IN THE GAUTENG DIVISION OF THE HIGH COURT OF SOUTH AFRICA, PRETORIA

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED: NO
14 February 2017

In the matter between: - CASE NO: **2016/8250**

Q-PHOTO (PTY) LTD 14/2/2017 **APPLICANT**

And

HENRY-DEAN TOPE **FIRST RESPONDENT**

ATPHOTO (PTY) LTD **SECOND RESPONDENT**

JUDGEMENT

TSATSAWANE AJ

Introduction

1 The applicant seeks an order to enforce a restaurant of trade agreement. In this regard, it seeks an order in terms of which, amongst others:

1.1 the first respondent is interdicted and restrained from being interested in the second respondent's business;

1.2 the first respondent is interdicted and restrained from, either alone or jointly with others, being engaged, interested or concerned in any business, including the second d respondent's business which, amongst others, produces and or manufactures any of the products produced and manufactured by the applicant;

1.3 the first respondent is interdicted and restrained from divulging the applicant's information and trade secrets;

1.4 the second respondent is interdicted and restrained from keeping the first respondent in its employment.

2 The application is opposed by the first respondent. The second respondent did not play any role in the proceedings before me.

The restrained of trade agreement

3 The applicant and the first respondent concluded a contract of permanent employment in April 2013 and the restraint of trade provisions are contained in Annexure A thereto.

4 There is no dispute about the validity and enforcement of the restraint of trade agreement and that it seeks to restrain the first respondent from, amongst others, disclosing the applicant's trade secrets and being engaged or interested in any business which completes with the applicant. In particular, the first respondent agreed not to work for the second respondent and the applicant seeks to interdict him from doing so.

5 The restraint period is defined in clause 1.5 of the restraint of trade agreement to mean a period of twelve months following the termination of the employment relationship. The first respondent resigned from the applicant's employment with effect from 12 December 2015.

The applicant's case

6 This application was brought on an urgent basis and set down for hearing on 9 February 2016. At that time, the first respondent was already employed by the second respondent.

7 The application was struck-off the roll for lack of urgency and it came before me in the normal opposed motion court on 4 August 2016. At that time the first

respondent had already been in the second respondent's employment for many months without any restraint or interdict.

8 In paragraph 9.6 of its founding affidavit, the applicant says that:

> "*9.6 Although to date there is no concrete proof I can place before this honourable court, all that the Applicant can submit is that there are trade secrets and or secret information to which the First Respondent had access as a result of his position and employment with the Applicant, and which in theory the First Respondent could transmit to the Second Respondent should he desire to do so.*"

9 As I understand the applicant's above quoted paragraph, it simply means that there is no evidence to prove that the first respondent gained access to the applicant's trade secrets or secret information. The first respondent can only divulge that which he has acquired and the applicant says that there is no "*concrete proof*" that "*there are trade secrets and or secret information to which the First Respondent had access as a result of his position and employment...*"

10 Insofar as the applicant seeks to interdict and restrain the first respondent from divulging "*any information concerning the trade secrets of the Applicant*" it must establish not only that the first respondent is in possession of "*information concerning the trade secrets of the Applicant*" it must also expressly identify (in its founding papers) such information, and also state how the first respondent acquired such information. On the applicant's version, there is no "*concrete proof*" of the first respondent acquiring access to such information.

11 In its attempt to justify the hearing of this application on an urgent basis, the applicant said the following in its founding affidavit:

"*9.2* *Should the Applicant need to wait to be heard in the normal course, at the stage at which we will be heard by this honourable court, the related problems and or potential damage would have become only academic in nature, offering no implementable or practical relief to the Applicant herein. This would relate directly to the nature of the information which the First Respondent has in his possession and the fact that the quantification of the potential damage is almost impossible to quantify at this point.*

...

9.4 *it is submitted and argued that as a result of the very nature of the application, it is rendered urgent, and that should the relief sought not be granted on an urgent basis, there will be no other form of relief in terms of which the Applicant will be able to obtain substantial relief.*

...

9.4.1 *In the event of the list of professional fall into the hands of the Second Respondent, and they are in consequence lured to the business of the Second Respondent by, for example, offering them discounts based on the pricing structure of the Applicant, undercutting same, serious financial damage could be inflicted on the business of the Applicant without the Applicant having real recourse by way of the institution of action proceedings for the recovery of damages.*

9.6.1 *I submit that it is highly unlikely that the First Respondent would refrain from divulging the Applicant's secret information to the Second Respondent, even if it is only to impress the Second Respondent can add to the business of the Second Respondent.*"

12 On the applicant's version quoted above:

12.1 There is no evidence that the first respondent had any access to the applicant's trade secrets.

12.2 If the relief was not granted on an urgent basis and the application is only heard in the normal course which is what eventually happened, "*the related problems and or potential damage would have become only academic in nature, offering no implementable or practical relief to the Applicant herein.*"

12.3 It is highly unlikely that the first respondent would refrain from divulging the applicant's secret information to the second respondent, "*even if it is only to impress the Second Respondent with the value that the First Respondent can add to the business of the Second Respondent.*"

13 Insofar as there is no evidence or "*concrete proof*" that the first respondent had access to the applicant's trade secrets or secret information, it follows that the applicant is not entitled to an order interdicting the disclosure of trade secrets and secret information. This is so due to the fact that such an order is only competent if it has been established that the person to be interdicted did acquire the trade secrets or secret information sought to be protected. In addition, the information must be identified and it must also be stated (in the founding affidavit) as to when and how the information was obtained. It is not sufficient to simply "*submit ... that there are trade secrets and or secret information to which the First Respondent had access.*" It is also not competent to attempt to make out such a case in the replying affidavit.

14 When this application was heard in August 2016, the first respondent had already been employed by the second respondent for a period of eight months. When the application was struck-off the roll for lack of urgency, the first respondent had already been employed by the second respondent for a period of two months. On the applicant's version that "*it is highly unlikely that the First Respondent would refrain from divulging the Applicant's secret information*" even if it is to impress the second respondent, the first respondent must have divulged the alleged trade secrets or secret information (if any) the very first month (if not the first day) that he started working for the second respondent in order to impress the second respondent. There is no reason why the first respondent would have waited for too long "*to impress the Second Respondent with the value that the First Respondent can add to the business of the Second Respondent.*"

15 Accordingly, if there are any trade secrets or secret information to which the first respondent gained access, the first respondent must, on the applicant's own version, have already divulged the same to the second respondent. For this reason, the relief sought in this regard would serve no purpose.

16 As far as the interdict against the second respondent is concerned, no purpose would be served by granting that relief. Such an interdict would only serve to punish the first respondent, which is not the purpose of a restraint of trade agreement. In any event, that which the restraint of trade of agreement was intended to protect must, on the applicant's own version have been disclosed to the second respondent.

17 In the view which I have taken, it is not necessary to canvass many of the first respondent's submissions other than his opposition to the alternative relief which the applicant seeks. In its alternative relief, the applicant wants the Court to determine the "*restrictions in terms of the restraint of trade clause*." The applicant has not made out a case in its founding affidavit to justify the Court effectively rewriting the restraint of trade agreement. The Court also cannot do so. Accordingly, the invitation is refused.

18 The first respondent is not entitled to costs due to the fact that he took employment with the second respondent in circumstances where he expressly agreed not to take employment with the second respondent. In addition, the applicant would most probably have brought its application earlier (and most probably obtained its order) if the first respondent had disclosed his intention to take employment with the second respondent as he was aware that he was prohibited from doing so in terms of his employment contract with the applicant.

19 In the premises, the following order is made:

19.1 the application is dismissed;

19.2 there is no order as to costs.

Kennedy Tsatsawane

Acting Judge of the Gauteng Division of the High Court of South Africa, Pretoria.