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**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

CASE NO: UM193/22

Reportable: **NO**

Circulate to Judges: **NO**

Circulate to Magistrates: **NO**

Circulate to Regional Magistrates: **NO**

In the matter between:

**MAM TRAILERS (PTY) LTD
(REG.NO :2[...])**

1st Applicant

**ANNUBE (PTY) LTD
(REG.NO.:2[...])**

2nd Applicant

AND

**WALDRI TRAILERS (PTY) LTD
(REG.NO:2[...])**

1st Respondent

**WALDO VAN DEN BERG
ID: 6[...]**

2nd Respondent

**PACIFIC TRAILERS (PTY) LTD
(REG.NO: 2[...])**

3rd Respondent

Heard: **28 APRIL 2023**

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be on **25 MAY 2023**.

ORDER

The following order is made

1. The application is dismissed,
2. The applicants are ordered to pay the costs of the application which shall include the costs reserved by the Gauteng Division of the High Court in Pretoria on **27 September 2022**.

JUDGMENT

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- [1] The applicants brought an application to enforce a restraint of trade clause in a sale agreement entered into with the first respondent. The application was opposed by the respondents.
- [2] The background of the matter is that on **4 July 2019** the applicants signed a sale agreement wherein the first respondent sold a trailer rental business as a going concern. The first respondent was were represented by the second respondent as its sole director and the applicants represented by Maarten Jooste. There was a restraint of trade clause in the agreement that interdict the first respondent from being involved in a vehicle trailer business or any activity similar to a vehicle trailer rental business either as principal, agent, partner, franchisor, representative, shareholder, director, employee, consultant, advisor, financier, or in any other like or similar capacity, directly or indirectly be associated or concerned with interested or engaged in any firm, business,

company or other association of persons which carry on such business within the KOSH area, the territory defined as Klerksdorp, Orkney, Stilfontein and Hartebeesfontein for a period of 5 years from **1 May 2019**.

- [3] Pursuant to the agreement of sale there was a written addendum entered into by the first respondent together with the applicants. In the written addendum the purchasers were amended to the first and second applicants. At the time of the addendum there was an amount of R1 150 000-00 outstanding and it was held in the trust account of a firm of attorneys who were instructed to release the amount upon signature of the addendum. The said amount would then be the full and final payment of the entire purchase price. Thereafter, ownership of the entire business would transfer to the purchasers. The amount was released on **16 September 2021**.
- [4] The applicants allege that in **August 2022** they were alerted to the fact that the second respondent has created a new business venture which is the third respondent. According to the applicants the third respondent is an entity in the business of vehicle trailer rental in the KOSH area with the second respondent as its sole director and operates from 1[...] O[...] T[...] Drive, E..., Klerksdorp. The applicants now brought this application to interdict the third respondent's business and to enforce the written agreement of sale with the restraint of trade clause.
- [5] In contention, the respondents argued that there was no case made out against the second respondent who was not the seller in the sale agreement and the written addendum. In addition, that the applicants did not make out a case to pierce the corporate veil in order to succeed against the second respondent as the director of the first and third respondents. It was argued that clause 8 of the sale agreement speaks to the seller who was the first respondent and not the second or third respondents.
- [6] The relief sought by the applicants is for a final interdict. In order to succeed the applicants must establish a clear right, an injury committed and the absence of a satisfactory remedy. These requirements need to be established

against all the respondents herein. The case of the applicants is based on the sale agreement entered into between the applicants and the first respondent. The second respondent acted on behalf of the first respondent and the third respondent was never a party to the agreement.

[7] The applicants' case is that the trailer business which is in direct breach of the restraint of trade is conducted by the third respondent with the second respondent as its sole director. The question is whether the third respondent can be sued for the enforcement of an agreement that it was not a party to. In addition, have the applicants made out a case to sue the second respondent as the sole director of the first respondent and the third respondent.

[8] It is trite that a restraint of trade is defined as limiting an employee from accepting future employment which could be to the detriment of the current employer. In this matter the clause in the sale agreement was to prevent the seller from competing with the buyer in future.

[9] The court in **Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984(4) SA 874 (A)** held that the restraint of trade agreements are, enforceable unless, and to the extent that they are not contrary to public policy on the basis that they impose an unreasonable restriction on the former employee's freedom to trade or to work.

[10] In **Den Braven SA (Pty) Ltd v Pillay and Another 2008 (6) SA 229 (D)** it was held that:

"The proper approach in my view is for the court to ask itself whether the conduct that the applicant seeks to restrain by way of an interdict is conduct that falls within the terms of the restraint agreement and from which the former employee agreed to abstain..."

[11] It is clear from the above cases that there must be an agreement between the parties which should be enforced. As stated above, the hurdle for the applicants herein is to establish that there is an agreement between them and

the respondents. The applicants' version is that the agreement was between them and the first respondent. In the sale agreement the seller is described as follows "**Waldri Trailers (Proprietary) Limited, Registration Number: 2[...]** herein represented by **Waldo van den Berg, duly authorised hereto by a resolution** with chosen domicilium citandi et executandi at **ADDRESS: 1[...]** S[...] **Ave, Flamwood, Klerksdorp,2571, Telephone No. 0[...], EMAIL ADDRESS:a[...], VAT NUMBER** (hereinafter referred to as "the **SELLER**").

[12] There is no doubt that in the sale agreement the seller is the first respondent. The clause of restraint of trade in the agreement provides that:

"8 RESTRAINT OF TRADE

8.1 *The SELLER, in order to protect the Goodwill of the Business and the interest of the PURCHASER in the Goodwill of the Business, agrees in favour of the PURCHASER and the Business that the SELLER will not within the area referred to in clause 8.2 and for a period of five years after the Effective Date, either as principal, agent, partner, franchisor, representative, shareholder, director, employee, consultant, adviser, financier, or in any other like or similar capacity, directly or indirectly be associated or concerned with, interested or engaged in any firm, business, company or other association of persons which carries on a vehicle trailer rental business or any activity similar to the Business carried on by the SELLER on the Effective Date, or similar to any new but similar (part of a) business established by the PURCHASER after the Effective Date.*

8.2 *The area covered by this restraint shall be limited to the so-called KOSH area, the territory defined as Klerksdorp, Orkney, Stilfontein, and Hartebeesfontein.*

8.3 *The parties agrees that:*

8.3.1 *this restraint is reasonable as to subject matter, area and duration and is reasonably necessary in order to preserve and to protect the Goodwill of the Business.*

8.3.2 *despite the manner in which the restraints in clause 8.1 and the areas in clause 8.2 are grouped together or linked geographically, each of them constitutes a separate and independent restraint, severable from each of the other restraints.*

8.4 *The above provisions will not be interpreted so as to prevent the SELLER from:*

8.4.1 *owing not more than 5 per cent of shares or other securities in any company, if the nature of the business or activity of such company is a business or activity restricted in terms of clause 8.1, or*

8.4.2 *continuing to hold any such interest which it presently hold such.*

8.5 *The PURCHASER acknowledges and accepts that the SELLER is the owner and proprietor of a larger business comprising the manufacturing, retailing, wholesaling, leasing, and general trading of vehicle trailer(s), and related products (including associated goodwill, and Intellectual Property), and that the sale of the Business as a going concern, being the subject matter of this agreement, shall be limited to business, and that the sale being the subject of this agreement shall exclude the Franchise in its entirety, in no way affecting the SELLER's rights as Franchisor, save for that provided in this clause 8."*

[13] Clause 8 of the agreement places an obligation on the seller being the first respondent to ensure that the Goodwill of the Business of the Purchaser is protected. The applicants in the founding affidavit allege that: *"the second respondent has now created a new venture and business being the third*

respondent to trade in direct competition with the first and second applicants' trailer rental business". It is further alleged that "From this it is clear that the First and Second Respondents has breached Clause 8 of the agreement of sale and deliberately and mala fide acted contrary thereto by using the Third Respondent as a vehicle and a tool to act in defiance of the term."

[14] The applicants allege that it is both the first and second respondents that are in breach of the agreement. However, this is clearly not true because the second respondent is not a party to the agreement. In addition, the applicants failed to apply for the court to pierce the corporate veil of the first respondent in terms of section 20(9) of the Companies Act 71 of 2008 in order to hold the second respondent liable. The applicants have also not provided any shred of evidence that the first respondent is a shareholder or partner in the third respondent to sustain the argument that the first respondent is using the third respondent to act in defiance of the agreement.

[15] The applicants in this matter could not make out a case for the applicability of the restraint of trade agreement against the second and third respondents. As far as it relates to the first respondent, the applicants failed to establish any breach of the restraint of trade by the first respondent. Lack of clear right by the applicants cannot result in the granting of an interdict against any of the respondents herein and as such the application stands to fail.

Costs

[16] This application was first launched in the Gauteng Division of the High Court, Pretoria where it was transferred to this Court for lack of jurisdiction. The costs were reserved for determination by this Court. The applicants have not succeeded and I see no reason why they should not be liable for the costs of this application, including the costs reserved by the Gauteng Division of the High Court in Pretoria.

Order:

[17] Consequently, the following order is made:

1. The application is dismissed,
2. The applicants are ordered to pay the costs of the application which shall include the costs reserved by the Gauteng Division of the High Court in Pretoria on **27 September 2022**.

J T DJAJE
DEPUTY JUDGE PRESIDENT
NORTH WEST HIGH COURT DIVISION, MAHIKENG

APPEARANCES

DATE OF HEARING : 28 APRIL 2023

DATE OF JUDGMENT : 25 MAY 2023

COUNSEL FOR THE APPLICANTS : ADV B RILEY

COUNSEL FOR THE RESPONDENTS : ADV R GRUNDLING