IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

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

13.3.2018
DATE

SIGNATURE

13/3/18

CASE NO: 63890/17

In the matter between:-

GREAT SHIFT TRADING 94 CC t/a GST ELEVATORS AND ESCALATORS	**Applicant**
And	
AREND FREDERICK DE WAAL BURGER	**First Respondent**
FREDERICK (FRED) BURGER	**Second Respondent**

JUDGEMENT

MSIMEKI J

[1] In this restraint of trade agreement, brought by way of urgency, the applicant seeks an order;

''2.1. That the non-compliance with the rules of the Honourable Court in respect of dies, form and service, be condoned in terms of Rule 6(12) of the Rules of the Honourable Court and that this application be heard as an urgent application;

2.2 That the First Respondent be interdicted and restrained from being involved as proprietor, partner, director, shareholder, member, employee, consultant, contractor, financier, agent, representative, assistant or otherwise, and whether for reward or not, directly or indirectly in any company, close corporation, firm, undertaking or concern carried on in the territory of the Provinces of Gauteng, North West, Limpopo and Mpumalanga and which performs or make available prescribed services or in the course of the business of which prescribed services are offered or performed as per the definition in the Restraint of Trade Agreement dated 7 April 2015, for the period of 30 September 2017 to 1 October 2018.

2.3 That the First Respondent be interdicted and restrained from providing any of the prescribed services, or reward or not, to RR Elivators and Esculators (Pty) Ltd with registration number 2017/205114/07 for the period of 30 September 2017 to 1 October 2018.

2.4 That the First Respondent be interdicted from contacting and soliciting any of the following clients in respect of delivery of

prescribed services for the period of 30 September 2017 to 1 October 2018;

(i) Otis

(ii) Schindler

(iii) Kone

(iv) Sigma

2.5 The First Respondent is interdicted and restrained from encouraging or enticing or persuading or inducing any employee of the Applicant to terminate his employment with the Applicant for the period of 30 September 2017 to 1 October 2018;

2.6 The First Respondent is interdicted and restrained from furnishing any information or advice to any prescribed customer or use any other means to take any other action which is directly or indirectly designed, or in the ordinary course of events calculated, to result in such prescribed customer terminating its association with Applicant or transferring its business to or purchasing any prescribed services from any person other than the Applicant.

2.7 Costs of this application on attorney client scale only against the First Respondent save in the event that the Second Respondent opposes the relief sought then costs against the First and Second Respondent jointly and severally the one paying the other to absolved.

2.8 Further and/ or alternative relief."

BRIEF FACTS

[2] The deponent to the applicant's Founding Affidavit is Eugene Oswald Smit (Mr Smit), a member of the applicant who is duly authorised to depose thereto. The applicant maintains and repairs existing lifts and escalators. The applicant alleges that its four main clients are Otis, Schindler, Kone and Sigma. Of the four main clients, according to Mr Smit, Otis and Schindler contribute 80% to the applicant's annual revenue. Mr Smit states that he started the applicant's business from scratch and built it to where it today is. Mr Smit alleges that it employs 50% blacks and 50% whites. Mr Smit refers to their industry as very specialised and consisting of a few companies as the client base is very small. Lift and escalator companies, according to him, are few in the country. The people in the industry are also familiar with each other. Securing clients in the industry, according to him, depends on one's reputation and popularity.

[3] On 17 March 2015 the applicant and the first respondent entered into an employment contract. On 7 April 2015 they signed a Restraint of Trade Agreement which forms a separate document. The Restraint of Trade Agreement forms the subject matter of this application.

[4] Problems developed between the parties resulting in the first respondent resigning from his employment. The applicant seeks to enforce the Restraint of Trade Agreement which the first respondent regards as void. This precipitated this application.

[5] The first respondent raised two points in limine which he is not proceeding with.

i. THE ISSUES

[6] The issues to be determined are:

6.1 Whether the matter is urgent

6.2 Whether or not the Restraint of Trade Agreement is valid and enforceable.

6.3 Whether the first respondent has breached the Restraint of Trade Agreement.

6.4 Whether the applicant is entitled to the order that it seeks.

i. URGENCY

[7] The applicant, in this application, seeks an order preventing the first and second respondents from competing with it.

[8] The applicant employed the first respondent who has now resigned from its employment.

[9] The applicant has annexed to its papers confirmatory affidavits confirming that the first respondent admitted to the applicants' employees that he will operate in direct competition with the applicant. The first respondent formed a company which is seen by the applicant as the vehicle that the first respondent intends to use when he competes with the applicant. The fact that the first respondent has failed or refuses to give a written undertaking to the applicant

not to operate and compete with it is seen by the applicant as bolstering its view that it is, indeed, the first respondent's intention to operate in direct competition with the applicant.

[10] The applicant contends that the first respondent, supported by the second respondent, is planning to target its biggest client, Schindler, which has employed the second respondent and that it will suffer irreparable harm should the order that it seeks not be granted. It will, as it puts it, be forced to retrench 80% of its work force as Schindler is its main client.

[11] The applicant further contends that it has taken all reasonable steps in attempting to resolve the matter with the first respondent but to no avail. It further alleges that it has reduced the period of restraint of trade from 24 months to 12 months, and, also, limiting it to specific areas. It is submitted on behalf of the applicant that restraint of trade applications are, by their very nature, urgent. The submission has merit **(see Aqua d'or Mineral Water (Pty)Ltd t/a Aqua d'or v Camala and Another 2006 2 ALL SA 29 (C) at [40])**

[12] There is no alternative remedy and the application, in my view, is urgent.

1. VALIDITY OF THE RESTRAINT OF TRADE

[13] The first respondent states that he cannot remember signing the Restraint of Trade Agreement. This statement does not answer the simple question whether or not he signed the agreement. It is inconceivable that one will not know if he has signed the agreement or not. What makes it worse is that the agreement is

annexure X3 appearing on page 41 of the paginated papers. The signature is there. One would understand it if the signature was disputed. It is not. The first respondent simply cannot deny the existence of the Restraint of Trade Agreement.

[14] The respondent contends that the Restraint of Trade Agreement is void because the contract of employment makes provision for such clause that was not completed by the parties. The submission, on behalf of the applicant, is that the contention has no merit. The respondents seem to be referring to Clause 26.1 of the contract of employment appearing on page 39 of the papers.

[15] Clause 2.3 of the contract of employment, according to the applicant, takes care of the contention by the first respondent referred to in paragraph 14 above.

Clause 2.3 of the Contract of Employment provides:

"2.3 No indulgence or condonation by the employer of any breach of any form of this contract by the employee shall constitute a waiver of any of the employer's rights in terms of this agreement and no amendment of this contract shall be valid unless reduced to writing and signed by both parties."(My emphasis)

The Restraint of Trade Agreement has duly been signed by the parties.

The amendment of the contract of employment is permissible if it is reduced to writing and signed by both parties. The submission on behalf of the applicant, in my view, has substance.

[16] The restraint of trade agreement, in my view, is valid and enforceable.

BREACH OF THE RESTRAINT OF TRADE AGREEMENT

[17] The respondent contends that he has not breached the agreement. Sight should not be lost of the fact that the first respondent, in Clause 3.2 of the Restraint of Trade Agreement, expressly acknowledges that

> "The employee acknowledges that the only effective and reasonable manner in which the rights of THE COMPANY (applicant) in respect of their business secrets, customer connection and supplier connection can be protected is in terms of the restraints imposed upon THE EMPLOYEE in terms of this Agreement."

Clause 3.1.4 of the Restraint of Trade Agreement provides:

> "3.1.4 In the course of his employment with THE COMPANY, he will have the opportunity of forging personal likes with the customers and suppliers of THE COMPANY.

[18] I need to mention that the first respondent's job description is "general repairs and maintenance on lifts and escalators."(Clause 3.2) He was appointed as : assistant mechanic to render services generally associated with this position (Clause 3.1)

The applicant avers that the first respondent's salary, during his two (2) years of employment, almost doubled as a result of his technical training which he received on the job. The applicant further avers that the first respondent also received initiation costing knowledge of the applicant's pricing structure.

[19] The first respondent conceded that he had not been employed in the industry of exclusively repairing lifts and escalators. He states that he has gathered work experience, and done his training in construction and installation of lifts and elevators. He adds that the training and work experience had provided him with in-depth detailed knowledge of repairing lifts and escalators. If one has regard to the fact that he still needed to gain knowledge in the repair of lifts and escalators it then becomes clear that such knowledge, as he alleges, he did not have.

[20] The first respondent contends that Mr Smit is not a qualified lift mechanic yet, he deemed it fit to join him in order to acquire the knowledge which Mr Smit had. This does not make sense. Mr Smit's assertion that the first respondent joined the applicant in order to be trained by him to enable him (first respondent) to apply for a job at Schindler later in his career seems to me more probable. That the first respondent's seeking alternative employment was

based on financial reasons, as the first respondent states, also does not seem probable.

[21] The first respondent conceded that he, on 29 May 2017, registered a company, R R Elevators and Escalators (Pty) Ltd and that he is the sole director . The company, according to him, is dormant. This again, appears improbable in light of what the first respondent is alleged to have said to the applicant's employees regarding his intention to compete with the applicant. The company's name surely explains what it has been formed for.

[22] The first respondent states that he has not yet made a decision regarding his future endeavours and that he has never taken any action which contravened the Restraint of Trade Agreement. This loses sight of the fact that the applicant seeks to prevent first and second respondents from competing with it. If what the first respondent says is anything to go by one wonders why, as applicant correctly avers, he opposes the application.

[23] Mr Smit avers that applicant discovered that the first respondent had formed a company. Once the first respondent, according to Mr Smit, was confronted with the formation of the company, he tendered his resignation. This behaviour is most surprising and intriguing. This can only confirm Mr Smit's concern after learning that the first respondent intended to compete with the applicant in the business of maintaining and repairing lifts and escalators. Ms Madelein Boshoff and Mr Andries Bruyns confirm and justify Mr Smit's concern in their confirmatory affidavits.

[24] It is common cause that the second respondent works for Schindler, the applicant's biggest client. It is also common cause that the second respondent is the first respondent's father. Mr Smit states that he employed the first respondent at the instance and insistence of the second respondent and that the second respondent needed Mr Smit to train his son who intended working for Schindler.

[25] It is further common cause that the later developments involving the first respondent and the applicant did not please the second respondent. This, according to Mr Smit, resulted in meetings which did not bear fruit. Mr Smit's explanation regarding the meetings, in light of the facts of the case, is more probable and acceptable.

[26] The facts of the case clearly demonstrate that the first respondent breached the restraint of trade agreement.

THE ORDER THAT THE APPLICANT SEEKS

[27] The applicant, on discovering what the first respondent was up to, according to his version, gave him the opportunity to have the matter amicably resolved. The first respondent, as a way of resolving the matter, was also asked to give an undertaking that he would not breach the restraint of trade agreement. The applicant avers that this did not solve the problem as the first respondent failed to give the undertaking.

[28] To determine the issues the court has regard to the facts of the matter as stated in the papers and apply the relevant case law thereto.

[29] The contract of employment clearly evinces that the first respondent was employed as a mechanic by the applicant. This is common cause. He was responsible for general repairs and maintenance of lifts and escalators. It is noteworthy that the first respondent never raised the issue that the applicant was not entitled to employ him for whatever reason. It will be remembered that the first respondent alleges that Mr Smit is not a qualified mechanic. Although the first respondent states that he had been trained in the construction and installation of lifts and escalators, and that the training and work experience had provided him with in-depth and detailed knowledge of repairing lifts and escalators, evidence at the court's disposal negates it. Evidence further demonstrates that his salary in the two years that he worked for the applicant almost doubled as a result of his technical training.

[30] The first respondent clearly signed the Restraint of Trade Agreement as shown above. The first respondent, at the time he signed the Restraint of Trade Agreement, was also clearly aware that the only way in which the applicant could best have protected its business was through the signing of the restraint of Trade Agreement. This, the first respondent acknowledges, in Clause 3.2 of the agreement. Further, in Clause 3.1.4 of the agreement, the first respondent expressly acknowledges that he, in the course of his employment would have the opportunity of forging personal likes with the contractors and suppliers of the applicant.

[31] The first respondent takes no issue with the area in which the applicant operates or its clients' list.

[32] The applicant's employees have supplied affidavits confirming that the first respondent intended to do exactly the same work which the applicant did for Schindler. One can understand why the first respondent registered his company in May 2017, strange enough the first respondent merely offers bare and bald denials of fact and adding that he has not made a decision regarding his future. This is improbable. If this is in fact so, as the applicant correctly asks itself, why, indeed, is the first respondent opposing the application.

[33] The applicant states that the second respondent is in a position to influence Schindler to give work to certain companies. The first respondent denies this. The applicant explains that the second respondent is a service leader at Schindler and that he has already given a project directly to the first respondent attempting to bypass the applicant. The project seems to relate to Hallmark Building which the first respondent deals with in paragraph 26 of his opposing affidavit. Due to the problems experienced regarding this site, Mr Smit decided to allocate the site to Mr Bruyns. However, the first respondent remained on site at the instance of Mr Deon Gerber, the applicant's foreman.

[34] Mr Smit in his replying affidavit states that the first respondent was on site for 12 days when he emailed a letter to the second respondent in September 2017 regarding the site. On 20 September 2017 Mr Smit emailed a letter to the second respondent requesting clarity regarding the work which was done on the lifts as he had wanted to charge for the work up to that stage. Mr Smit contends that he struggled to get the feedback that he required. Clearly, one can see that there is a service problem regarding the site and this seems to

have bolstered Mr Smit's concern and the fact that the application was necessary to protect the interest of the applicant.

[35] The interactions between Mr Smit and the second respondent convinced Mr Smit that the first respondent was clearly going to compete with the applicant and that the first respondent would receive the support of the second respondent. Evidence seems to support this.

[36] It is noteworthy that the Restraint of Trade Agreement provides that: "the restraint period means the period during which THE EMPLOYEE is employed by THE COMPANY and a period of twenty four (24) consecutive, one month period from the termination date."

[37] The applicant has reduced the period of twenty four months (24) to twelve months (12). The applicant, further, has limited areas which are covered by the agreement.

[38] The first respondent seems to say that the Restraint of Trade Agreement is not enforceable because "it offends against public policy." What is lacking, however, is a suggestion that the relief sought is unreasonable or wider than is necessary.

[39] **Dlodlo J, in Aqua d'or Mineral Water (Pty) Ltd t/a Aqua d'or v Camara [2006]2 ALL SA 29(C) at [31]** dealing with trade connections, cites what the court said in **Rawlin and Another v Carantruck 1993 (1) SA 537 A at 541 G-H namely:**

"The need of an employer to protect his trade connections arises where the employees has access to customers and is in the position to build up a particular relationship with customers so that when he leaves the employer's service he could easily induce the customers to follow him to a new business. This depends on whether 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. 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; frequency and duration of contact between and customer; where such contact takes place; what knowledge he gains of their requirements and business; the general nature of the 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 business are; in the case of salesman the type of product being sold; and whether there is evidence that customers were lost after the employee left.

With regard to trade secrets and pricing structures, in order for the applicant to demonstrate that its pricing structures constitute proprietary information, the applicant must show the extent to which its pricing structures are important in the sense that they are confidential and would be valuable to a former employee **(Bridgestone Firestone Maxiprest Limited v Taylor [2003] 1 ALL SA 299 (N) at 303a)"**

[40] **In Aqua d' or Mineral Water (pty) Ltd t/a Aqua d'or v Camara and Another [2006] 2 ALL SA 29(C) at [34] Diodlo J said:**

"The Rawlins case (supra) certainly contains an authoritative statement of the legal principles to be applied in the instant case. Case law on restraint of trade shows that it is customary to distinguish broadly between customer connections and trade secrets as two (2) types of proprietary interests that are capable of protection by means of restraint clause. The respondent bears the onus of proving that no protectable customer connection existed. The customer connection is capable of being established with a limited customer base than it is with a customer base consisting of a large number of different entities. Indeed a series of bold denials by a respondent are hardly helpful."

[41] **In [41] of Aqua d'or Mineral Water (Pty) Ltd t/a Aqua d'or Camara (Supra)** Dlodlo said:

"The requirements for the granting of an interdict are well-known and need not be set out in this judgement. It is trite law that a final interdict in application proceedings will be granted only if the facts as stated by the respondent, together, with the admitted facts in the applicant's affidavits, justify such an order, subjects to the provision that disputes of fact on the papers must be genuine or bona fide dispute of fact. As set out in **Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)** bald denials of fact by the respondent or those denials which are so far- fetched or clearly untenable that the Court would be justified to reject same, do not generate bona fide disputes of fact."

Save for the denials of fact that the first respondent's affidavit is replete with, there are no unique disputes of fact in this matter. The applicant's case is

simple, clear and easy to follow. Indeed the denials are far-fetched and deserve to be rejected by the court.

[42] I have, above, demonstrated that the first respondent acknowledged that he will have the opportunity of forging personal likes with the applicant's customers and suppliers of the company. He further acknowledged that the only effective and reasonable manner in which the rights of the applicant in respect of its business secrets, customer connection and supplier connection could be protected was in terms of the restraint of trade agreement which he signed. The applicant has demonstrated that this has eventuated.

[43] The Aqua **d'or case (supra)** demonstrates that the relationships between the applicant and its customers justifies protection by way of a covenant in restraint where a respondent can easily induce the customers to follow him to a new business. The submission on behalf of the applicant, that its relationship with its customers deserves this kind of protection, in my view, is correct. It must be remembered that the second respondent holds an important position at Schindler.

[44] The applicant has reduced the period of restraint from twenty four (24) months to twelve (12) months. Further, the restraint now covers specific areas where the maintenance and repairs can be effected.

[45] If one has regard to the Founding Affidavit, the Opposing Affidavit and the Replying Affidavit, it cannot be said that the applicant has not made out a case for the relief that it seeks in this matter.

[46] The first respondent's case is replete with improbabilities. The bare and bald denials of fact that the first respondent has proffered, in my view, are unhelpful.

[47] Regard being had to the facts of this matter, the restraint is reasonable and does not offend against public policy. The application should succeed.

I, in the result, make the following order:

1. The matter is urgent.
2. That the First Respondent is interdicted and restrained from being involved as proprietor, partner, director, shareholder, member, employee, consultant, contractor, financier, agent, representative, assistant or otherwise and whether for reward or not, directly or indirectly in any company, close corporation, firm, undertaking or concern carried on in the territory of the Provinces of Gauteng, North West, Limpopo and Mpumalanga and which performs or make available prescribed services or in the course of business of which prescribed services are offered or performed as per the definition in the Restraint of Trade Agreement dated 7 April 2015, for the period of 30 September 2017 to 1 October 2018.

3. That the First Respondent is interdicted and restrained from providing any of the prescribed services, or reward or not, to RR Elevators and Esculators (pty) Ltd with registration number 2017/205114/07 for the period of 30 September 2017 to 1 October 2018.

4. That the First Respondent is interdicted from contacting and soliciting any of the following clients in respect of delivery of prescribed services for the period of 30 September 2017 to 1 October 2018;

4.1 Otis

4.2 schindler

4.3 Kone

4.4 Sigma

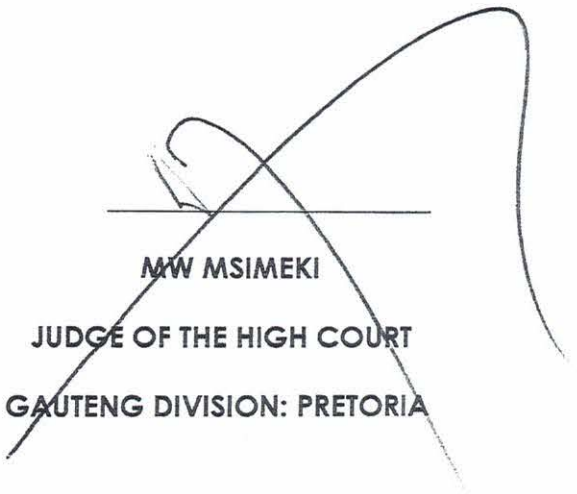
5. The First Respondent is interdicted and restrained from encouraging or enticing or persuading or inducing any employee of the Applicant to terminate his employment with the applicant for the period of 30 September 2017 to 1 October 2018.

6. The first Respondent is interdicted and restrained from furnishing any information or advice to any prescribed customer or use any other means to take any other action which is directly or indirectly designed, or in the ordinary course of events calculated, to result in such prescribed customer terminating its association with applicant or transferring its business to or purchasing any prescribed services from any person other than the applicant.

7. The costs of this application shall be borne by the first respondent.

ATTORNEYS FOR THE APPLICANT
CARAVAGH & RICHARDS

ATTORNEYS FOR THE RESPONDENT
DJV INCORPORATED



MW MSIMEKI

JUDGE OF THE HIGH COURT

GAUTENG DIVISION: PRETORIA