



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: J 838 / 2017

In the matter between:

AQUATAN (PTY) LTD

Applicant

and

HEINRICH JANSEN VAN VUUREN

First Respondent

ENGINEERED LININGS

(a division of PSV INDUSTRIAL (PTY) LTD)

Second Respondent

Heard: 19 April 2017

Delivered: 4 May 2017

Summary: Restraint of trade – duration - restraint is unreasonable in relation to the nature of the protectable interest when balanced against the countervailing right of the employee to work in his trade – applicant has the duty to set out a proper basis for the partial enforcement or the reading down of a restraint of trade agreement

JUDGMENT

Whitcher J

- [1] This urgent application is to enforce a restraint of trade agreement concluded between the applicant and the first respondent, in terms of which the first respondent agreed to refrain from being employed by a competitor of the applicant for a period of three years from the termination of his employment with the applicant.
- [2] The restraint sought by the applicant is unlimited in regard to area, notwithstanding that the restraint agreement is limited to a defined territory, namely the Republic of South Africa, Botswana, Lesotho, Swaziland, Zimbabwe and Namibia.
- [3] The applicant employed the first respondent, a qualified civil engineer, in the capacities of contracts manager, executive contract manager and sales manager for a period of 13 years and 5 months. Both the first respondent's initial offer of employment as Contracts Manager and his later appointment to Sales Manager contain confidentiality undertakings in terms of which he agreed that during his employment with the applicant he would acquire confidential information of the applicant and deal with the applicant's customers, and, as a result, he agreed to refrain from being employed by a competitor of the applicant - for three years in respect of the later agreement.
- [4] On 24 March 2017, the first respondent resigned from the applicant and took up employment with a direct competitor of the applicant. Both the applicant and Engineered Linings, which trades as a division of the second respondent, are specialists in the supply and installation of synthetic geo-membrane lining used for the containment of liquids and waste, environmental protection and concrete corrosion protection.
- [5] The first respondent, in his opposing affidavit, attempted to downplay his role in - and knowledge of - the following aspects of the applicant's business. However, having regard to his qualifications, the nature and requirements of the positions he held during his 13 years of service, I find it inconceivable that he did not acquire *intimate* knowledge of the applicant's installation, project management, quality control, costing, pricing, marketing and tender

processes, potential projects, enquiries register and the applicant's customers, target customers, suppliers and consulting engineers. He admitted same to some extent in a letter to the managing director of the applicant:

“In dertien jaar het ek soveel op site en Aquatan se naam hoog gedra en soveel in diepte van site kondisies geleer en vrae wat konsultante het en waarvoor uitgekyk word i.t.v spesifikasie en installasie prosedures”.

- [6] The applicant's claim that, apart from its managing director, the first respondent has the most comprehensive technical knowledge and experience in the applicant and that he was often consulted to assist with the more technically complex estimates to provide accurate costing is highly plausible.
- [7] The question, however, is whether the information the first respondent acquired is worthy of protection as trade secrets and whether he had such personal knowledge of, and influence over, the customers of the applicant as would enable him to take advantage of the applicant's trade connections.
- [8] The applicant sought to rely on, amongst others, the part of the agreement wherein the first respondent agreed he would acquire confidential information and customer connections during his employment and, further, acknowledged the reasonableness of the restraint. This is misplaced. It is trite that the reasonableness of the restraint is determined with reference to the circumstances at the time the restraint is sought to be enforced.
- [9] In *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn*,¹ the court found that:

[17] The fact that parties to an agreement choose to describe a restraint as being reasonable, as in the present case, is not itself decisive. The reasonableness or otherwise thereof is a matter for the court to determine (*Basson* (supra) at 768A - C) . . .

¹ 2008 (2) SA 375 (C)

[10] Turning to whether the knowledge acquired by the first respondent while employed by the applicant constituted trade secrets (and thus should be protected), the court in *Experian SA (Pty) Ltd v Haynes and Another*, stated:

It is trite that the law enjoins confidential information with protection. Whether information constitutes a trade secret is a factual question. For information to be confidential it must be capable of application in the trade or industry, that is, it must be useful and not be public knowledge and property; *known only to a restricted number of people or a close circle*; and be of economic value to the person seeking to protect it.² (emphasis added)

[11] I note here that, at the commencement of the hearing, with no prior notice to the first respondent's legal team, the applicant tendered a confidential affidavit for the court's attention. I did not accept it because it was not tendered to the first respondent's attorney and counsel, which had been possible with appropriate non-disclosure undertakings. The third respondent, at least through his legal counsel, accordingly had had no opportunity to make representations on the contents thereof. I did not permit an adjournment because the applicant claimed the application was urgent and ought to have anticipated the first respondent's objection.

[12] In my view, the papers before me demonstrate that the first respondent was, by and large, not exposed to trade secrets. The applicant failed to demonstrate that the first respondent was exposed to techniques, technology and installation processes unique to the applicant and exclusively in the knowledge of the applicant. Unlike the applicant, the first respondent pertinently dealt with this issue in his affidavit and gave detailed evidence that the applicant does not use unique, secret technology and installation processes. The technology and installation processes in the industry is reasonably standard and readily available in the public domain [conferences, specialist magazine articles and so on]. The applicant's patented products and solutions are available to all in the industry. It has, in any event, recourse to patent law to protect unauthorised use of these products or methods.

² (2013) 34 ILJ 529 (GSJ) at para 19.

- [13] On the papers, the only unpatented material unique to the applicant is Hyperliner. I, however, accept that the first respondent does not know the formula used in the manufacturing process, nor was this alleged.
- [14] The only product uniquely manufactured by the applicant, again on the papers, appears to be HiDrain. In my view, the knowledge acquired by the first respondent about the use and installation of this one specific product does constitute a trade secret. I will return to this finding later, pausing to note here, however, that the first respondent's submission in his answering affidavit that similar products (cupsated drain cores) are available from numerous suppliers was not contested in reply.
- [15] I accept the first respondent's reasoning that information pertaining to potential projects, particularly major ones, is available in the industry generally in that the majority of projects go out to tender. The applicant did not direct the court's attention in its founding affidavit to any particular project in which it possessed specific knowledge that the first respondent acquired and could misuse.
- [16] The applicant alleges in reply, (for the first time and impermissibly), that its company specific standards far exceed (the applicant does not say how) those in the public domain and that its SANS 10409 is currently under review and the first respondent is familiar with the rewrite.
- [17] The applicant provided no substantive evidence to gainsay the first respondent's testimony that the industry is small, with common suppliers, customers and consultants such that the first respondent did not acquire knowledge of the *specific* needs and methodologies of the applicant's customers – the needs and requirements and methodologies of the customers in the industry are known to the companies that operate in the industry. Indeed, since the majority of projects go out to tender, these customers' needs would be published for all to see. The first respondent also plausibly disputed that his relationships with consultants is unique in some way such

that he knew how, other than through the obvious mechanism of payment, to obtain priority service from them.

- [18] I am further not convinced that the applicant made out a sufficient case in its founding affidavit that its software was in any way specialised.
- [19] With regard to costings, I accept that this constitutes a trade secret and that the first respondent's position would have given him insight into such. This would include mark-up or margin policies, overhead costs and supplier pricing arrangements. However, the first respondent avers that since August 2016, he was no longer involved in costing work and any knowledge he may have is no longer current. This evidence was not disputed in reply meaning that the court may accept that the first respondent's knowledge of costings is already eight months old.³
- [20] The applicant has not disputed the averment that labour and material prices increase annually and the applicant must further continually adjust its costings to take into account the volatile rand / dollar exchange rate. Notwithstanding the above, I do find that the applicant has a protectable interest in keeping this information, of economic value, confidential. Whether a restraint for the full period three year period is reasonable is a matter I will return to later.
- [21] I accept that the first respondent possesses knowledge of specific customer needs that could be conveyed to his new employer to the prejudice of the applicant. Specifically, he probably knows how a customer or consultant could be influenced by alternative specifications, higher standards, or alternative products which could ensure the successful award of a tender or project. However, in my view, the nature of this knowledge is not proprietary. To the extent that the first applicant's technical competence and experience in the industry has given him a feel for how to structure a liquid containment solution that best addresses a customer's needs – this is more a skill he has

³ While I understand that the applicant claims that its costing methodology is also a secret, it did not explain how knowledge of this methodology would help a competitor if the applicant continually adjusted its margin, reduced overheads or obtained better deals from suppliers which is an inevitable part of doing business.

developed and carries in his head than a discrete piece of knowledge he has purloined from the applicant's cabinet of trade secrets.

- [22] It seems obvious that a major concern underlying this application is that the first respondent possesses *technical* skills and experience which he is able to strategically apply to give whomever employs him a competitive advantage in marketing their services and drafting attractive tender proposals⁴. This ability, however, has a value without reference to any of the applicant's secrets. It is an ability to strategically apply general technical knowledge and experience to the advantage of an employer and, as stated above, does not belong to the applicant. As stated by the Labour Appeal Court in *Labournet (Pty) Ltd v Jankielsohn and Another*⁵:

Even if an employer spent time and effort and money to train or "skill" an employee in a particular area of work the employer has no proprietary hold on the employee, or his, or her, knowledge, skills and experience, even if those were acquired at that employer.

- [23] The same point was made in *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another*⁶, where the court pointed out that:

In seeking to protect his 'investment' in training the workmen, the employer is pursuing an objective which is unreasonable and contrary to public policy. For public policy requires that workmen should be free to compete fairly in the market place to sell their skills and know-how to their own best advantage; and the enforcement of a restraint which has no objective other than to stifle such free and fair competition is unreasonable and contrary to public policy.

- [24] Turning to the issue of customer connections, in *Rawlins v Caravantruck (Pty) Ltd*,⁷ it was held that whether there is an attachment between an employee and customer of such a nature that the employee would be able to induce

⁴ The applicant calls it "technical knowledge" (including the strategic application to maintain a competitive advantage).

⁵ (JA48/2016) [2017] ZALAC 7

⁶ 1991 (2) SA 482 (T)
1993 (1) SA 537 (A) at 541 G-I

those customers to follow him or her to another company is a question of fact to be determined in each case:

A great deal will depend on the employee's duties, his personality, the frequency of his contact with clients and the duration of such contact, what knowledge he gains of their requirements and business, the general nature of the relationship he or she has with clients; whether the employee is involved in the canvassing of customers and whether any customers were lost after the employee left his or her employment. This is clearly not a closed list of factors.

- [25] The first respondent plausibly rebutted the applicant's rather vague averments that relationships the first respondent may have developed with customers or consultants placed him in a position to induce them to follow him to the second respondent. Once again, the majority of projects go to tender, so the applicant's customer base in that regard is not specific to it. Second, I agree that the applicant has not specified in its founding affidavit the nature of the first respondent's relationship with (any) customers such that they may plausibly cancel orders already placed. It is an example of the rather broad and vague manner in which the applicant pleaded its case that it does not initially name any client with whom the first respondent could be said to enjoy a '*strong enough*' relationship to likely induce such a client to terminate its work with the applicant.
- [26] I turn now to what I see as the defining issue in this case. The applicant contends that it conducts business in South Africa, the African continent and the Indian Ocean Islands. It contends that a three year restraint is necessary to protect the interests it has identified.
- [27] Aside from the passages in the authorities already mentioned, the Labour Appeal Court in *Labournet* succinctly summarized the law on restraint of trade.

- [39] According to the decision in *Magna Alloys and Research SA (Pty) Ltd v Ellis*,⁸ (“*Magna Alloys*”) restraints of trade are enforceable unless they are proved to be unreasonable. Because the right of a citizen, to freely choose a trade, occupation, or profession and to practice such, is constitutionally protected, the *onus* to prove “*the reasonableness*” of a restraint might well have been affected.
- [40] In *Reddy*⁹, the Supreme Court of Appeal preferred not to become embroiled in the issue of *onus* and adopted a pragmatic approach, which according to it, was consistent with an approach where there was a direct application of the Constitution to restraint agreements. This approach was specifically adopted in respect of motion proceedings for the enforcement of restraints where the issue for determination was the reasonableness of the restraint. In terms of that approach, where the facts, concerning the reasonableness, had been canvassed in the affidavits – genuine disputes of fact are to be resolved in favour of the party sought to be restrained by applying the so-called *Plascon-Evans* rule.¹⁰ If the accepted facts show that the restraint is reasonable, then the applicant must succeed, but if they show that the restraint is unreasonable then the respondent in those proceedings must succeed.¹¹
- [41] The enquiry into the reasonableness of the restraint is essentially a value judgment that encompasses a consideration of two policies, namely the duty on parties to comply with their contractual obligations and the right to freely choose and practice a trade, occupation or profession. A restraint is only reasonable and enforceable if it serves to protect an interest, which, in terms of the law, requires and deserves protection. The list of such interests is not closed, but confidential information (or trade secrets) and customer (or trade) connections are recognised as being such interests. To seek to enforce a restraint merely in order to prevent an employee from competing with an employer is not reasonable.¹²

⁸ 1994 (4) SA 574 (A)

⁹ *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 406 (SCA)

¹⁰ See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634

¹¹ See *Reddy v Siemens Telecommunications (Pty) Ltd* (above) at 496B-D; and the LAC’s decision in *Ball v Bambalela Bolts (Pty) Ltd and Another* (above) at para 14.

¹² See *Ball v Bambalela Bolts (Pty) Ltd and Another*, *supra*.

[42] According to the Appellate Division in *Basson v Chilwan and Others*,¹³ the following questions require investigation; namely, whether the party who seeks to restrain has a protectable interest, and whether it is being prejudiced by the party sought to be restrained. Further, if there is such an interest – to determine how that interest weighs up, qualitatively and quantitatively, against the interest of the other party to be economically active and productive. Fourthly, to ascertain whether there are any other public policy considerations which require that the restraint be enforced. If the interest of the party to be restrained outweighs the interest of the restrainer – the restraint is unreasonable and unenforceable.

[43] It is now clear from, *inter alia*, *Basson* and *Reddy* that the reasonableness and enforceability of a restraint depend on the nature of the activity sought to be restrained, the *rationale* (purpose) for the restraint, the duration of the restraint, the area of the restraint, as well as the parties' respective bargaining positions. The reasonableness of the restraint is determined with reference to the circumstances at the time the restraint is sought to be enforced.¹⁴ With reference particularly to the facts of this matter, it is an established principle of law that the employee cannot be interdicted or restrained from taking away his or her experience, skills or knowledge, even if those were acquired as a result of the training which the employer provided to the employee.¹⁵

[44] Even though it is acknowledged that it is difficult to distinguish between the employee's use of his or her own knowledge, skill and experience, and the use of his or her employer's trade secrets, it is accepted that an employee cannot be prevented from using what is in his, or her, head.¹⁶

[45] Also relevant to this matter are the principles relating to the reasonableness of the duration of the restraint. This aspect is generally assessed as part and parcel of assessing the reasonableness of the restraint, but it bears

¹³ 1993 (3) SA 742 (A) at 767E-I.

¹⁴ See: *Reddy v Siemens Telecommunications (Pty) Ltd (above)* at 497F, at para 16; *Ball v Bambalela Bolts (Pty) Ltd (above)* at para 17.

¹⁵ See: *inter alia*, *Easy Find International SA (Pty) Ltd v Insta Plan Holdings 1983 (3) SA 917 (W)* at 929F-930A and the cases cited there.

¹⁶ See; for example, *Northern Office Microcomputers (Pty) Ltd v Rosenstein [1981] 4 All SA 509; 1981 (4) SA 123 (C); Knox D'Arcy Ltd v Jamieson [1992] 4 All SA 275; 1992 (3) SA 520 (W)*. In, *inter alia*, *Automotive Tooling Systems (Pty) Ltd v Wilkens 2007 (2) SA 271 (SCA) at 282E-G*, it was held that the skills which an employee acquired in the course of developing his or her trade, even if they were specialised, did not constitute a protectable interest of the employer who sought to restrain the employee.

mentioning that the duration must be rational and reasonable. It cannot be reasonable if it is not rational.”

- [28] Above, I have found that the applicant has a protectable interest, on the grounds of confidentiality, in the following knowledge that the employee possesses: the use and installation of the HiDrain product; and costings, which include mark-up or margin policies, overhead costs and supplier pricing arrangements.
- [29] In respect of the HiDrain product, while it is unique to the applicant, the first respondent's knowledge of its existence and installation is hardly a commercial game-changer. This is because other cusped drain core products are on the market for anyone in the industry to use. I did not understand the applicant to suggest that the second respondent would copy this product if it received details of the HiDrain from the first respondent. Any prejudice likely to be suffered would be limited to a competitor having the benefit of a first-hand assessment of how well HiDrain works and insight into what cost savings it might entail.
- [30] While it is understandable that the applicant wishes to keep this secret, the question I must answer is whether a three year restraint is reasonable in relation to this interest when balanced against the countervailing right of the employee to work in the only trade in which he enjoys any prospects of income commensurate with what he had. This is, in its nature, a judgement call. To my mind, the employee will likely lose far more than the applicant should the restraint be enforced to protect. Losing a job in the present depressed economic climate is not something lightly to be contemplated and does not seem justified in light of all the nature of the interests the applicant has established it has.
- [31] In respect of the costings, I take note of the applicant's contention that its pricing methodology does not change drastically every year. The first respondent partially denies this by stating that pricings themselves change at least once a year. He also states that for eight months already, he had not

played any role in costings. Consequently, again, while the applicant has a protectable interest in its recent costings being confidential, this court in my view cannot reasonably enforce such confidentiality for three years. Such a period is obviously excessive given the disconnection between the rationale for the restraint (to protect trade secrets unlikely to be in operation for more than a year) and the duration of the restraint (three years).

[32] I turn now to whether enforcing a restraint for a lesser period may be appropriate. In its notice of motion the applicant asked that the first respondent be interdicted and restrained for a period of 3 (three) years from 30 April 2017, *alternatively for such a period as the court deems reasonable and appropriate*.

[33] Although, I may have been inclined to confirm a restraint for a shorter period, I decline to accept the task of calculating what this should be for the reasons that follow.

[34] In *Benchmark Signs Incorporated v Muller and Another*¹⁷, Molahleli J neatly set out the law in this regard:

[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:

¹⁷ (J1153/16) [2016] ZALCJHB 238, unreported, (7 July 2016).

“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.”

[23] In *Henred Reuhauf (Pty) Ltd v Davel & Another*,¹⁸ 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 was 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.

[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]

¹⁸ (2011) 32 ILJ 618 (LC).

[24] In the present matter the applicant neither concedes nor acknowledges 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 ...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 reading 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* 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."

[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."

[35] In this matter, the applicant only contemplates (but both fails to set out a proper basis and fails to make the necessary concession in the pleadings - for) a partial enforcement or reading down of the duration of the restraint in its notice of motion. The reasonableness of a shorter duration was thus not raised "as an issue to be dealt with in evidence and argument".¹⁹ Since this issue was not adequately canvassed, I decline to cut and trim the over-broad restraint the applicant wishes to enforce.

[36] In the circumstances I thus find that the first respondent has discharged the onus of showing that the restraint of trade provisions in his contract are unenforceable.

Order

[37] The application is dismissed with costs.

Whitcher J

¹⁹ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 of Synthesis (4) SA 874 (A) at 896A - E*

Judge of the Labour Court of South Africa

APPEARANCES:

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Instructed by:	A J Stone Attorneys
For the first respondent:	Adv L Hollander
Instructed by:	Fluxmans Inc. Attorneys

LABOUR COURT