

SOUTH AFRICA / JUDGMENT

# Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes and Another (J 2073/11) [2011] ZALCJHB 150 (17 October 2011)

[2011] ZALCJHB 150

## COURT

Labour Court Johannesburg

## BEFORE

Steenkamp

## CASE / FILE NUMBER

J 2073/11

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA

HELD IN JOHANNESBURG

Case No: J 2073/11

Reportable

Of interest to other judges

## In the matter between:

CONTINUOUS OXYGEN SUPPLIERS (PTY) LTD

T/A VITAL AIRE

.....Applicant

and

ELIZABETH MEINTJES

.....First

respondent

ECOMED (PTY) LTD

.....Second

respondent

Heard : 10 October 2011

Delivered : 17 October 2011

Summary: Restraint of trade

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**JUDGMENT****STEENKAMP J****Introduction**

This is an urgent application to enforce a restraint of trade agreement and to interdict the second respondent from disclosing

confidential information in terms of her contract of employment.

**Background**

The applicant conducts the business of a respiratory home care company. It imports, markets, sells, rents and distributes respiratory equipment such as oxygen concentrators, impulse system cylinders and CPAP machines. It refers to these products as “the equipment”.

The equipment is distributed to patients who suffer from respiratory problems. It is usually prescribed by a medical practitioner. Either the patient will pay for it directly or a medical aid would pay for the equipment or a portion thereof.

Once payment is approved, the applicant would deliver the equipment to the patient’s home, demonstrate it to the patient and offer after-sales support.

The industry is competitive, with only a limited number of undertakings operating as importers, distributors and marketers of

similar equipment. At the moment, the applicant is the only one of its kind with a base in the Limpopo province.

The patients who use the equipment mostly have long term or chronic illnesses and the applicant customarily establishes a long term relationship with the patient.

The first respondent, Ms Elizabeth Meintjes (“the employee”), has had a working relationship with the applicant for some 14 years, dating back to 1999.

The applicant and the employee agreed that she would establish a branch in Polokwane as from 2003, operating from her residence. They agreed to an initial period of three months to establish the viability of such a branch and entered into a fixed term contract of employment for three months, valid until 30 April 2003. The parties signed the agreement on 11 February 2003.

On the same day, the parties entered into a separate “agreement of restraint and confidentiality”. The restraint agreement does not specify an expiry date, nor does it make any reference to the fixed term contract of employment or vice versa. It stipulates that:

*“This agreement constitutes the entire contract between the parties with regard to the matters dealt with in this agreement and no*

representative [sic], terms, conditions or warranties not contained in this agreement shall be binding on the parties.”

The restraint agreement further stipulates:

*“No agreement varying, adding to, deleting from or cancelling this agreement shall be effective unless reduced to writing and signed by or on behalf of the parties.”*

The employee was appointed as branch manager for the Polokwane branch. At the end of April 2003, it appeared that the branch was indeed viable and she continued in that position. On 7 May 2003, the applicant sent her a new letter of appointment. She signed it on 12 May 2003. In terms of this letter, her permanent appointment as branch manager for Polokwane was confirmed as from 1 May 2003. She would be remunerated on a commission basis as follows:

R65 per Concentrator patient.

R35 per CPAP patient.

R35 per demonstration.

In 2004 her terms and conditions of employment were amended and agreed to as follows:

Basic monthly salary: R6800 per month.

Commission: R15 per patient.

The contract of employment (as embodied in the letter of appointment) contains the following confidentiality clause:

*“All of the information of a confidential nature, acquired by me during the course of my employment with the company will be treated as such by me and will not be disclosed, without written authority from the company, to any other persons.*

For the purposes of this clause, confidential information shall be deemed to include but shall not be limited to:

the company's trade secrets, business and techniques.

the identity of the company's clients or customers, contacts and referrers.

For one or more or all the reasons set out above, it is therefore agreed that I shall not:

Directly or indirectly, divulge and/or disclose and/or use any confidential information at all knowledge acquired by me relating to trade secrets and / or technical information and / or know-how of the company to any person whatsoever, whether for my benefit or otherwise, save to those officials of the company, whose province it is to know the same.

For a period of 12 months after my leaving the employ of the company, whether voluntary or otherwise, approach, canvasses [sic] or entice directly or indirectly, customers or employees of the company away from it or utilise any third party to do this."

The “referrers” alluded to in the first clause (b) are referring doctors who would prescribe the equipment.

The separate restraint agreement includes restraint of trade, confidentiality and non-solicitation clauses. The pertinent extracts

are the following:

*“The Vital Aire employee undertakes that she shall not, during this agreement and for a period of two years after the termination of the agreement for any reason whatsoever, be directly or indirectly interested, engaged or concerned, whether as principal, agent,*

partner, representative, shareholder, director, employee, consultant, adviser, financier, administrator, member or any other like capacity in any business – carried on within the Republic of South Africa; which imports, markets and rents/sells oxygen concentrators, CPAP machines, impulse system cylinders and other respiratory equipment. (“the competitive business”).”

Under the heading “confidentiality”, it is recorded that the company carries on business, inter alia, as a respiratory home care company. It further records that the VitalAire employee, by virtue of her association with the company will become possessed of will have access to the company’s trade secrets and confidential information, including the following:

manufacturing know-how, processes and techniques;

designs;

knowledge of and influence over the company's customers and business associates;

the contractual arrangements between a company and its business associates;

the financial details of the company's relationship with its business associates;

the financial details (including credit and discount terms) relating to the company's customers;

the names of prospective customers and their requirements;

details of the company's financial structure and operating results;

details of the remuneration paid by the company to its various employees and their duties; and

other matters which relate to the business of the company and in respect of which information is not readily available in the

ordinary course of business to a competitor of the company.

The restraint agreement then stipulates:

"If, on termination of the Vital Aire employee's employment for any reason whatsoever, the employee takes up employment or otherwise becomes associated with or interested in a competitor of the company, the company's proprietary interests in its trade secrets will be prejudiced."

It goes on to record an undertaking that the employee will not divulge any of the company's trade secrets or solicit any of its employees to join a competitor.

On 16 September 2011, the employee resigned with effect from 30 September 2011. It is common cause that she did so in order to take up employment at higher remuneration with the second respondent, Ecomed (Pty) Ltd.

Ecomed operates in the same industry as the applicant and offers similar equipment, albeit under different brand names. Up to now, it has not had a presence in Polokwane or in Limpopo. Although the employee maintains that she will have "additional duties" to those she fulfilled at the applicant, she does not deny that the substance of her job will be the same. It appears that she will continue to operate from the same premises, but she will now offer Ecomed's products rather than those of the applicant. The inference is inescapable that Ecomed intends to obtain a foothold for a competing business in Limpopo by using the services of the employee. The question is whether the applicant has an interest worthy of protection; whether the restraint is enforceable; and whether the employee has confidential information that she would be able to use to the advantage of Ecomed and to the detriment of the applicant.

But first, I need to deal with the question of urgency.

### Urgency

This application was brought on an urgent basis during the court recess. The application was launched on 27 September 2011. The

respondents submit that the applicant should have approached the court earlier, ie on 22 September 2011, when it learnt that she intended to take up employment with Ecomed.

In my view, litigants should be encouraged in any attempts to avoid litigation, rather than rushing to court as a first option.

Litigation is costly and often unnecessary. In this case, the applicant wrote to the employee on 22 September 2011 in the following terms:

*"You are reminded and warned that you are prohibited from being employed by the competitors [sic] in terms of your restraint of trade. You are further requested not to commence employment with the competitors as such action will amount to the breach of your restraint of trade agreement with the company. Should you proceed to join the competitor company will have no option but to enforce the restraint of trade. You are therefore requested to undertake in writing that you will not be joining the competitor in breach of your restraint of trade."*

She did not respond. Although the applicant did not impose a deadline on her to do so, it launched its application within a very

short time – five days after it had sent the letter to the employee – when it became apparent that no undertaking would be forthcoming. Had the letter had the desired effect, any litigation and the attendant costs would have been unnecessary. And the application was launched before the employee had left the applicant's employment and before she could take up employment with Ecomed.

In my view, the applicant has established sufficient grounds for urgency.

The law pertaining to restraints of trade

I recently summarised the position with regard to restraints of trade in our law, having considered the position before and after

the Constitutional dispensation, in *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronjé and Another*.<sup>1</sup> I do not intend to repeat that extensive discussion. In summary, though, the position appears to me to be the following:

*"1 Covenants in restraint of trade are generally enforceable and valid. Like all other contractual stipulations, however, they are*

unenforceable when, and to the extent that, their enforcement would be contrary to public policy. It is against public policy to enforce a covenant which is unreasonable, i.e. one which unreasonably restricts the covenantor's freedom to trade or to work.

2 Insofar as it has that effect, the covenant will not be enforced. Whether it is indeed unreasonable must be determined with reference

to the circumstances of the case.

3. Such circumstances are not limited to those that existed when the parties entered into the covenant. Account must also be taken of what has happened since then and, in particular, of the situation prevailing at the time the enforcement is sought.

4. Where the onus lies in a particular case is a consequence of substantive law on the issue.

5 What that calls for is a value judgement, rather than a determination of what facts have been proved, and the incidence of the onus accordingly plays no role.

6 A court must make a value judgement with two principal policy considerations in mind in determining the reasonableness of a restraint:

6.1 the first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim *pacta sunt servanda*;

6.2 the second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions.

Both considerations reflect not only common-law but also constitutional values. Contractual autonomy is part of freedom informing the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life. In this sense, freedom to contract is an integral part of the fundamental right referred to in s 22.”<sup>2</sup>

A clear right?

The applicant is seeking relief in the form of a final interdict. Therefore, it has to show a clear right; the absence of an

alternative remedy; and that, if the interdict should not be granted, that it will suffer irreparable harm.

In order to establish a clear right, the court has to consider whether there is an interest deserving of protection; if so, whether

the employee is in a position to threaten those interests; and if so, that must be weighed up against the interest of the employee not to be economically inactive and unproductive. The court must also consider whether any other facet of public policy plays a role.<sup>3</sup>

But the respondents raise an initial defence to the application, even before those factors are to be considered; and that is that the employee alleges that the restraint agreement has lapsed.

Is the restraint agreement still extant?

The employee maintains that she signed the restraint agreement on the same day as her fixed term contract of employment; that the fixed term contract expired on 30 April 2003; that the restraint was ancillary to that contract; and that, therefore, the restraint lapsed on 30 April 2003. If that is so, the two year restraint period lapsed on 30 April 2005. Her fixed term contract of employment from 1 May 2003, she says, did not incorporate the restraint agreement.

This argument cannot be sustained. Firstly, on the plain language of both agreements, there is no cross-referencing leading to an inference – much less so a clear indication – that the restraint agreement was incorporated in the fixed term contract and not in the permanent contract of employment. The restraint was always incorporated in a separate agreement with no termination date, other than to stipulate that it will apply for a period of two years “after the termination of this agreement” and “on termination of the VitalAire employee’s employment”. Secondly, the employee’s employment with VitalAire did not terminate on 30 April 2003; she became a permanent employee immediately thereafter and remained one until she resigned with effect from 30 September 2011.

The terms of the restraint agreement must be considered in terms of the parol evidence rule. As this court stated in *Swissport SA (Pty) Ltd v Smith NO and Others*<sup>4</sup>:

*“It is a fundamental principle of our law of contract that, once parties have decided to reduce a contract to writing, the resulting document will be accepted as the sole evidence in terms of the contract. This is known as the parol evidence rule and was expressed in the following terms in Johnson v Leal 1980 (3) SA 927 (A) at 934B:*

“The aim of the rule is to prevent a party to a contract which has been integrated into a single and complete written memorial from seeking to contradict, add to or modify the writing by reference to extrinsic evidence and in that way to redefine the terms of the contract.”<sup>5</sup>

There can be no doubt that the restraint agreement still applied to the employee when she resigned from the applicant’s employ to take up employment with Ecomed on 30 September 2011.

The question remains whether it is enforceable.

A protectable interest?

As I pointed out in Esquire Technologies,<sup>6</sup> a restraint is valid if there is a proprietary interest which justifies protection. Those interests are usually in the nature of trade secrets, know-how, pricing or customer connections. Therefore, a restraint would be an enforceable restriction on the activities of an employee who (for example) had access to the company’s customers and could use his/her relations with the company’s customers to the advantage of a competitor and to the detriment of the company.

The interest that the applicant seeks to protect is primarily its customer connections, ie the connections with prescribing doctors

and patients; and the know-how regarding its products, pricing and users (ie patients).

The employee, in her position as branch manager, had intimate knowledge of these factors. She is married to a doctor in Polokwane

and knows the medical practitioners in town well. They prescribe the applicant’s products to patients, and the employee personally interacts with those patients – some 292 at present – on a regular basis.

In terms of her conditions of employment, as specified in her current contract of employment with the applicant, the employee had the following duties:

to visit patients to install and maintain the applicant’s equipment, for which she was paid an agreed fee for each visit;

to create market awareness of the applicant's equipment and service;

to demonstrate the equipment to physicians, general practitioners, clinics, pharmacies, old age homes and retirement villages;

to regularly visit patients and assist them with support and maintenance of equipment;

to remain available to patients in her area [ie, Limpopo] and to attend to emergencies; and

to keep and maintain personal records of patients, patient contracts, and all equipment and stocks.

The employee also fulfilled the functions of a so-called "home care adviser", entailing support and advice to patients and developing a trust relationship with them.

As summarised in *Esquire Technologies*,<sup>7</sup> with reference to *Rawlins and Another v Caravantruck (Pty) Ltd*:<sup>8</sup>

*"A protectable customer or supplier relationship exists where an employee has personal knowledge of, and influence over, the customers*

*(or suppliers) of his employer so as to enable him, if the competition were allowed, to take advantage of his former employer's*

*trade connections."*

That is certainly the case here. The employee has intimate knowledge of the applicant's products and pricing; she is intimately

acquainted with the prescribing doctors and the patients who use the products; and she is ideally situated to persuade those doctors and patients to use the products of her new employer – ie similar products under a different brand name, supplied by Ecomed – rather than the products supplied by her old employer that they had been using hitherto.

Ecomed is a direct competitor of the applicant, distributing the same type of equipment under different brand names. By utilising the services of the applicant's former branch manager, operating from the same premises, it will be ideally situated to obtain a foothold in Polokwane. It will have access to dispensing doctors and existing patients through the very same person who had serviced them before.

There can be no doubt that the employee is in a position to act to the detriment of the applicant, in accordance with the second

question posed in *Basson v Chilwan*.<sup>9</sup>

The employee finds herself in a similar position as the one in *Reddy v Siemens Telecommunications (Pty) Ltd*,<sup>10</sup> where the Supreme Court of Appeal noted:

*"Reddy [the employee] is in possession of confidential information in respect of which the risk of disclosure by his employment with a competitor, assessed objectively, (footnote omitted) is obvious... Reddy will be employed by Ericsson, a 'concern which carries on the same business as the applicant' in a position similar to the one he occupied with Siemens. His loyalty will be to his new employer and the opportunity to disclose confidential information at his disposal, whether deliberately or not, will exist. (footnote omitted) The restraint was intended to relieve Siemens precisely of this risk of disclosure. In these circumstances the restraint is neither unreasonable nor contrary to public policy."*<sup>11</sup>

Lastly, there is no aspect of public policy that militates against the enforcement of the restraint. The employee was employed in a senior position as branch manager and willingly entered into the agreement. This is not a matter where the restraint is so unreasonable as to make it unenforceable.

I say this with one caveat in mind, though. The scope of the restraint, with regard to its duration and area, also has to be considered.

The area is the whole of South Africa. I asked Mr Snyman, for the applicant, whether it would not have been reasonable to restrict it to Limpopo. He pointed out, and I think fairly so, that if that were the case, it would still be relatively easy for Ecomed to employ the employee at its head office in Gauteng, and from there to use her intimate knowledge of the applicant, its products, patients and the prescribing doctors in order to gain an unfair advantage in Limpopo and the rest of the country.

That leaves the period of the restraint. A period of two years, when weighed up against the Constitutional right to choose her occupation or trade freely, does seem to me to be overbroad. This court has, in the past, remarked that it is undesirable to cut and trim a manifestly overbroad restraint at the behest of the party who drafted it.<sup>12</sup> But in circumstances where the period of the restraint seems to me to be the only unreasonable part of it, and where the restraint

agreement stipulates that each part of it (eg the period, area and activity) is separate and independent, it seems to me to be in the public interest to restrict that separate part of the restraint to a period of 12 months. Mr Snyman, for the applicant, did not object to such a restriction.

I find, then, that the applicant has established a clear right for the relief sought, subject to the limitation of the operative period of the restraint to 12 months.

Irreparable harm?

I have come to the conclusion that the restraint of trade agreement is enforceable and that the applicant has interests worth

protecting. It is axiomatic that the applicant will suffer irreparable harm if it is not enforced. The potential harm caused by an employee who is in a position to divulge trade secrets to and exploit customer connections in favour of her new employer cannot be easily remedied by a damages claim in due course.

Alternative remedy?

As I said in *Esquire Technologies*,<sup>13</sup> this criterion overlaps to a great extent with irreparable harm in restraint of trade cases. The obvious alternative remedy of a damages claim is cold comfort to an applicant that seeks to enforce a legitimate restraint of trade covenant. By the time a damages claim is likely to be heard, the horse would have altered and the harm would have been done. That harm is very difficult to repair. The alternative remedy of a damages claim in due course. In a case such as this one is more apparent than real. The urgent relief sought should

not be disallowed because the applicant has an alternative remedy in due course.

## Conclusion

I conclude that the restraint of trade agreement is valid and enforceable; and that the applicant has satisfied the requirements

for urgency and for the granting of a final interdictory relief. It is not necessary for me to decide whether the applicant is also entitled to the alternative remedy based on the confidentiality clause in the contract of employment.

With regard to costs, I take into account that the applicant warned the employee that, should she commenced employment with a

competitor, she would be in breach of her restraint of trade agreement. She nevertheless continued to do so. Once the application

had been launched, the second respondent similarly did not refrain from assisting the employee in the breach, but rather assisted her by imposing the relief sought. There is no reason in law. In law or fairness why the respondents should not be ordered to pay the applicant's costs.

## Order

The first respondent is interdicted from directly or indirectly, for a period of 12 months calculated from 30 September 2011, within the Republic of South Africa:

competing with the business of the applicant, being the business of importing, marketing, renting or selling of oxygen concentrators,

CPAP machines, impulse system cylinders and respiratory equipment;

soliciting or accepting any business or custom from any existing customers of the applicant;

being employed by any business or entity or person which conducts business, which is similar to or competes with that of the

applicant, and in particular the business of the second respondent;

revealing or disclosing or in any way utilising, whether for the first respondent's own purposes, or for the purposes of any third party, any of the applicants confidential information.

The second respondent is interdicted and restrained from employing or being associated with the first respondent in breach of the restraint of trade agreement between the applicant and the first respondent.

The respondents are ordered to pay the applicants costs jointly and severally, the one paying, the other to be absolved.

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Steenkamp J

Appearances:

For the applicant : Mr S. Snyman of Snyman Attorneys

For the respondents : E.S.J. van Graan SC

Instructed by : Naude & Britz Attorneys

1(2011) 32 ILJ 601 (LC).

2Id at para [37].

3These questions were formulated in *Basson v Chilwan and Others* 1993 (3) SA 742 (A) 767 G-H.

4(2003) 24 ILJ 618 (LC).

5Id at para [12]

6supra n 1 at para [27].

7Id at para [31].

8[1992] ZASCA 204; 1993

(1) SA 537 (A) 541E; 543 C-G.

9Above n 3 at 767.

10 2007

(2) SA 486 (SCA); (2007) 28 ILJ 317 (SCA), cited in *Esquire Systems* (supra) para [35].

11Reddy above n 11 at para [20].

12*Henred Freuehauf (Pty) Ltd v Davel and Others* (2011) 32 ILJ 618 (LC) at para [22]; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 16H - I; *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn and Another* 2008

(2) SA 375 (C) at paras [40] – [44].

13Supra n 1 at para [40].

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