

SOUTH AFRICA / JUDGMENT

New Reclamation Group (Pty) Ltd v Davies and Another (A5033/2014) [2015] ZAGPJHC 7 (30 January 2015) [2015] ZAGPJHC 7

COURT

South Gauteng High Court, Johannesburg

BEFORE

M L Mailula, B Mashile, M Zulu

CASE / FILE NUMBER

A5033/2014

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: A5033/2014

DATE: 30 JANUARY 2015

In the matter between:

THE NEW RECLAMATION GROUP (PTY) LTD.....Appellant

And

NEIL DAVIES.....First Respondent

WEST RAND SCRAP (PTY) LTD.....Second Respondent

J U D G M E N T

THE COURT:

- [1] This is an appeal against the judgment of Tsoka J handed down on 20 March 2014, leave to appeal having been argued and granted by him on 4 June 2014. The matter concerns the enforcement of a contractual restraint of trade and confidentiality undertakings given by the First Respondent, a former employee of the Appellant, in favour of the Appellant. The Second Respondent is cited merely because it might have an interest in the outcome hereof as the First Respondent is in its employ.

- [2] The Appellant seeks an order against the First Respondent preventing him from being employed by or from carrying on a business either solely or jointly or as an agent of the Second Respondent or any other competitor of the appellant up to and including 5 February 2015 in the Republic of South Africa and Botswana. The appellant further seeks an order against the First Respondent preventing him from disclosing the confidential information and trade secrets of the Appellant. No relief is sought against the Second Respondent and it has not opposed the application.
- [3] The operation of the restraint of trade agreement was instigated by the First Respondent's dismissal from his employment with the Appellant. His expulsion was pursuant to charges of fraud and misappropriation of funds allegedly executed by him against the Appellant. The charges culminated in the institution of disciplinary proceedings against him during which he was found guilty and subsequently sacked.
- [4] The factual background is that the First Respondent qualified as an accountant in 1997. He joined his father's company, Midway Metals (Pty) Ltd, at the beginning of 1997. Midway Metals thereafter traded as West Rand Recycling. The First Respondent was employed in the business as an accountant. In November 1998 the Appellant's predecessor in title "The Reclamation Group" (which was then Lexshell 246 (Pty) Ltd) acquired West Rand Recycling.
- [5] Shortly after the acquisition of West Rand Recycling, in November 1998, the first respondent was appointed as a Financial Manager of the West Rand Division of The Reclamation Group. In 2003, the First Respondent left The Reclamation Group to begin his own plastic recycling business. When his business did not do well, he was then re-employed by the Appellant as a trader in non-ferrous metals on 12 May 2008.
- [6] At the time when the First Respondent re-joined the Appellant in 2008, he was employed as a trader in non-ferrous metals based at the appellant's head office. At that time, he concluded the 2008 restraint agreement. In 2009, the First Respondent was promoted to the position of Branch Manager of the Appellant's West Rand Branch. In this position, the First Respondent's functions and responsibilities included the following:
- 6.1 Servicing the Appellant's customer base;
 - 6.2 Dealing with problems and queries which arose from time to time;
 - 6.3 Ensuring sales budget targets were met;
 - 6.4 Submitting tenders for long-term contracts;
 - 6.5 Liaising with the Appellant's Chief Operating Officer and Chief Executive Officer and finance department; and
 - 6.6 Attending branch manager meetings at which the Appellant's strategies were discussed.

[7] In 2010, the First Respondent was appointed as Manager of the appellant's Botswana operation and as a Director of ReclamBotswana (Pty) Ltd. Here the First Respondent was responsible for the appellant's entire Botswana operation. In this role, he reported back bi-weekly to senior management. At the meetings, the following matters were traversed:

7.1 The Appellant's international operations;

7.2 Pricing related matters;

7.3 Recruitment of new staff;

7.4 Training of staff;

7.5 Opening of new bucket shops;

7.6 Performance reviews of the Appellant's different branches; and

7.7 The nature and extent of scrap supply.

[8] During early 2011, the First Respondent was promoted within the South African business to Divisional Head. In this position, he had overall responsibility for twelve of the Appellant's branches, including the West Rand. His duties included negotiating with third parties to secure premises to be leased and acquired by the appellant; overseeing the administrative support for the operation on Botswana; and providing security related advice to prevent potential hijacking risks for copper scrap.

[9] From 23 June 2011, he was appointed to a management committee within the Appellant and in this role, he had unrestricted access to all strategic and financial information relating to the business of the Appellant, as well as information relating to the Appellant's suppliers and customers.

[10] On 1 July 2011, the first respondent signed a second restraint agreement. This agreement was signed by the First Respondent but not by the appellant. The only material difference between the 2008 and 2011 agreements is that under the 2008 agreement, the period of the restraint was three years and under the 2011 agreement, the restraint period was two years.

[11] We turn now to the nature of the businesses of the Appellant and the Second Respondent. It is common cause that the Appellant and the Second Respondent are competitors in their respective areas of business. The difference between them, however, is that the Appellant's operations extend throughout the country and in some instances, across neighbouring countries. The Second Respondent, on the other hand, operates a similar business at a smaller scale. It runs its business largely at one depot albeit

that it has the capability to reach out to suppliers and customers all over the country.

- [12] The businesses of both parties involve the purchase, sale and processing of ferrous and non-ferrous scrap metal. Processing involves cleaning, grading, sorting, stripping, cutting, shredding and any other beneficiation (chemically or otherwise) of ferrous and non-ferrous metals into any form whether as a finished or a semi-finished product.
- [13] Both parties purchase scrap metal from third parties including industrial companies, the informal sector and merchants that conduct business within and outside South Africa. The scrap metal is then graded, sorted and processed for onward sale to consumers of either ferrous or non-ferrous scrap metal. The processing which is carried out is dependent on the needs of each customer and the nature of the material.
- [14] The varying sources and types of supply and the changing customer needs for scrap metal entails knowledge of who the suppliers are, where they are located, what scrap they supply, in what quantities and at what price they are willing to sell their scrap. Similarly, knowledge of the customers and their specific scrap requirements at any point in time is a critical requirement of running a successful scrap business.
- [15] When the matter served before the court a quo, the Appellant had founded its case on the basis of the 2011 restraint of trade agreement. The Respondent argued that the 2011 agreement was not enforceable because it was signed by the First Respondent alone and not the Appellant. Apart from the aforesaid, the First Respondent also asserted that the 2011 agreement could not be the applicable agreement as the 2008 agreement contains 'a no variation except in writing clause'. The Appellant then filed a supplementary affidavit wherein it sought to rely on the 2008 agreement in the event that the court a quo came to the conclusion that the 2011 agreement was not valid and enforceable.
- [16] The court a quo ruled that the 2011 agreement constituted an offer which was not accepted by the First Respondent and accordingly held that the 2008 agreement was applicable. When the matter came before this court, however, the need to decide which of the two agreements was valid was rendered irrelevant anyway because Counsel for the First Respondent agreed that the pertinent agreement was the 2008 upon which the Appellant was relying as an alternative in his supplementary affidavit. Accordingly, a decision on which of the two agreements this matter is based became academic.
- [17] The issues that require determination are:
- 17.1 The validity and enforceability of the 2008 agreement;
 - 17.2 The existence of trade secrets and confidential information worthy of protection;
 - 17.3 Whether or not the First Respondent breached the agreement.
- [18] The legal position concerning restraint of trade agreements is that a party seeking to enforce a restraint of trade agreement requires to raise the restraint agreement and prove a breach thereof. The opposing party seeking to avoid the restraint bears the onus to demonstrate on a balance of probabilities that the restraint agreement is unenforceable

because it is unreasonable. The test for the determination of reasonableness or otherwise of a restraint of trade provision is set out in *Basson v Chilwan and Others* [1993] ZASCA 61; 1993 (3) SA 742 (A) at 767C-Hin:

18.1 Is there an interest of the one party, which is deserving of protection at the termination of the agreement?

18.2 Is such interest being prejudiced by the other party?

18.3 If so, does such interest so weigh up qualitatively and quantitatively against the interest of the latter party that the latter should not be economically inactive and unproductive?

18.4 is there another 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?

[19] It is settled that insofar as the first leg of the test in *Basson v Chilwan & Others* supra, the proprietary interests that can be protected by a restraint of trade agreement are in essence of two kinds and these are:

19.1 all confidential information that is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him, to gain a relative competitive advantage – trade secrets; and

19.2 The relationships with customers, potential customers, suppliers and others - trade connection of the business, being an important aspect of its incorporeal property known as goodwill. See *Sibex Engineering Services (Pty) Ltd v Van Wyk & Another* 1991 (2) SA 482 (T) at 502 D-F.

[20] Whether information constitutes a trade secret is a factual question. For information to be confidential it must be:

20.1 Capable of application in trade or industry, that is, it must be useful and not be public knowledge and property;

20.2 Known only to a restricted number of people or a closed circle; and

20.3 Of economic value to the person seeking to protect it. See *Townsend Productions (Pty) Ltd v Leech & Others* 2001 (4) SA 33 (C) at 53J-54B.

[21] With regard to customer connection, 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 a customer. See *Rawlins & Another v Caravantruck (Pty) Ltd* [1992] ZASCA 204; 1993 (1) SA 537 (A) at 541C/D-I.

[22] A respondent bears the onus of proving the unreasonableness of the restraint. A respondent must establish that he had no access to confidential information and that he never acquired any significant personal knowledge of or influence over the applicant's customers whilst in the applicant's employ. It suffices if it is shown that trade connections through the customer

contact exist and that they can be exploited if the former employee were employed by a competitor. Once that conclusion has been reached and it is demonstrated that the prospective new employer is a competitor of the applicant, the risk of harm to the applicant if its former employee were to take up employment becomes palpable.

- [23] Where the applicant has endeavoured to safeguard itself against the unpolicable danger of the respondent communicating its trade secrets to, or utilising its customer connection on behalf of, a rival concern after entering their employ by obtaining a restraint preventing the respondent from being employed by a competitor, the risk that the respondent will do so is one which the applicant does not have to run and neither is it incumbent upon the applicant to inquire into the bona fides of the respondent and demonstrate that he is mala fides before being allowed to enforce its contractually agreed right to restrain the respondent

from entering the employ of a direct competitor. See *Institute for International Research v Tarita & Others* 2004 (4) SA 156 (W) at 167B-C.

- [24] In those circumstances, all that the applicant can do is to show that there is secret information to which the respondent had access, and which in theory the respondent could transmit to the new employer should he desire to do so. Where the ex-employer seeks to enforce against his ex-employee a protectable interest recorded in a restraint, the ex-employer does not have to show that the ex-employee has in fact utilised information confidential to it - merely that the ex-employee could do so. The very purpose of the restraint agreement is that the applicant does not wish to have to rely on the bona fides or lack of retained knowledge on the part of the respondent, of the confidential information. It cannot be unreasonable for the applicant in these circumstances to enforce the bargain it has exacted to protect itself.
- [25] Indeed, the very ratio underlying the bargain is that the applicant should not have to content itself with crossing its fingers and hoping that the respondent would act honourably or abide by the undertakings that he has given. It does not lie in the mouth of the ex-employee who has breached a restraint agreement by taking up employment with a competitor to say to the ex-employer 'Trust me: I will not breach the restraint further than I have already been proved to have done.' See *Institute for International Research v Tarita & Others* supra.
- [26] Insofar as trade secrets are concerned, the court a quo agreed with the First Respondent's assertion that none existed to which the first respondent was exposed during his employment with the Appellant. The court a quo further regarded the surprised expressed by the Appellant's customers when they learned that the First Respondent had concluded a restraint of trade agreement with the Appellant as evidence that there was no confidentiality in the industry. Once the court a quo had made the aforesaid pronouncements on trade secrets and trade connections, the fate of the Appellant was inexorable.
- [27] The Appellant has strongly contended that it has an interest worthy of protection in areas such as recycling know-how, distribution know-how, business know-how, process, techniques and trade secrets in general. To maintain its leading role and significance in the

industry, the Appellant actively and deliberately persuaded the First Respondent to learn from other experienced individuals employed within the Appellant to gain an all-round education and understanding of the recycling and distribution know-how, processes and techniques as implemented by the Appellant.

- [28] It was in the manner described above that the First Respondent became privy to the strategic and competitive manner in which the Appellant promotes and markets its business. In the light of the above, the First Respondent was able to educate other individuals employed within the Appellant's business on how to compete effectively in the scrap metal industry.
- [29] The Appellant argued further that the First Respondent might have acquired some knowledge of how the industry operates but could not run such a business prior to his acquisition of the knowledge and experience from the Appellant. What is therefore patent and undeniable is that he failed to run a similar business enterprise on his own. It is only subsequent to his exposure to the trade secrets and business connections of the Appellant that he has become a successful and competent employee in the industry. The information that the First Respondent acquired is pertinent across the Appellant's business throughout the areas over which it seeks to restrain the First Respondent being the whole of South Africa and Botswana where it operates business.
- [30] The First Respondent on the other hand has asserted that the Appellant is not entitled to appropriate the knowledge and experience that he gained from the Appellant's predecessors. The predecessors of the Appellant, so the argument goes, were separate and distinct and cannot be said to have been part of the Appellant in any manner. This argument is artificial as a successor in title inherits all that the predecessor owned. In this scenario therefore the position is that the Appellant took over and became the successor in title and as such is entitled to restrain any person who has been exposed to such knowledge and experience while in the employ of its predecessor.
- [31] As a result of his knowledge acquired whilst with the Appellant, the First Respondent became aware of strategic and confidential information. Such information relates to prospective transactions with customers and suppliers situated throughout the area where the Appellant conducts its business. In addition, the First Respondent also became exposed to particular prices and discounts negotiated with customers and suppliers with whom he dealt (and with whom other employees and representatives of the Appellant dealt. Generally, the First Respondent came to know of the Appellant's pricing methods and structures.
- [32] The information to which the First Respondent was exposed is confidential because it was Capable of application in trade or industry. It was only known to those employees of the Appellant who had to know about it. It was of economic value to the Appellant who of course sought to protect it.

- [33] While in the employ of the Appellant, the First Respondent created close relationships with both customers and suppliers of the Appellant. Relationships with suppliers are crucial in the industry because if a scrap business cannot secure a steady and reliable source of scrap material for recycling, it will very quickly go out of business. It was precisely for this reason that the First Respondent was encouraged to make and establish contacts with suppliers and customers.
- [34] It is apparent from the affidavits of some of the suppliers of the Appellant that the First Respondent has successfully built very strong links with the customers and suppliers of the Appellant. These connections that the First Respondent has created would threaten any employer in the position of the Appellant.
- [35] The First Respondent was, in relation to the Appellant and the customers with whom he dealt, aware of each customer's business and that customer's specific and particular requirements. In relation to the Appellant and the suppliers with which he dealt, he would have been mindful of each supplier's business and that supplier's specific and particular requirements. He would have been also acutely conscious of the needs and requirements of the Appellant's customers and suppliers. Having assessed the customer's needs, he would have been in a position to ensure that he could and did, through the Appellant, fulfil those needs. He would have been able to forge relationships with key representatives of the Appellant's customers, potential customers, suppliers and potential suppliers which greatly facilitated on-going business with the Appellant's customers and suppliers.
- [36] Thus, the three affidavits provided by Rudi Scrap Metals, JJD and Magogo Scrap Metals, all of which were the Appellant's suppliers are a clear indication that their connection with the First Respondent was strong. He had serviced them for years. It was with him, rather than the Appellant, that a relationship had been built up over the years. They therefore had no hesitation in providing supplies to the Second Respondent when they were approached to do so by the First Respondent.
- [37] The surprise or shock exhibited by the Appellant's suppliers when they learned that the First Respondent had signed a restraint of trade agreement with the Appellant is ambivalent as one cannot conclusively state that their reaction to the news is an indication of the existence or non-existence of confidential information. A more objective approach in the circumstances is thus required and that is simply to go to the facts and determine what they reveal. It is abundantly clear from the testimony of the three suppliers as outlined in their affidavits that they had dealt with the First Respondent and that they would like to follow him wherever he would take them.
- [38] We agree entirely with the argument of the Appellant that although the First Respondent denied that he made the approaches in these three instances, his evidence on this point relied on unsupported hearsay evidence and allegations that the Appellant's suppliers who provided confirmatory affidavits had perjured themselves. The First Respondent laid no factual basis for this allegation of perjury other than the uncorroborated hearsay evidence.

Moreover the allegations that the First Respondent approached the Appellant's suppliers were confirmed under oath by each supplier in confirmatory affidavits attached to the founding affidavit.

- [39] The court is reasonably satisfied that on the basis of what is described above, the Appellant has established that trade secrets and trade connections existed. These secrets and connections required protection against employees who have become exposed to them such as the First Respondent. Once the court has concluded as aforesaid, it should follow as a matter of course that the restraint that the parties concluded had a purpose to serve and is therefore valid and enforceable.
- [40] Validity, enforceability, existence of trade and business secrets having been established, the last issue that falls for determination by this court is to establish whether or not the First Respondent violated the provisions of the agreement. The agreement describes in detail the trade secrets in Clause 4. Clauses 5 and 6 deal with the non-solicitation of employees and the actual restraints respectively. The First Respondent acknowledged that he will be exposed to such information by appending his signature to the agreement. As a matter of fact, there is sufficient proof in the founding affidavit that he was indeed exposed.
- [41] In Clause 6.5 of the agreement, the First Respondent acknowledges and agrees that the restraints imposed upon him in terms of Clause 6 are reasonable as to subject matter, area and duration and are reasonably necessary to protect the proprietary interests of the Appellant, its successors-in-title and assigns in the business and its underlying assets.
- [42] The Appellant alleges that the First Respondent's employment by and/or association with the second respondent commenced whilst he was still employed by the Appellant and continues to this day. In view of the fact that the second respondent is a direct competitor of the Appellant, such employment and/or association constitutes a breach of the restraint of trade agreement, which the first respondent signed in 2008 making certain undertakings in favour of the Appellant.
- [43] In direct violation of Clause 5 of the agreement, In March 2013 The First Respondent offered employment to Mbedlhi with the Second Respondent, a former driver in the employ of the Appellant. Mbedhli tendered his resignation with immediate effect to Pavkovich and told him that he would be joining First and the Second Respondents. Mbedhli was very resolute as he would not even consider an effort by the Appellant to match the offer made by the Appellant. It has since been confirmed that Mbedhli is indeed in the employ of the Second Respondent, a company in direct competition with the Appellant.
- [44] In late March 2013, the First Respondent recruited Joseph Itumeleng who was also in the Appellant's employ as a driver. Like Mbedhli, Joseph would not consider a revised offer meant to match that of the Appellant. When Pavkovichq called Joseph a week later to find out why he was not coming to work, the latter told him that after persuasion by the First Respondent he had taken up employment with the Second Respondent. Similar approaches with offers of employment with the Second Respondent were made to Maroping Rosina

Sekotaborwa and Susan Mansfield by the First Respondent.

- [45] Needless to state that all these approaches constitute a contemptuous violation of Clause 5 of the agreement. It cannot assist the First Respondent's case to state that the recruited employees could not have caused any major loss of business to the Appellant as they were not key in the conduct of its business. Whatever the position is, the solicitation of the Appellant's employees constitutes a blatant and deliberate infringement of the agreement.
- [46] Following disciplinary proceedings against the First Respondent, the First Respondent was dismissed on 6 February 2013. His dismissal activated the provisions of Clause 6 of the agreement in particular that he would not for a period of two years take employment with a competitor of the Appellant. Subsequent to his release from employment with the Appellant, however, it transpired that the First Respondent had been associated with the Second Respondent and that he was then fully employed by it. The Second Respondent currently operates its business in the precise areas over which the First Respondent had control whilst in the employ of the Appellant and in respect of which the Appellant sought to enforce its restraint.
- [47] The Appellant contended that the fact that the business of the Second Respondent has been established in the very areas which the First Respondent controlled whilst in the employ of the Appellant, is indicative of the key role which the first respondent plays in the Second Respondent. In fact it must be correct to add to the foregoing that the Second Respondent would not have been interested in the First Respondent had it not been attracted by the knowledge and experience that he gained whilst in the employ of the Appellant.
- [48] The trade secrets and customer connections, which the First Respondent acquired as a trader from 2008, would enable a competitor to compete unlawfully with the Appellant if it were to be disclosed to it. The information about the scrap business which the First Respondent obtained would be passed on to the Second Respondent to the detriment of the Appellant. The question of unreasonableness does not arise in view of the provisions of Clause 6.5 of the agreement besides, the power play between the parties was evenly spread between the parties in 2008 unlike in 2011.
- [49] In the circumstances the court finds that:
- 49.1 The trade and customer connections of the Appellant are an interest which is worthy of protection;
- 49.2 The interest of the Appellant is being prejudiced by the First Respondent taking up employment with a competitor, the Second Respondent;
- 49.3 A qualitative and quantitative weighing up of the interest of the Appellant tilts in favour of restraining the First Respondent for the period of the restraint, two years; and
- 49.4 The First Respondent was free when he made the restraint undertakings and should for that reason be held to observe his obligations.

[50] In the result, the Court makes the following order:

1. The appeal is upheld with costs.
2. The order of the court a quo is set aside and is replaced with the following:

"1. The First Respondent is hereby interdicted and restrained –

1.1 for a period of two years calculated from 6 February 2013 ("the termination date") up to and including 5 February 2015 ("the restraint period") whether as proprietor, principal, member, agent, partner, representative, shareholder, director, manager, employee, consultant, advisor, financier, administrator and/or any other like capacity, whether for reward or not, and whether alone or jointly, from being directly or indirectly associated and/or concerned with, interested and/or engaged in and/or interest himself in any entity, including but not limited to the second respondent, which carries on any and all activities which are the same as, similar to or directly or indirectly competitive with the business of scrap metal dealers (whether ferrous scrap metal and/or non-ferrous scrap metal and/or re-rollable and/or re-usable steel products) which involves –

1.1.1 the ongoing purchase of ferrous and non-ferrous scrap metal from the public in general including demolition and dismantling contractors, any generators of scrap metal and the industry as a whole;

1.1.2 the processing and sale thereof to consumers of those products either as raw material or as a re-usable item;

1.1.3 as haulers and/or plastic recyclers and/or paper recyclers and/or cardboard recyclers and/or glass recyclers and/or rubber recyclers which involves –

1.1.3.1 the ongoing purchase of plastic and/or paper and/or cardboard and/or glass and/or rubber from the public in general and the industry as a whole; and

1.1.3.2 the processing and sale thereof to consumers of these products either as a raw material or a re-usable item;

1.1.3.3 the transportation of scrap metal and/or paper and/or plastic and/or cardboard and/or rubber and/or glass;

1.1.3.4 demolition work that generates scrap metal;

1.1.3.5 diamond mining, beneficiation and marketing; and

1.1.3.6 primary steel activities,

("prescribed activities"), and/or any other activities of the applicant as at the termination date (collectively "competitive activities") anywhere in South Africa and/or Botswana ("prescribed area");

1.2 during the restraint period, directly or indirectly, whether as proprietor, partner, director, shareholder, employee, consultant, contractor, financier, agent, representative, assistant, trustee or beneficiary of a trust or otherwise in any part of the prescribed area and whether for reward or not, and/or alone or jointly, from –

1.2.1 soliciting orders from prescribed customers ("prescribed customers") as defined annexure "A" hereto for the prescribed goods ("prescribed goods") as defined annexure "A" hereto and/or the prescribed services ("prescribed services") as defined annexure "A" hereto; and/or

1.2.2 canvassing business in respect of the prescribed goods and/or prescribed services from prescribed customers; and/or

1.2.3 selling or otherwise supplying any prescribed goods to any prescribed customer; and/or

1.2.4 rendering any prescribed services to any prescribed customer; and/or

1.2.5 purchasing any prescribed goods from any prescribed supplier (as set out annexure "A" hereto) or accepting the rendering of any prescribed services from any prescribed supplier; and/or

1.2.6 soliciting orders from prescribed suppliers for the rendering of prescribed services or the supply of prescribed goods; and/or

1.2.7 soliciting appointment as a distributor, licensee, agent or representative of any prescribed supplier in respect of the prescribed goods and/or the prescribed services;

1.3 during the restraint period –

1.3.1 either for himself or as agent of anyone else, from persuading, inducing, soliciting, encouraging or procuring any employee of the applicant to –

1.3.1.1 become employed by or interested in any manner whatever in any entity, directly or indirectly in competition with the business carried on by the applicant; or

1.3.1.2 terminate his employment with the applicant;

1.3.2 from furnishing any information or advice to any employee then employed by the applicant or to any prospective employer of such employee or use any other means which are directly or indirectly designed, or in the ordinary course of events, calculated to result in any such employee terminating his or her employment by the applicant or becoming employed by, or directly or indirectly interested in or associated with, any other entity;

1.4 from using or directly or indirectly divulging or disclosing to any third party any of the applicant's trade secrets and/or confidential information, which includes but is not limited to –

1.4.1 recycling know-how, processes and techniques;

1.4.2 distribution, know-how, processes and techniques;

1.4.3 information relating to strategy, being information as to new business, cessation of business, focus of business, client retention, marketing approach, investment strategy, the applicant's group strategy, pricing of services, information technology, shareholding, staffing of the business and remuneration of employees (including the structuring of remuneration);

1.4.4 information relating to financial performance, being information as set out in management accounts, financial projections and financial statements, specifically including (without limitation) information as to the profitability (or otherwise of the applicant), its margins, cash flows and all other issues relating to the income statements, balance sheets, cash flow statements and other financial reports;

1.4.5 information relating to involvement in tenders, being information as to which tenders the applicant is or will be participating in, all information contained in tender submissions, the applicant's marketing approach to any tender and whether the tender was awarded to the applicant or not and the grounds therefor;

1.4.6 information relating to operating activities, being all information relating to administrative systems, information technology, service level agreements between the applicant and any service provider, day to day operating performance, information relating to staffing, problems experienced in relation to individual staff members or on the whole, remuneration, dismissals, appointments, disciplinary problems, staff strategy and issues relating to diversity and employment equity;

1.4.7 information relating to client management, being all information relating to former, current and/or targeted clients, any problems relating to them, their profitability (or otherwise), the marketing approach taken in respect of them and strategies for dealing with competitors; and

1.4.8 technical and business know-how and trade secrets in general.

2 The Second Respondent is hereby interdicted and restrained from being party to the First Respondent acting in the manner set out in paragraph 1, inclusive of paragraphs 1.1 to 1.4.8 above.

3 The First Respondent is to pay the costs of the application AND that the aforesaid costs are to include, inter alia, the costs occasioned by the employment of two counsel.”

M L MAILULA

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

B MASHILE

M ZULU

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

Date of Hearing: 08 October 2014

Date of Judgment: 30 January 2015

Counsel for the Appellant: Advocate Subel

Instructed by: Werksmans Attorneys Tel: 011 – 535 8283

Counsel for the Respondents: Advocate van Blerk

Instructed by: Brian Kahn Incorporated

Tel: 011 – 577 5600

ANNEXURE A

DEFINITIONS

1. “prescribed customer” means any person -

1.1 who is or was a customer of the applicant in connection with the competitive activities, as at termination date;

1.2 who is or was a prospective customer of the applicant in connection with the competitive activities, at the termination date whom the employee or the applicant had approached to do business with the applicant within the period of one year preceding the termination date;

1.3 who purchased prescribed goods from the applicant within the period of one year preceding the termination date;

1.4 to whom prescribed services were rendered by the applicant within the period of one year preceding the termination date.

2. “prescribed goods” means any and all goods which are dealt in or by the applicant in the ordinary course of business and in connection with the competitive activities, as at the termination date.

3. “prescribed services” means any and all services rendered by the applicant in the ordinary course of business and in connection with the competitive activities, as at the termination date.

4. “prescribed supplier” means any person -

4.1 who is or was a supplier of prescribed goods and /or prescribed services to the applicant as at the termination date;

4.2 who is or was a prospective supplier of prescribed goods and/or prescribed services to the applicant at the termination date which the employee or the applicant had approached to do business with the applicant within a period of one year preceding the termination date; or

4.3 who supplied prescribed goods and/or prescribed services to the applicant within the period of one year preceding the termination date.

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