REPUBLIC OF SOUTH AFRICA

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J1619/15

In the matter between:

INTERWASTE HOLDINGS LIMITED **Applicant**

and

MAHONEY, BRENT **First Respondent**

WASTEMAN HOLDINGS (PTY) LTD **Second Respondent**

Heard: 27 August 2015
Delivered: 08 September 2015
Summary: (Restraint of trade – confidential information – partial enforcement)

JUDGMENT

LAGRANGE J

Introduction

[1] This is an urgent application to enforce a restraint of trade agreement. The applicant is a listed company operating in a wide range of activities in the

waste removal and disposal industry. The first respondent was employed as a general manager by the applicant and performed a variety of functions set out in more detail below.

[2] It is common cause that the first respondent, Mr B Mahoney ('Mahoney') entered into a restraint of trade agreement with the applicant as part of his contract of employment on 22 January 2013. He resigned from the applicant on 27 July 2015 and on 3 August 2015 started work with the second respondent ('Wasteman'), an undisputed competitor of the applicant. Wasteman is not opposing the application.

[3] The main issues in dispute are whether:

3.1 Mahoney has confidential or proprietary information of the applicant that would be of value to a competitor and therefore constitute a protectable interest of the applicant;

3.2 Mahoney was responsible for the customer connection between Mahoney and three of its major customers, Sappi, Kimberley-Clarke and Prosep Chemicals, which could be exploited by a competitor of Mahoney, such as Wasteman;

3.3 Mahoney's appointment as a waste facilities' manager by Wasteman requires him to perform duties which are very different from anything he previously performed at Mahoney and therefore does not involve him using any previous expertise or knowledge gained from employment with Mahoney.

[4] Interwaste argued that since the restraint agreement was in place and that Mahoney had gone to work for a competitor, Mahoney was in breach of the restraint and he had failed to discharge the burden on him to demonstrate that it would be unreasonable to enforce it.

[5] Interwaste emphasised Mahoney's alleged lack of a protectable interest as his primary objection to the attempt to enforce the restraint. He also contends in effect that his appointment as a waste facility manager of the second respondent does not entail him working in an area in which he acquired expertise or knowledge when he worked for the applicant, and that such knowledge which he did acquire in the course of working for the

applicant is of no value to him in his present role. Mahoney also contested that the application was not urgent because the applicant had known since the end of July that he would be working for Wasteman from early August. He also questioned the authority of Mahoney's financial director, Mr A P Broodryk, to depose to the founding affidavit.

Challenge to Authority

[6] The procedure for dealing with challenges to the authority of a director to launch proceedings on behalf of a company has been authoritatively laid down in the judgement in ***Eskom v Soweto City Council*** [1] and confirmed and contextualised in the SCA decision of ***Unlawful Occupiers, School Site v City of Johannesburg***.[2] The approach has also been followed in this court in **SA Post Office v Govender & others**.[3] Although the applicant did raise the issue in his answering affidavit, it should have been brought by way of a separate interlocutory application in terms of Rule 7 of the Uniform Rules of Court. Quite apart from that, the act of deposing to an affidavit, does not in itself require authority, and the real issue insofar as there is good cause to doubt whether the application is duly authorised by the applicant is whether the applicant's attorneys of record have the necessary power of attorney to proceed. Their authority to launch the application was not challenged. It is clear from the papers that the applicant made clear its intention to enforce the restraint before it was launched and the deponent is a director of the applicant. On the face of it, there is no good reason to doubt that the application was authorised by the applicant.

Urgency

[7] Mahoney made known his intention of taking up employment with Wasteman on 27 July 2015, which is the same day he handed in his resignation. He was advised in writing the same day that he did not have

[1] 1992 (2) SA 703 (W)

[2] 2005 (4) SA 199 (SCA) at 206-207, paras [13] – [16].

[3] (2003) 24 *ILJ* 1733 (LC) at 1735,paras [1] – [5].

to work his notice and at the same time was expressly reminded of the restraint agreement. When he handed in his resignation he had intended to work his notice and commence employment with Wasteman in September, but having been relieved earlier he started his new employment on 1 August. The only issue is whether Interwaste knew this and ought to have acted earlier than when it actually launched the application on 14 August 2015. Whether the applicant knew on 27 July that Mahoney would start immediately or not, it did not delay in seeking to prevent his employment by Wasteman. Apart from the parting letter to Mahoney, it advised Wasteman the same day of its concerns that Mahoney's employment by Wasteman would be in breach of the restraint.

[8] It is clear that the applicant acted pre-emptively by issuing the letters on 27 July to stop the respondents acting in breach of the restraint. It pursued communications with Wasteman in the days that followed and warned it of pending litigation to enforce the restraint. *Albeit* that the correspondence was at that stage with Wasteman's attorneys of record, it seems inconceivable that Mahoney, who was represented by the same attorneys in these proceedings was not aware thereof. In any event, I do not think a two week delay in launching the application was unduly dilatory and the week provided for the respondents to oppose was adequate. There is nothing to suggest that they were not able to deal with the issues in the time available and Mahoney also filed an additional affidavit after receiving the applicant's replying affidavit, to which the applicant did not object. In the circumstances, I am satisfied that the applicant acted sufficiently promptly. I am also satisfied that a damages claim in due course would be unlikely to provide substantially the same relief which the applicant had contracted for in the restraint agreement.

Merits

[9] For the purposes of addressing the merits, the judgment follows the suggested approach in ***Basson v Chilwan and Others*** 1993 SA 742 (A) at 767C-H.

Existence of a protectable interest

[10] Mahoney held the position of on-site general manager of Inter-Waste Cleaning and was a director of Enviro-Waste SA (Pty) Ltd, a wholly owned subsidiary of the applicant. He was also for a while the manager of the group's largest single operational depot, Gauteng Logistics, but was relieved of this responsibility in 2014 at his request. It is common cause that those roles involved him in liaising with the group operations and with customers regarding waste management solutions as well as negotiating and concluding contracts with clients. He also reported to Inter-Waste (Pty) Ltd Exco and attended Exco meetings from September 2013 until November 2014.

[11] The Exco comprised all executive directors of the applicant, divisional directors,senior general managers. The Exco is charged with the overall management of the group's business and for recommending short, medium and long-term strategic planning to the board. The most important operational decisions are made at that level. The applicant claims that it is the strategic medium and long-term planning that is performed in the body that allows it to achieve a competitive edge, as the basic cost structure and regulatory environment affecting the applicant and its competitors is the same for all of them. Consequently, it contends that the applicant would have acquired knowledge of its medium and long-term planning, which would obviously be confidential proprietary information of value to a competitor. The strategies Mahoney was privy to included sales and pricing strategy. He would also have acquired knowledge of the sales pipeline, pending tenders, tenders awarded, most profitable operations and customer profiles. The timeframes involved in the different planning scenarios are not identified.

[12] Mahoney does not dispute the information he may have obtained through his participation in Exco, but maintains that because he had not been sitting on that body since November 2014 and claimed to have no recollection of the content of information packs circulated at such meetings, such knowledge that he had was no longer accessible to him at best or, at worst, was of very limited current value to the extent that he still

retained any of it, as that information was now outdated. He also contends that simply by reading information on the applicant's website a competitor or experienced businessmen could work out the applicant's short-term, medium-term and long-term strategy. Lastly, he had not been a participant in the most recent executive strategy and sales conference held in 2015.

[13] Apart from insights into group plans, the applicant maintained that Mahoney had acquired knowledge of the applicant's operational matters, such as the financial management system which contained customer details, logistics management, supplier details and historic financial information and pricing. He was also privy to strategic planning sessions with other managers.

[14] Although Mahoney does not deny that he was exposed to the applicant's "Navision" financial management system containing customer details, historic financial information, pricing and supplier details, he points out that it is not possible to download such information from the system. He further makes the point that the applicant's financial statements are public knowledge by virtue of it being a listed company. However, the applicant emphasised that Mahoney did have access to the system until the day he resigned. Mahoney minimises the significance of his meetings with other managers, which he claims had a narrow focus on day to day operations and did not deal with strategic matters. Somewhat enigmatically, also Mahoney claimed that his knowledge of vehicle management and the routing of drivers was common knowledge.

[15] Lastly, the applicant maintains that of Mahoney had developed relationships with many of its key customers including large manufacturing corporations, mining houses and many others. He also was responsible for managing the relationship between the entities he worked for and their key customers, whom he met on a regular basis and for whom he would have constituted the most important contact with the applicant.

[16] By contrast, Mahoney says that he only had three customer accounts being SAPPI, Kimberley Clarke and Prosep Chemicals. Moreover, he maintains that there is nothing secretive about customer pricing in the waste services industry as companies regularly tender to provide such

services and customers will often disclose the terms of competing tenders to competitors in order to negotiate a better deal. Besides arguing that the pricing of such tenders is a relatively complex one and not simply a matter of comparing prices, the applicant contends that it is the very competitive nature of the industry and Mahoney's knowledge of its inner workings which would give the second respondent a distinct advantage if it employed Mahoney. The applicant also maintains that by virtue of his position "those with keys to the other customers" reported to him and he had in-depth knowledge of customer details and their requirements.

[17] It must be said that in evaluating the extent of the applicant's protectable interest, both parties set out their factual averments at a relatively high level of generality, making it frustratingly difficult for the court to gain much insight into the real depth of Mahoney's knowledge or to what extent that knowledge would be of real current or lasting economic value. What can be gleaned with some degree of certainty based on the respective factual averments is that:

17.1 Mahoney did have access to the applicant's customer and supplier details and pricing information up to the time of his resignation, though he was not in the ordinary course of his work performing the kind of duties that would mean that he was intimately familiar with much of the detail thereof except in relation to the three customers that he dealt with;

17.2 He has some knowledge of other customers based on persons reporting to him, though the extent of the knowledge of the applicants customer network he might have acquired in this fashion does not amount to significant personal knowledge and he is not the applicant's contact person for customers other than the three he dealt with himself;

17.3 He was privy to strategic thinking of the group at least until November 2014, but has no knowledge of changes that might have occurred afterwards or of the outcome of the applicant's most recent strategy and sales conference in 2015;

17.4 In the course of the time he spent on Exco he acquired an overview of the different operational divisions of the applicant's group reporting in that forum and gained some understanding of their respective contributions to the group at the time;

17.5 As a member of Exco he would have been exposed not merely to group financial reports but to more disaggregated financial information relating to divisions reporting to Exco

17.6 He is familiar with the way service offerings are priced, not simply with the typical prices of such offerings;

[18] Barring the general information he might have had about customers, other than the three he had direct dealings with, the information mentioned is obviously information pertaining to the inner workings of the applicant's business and is information acquired by Mahoney by virtue of the managerial position he occupied and the functions he performed, which would not normally be made available to the public. The more current the information in question the more valuable it would be to a competitor wishing to gain insight into the applicant's business. The applicant is entitled to protect itself against the risk of such confidential information being disclosed.

Is the applicant's interest being prejudiced by Mahoney taking up employment with the second respondent?

[19] The information acquired by virtue of his membership of Exco was only seven months' out of date by the time he joined the second respondent. He had established work relationships with three significant clients of the applicant who could potentially follow him to his new employer. Although there is no suggestion he had taken customer lists or that he was approaching former customers of the applicant he did have recent access to customer and supplier details and current pricing of the services provided to them.

[20] Mahoney contends that he is not employed in any capacity by the second respondent in which the information he had access to would be utilised. His role as a facilities manager is not one he performed at the applicant

and is one he has no prior experience in. By implication, the skills and knowledge he is required to exercise in his new position cannot benefit from knowledge obtained about the applicant's business when he worked for it. Moreover, he expressed his willingness both in his answering affidavit and in an open tender in court to abide by the confidentiality obligations he has towards the applicant under contract and common law.

[21] There is ample authority for the proposition that the party seeking to enforce a restraint to protect its legitimate interest in preserving the confidential nature of information pertaining to its business, does not have to wait for the former employee to actually breach the obligation to preserve it. The purpose of entering the restraint agreement is at least in part so the employer does not have to run the risk of relying on the *bona fides* of the employee not to breach his duty to preserve the confidentiality of business information acquired in the course of his employment. In ***Reddy v Siemens Telecommunications (Pty) Ltd***,[4] Malan AJA reiterated the principle:

> "I agree with the remarks of Marais J in BHT Water:
>
> 'In my view, all that the applicant can do is to show that there is secret information to which the respondent had access, and which in theory the first respondent could transmit to the second respondent should he desire to do so. The very purpose of the restraint agreement was that the applicant did not wish to have to rely on the bona fides or lack of retained knowledge on the part of the first respondent, of the secret formulae. In my view, it cannot be unreasonable for the applicant in these circumstances to enforce the bargain it has exacted to protect itself. Indeed, the very ratio underlying the bargain was that the applicant should not have to content itself with crossing its fingers and hoping that the first respondent would act honourably or abide by the undertakings he has given. . . . In my view, an ex-employee bound by a restraint, the purpose of which is to protect the existing confidential information of his former employer, cannot defeat an application to enforce such a restraint by giving an undertaking that he will not divulge the information if he is allowed, contrary to the restraint, to enter the employment of a competitor of the applicant. Nor, in my view, can the

[4] 2007 (2) SA 486 (SCA)

ex-employee defeat the restraint by saying that he does not remember the confidential information to which it is common cause that he has had access. This would be the more so where the ex-employee, as is the case here, has already breached the terms of the restraint by entering the services of a competitor.' " [5]

[22] In the light of this authority, the actual role currently performed by Mahoney as a Facilities Manager does not detract from the fact that the risk the applicant sought to protect itself against by preventing Mahoney from working for a competitor such as the second respondent still exists. In this regard I also note the somewhat vague assurance given by the second respondent about Mahoney's appointment that his position *"…is likely focused on facilities management and is to a large extent distinguishable from the role he occupied at Interwaste Holdings.*" Further, the failure of the second respondent to provide any greater specificity about Mahoney's post including his job specification, role and functions despite being asked for the same by the applicant, does not inspire confidence in the undertakings Mahoney was willing to give.

Does the applicant's interest weigh up qualitatively and quantitatively against the interest of Mahoney in not being economically inactive and unproductive?

[23] The applicant argues that the agreement only prevents Mahoney from working for its competitors. Mahoney contends that most of the last fourteen years of his work experience is in the waste sector and he should not be barred from finding employment in his chosen field. In the light of the discussion above, the difficulty Mahoney has is to overcome the applicant's right to immunise itself against the risk his knowledge of its business might become available to the second respondent. The only meaningful way this can be done is not to allow him to work for the second respondent for a reasonable period, even if this does limit his ability to pursue his chosen field of work for a while.

[5] At 500, para [20].

[24] This raises the further question whether the restraint goes further than necessary to protect the applicant's interest?[6]. It is at this juncture that the scope of the restraint does raise concerns. It is true that the respondent does not make averments about the specific period over which any knowledge of confidential business information he acquired would be rendered valueless. His essential contentions are that most of information he may have been privy to by virtue of his position on Exco is about ten months' out of date. However, the applicant in rebuttal provides few specifics why this would not make any difference to the continued value of such information. In the founding affidavit it makes a vague reference to the fact that the award of tenders can sometimes be a drawn out process lasting in excess of a year or more, without even alleging that there are any tenders currently pending, or pending at the time he left Exco, that he is, or would have been aware of.

[25] I accept that there was other current information the applicant may have had access to on the financial system at the time he left, but in the absence of any evidence that he could have retained copies of such information, there is no basis for believing he will retain any useful memory of that information for as long as two years.

[26] In the circumstances, while I am satisfied that the applicant is entitled to enforce the restraint, I think the two year period of the restraint is unduly onerous and goes further than is necessary to protect the applicant's legitimate interests. A period of one year should suffice to protect the applicant's legitimate interests adequately.

Costs

[27] As both parties have been partially successful, it would not be appropriate or fair in my view to make a costs order.

[6] See ***Kwik Kopy (SA) (Pty) Lted v van Haarlem & Another*** 1999 (1) SA 472 (W) at 484E

Order

[28] The application is heard as one of urgency in terms of rule 8 and the applicant's failure to comply with the court rules to bring the application on an urgent basis is condoned.

[29] The first respondent is ordered not to disclose to any person any confidential information concerning the activities of the applicant.

[30] The first respondent is ordered not take up employment with the second respondent for a period of one year calculated from 27 July 2015.

[31] Each party must pay its own costs.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	**C Whitcutt SC assisted by H A Van der Merwe** **Instructed by Fluxmans Inc.**
FIRST RESPONDENT:	**O Cook SC** **Instructed by Norton Rose Inc.**