

SOUTH AFRICA / JUDGMENT

JMG & Sons Trucking Components (Pty) Ltd v Brabson and Another (J1575/12) [2014] ZALCJHB 283 (28 July 2014) [2014] ZALCJHB 283

COURT

Labour Court Johannesburg

BEFORE

R Lagrange

CASE / FILE NUMBER

J1575/12

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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA,

IN JOHANNESBURG

JUDGMENT

Not reportable

Case no: J 1575/12

In the matter between:

JMG & SONS TRUCKING COMPONENTS (PTY) Ltd Applicant And BRABSON, ADRIAN JARROD
First Respondent EURO TRUCK SPARES (PTY) LTD Second Respondent

Heard: 10 July 2014

Delivered: 28 July 2014

Summary: (Restraint of trade– customer connections and pricing information as a protectable interest –limited interest established– balancing of interests justifies significant variation of the restraint).

LAGRANGE, J

Introduction

- [1] This matter concerns an urgent application to enforce a restraint of trade agreement. At the outset, I must point out that all the parties' affidavits were drafted at a level of generality which made it exceedingly difficult to make factual findings and if the court could impose a penalty on the legal representatives for this I would have done so because of the burden placed on the court by such drafting.
- [2] In terms of a permanent contract of employment entered into on 25 February this year, the first respondent Mr AJ Brabson undertook, for a period of three years following the termination of his employment, not to have a direct or indirect interest in any undertaking or business in South Africa, Namibia or Lesotho which at some stage was in direct or indirect competition with the applicant's business of selling truck spares, parts and components in the retail market.
- [3] The first respondent became a permanent employee of the applicant on 1 March 2014 and resigned around 12 June 2014 on one month's notice, ostensibly because he had been promised commission of 3.5 % on sales generated by him but had only been paid 2.5% for sales in excess of R100,000. The applicant contends it never agreed to pay him 3.5 % commission and points out that the contract of employment makes no provision for any commission. What is noteworthy is that the first respondent left just when he had made enough sales to become eligible for commission which does tend to support an inference that when he realised he was only going to be paid 2.5 %, his expectations were not met. Be that as it may, he left to become an independent agent in the same market as the applicant. According to the opposing affidavit deposed to on behalf of the second respondent and direct competitor of the applicant, Eurotruck Spares, it entered into an ad hoc relationship with the first respondent in terms of which it would provide quotations for parts to prospective customers and he would be paid a commission if a deal was concluded.
- [4] The applicant contends that the first respondent simply worked for it long enough to use its business as a springboard for establishing his own business in the same market. He in turn accuses the applicant of employing him in order to gain access to his father's network of contacts in the industry. The first respondent's father works as an assessor for a major truck repair business and over the years it is claimed he had developed a network of trade contacts which he passed on to his son. The applicant claims that if the first respondent did receive leads from his father's trade connections and if approached such contacts for orders whilst he was employed by the applicant, those contacts became the applicant's clients and it was entitled to protect its relationship with them. No specific indication was given of any clients acquired in this manner by the applicant.
- [5] The applicant says it wishes to protect its interest in its customer relationships and it accuses the first respondent of working for it just long enough to establish a relationship with the applicant's customers before leaving to work for a direct competitor of the applicant. There is no real dispute that the first respondent is in breach of the restraint by leaving to work on

his own account in collaboration with a direct competitor. Accordingly, it rests on the first respondent to demonstrate that the restraint is unreasonable in terms of the test pronounced in *Basson v Chilwan and Others*[1] namely if:

5.1 the applicant has an interest worthy of protection after the termination of the agreement;

5.2 that interest is threatened by the actions of the respondent party;

5.3 whether the interest of the party seeking to enforce the restraint outweigh the interest of the respondent party not to be economically inactive or unproductive, if the first two requirements are met.

5.4 There is any other aspect of public policy quite apart from the relationship between the parties which requires the restraint to be maintained or rejected.

A protectable interest threatened by the first respondent ?

[6] What the applicant seeks to protect the first respondent from exploiting in particular is his knowledge of the identity of its customers, the contact persons of such customers and the nature of the products they bought and what they paid for them. The first respondent admits to having had contact with contact persons of three clients of the applicant. However he denies that he established any close relationship with them. It is noteworthy that in the months of February, March, April and May this year the first respondent only earned commission of R 1757-00 for the first time in May, which means that in that month he recorded approximately R 170,000 worth of sales, but he had failed to reach the threshold for earning commission in any of the other months. His basic gross monthly salary during this period was R 3,400 for the first two months and R 5,000 thereafter. The deponent to the applicant's replying affidavit, the managing director of the applicant, observed that it was only in May that the applicant started making "some

decent sales", which success the deponent attributes to his own efforts in training the first respondent up as a salesperson. The applicant suggests this rise in his sales was why the second respondent left at that point.

[7] On the evidence available in the affidavits, I am satisfied that it is not really in dispute that the applicant had access to the applicant's database of customers, whether or not he also had other contacts acquired from his father. It is also true that he did approach existing clients of the applicant for business shortly after he resigned. On the other hand, there is simply insufficient evidence to conclude that the second respondent had developed any kind of close connection with any of the contact persons of the limited number of customers specifically cited in the affidavits, in the course of the few months that he operated as a salesperson on his own.

- [8] Further, in the second respondent's answering affidavit, the point is made that the industry is a small one comprising on 5 or 6 suppliers and that the number of panel beaters and service centre agents is also limited and known to the suppliers in the industry. Although the applicant denies sharing any suppliers with the second respondent it did not take issue with the small size of the industry and the extent to which knowledge of the customers is not exclusive to it.
- [9] Moreover, two of the businesses mentioned as customers of the applicant are also businesses of the second respondent and were so prior to the first respondent even being employed by the applicant.
- [10] On the issue of his knowledge of prices paid by customers, the first respondent says that he received no information other than the recommended market price and had no knowledge of any specific pricing formula which differed from what another competitor might apply. He also claims that the pricing of a particular part is easily obtainable, a view which is also supported by the second respondent. In the second respondents answering affidavit it is stated:
- "it is an industry norm that any person is desirous of obtaining spares would find quotations from the major role players and then play each of these quotations off until they get the best deal, especially the insurance companies. It would generally happen that we provide a quote and then be confronted with a competitive quote and require to either beat it or match it. It is therefore in the public domain and easily accessible exactly what the profit margin of each of the parties because we all get provided by the same importers of the equipment."*
- [11] The applicant disputes the contention of both respondents that it obtains its goods from the same suppliers as they do, though none of the parties provide any detail about the identity of their suppliers, which might be indicative that the suppliers are not necessarily the same since none of the parties wish to name them. The applicant, contrary to what the first respondent says, also claims that it has specific price agreements with regular and long-standing customers which are generally not known in the marketplace and particularly not by the second respondent, but would have been available to the first respondent. Similarly, it claims that it has particular agreements in place with its suppliers concerning pricing and rebates on parts purchased, which is confidential information. Despite this, the applicant does not dispute the normal method of obtaining prices for parts described by the second respondent. Equally, as already mentioned, it does not dispute that, knowledge of the identity of customers and suppliers in the small industry does not belong to it alone.
- [12] The second respondent avers that the pricing and profit margin depends on the frequency of business or the business needs of the supplying company "at any given stage" in order to compete with other suppliers.

- [13] Given that it appears the market for parts is a competitive one in which there is considerable pressure on suppliers like the applicant and the second respondent to match or better an easily obtainable competing price and that pricing is contingent on current market conditions, I am not persuaded that the value of any knowledge the second respondent might have acquired of specific price agreements of the applicant can be of a lasting nature.
- [14] In light of the above, I am not persuaded that the second respondent had acquired knowledge of contacts of customers beyond the three specifically mentioned, who are in any event not its exclusive customers, and that there is insufficient evidence to argue that he walked away from the applicant with its trade connections 'in his pocket', or that he had established firm relationships with those he had dealt with. Moreover, the scope of his trading activity on behalf of the applicant since his permanent employment is reflected in the fact that he only obtained sales worthy of receiving any commission in May this year. Lastly, any knowledge he had of special pricing arrangements of the applicant is likely to be of transient value, considering the importance of current market conditions and the practice of obtaining competing quotes. In short, though the applicant has a protectable interest it is a limited one.
- [15] The prejudice actually caused is limited mainly to the first respondent's contact with one customer which was not also a customer of the second respondent and to his ability to possibly exploit his knowledge of pricing agreements of the applicant. It is also possible that he has been able to use to his advantage the contact he had made with the other two customers of the applicant, even if they were not exclusive customers of the applicant.

Weighing up the interests of the parties.

- [16] Having found that the applicant has a limited protectable interest in stopping the first respondent from competing with it in the industry, is that interest outweighed by the first respondent's interest in being economically active? It was not disputed that the second respondent has no other work experience or qualifications, which would allow him to easily obtain alternative work other than any experience he might have acquired trying to become a professional golfer. On the other hand, he has obtained some advantage which he would not otherwise have got had he not been employed by the applicant.
- [17] What is really at stake here is whether the restraint the applicant seeks to impose does not go far beyond what is reasonably required to protect its interest in information relating to specific pricing agreements structures or a trade connection with one client who is not an existing client of the second respondent. On the evidence I believe that this knowledge is of transient value at best given the context of a competitive pricing environment in which quotes from one supplier are used to beat down the price of another. Another consideration is that the second respondent was only engaged as a sales representative for a few months before he left. It is not as if he was leaving after a period in which he had become well established as a person known by a significant number of applicant's business contacts as one of the 'faces' of its business. There is also no evidence that he developed contacts with

more than the few firms specifically mentioned in the papers

Variation of the restraint

- [18] In the circumstances described above, I believe that this is one of those instances in which the court should only grant limited partial relief by means of significantly attenuating the duration of the restraint. The agreement prevents the first respondent from soliciting business from the applicant's clients for a period of two years and prevents him from being engaged in competitive activity with it for three years.
- [19] I am of the view that, on the very limited protectable interest established, neither restraint should operate for a period of longer than four months from the date of the termination of his services.
- [20] As the applicant is only successful to a limited degree, I do not think this is a case in which the respondents should be mulcted in costs.

Order

[21] In the light of the above, it is ordered that:

21.1 The second respondent is bound by and must comply with the restraint of trade agreement contained in Annexure "FA3" to the applicant's notice motion, save that the agreement is varied by the deletion of the words "three (3) years" in paragraph 1 of the agreement, which are replaced by the words "four (4) months".

21.2 The second respondent is bound by clause 18 of his contract of employment contained in Annexure "FA2" to the applicant's notice motion, and must comply with the clauses 18.2 and 18.3 thereof subject to the variation of clause 18.3 by the deletion of the words "2 (two) years", which are replaced with the words "4 (four) months".

21.3 Each party must pay their own costs.

R LAGRANGE, J

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:

S Snyman of Snyman Attorneys

FIRST RESPONDENT: G Scheepers instructed by A Swart

[1] 1993(3) SA 742 (A) at 767G-H

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