Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case no: J 1597/16

In the matter between:

MARS FIBRE AND INFRASTRUCTURE (PTY) LTD — **First Applicant**

and

MARTHINUS G D VERMEULEN — **First Respondent**

FIBREHOODS — **Second Respondent**

Heard: 11 August 2016

Delivered: 19 August 2016

Summary: (Restraint of trade – breach – protectable interest – being part of same industry insufficient – skills)

JUDGMENT

LAGRANGE J

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Introduction

[1] The applicant company ('Mars') describes its business as installing the "client-specific infrastructure" within the telecoms industry and entailing the performance of "full turnkey services necessary for the installation of infrastructure other than, for instance, sales and the lighting of the fibre cables".

[2] Mars seeks to enforce a restraint of trade agreement against the first respondent, Mr M. G. D Vermeulen, its former lead planner ('Vermeulen'), who is now employed as a planner with the second respondent ('Fibrehoods'). Fibrehoods describes its own business in the following terms:

> "Fibrehoods is a leading fibre network distribution company providing aerial Fibre-to- the-Home (FTTH) to the Gauteng region.
>
> Fibrehoods is a joint venture between RMBH Holdings and the Waterfall Investment Company (WIC) established for the purposes of pursuing fibre network opportunities in the last mile, specifically focusing on Fibre to the Home (FTTH) services..."

[3] The relevant portions of Vermeulen's contract of employment encapsulating the restraint of trade read:

> "RESTRAINT OF TRADE
>
> The employee further undertakes that, during his employment with Mars Fibre, and for a period of 6 months after the termination of this agreement for any cause whatsoever, he/she will not represent or canvas or accept orders or on behalf of any person, firm or company for products, goods or services of an like or similar kind to, or designed to perform functions like or similar to those of the products, goods or services sold by the company, or to engaged or to be interested either as a principal, owner, agent, representative or employee, in any business competing with, or that are clients of Mars Fibre, with any client or contractors of Mars Fibre."

[4] A confidentiality and nondisclosure agreement was annexed to Vermeulen's contract of employment, relevant portions of which read:

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"1.1 The employee undertakes that he will not, directly or indirectly, use for his own benefit or the benefit of any other person, and will keep confidential and not disclose, any trade secrets or confidential information of:

1.1.1 the employer or the shareholders of the company or any holding or subsidiary company; and

1.1.2 any client, customer or potential client or customer of the employer which may have come to the knowledge of the employee either directly or indirectly and whether in the course and scope of the employee's employment or not.

1.2 For the purpose of this agreement, the expression 'trade secrets and confidential information' includes but is not confined to technical detail, techniques, know-how, method of operating, costs and sources of material, pricing policies, computer printouts, technical bulletins, names of customers and potential customers (including potential customers who have not yet been contacted but in respect of whom there is an intention to contact the purposes of doing business) and products, formulations, drawings, technical details, plans, formulae, and the like, which belong to or in respect of which any of the following parties have rights:

1.2.1 the employer, its shareholders or the holding or subsidiary company; or

1.2.2 customers or clients the company, the company shareholders or the holding or subsidiary companies of such customers or clients and includes information furnished in oral, written or physical form

...

1.3.4 the obligations imposed on the employee to retain the confidential information in confidence will continue to apply for so long as the information furnished remains confidential.

...."

[5] Mars contends that Vermeulen's employment by Fibrehoods is in breach of his contract in restraint of trade in the following respects:

5.1 The applicant claims to have knowledge that Fibrehoods is intending to expand its business into buried fibre infrastructure.

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5.2 Even if it remains operating only in the aerial fibre network distribution business, that entails installing fibre infrastructure in trenches at least at certain points, the job of planning the installation and distribution of fibre networks remains the same, Vermeulen would be occupying the same or similar position in his new job that he occupied with Fibrehoods, and Fibrehoods competes with at least one of Mars's customers, Vumatel, a fibre infrastructure provider that builds fibre networks.

Mars does not suggest that Vermeulen is involved in canvassing for customers on behalf of Fibrehoods, but only that, he is in breach of the restraint in the sense that he is interested as an employee in a business which competes with or is a client of Fibrehoods.

[6] In respect of the confidentiality requirements applicable to Vermeulen, Mars asserts that it has a protectable interest in the information which it provided Vermeulen with and to which he had access namely, confidential information including records, databases, access to financial information, customer requirements, ongoing commercial opportunities, customer lists, supplier lists, and company methods of planning services for the installation of fibre infrastructure connections. It also maintains that he enjoyed direct exposure to customers and to methods of providing services to others within the "fibre optic infrastructure installation business". It further claimed to have invested heavily in training him in the skills required to become a lead planner, including training him to use a software called MapInfo to draw up work and sites plans.

[7] It is trite law that a party wishing to enforce a restraint of trade agreement bears the onus of establishing the existence of a binding restraint of trade and that the employee party is in breach thereof.[1] In this application, there is no dispute that the restraint exists and applies to Vermeulen. The difficulty Mars has is establishing that Vermeulen is employed by its competitor or client in breach of the restraint. Vermeulen acknowledges that he has been employed by Fibrehoods since 1 August 2016. However,

[1] See e.g ***Vox Telecommunications (Pty) Ltd v Steyn and Another*** **(2016) 37 *ILJ* 1255 (LC)** at 1261, paras 26-27.

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Vermeulen and Fibrehoods dispute that Fibrehoods is a competitor of Mars. They assert that the business of the applicant is confined to trenching and the installation of microducts, in which another contractor installs the optic fibre cables. On the other hand, Fibrehoods is a licensed network company providing electronic communication network services, similar to those provided by Vodacom or MTN. Vermeulen also directly disputes Mars' general contention that it provides a full 'turnkey' service in the sense of setting up an operational fibre optic network that simply needs to be activated by the licensed network company client. In his answering affidavit, he explains that Mars "does not provide the fibre optic cable nor does it populate the micro ducts with the fibre-optic cable", but "merely digs trenches, the laying of the fibre cable then comes afterwards-and is not done by [Mars]".

[8] It is only in the reply that Mars first identifies any clients that it provides turnkey services for, but even then, there is an ambiguity about precisely what the end product is, which it provides to those clients. Thus it continues to describe the 'turnkey' nature of its product as "full turnkey services necessary for the installation of fibre infrastructure for several clients such as…" (emphasis added). To describe one's product as something necessary for the installation of fibre infrastructure does not logically entail the corollary that this obviously includes the laying and connection of the optic fibre infrastructure itself. Similarly, it is again only in the replying affidavit that Mars makes the claim that it is providing a specific client, Altech, with aerial fibre installations. Mars inexplicably failed to make this claim in the founding affidavit when it ought to have been preoccupied with dealing directly with the issue whether the second respondent was a competitor. It is also revealing that in its founding affidavit, Mars sought to include Fibrehoods within the ambit of its competitors not on the basis that Mars itself was also engaged in the installation of aerial fibre networks, but on the basis that Fibrehoods was about to use trenching for the installation of infrastructure, or alternatively that some trenching was necessary when an aerial network was connected to an end user.

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[9] Mars has sought to bolster its case in reply and even then did so in an ambiguous way, at least in part. It is a trite principle that an applicant must stand or fall by the averments made in its founding affidavit and that, absent exceptional circumstances which might justifiably excuse glaring omissions in the founding papers, a case cannot be made out in reply.[2]

[10] In his answering affidavit, Vermeulen says that his job was to survey routes and access requirements required by Mars' client, Dark Fibre Africa, after which he would draw up a plan for Dark Fibre Africa. If the plan was accepted, then it was the task of Mars to start digging trenches and laying micro ducts for the installation of optic fibre. Essentially, the business of Mars is that of civil trenching which Vermeulen describes as merely laying the skeleton for a fibre optic network, which is then installed by the party that contracted Mars to do the trenching. By comparison, Fibrehoods contracts with third parties to install the actual aerial optic fibre network which it then owns and operates as a licensed network company providing electronic communication network services. At Fibrehoods, Vermeulen is engaged in vetting the plans for aerial fibre installation submitted by contractors engaged by Fibrehoods to install the aerial fibre network.

[11] As mentioned, it was only in the replying affidavit that Mars began trying to make out a case that it also installed fibre optic cabling and not merely the micro ducts in which cabling would be inserted. In any event, on the evidence, it is apparent that the two businesses have little in common in terms of the end products which they supply to clients. It is true that they both conduct businesses in the fibre optic network sector but the different nature of those businesses do not make them competitors. In essence, Fibrehoods' customers are the end-users of the aerial network it provides, namely the internet service providers ('ISPs'). By contrast, the clients of Mars are fibre optic network companies that install their fibre-optic cables in the trenches laid by Mars. If Fibrehoods contracted for the installation of its networks on the ground, it might make use of the services of a company like Mars to prepare the trenching and conduits in which another

[2] See e.g ***Betlane v Shelley Court*** **2011 (1) SA 388 (CC)** at 396 para 29 and the authorities cited there.

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contract would install the fibre optic network. As things presently stand, Fibrehoods is only engaged in the establishment of aerial fibre optic networks and would have no use for trenching services like those provided by Mars, so it would not even be a potential client of the applicant. Having regard to the end product or service which Mars and Fibrehoods provide, it is fairly obvious they do not compete with each other in the same market.

[12] As Mars itself acknowledges, assuming Vermeulen did work as a planner for Fibrehoods, if the two firms were not competitors, that would not be a problem. Since the evidence shows that they are not, then the fact that Vermeulen may do planning related work for Fibrehoods means that there is no competitive advantage over Mars which Fibrehoods can derive from utilising Vermeulen's skills.

[13] Similarly, such skills which he might have acquired in the course of working for Mars are not being deployed in the service of Fibrehoods in a way that would pose any competitive disadvantage on Fibrehoods. Vermeulen is entitled to use those skills in another occupation provided that occupation does not involve him in an undertaking that competes for the same clients which Mars does. Even if it were true that Mars had invested enormously in training Vermeulen, which is not a conclusion supported by the evidence, using such expertise in the course of his employment by Fibrehoods is only relevant in the context of enforcing a restraint if it gives Fibrehoods some competitive advantage over Mars. That is not the case here. Even if Mars had a natural interest in retaining Vermeulen on account of 'investing' in him, that is not sufficient to amount to a protectable legal interest that can be enforced using a restraint of trade:

> "2. An employer who has been to the trouble and expense of training a workman in an established field of work, and who has thereby provided the workman with know-how and skills in the public domain which the workman may not otherwise have gained, has an obvious interest in retaining the services of the workman. In the eye of the law such an interest is not of the nature of property in the hands of the employer. It affords the employer no proprietary interest in the workman, or in his knowledge or skills. It is therefore not an interest which the employer may legitimately

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seek to protect by requiring the workman to agree to a restraint on his use of the know-how or his exercise of the skills. For such know-how and skills in the public domain become attributes of the workman himself and in no way belong to his employer.

3. A workman who has agreed with his employer to subject himself to a restraint on the exercise of his knowledge and skills can be held to his undertaking. However, if, at the time when the employer seeks to enforce the restraint, it appears that the employer has no interest to protect other than the 'investment' he made by training the workman, the workman will have succeeded in discharging the *onus* of proving that the enforcement of the restraint would be unreasonable and contrary to public policy."[3]

[14] On the evidence before me, the nature of the work in which Vermeulen's planning skills are engaged is that of someone vetting plans prepared by someone else rather than doing them himself. Moreover, the nature of those plans are very different from the kind of plans he had to prepare for trenching work when he was working for Mars. The plans he now considers are the actual fibre-optic installation plans prepared by the contractors who install the aerial networks for Fibrehoods.

[15] The second question is whether Mars has a protectable interest in preventing the risk of Vermeulen divulging confidential information about its business. To warrant the court intervening to protect an applicant's confidential information, three criteria must be met:

> "… [F]or information to be regarded as confidential it must meet the following criteria: it must be useful, in the sense that it must be capable of use or application in trade or industry; it must, objectively, not be public knowledge or public property, but known only to a restricted number of persons; and it must be of economic value to the plaintiff."[4]

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[3] ***Sibex Engineering Services (Pty) Ltd v Van Wyk and Another*** **1991 (2) SA 482 (T)** at 507D-H. See also ***Automotive Tooling Systems (Pty) Ltd v Wilkins and Others*** **2007 (2) SA 271 (SCA)** at 279, para 10.

[4] **Waste Products Utilisation (Pty) Ltd v Wilkes and another 2003 (2) SA 515 (W)** at 577B C.

In *Coolair Ventilator Co SA (Pty) Ltd v Liebenberg and Another* [5]cited with approval in *Waste Products* the court explained the economic value of information which is required thus:

> 'If . . . it is objectively established that a particular item of information could reasonably be useful to a competitor as such, i.e. to gain an advantage over the plaintiff, it would seem that such knowledge is *prima facie* confidential as between an employee and third parties. . . .'[6]

[16] As far as his knowledge of Mars' customer connections is concerned, Vermeulen says he knows of none that would be of any value to Fibrehoods. Mars does not provide any details of such connections in rebuttal. Secondly, both Vermeulen and Fibrehoods deny that confidential information about Mars' business would be of any relevance to Fibrehoods' business. Even in reply, Mars does not elaborate on the nature of any confidential information that would be of commercial benefit to Fibrehoods, if Vermeulen did disclose it. Consequently, this is not the type of case where the undertaking given by Vermeulen not to disclose such confidential information he might have acquired in the course of his employment by Mars cannot be regarded as a sufficient safeguard, given the absence of any apparent commercial threat the potential disclosure of such information to Mars might hold.

[17] In conclusion, I am satisfied that Mars has failed to establish that Vermeulen has acted in breach of the restraint of trade provisions of his contract of employment or that he has breached a duty of confidentiality he owes to his former employer.

Order

[18] The application is dismissed with costs.

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[5] **1967 (1) SA 686 (W)**

[6] At 689G.

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Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	A Mosam assisted by M Musandiwa instructed by Hafegee, Roskam & Savage Inc.
RESPONDENTS:	S Swartz instructed by M Salomon & Associates

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