

SOUTH AFRICA / JUDGMENT

Best Advice Financial Services (Pty) Ltd v Smith and Another (1991/2018) [2018] ZAFSHC 46 (10 May 2018) [2018] ZAFSHC 46

COURT

Free State High Court, Bloemfontein

BEFORE

LJ Lekale

CASE / FILE NUMBER

1991/2018

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IN

THE HIGH COURT OF SOUTH AFRICA,
FREE
STATE DIVISION, BLOEMFONTEIN

Reportable:

NO
Of
Interest to other Judges: NO
Circulate
to Magistrates: NO
Case
number: 1991/2018
In

the matter between:

BEST
ADVICE FINANCIAL SERVICES
(PTY)
LTD
Applicant
and
MARIE
SMITH
First Respondent
AT
RISK ADVISORS (PTY)
LTD
Second Respondent

CORAM: LEKALE, ADJP
HEARD

ON: 25
APRIL 2018

JUDGMENT

BY: LEKALE, ADJP

DELIVERED ON: 10 MAY 2018

SUMMARY: Restraint of trade- Enforcement thereof- Restrainee contacting clients she used to service on behalf of restrainer before termination of consultancy contract with full

knowledge of the prohibition- Covenant going further than necessary and as such unreasonable- Duration of covenant reduced accordingly.

BACKGROUND

AND INTRODUCTION

[1] On 21 September 2004 the applicant and the first respondent concluded a written agency/ consultancy contract which included a restraint clause in terms of which the first respondent, as a consultant, inter alia, undertook not to be engaged in any business that is similar to that of the applicant as a consultant or advisor in the Mpumalanga

Province for a period of 3 years after its termination.

[2] On 12 January 2018 the applicant debarred the first respondent in terms of section 14 of Financial Advisory and Intermediary Services Act 36/2002 (FAISA) and terminated the consultancy contract following a disciplinary inquiry into allegations of unethical conduct levelled against her as a consultant. The first respondent, thereafter, secured an order suspending her debarment from the High Court in Pretoria on 20 February 2018 and subsequently secured affiliation with the second respondent which does business similar to the applicant and is based in Johannesburg.

[3] On or about 10 April 2018 the applicant received information indicating that first respondent was contacting some of the clients

she used to service in Mpumalanga as a consultant attached to the applicant introducing herself as a representative of the second

respondent and soliciting business as a short term broker. Several of such clients have since switched loyalty from the applicant to the second respondent by assigning the latter as their servicing advisor and on 17 April 2018 the applicant received a request from an insurer to move three more clients to the second respondent.

- [4] The applicant feels aggrieved by the conduct of the first respondent and launched the instant application on an urgent basis on 19 April 2018 moving, inter alia, for an order enforcing the covenant against the first respondent. The first respondent, on her part, opposes the motion while there are no opposing papers filed by the second respondent.

ISSUES

FOR DETERMINATION

- [5] Parties are ante omnia at variance on whether or not the matter warrants urgent attention on the part of the court with the first respondent contending that urgent relief is not necessary insofar as the applicant expressly became aware of her alleged offending conduct in early March 2018 but waited until mid April 2018 to launch the present proceedings.
- [6] In the event of the court finding cause to entertain the matter out of turn as urgent, the parties are in dispute over whether or not the first respondent breached the covenant insofar as she is employed in Johannesburg and the clients she contacted are those she used to service and, as such, her own and not new clients.
- [7] In the further event of the question in [6] above being decided in the affirmative then the dispute between the parties extends to the question whether or not the covenant goes further than necessary and is, as such, unreasonable with the first respondent effectively contending that three years is inordinately long.

CONTENTIONS FOR THE PARTIES

- [8] Mr Bester for the applicant submits on papers and before the court, inter alia, to the effect that the relief sought is inherently urgent and that the applicant has protectable interest in the form on clients based within Mpumalanga province. The covenant is reasonable in all respects insofar as it seeks to protect such interest to which the first respondent has access as a result of her previous professional relationship with the clients.
- [9] On behalf of the first respondent Mr Roux submits, both on papers and before the court, inter alia, that the first respondent was aware that the effect of the restraint clause was to prohibit her from contacting applicant's clients based in Mpumalanga although it does not expressly refer to such clients. The first respondent only contacted the relevant clients in order to set the record straight after the applicant tarnished her name when it debarred her. Six months would be reasonable as the duration of the covenant in question in the circumstances of the present matter regard being had to the first respondent's personal circumstances and right to earn a living for herself and her children as a single parent.

APPLICABLE LEGAL POSITION

- [10] In motion proceedings urgency is a boarding pass which entitles an applicant for urgent relief to jump the queue, to forge its own rules with regard to service and form subject to the court's approval in order to be heard out of turn. (See *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*
- [2015] JOL 28244 (GSJ)).
- [11] In proceedings of the instant nature where a final relief is sought on motion the onus on the applicant includes showing, on a balance of probabilities, that it has a clear right which it seeks to protect, actual or imminent injury to the same as well as absence of alternative appropriate relief. (See *V&A Waterfront Properties (Pty) Ltd and Another v Helicopter Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA).
- [12] At common law, where the final relief sought is the enforcement of a restraint clause the onus on the applicant is limited to proof of the existence of the covenant relied upon with the consequence that once established the restraint is *prima facie* enforceable until and unless it is shown by the party seeking to escape it that it is unreasonable and *contra bonos mores*. (See *Magna Alloys and Research SA (Pty) Ltd v Ellis*
- [1984] ZASCA 116; 1984 (4) SA 874 (A)).
- [13] Where the facts concerning the reasonableness or otherwise of the restraint are fully before the court the court makes a value

judgment

on whether or not the restraint is reasonable regard being had to the fact that public interest requires that the parties should comply with their contractual obligations in line with the notion expressed in the maximum *pacta servanda sunt* as well as the fact that it is in the interest of society that all people should “be productive and be permitted to engage in trade and commerce or professions”. (See *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA)).

- [14] The enquiry as to the reasonableness of a contractual restraint involves consideration of facts and circumstances prevailing at the time the restrainer seeks to enforce the restraint such as the duration of the restraint, the area over which it applies, whether or not the restrainee was paid any consideration in respect of the restraint, whether the restrainee would still have the ability to earn a living if the restraint is enforced and that the “proprietary interest or capital asset which the restrainer seeks to protect as well as all other relevant circumstances prevailing at the time enforcement is sought”. (See *Magna Alloys and Research SA (Pty) Ltd* supra and *J Louw and Company (Pty) Ltd v Richter and Others* 1987 (2) SA 237 (N)).
- [15] In assessing the reasonableness of the restraint the court considers the questions whether or not there exists an interest which deserves protection after the termination of the contract between the parties; whether such protectable interest is threatened by the other party; whether such interest weighs both qualitatively and quantitatively heavier than the

interest of the other party not to be economically inactive and unproductive; whether there is an aspect of public policy which either militates against or supports the enforcement of the restraint and lastly whether the restraint goes further than necessary to protect the relevant interest. (See *Basson v Chilwan & Others*

[1993] ZASCA 61; 1993 (3) SA 742 (A) at 767 and *Kwik Copy SA (Pty) Ltd v Van Haarlem and Another* 1991

(1) SA 472 (W) at 484E with regard to the last enquiry)

[16] A covenant which prevents a party after termination of his or her employment from earning a living by partaking in trade or industry or profession without a corresponding interest of the other party deserving of protection is unreasonable and, as such, unenforceable. (See *J Louw and Company (Pty) Ltd v Richter and Others supra*.

[17] Trade secrets, pricing a customer/supplier connections are all proprietary interests which prima facie deserve protection. A protectable customer or supplier relationship exists where an employee has personal knowledge of and

influence over the customers or suppliers of his/her employer such that if he or she were to leave the employer he or she would

automatically carry the customers with him or her and, if competition were to be allowed, he/she would be able to take advantage of his employer's trade connections. (See *Rawlins and Another v Caravantruck (Pty) Ltd*

[1992] ZASCA 204; 1993 (1) SA 537 (A) at 541 (D-I)).

APPLICATION OF LEGAL POSITION AND FINDINGS

[18] There is no dispute about the existence of the covenant and as such the onus is on the first respondent to show that it is unreasonable and contra bonos mores.

[19] The parties are further effectively in agreement that the covenant not only prohibits the first respondent from taking up employment in Mpumalanga with a company which carries a business similar to that of the applicant but that it also prohibits her from contacting the applicant's clients in Mpumalanga for the purposes of soliciting business. To the extent that the first respondent

contacted such clients with a view to soliciting business from them she breached the relevant covenant regard being had to the fact that the applicant's interest in this regard undisputedly deserves protection insofar as the first respondent has influence on such clients.

[20] It is true, as contended by the first respondent, that the relationship she had with the clients whilst working as a consultant

with the applicant was personal and that she built the relationship over a period of 20 years earning a living from such services.

A period of 3 years therefore appears to be very long regard being had to the fact that for a new consultant to take over the relevant

clients on behalf of the applicant it would definitely take far less than 3 years. On the other hand the first respondent had been working as a consultant for the applicant for about 14 years and reasonably knows the industry very well around the area in question. To deprive her of the opportunity to earn a living in familiar neighbourhood appears unreasonable regard further being had to her need to earn a living and to be productive for the benefit of not only herself but also her children. Striking a healthy balance between the protectable interests of the applicant and the rights of the first respondent is the real issue between the parties in casu. It should, further, be noted that the first respondent received no compensation from the applicant for forfeiting her right to partake in trade or commerce or profession in the Mpumalanga Province where she has been working for 20 years. In my view 6 months is a reasonable period in the circumstances of the instant matter for the operation of the restraint.

COSTS

[21] The applicant asked for punitive costs against the first respondent while the first respondent, on her part, asked that no order as to costs be made against her and each party be directed to pay its own costs.

[22] The question of costs is dictated to a large extent by fairness. I am persuaded that the duration of the covenant as it stands is inordinately long and has the effect of totally rendering the first respondent unproductive in the relevant area. To the preceding extent I am satisfied that the first respondent achieved some success and is, as such, also entitled to a recognition that she had cause to oppose the matter in order to get relief as far as the duration of the covenant is concerned. In the circumstances parties were successful in their respective claims.

ORDER

[23] In the result non-compliance with the rules of the court in respect of dies, form and service, are condoned in terms of rule 6(12) of Uniform Rules of Court and the matter is, as such, heard as an urgent application.

[24] The first respondent is interdicted and restrained from being involved as proprietor, partner, director, shareholder, member,

employee, consultant, contractor, financier, agent, representative, assistant or otherwise and whether for reward or not, directly or indirectly in any company, close corporation, firm, undertaking or concern carried on in the territory of Mpumalanga and which performs or makes available prescribed services or in the cause of the business of which prescribed services are offered or performed as per the definition in the restraint of trade agreement dated 21 September 2004 for the period of six months calculated from 12 January 2018.

[25] The first respondent is interdicted from contacting and/or soliciting any of the applicant's clients in Mpumalanga Province in respect of the delivery of prescribed services for the period of six months calculated from 12 January 2018.

[26] Each party to pay its own costs.

LJ LEKALE, ADJP

On behalf of applicant: Adv. M Bester

Instructed by:

Rossouws Attorneys

Bloemfontein

On behalf of respondents: Adv. LA Roux

Instructed by:

Peyper Austen Inc.

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