

SOUTH AFRICA / JUDGMENT

DRG Foods (Pty) Ltd v Ioannides and Others (2680/2014) [2015] ZAECPEHC 62 (10 November 2015) [2015] ZAECPEHC 62

COURT

Eastern Cape High Court, Port Elizabeth

BEFORE

N G Beshe

CASE / FILE NUMBER

2680/2014

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IN THE HIGH
COURT OF SOUTH AFRICA
(EASTERN
CAPE LOCAL DIVISION – PORT ELIZABETH)
CASE
NO.: 2680/2014
In

the matter between:

DRG
FOODS (PTY) LTD
REGISTRATION
NUMBER 2013/158669/07
Applicant
And
GEORGIOUS
IOANNIDES
1st
Respondent
FERNANDO
AUGUSTO BRASS
2nd
Respondent
IAN
LETLOGONONO MOGOMOTSI
3rd
Respondent
CHRISTALENE
OLIVIA FILANDER

4th
Respondent
CORNELIA
MINI
5th
Respondent
JOSEPH
MOREIRA
6th Respondent

JUDGMENT

BESHE, J:

[1] Applicant approached this court for an order in the following terms:

1. That the ordinary rules pertaining to forms and service be dispensed with and that this Application be heard as one of urgency

in terms of the provisions of Rule 6(12) of the Uniform Rules of Court.

2. That a rule nisi be issued calling upon the First Respondent, the Third Respondent, Fourth Respondent, Fifth Respondent and Sixth Respondent to show cause, if any, on TUESDAY, 7 OCTOBER 2014 at 09h00 or so soon thereafter as the matter may be heard why an Order should not be granted in the following terms:

2.1 That the First Respondent be interdicted and restrained from being engaged in whether directly or indirectly or employed in or associated in any way in the restaurant business from date of termination of employment for a period of one year within the area demarcated by the boundaries of Walmer Boulevard, Heugh Road up to 8th Avenue Walmer, Target Kloof Road and Albany Roads, Port Elizabeth;

2.2 That the First Respondent be interdicted and restrained from utilising for himself, or for the benefit of any other person or entity, or from disclosing to any other person or entity, any information or trade secrets, including recipes, relating to the business of the Applicant;

2.3 That the Third Respondent, Fourth Respondent, Fifth Respondent and Sixth Respondents be interdicted and restrained for a period of one year from utilising for himself or herself or for the benefit of any other person or entity or from disclosing to any other person or entity any information of trade secrets and recipes relating to the business of the Applicant for a period of one (1) year within the district of the Nelson Mandela Bay Municipality;

2.4 That the First Respondent, Third Respondent, Fourth Respondent, Fifth Respondent be ordered to pay the costs of this Application

jointly and severally, other than in the event of the Second Respondent opposing in which case all Respondents be ordered to pay

the costs jointly and severally, the one paying the other to be absolved;

3. That the relief sought in paragraph 2.1 and 2.2 above operate as an interim interdict pendent lite with immediate effect against the First Respondent, the Applicant to institute permanent enforcement proceedings within thirty

(30) days of the granting of any Order this Honourable Court deems meet.

4. That paragraph 2.3 operates as an interim interdict against the Third, Fourth and Fifth Respondents with immediate effect pending the return day.

5. Further and/or alternative relief.

[2] Applicant is DRG Foods (Pty) Ltd, a company duly incorporated in terms of the Laws of the Republic of South Africa with registration number 2013/158669/07. Applicant conducts a restaurant business which is situated at 14 Stanley Street, Richmond Hill, Port Elizabeth and trades under the name and style of “ZORBA’S”. First respondent is Georgios Ioannides, an adult male of 10 St Philips Street, Richmond Hill, Port Elizabeth. Second respondent is Fernando Augusto Brass, an adult male with identity number 460305 5145 18 6 whom conducts his own restaurant business as Fernando’s Grill in Moffet Street, Richmond Hill, Port Elizabeth. Third respondent is Letlogonolo Mogomotsi, an adult male with identity number 740915 5842 08 7 whose full and further particulars are unknown to the applicant of number 8 West Minister House, Parliament Street, Central, Port Elizabeth. Fourth respondent is Christalene Olivia Filander, an adult female with identity number 680114 0198 08 1 whose full and further particulars are unknown to the applicant of BD 36-01, Extension 36, Rensburg Road, Bethelsdorp, Port Elizabeth. Fifth respondent is Cornelia Mini, an adult female with identity number 670502 0159 08 1 whose full and further particulars are unknown to the applicant of number 5 St Mary, Military Road, Central, Port Elizabeth. Sixth respondent is Joseph Moreira, an adult male with identity number 710302 6292 26 3 whose full and further particulars are unknown to the Applicant of No 3 Imperial Court, Russell Road, Central, Port Elizabeth.

It is common cause that third to sixth respondents were employees of the applicant.

[3] According to Mr Robert Ginsburg, who is a director of the applicant, who deposed to the founding affidavit, the following, briefly stated, are the grounds upon which applicant contends it is entitled to the relief it seeks:

First respondent is one of the directors and an employee of the applicant. He has not given any formal notification that he is resigning as such.

Third to sixth respondents were employees of the applicant.

First respondent owed a fiduciary duty to the applicant which he has breached. Is engaging in unlawful competition with the applicant.

First, third to sixth respondents are parties to a restraint of trade agreement and are in breach thereof.

No relief is sought against the second respondent. He is cited purely as an interested party.

- [4] According to Ginsburg; during the 80's, first respondent conducted a restaurant business under the style and name of Zorba's. Zorba's is also the trading name of the applicant. First respondent has however not conducted a restaurant business in the last five years. During the year 2013 Ginsburg and first respondent agreed to rent the premises from which applicant's Zorba's (the present Zorba's) is conducted. To this end, they asked an attorney to draft the necessary contracts which included a shareholders' agreement. According to Ginsburg, it was agreed that first respondent would be subject to a restraint of trade in order to protect the interests of the business and Ginsburg's investment.
- [5] First respondent was reluctant to sign the agreement and insisted on a shorter simpler contract. This done, he (Ginsburg) alleges the agreement was signed by both parties. In this regard Ginsburg attaches a document entitled –

“MEMORANDUM OF UNDERSTANDING ENTERED INTO BY AND BETWEEN

ROBERT GINSBURG

AND

GEORGIOUS IOANNIDES”

Clause 5 of the agreement reads:

5. All items and / or dishes prepared and designed for the Restaurant shall remain the property of Robert and / or the company which he uses as a vehicle to trade as a Restaurant.

Clause 8 reads thus:

8. George shall in order to protect the business goodwill, not be directly or indirectly involved in any Restaurant business in competition with the business conducted by Robert for a period of one (1) year, which period George hereby warrants is a reasonable period.

Also attached to an affidavit is an unsigned Shareholders' Agreement. Clause 21 of this unsigned agreement consists of a restraint of trade envisaged to apply for a period of three (3) years.

Ginsburg conceded that the memorandum of understanding does not state the area in which the first respondent would be restrained from being involved in a restaurant business, but contends that reliance for the existence of the restraint clause is placed on the Shareholders'

Agreement.

[6] Ginsburg conceded that the attached copy of the Shareholders' Agreement is unsigned. He contends that the agreement was signed by himself, his son Dylan and the first respondent. There are no details as to when and under what circumstances the Shareholders' Agreement was signed and whether there were any witnesses present at the time. The agreement provides for two witnesses in respect of each of the three proposed signatories. All Dylan states at paragraph 3 of the confirmatory affidavit is: "I have read the Affidavit of Robert Ginsburg on behalf of the applicant herein and confirm the content thereof as far as it relates to me".

[7] Ginsburg contends that the new Zorba's opened for trading on the 27 December 2013. That it was agreed that the second respondent would be responsible for the kitchen, the recipes, food preparation and serving thereof. That although in terms of the memorandum of

understanding, second respondent undertook to make all recipes available to the applicant, has failed to do so. (Paragraph 36 of the founding affidavit). He further states that second respondent did not report for work on Tuesday the 1 July 2014. So did four other employees. Those being third and sixth respondents. He has been reliably informed that first respondent will soon be opening a restaurant in Retief Street, Port Elizabeth.

[8] Third to sixth respondents so Ginsburg contends, were also subject to restraint of trade agreements. To this end, a Memorandum of Agreement is attached in respect of each

of the third to sixth respondents. Clause 4 thereof stipulates:

"4. The Employee hereby undertakes to keep all trade secrets and recipes of the Employer secret and not to share it with anybody else. The Employee also undertakes for a period of one (1) year not to cook or prepare any meals on the menu of the Employer within the district of the Nelson Mandela Bay Municipality."

Only third, fourth and fifth respondents signed the memorandum.

[9] In support of the application, Priscilla Mogomotsi who is also one of the employees of the applicant deposed to an affidavit wherein she states inter alia that:

She has on several occasions overheard first, third to sixth respondents plotting their exit from applicant and planning to start their own restaurant. Third respondent, who is her brother, fourth and fifth respondents had previously worked with the first respondent in the restaurant business.

[10] In his answering affidavit, first respondent admits that he is employed by the second respondent in his restaurant, George's Greek Taverna as a Manager. The restaurant in question opened its door for business in August 2014. The reasons he cited for contending that applicant is not entitled to the relief he seeks are summarised herein under:

He met Ginsburg in 2012. They discussed the possibility of opening a restaurant under the name and style Zorba's. To this end Ginsburg entered into a lease agreement with the landlady of the premises where Beverages Pub & Grub has previously operated. The signed memorandum of understanding referred to earlier "RG3" which commenced in August of 2013 that:

- (i) The validity of the agreement would have expired after one year (August 2014).
- (ii) That in any event it is too wide, vague and does not refer to any specific area and is thus contrary to public policy.
- (iii) Was overtaken by the signing of the shareholders' agreement.

The shareholders' agreement that is annexed by the first respondent to the answering affidavit is signed firstly by him, followed by Ginsburg and lastly by Ginsburg's son Dylan on the 28 October 2013. Unlike the unsigned one which in nineteen

- [19] pages long and consists of twenty two (22) clauses, the one annexed by first respondent is seven (7) pages long and consists of six (6) clauses. It does not have restraint of trade clause. First respondent states further that since no shares were ever transferred to him, he never became a shareholder in applicant. He denied he had any intention to open a restaurant but left because of the manner in which he was treated by Ginsburg and told to leave if he wanted to. That he was compelled to find ways to earn a living after being constructively dismissed by Ginsburg. I do not think that it is necessary to repeat the details of the bad treatment first respondent alleges he suffered in the hands of Ginsburg. He denied he enticed third to sixth respondents to take up employment with the second respondent.
- [11] Sixth respondent did not sign the memorandum of agreement that contains an undertaking not to "cook or prepare meals on the menu of the Employer within the district of the Nelson Mandela Bay Municipality for a period of one (1) year". Third to fifth respondents did.
- [12] Third respondent points out that the agreement was signed six months after he started working for the applicant. That same was signed under the following circumstances:

It was in the midst of his duties in a busy kitchen when Ginsburg asked him to sign a document telling him he was free to leave his employment and work at any other place if he was not happy. He took Ginsburg's word and signed the document presented to him.

- [13] The same version is proffered by fourth and fifth respondents in addition third and sixth respondents deny they were enticed by first respondent to leave applicant's employ. They left because they were not happy with the manner in which they were treated by Ginsburg. They left at the time they did because they were waiting for their wages to be paid at the end of June 2014.

- [14] Third to sixth respondents contend that it will be unfair to restrain them for one year yet they have not been employed by the applicant for one year. It appears to be common cause or not in dispute that before working for applicant first, third, fourth, fifth and sixth respondents have been involved in the restaurant business for years.
- [15] At the heart of this application is the question whether the applicant has succeeded in showing that there exists an agreement or a restraint of trade in respect of the respondents and whether such, if proved to exist has been breached by the respondents. And whether it has been shown that first respondent took applicant's recipes. Regarding the recipes, Ginsburg states that although it was agreed according to the memorandum of understanding that first respondent would make all recipes available,
- he failed to do so. There can be no question therefore of first respondent taking recipes which he never provided in the first place.
- [16] It is clear that sixth respondent was not bound by a restraint of trade. The application stands to be dismissed against the sixth respondent. It is common cause that he did not sign any agreement in this regard.
- [17] There is no clarity whatsoever as to origins of these recipes, considering the history of the applicant. It is not clear at what stage and by whom these recipes were compiled and where they were kept. In whose custody they were. It must also be borne in mind that it is the first respondent who has previously and for many years been involved in the restaurant business. It would be reasonable to assume that he also brought skills and knowledge in this regard. Respondents make the point that there was nothing unique about applicant's meals, they were just like meals served at other restaurants. I am not persuaded that the applicant has succeeded in showing that he had any interest worthy of protection in this regard.
- [18] It is trite that where one exists, a restraint of trade is in principle enforceable. However not all restraints of trade are

enforceable. A restraint of trade that is contrary public policy or public interest is enforceable.

- [19] Third, fourth and fifth respondents each signed a restraint of trade agreement. It is necessary to look at the whole agreement as it stands in respect of third, fourth and fifth respondents and then examine their contentions as regards the agreement. The agreement is entitled "MEMORANDUM OF AGREEENT"

"WHEREAS the Employer in recognition of the effort and contribution made by the Employee to the business of the Employer it wishes to introduce a discretionary incentive program for the Employee

The parties hereby agree as follows:

1. The Employer shall after every full three (3) month cycle of the Employee's employment, pay to the Employee a bonus of R3000.00.

2. The above bonus shall be at the Employer's sole and absolute discretion based on the Employee's performance, attendance, work ethic and any other factor the Employer in its sole and absolute discretion deems relevant.
3. The parties agree that this contract is an incentive only and not part of the Employee's Employment Contract and entered into by the Employer ex gracia.
4. The Employee hereby undertakes to keep all trade secrets and recipes of the Employer secret and not to share it with anybody else. The Employee also undertakes for a period of one (1) year not to cook or prepare any meals on the menu of the Employer within the district of the Nelson Mandela Bay Municipality.

DATED at PORT ELIZABETH this the 28th day of March 2014."

[20] The respondents concerned allege that they signed the agreements in the middle of their shifts. It was not explained to them that the agreement was one of restraint of trade. In fact Ginsburg told them there would be no restriction as to where they work should they leave the employ of the applicant. They did not get any

increment. The agreement speaks of a bonus. They had been in the employ of the applicant for less than a year. They did not acquire

any skills from the applicant. They had been involved in the restaurant business for many years. Meals served at applicant's

restaurant are the same as those served in other restaurants. They do not have any other skills / training apart from those related to preparing meals as grillers etc. They have dependants to support. The restraint, if enforced, will preclude them from working anywhere in the Nelson Mandela Bay Municipality. They therefore be without an income for one year.

[21] Ginsburg does not deny that he informed the respondents there would be no restrictions of where they work after leaving applicant but that there was a rider that as long as it was not in competition with the business of the applicant.

[22] It appears to me that in these circumstances it would be unreasonable to expect third to fifth respondents not to ply their trade or use their only skills within the Nelson Mandela Metro for one year and therefore not have any income, especially in view of the fact that they did not acquire the said skills from the applicant. In my view, enforcing the restraint would be contrary to public policy. See head note *Mappha Alloys and Research (SA) (Pty) Ltd v Ellis* [1984] ZASCA 102; 1984 (4) SA 863. I am satisfied that third to fifth respondents succeeded in showing that the undertaking is unreasonable and therefore against public policy.

[23] Is there a valid restraint of trade agreement between the applicant and the first respondent? Applicant relies on an:

1. Unsigned Shareholders' Agreement.

2. Signed memorandum of understanding.

The unsigned shareholders' agreement purports to restrain the first respondent as one of the Directors and Shareholder not to:

- i. Act as consultant or advisor,
- ii. Hold any direct interest in or
- iii. Act as agent or representative for a business in competition with the business of the applicant for three years after ceasing to be a director or shareholder of the applicant within the Republic of South Africa.

First respondent denies signing the agreement and explains that he preferred a simpler shorter agreement. As indicated earlier in this judgment, there is very little or scarcity of information about the circumstances under which the agreement was signed as alleged by Ginsburg. Lo and behold, a shorter agreement was signed by the parties – the Memorandum of Understanding. The relevant portion of that agreement reads:

“8. George shall in order to protect the business and goodwill, not be directly or indirectly involved in any Restaurant business in competition with the business conducted by Robert for a period of one (1) year, which period George hereby warrants is a reasonable period.”

The agreement appears to have been signed in August of 2013. It does not state the area where it would operate or when the one year period starts from or the occasion that will trigger the operation of the one year period. I agree with the submission made on behalf of the first respondent that the agreement or wording of the restraint is too wide and too vague to be enforceable and does not refer to any specific area.

[24] I am unable to find that the applicant has made out a case that there is binding agreement in restraint of trade between applicant and the first respondent. Applicant has not made out a case for the relief it seeks against first, third to sixth respondents.

[25] Accordingly the application is dismissed with costs, such costs to include the costs occasioned by the employment of two counsel.

N G BESHE

JUDGE OF THE HIGH COURT

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