



REPUBLIC OF SOUTH AFRICA

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN
JUDGMENT

Case no: C 633/15

In the matter between:

TWK AGRICULTURE LTD

Applicant

and

WAGNER, WYNAND JOHANNES
(SNR.)

First Respondent

WAGNER, WYNAND JOHANNES
(JNR.)

Second Respondent

Heard: 7 August 2015

Delivered: 12 August 2015

Summary: (Restraint of trade – urgent – protectable interest established – restraint reasonable except for duration given client base sought to be protected and closure of branch from which clients were serviced)

JUDGMENT

LAGRANGE J

Introduction

- [1] This is an urgent application to prevent the individual respondents in this matter from soliciting the custom of clients or accepting business from clients of the applicant for a period of two years from 30 June 2015 and to prevent them from using any confidential information, trade secrets or particulars of clients for their own or for a third party's purposes.
- [2] The respondents are both short-term insurance brokers formerly employed in the Mossel Bay branch of the applicant's business. Previously the first respondent burned his own brokerage business Wagner & Van Zyl (Pty) Ltd, which he sold to the applicant with effect from 1 June 2013.
- [3] The applicant decided to close the branch and to service its existing clients in the Mossel Bay area from its Knysna branch, pursuant to which it retrenched the respondents with effect from 30 June 2015. The respondents are contesting the fairness of their retrenchment in other proceedings.
- [4] In mid-July 2015 the applicant received numerous cancellations of their mandate as brokers from clients who had transferred their mandate to All about Insurance Brokers or UMA Underwriting Consultants with effect from 1 August 2015. A number of the change of mandate forms contained a written statement to the effect that the policyholder had decided, of their own choice, to retain one of the respondents as their broker. The respondents are now registered as brokers with the two entities in question. The respondents claim that the applicant's former clients, entirely of their own accord, cancelled the applicant's appointment as their broker and transferred their mandates and not at the instance of the respondents' solicitations.
- [5] In terms of the respective restraint of trade agreements signed by the respondents they undertook, in any capacity, not to be involved or interested in any undertaking in the insurance industry for a period of 24 months after the termination of their service, for whatever reason, in the Mossel Bay area in respect of the first respondent and in the Eastern Cape area in respect of the second respondent. They also undertook not to make use of any information or knowledge, inter-alia of the applicant's

clients acquired by the respondents by virtue of their positions or arising from the business of the applicant. Lastly, they undertook for the duration of the restraint period not to solicit the business of any party that had been a client of the applicant in the 12 months prior to the termination of their services and the inception of the restraint period.

[6] The respondents do not dispute the existence of the restraint of trade agreements they both concluded with the applicant. Similarly they do not deny that they have a close relationship with the clients, whom they describe as “friends of the respondents”. They maintain that the clients are free to choose their own insurance broker and cannot be forced to stay with the applicant. Consequently, the respondents contend that the cancellation of the applicant’s mandate and the appointment of the new brokers does not amount to a breach of their restraints. They also contended that the period of the restraint is unreasonably long and it is also unenforceable owing to the unfairness of their dismissals.

[7] In ***Omni Technologies (Pty) Ltd t/a Gestetner Eastern Cape v Barnard and others***¹, the court reiterated the primary competing policy considerations in deciding on the enforceability of a restraint, namely that the public interest requires that parties should comply with their contractual obligations (the maxim applicable is *pacta servanda sunt*) and that all persons should in the interests of society be productive and permitted to engage in trade and commerce or the professions. Elaborating on this balancing of rights, the court stated:

“A restraint is against public policy and unenforceable if it would prevent a party after termination of his or her employment from participating in trade or commerce without a corresponding interest of the other party deserving of protection. Five questions require to be answered when the reasonableness of a complaint is considered (the fifth one being implied by the third).

- (i) Does the one party have an interest that deserves protection after termination of the agreement?
- (ii) If so, is that interest threatened by the other party?

¹ [2008] 2 All SA 207 (SE)

- (iii) In that case, does such interest weigh up qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?
- (iv) 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?
- (iv) Does the restraint go further than necessary to protect the interest?"²

The existence of a protectable interest

- [8] The applicant does not seek to enforce the geographical restraint preventing the respondents from pursuing the business of insurance broking in the areas mentioned. All it seeks is to preserve its interest in its trade connections with clients with whom it did business in the 12 months prior to the termination of the respondents' services. The applicant's interest in those connections is an important aspect of the applicant's incorporeal property in the form of goodwill and it is trite law that it is entitled to protect that interest. When the respondents dealt with those clients, they did so on behalf of the applicant's business and not for their own account. Whether those clients were ones that they had originally brought into the applicant's business through the sale agreement, or whether those with clients they acquired in the course of working for the applicant, the insurance business and relationship developed with those clients and was that of their employer and not theirs to exploit for their own personal gain, even if they had been responsible for obtaining such business or sustaining it through their personal relationship with those clients. The respondents argued that the protectable interest which the applicant had ended when it closed the Mossel Bay office in which they were employed.
- [9] The applicant's right to immunise itself from the prospective exploitation of its confidential client information is also a proprietary interest it is entitled to protect.

² At 211

The threat to the applicant's protectable interest

[10] The respondents contend that there is no proof that the respondents had influenced the choice of the applicant's clients to transfer their business to the brokerages in which they are presently engaged, in the absence of any affidavits from the applicant's erstwhile clients. They also argued that there was no evidence of any further cancellations by the applicant's clients after the initial surge of applications and therefore no reason to believe that a further loss of clients to the respondents' current brokerage agencies would occur, and it was suggested in argument that the applicant had an alternative claim in damages which it could pursue in respect of the business it had lost.

[11] Firstly, it may be so that the applicant did not obtain an affidavit from any of the former clients who transferred their business to the respondents. It may also be true that those clients might not have required much inducement to cease doing business with the applicant after it closed the office where the respondents were employed. However, it is apparent that the vast majority of the approximately 70 forms revoking the applicant's mandate and appointing the new brokerages appear to have been signed on 1 July 2015, the day after the respondents were retrenched. It seems highly improbable that this simultaneous mass cancellation immediately after the respondents' services were terminated would have occurred without active canvassing by the respondents. Secondly, the fact that such a large number of cancellations were effected initially provides little reassurance that if the respondents are not restrained at this point they will not redouble their efforts thereafter to obtain more of the applicant's existing business.

The balance of competing interests and other public policy considerations.

[12] As mentioned, the applicant seeks to prevent the respondents from re-launching independent careers as insurance brokers by exploiting the applicant's trade connections. The applicant does not seek to prevent them from pursuing those careers by soliciting insurance business from other potential clients within the ambit of the applicant's geographical sphere of operation. Granting the relief would not require the respondents

to abandon their work as insurance brokers, but merely not to engage with the applicant's clients for a defined period. It would curtail their ability to use the applicant's client base as a foundation for their future business. They may feel aggrieved that they had personally cultivated those clients during their employment with the applicant, but that did not make those clients 'theirs'. On this basis the applicant's interest in enforcing the restraint outweigh those of the respondents in not enforcing it.

[13] It was also argued by the respondents that the circumstances of their retrenchment should be considered as a factor militating against the enforcement of the restraint. In support of this, the respondent's cited the judgment of the industrial court in **Sharp v New Wave Surfing Promotions CC t/a Island Style**.³ In that case the court awarded an employee compensation for his unfair retrenchment calculated on the basis of the financial loss suffered by the employee as a result of the imposition of a restraint of trade. However, there is ample later authority that the question of determining whether or not an employer has demonstrated a proprietary interest worthy of protection after an employee is dismissed is quite distinct from the question whether or not the employee was fairly dismissed.⁴

[14] The applicant seeks to prevent the respondent's from doing business with those of its clients who were doing business with it in the 12 months preceding the inception of the restraint but seeks to extend its right to exploit that base for two years hence, in circumstances where it has also closed the branch in which that business was generated and from which clients were serviced. While its interest in that client base is undeniable and though it maintains it will service those clients from its other branches in that part of the country, its commitment to the client base of that branch is clearly not what it was when it maintained a local branch office to service that clientele more conveniently. In the circumstances, I think a restraint period of twenty four months is unreasonable to try and preserve clients who were not necessarily clients for longer than a year and given

³ [1994] 10 BLLR 149 (IC)

⁴ See **Bonfiglioli SA (Pty) Ltd v Panaino (2015) 36 ILJ 947 (LAC)** at 954, para [24].

the applicant's reduced branch profile and dedicated resources in that area. A period of twelve months would constitute a more reasonable limitation in my view.

Existence of an alternative remedy

[15] It was argued that the applicant could simply sue the respondent's for damages rather than stopping them from doing business with its former clients. The applicant can do this in any event, but curtailing the respondent's unlawful business activities is not what a damages claim in due course would achieve, nor would it stop them committing further breaches of the restraint agreement in the near future.

Urgency

[16] The application was launched on 29 July and was set down for hearing on 7 August 2015. The evidence of the cancellations came to light in July. It might have been brought earlier in July, but it was brought within reasonable time. On the facts of the case, the respondents had sufficient time to adequately oppose the application. I am satisfied the matter is urgent enough to be heard within 10 days of it being filed.

Costs

[17] As the respondents appear to have solicited a significant number of the applicant's former clients and the applicant is largely successful, costs should follow the result.

Order

[18] The matter is heard as one of urgency.

[19] The first and second respondents are interdicted from directly or indirectly:

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19.1 Soliciting the custom of clients of the applicant and/or accepting any business or custom from the clients of the applicant, and/or in any manner enticing the clients of the applicant to terminate their business with the applicant, in particular those clients appearing on

the schedule annexed hereto as Annexure "A", for a period of 12 (twelve) months; and

19.2 Conducting any business with, or having any business relationship with, any of the cancelled clients of the applicant that have cancelled their business with the applicant after 30 June 2015, and in particular any clients appearing on the schedule annexed hereto as Annexure "A", for a period of 12 (twelve) months; and

19.3 Revealing or disclosing or in any way utilising, whether for the first and second respondent's own purposes, or for the purposes of any third party, any of the applicant's confidential information and/or client particulars relating to any clients appearing on the schedule which is Annexure "A" to this order.

19.4 This order applies only to clients that were clients of the applicant during the period 1 July 2014 to 30 June 2015.

19.5 The respondents are jointly and severally liable for the applicant's costs, the one paying the other to be absolved.



Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

Applicant: S Snyman of Snyman Attorneys

Respondents: J O Hanekom

Instructed by: Leon Frank & Partners.

LABOUR COURT

From:

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12/08/2015 09:53

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ANNEXURE "A"

SCHEDULE OF CLIENTS

CLIENT NAME	REF	POLICY
BOSHOFF, J		ALL4U-0018025
BOSHOFF, J		MULPX-0017719
BOTHA & HENDRICKS CHJ & HS		19862062
CARSTENS, M		MULPX-0017738
COLLINS, H		612307938
DE BEER, MM		602198359
DELMOS CONSTRUCTION		OMN-0021489
DELMOS CONSTRUCTION		ENG-25184
FISHER, DC		002-303285
FISHER, DC		002-451113
FIZILO, B		70319374007
GOUWS, NE		613792449
AANDIEBRAND VLEISMARK	AANDI001	78621438943
VERMEULEN JJJ		619001672
KEHEMI, CM		70319281535
KHOZA, AL		002-171533
KRITZINGER IC & PHH VAN BILJOEN		22080469
KUNNEKE, T		612178054
KUYLER BAKWERKE		15626237
LENSING J	LENSJ002	73201400331
LENSING, PJ		ASSIST - 0008784
LENSING, PJ		PALDN - 0008783
LENSING PJ		615390623
LIEBETRAU, V		MULPX-0017704
MARAIS, C - LEGASSICK		ASSIST - 0009908
MARAIS, C - LEGASSICK		MULPLX - 0009907
MARAIS, EV		002-159342
MATULEDI, TV		70319448853
MEYER, CA		24412448
MEYER, CC		600658093
MKHIZE, GM		24331803
MULLER, LL		CHAR001-0017711
MULLER, LL		MULPLX-0017710
MYEKO, NM		002-54747
MYNHARDT, G		610247288
NAUDE, IA		ASSIST - 0000705
NAUDE, IA		PALDN - 0000704
NAUDE, IA		612469040
NO 1 HOLIDAY		5511906285
NOMDO, JW		OCR-0021531



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NOMDO, JW		TLC-0017746
OLIVIER, A		602195023
OSBORNE, DS	OSBOD001	7450478
OUDTSHOORN OFFISIERE CLUB		786-0017727
PAHLE, CB		ALL4U-0017857
PAHLE, CB		PALDN-0017749
PAHLE, CB		OCR-0025794
PAMBANI, M		002-133568
PIENAAR, S		609485205
PIETERSE, JS		MULPLX-0020187
PRETORIUS, PJC		MULPLX-0017747
REYNECKE, CH		610431828
SIMELANIE, AL	SIMEA002	7450494
SIMELANIE, AL		002-357544
SIMELANIE, AL		002-148149
SIXAXENI, NO		CHAR001-0017744
SIXAXENI, NO		PALDN-0017743
SMIT, RW		732 - 0008267
SMIT, RW		ASSIST-0007926
SMIT, RW		ALL4U-0017906
SMIT, RW		MULPLX-0017723
SNYDERS, D		ALL4U-0017911
SNYDERS, D		TLC-0017728
SNYMAN, M		601047942
STAR LUBRICANT DISTRUBUTORS		BUS-0005492
TYELELA, GG		55627980
VALENTYN, E		MULPLX-0017731
VAN DEN BERG, DPJ		ALL4U-0018106
VAN DEN BERG, DPJ		CHAR001-0017734
VAN DEN BERG, DPJ		MULPLX-0017735
VAN DEN BERG, DPJ		4000401601
VAN DEN BERG, JL		4000515149
VAN DER HOVEN, H		ALL4U-0018107
VAN DER HOVEN, H		MULPLX-0017739
VAN DER HOVEN, H		TLC-0017740
VAN SCHALKWYK CW		
VAN DER WALT, BJ		611002459
VILJOEN, JL		MULPLX-0017742
WAGNER, WJ		609883006
WANER AMP & WJ		74721440747
WALANZA, NV		556622539
WICOMBE, S		556478616
WILDEMANS, NE		22194089
WITHAM, KA		732 - 0008700
WITHAM, KA		ASSIST - 0012236
WORLD OF BEAUTY		786 - 0010808
BENJAMINE E		89321455951

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ENGELBRECHT, C		888034235
ERICA GUEST HOUSE		BB 0274
GOUWS, NE		002-643276
HADDAD E		18678545
HADDAD SI		18677647
HARMSE AM	HARMA001	22112510
JANSEN, PJ		70320260739
JERLING EM		PER-0026996
KANNEMEYER BJ		6528260114
KHOZA SC		002-634917
KHOZA, AL		002-422055
LA GRANGE MJ		MER-0006380
LE GRANGE M		PER-0026714
LE ROUX HR		89321445258
MOCWANE, DS		556266867
MTSHA, MW		200-54900
MTSHA, MW		002-564035
NONTONGANA, B		89321044690
OLIVIER, SMW & AD	OLIVS001	LMC 0000 - 07797
OOSTHUIZEN CV & AS LERM	OOSTC002	LMC0000-11851
PRINSLOO A		951147492
RIPCOR LANDBOUDIENSTE	RIPCO001	22858113
RISI, VP	RISIV001/000	GRC4325659
RISI, VP	RISIV001/000	GRC4325659
ROUX, EE		89321326535
S HADDAD AGRICULTURE SERVICES		6464718
SIXAXENI, MN		89321136787
SMIT J		89321333833
SMIT, JC		89320094576
SMIT, M	SMITM004	7450494
SNYMAN, M	SNYMM002	78620973048
SWANEPOEL EH		951157661
TOWN HOUSE,		22021097870
VAN DEN BERG, DPJ		4000401601
VAN DER MERWE C		20487842
VAN DER WALT BJ		89321453967
VERWEY AR		609930837
VORSTER LB		557265149
WANDRAG S	WANDS001	73201400331
128 BEACH ROAD		22021399259
AQUA FLOC	AQUAF001	63119253106
ARNISTON GASTEHUIS		22019598087

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BRAAF SM	BRAAS001	7450494
CLAASSENS AH	CLAAA001	73201400473
CLAASSENS R & EF SNYMAN	CLASR001	7450494
CLAASSENS R & EF SNYMAN	CLASR001	22858113
CLOETE, TM	CLOET002	7450494
DU PLESSIS JP		63307532717
DU TOIT, C	DUTOC001	73201400473
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E KASK 1/a KASSIESKRAAL BOERDERY		ENV0000-01108
FLOWERS 4 U	FLOWE001	63146933060
FOURIE J		QT8124915
FOURIE J		23681
FOURIE, WBS		557107456
GLOBAL TRUST		63119250764
HAKUNA MATATA GAMELODGE		55119854047
HANEKOM, WJ	HANEW001	73201400473
HIGHVIEW LODGE		22019604727
IKAPA COMMODITIES		63119836803
INFINITE POSSIBILITIES		19959354
JOHAN SOEKOE ACCOUNTANT		63118818284
JORDAAN, LJ		Santam
KASSIESKRAAL BOERDERY		53521426062
LE ROUX, H	LEROH001	7450494
LETCA VERVOER	LETCA001	78620748089
LINGENFELDER HJ	LINGH001	73201400473
LUDICK AE	LUDIA001	7450494
LUDICK, L	LUDIL001	7450494
MEERHOF LODGE		220 2079 4691
METCALF, WF		606 602 375
METSI CHEM IKAPA		63118827864
METSI ENVIROMENT		ENV0000-00708
NIGRINI DJ		C001785
OLIVIER, HP	OLIVH001	7450494
PHALE CB		OCR-0022239
PLOEBAK STAALWERKE	PLOEB001	22112472
PRETORIUS P		18752380
PRETORIUS CJ	PRETC002	7450494
PRETORIUS PW		18752268
RESTING PALMS		22021379173
RT CELLULAR / CELLULAR GROUP		OMN-0026485
SCHOERDER MT		74719796492
SEDUMEDI, MH		559667488
SMIT, M		70321034801
SONDEREND FABRIKANTE	SONDE001	22112472
STAFFCOR RECRUITMENT AGENCY	STAFF001	22112472

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SWAWEL VET	SWAWE001	GRC4325659
TERBLANCHE R	TERBR002	7450494
TERBLANCHE, WJ	TERBW001	73201400473
ULTRA WATER		63118826720
VAN DER NEST VERVOER		OTTA - 0023309
VAN DER NEST, JG	VANDJ006	7450494
VAN STADEN, PAJ	VANSP001	73201400473
VAN WYK CPA	VANWC002	73201400473
VERMEULEN, WA Dr		COM4726551
VISSER, JG	VISSJ002	73201400473
WAGNER W		618241858
WATERLOO TRUST	WATER002	63120883196
WERNER KASK FAMILIE TRUST		6528026114
YOUNGSHOPE PLASE	YOUNGS001	22112510

