THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

Reportable

CASE NO: J736/12

In the matter between:

TUV SUD SOUTH AFRICA (PTY) LTD **First Applicant**

and

BRANDERS, RONALD JOHN **First Respondent**

EQUITY CONSULTING ENGINEERS LIFTS AND ESCALATORS (PTY) LTD **Second Respondent**

Heard: 21 April 2015
Delivered: 24 April 2015
Summary: (Restraint of trade)

JUDGMENT

LAGRANGE, J

Background

[1] This is an urgent application to restrain the first and second respondents from breaching the first respondent's restraint of trade undertakings contained in clause 6.1 of his contract of employment with the applicant, his former employer.

[2] The applicant is one local operating arm of an international firm. It describes its business as covering consulting, testing, certification maintenance management and training of vertical transportation systems or, in more everyday parlance, lifts and escalators. It first established its presence in South Africa with the foundation of TUV SUD South Africa (Pty) Ltd in May 2010. On 1 March 2012, TUV SUD South Africa holding (Pty) Ltd acquired WAC Projects (Pty) Ltd. The first respondent, Mr Brander as a 16% shareholder in WAC was one of the sellers of the firm in that transaction. It is common cause that the applicant has 42 years experience in the lift industry, 33 years of which he spent working for Schindler Lifts SA (Pty) Ltd.

[3] WAC subsequently underwent a change of name to become the applicant and Branders remained an employee of the applicant. As the applicant retains the same corporate identity as WAC, the contract of employment concluded between Branders and WAC around the time of the sale of shares in March 2012 remained a binding contract between him and the applicant. When he concluded the agreement selling his shares in WAC Branders also undertook certain obligations restraining him from competing with the business for a period of three years, but those are of no direct relevance in this application which is solely concerned with the enforcement of the restraint provisions of his employment contract.

[4] When the contract was concluded, Branders was appointed as inland regional manager of the company with duties and responsibilities determined by the CEO of the applicant from time to time. He claims that the at some stage his job title was unilaterally altered during 2013 to that of maintenance manager a claim which the applicant does not dispute but merely contends he did not pursue as a

grievance at the time. In any event, he was obviously replaced in this capacity at some stage prior to his resignation by the deponent to the founding affidavit, Mr Rahim. Ostensibly, this was one of the reasons which led Branders to hand in his resignation on 12th of January 2015 with his effective termination being the end of March 2015. What the applicant seeks to enforce is the restraint provisions in his employment contract which are applicable for a 12 month period from 1 April 2015 until 31 March 2016.

[5] From correspondence between the parties during February and March 2015 it is clear that the applicant was reluctant to relinquish his involvement with clients he had been servicing and the applicant cautioned him against making any commitments about his continued availability to such clients and against soliciting business from them contrary to the terms of his restraint. At the same time the parties did open up discussions to explore the possibility of Branders becoming a subcontractor to the applicant. However these discussions foundered when Branders presented his counterproposal on 27 March 2015 which would have required the applicant to waive any right to enforce the restraint agreement.

The extent and reasonableness of the restraint

[6] The determination of reasonableness is, essentially, a balancing of interests that is to be undertaken at the time of enforcement and includes a consideration of the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests.[1] In this instance, the period of the restraint is twelve months from the termination of Branders's employment and will expire on the 31 March 2016. The use of the restraint is countrywide and extends to any country in Southern Africa in which the applicant has conducted business. Applicant's counsel, *Mr Makka,* readily conceded that any restraint outside South Africa could not be enforced in any event by this Court. In summary, the activities restricted in terms of clause 10.2 of the employment contract concern the solicitation of orders, canvassing business, rendering of services and soliciting

[1] See Reddy v Siemens Telecommunications (Pty) Ltd 2007 (2) SA 486 (SCA) para 16 at 497F

appointments as an employee or consultant of any prescribed customer and in respect of any prescribed services. 'Prescribed services' are defined in the contract as *"… All services rendered by the* business [of the applicant] *during the twelve months preceding the termination of the employee's employment."* Similarly, 'prescribed customers' are defined as *"... The customers or clients of the business during the 12 (twelve) months preceding the termination of the employee's employment with the company".*

[7] In terms of clause 10.6 of his employment contract, Branders also undertook, during the restraint period, not to induce or encourage any other employee of the applicant from leaving the applicant to join him in a venture in which Branders is interested. Branders himself also undertook not to accept employment in any capacity for any entity that could be considered a competitor of the applicant in relation to the prescribed services.

[8] Lastly, Branders undertook not to prejudice the applicant's proprietary rights in its confidential information. In essence, the contract described confidential information as information specific to the business of the applicant. To ensure the protection of the applicant's interests in its confidential information, Branders effectively agreed not to divulge or use such information for any purpose other than that permitted in the course of his employment by the applicant.

[9] Having regard to the above, the ability of the applicant to compete with the applicant by exercising his own skill and knowledge acquired independently of the applicant, but without relying on access and knowledge of its proprietary confidential information, in essence, is restricted only to competing for business of customers of the applicant who were its customers during his last twelve months of employment and only in respect of that type of business in which the applicant had been engaged during that period. This does not prevent the applicant from approaching potential clients who were not customers of the applicant during that time.

[10] Clause 10.7 which prevents him from "accepting" employment in any capacity with any entity that might be regarded as a competitor of the company if his

employment relates to any type of services provided by the applicant during the last twelve months of Branders's employment might appear to impose a wider limitation on Branders's ability to engage with potential clients who were not previously customers of the applicant, because the mere fact that Branders accepts employment from a competitor in the same field as the applicant is enough to activate the restraint even though the work performed is for a customer that was not previously a customer of the applicant during Branders's last twelve months of employment. Nonetheless, it does not seem this restriction was intended to prevent the applicant from running his own business in same field as the applicant, provided that he does not attempt to offer his service or that of his company to pre-existing customers of the applicant during his last twelve months of employment in respect of any of the types of service rendered to customers by the applicant during the same time. If the ambit of clause 10.7 applied to a business established by himself it would render the more carefully circumscribed area of non-competition set out in clause 10.2 redundant. That provision states:

> *"10.2 The employee hereby undertakes in favour of the Company that neither he nor any Entity in which he is directly, and/or indirectly interested will, during the Restraint Period, either alone or jointly –*
>
> *10.2.1 solicit orders from Prescribed Customers for the Prescribed Services;*
>
> *10.2.2 canvass business in respect of the Prescribed Services from Prescribed Customers;*
>
> *10.2.3 render any Prescribed Services to any Prescribed Customer;*
>
> *10.2.4 solicit appointment as a consultant or employee of any Prescribed Customer is such appointment relates to the Prescribed Services."*

[11] The net effect of the restraint is to protect the applicant's pre-existing business activities in which it was engaged and the customer connections established or maintained only during the year before the applicant became a potential competitive threat. It also prevents him from accepting employment in any capacity

from a third party, excluding one in which he has a personal interest,that may be considered a competitor of the applicant if his employment relates to the prescribed services. As mentioned above, this does not prevent the applicant from approaching non-customers of the applicant for work in which he will be able to use his accumulated expertise and training, provided only that he does not rely on information belonging to the applicant which he obtained either in the course of working for it or by copying it.

[12] The applicant is entitled to protect itself against the unfair advantage that a recent employee of Branders's seniority performing the role he did, and with the knowledge of the applicant's business he had, would have in competing against it immediately after leaving its business compared with any other potential competitor with the same professional expertise as Branders but without having the knowledge about the applicant's business gained from working for it. It does not seem unreasonable to prevent Branders from exploiting that unfair advantage for a reasonable period to allow the value of his current knowledge of the state of the applicant's business which he had at the time of his departure to diminish. As such knowledge becomes less relevant in providing insight to the applicant's current business activities so its value to a competitor will be reduced. Correspondingly, Branders's ability to exploit his intimate knowledge of the activities and client connections of the applicant as a tool for competitive advantage will wane as his current knowledge of the applicant's business becomes similar to what other competitors without inside information of the business would be able to ascertain. It has not been suggested by Branders that the applicant has a monopoly in respect of the engineering consulting services it supplies in relation to vertical transportation systems such as lifts and elevators such that there are no other potential clients who were not customers of the applicant in the previous twelve months that he could approach. What the twelve month period does prevent is him relying on connections built up whilst working for the applicant and his knowledge of its contractual commitments to clients to position himself advantageously as an alternative supplier of services to clients whose needs and commitments he already knows from his prior employment.

[13] In relation to the geographic scope of the restraint, the applicant did not set out any facts that could provide a sound justification why a restraint applicable throughout the country was unreasonable.

[14] In the circumstances, the balance struck by the provisions of the restraint between Branders's right to pursue his profession using his own skill and expertise acquired over many years and the applicant's right not have him use the knowledge he acquired of its particular business when he was an employee pursuing their interests is both reasonable and fair in my view

Acts in breach of the restraint and the applicant's interest in its confidential information

[15] The applicant complains of a number of actions by the first respondent which it maintains are in breach of the restraint provisions in his employment contract. But these are summarised below.

[16] In July 2014, whilst he was still employed by the applicant and without its knowledge and the written consent of the applicant's CEO, Branders registered the second respondent with himself as the sole director. Branders does not dispute that the second respondent competes with the business of the applicant or that his company applied for accreditation for lift inspection with the South African National Accreditation System ('SANAS'): he only takes issue with the scope of that competition on the basis that he only operates in the Johannesburg area whereas the applicant's client base is both national and international. Branders also did not dispute the applicant's claim that he knew that he needed the written consent of the applicant's CEO to hold additional business interests.

[17] The applicant claims that Branders induced a number of employees, a Mr Hendricks, to resign and join the second respondent. Branders does not deny that the second respondent recruited Hendricks but denies being instrumental in inducing him to leave the applicant to work for his own business. Hendricks resigned on the same day as Branders. The applicant also contends that Branders sent Hendricks emails shortly before they left the employment of the applicant

recommending that Hendricks prints proprietary information of the applicant, which the applicant denies in bald terms.

[18] According to the applicant, Branders also solicited orders from its existing customers in respect of services it currently provided, canvassed business from, and rendered services to, prescribed customers. The applicant further accused Branders of seeking appointment as a consultant to the existing customer for existing services provided by the applicant. These claims relates in particular to three existing clients of the applicant, namely Standard Bank, PRASA and Medi-clinic.

[19] While admitting that he attended a meeting with Standard Bank and the applicant's representative on 9 April 2015, in his capacity as a representative of the second respondent, together with Hendricks, Branders claims he was there at the request of the bank and not because he had solicited business from it. There was also evidence of a communication between Hendricks in his capacity as an employee of the second respondent and Kone Lifts concerning bi-monthly meetings relating to work for the applicant's client, Standard Bank. From the correspondence it is apparent that the Kone representative is confused whether the applicant or the second respondents are the appointed consultants in the contract under consideration. Branders's only explanation for this is that once again it was Standard Bank which requested such meetings. Elsewhere in his affidavit he claims that he agreed to assist the bank free of charge as a technical adviser to oversee rectification of the access control system, something for which the applicant had previously been paid.

[20] In respect of PRASA and Medi-clinic, Branders claims they approached him as a representative of the second respondent to complete vendor application forms.

[21] Apart from these specific acts directly relating to competition, Branders also accessed a significant number of proprietary documents or containing proprietary information such as pricelists, lift and escalator item lists, project contract specifications, maintenance agreements, audit checklists for lifts and escalators and the like. Branders admits accessing the documents in question and other

folders but claims that he accessed the documents simply in order to assist him in the preparation of quotations for the applicant in the event that he and the applicant agreed on a sub-contracting arrangement. In relation to the folders he accessed he alleges that those were accessed in the course of the performance of his functions while he was still employed by the applicant.

[22] In his answering affidavit, the applicant offers an undertaking not to use any of the information he obtained and asserts there is no risk he will do so. The applicant contends that this undertaking was not given prior to its embarking on the litigation despite its attempts to secure the same from him, which it appears to have sought in its letter of 7 April 2015.

[23] Branders further does not deny the significance of having knowledge of the detailed pricing structure of the applicant but denies that he had knowledge of 'all' margins mark up and pricing strategies for the applicant's consulting services. However he did not attempt to detail the circumscribed extent of such knowledge. He further admitted, without qualification, to having access to the applicant's confidential and strategic information and having knowledge of the applicant's infrastructural overheads, marginal overheads and related costs, product offerings, logistical capabilities, staffing capabilities, procurement, equipment capabilities, as well as the usefulness of such information to a competitor like the second respondent.

[24] Having regard to the above, it is reasonable to conclude that Branders breached the provisions of the restraint prohibiting attempts to conduct business with prescribed customers in respect of prescribed services (clause 10.2). His assertion that he was willing to work 'free of charge' for certain former clients of the applicant, was more probably an attempt to ingratiate himself with the applicant's clients as an inducement for future business than simply a gesture of goodwill, in circumstances where he had taken steps to establish himself in the same type of business through the creation of the second respondent.

[25] Branders also most probably induced Hendricks to terminate his employment with the applicant and join him in his new business conducted by the second

respondent in breach of clause 10.6.2. It is also most probable that the applicant is in a position to use confidential information of the applicant which he accessed during the time he was serving his notice period either directly himself or indirectly through Hendricks. The applicant did not explain why he needed all the files accessed except in the broadest terms and it is difficult to see why he would have needed all the detailed information he obtained simply for the purpose of drafting a sub-contracting proposal. It is more probable he wanted to obtain any information about the operations of his erstwhile employer which he believed would give him inside information not normally available to other competitors of the applicant. In the circumstances and given the timing when the material was accessed, there is a strong likelihood Branders has not returned such information in terms of clause 11.2 of this employment contract.

Urgency

[26] It is true that the applicant had strong indications by mid February 2015,that Branders might be preparing to embark on an enterprise which would have the effect of breaching the restraint provisions of contract of employment, once he finally left. It is also evident that it sought to prevent this by attempting to conclude a subcontractor agreement with Branders and it was only when Branders made his counterproposal at the end of March 2015 that it became evident this alternative solution would come to nought. It was only on 2 April on the eve of the Easter weekend that the applicant was made aware that Branders was acting free of charge as a consultant to Standard Bank that clear evidence of his breach started to emerge. On the following Wednesday the applicant gave Branders an ultimatum to give a written undertaking to comply with the obligations set out in his restraint. On 8 April, Branders made it clear he would not comply. The application was launched a week later and Branders had four days to prepare his answering affidavit. Aside from not being able to get a confirmatory affidavit from Hendriks, which was still not provided when the matter was heard on 21 April, there is no obvious prejudice Branders suffered in having to respond in the time available. I appreciate also the difficulty of launching an application prematurely when no

breach has occurred. In the circumstances, I believe the requirements of urgency were met.

Conclusion

[27] In the light of what is set out above, I am satisfied that the applicant has established that Branders has acted in breach of his restraint of trade obligations and the obligations flowing from his employment contract relating to the applicant's confidential information in which it has a proprietary interest. It was never in dispute that the applicant has an interest worthy of protection by means of the provisions of the restraint. I am also satisfied that the restraint achieves a reasonable balance of the parties respective legal interests in the sense meant in *Reddy'*s case.

Costs

[28] Although Branders clearly believed he could circumvent the effect of the agreement, I am prepared to accept he genuinely believed that the restrictions it imposed on him were unduly onerous and unreasonable, perhaps because it seemed to him to prevent him from operating in the lift and elevator consulting engineering market altogether. This does not excuse his secret registration of the second respondent, or his vain attempt to avoid appearing to breach the restraint by offering his services, at least to begin with, on a non-commercial basis. Nonetheless, I believe an ordinary cost order is appropriate.

Relief

[29] The relief granted has been reformulated to more closely accord with the terms of the restraint and for the reasons stated above does not include a blanket prohibition on Branders competing in the market provided he does so within the constraints imposed by his contract of employment. The applicant is also entitled to relief relating to the applicant's retention and potential use of its confidential information. For reasons which are not apparent, the applicant sought no relief in respect of Branders' enticement of its employees despite the fact that Branders

appears to have acted in breach of his obligations in relation to Hendricks. Consequently, no relief has been ordered in that regard.

Order

[30] In the circumstances the following order is made:

30.1 The matter is dealt with as one of urgency dispensing with the requirements of the Rules of the Labour Court relating to time periods for service of process.

30.2 The first respondent is interdicted for a period of twelve months commencing on 1 April 2015 and ending on 31 March 2016, either personally or, directly or indirectly, through any entity in which he is engaged or has an interest, including the second respondent, from :

30.2.1 soliciting orders from prescribed customers for any prescribed services;

30.2.2 canvassing business in respect of any of the prescribed services from any prescribed customer;

30.2.3 rendering any prescribed services to any prescribed customer;

30.2.4 soliciting appointment as a consultant or employee of any prescribed customer if such appointment relates to a prescribed service,

provided that the terms 'prescribed customers' and 'prescribed services' shall carry the same meaning as defined in clauses 1.1.12 and 1.1.13 of the first respondent's employment contract of 2012 annexed as "FA2" to the founding affidavit.

30.3 The first and second respondents are interdicted and restrained from directly or indirectly using, divulging or disclosing confidential information of the applicant, as defined on clause 1.1.6 of the first respondent's employment contract of 2012 annexed as "FA2" to the founding affidavit and specifically including customer information.

30.4 The first and second respondents are ordered to immediately refrain from using any of the applicant's documents, including customer information.

30.5 The first and second respondents are ordered to return all copies and extracts of the applicant's documents in their possession (which documents include customer documents) by 16h00 on 28 April 2015, and to delete all electronic copies or extracts of the documents from any database, computer, internet or other electronic server, electronic storage device of whatever nature, included but not limited to the Cloud and Dropbox virtual storage facilities.

30.6 The first respondent is ordered to provide the applicant with a list of all contacts and data that he deleted from the company-issued cell phone, and to delete all such contacts and data in his possession.

30.7 This order may be served by telefax on the first and second respondents or by electronic mail (email).

30.8 The first and second respondents must pay the applicant's costs on a party and party scale, for which they are jointly and severally liable, the one paying the other to be absolved.

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R LAGRANGE, J

Judge of the Labour Court

Appearances:

For the Applicant:	A Makka
Instructed by:	Webber Wentzel
For the First and Second Respondents:	G Beytel
Instructed by:	Paul Leisher