

SOUTH AFRICA / JUDGMENT

Com Office Systems Port Alfred CC v Ord and Another (2402/2019) [2019] ZAECHGHC 97 (15 October 2019) [2019] ZAECHGHC 97

COURT

Eastern Cape High Court, Grahamstown

BEFORE

M.J. Lowe

CASE / FILE NUMBER

2402/2019

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IN THE HIGH COURT OF
SOUTH AFRICA
EASTERN
CAPE DIVISION, GRAHAMSTOWN
Case No: 2402/2019
Date
heard: 10
October 2019
Date
delivered: 15
October 2019
In

the matter between:

COM
OFFICE SYSTEMS PORT ALFRED CC
Applicant
and
TIMOTHY
DAVID ORD
First
Respondent
TIMS
PRINT AND COPY (PTY) LTD
Second
Respondent

JUDGMENT

LOWE, J:

INTRODUCTION

- [1] Applicant conducts business as a printing and copying service and sells ink and toner cartridges, also selling and repairing computers and printers.
- [2] First Respondent, previously employed by Applicant, resigned in March or mid-April 2019, having prior to this registered Second Respondent, of which he is clearly the guiding hand and mind. He commenced trading as Second Respondent providing printing and copying services, selling ink cartridges, selling and repairing computers and selling printers, in a business virtually identical to Applicant and in business premises close to that of Applicant.
- [3] Applicant brings this application to interdict First and Second Respondents from trading accordingly (now in a reduced area) seeking to enforce a restraint of trade agreement voluntarily concluded between Applicant and First Respondent at the time of his employment as Manager of First Respondent on 20 May 2017, and relies further on allegations of unfair competition.
- [4] The Application is brought on a semi-urgent basis.

BACKGROUND

- [5] Prior to taking up employment with Applicant, First Respondent ran a business from his home in Port Alfred for some 17 years as a general supplier of printing and copy equipment, buying and selling computers and computer equipment. In so doing he clearly built up a large client base and a relationship with suppliers, as also knowledge and experience in the industry. It is common cause that this was important to Applicant when employing him and that his customers followed him to Applicant. Of course they then enjoyed the additional services offered by Applicant in printing and copying services.
- [6] A limited dispute on the papers is whether or not First Respondent also became privy to Applicant's suppliers.
- [7] First Respondent argues that he knew who Applicant's customers were prior to his employment and that the remainder were his prior clients – thus denying, being privy to confidential information. He says customers simply come in when they need the services offered.

- [8] It was however clear on a proper approach to the affidavits, that he became familiar with all aspects of Applicant's business and has knowledge of not only Applicant's business but also of Applicant's customers, sales records and debtors lists. This says Applicant, with justification, is still confidential information and most certainly not disclosed to outsiders. Applicant it must be remembered, was Manager of Applicant's Port Alfred Business and necessarily privy to much of its business details.
- [9] Applicant argues that this inevitably enables him to make "tailored" offers to customers, with which I agree.
- [10] Applicant alleges a loss of customer base since First Respondent's and Second Respondent's business commenced. This is met with a bald denial in circumstances in which this denial falls to be easily rejected and is clearly not bona fide as First and Second Respondents must necessarily be in a position to clearly establish and disclose their new customer base and whether these are or include former customers of Applicant. Their stance on this is thus devastatingly insufficient.
- [11] It is clear that First Respondent, whilst in the employ of Applicant, set up Second Respondent secretly and having done so resigned from Applicant going directly to Second Respondent, a directly competing business, taking with him at least some of Applicant's customer base and a detailed knowledge of much of Applicant's business.

THE CONTRACT

- [12] The Contract of Employment signed on 20 May 2017 provides at paragraph 19 as follows:

"19 Restraint of Trade

19.1 You shall not be directly or indirectly involved in any other business whilst in the Company's employ, unless full disclosure of this has been made, and the Company's written consent has been given. Such business activities shall not be pursued during official working hours and shall not be in conflict with interest of the Company's business activities.

19.2 As an employee of the Company, by reason of association and service, you will acquire knowledge of the Company's trade secrets, sources of supply, patents of trade, business methods, suppliers and clientele. Such knowledge could be advantageous to the Competitors of the Company. You therefore undertake:

19.2.1 That you will not directly or indirectly, and whether as principal, agent, partner, representative, shareholder, director or employee, be associated with or interested in (which expression includes, inter alia, the loan or advancement of money to) any firm, company, person, or group carrying on business in competition with that of the Company and/or any company, firm or undertaking which it may now or in future control, or with which it may become associated; and

19.2.2 That you will not knowingly solicit, in competition with the Company, a customer or any person who, as at the date of termination of your employment, is or was a customer of the Company; and

19.2.3 That you will not commence business on your own account, enter into any partnership, accept any position as director of any company, accept any employment with any person, firm, group, partnership or association whatsoever, that directly or indirectly competes with the business of the Company and/or carries on a business similar to that the Company, specifically in relation to the business and processes of the refilling of ink and laser cartridges printers and photocopiers.

19.3 This restraint shall endure while in the employ of the Company and for a period of twelve months from date of termination of your employment for any reason whatsoever, and shall apply throughout the area of the Eastern Cape.

19.4 By signing or acknowledge receipt of this contract of employment, you agree that the restrains of trade set out in it are responsible in all respects.”

[13] That this is susceptible to simply interpretation in context is not disputed and its meaning and ambit is clear.

THE APPROACH

[14] Generally applications are not designed to resolve factual disputes between the parties and are decided on common cause facts. Probabilities and onus issues are not of Application[1].

[15] As is set out in Civil Procedure in the Supreme Court[2]:

“It is well established the Plascon-Evans rule that wherein motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in the applicant’s affidavits, which have been admitted by the respondents, together with the facts alleged by the latter, justify such order. It may be different if the respondent’s version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.” [3]

[16] The Court has to accept those facts averred by Applicant that were not disputed by Respondent, and Respondent’s version insofar as it was plausible, tenable and credible[4]. I adopt this approach to the affidavits accordingly.

URGENCY

[17] This matter was brought as one of semi-urgency.

[18] In short the time periods for reply were truncated and thus Respondents had the usual time in which to answer. Respondents were however afforded some three Court days from the filing of the reply by Applicant in which to consider same and file heads of argument.

- [19] The reply contained new material and at the hearing Applicant abandoned paragraphs 29, 30, 38, 39, 55, 56, 62 and 63 thereof.
- [20] The matter was otherwise ripe for hearing and notwithstanding the complaint of the truncation of timeframes I failed to discern any real prejudice to Respondents.
- [21] Respondents relied heavily on Applicant's delay in bringing the Application from the end of April 2019 to 15 August 2019 (three and a half months) suggesting that this was inordinate and thus urgency self created. It was further suggested that there were insufficient allegations as to the nature of, and reasons for, the alleged urgency.
- [22] I cannot agree with these contentions in the circumstances of this particular matter.
- [23] In *Boomerang Trade CC t/a Border Sheet Metals v Groenewald and Another*
- [5] Smith J held:
- "[33] When an applicant has departed from the normal time periods and has stipulated truncated time limits in its notice of motion, it must set out circumstances justifying the extent of the departure from the normal time limits, and why it claims that it could not obtain substantial redress at a hearing in due course. (Luna Meubel Vervaardigers (EDMS) BPK v Makin and another (t/a Makin's Furniture Manufactures) 1977*
- (4) SA 135 (W) at 137F-G).
- [34] ...
- [35] Mr Patterson, who appeared for the Applicant, on the other hand submitted that proceedings for the enforcement of restraint of trade agreements are inherently urgent.
- [36] I agree with Mr Paterson that proceedings for the enforcement of a restraint of trade agreement are usually, by their very nature, urgent. They invariably seek to interdict ongoing unlawful action in respect of which an applicant continues to suffer financial losses which are notoriously difficult to quantify, or to recover by way of action. (*Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another* 2009
- (3) SA 78 (C) at 88J."
- [24] I agree herewith in principle.
- [25] I am aware of *Macneil Jhb (Pty) Ltd v Cocolaras and Another* [6] Nkutha-Nkontwana J held:
- "The legal principles and evolution*
- [18] The principles applicable to urgent applications in relation to restraint of trade litigation are succinctly echoed in *Ecolab (Proprietary) Limited v Thoabala and Others*, where the Court said that:

[20] ... parties alleging breaches of restraint of trade agreements are not indemnified from satisfying the requirements in Rule 8. Thus, a mere contention that the enforcement of restraint of trade is inherently urgent and therefore must be treated as such by this court without any further consideration cannot by all accounts be sustainable. The fact that these disputes may have an inherent

quality of urgency cannot be equated to a free pass to urgent relief on the already over-burdened urgent roll in this court. Like all other urgent matters, more than a mere allegation that a matter is urgent is required.[2] This therefore implies inter alia that the Court must be placed in a position where it must appreciate that indeed a matter is urgent, and also that an applicant in the face of a threat to it or its interests had acted with the necessary haste to mitigate the effects of that threat.”

[26] In this matter however whilst having earlier threatened action in May 2019, in a letter of demand, Applicant says in its founding affidavit:

“34. The Applicant was hesitant to embark in litigation and enforce the restraint of trade agreement, and only resolved in late May to proceed with the application. The reason for this was that the Applicant needed to assess the effect this would have on the business of the Applicant as the Applicant did not wish to rush into any litigation unnecessarily. Thereafter, in June instructions were given to my attorney to proceed with the Application. After our initial consultation my attorney requested further information from me on or about 18 June 2019. I supplied the requested information on or about 4 July 2019 and on or about 12 July 2019 a further clarification was requested. I was in Cape Town on business for several weeks and was unable to supply the information as I was away from the Com Office administrative office in East London where the information that I needed to access is located. I was not able to remotely access the information and I was only able to provide the requested information by 5 August 2019.”

[27] Whilst there was a long delay, in the circumstances of this matter, to pause to assess the real effect of its new competitor was not unreasonable or irresponsible, further the truncation of the time periods was limited, to say the least, and no effective prejudice was demonstrated. Further the inherent urgency in restraint applications assists Applicant.

[28] In the result, I consider the matter to be properly before me.

THE MERITS

[29] In general terms the relevant facts have already been set out above.

[30] In restraint of trade matters the general principles are now well settled:

[30.1] A restraint is valid and enforceable unless contrary to public policy[7].

[30.2] The public interest requires (in general) that parties comply with contractual obligations, but should insofar as possible be free to engage in commerce and professions and no unreasonable restraint should be placed thereon[8].

[30.3] The party seeking to restrain must have a “legitimate interest” to protect[9].

[31] There are several issues to be considered in restraint matters being[10]:

“• is there an interest deserving of protection on termination of the agreement;

- is that interest being prejudiced by the conduct of the party restrained;
- if so, how does the interest weigh up qualitatively and quantitatively against the interest of the other person not to be economically

inactive and unproductive;

- is the restraint wider than is necessary to protect the interest;
- is there another facet of public policy not related directly with the relationship between the parties that requires that the restraint

should not be enforced?”

[32] This must be considered in the light of the circumstances at the time of enforcement[11].

[33] At 54.9 van Blerk (supra) correctly sets out that:

“In considering whether it would be unreasonable to enforce the restraint against a former employee, factors such as the following will often be relevant:

- the inequality of the bargaining position between the employer and employee;
- the extent to which the employee derived benefits from such employment, at no cost to himself or herself, but at cost to the employer;
- the extent of the remuneration, including commission for services rendered;
- the length of employment;
- the circumstances giving rise to the termination of the employment: was there misconduct on the part of the employee or was the employment terminated, albeit lawfully, in circumstances that were commercially unfair to the employee?”

[34] What must be considered particularly in this matter, over and above what I have already set out, is most importantly the nature of the restricted activity, the area of operation geographically, the period of restriction and the interest relevant to protection.

[35] Legitimate interests include patrimonial interests, business or trade connections, clientele and trade secrets[12].

[36] The reasonableness of the restraint (not the same as reasonableness inter partes) is what is considered, but certainly the individual interests and protectable interests are also to be considered[13].

[37] In *Aranda Textile Mills v Hurn & Another* [14] it was held that for information to qualify as confidential it must meet three requirements:

[37.1] it must be capable of application in a trade or industry;

[37.2] it must not be public knowledge or public property (ie, it must be known only to a restricted number of closed circle of people); and

[37.3] it must, objectively, be of economic value to a rival.

[38] Whether an employee has acquired trade connections is a question of fact. Simply put the question is whether an employee has established such a relationship with customers that he could easily influence them to follow him to a new business – considering his duties, seniority, duration of contact with customers, the place where this occurred, his knowledge gained, the nature of the relationship

between employee and customers, the degree of competitiveness between rival businesses and whether there is evidence of loss of

customers[15].

[39] In this matter the above is strongly supportive of Applicant's case in respect of which every factor set out above is well satisfied on the facts. First Respondent was not only Manager but had much contact with customers and certainly not only those that came with him, this was with frequency and over the full duration of his employment, this adding to his knowledge of customers and potential customers. The competing businesses are identical and there is no doubt as to loss of customer base in Applicant's hands on a proper approach to the affidavits.

[40] There is also no doubt (on a proper approach to the papers) that First Respondent has acquired at least some knowledge of customer lists and contacts and trade connections, this all affording a clear protectable interest and the acquisition of customer and trade connections.

[41] The nature and extent of the restraint – a question of interpretation – is uncontentious in this matter, being throughout the Eastern Cape for a period of one year.

[42] The period of the restraint (1 year) is perfectly reasonable. The area is not, as a reasonable area could clearly not have been legitimately beyond Port Alfred.

[43] The question is whether the impugned conduct falls within this restraint, which is too widely stated area related, should be interdicted over a limited area a so-called "overbreadth" [16].

[44] The failure to enforce the restraint would in my view cause an injustice – the restraint is well justifiable as I have said and is for a reasonable period, simply being too wide geographically. The Court will of course not make a contract for the parties – but in this matter there is no danger hereof.

[45] In *National Chemsearch (SA) (Pty) Ltd v Borrowman and Another* [17], the Transvaal Full Bench abandoned the rules on severability in favour of an approach that Botha J described as follows:

“The ratio of this approach I shall attempt to formulate as follows: when a restraint according to its terms as agreed upon is found to be unreasonably wide in its scope of operation, the Court can, in a proper case, enforce the restraint partially, by issuing an order incorporating the addition of such limiting words to the restraint as agreed upon as are appropriate to restrict its scope of operation to what is found to be reasonable.”

This approach was approved by the Appellate Division in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*

[18] and *Sunshine Records (Pty) Ltd v Frohling* [19].

[46] This is a matter perfectly suited to partial enforcement. In argument the area of the restraint was conceded by Applicant as too large and a limited area contended for, being Port Alfred.

[47] This for a period of 1 year is more than reasonable.

[48] This matter is, as I have said, tailor made for partial restraint, and Applicant has made out a proper case therefor[20].

[49] In the result I find that Applicant is indeed entitled to the limited relief sought in respect of at least First Respondent.

[50] Whether this should extend to Second Respondent was contested

[51] In my view this can be shortly dealt with. First Respondent stealthily set up Second Respondent whilst in the employ of Applicant for the very purpose of conducting an identical and competing business with Applicant close to its premises. This was done deliberately and commenced upon First Respondent’s resignation or shortly thereafter and impacts on Applicant’s

business.

[52] Second Respondent whilst having two Directors, being First Respondent and his wife, is clearly his alter ego and business vehicle.

[53] It follows as night follows day that it too must be restrained.

COSTS

[54] As to costs these must follow the result but no case is made out for a punitive costs order.

ORDER

[55] The following order issues:

1. Applicant is granted leave to bring this application on a semi-urgent basis as provided for in Rule 6(12) of the Uniform Rules of Court.
2. First Respondent is interdicted and restrained, whether indirectly or directly from being employed by, or associated with, Tims Print and Copy (Pty) Ltd (Second Respondent) and/or any other entity which trades in competition with Applicant in any capacity, for a period commencing from the date hereof until 8 April 2020 within the Port Alfred Municipal area.
3. First Respondent is, for the period from date hereof to 8 April 2020, interdicted and restrained from divulging any of Applicant's trade secrets or other confidential information to any party, including Tims Print and Copy (Pty) Ltd (Second Respondent) and/or any other entity which trades in competition with Applicant, within the Port Alfred Municipal Area.
4. Second Respondent is for the period from date hereof to 8 April 2020, interdicted and restrained from offering printing and copying services and selling, refilling or refurbishing ink and toner cartridges for printers and photocopiers; selling A4 paper; selling desktop and laptop computers and computer peripherals within the Port Alfred Municipal area.
5. First and Second Respondent are ordered to pay the costs of this application on the ordinary scale, jointly and severally, the one paying the other to be absolved.

M.J. LOWE

JUDGE OF THE HIGH COURT

Appearances:

Obo Applicant: Adv J Barker

Instructed by: Huxtable Attorneys, Grahamstown

Obo Respondents: Adv T.S. Miller

Instructed by: Wheeldon Rushmere & Cole Inc, Grahamstown

[1] Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd

[1984] ZASCA 51; 1984

(3) SA 623 A 634 – 635; National Director of Public Prosecutions v Zuma 2009

(2) SA 279 SCA [26]

[2] Harmse (Butterworths) B6.45

[3] Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd 2017

- (2) SA 1 (SCA)
- [4] Airports Company South Africa Soc Ltd v Airports Bookshops (Pty) Ltd t/a Exclusive Books [2016] 4 All SA 665 (SCA).
- [5] (EL 2300/10, ECD 1938/12) [2012] ZAECELLC 18 (18 September 2012)
- [6] (J1722/17)
- [2018] ZALCJHB 2 (11 January 2018)
- [7] Sunshine Records (Pty) Ltd v Fohling and Others 1990
- (4) SA 782 (A), Basson v Chilwan 1993
- (3) SA 742 (A).
- [8] Sunshine at 794.
- [9] Basson 767E-F.
- [10] Juta
- Precedents for Applications in Civil Proceedings, Peter van Blerk (page 565/566); Basson supra at 767E-I, as read with Kwik Copy SA (Pty) Ltd v Van Haarlem 1999 (1) SA 472 (W) at 484D-E; Reddy v Siemens Telecommunications (Pty) Ltd 2007
- (2) SA 486 (SCA) at para [17].
- [11] Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A)
- [12] Sibex Engineering Services (Pty) Ltd v Van Wyk and Another 1991
- (2) SA 482 (T). Basson supra. Contract of General Principles , Van Huyssteen et al 5th Edition Juta, 7.69 and footnote 82.
- [12] Sibex Engineering Services (Pty) Ltd v Van Wyk and Another 1991
- (2) SA 482 (T).
- Basson supra.
- Contract of General Principles , Van Huyssteen et al 5th Edition Juta, 7.69 and footnote 82.
- [13] Magna Alloys supra 897-8. Contract supra 7.68 and footnote 178 and 179.
- [13] Magna Alloys supra 897-8.
- Contract supra 7.68 and footnote 178 and 179.
- [14] [2000] 4 All SA 183 (E), paragraph 30
- [15] LAWSA Vol 9, 3rd Edition, LexisNexis. S337 and footnote 14, 15 and 16.

[16] Den Braven SA (Pty) Ltd v Pillay And Another 2008

(6) SA 229 (D) [36]

[17] 1979

(3) SA 1092 (T) at 1116D

[18]

[1984] ZASCA 116; [1984] 2 All SA 583, 1984 (4) SA 974 (A) 896A-E

[19] [1990] 1 All SA 8, 1990 (4) SA 782 (A) 794G-796D

[20] See also: Magna Alloys 896A-E and Sunshine 794G-796D

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