REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 536/15

In the matter between:

OASYS INNOVATIONS (PTY) LTD **Applicant**

t/a GL EVENTS OASYS

and

BEULAH HENNING **First Respondent**

ASHLEIGH MASFEN **Second Respondent**

Delivered: 6 November 2015

RULING ON LEAVE TO APPEAL

STEENKAMP J

Introduction

[1] The respondents, Beulah Henning and Ashleigh Masfin, have applied for leave to appeal against my judgment of 10 September 2015.

[2] The respondents *a quo* (the employees) are thus the applicants in the application for leave to appeal. The applicant *a quo*, Oasys, opposes the application for leave to appeal.

[3] The judgment found that the employees were in breach of their respective restraints of trade. I made the following order:

> "27.1 The respondents are interdicted and restrained for a period of 24 months, calculated from 30 May 2015, and in the province of the Western Cape, from:
>
> 27.1.1 soliciting business for their own benefit, or the benefit of the person or entity that trades as Big Show Stoppers, or any undertaking other than the applicant itself, from any of the applicant's customers with whom it currently undertakes or has undertaken business within an 18 month period calculated from 1 June 2015;
>
> 27.1.2 employing or offering employment, causing employment to be offered, or soliciting for employment any of the applicant's employees who were in or are currently in its employ or were in its employ within a period of 18 months calculated from 1 June 2015;
>
> 27.1.3 divulging to any third person or making use of any know-how, trade secrets, or confidential information which is not information already in the public domain;
>
> 27.1.4 procuring or in any way influencing their position with an undertaking such that the services provided to a company customer be terminated, or attended to by any undertaking other than the company. (This provision applies only if the respondents are employed by a company customer).
>
> 27.2 The respondents are ordered to pay the applicant's costs, jointly and severally, excluding the costs for 31 July 2015 and the costs associated with the pleadings filed between 31 July and 4 September 2015."

[4] The employees have raised various submissions in this application for leave to appeal, mainly in relation to the facts. As their legal representative summarised it in their submissions, it is based on:

> "The evidence overlooked / misinterpreted by the Court *a quo* in relation to the evidence led at the hearing."

[5] The reference to "evidence led at the hearing" is somewhat misplaced, as the matter was heard on motion, on an urgent basis, and no oral evidence was led. The evidence before the Court was thus in the form of affidavits and had to be assessed in accordance with the rule in *Plascon-Evans*.[1] That task was complicated by the fact that the parties delivered seven sets of pleadings between them.

[6] Before dealing with the employees' submissions, I address the applicable test to be applied in applications for leave to appeal.

The test to be applied in applications for leave to appeal

[7] As Mr *Hansen* pointed out on behalf of the employees, section 166(1) of the Labour Relations Act[2] read with Rule 30 of the Rules for the conduct of proceedings in the Labour Court permits an appeal from a judgment of the Labour Court to the Labour Appeal Court with leave of the Labour Court.

[8] The traditional test applicable whether leave to appeal should be granted is whether there is a reasonable prospect that another Court may come to a different conclusion to that reached by the Court whose judgment is sought to be taken on appeal.[3] The possibility that another court may come to a different conclusion has to be assessed with reference to the facts and the law, and will involve the consideration of factors such as whether they have satisfied the Court that there is a reasonable prospect of the appeal succeeding.[4] And another aspect for consideration for leave to appeal is whether the matter is of substantial importance for the applicants or both the applicants and the respondent.[5]

[9] But to these authorities must be added three cautionary notes sounded by the higher courts dealing with appeals. The first came from Davis JA in *Martin & East (Pty) Ltd v NUM*:[6]

---

[1] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 *3) SA 623 (A).

[2] Act 66 of 1995.

[3] *Dince v Dept of Education, North West* [2010] 6 BLLR 631 (LC) para [3].

[4] *Tsotetsi v Stallion Security (Pty) Ltd* (2008) 31 *ILJ* 2802 (LC) para [14].

[5] *GA Motor Winders (Eastern Cape) cc v CCMA* (1999) 20 *ILJ* 1802 (LC) para [3].

[666] (2014) 35 *ILJ* 2399 (LAC).

> "The Labour Relations Act was designed to ensure an expeditious resolution of industrial disputes. This means that courts, particularly courts in the position of the court *a quo*, need to be cautious when leave to appeal is granted, as should this Court when petitions are granted.
>
> There are two sets of interests to consider. There are the interests of the parties such as appellant, namely who are entitled to have their rights vindicated, if there is a reasonable prospect that another court might come to a different conclusion. There are also the rights of employees who land up in a legal "no-man's-land" and have to wait years for an appeal (or two) to be prosecuted.
>
> This was a case which should have ended in the Labour Court. This matter should not have come to this court. It stood to be resolved on its own facts. There is no novel point of law to be determined nor did the court *a quo* misinterpret existing law. There was no incorrect application of the facts; in particular the assessment of the factual justification for the dismissals/alternative sanctions.
>
> I would urge labour courts in future to take great care in ensuring a balance between expeditious resolution of a dispute and the rights of the party which has lost. If there is a reasonable prospect that the factual matrix could receive a different treatment or there is a legitimate dispute on the law, that is different. But this kind of case should not reappear continuously in courts on appeal after appeal, subverting a key purpose of the Act, namely the expeditious resolution of labour disputes."

[10] I dare say that these sentiments expressed by the LAC are even more pertinent in a case such as this one, where the application was heard on an urgent basis and the restraint of trade may well have run its course by the time it is resolved by the appeal courts.

[11] The second *dictum* is from the SCA in *Kruger v S*:[7]

> "[2] Before dealing with the merits of the appeal, it is necessary at the outset to deal with the test applied by the high court in granting leave to appeal to this court. Despite dismissing the appellant's appeal, the high court concluded that it was 'possible' that another court might arrive at a different conclusion and that leave to appeal should not be 'lightly refused'

[7] 2014 (1) SACR 369 (SCA) paras [2] – [3].

where the person concerned is facing a lengthy sentence of imprisonment. This is an incorrect test. What has to be considered in deciding whether leave to appeal should be granted is whether there is a reasonable prospect of success. And in that regard more is required than the mere 'possibility' that another court might arrive at a different conclusion, no matter how severe the sentence that the applicant is facing. As was stressed by this court in *S v Smith* 2012 (1) SACR 567 (SCA) para 7:

'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal.'

[3] The time of this court is valuable and should be used to hear appeals that are truly deserving of its attention. It is in the interests of the administration of justice that the test set out above should be scrupulously followed. In the present case, it was not, and this court has had to hear an appeal in respect of which there was no reasonable prospect of success."

[12] And thirdly, the SCA held in in *Dexgroup (Pty) Ltd v Trustco Group*[8] that:

" The need to obtain leave to appeal is a valuable tool in ensuring that scarce judicial resources are not spent on appeals that lack merit. It should in this case have been deployed by refusing leave to appeal."

[13] It is against that background that this application must be assessed.

<u>The employees' submissions with regard to evidence allegedly overlooked</u>

[14] The would-be appellants submit that the court misdirected itself in respect of various findings of fact in that it misdirected itself or overlooked the evidence in various respects. I will deal with each of those submissions.

[8] [2013] ZASCA 120 (20 September 2013).

The finding that Oasys has a protectable interest

[15] It is settled law that customer connections and trade secrets are protectable interests, as set out in para [20] of the judgment.[9] From the evidence on affidavit before the Court it transpired that Oasys has been in existence for 33 years, that it enjoys a good reputation and has a substantial customer base. The employees held key positions with Oasys, as set out in para [21] of the judgment. They were employed for a considerable length of time viz. 15 and 7 years respectively. They concede that they have good relationships with Oasys's customers. They were clearly able to build up relationships with those customers so as to make them able to induce the customers to follow them when they left. That this is so was evidenced with Conferences et al who gave their Cape Wine Show business to Big Show Stoppers as a result of the relationship between the employees and Ms Deidre Cloete.

[16] The variables mentioned by the employees in an attempt to justify the contention that no customer connections worthy of protection exist are unsustainable. Every customer who requires a service will be influenced by pricing and delivery, just like every customer purchasing a product will be influenced by price and quality. This in no way detracts from the fact that they were in a position to influence Oasys's customers by virtue of the position they held so as to be able to direct business to Big Show Stoppers. They could do this by under-cutting Oasys's known price structures or simply misusing the relationship built up with that customer to divert business away.

[17] This ground of appeal has no reasonable prospects of success, given the factual findings on the evidence before the Court.

The finding that Oasys's interests are prejudiced

[18] The attempt to solicit business from Mining Indaba LLC and the fact that Conferences et al gave their Cape Wine Show business to Big Show Stoppers is clear evidence that Oasys's interests are prejudiced in that it ran the risk of losing the Mining Indaba 2016 and lost the revenue it had

[9] With reference to *Rawlins v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) 541 D-I.

historically generated on the Cape Wine Show. This ground of appeal has no reasonable prospect of success.

The enforcement of the restraints will not render the employees economically inactive and unproductive; and this enforcement is a justifiable limitation to the employees' interest when weighed up against Oasys's interests

[19] It was not the employees' case in the court *a quo* that they would be rendered economically inactive and unproductive by virtue of the enforcement of the restraints. In fact, they conceded that there is enough of a customer base and business to go around which would mean they would not need to canvass Oasys's customers. And, as the Court pointed out in para [23], they are not prevented from working for a competitor. They are already gainfully employed as directors of Big Show Stoppers. The only limitation on them is that they cannot solicit the business of the customers with whom they developed connections during the course of their employment with Oasys for the benefit of Big Show Stoppers. There is no detriment to them economically in this regard. This ground of appeal has no reasonable prospects of success.

The restraints or portions of them are not enforceable; are unreasonable; and are contrary to public policy

[20] A litigant who challenges the reasonableness and thus enforceability of a restraint bears the onus to prove such unreasonableness[10] . This, regard being had to the common cause facts, the employees have failed to do. When deciding whether a restraint is unreasonable the court is enjoined to make a value judgment when determining whether to enforce a restraint of trade based on two competing policy considerations. The one is that the public interest requires that parties should comply with their contractual obligations. The other is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or their professions. That is what the court *a quo* did.

[10] *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (A) at 496A; *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A).

[21] The common cause facts relating to the position held by the employees are such that they held the classic position relative to customers to be able to exercise influence over them and which requires the protection afforded by the respective restraints, as set out in paragraph [21] of the judgment.

The conclusion that the employees had breached the restraint relative to Mining Indaba LLC

[22] The common cause facts support the finding that the employees had breached the restraint by the approach to tender for the 2016 Mining Indaba. The approach to Mr Feinsilver was clearly in breach of the provisions of the restraint of trade. Applicants do not deny the approach; rather they state that the email communication which recorded the approach was taken out of context. They offered no explanation as to how it was taken out of context and in what respects a contextualisation would render the approach innocent. As such the finding relative to Mining Indaba LLC was justified. This ground of appeal has no reasonable prospects of succeeding.

Gearhouse and Conferences et al

[23] No finding was made by the court that that the employees breached their restraint relative to Gearhouse or Conferences et al.

The employees had created customer connections whilst in the employ of Oasys that were of such a nature that they would constitute a protectable interest and they were in a prime position to influence those customers and to carry those customers with them

[24] As mentioned in the judgment, the employees were employed as accounts personnel for 15 years and 7 years respectively. The positions held by them and the period of time with which they held such positions gave them the opportunity to build up customer relationships so as to exercise influence over them. They were the key personnel that a customer would call when enquiring about Oasys's services. Their jobs entailed sourcing new business, liaising with existing clients, obtaining the specific needs and requirements of a customer relative to an event or exhibition, liaising

with the design department, producing and presenting quotations, and overseeing the execution, supply and installation of the infrastructure required for an exhibition or event. Their employment with Oasys allowed them to gain personal knowledge of and influence over its customers which would enable them to take advantage of those customer connections.

[25] The employees lay no factual basis to support their submission that the court erred in finding that they had established customer connections which were worthy of protection or that they were in the perfect position to carry customers away with them.

[26] This ground of appeal has no reasonable prospects of succeeding.

The finding that Oasys had trade secrets worthy of protection and the employees had reasonably been suspected of divulging these trade secrets and confidential information to third parties

[27] Oasys's confidential information in the form of pricing and incentives is valuable confidential information which is worthy of protection. The employees have gained valuable information relative to pricing, incentives and the business needs of its customers. They had full knowledge of its price structure. They are the ones who compiled quotes in respect of the exhibitions or events. They had knowledge of incentives given to customers. Price structures have been told to be confidential information worthy of protection by the courts.[11] But no finding was made by the Court *a quo* that the employees had been suspected of divulging these trade secrets and confidential information to third parties. This ground of appeal has no reasonable prospects of succeeding.

The finding that a two year restraint period was reasonable

[28] The onus is on the employees, who seek to escape the restraint, to show that the period of two years is unreasonable. This they have failed to do.

[11] *Meter Systems Holdings Ltd v Venter* 1993 (1) SA 409 (W); *Esquire System Technology (Pty) Ltd v Cronje* (2011) 32 *ILJ* 601 (LC).

[29] Oasys's customers do not do weekly or monthly business it, but their business is limited in most cases to annual or bi-annual exhibitions, as pointed out in para [23] of the judgment. The two year restraint is necessary to negate the influence that the former employees have over those customers. For this reason the period of the restraint is indeed reasonable and enforceable. This ground of appeal has no reasonable prospects of succeeding.

The territory of the restraint was reasonable

[30] The employees say that the majority of Oasys's customers are based in the Western Cape and that they do not service customers from other provinces. They lay no factual basis for the assertion that the territory of the Western Cape is unreasonable, either in their answering papers or in their submissions. The complaint in the answering papers relative to territory was that the restraint should not apply to territory outside of the Western Cape which is in line with the judgment handed down by the Court. This ground of appeal has no reasonable prospects of succeeding.

The judgment is ambiguous in that it is unclear which customers on the list of annexures "A" and "B" are not protected by the restraints

[31] No such ambiguity exists. The employees are restrained from soliciting business of customers with whom Oasys currently does business or has undertaken business within an 18 month period calculated from 1 June 2015. There is no reference to the annexures referred to in the notice of motion in the Labour Court judgment and as such the clause is unambiguous. This ground of appeal has no reasonable prospects of succeeding

The judgment is ambiguous in that it is unclear whether the restraints are applicable only to the customers on the lists that are based in the Western Cape, as long as the customer exhibitions are held elsewhere

No such ambiguity exists. The employees are restrained from soliciting business of customers with whom Oasys does business or has

undertaken business within an 18 month period calculated from 1 June 2015. The prohibition is against soliciting business in the Western Cape from the customers specified in the order. This ground of appeal has no reasonable prospects of succeeding.

The judgment that is ambiguous in that it is unclear as to whether the restraints are operative to exhibitions in the Western Cape, as long as the clients on the lists are based elsewhere

[32] No such ambiguity exists. The employees are restrained from soliciting business of customers with whom Oasys currently does business with or has undertaken business within an 18 month period calculated from 1 June 2015. It was the employees' case that they only did business with customers in the Western Cape. The prohibition is against soliciting such customers' business in the Western Cape. This ground of appeal has no reasonable prospects of succeeding.

Conclusion

[33] There are no reasonable prospects that another court will come to a different decision based on the facts that were placed before the court *a quo* on affidavit.

[34] Both parties asked for costs to follow the result. I see no reason in law or fairness to differ.

Order

The application for leave to appeal is dismissed with costs.

_____

Steenkamp J

APPEARANCES

APPLICANTS (respondents *a quo)*:	Blane Hansen of Michael Ward attorneys.
RESPONDENT (applicant *a quo*):	D M B Watson Instructed by Shepstone & Wylie.