

SOUTH AFRICA / JUDGMENT

Demari Tools and Supplies (Pty)Ltd v Abiel and Another (J 1600/23) [2024] ZALCJHB 126 (23 February 2024) [2024] ZALCJHB 126

COURT

Labour Court Johannesburg

BEFORE

Ngwenya

CASE / FILE NUMBER

J 1600/23

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THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG
Not Reportable
Case No: J 1600/23

In the matter between:

DEMARI TOOLS AND
SUPPLIES (PTY) LTD
Applicant
And
CHABANE,
ABIEL
First Respondent
SA SAW BLADES (PTY)
LTD
Second Respondent

Heard:

30 November 2023
Date
Delivered: 23
February 2024
This judgment was
handed down electronically by circulation to the parties via email.
The date for hand-down is deemed 23 February
2024.

JUDGMENT

NGWENYA, AJ

Introduction.

- [1] The Applicant, has approached this Court, on an urgent basis, seeking to enforce written restraint of trade undertakings made by the First Respondent, in an employment contract. Urgency was not contested and in exercising my discretion I will treat the application as urgent.

The Relevant Factual Background

- [2] On or about 28 February 2023, the applicant and the first respondent concluded a written contract of employment. The contract of employment was for a fixed term until the period 28 April 2023. Pursuant to the expiry of the first contract of employment, on 1 May 2023, the applicant and the first respondent entered into a further contract of employment, in terms of which the first respondent would be employed for a further month. The contract of employment was to terminate on 31 May 2023.
- [3] The first respondent was employed, it is pleaded, in terms of both contracts of employment, as a sales representative and driver. As a sales representative and driver, it is explained, the first respondent was responsible for duties which entailed attending at the applicant's customers as well as generating further sales by approaching potential new customers within his designated area of operation – Gauteng.
- [4] Both contracts of employment incorporated confidentiality and restraint undertakings which read as follows:

A CONFIDENTIALITY

A.1 During the period of employment of the employee and subsequent thereto, the employee shall keep confidential and shall not disclose any of the Company's secrets or confidential information or that of its subsidiary or associated Company's other than to persons authorised by the Company or those employed by the Company who are required to know such confidential information for the purposes of their employment with the Company.

A.3 For the purposes of this clause, "confidential information" means any and all information which is stated confidential, or imparted and received in confidence, or by its nature, intended to be kept confidential, including particulars of the Company's:

- Customers or suppliers and arrangements with them.
- Products and their commercial sales and distribution.

- Operating methods, operating processes, financial arrangements, marketing strategies and marketing techniques.
- Patents, trademarks, and trade secrets.
- Computer and information technology programmes.
- Databases and the contents thereof.
- Product pricing and discounts

C2. SECRECY AND RESTRAINT AFTER EMPLOYMENT WITH COMPANY:-

The employee hereby undertakes, should the employee cease to be employed by the Company for any reason whatsoever, that the employee shall not for a period of 12 months within all provinces in South Africa, either directly or indirectly obtain employment with any firm or company who or which competes in any way with the activities then pursued by the Company Demaro Tools & Supplies (Pty) Ltd. It is recorded that the definition of the Company's activities is defined as collection, delivery or blades / cutting tools, sharpening of blades, commercial sales and distribution of new blades, cutting tools, diamond tooling, the machining of all ranges of cutting blades, cutting blades, cutters and spares used predominantly in the woodworking, steel and aluminium industry as well as the non-wood industry (UPVC.)

- [5] There is some dispute about the date on which the first respondent's employment terminated. The first respondent states that he only "worked a week" in terms of the second contract of employment, while the applicant appears to rely on the termination of employment as at the date of 31 May 2023, when the second contract of employment expired. Although this is an area of dispute between the parties, I am of the view that it is not a significant area of dispute, as I accept that the first respondent's employment terminated during May 2023.
- [6] The applicant stated that during or about 19 October 2023, it became aware that the first respondent was employed by the second respondent. Upon becoming aware of this fact, the applicant's attorneys of record wrote a letter to the second respondent and indicated that the first respondent was in breach of his restraint undertakings. The second respondent responded and in essence stated that it was not unlawfully competing with the first respondent. The balance of the correspondence is not relevant, as the second respondent delivered a notice to abide.
- [7] This urgent application was launched by the applicant against this

background.

The Competition between the applicant and the second respondent as pleaded

[8] The applicant is a business which it is alleged, consists of inter alia, the import and sale of aluminium tooling for manufacturers in the aluminium window industry and consists of approximately 500 different products. The business activities, consist of the collection, delivery of blades/cutting tools, sharpening of blades,

commercial sales and distribution of new blades, cutting tools, diamond tooling, the machining of all ranges of cutting blades,

cutting blades, cutters and spares used predominantly in the woodworking, steel and aluminium industries, as well as the non-wood

industry. The applicant additionally imports and commercially sells German tools.

[9] The applicant also offers sharpening services which services consist of the collection of tools from a customer which are then brought to the applicant's premises where staff members sharpen the tools. Once the process is completed, the tools are returned to the customers. Generally, it is pleaded, a sales representative such as the first respondent would deliver approximately 10 to 60 blades a day for sharpening. The sharpening services are the lifeblood of the applicant, as the average saw blade has a running life of 9 working hours before it goes blunt – then it requires sharpening.

[10] There is no dispute, on the papers before me, that the applicant and the second respondent are competitors. The applicant pleads that the second respondent's websites state that it is a supplier of saw blades, cutter heads, routing, drilling, planer knives and spare parts utilised in the wood industry. In addition, the second respondent offers the same sharpening services as the applicant and it is alleged "is actively targeting the applicant's client base specifically in this area".

The protectable interest as pleaded

[11] The applicant states that although the first respondent was employed for only a relatively short period, all of the applicant's customers were introduced to the first respondent. The first respondent gained insight into the type of products and services the applicant's customers required and ordered from the applicant, the regularity of the orders and the prices.

[12] The deponent to the applicant's founding affidavit, states that he personally trained the first respondent on customer training which included customer pricing, introduction to applicant's customers and training on the products customers required from the applicant and on sold. The applicant's confidential information it is contended, included but was not limited to customer lists, products listing, services and pricing.

[13] Chris Poltera ("Poltera"), the applicant's sales representative accompanied the first respondent on the road to do on the road training by visiting the applicant's customers and showing the first respondent how to address customers, how to market to the customer and what to look out for at the customer's premises to drive sales and services.

- [14] It was explained that the first respondent duties entailed call sheets, which call sheets had customers names and contained confidential information such as the identification of the customer, locations of the customers, products or services, prices and mark ups or profit margins.
- [15] In addition, it is stated that the first respondent would be on the road all day attending to customers' needs and procuring new customers for the applicant. The information that was gathered during the day would be handed to the deponent of the founding affidavit who would prepare a quote for the customer and if accepted would be invoiced by the deponent or the financial staff of the applicant.
- [16] In relation to trade connections, it is pleaded that the first respondent had contact with any and all of the applicant's customers within his designated territory being Gauteng on a daily basis and met with them frequently on a bi-weekly basis.

The pleaded breach of the restraint undertakings

- [17] The applicant became aware of the first respondent's employment with the second respondent during October 2023. The applicant became aware of this fact because Poltera was informed that the first respondent had attended at the premises of an existing customer of the applicant, Bed Base in Lanseria and had left a business card saying that he works for the second respondent and could offer better prices. Poltera was also informed that the first respondent had been at the premises of another customer, Status Shopfitters in Kya Sands, Poltera was again presented with a business card of the first respondent.

The Applicable Legal Principles

- [18] The issues in this application concern whether, the first respondent's employment, with the second respondent breaches the restraint undertakings contained in the employment contracts. That requires a consideration of the protectable interest as pleaded by the applicant, because, as the Labour Appeal Court has stated in *Labournet (Pty) Ltd v Jankielsohn and another*[1]:

"... 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 lists 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."

- [19] In deciding whether the enforcement of a restraint of trade would be reasonable, is dependent on the test which was expressed in *Basson v Chilwan and others*[2] as follows:

- a. Is there an interest of the one party which is deserving of protection at the termination of the agreement?
- b. Is such interest being prejudiced by the other party?
- c. If so, does such interest so weigh up qualitatively and quantitatively against the interest of the other party that the latter should not be economically inactive and unproductive?
- d. Is there any other facet of public policy having nothing to do with the relationship between the parties but which requires that the restraint should either be maintained or rejected?

[20] The interest that can be protected, as stated by the LAC[3] is confidential information and customer connections. This Court recently, in *Mapa Cleaning Technologies CC v Letlhogonolo Pearl Lettie Kgawane*[4] explained the protectable interests as follows:

[29] Confidential information would be: (a) Information received by an employee about business opportunities available to an employer; (b) information that is useful or potentially useful to a competitor, who would find value

in it; (c) Information relating to proposals, marketing or submissions made to procure business; (d) information relating to price and/or pricing arrangements, not generally available to third parties; (e) information that has actual economic value to the person

seeking to protect it; (f) customer information, details and particulars; (g) information the employee is contractually, regulatory or statutory required to keep confidential; (h) Information relating to the specifications of a product, or a process of manufacture, either of which has been arrived at by the expenditure of skill and industry which is kept confidential; and (i) information relating to know-how, technology or method that is unique and peculiar to a business.

Importantly, the information summarized above must not be public knowledge or public property or in the public domain. In short, the confidential information must be objectively worthy of protection and have value.

[30] Trade connections as an interest worthy of protection would be where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he or she leaves employment and becomes employed by a competitor, the employee could easily or readily induce the customers to follow the employee to the new business. Whether the employee can be seen to have the ability to exert this kind of influence, is dependent upon: (a) the duties of the employee; (b) the employee's particular personality and skill; (c) the frequency and duration of contact between the employee and the customer(s); (d) the nature of the relationship between the employee and the customer(s) and in particular whether the relationship carried with it a notion of trust and confidence; (e) the knowledge of the employee concerning the particular requirements of the customer and the nature of its business; (f) how competitive the rival businesses are, and (d) the nature of the product or services at stake. (footnotes omitted)

Analysis

- [21] The application is focussed on two key areas; (i) confidential information and (ii) customer connections. The first respondent disputes that he has access to the type of confidential information which the applicant seeks to rely upon in support of this application. Where it comes to factual disputes, I will determine these factual disputes in line with the principles established in *Plascon Evans Paints v Van Riebeeck Paints*[5], which equally apply in restraint of trade applications.
- [22] I will deal first with the pleaded case concerning confidential information. The applicant alleges that the first respondent had access to customer lists, product listing, services and pricing. The affidavit does not sufficiently make out a case concerning the confidential nature of the product listing and services and is primarily focussed on customer lists and information as well as pricing.
- [23] The first respondent denies access to the confidential information contended for and states that he “was never allowed, and or invited or was shared to [me], not in my first employment with the Applicant, nor the short terms of my last employment with the applicant to learn how prices was calculated, or costings or who the suppliers are”. In relation to customer lists, the first respondent explains that “[I]t was my instruction by the Applicant, to find and approach new customers while I am on my routes to do the deliveries and collection at customers that was written on the trip sheets. The trip sheet were always handed in and new ones was issued in the mornings”.
- [24] Even if it can be accepted that the information relied upon by the applicant is information worthy of establishing a protectable interest, I am not convinced that the first respondent is possessed of any of this kind of information to the extent that it can have any value to a competitor.
- [25] In my assessment, on the pleaded case, the first respondent was not involved in the determination of pricing structures with the applicant’s clients. This is based on the applicant’s version and the first respondent’s version. The applicant’s deponent clearly stated that once a trip sheet is provided by the first respondent, the deponent to the founding affidavit and/or employees in the finance department would prepare a quote to the customer and would provide such quote to the customer. This was confirmed in the first respondent’s answering affidavit.
- [26] The first respondent explains this aspect clearly and states that “[I]t was my duty to find the customers, but the applicant and Mr. Poltera would then take the matter further, by visiting them or phoning them”. The first respondent was therefore not engaged in the negotiations with the customers and therefore would not be privy to the pricing structures of the applicant or any discounts applied.

- [27] The applicant additionally relies on customer lists. There is a dispute in this respect. The applicant pleads that the first respondent would, during the short period of employment, have “been introduced to all the applicant’s customers” and the first respondent would have gained “insight (as he was required in terms of his job description) into the type of products and services the applicant’s customers required and ordered from the applicant, the regularity of the orders and the prices charged”.
- [28] The first respondent denies access to customer lists, and he explains that he would be provided with a trip sheet and these trip sheets would be returned to the applicant. Although this was clearly raised in the answering affidavit, the replying affidavit does not engage with this aspect at all. The first respondent’s version is additionally confirmed by the applicant’s own version, as I stated above, which is that the trip sheets are returned to the applicant. I am also fortified in my view by the applicant’s founding affidavit, which attaches a document which is termed “Ongoing Demaro Customer List”. The document is blank and states “ongoing list”. I accept the first respondent’s version that he did not have access to the applicant’s database and customer lists.
- [29] I am not persuaded that the applicant has access to the confidential information as contended for by the applicant.
- [30] That brings me to the trade connections, which the applicant relies upon in support of its case. On this score, I do not believe that the applicant has done enough to make out a case relating to a protectable interest where it comes to trade connections.
- [31] Other than general statements about what was expected of the first respondent where it comes to dealing with customers, there is little in the form of elaboration as to why the first respondent would hold a particular relationship with customers that would cause him to carry these customers in his pocket. The first respondent stated that all of the negotiations and meetings with the customers was not attended to by him. I am not convinced that the relationship between the first respondent and the customers was of the nature of a close working relationship and relationship of trust that would cause the first respondent to carry those customers in his pocket.
- [32] Concerning the two customers which it is contended the first respondent visited, I am not satisfied that it evidences a breach of the restraint of trade nor that it supports the contention that the first respondent has any trade connections with the customers. In relation to the customer Bed Base, the first respondent explained that he had a relationship with the customer even before working for the applicant but additionally the company Bed Base works with various several tooling suppliers. This aspect was not disputed or dealt with at all in reply, except to simply point out that the first respondent admitted to have visited Bed Base.

[33] In addition, the first respondent denies having made any offers to the Bed Base customer of better pricing. This is because, as he explains, he did not have access to any of the pricing. There is no confirmatory affidavit from the customer to confirm the conversation that was held between the customer and the first respondent and such conversations amounts to inadmissible hearsay and no basis has been made out for its admission.

[34] In relation to the second customer, the first respondent denied having visited such customer, and provided a plausible explanation that another employee of the second respondent was responsible for servicing that client.

[35] Accordingly I find that the applicant has failed to establish a protectable interest relating to trade connections that corresponds with the Court's dictum in *Rawlins and another v Caravantruck ("Pty") Ltd*[6], where the Court said:

"The need of an employer to protect his trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he leave the employer's service he could easily induce the customers to follow him to a new business.."

[36] This should be end of the enquiry, however , even on the score of quantitative and qualitative weigh off to be conducted, I am not satisfied that the restraint of trade should be enforced.

[37] The Court in *Plumblink SA (Pty) Ltd v Legodi and Another*[7] summarized the factors to be considered, being (1) the scope and period of the restraint; (2) whether the employee was possessed of the skills, expertise, qualifications and experience before joining the employer; (3) the nature of the industry; and (4) the ability of the employee to secure gainful employment elsewhere, it must also be considered whether the enforcement of the restraint

would go further than necessary in order to protect the interests of the employer.

[38] In relation to the nature of the industry, the applicant has not pleaded any particular features which would distinguish it from all other businesses in the industry, which would be of value to the second respondent. The first respondent was not involved in the negotiations with the clients or the determining of prices.

[39] In relation to experience, the first respondent explained that he had been engaged in this industry for a number of years and obtained his skills over the course of years, he denied any specific training from the applicant.

[40] Finally, it weights in my consideration that the applicant seeks to enforce a restraint for a period of 12 months in circumstances where the first respondent was only employed for a period of approximately four months.

[41] For all these reasons, I am not satisfied that the requirement of quantitative and qualitative weight off favours the applicant, even if the applicant had made out a case of a protectable interest.

Conclusion

[42] In summary, although the applicant has demonstrated a valid restraint of trade agreement, the applicant has not demonstrated a protectable interest worthy of protection.

[43] In the premise I make the following order:

Order:

[44] The application is dismissed.

[45] There is no order as to costs.

Z NGWENYA

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:HJ Fischer

Instructed by:Spellas Lengert Kuebler Braun Inc

For the First Respondent:In person

[1] [2017] 5 BLLR 466 (LAC) para 40

[2]

[1993] ZASCA 61; 1993

(3) SA 742 (A); Also see Medtronic (Africa) (Pty) Ltd v Van Wyk and Another (2016) 37 ILJ 1165 (LC)

[3] Labournet v Jankielson (2017) 38 ILJ 1302 (LAC)

[4] [2023] JOL 61568 (LC); [2023] ZALCJHB 305 (24 October 2023)

[5] 1984

(3) SA 623 (A)

[6] 1993

(1) SA 537 (A)

[7] (2020) 41 ILJ 1742 (LC)

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