IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT)

Case number: 4046/2013

Date: 15 February 2013

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHERS JUDGES: YES/NO
(3) REVISED

15/2/2013 Pretoria
DATE SIGNATURE

In the matter between:

BARAKA ENTERPRISE CONSULTING (PTY) LTD Applicant

And

KRISHNA REDDY 1st Respondent
KIRAN KAKOLU 2nd Respondent
PRASAD MADASU 3rd Respondent

JUDGMENT

PRETORIUS J,

[1] In this urgent application the applicant seeks to enforce restraint of trade provisions whereby the respondents are interdicted and

restrained from competing with the applicant in its direct customer base to deliver the same services as the applicant for a period of 6 months after termination of their engagement with the applicant.

[2] The applicant is an information and technology professional services company. It concluded a contract with the City of Tshwane Municipality to provide support services for the SAP system as set out in the SAP Support agreement. This contract terminated on 31 December 2012.

[3] During January and March 2010 the applicant contracted the respondents as independent contractors, based at the City of Tshwane. The first respondent was appointed as a SAP consultant and the second and third respondents were appointed as FICA consultants by the applicant to work at the City of Tshwane as such.

[4] According to their appointment letters they were required to render services at the City of Tshwane. Clause 5 of the appointment letters provided:

> *"5.1 It is recorded that during your engagement with the Company, you will become intimately concerned with the business of the Company or any other business carried on by the Company, from time to time, and by virtue of such involvement you will have access to the trade secrets, marketing methods, customer lists, customer*

know-how of the Company which the Company is entitled to protect. You will therefore undertake that you shall not during your engagement with the Company and for a period of 6 (six) months after the termination of your engagement for any reason whatsoever whether directly or indirectly;

5.1.1 Persuade, induce, encourage or procure any employee of the Company, to become employed by or interested in any manner whatever in any field of activity that competes with the company;

5.1.2 Compete with the company in its direct customer base to deliver the same services as the company."

[5] The City of Tshwane did not renew the agreement after 31 December 2012. The respondents did not return to work at the applicants in January 2013. It is common cause that they are employed by EOH, a company which presently renders SAP support systems services to the City of Tshwane. Accordingly the applicants argues that the respondents are in breach of the restraint clause, as they are doing the same work they did whilst contracted by the applicant.

[6] The respondents deny breaching the restraint of trade. The respondents allege that the applicant has no protectable interests at all, and no order should be granted.

[7] At the outset, Mr Maloka, for the applicant, indicated that the applicant abandons prayer 3 of the notice of motion and I will not deal with it.

[8] In **Basson v Chilwan and Other 1993 (3) SA 742 (A)** it was set out by Nienaber JA at p 767 G – H:

"(a) Is daar 'n belang van die een party wat na afloop van die G ooreenkoms beskerming verdien?

(b) Word so 'n belang deur die ander party in gedrang gebring?

(c) Indien wel, weeg sodanige belang kwalitatief en kwantitatief op teen die belang van die ander party dat hy ekonomies nie onaktief en onproduktief moet wees nie?

(d) Is daar 'n ander faset van openbare belang wat met die verhouding tussen die partye niks te make het nie maar wat verg dat die beperking gehandhaaf moet word, al dan nie? (Laasgenoemde vraag kom nie hier ter sprake nie.)"

These are the questions that must be considered in the present application.

[9] The respondents argue that the court has to apply the findings of the Appellate Divisions in the **Basson case (supra)** where Botha JA held at 778 C-D:

> *"In essence, the Chilwans are* ***seeking to prevent Basson from using his skill and experience, and his innate or acquired abilities, to the potential detriment of their***

investment. In this respect the case bears no resemblance to the case of the seller and buyer of a business. On the contrary, it approximates closely to the case of an employer and employee relationship in one respect. In relation to such cases it has often been said in the authorities that a man's skills and abilities are a part of himself and that he cannot ordinarily be precluded from making use of them by a contract in restraint of trade." (court's emphasis)

[10] The applicant does not set out at all on which facts the applicant relies in connection with the knowledge of the respondents. It would be incorrect to interpret the restraint of trade that the respondents are prohibited for a period of six months from competing with the applicant by not seeking employment with any other competitor and/or any clients of the applicant. This will cause the respondents not to apply their trade for the duration of the restraint and they will be prevented to use their skills and abilities, which are part of themselves. These facts correspond to a great extent with the facts which had to be decided in the Basson case(supra).

[11] The allegations the applicant relies on is set out as:

"1. Proprietary information of a special nature;

2. contracts and the skills and experience obtained represent commercial and competitive value for the applicant;

3. *this competitive edge;*

4. *critical information."*

[12] No particulars are added so that the court can find on what basis the applicant is bringing the application and on which secret facts or knowledge by the respondent's does the applicant rely.

[13] The applicant sets out in the replying affidavit that the protectable interest is:

"1. Prior exposure to the City's SAP system;

2. were exposed to the applicant's working methods at the City;

3. ...the unique skills set that is possessed by its consultants, the respondents;

4. using the same skill set they acquired by virtue of their engagement by the applicant;

5. obtained skills and experiences related to the City's SAP system."

[14] This contains no particulars of what the applicant wishes to protect. The fact that the respondents gained more experience and a SAP certification in respect of certain modules, does not constitute a protectable interest.

[15] The court accepts the evidence of the respondents that none of them gained any knowledge of the manner in which the applicant conducted its business. They are not involved in the management of the applicant, but were mere employees who did the work as required by the applicant. They only rendered standard SAP services and not specialised services.

[16] If regard is had to the restraint provision it is clear that it only prohibits competition. There is no mention that the respondents are not entitled to work for a company which is competition for the applicant.

[17] In **Reddy v Siemens Telecommunications (Pty) Ltd 2007 (2) SA 486 (SCA)** Malan AJA found in paragraphs15 and 16:

> ***"The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions.*** *Both considerations reflect not only common-law but also constitutional values. Contractual autonomy is part of freedom informing the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life. I****n this sense, freedom to contract is an integral part of the fundamental right referred to in s 22."***

and:

> ***Where the interest of the party sought to be restrained weighs more than the interest to be protected, the restraint is unreasonable and consequently unenforceable.*** *The enquiry which is undertaken at the time of enforcement covers a wide field and includes the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests.* "(court's emphasis).

[18] The four considerations to determine whether the restraint of trade is reasonable must be considered by the court. This court cannot find that there is an interest that should be protected after the agreement with the applicant had been terminated. The applicant has no interest that will be prejudiced as no details of the interest of the applicant is set out by the applicant in the founding affidavit. Public policy does not dictate that the restraint should be enforced, as there is nothing else in the terminated relationship between the parties that should be protected.

[19] The court has considered all the arguments, heads of argument and pleadings carefully. I cannot find that there is any basis to interdict and restrain the respondents as requested by the applicant.

[20] The application is dismissed with costs.

Judge Pretorius

Case number	: 3209/2013
Heard on	: 13 February 2013
For the Applicant / Plaintiff	: Adv Makola
Instructed by	: Ramushu Mashile
For the Respondents	: Adv Hollander
Instructed by	: Botoulas Krause & Da Silva INC
Date of Judgment	: 15 February 2013