IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 32061/14

27/6/2014

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
27/6/2014 DATE SIGNATURE

In the matter between:

PRIMEDIA (PTY) LTD APPLICANT

and

ANDRIES BASSON 1ST RESPONDENT

SUBCONCEPT PROPRIETORY LIMITED

T/A NU METRO CINEMAS 2ND RESPONDENT

JUDGMENT

TLHAPI J

[1] The applicant approached the court by way of urgency for an order in the following terms:

"2. *That the first respondent for a period of, 18 (eighteen) alternatively, 12 (twelve months, from date of termination of his employment with the applicant, being 28 February 2014 be interdicted and restrained from:*

2.1. remaining in the second respondent's employ within the area of the Republic of South Africa;

2.2. being interested or engaged, whether directly or indirectly, whether as a contractor or employee, as proprietor, partner, shareholder, member, director, employer, executive, agent, consultant or otherwise, with the second respondent within the areas of the Republic of South Africa;

2.3. whether for his own benefit or that of another or others, using, exploiting or otherwise turning to account or knowingly divulging for use, exploitation or otherwise turning into account, any knowledge or information, confidential or otherwise, gained by the first respondent as a result of or in connection with his employment or association with the applicant.

3. Alternatively, that the order sought in paragraph 2 (two) above, operate as an interim, pending the finalization of this application.

4. Directing that the first respondent and second respondents' be ordered to pay the costs of this application, jointly and severally, the one paying the other to be absolved, including the costs of two counsel."

The application was opposed. I also ruled that the matter was urgent. Regarding jurisdiction, the main portion of the relief being against the first respondent, who is resident within the jurisdiction of this court, this court has jurisdiction to hear the matter.

[2] The applicant under the brand "Ster-Kinekor" operates as the largest movie exhibitor in Africa with 55 (fifty five) commercial cinema outlets in South Africa and with international sites based in Lesotho, Namibia, Zambia and Zimbabwe. The first

respondent was in the employ of the applicant in the positions of General Manager: Catering (21 September 2009); Regional Manager: Gauteng West (1 April 2010); Regional Manager: Cape Town and KZN (1 August 2013). The applicant and first respondent concluded two restrains of trade agreements, the first on 29 September 2009 and the second on 16 September 2013.

[3] The second respondent wholly owned by its subsidiary Avusa , was the applicants direct competitor in the market, hence a specific term in the second restraint agreement that first respondent 'would be specifically restrained from being employed by the second respondent within a 12 month period from the date of termination of his employment'

[4] The applicant averred that first respondent had during his employment, access to and gained knowledge of all the aspects of applicants business and that the knowledge of its business was confidential and protectable as set out in the first and second restraint agreements.

The first restraint defined the categories of engagement the first respondent was restrained from engaging with competitors. These involved methods of business; associations with and strategies developed to enhance contact with clients, customers and business connections, which exposed the first respondent to have access to confidential information of the applicant and would enable unfair and prejudicial competition if not restrained.

Clauses 2.1; 2.2; 2.3 of the second restraint defined the nature of documents which constituted confidential information which included those devised, created or authored by the first respondent within the scope of his employment; it also stated the concerns that the first respondent was not to take up employment for a period of 12months after termination of his employment; clause 3.2 defined what constituted copyright.

[5] Examples of the areas in which the first respondent was actively involved were in developing the catering aspect of the business which the applicant contended was a 'differentiator to its competitors in its value propositions to its customers.' The first respondent was involved with the development, creation and implementation of the applicant's 'five year catering strategy' which entailed the unique innovations, for example, the offering of a coffee shop at its Eikestad Cinema Complex, the 'flute dispensers for slush drinks; 'IMAX' and 'VIP Lounge' at Gateway. The first respondent was involved in the creation of a variety of programmes aimed at enhancing interaction and responsiveness of its client and customer base and programmes to encourage employee effectiveness.

[6] The first respondent citing personal reasons and financial difficulties resigned by email dated 3 February 2014 and stopped working for the applicant on 28 February 2014. He had been offered and accepted new employment and was paid twice his salary. He refused to consider a counter offer not to leave by the applicant.

On 4 March 2014 the first respondent called Irshaad Mahomed ('Mahomed), the operations executive of the applicant and deponent to the founding affidavit, that rumours in the market that he was joining the second respondent were unfounded and informed that he was joining Kentucky Fried Chicken ('KFC'). It came to Mahomed's attention during the first week of April 2014 that the first respondent may be employed by the second respondent. A letter was addressed to the latter on 10 April 2014 enquiring about the employment of the first respondent and making them aware of the restraint of trade agreement applicant concluded with the first respondent. The second respondent was requested to undertake that it would not enter into any business relationship with the first respondent for the period of the restraint and threatened them with the present application should no undertaking be received by 11 April 2014. On 16 April 2014 a response on behalf of the respondents was received confirming the employment of the first respondent and, renouncing the second restraint agreement and the binding effect thereof on the first and second

respondent. The applicants communicated their intention to enforce the agreement on 17 April 2014.

[7] The answering affidavit was deposed to by the first respondent, Mr Basson. Both respondents denied all the averments in the founding papers that support applicant's claim. According to respondents they compete for the business of movie goers and that the product offered was the same. Neither was possessed of a 'chemical formula' which may enhance the movie going experience'. In order to enhance the movie going experience the cinema house was expected to engage the services of experienced managers with operational managerial skills which would ensure an operation that was 'cost effective to the company and beneficial and attractive to the patrons.

[8] The first respondent averred that he acquired this experience over the past ten years by his involvement with the Nu Metro Group (between 2005 and 2009) and thereafter with the Ster Kinekor Group (between 2009 and 2014). He contended that the skills acquired were his own and that he had not in all these years been privy to any secret techniques and strategies peculiar to the industry. Accessible over the internet were documents that dealt with a variety of topics, information and elements relating to the cinema business, which were applied in the business of the applicant and second respondent and, examples were annexed to the papers. He further contended that the applicant had failed to give any detail to suggest confidential strategy. He denied having co-created certain strategies or involvement with the development of the coffee shop and had no knowledge of the five year catering strategy. A report to the Competitions Commission was intended for what he considered to be an unfair strategy to prevent him from employment.

The first respondent contended that the one possible area of competition could pertain to the location of a cinema complex which was depended upon 'the

conclusion of viable lease agreements and he, as operations manager would not be privy to future plans of the applicant in this regard.

[9] Prior to him leaving the applicant two of its executives left to join the second respondent, Mr Leitch ('Leitch') and Mr Roberts ('Roberts') both now occupying positions of Property Development Executive and Chief Executive Officer of the second respondent, Nu Metro Cinemas. Roberts was responsible for developing some of the concepts that the applicant was now laying claim to (Cinema Nouveau / Cinema Prestige Theatres). Both executives agreed with him that there was nothing secretive in the movie business and the applicant has not sought to enforce its restraints against them. He contended that this application was nothing more than an attempt to deny the second respondent access and use of his skills to the advantage of the second respondent and that this constituted unlawful and unfair competition.

[10] Mr Colin Barclay of Prophet Margin Consultants, a catering consultant, had been involved only in giving input when required to do so. Mr Barclay had been engaged by Roberts to provide the same services to the second respondent from December 2013.

He averred that he was coerced by the Human Resource Executive for various reasons to sign the second restraint agreement. He contended that the second restraint did not found a cause of action. The second restraint superseded the first one and it was specific to the Times Media Group which is not a party to these proceedings and he was not employed by them.

[11] The first respondent averred that his resignation was not underhand. He was employed by KFC and while there, he was approached by a recruitment agency and interviewed for a position in the entertainment industry. Several offers were made on behalf of the second respondent which he initially refused to accept until an offer which he could not resist was put on the table and that this landed him employment with the second respondent as their national operations manager.

[12] In reply the applicant gave the context and details in which it enforced and settled its restraint of trade with Mr Leitch. The applicant also addressed its engagement with Prophet Margin Consultants and the context of engagement and that the relationship ended around April 2013. Furthermore it was averred that the first respondent was part of an executive business strategy session held in Johannesburg on 14 – 15 January 2014 which was formulated after the departure of Roberts and Leitch.

[13] On the day of the hearing the respondent served and filed an application to strike out certain new facts raised in the replying affidavit which were deemed to be vexatious, irrelevant and / or inadmisssible.

> paragraphs 19.1:- the alleged enforcement of restraint against Leitch and reference to the conclusion of 'settlement negotiations' and a settlement agreement;
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> paragraph 21.4: – reference to 'business strategy' relating to catering post April 2013;
>
> paragraph 23.1: – that annexure 'D' was concluded after the 'Leitch Affair' that this was not pleaded in the founding affidavit;
>
> paragraphs 23.5: - reference to the first respondent having freely and voluntarily concluded the second restraint, that this consists of legal argument;
>
> paragraph 26:- of the first respondent being part of an executive strategy session held in Johannesburg on 14-15 January 2014, 'formulated after the departure of Robert and Leitch';
>
> paragraph 26.6:- paragraph 28.11 in the founding affidavit with reference to 'creating and implementing flute dispensers for slush drinks' to reference in

reply to 'the methodology behind the profitable operations', that the latter was a new allegation;

paragraph 26.6:-amounted to hearsay;

The application was opposed and there being no time to answer, the applicant elected to call Mahomed to testify concerning the executive strategy session, convened on 14 and 15 January 2014 in Johannesburg. The meeting was attended by a select few being regional managers, the first respondent being one of them and all constituting part of the Operations Executives Business Strategy Team. The team reported to Mahomed. The strategies dealt with 'included the applicants' total business strategy. The team were expected to give in- put, to develop, create and to report, to implement in their respective regions and to give feedback which was to be filtered through to the board.

I heard argument and ruled that I would admit the affidavit and deal with the application to strike out in my consideration of the whole application.

[14] Mr Pillay argued that the settlement agreement with Leitch had nothing to do with the restraint because restraints were only enforceable by means of a court order.

As I see it there are instances where certain facts may be raised for the first time in a replying affidavit and this occurred where there was a bare denial by the first respondent of having attended a strategic meeting during January 2014. The other issue concerned Leitch. Applicant was entitled to reply for the purpose of clarification. In as far as issues around the settlement agreement with Leitch were alleged by the applicant, no confirmatory affidavit was annexed by Leitch to confirm that the settlement agreement had nothing to do with the restraint. In the absence of the confirmatory affidavit, the averments concerning him constituted hearsay.

[15] Now the issue to determine in this application is whether there are confidential and customer related protectable interests, entitling the applicant to enforce the restraint agreement.

[16] Restraint of trade agreements were *prima facie* valid and enforceable unless they are unreasonable and offend against public policy, *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A). It was also trite that where an employee alleges that he is not bound by the restraint agreement, he bears the onus to prove on a balance of probabilities why the restraint was unreasonable and unenforceable *Magna Alloys supra.* This should be the case, as in this matter, where the first respondent alleged that he was coerced into entering into the second restraint, or that the restraint offended against his right to freely pursue employment in a field he has individually acquired experience.

[17] Mr Pillay for the respondents while conceding the principle in Magna Alloys on the onus, argued that other considerations were applicable. Where there were disputes of fact the matter had to be resolved on the version of the respondent. Furthermore that in *Reddy v Siemens Telecommunication (Pty) Ltd 2007 (2) SA 485 (SCA)* it was stated that what the court was really faced with was a value judgement, the question being, was the restraint reasonable and justifiable in the circumstance,

[18] Confidentiality is determined objectively. In Coolair v Ventilator Co (SA) (Pty) Ltd 1967 (1) SA 686 (W) at 689 F-H the following was stated:

> "*The difficult question in each case would be to decide what information gleaned by an employee is to be regarded as disclosable as being harmless or general knowledge and what items are confidential or secret. The dividing line may move from case to case, according to what is general practice or convention in the category of trade or manufacture in which the plaintiff falls, with particular reference to existing or potential competitors of his. If, however, it is objectively established that a particular item of information could*

reasonably be useful to a competitor as such, i.e. to gain an advantage over the plaintiff, it would seem that such knowledge is prima facie confidential as between an employee and third parties and that disclosure would be a breach of the service contract"

[19] It was common cause that the first respondent entered into two restraint agreements with the applicant. It was also common cause that the relevant terms of the said agreement, that is, the interests that the applicant wished to protect were identified in the first and second restraint agreements, and these terms were referred to in the founding affidavit. The second respondent happens to be the applicants' major competitor in South Africa.

[20] Mr Luderitz for the applicant argued that a distinction had to be made between senior management and 'ordinary' employees, and that a 'higher or stricter duty of confidentiality' was demanded of an employee in a senior position.

In following the *Reddy* matter, in my view, a consideration in making a value judgment would be to look at the first respondent, the position he previously occupied with the applicant; the position he is presently employed in and, to establish whether in the circumstances there was present a risk of him disclosing information if he chose to do so to the competitor.

[21] After joining KFC several offers were put on the table by the second respondent before he accepted their employment. The nature of the meeting held in January 2014 as testified by Mahomed, gave credence to the contention that the first respondent was not just an ordinary employee of the applicant, he played an integral part in the business of the applicant, and understood in the restraint agreements he voluntarily entered into that restraint on the terms stipulated was necessary. What is important is that given the vast self taught experience that the first respondent claimed he had, he never objected to the content of the restraints as being

unreasonable, or as having the potential of being prejudicial to him or against public policy.

[22] The test for determining whether a restraint was reasonable or unreasonable rested with the first respondent, as agreed to in the restraint agreement. In *Basson v Chilwan and Others 1993 (3) SA 742 (A) at 767 G-H,* the test was stated as follows:

> "*(a) Does the one party have an interest that deserves protection after termination of the agreement?*
>
> *(b) If so, is that interest threatened by the other party?*
>
> *(c) In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?*
>
> *(d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires the restraint be maintained or rejected?"*

The only requirement was, in the circumstance, for the applicant to prove that there was probability that the first respondent would 'consciously or unconsciously disclose information to a competitor, *Longfilends Trading CC v S*herryl Gay*le Bradfield and Another (Case 10605/2011 (KZNHC) para 21 and 22.*

[23] It is necessary to establish what the protectable interest is which the applicant seeks to protect.

The scope of confidentiality was defined in the agreements concluded with the first respondent:

1. in the employment agreement paragraph 18, "...the company's trade secrets, confidential documentation, technical know-how and data, drawings systems chemical formulae methods, software, processes client

lists programmes, marketing and or financial information.....the employee acknowledges that such confidential information represents a substantial monetary value for the company"

2. in the first restraint, paragraph 4.3, "...shall include but shall not be confined to technical detail, technics, ..know-how, methods of operating, business plans, costs and products, pricing and marketing strategies, price lists, ...information on or concerning customers and potential customers"
3. in the second restraint paragraph 2.1, "....reports, manuals financial statements, budgets, indices...which are created, compiled or devised or brought into being by an employee"

[24] Mr Pillay relying on *Knox D'Arcy Ltd and Others v Jamieson and Others 1992 (3) SA (WLD) at 526 (b) G-H* argued that there was no protectable interests in as far as the applicants customer connections were concerned and that the applicants had failed to make out a case in that regard. No relationships existed or ever existed between the first respondent and customers of the applicant with the probability that such customers would go to the second respondent. The applicant, he said, failed to outline the confidential information complained about when initially invited to do so by the respondents' attorneys, the confidential information was not before the court in written form, for example there was no secret manual about the coffee shop.

The facts in the *Knox D'Arcy* case *supra* are distinguishable and the situation to be determine was not comparable to the relationship between candidate attorney and his principal. The first respondent had called for the applicant's South African lists of customers and the questions was whether this was done for the purpose of copying or memorizing such information. The court did not find, as was argued, that confidential information is not protectable at all. In granting a temporary interdict where the applicants had not indentified the customers and potential customers in the lists called for, the court still found that in the circumstances of that case the

suspicions against the respondents were justified. Stegmann J qualified his view at page 528 G-H:

> *"Where the confidential information is of the type under (b), the first respondent and second respondent would be free to use it provided that they had not, by breaching their fiduciary duties to the applicants, wrongfully and unlawfully prepared themselves a 'springboard' to save themselves the time and trouble and expense of having to cultivate their own customers in the way the applicants have had to do. A temporary interdict (and also a final interdict) which aims to deprive the respondents of that unfair and unlawful advantage, must be appropriately limited in time .... The object is not to punish the respondents' nor to prevent them from competing lawfully with the applicants"*

[25] The Atlas Organic Fertilizers v Pikkewyn Ghwano 1981 (2) SA 173 (T) dealt with unlawful competition, the issues were identified by Van Dijkhorst J at 192 H:

> *"Our system of free enterprise requires for its successful functioning a competitive market where personal skills and expertise can be freely bartered....*
>
> *In this case there does not arise the collision between the two ideas, freedom of trade and the sanctity of contracts, as in the case of contracts in restraint of trade"*

The '*skill and knowledge'* which an employee '*had acquired by the exercise of his own mental faculties on what he had seen, heard and experienced of in the employment of the appellants'* referred to by Lord Atkinson in *Herbert Morris Ltd v Saxelby (1916) I AC 688*, is in my view, not the issue to be determined. I have to consider what the first respondent acknowledged as constituting a protectable interest for a specified period (12 or 18 months) in the restraint agreements.

[26] The first respondent set out what he does, '*presenting a fresh experience, having well presented helpful staff, keeping the premises vibrant and alluring. Cleaning Toilets, making the complex clean, offering patrons various snack options, keeping the cost affordable, offering methods for payment,'* According to the first respondent he was possessed of operational skills acquired over 10 years with the second respondent and applicant, that there was no manual for these skills and there was no reason for the applicant to complain.

In my view this description constitutes a simplification of the first respondent's position and his responsibilities, and does not describe what his responsibilities were with the applicant. He was virtually head hunted so to speak after KFC. It makes a joke of the content of the terms of the restraint that he bound himself to, it does not even consider the nature and complexity of the issues dealt with in conjunction with participants at the meeting in January 2014 to discuss and plan the business strategy for the next five years. I am of the view that the applicants have made out a case for the main order sought.

The first respondent has therefore not made out a case in my view why the restraints should not be enforced or why they should be considered as being unreasonable.

On the other hand I am also not satisfied that a case has been made out against the second respondent.

[27] In light of the above I give the following order:

[1] The first respondent is interdicted and restrained for a period of 12 months calculated from the date of termination of his employment being 28 February 2014 from:

1.1 remaining in the second respondent's employ within the area of the Republic of South Africa;

1.2 being interested or engaged, whether directly or indirectly, whether as a contractor, or employee , as proprietor, partner, shareholder, member, director, employer, executive, agent consultant or otherwise, with the second respondent within the area of Republic of South Africa;

1.3 whether for his own benefit or that of another or others, using exploiting or otherwise turning to account or knowingly divulging for use, exploitation or otherwise turning into account, any knowledge or information, confidential or otherwise, gained by the first respondent as a result of or in connection with his employment or association with the applicant.

2. The first respondent is directed to pay the applicant's costs of the application including the costs of two counsel.

3. The application against the second respondent is dismissed with costs.

TLHAPI V.V

(JUDGE OF THE HIGH COURT)

MATTER HEARD ON	:	13 MAY 2014
JUDGMENT RESERVED ON	:	14 MAY 2014
ATTORNEYS FOR APPLICANT	:	TOMLINSON MNGUNI JAMES

ATTORNEYS FOR THE RESPONDENT: STRAUSS DALY ATTORNEYS