REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 290/15

In the matter between:

ARCHER'S EDGE EQUIPMENT CC **Applicant**

and

BRADLEY MATTHYSEN **First Respondent**

MAGNUM ARCHERY CC **Second Respondent**

BAZIBIX (PTY) LTD T/A **Third Respondent**

BAZIFON LABOUR

Heard: **24 February 2015**

Delivered: **10 March 2015**

Summary: Restraint of trade. Not urgent, no protectable interest. Restraint unreasonable and unenforceable.

JUDGMENT

STEENKAMP J

Introduction

[1] The applicant, Archer's Edge Equipment cc, seeks to enforce, on an urgent basis, a restraint of trade clause against its former employee, Bradley Matthysen; his new employer, Bazifon Labour (a labour broker); and the entity where he is now employed through the labour broker, Magnum Archery cc. Magnum is in competition with Archer's. Both sell and service crossbows. Archer's has the exclusive rights to the Bowtech brand, and Magnum to Hoyt.

Background facts

[2] The employee, Matthysen, worked for Archer's. He is a professional bow hunter. He was employed in 2007 as a sales manager. He honed his skills and was promoted to shop manager. He resigned in July 2014 to take up a position as bow technician with another competitor, Wildman Zambezi. The applicant's owner and sole member, Redge Grant, accepted undertakings from Matthysen that he would not divulge the applicant's confidential information and would not solicit its customers, suppliers or staff.

[3] As part of his contract of employment with Archer's, Matthysen had signed a restraint of trade agreement including the following terms:

> "During your employment and for a period of **2 years** after the termination of your employment within a radius of **50 km** from the premises of the Company, for any reason whatsoever : -
>
> You will not knowingly be directly or indirectly employed, interested or engaged within the Republic of South Africa in any capacity whatsoever with any company, firm or business which is similar to or which competes with the business of the Company or any significant part of the business of the Company at the time of the termination of your employment.
>
> You will not solicit or tout for any clients [*sic*] or prospective clients of the Company or suppliers or any other connections of the Company, nor shall you seek to solicit, tout for or entice any of the staff of the time being of the Company or any of the Company's clients."

[4] Matthysen's employment with Wildman Zambezi was clearly in breach of the restraint clause. However, given the assurances he gave to Grant, Archer's did not enforce it.

[5] Some six months later, in January 2015, Bazifon Labour (the third respondent) recruited and placed Matthysen as a bow technician for Magnum Archery (the second respondent) with effect from February 2015.

[6] On 26 January 2015 Grant sent Matthysen a text message indicating that he was aware that Matthysen was going to work at Magnum. On 6 February the applicant's attorneys sent Matthysen a letter reminding him of the restraint agreement. They demanded a written undertaking that he would abide by the restraint "and that you shall not continue your employment with Magnum Archery in contravention of the applicable restraints".

[7] The third respondent, Bazifon Labour, responded the next day. Its managing director, Arnoux Mare, explained that it (and not Magnum) employed Matthysen. He said that they "want this matter to be resolved" and asked for a copy of the employment contract.

[8] A roundtable discussion took place at Bazifon on 10 February 2015. Both parties' attorneys were present. The next day, 11 February 2015, Matthysen's attorneys made the following proposals:

8.1 Matthysen would not in any way contact any of the known customers of Archer's Edge.

8.2 Matthysen would not in any way contact or influence any of the applicant's employees regarding their employment or the applicant's operations or those of any direct competitor.

8.3 Matthysen would be employed as a bow technician and would not form part of any sales of any items of any make.

8.4 Any information regarding the applicant and its operations would remain confidential.

8.5 The period of restraint should be reduced to one year.

8.6 Should the applicant accept these undertakings and proposals, a settlement agreement would be drafted and made an order of court.

[9] The applicant did not accept Matthysen's undertakings or proposals. It launched this application on an urgent basis on 16 February 2015 to be heard on 24 February 2015.

Evaluation / Analysis

[10] The respondents take issue with the alleged urgency. I shall deal with that aspect first.

Urgency

[11] Matthysen started working for Wildman Zambezi in August 2014. The applicant new that. Its managing director, Redge Grant, also knew that Wildman sells bows and archery in direct competition with Archer's. Yet he took no steps to enforce the restraint, having accepted Matthysen's undertakings. It is only when Matthysen started working for Magnum (through Bazifon) that the applicant sought to enforce the restraint on an urgent basis on one week's notice.

[12] Had the matter been urgent, and had the applicant been serious about enforcing the restraint of trade clause, it would have done so six months ago when Matthysen started working at Wildman Zambezi. It attempts to do so only now, on an urgent basis and on short notice, in circumstances where the respondents were prepared to offer the applicant essentially the same undertakings that it had been prepared to accept from Matthysen and Wildman Zambezi at the time.

[13] The applicant tries to explain this away by saying that, at Wildman, Matthysen "was not working in competition with the applicant, but was working on guns." But it is common cause that Wildman also sells and services crossbows; in the answering affidavit, Matthysen says that he worked as a bow technician at Wildman; and the applicant does not explain why he was prepared to accept undertakings from that entity but not from the respondents in this case.

[14] Matthysen started working for a competitor of the applicant in breach of the restraint of trade clause more than six months ago. His move from that entity to Magnum does not make the present application urgent. It should be struck from the roll for that reason alone.

[15] In any event, the applicant had slim prospects of success on the merits. Even though it is not strictly necessary, given my view on urgency, I will address those aspects briefly.

Restraint of trade: the principles

[16] Counsel for both parties referred to the principles set out in *Esquire*.[1] The court, having summarised the relevant principles, held that:

> "A restraint is valid if there is a proprietary interest which justifies protection. Those interests are usually in the nature of trade secrets, know-how, pricing or customer connections. Therefore, a restraint would be and enforceable restriction on the activities of an employee who (for example) had access to the company's customers and could use his/her relations with the company's customers to the advantage of a competitor and to the detriment of the company.
>
> …
>
> A restraint would be unenforceable if it prevents a party after termination of his or her employment from partaking in trade or commerce without a corresponding interest of the other party deserving of protection. Such a restraint is not in the public interest."

[17] The court in *Esquire* also referred back to the well-known test for the enforcement of a restraint of trade agreement in *Basson v Chilwan*:[2]

17.1 Is there an interest which is deserving of protection upon termination of the agreement?

17.2 Is such an interest being prejudiced by the other party?

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[1] *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronjé* (2011) 32 *ILJ* 601 (LC).

[2] 1993 (3) SA 742 (A) 767 G-H.

17.3 If so, does the interest way qualitatively and quantitatively against the interests of the other party not to be economically inactive and unproductive?

17.4 Is there an in aspect of public policy, having nothing to do with the relationship between the parties, which requires the restraint being enforced or not?

An interest worthy of protection?

[18] The applicant alleges that the information regarding its customers and suppliers, its costing and fee structures, is of a nature deserving protection. It says that Matthysen is threatening those interests merely by joining Magnum. It also alleges that Matthysen was the public face of the applicant and its exclusive brand, Bowtech. It adds that most of the applicant's customers are active in the area in a radius of 50 km of its shop. And it alleges that "the integrity of the applicant, its brand and its services also constitute protectable interests within the applicant's business."

[19] In their answering affidavits, the respondents pointed out that the applicant is the exclusive seller and distributor of Bowtech in South Africa. Magnum simply cannot and does not compete in that regard. It is the sole distributor for Hoyt bows. The knowledge Matthysen had in respect of Bowtech is of no use to Magnum. Where Archer's and Magnum have shared rights to sell and distribute other brands, the suppliers, costing and fee structures are known to both entities.

[20] Matthysen does not work as a salesperson for Magnum, but as a bow technician. That is where his contact with and influence over Magnum's customers lies. And he has in any event given an undertaking that he will not disclose any confidential information pertaining to Archer's. The applicant has not made any allegation in its founding papers that Matthysen has indeed disclosed such information - neither in his present position nor in his employment with Wildman Zambezi in the previous six months.

[21] The only evidence that Matthysen was the "public face" of Bowtech is a photograph of him dressed in a Bowtech T-shirt and holding a crossbow of that brand in a magazine. But he is not identified in the photograph and there is no allegation that he acts for that brand or the applicant as a "brand ambassador" in a professional capacity, analogous to, say, AB de Villiers using exclusively Kookaburra cricket bats.

[22] The applicant itself says that most of its clients are active in and reside within an area of 50 km around Pretoria. The parties were *ad idem* that the hub of the bow and archery industry is in Gauteng (more specifically Northern Gauteng). The radius of 50 km, although it does not appear unreasonable on the face of it, does become unreasonable in the light of that fact. I agree that it appears to be nothing but an attempt to restrain and control open market competition.

[23] I'm not persuaded that there is an actual interest that justifies protection in the form of the restraint clause. The applicant is simply seeking to restrain any competition with in the area within which it operates. And it seeks to do so for an unreasonable period of two years in circumstances where Matthysen was prepared to accept a period of one year and to have that made an order of court, without conceding that it was reasonable, but in an effort to avoid the costs of this litigation.

Prejudice

[24] In the absence of a protectable interest, there can be no real prejudice to the applicant. But in any event, the respondents have given the undertakings that would have negated any prejudice; and they were prepared to make those undertakings the subject of a court order. It would have been a simple matter for the applicant to obviate any perceived or threatened prejudice.

Weighing up

[25] The applicant's interest, if any, must also be weighed up against the interest of Matthysen not to be economically active and productive. And the aspect of public policy must be considered together with this question.

[26] A restraint will generally be unenforceable if it prevents a party after termination of his or her employment from partaking in trade or commerce without a corresponding interest of the other party deserving of protection. When I weigh up the competing interests in this case, it appears to me that Matthysen would be prevented from being economically active in his area of expertise, should the restraint be enforced. On the other hand, the applicant has not shown a persuasive interest worthy of protection. The applicant is merely seeking to stifle competition. Grant has also not adequately explained why he seeks to enforce the restraint against Magnum when he was satisfied with the necessary undertakings from Matthysen and Wildman Zambezi at the time.

[27] On balance, I am not satisfied that the interests of the applicant outweigh those of the respondents. And with regard to public policy, it appears to be more important for Matthysen to remain economically active than it is for the respondents to be prevented from competing with the applicant, especially where Archer's and Magnum have the exclusive rights to different brands.

[28] Lastly, I consider the requirements for a final interdict.

Clear right

[29] Given my findings above, I am not satisfied that the applicant has shown a clear right to the relief it sought.

Irreparable harm

[30] The only harm that the applicant may suffer is that Magnum would have gained the services of a skilled and experienced bow technician. That may have the effect that some customers would prefer to have their equipment serviced by Matthysen in that capacity. That is in the nature of competition in an open market. It is not enough to entitle the applicant to the relief it seeks.

Absence of another satisfactory remedy

[31] The applicant had another remedy available to it. It could have accepted the undertakings offered by the respondents, as it did in the case of Matthysen's employment with Wildman Zambezi. Instead, it incurred unnecessary costs by engaging the respondents in litigation in circumstances where the urgency had dissipated.

Conclusion

[32] The application is not urgent. Any urgency that may have existed at the time when Matthysen left the applicant's employment had dissipated by the time it approached this court six months later.

[33] With regard to costs, I take into account that the applicant has not made out a case for urgency; that its prospects of success were in any event slim; that the current litigation could have been obviated by the applicant accepting the respondents' undertakings, as it had done before in the case of Wildman Zambezi; and that both parties have asked for costs to follow the result. In law and fairness, the applicant should be ordered to pay the respondents' costs.

Order

[34] I therefore make the following order:

34.1 The application is struck from the roll for lack of urgency.

34.2 The applicant is ordered to pay the respondents' costs.

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Steenkamp J

APPEARANCES

APPLICANT:	Ms S Lancaster of Crafford attorneys.
RESPONDENTS:	Ms C Prinsloo Instructed by Maree attorneys.