

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO:10071/2012

In the matter between:

KIRK MARKETING (PTY) LIMITED

Applicant

and

GARETH BRENDAN BURMEISTER

First Respondent

TILE AND FLOOR CARE CHEMICALS (PTY) LIMITED

Second Respondent

JUDGMENT

Delivered : 19 October, 2012

M PILLEMER, AJ:

[1] The Applicant seeks an order enforcing a restraint of trade agreement against the First Respondent, its erstwhile employee together with an interdict against the Second Respondent, the new employer of the First Respondent. Second Respondent is a trade competitor in relation to some of Applicant's product ranges.

[2] The matter was launched as an urgent application, which after directions were given for the exchange of affidavits and a preferential date allocated. It was argued on the papers before me as an opposed motion where final relief was sought.

Neither party sought a reference to oral evidence notwithstanding factual disputes on the papers. The approach adopted is practical and understandable in the light of the limited duration of the restraint and the delays involved in attempting to resolve the factual disputes by way of oral evidence. The matter was thus argued on the basis of the rule in *Plascon-Evans*¹.

[3] The Founding Affidavit was very thin on factual detail and is replete with what can be described as restraint of trade jargon together with factual conclusions devoid of detailed evidence from which such a conclusion is to be drawn. This is particularly so when the founding affidavit deals with the topic of trade secrets and confidential information, where the case is expressed in broad generalisations. The answering affidavit dealt with the founding papers fully in two affidavits, the first drawn as a matter of urgency to meet the urgent application for interim relief and a supplementary affidavit that fleshed the defence out more fully. The Applicant attempted to bolster the case by providing more detail in reply, but this really is of little help and only served to create factual disputes. The case does not lend itself to being dealt with in the so-called robust fashion because there was nothing to suggest that the First Respondent's version was not truthful and bona fide.

[4] The factual picture upon which the application is to be decided can be summarised as follows:

- (a) The Applicant describes itself as a manufacturer, wholesaler and retailer of product ranges used in the flooring and wall covering industries throughout South Africa.

¹In *Polaris Capital (Pty) Ltd v Registrar of Companies and Another* 2010 (2) SA 274 (SCA) at para [5] the SCA summarised the essence of the rule as follows: "Being an application for final relief the *Plascon-Evans* rule applied and the matter had to be decided on the facts stated by the second respondent and the facts stated by the appellant insofar as those facts were admitted by

(b) The First Respondent is a young man who, before he took up employment with the Applicant, had about five years work experience with three different employers. He has a personality suited to being a sales representative and was well liked. He was reasonably well educated and was studying part-time towards an LLB degree, but gave that up in 2004. He had no knowledge of the flooring industry when he was employed. He received in house training to equip him in understanding the products to be able to effectively sell them.

(c) The Applicant required new employees to sign a contract of employment and a restraint of trade agreement as a condition of employment. First Respondent was given the contracts to look at on 18 April 2011 and he returned them signed on 21 April 2011. He believed that if he wanted the job, which he did, he had to sign and he duly did so without demur. His bargaining position was much weaker than that of the Applicant.

(d) First Respondent's salary was R6 800 per month plus commission. The papers do not disclose what the average commission was that he earned. He had a three month probationary period where he could be dismissed on short notice if he was found to be unsuitable and thereafter the contract was terminable on a month's notice.

(e) The restraint of trade agreement is obviously generic and intended for a range of employees and not merely sales representatives. It goes far beyond what would be reasonable to protect the Applicant against a newly appointed junior employee, which is what he appears to be even though he is described by the Applicant as fairly senior. The restraint is drawn in this way

the second respondent or not denied in a manner that raises a real, genuine or bona fide dispute of fact."

presumably because it is intended to remain in place for a long time and to cover all bases and remain applicable as the employee develops and gains more experience of the business of the employer.

(f) The First Respondent's job was typically that of a sales representative. He had to call on clients and prospective clients, had to meet sales targets, was required to conduct in store training for clients in respect of some of the product ranges, had to check the client's site to see that their needs were being met by the Applicant and had to attend to administrative tasks relating to the sales function. He had a special function in relation to a product range called Zierath Mirrors, where he received training and was required to train others and to deal with product queries in relation to these mirrors. During the time he was employed one mirror was sold. It is an expensive product.

(g) The First Respondent was not given access to information that made him privy to the applicant's profit or profit margins in respect of the product ranges he was tasked with selling, he did not know the identities of or the location of the Applicant's suppliers and he had no knowledge of the cost at which the Applicant acquired its products from its suppliers. The Applicant did not disclose sales or marketing strategies to him. He was given a customer base of 140 customers with most of the business he did being with large retail chains, which stocked not only the Applicant's products but also those of competitors including the Second Respondent. The business environment in which he worked was competitive and there were a number of sales representatives calling on the same customers. The customers he serviced were long standing and loyal customers of the Applicant and its product range. He did not develop close relationships with the contact persons of the customers and would not be able to induce them to give up their support of the Applicant's products. These contact persons interacted with a number of different sales persons as a matter of course and no special relationships

were built up. The customers First Respondent dealt with were all based in KwaZulu-Natal.

(h) The Applicant gave the First Respondent some training. He says that the only formal training involved attendance at two internal sales conferences, which focused mainly on sales shortfalls, how to boost sales and on new products that would be introduced. In reply the Applicant has set out information that the training was more extensive than that testified to by the First Respondent, but since it is evidence in reply and the matter is to be decided on the *Plascon Evans* rule not much turns on this. He had no knowledge of contractual arrangements or new client development strategies.

(i) The First Respondent was provided with information relating to special pricing structures applicable to certain of the customers, of the discount structures and the Applicant's payment terms for certain clients and early payment discounts. The customers themselves did not treat this kind of information as confidential and were quite willing to provide it to competing sales representatives. The First Respondent had a file relating to the same kind of information in relation to competitors of the Applicant, which was provided to him by the customers on his request.

(j) The special arrangements were in most circumstances long standing arrangements, where the intricacies such as costing calculations and margins were not made available to the First Respondent and the arrangements were concluded between the customer and the senior management of the Applicant. As a sales representative the First Respondent had no say in making or changing these arrangements.

(k) The Second Respondent employed the First Respondent because he had experience and knowledge in the flooring industry, which he gained while

working for the Applicant. The job offer that he accepted from Second Respondent was a career advancement for him. The salary was higher and he fulfilled a managerial role. Second Respondent instructed First Respondent to inform the Applicant immediately he accepted the position, which First Respondent did. Second Respondent has not received any confidential information from the First Respondent in relation to the Applicant's business. Second Respondent put up a short affidavit setting out its position, but otherwise abides the decision of the court.

[5] The restraint as set out in the restraint of trade agreement was extremely wide and went way beyond protecting the Applicant against the risk First Respondent may have presented to it in his role as sales representative. In it he agrees that he will not for a period of one year after the date of termination within the provinces of the Republic of South Africa in whatever capacity, directly or indirectly be associated or concerned with, interested or engaged in any business that is with the prescribed business of the employer and prescribed business is a defined term covering the following: "the employer carries on business of the marketing, selling, advertising, hardware, blades, chemicals, trims, tools, and various manufacturing processes and any other products that the employer may at its discretion deal in from time to time".

[6] Prayer 2.2 of the Notice of Motion seeks an interdict in these wide terms paraphrasing the restraint provisions save that the period now asked for is nine months and not a year. This goes much further than the reasonable protection an employer may require and as it stands is way too broad and unreasonable. Mr Combrinck, who appeared for the First Respondent, contended that in the result the restraint is unreasonable and the Applicant is not entitled to any relief under it².

² *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel v Kuhn and Another* 2008 (2) SA 375 (C)

[7] Although the interdict sought in prayer 2.2 is in my view overbroad and accordingly unreasonable and the relief sought in those terms must be refused, this does not provide the whole answer to the Application. What is referred to as the perennial problem of overbreath is discussed in *Den Braven SA (Pty) Ltd v Pillay and another*³, which expressly disapproved of and declined to follow *Avtech*, in which Wallis AJ (as he then was) points out that generally if the conduct complained of falls within the restraint and what is sought is to prevent that conduct, then relief may be granted even if there is other conduct set out in the overbroad restraint of trade agreement which it would be unreasonable to prevent, but which is not being attempted and there is no application to prevent it. It would lead to a failure of justice if the conduct that it would be reasonable to prevent and which falls within the restraint cannot be prevented.

[8] Prayer 2.1 of the Notice of Motion seeks only to prevent the First Respondent being employed by the Second Respondent. The First Respondent agreed not to be employed by a competitor in the overbroad undertaking he gave and so what is sought is a remedy that is foreshadowed by the restraint and, provided protectable interests are established that it would not be in the public interest not to enforce, the relief limited in that way may still be granted. It is necessary therefore to examine whether or not the facts establish a protectable interest that may be endangered if the First Respondent is employed by Second Respondent.

[9] The Applicant relies firstly upon trade connections and secondly on trade secrets and confidential information to which the First Respondent was privy over which it asserts a proprietary interest that it contends is protectable.

[10] A restraint of trade agreement is valid and enforceable unless it is unreasonable because then it is against public policy to enforce it. In a matter where the facts upon which the decision has to be made are essentially common cause

³ 2008 (6) SA 229 (D)

because it is being decided on the *Plascon Evans* rule, the court has to make a value judgment with two principle policy considerations in mind in determining the reasonableness of the restraint. The first is that the public interest requires that parties should comply with their contractual obligations. The second that all persons should in the interests of society be productive and permitted to engage in trade or commerce or the professions. Both considerations reflect not only common law but constitutional values. The four questions that have to be considered in determining the reasonableness of a restraint are⁴:

- (a) Does one party have an interest that deserves protection after the termination of the agreement?
- (b) If so, is that interest threatened by the other party?
- (c) In that case, does the 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 to be maintained or rejected?

The first question of the four that has to be answered therefore is whether or not there is a protectable interest.

[11] With regard to trade connections, to be protectable the connection between the customer and the former employee must be such that it will probably enable the

⁴ *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) paras [15] and [16], approving of *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 767G-H

former employee to induce the customer to follow him to a new business.⁵ The contention made on behalf of Applicant that the First Respondent is able to induce customers to change allegiance because of his special relationship with them is far fetched and fanciful on the facts. First Respondent was only one of many sales representatives calling on the Applicant's long established clients, many of whom were national chains where the pricing and deals were negotiated at head office level. He only did this for a relatively short period and had to service one hundred and forty customers. The customers stocked products of the Applicant and its competitors. There was no evidence of anything out of the ordinary in relation to these customers that would give the First Respondent some hold over them or any factual basis given as to why he would "have them in his pocket", which is what is required to be established. The protectable interest based on the trade connections was accordingly not established.

[12] In relation to trade secrets and confidential information, the only aspect where there is some factual evidence to support such a contention relates to the knowledge the First Respondent accepts he acquired of special pricing structures applicable to some of the customers, his knowledge of the discount structures and his knowledge of the terms for payment of certain clients and early settlement discounts. I accept that this is the kind of information that ordinarily would be regarded as confidential and possibly a trade secret deserving of protection. However on the facts before me the First Respondent was dealing with one hundred and forty customers and to keep such information in his head after he left is some mammoth task. Added to that he was only privy to part of the information and importantly it was that part that the customer itself did not regard as confidential and was willing to share with other sales representatives. This kind of information is by its nature fluid and changes over time. The information the First Respondent would have been able to take away with him is

⁵ *Den Braven SA (Pty) Ltd v Pillay and another* 2008 (6) SA 229 (D) at 236D-E after the extensive quotation from *Rawlins and another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at 541D-H

what he remembers and even then the information he had was of limited value since it did not include costs or margins. Although I accept that this is borderline I have come to the conclusion that it is too flimsy to be deserving of protection, but even if it is, the balance that has to be achieved under the third question of making a value judgment and measuring whether the interest weighs qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive is in my assessment against affording Applicant protection.

[13] It follows that the restraint that the Applicant seeks to enforce against First Respondent is found to be unreasonable.

[13] As against Second Respondent the Applicant seeks to interdict it using Applicant's trade secrets communicated to it by the First Respondent. The Second Respondent says it has not been given any and has no intention of using any information. There is not reason to doubt this evidence. Against a third party like the Second Respondent the Applicant had to set out evidence to establish the delict it relied upon, but the papers did not achieve this result. The application against Second Respondent must fail for want of evidence of it committing a delict of the kind that would justify this kind of relief.

[11] In the result the Application is dismissed with costs.

M PILLEMER, AJ

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Date of hearing : 16 October 2012

Date of Judgment : 19 October 2012