, by contact with the customer, gets the customer so strongly attached to him that when the employee quits and joins a rival he automatically carries the customer with him in his pocket.*"

[24] The statement above has been applied in our courts (for example, by Eksteen J in *Recycling Industries (Pty) Ltd v Mahommed and Another* 1981 (3) SA 250 (E).

> *". Whether the criteria referred to are satisfied is essentially a question of fact in each case, and in many, one of degree. Much will depend on the duties of the employee, his personality, the frequency and duration of contact between him and the customers, where such contact takes place, what knowledge he gains of their requirements and business, the general nature of their relationship including whether an attachment is formed between them, the extent to which customers rely on the employee and how personal their association is, how competitive the rival businesses are, in the case of a salesman, the type of product being sold and whether there is evidence that the customers were lost after the employee left* (*Heydom (op cit* at 108-210, and see also *Drewtons (Pty) Ltd v Carlie* 1981 (4) SA 305 (C))."

[25] It was, as stated, common cause that the first respondent commenced employment with the second respondent and that such employment is in breach of the restraint of trade agreement. At the heart of the issue raised by the first respondent as to why the restraint should nonetheless not be enforced is the contention that the applicant has no protectable interests and that his employment at the second respondent does not infringe any protectable interests. He also disputes that the restraint sought to be enforced is reasonable, more specifically, he contends that the restraint of trade provision is overbroad and too wide for it to be considered as reasonable.

PROTECTABLE INTEREST

[26] The proprietary interests that could be protected by a restraint are essentially of two kinds. The first consists of the relationship with customers, potential customers, suppliers and others that go to make up what is compendiously referred to as trade connections of the business, being an important part of its incorporeal property known as goodwill. The second kind consists of confidential information which is used for the carrying on of the business and which could be used by a competitor if disclosed to him/her to gain a relative competitive advantage. Such confidential material is sometimes compendiously referred to as "*trade secrets*". See *Sibex Engineering Services (Pty) Ltd supra.*

CONFIDENTIAL INFORMATION

[27] The applicant seeks enforcement of the restraint of trade undertakings that the respondent afforded the applicant on the premise that the respondent had access to the applicant's confidential information. The applicant alleges that its trading information, *inter alia*, relating to its entire business *modus operandi*, nuances of how it operates business, particularly as regards its profit margins coupled with the discount price strategy employed by it is confidential and constitutes its trade secrets and is information that is not public knowledge which the first respondent, due to his position and through the performance of his functions and responsibilities, had access to and acquired knowledge of during his employment at the applicant. In this regard the first respondent was amongst others said to have been responsible for canvassing, searching and securing new customers, obtaining more business from existing customers, overseeing the process of orders being responsible for sales which involved preparing and providing quotations for products to customers, attending weekly sales meetings, developing new sales strategies, preparing sales strategies

and budget, preparing action plans which set out the vision, mission, goals and objectives of the applicant.

[28] The first respondent contends that the information which the applicant seeks to protect is in the public domain. The first respondent contend that there is no secrecy in so far as prices in the industry are concerned because competitors adjust their prices as and when necessary and to the extent that they are able to do so in order to undercut a competitor's quote. The first respondent avers that a suggested "rate guide" of recommended hire rates is published by the CPHA (Contractors Plant Hire Association) from time to time in an industry magazine, CPHA magazine. According to the first respondent, this magazine contains a schedule of suggested hire rates and lists all the various plant and tool hire companies where particular equipment can be rented. The first respondent states however that the rate guide is not adhered to by competitors in the industry as they by and large charge lower rentals than the published rates in order to undercut a competitor therefore, rentals at which equipment is hired is not confidential as one need only pick up a phone and call a competitor for a quote to know what rate a competitor would charge for a piece of equipment. There is no merit in this argument. It is common cause that the respondent had access and was privy to regular sales update meetings where also the progress of the business, targets and any other issues relating to the business including the methodology was discussed. In addition the first respondent attended meetings during which the applicant's current client base as well as future and prospective clients were identified and discussed.

[29] In *Experian SA (Pty) Ltd v Haynes and Another* 2013 (1) SA 135 (GSJ) the Court had the following to say in relation to trade secrets:

'"...It is trite that the law enjoins confidential information with protection. Whether information constitutes a trade secret is a factual question. For information to be confidential it must be capable of application in the trade or industry, that is, it must be useful and not be public knowledge and property; known only to a restricted number of people or a close circle; and be of economic value to the person seeking to protect it..."

[30] As I have pointed out above, the *onus* is on the respondent to prove the unreasonableness of the restraint. He must establish that he had no access to confidential information and that he never acquired any significant personal knowledge of, or influence over, the applicant's customers whilst in the applicant's employ. It suffices if it is shown that trade connections through customer contact exist and that they can be exploited if the former employee were employed by a competitor. Once that conclusion has been reached and it is demonstrated that the prospective new employer is a competitor of the applicant, the risk of harm to the applicant, if its former employee were to take up employment, becomes apparent. See *Den Braven SA (Pty) Limited v Pillay and Another* [2008] 3 All SA 518 (D) at paragraphs [17] to [18].

[31] Where an applicant as employer, has endeavoured to safeguard itself against the unpoliceable danger of the respondent communicating its trade secrets to, or utilising its customer connection on behalf of a rival concern after entering that rival concern's employ by obtaining a restraint preventing the respondent from being employed by a competitor, the risk that the respondent will do so is one which the applicant does not have to run and neither is it incumbent upon the applicant to enquire into the *bona fides* of the respondent, and demonstrate that he is *mala fides* before being allowed to enforce its contractually agreed right to restrain the respondent from entering the

employ of a direct competitor (see *IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Tarita and Others* 2004 (4) SA 156 (W) at 166I to 167C). In such circumstances, all that the applicant needs to do is to show that there is secret information to which the respondent had access, and which, in theory, the respondent could transmit to the new employer should he desire to do so.

[32] The ex-employer seeking to enforce against his ex-employee a protectable interest recorded in a restraint, does not have to show that the ex-employee has in fact utilised information confidential to it: it need merely show that the ex-employee could do so. The very purpose of the restraint agreement is to relieve the applicant from having to show *bona fides* or lack of retained knowledge on the part of the respondent concerning the confidential information. In these circumstances, it is reasonable for the applicant to enforce the bargain it has exacted to protect itself. Indeed, the very *ratio* underlying the bargain is that the applicant should not have to contend itself with crossing his fingers and hoping that the respondent would act honourably or abide by the undertakings that he has given. It does not lie in the mouth of the ex-employee, who has breached a restraint agreement by taking up employment with a competitor to say to the ex-employer "*Trust me: I will not breach the restraint further than I have already been proved to have done*"

[33] The applicant in its founding affidavit, avers that by virtue of the first respondent's position and through the performance of his functions and responsibilities, the first respondent had access to the applicant's costing and pricing. The first respondent conceded that the industry is highly competitive but denied that he was involved in pricing and that he had access to any propriety interests of the applicant. From the

papers it is apparent that the first respondent is in possession of the applicant's confidential information.

CUSTOMER CONNECTIONS

[34] It is trite that the need of an employer to protect its trade connections would arise where the employee has access to its customers, or is in a position to build up a particular relationship with those customers, and could easily induce those customers to follow him or her to a new business. The applicant alleges that the first respondent whilst based at the applicant's Centurion branch largely spent time interacting with customers of its Honeydew branch whilst waiting for the Centurion branch to open. According to the applicant, the first respondent interacted regularly with its customers with regard to their servicing needs and requirements and in this regard the first respondent visited the applicant's customers for the purposes of establishing and maintaining, by email and telephonically, relationships as well as communicating with them as this was one of the core duties of the first respondent. The applicant further alleges that the first respondent was required to allocate time on certain customers as he was required to do a significant amount of canvassing for new business while attending to the existing customers.

[35] It is clear that by virtue of his position and through the performance of his functions and responsibilities, the first respondent did not only have access to the applicant's prospective and current clients, he had established a business relationship with some of the applicant's clients.

[36] The first respondent provided the applicant with an unconditional undertaking that he will not:

(i) contact any of the applicant's clients who are not common customers to the applicant and the second respondent;

(ii) he acknowledged having misappropriated the applicant's confidential information in the form of action plan and monthly reports.

[37] The applicant has, in my view, succeeded in proving that it has an interest, which is deserving of protection. Such an interest is clearly being prejudiced by the first respondent through his association with the applicant's direct competitor, Performance Plant Hire. The first respondent should, therefore, be interdicted from using the information that he obtained in confidential relationship with the applicant.

[38] As regards soliciting the employees to terminate their employment at the applicant, the sole basis is the first respondent's alleged attempt to solicit an employee on 4 April 2019 to resign from the applicant.

[39] The first respondent disputes any attempt to solicit an employee (Muller) to terminate his employment with the applicant. It is clear that on 4 April 2019 the first respondent was not yet employed by the second respondent. It is common cause that he tendered his resignation on 8 April 2019. In my view the first respondent would have no basis to attempt to solicit Muller, in the absence of him knowing whether he was going to be employed by the second respondent. The applicant's case on this score is weak, unsubstantiated and not supported by evidence. Therefore, the applicant's evidence in this regard is insufficient to establish a protectable interest, or to establish that any protectable interests that it may have in relation to other employees is threatened.

REASONABLENESS OF THE RESTRAINT

[40] The applicant seeks to enforce the restraint for the limited areas of Gauteng, Mpumalanga, Limpopo and North West for the remaining period of 6 months. The respondents' actual exposure was in relation to customers in Gauteng via the applicant's branches in Honeydew and the newly established Centurion. The applicant has about six branches.

[41] The applicant contends that the limited application of the restraint to Gauteng, Mpumalanga, Limpopo and North West for the remaining period of 6 months is not unreasonable although it does not have any branches in Limpopo and Mpumalanga but only customers.

[42] The first respondent states that he is a 41 year old with no other skill. He was previously employed at the second respondent for 11 years and at the applicant for less than six months. He states that at 41 years his employment prospects are poor. The first respondent contend that to enforce the restraint under these circumstances would be oppressive and serve no purpose other than to stifle competition in the industry and be unreasonable to him.

[43] The question is whether the applicant's interest weighed up against those of the first respondent would leave the latter economically inactive and unproductive. The applicant submitted that the first respondent will not be excluded from being economically active and productive and that he will just not be entitled to use the applicant as a "*spring board*" to unlawfully compete with it. It is further submitted that the first respondent is equipped to be employed in various other sales and managerial positions as he is well-qualified and experienced. The first respondent resigned from his employment with the applicant voluntarily and he immediately entered into a new contract of employment with the second respondent. The first

respondent has not demonstrated that he would be economically inactive should the restraint be enforced. He is entitled to be employed elsewhere for as long as he does not breach the provisions of the restraint agreement. Public policy requires that contracts concluded voluntarily be enforced, and I am satisfied that on the facts and the law, the applicant demonstrated that it is entitled to the relief it seeks.

[44] The only other issue for consideration is the period of the restraint and geographical area it covers. The first respondent submitted that the restraint covenant is too wide and thus unenforceable. As aforementioned, the contract required the first respondent to be restrained for a period of six months after the termination of the employment agreement within the areas of Gauteng, Mpumalanga, Limpopo and North West. In my view, the period of the restraint as recorded in the employment contract is reasonable. I am equally of the view that with regard to the geographical area, and given the nature of the applicant's client base, it would be reasonable for the restraint to cover the whole of the areas mentioned above.

[45] In the result I make the following order:

[46] The respondent is interdicted and restrained for a period of 6 month (with effect from 12 April 2019) and in the areas of Gauteng, Mpumalanga, Limpopo and North West from:

(i) being involved or engaged in any capacity, directly or indirectly in any business which competes with the business of the applicant;

(ii) being employed by the second respondent;

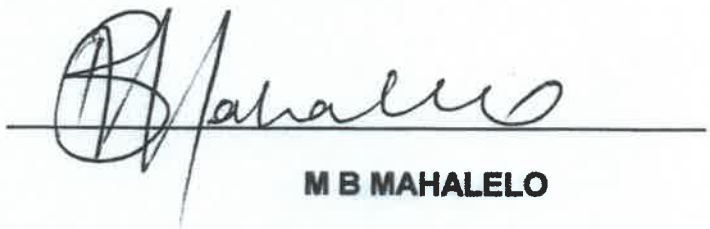
(iii) communicating with any supplier to or customer or potential customer of the applicant for the direct or indirect purpose of inducing such supplier or

customer or potential customer of any similar or competing business from contracting, offering to contract with or causing any contract to be offered to such supplier or customer without written consent of the applicant;

(iv) directly or indirectly using or disclosing any information of whatever nature in respect of or concerning the applicant, unless such disclosure is legally required by law or by the rules of a recognised stock exchange.

(v) from rendering, or attempting to do so directly or indirectly any service which is rendered by the applicant during the period of six calendar months after termination of employment with the applicant to or for the benefit of any customer of the applicant or soliciting, interfering with, enticing or attempting to entice away from the applicant any such customer;

[47] The first and second respondents to pay the costs jointly and severally the one paying the other to be absolved



M B MAHALELO

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

FOR THE APPLICANT: ADV L HOLLANDER

FOR THE RESPONDENTS: ADV J G BOTHA

DATE OF HEARING: 15 MAY 2019
DATE OF JUDGMENT: 07 JUNE 2019