THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 1153/16

Reportable

In the matter between:

BENCHMARK SIGNS INCORPORATED **Applicant**

and

MULLER DANIEL **First Respondent**

SEEK GROUP (PROPRIETRY LIMITED) **Second Respondent**

Heard: **30 June 2016**

Delivered: **07 July 2016**

Summary: Restraint of trade. The principle restated. Principles governing partial enforce and onus in that regard discussed.

JUDGMENT

MOLAHLEHI, J

Introduction

[1] This is an urgent application in terms of which the applicant seeks to enforce a restraint of trade clause in their agreement which prohibits the first respondent from taking employment or engaging in a business in competition with the applicant within the Republic of South Africa and for a period of three years. It is generally accepted that restraints of trade by definition are urgent matters. I have read the papers of the respective parties in relation to this issue and without over-burdening this judgment with those details, I am satisfied that the matter is urgent and will according be treated as such.

Background facts

[2] The applicant is a close corporation incorporated and registered in terms of the laws of South Africa. The applicant was established by Mr Russel Feigin, the deponent to the founding affidavit as a sole member. The applicant was established in 2003 for purposes of doing the business of providing signage system to various corporate clients. The business entailed facilitating, conceptualisation, design, production and installation of signage to customers. The business is service-based, and thus customers account the large portion of applicant's business. According to the deponent to the founding affidavit the focus of the business is on large commercial developments such as office buildings and shopping malls. It takes considerable time before the applicant could know whether or not it had been successful a project. The reason for this is that the signage in this in projects, is usually the last part of the project.

[3] The second respondent is a private company registered in terms of the company laws of South Africa. It is cited only as an interested party in the dispute between the applicant and the employee.

[4] It is common cause that the first respondent, who for convenience shall be referred to as the "employee", was employed by the applicant as assistant project manager in 2006. The employee rapidly progressed and in 2010 was appointed as operations manager and given member's interest in the applicant. At the time of the termination of the relationship with the applicant he was holding 20% of member's interest in the applicant.

[5] The employment of the employee was facilitated by an employment agency. Initially, the applicant was reluctant to employ him apparently because he had no experience

in the industry. He had at that stage returned from a career as a rugby player from overseas. He had no work experience.

[6] In addition to the employment contract, the employee concluded confidentiality and restraint agreements. In terms of this contracts the employee amongst other things acknowledged that by virtue of his employment and association with the applicant he would have access to certain confidential information of the applicant and this would result in him being in possession of such information. The nature of the information that he would have access to and ultimately possess was listed in the contract. He also in terms of the contract undertook to protect the applicant's proprietary interest in its trade secrets and confidential information. This means that he would not divulge or disclose or use the confidential information that he acquired whilst in the employ of the applicant.

[7] The employee resigned from his employ with the applicant on 9 March 2016. He thereafter filed a dispute with the CCMA concerning the alleged constructive dismissal which is still pending.

The case of the applicant

[8] Briefly the case of the applicant is that soon after the resignation of the employee , the dependent to the founding affidavit, the main member, Mr Feigin discovered that he had breached his confidentiality and restraint of trade undertakings. The breach took the form of the employee sending emails to the employees, customers and suppliers notifying them of his immediate resignation, including providing them with his contact details.

[9] The other complaint of the applicant is that it has discovered that the employee was providing the same service as those provided by it and that he has recruited some of its senior employees to his company being the second respondent. The examples of other breach relates to the allegations that the employee and the second respondent had taken over the Telkom and the Waterfront projects, which he had managed for the applicant whilst he was still in its employ.

The case of the employee

[10] The employee in his answering affidavit deals in some details with the reason for his resignation which relates to the alleged financial mismanagement of the applicant and

the manner in which relevant financial disclosures were not made to the South African Receiver of Revenue Services (SARS).

[11] The employee further contends that the restraint could no longer be applicable because the applicant has amended its business model from being a signage consultancy to a production facility which manufacture signage and not design.

[12] The applicant also contends that the restraint of trade is unreasonable because it prohibits him from doing work of signage for a period of three years and across the entire South Africa.

Legal principles

[13] The principle governing the approach to restraint of trade agreement is set out by the Labour Appeal Court (LAC) in the leading case of *Magna Alloys and Research (SA) Ltd v Ellis*.[1] In that case the court held that the restraint of trade agreements are enforceable unless, and to the extent that they are contrary to public policy because they impose an unreasonable restriction on the former employee's freedom to trade or to work. That decision was explained some years later in *Trevlyn Ball v Bambalela Bolts (Pty) Ltd and Another,*[2] in the following terms:

> "…. The effect of the Magna Alloys" decision was to place an onus on the party, sought to be restrained, to prove, on a balance of probabilities, that the restraint was unreasonable (See *Magna Alloys: Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at para 14 at 498E-499). However, because the right of a citizen to freely chose a trade, occupation, or profession, is protected in terms of section 22 of the Constitution and a restraint of trade constitutes a limitation of that right, the onus may well be on the party who seeks to enforce the restraint to prove that it is a reasonable, or justifiable limitation of that right of the party sought to be restrained."

[14] The incidences of onus in cases of restraint of trade are summarised by Mbha J (as he then was) in *Experian South Africa (Pty) Ltd v Heyns and Another, as follows:*[3]

> "The position in our law is, therefore, that a party seeking to enforce a contract in restraint of trade is required only to invoke the restraint agreement and prove a breach thereof. Thereupon, a party who seeks to avoid the restraint bears the onus to

[1] [1984] (4) SA 874 (A) at 891 B-C.
[2] [2013] (9) BLLR 843 (LAC) at para 13.
[3] [2013] (1) SA 135 (GSJ].

demonstrate on a balance of probabilities that the restraint agreement is unenforceable because it is unreasonable".

[15] The questions to answer in determining whether restraint is reasonable or otherwise are set out in *Basson v Chilwan and Others*, in the following terms:[4]

(a) Does the one party have an interest that deserves protection after termination of

(b) the agreement?

(c) If so, is that interest threatened by the other party?

(d) In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?

(e) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected?'

[16] The reasonableness or otherwise of the restraint of trade agreement quite often depends on its duration and geographic scope. The principle regarding the reasonableness of the restraint clause is that the duration thereof should not be any longer than is necessary to protect the interest of the employer in cases such as this.[5]

[17] Before dealing with the issue of the reasonableness or otherwise of the restraint it is important to point out that it does not appear that the employee disputes the breach of the undertaking made in relation to the restraint clause. His defence as indicated earlier is that the undertaking cannot be enforceable in the circumstances where the termination of his employment was due to constructive dismissal. He resigned because the applicant failed to address his concern relating to financial mismanagement and failure to comply with the tax law. It was for these reasons that he after resigning referred a dispute to the CCMA concerning the alleged constructive dismissal by the applicant. This matter is still pending before the CCMA. In my view, that matter has no bearing in the determination of this matter.

[18] The other defence of the employee is that the restraint of trade clause is unenforceable because the applicant has comprehensively amended its business

[4] [1993] (3) SA 742 (A) at 767 G-H.
[5] *Den Braven S.A. (Pty) Limited v Pillay and Another 2008* (6) SA 229 (D); [2008] 3 All SA 518.

concept from a signage consultancy to a full production and sale of signage. And in relation to the partial enforcement, he contends that he was not afforded the opportunity to deal with that because it was raised only in the replying affidavit.

[19] In my view this matter turns on the reasonableness or otherwise of the restraint clause both in terms of its duration and geographic scope. In terms of the duration the restraint is for a period of three years and the geographic scope is the entire South Africa. This, in my view, is unduly repressive to the employee and it is therefore contrary to public policy.[6] The restraint clause is consequently unreasonable and accordingly cannot be enforced.

[20] In the replying affidavit and in the heads of argument the applicant request that, in the event that the court finds the restraint to be unreasonable it should partially enforce the restraint by reading down the geographic scope and reduce the duration to two years.

[21] The approach to adopt when dealing with the request for partial enforcement is set out by Kathree-Setiloane J in *Kelly Group Limited v Capazorio and Others*[7] in the following terms:

> "[43] I am of the view that there is much force in this contention for the following reasons. Where a court is asked to read down an agreement so as to make it reasonable and, hence, enforceable, this must be pertinently raised at the outset, in the applicant's papers, and the facts must be set out in support of the severance itself and, of the partial enforcement of the restraint clause, so that the issues can be fully ventilated.

[22] In *Nampesca (SA) Products (Pty) Ltd v Zaderer*,[8] *the court* held that:

> "Our Courts are furthermore reluctant to cut down restraint clauses, unless it can be done by deleting the oppressive parts neatly and conveniently (see *MacPhail (Pty) Ltd v Janse van Rensburg and Others* 1996 (1) SA 594 (T) at 599B). Where only partial enforcement of a restraint is sought an applicant must lay a proper basis for the enforcement of a lesser restraint (see the *MacPhail* case *supra* at 599C; *Sunshine Records (Pty) Ltd v Frohling and Others* 1990 (4) SA 782 (A) at 795I). That has not been done in the instant case."

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[6] (See Basson at 771).
[7] 15484/2010) [2010] ZAGPJHC 139 (7 December 2010).
[8] 1999 (1) SA 886 (C); - PG 896.

[23] In *Henred Reuhauf (Pty) Ltd v Davel & Another*,[9] Lagrange J correctly, cautioned and warned against the development of a practice in terms of which wide ranging restraints are drafted, only to be reformulated into more reasonable restrictions when the matter comes to court. In this respect the Learned Judge had the following to say:

> "[21] At the hearing on the matter, Mr Snyman for the applicant, submitted that the applicant would be content if the restraint were to be imposed for a period of only 12 months in the Durban and Vryheid regions. If the restraint with a modified in this fashion, the first respondent would still be required to relocate if he wished to pursue employment in the industry. Given the slender nature of any protectable interests that the applicant might have, even a more circumscribed restraint would not justify the limitations placed on the first respondent's ability to work in the industry.
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> [22] Moreover, the practice of cutting and trimming a manifestly over-broad restraint at the behest of the party which drafted it, is not a practice the court should encourage. It would be wrong to promote the practice of drafting wide ranging restraints, which are only reformulated into more reasonable prohibitions when the matter comes to court, whereas up to that point the sweeping scope of the provision hangs over the employee like an exaggerated sword of Damocles." [10]

[24] In the present matter the applicant neither concede nor acknowledge that the restraint clause is unreasonable but as stated above says that it is only in the event that the court finds it to be so that partial enforcement should be made. The request for the partial enforcement is that the geographic scope of the restraint be limited to

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[9] (2011) 32 ILJ 618 (LC).

[10] Ibid at aras 21-22. The above was informed by what was said in SASFIN (Pty) Ltd v Beukes 1989 (1) SA 1 at page 16 H-I where the Appeal Court in dealing with the issue of a contract that is contrary to public policy had the following to say: In any event, it is in my view not open to parties to a contract to say to a court "take our agreement, such as it is, excise from it all that is bad, and retain what is good, and provide us with a contract which is legal and enforceable, even though it may not be what we originally had in mind". This is the effect of clause 3.18, on a literal interpretation thereof. Such an approach would offend the fundamental rule that the court may not make a contract for the parties (Laws v Rutherfurd 1924 AD 261 et 264). Furthermore, provisions in a contract similar to clause 3.18, if not restricted in their meaning, could lead to an abuse of the process of the court. Parties could simply insert whatever they wish, good or bad, into a contract, and, by resorting to a provision such as clause 3.18, leave it to the court to separate the chaff from the wheat. Not only could this lead to slovenliness in the drafting of agreements, but it could also provide fruitful ground for the exploitation of the unwary, the unenlightened and the disadvantaged. A clause having that effect might per se be contrary to public policy."

the Gauteng Province only except that it should operate country wide in the following areas; V&A Waterfront; Growthpoint; ABSA Bank; Barclays Limited; Allied electronics Corporation Limited (Altron); Airports Company of South Africa; Telkom SA SOC Limited; Radisson Hotel Group; Drake & Scull and Moneyline. The period of the restraint be reduced to two years from date of order.

[25] It is generally accepted that the onus to prove unreasonableness in cases of partial enforcement still remains with the respondent. However, the applicant has the duty to set out a proper basis for the partial enforcement or the read down of the restraint. In *Macphail (Pty) Ltd v Janse van Rensburg*[11], the Court after stating that the Courts are averse to cutting down the restraint of trade clauses said:

> "*Where a party does ask for partial enforcement of a restraint, he must lay a basis for the lesser restraint. See National Chemsearch (SA) (Pty) Ltd v Borrowman and Another (supra at 1114B-F and 1116G-H).*
> *I accept that, where a restraint clause is stated to be separable in its various components, it will be easier for a Court to resort to partial enforcement."*

[26] The approach which was adopted by the applicant in this matter in relation to the partial enforcement is not different that in Kelly Group Limited where the court in dealing with that issue had the following to say:

> "[44] Having perused the applicant's affidavits, it is clear that the applicant only makes mention in passing, in its replying affidavit, that in the event of this Court concluding that the period of 24 months is not justifiable, it will seek an order for a period of 18 months from date of termination of the first respondent's employment. This notwithstanding, nowhere on its affidavits does the applicant state that its 24 – month restraint is too wide, and it seeks to enforce something less than that. Nor does it set out facts in support of the severance or the partial enforcement of the restraint. Therefore, severance or partial enforcement has, in my view, not been pertinently raised by the applicant. Accordingly, the case must be dealt with on the basis that the applicant seeks to enforce a 24-month restraint, and not on the basis of counsel's submission from the bar. Accordingly, I am persuaded by the respondents' submission that the applicant elected to seek to enforce the full extent of the agreement on its papers. It should, therefore, be held to this election, and the restraint should be held to be unreasonable in its terms on this account too."

[11] 1996 (1) SA 594 (T).

[27] As indicated earlier the issue of partial enforcement in the present matter is raised for the first time in the replying affidavit and also without conceding that the restraint is over-board in terms of both its duration and geographic scope. Except for stating that the severance should be for the duration of two years and the geographic limit to what is mentioned above, the applicant provides no other details as to the partial enforcement.

[28] In my view even if the applicant was to be indulged with regard to its failure, the period two years is still too long for a case where on the applicant's own version the employee's skills prior to joining it was limited to that of a rugby player. This is also so when regard is had to the change in the nature of the applicant's business, though limited as it maybe.

[29] In the circumstances the applicant's application stands to fail. I see no reason in law and fairness why the costs should not follow the results.

Order

[30] In the premises the applicant's application is dismissed with costs.

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E Molahlehi, J

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate Fourie with Advocate Macdonald
Instructed by:	Brian Bleazard Attorneys
For the Respondent:	Advocate Grundlingh
Instructed by:	Cavanagh and Richards Incorporated