

SOUTH AFRICA / JUDGMENT

Roha SA Ingredients (Pty) Ltd v Gerhardt and Another (J853/2024) [2024] ZALCJHB 414 (17 October 2024) [2024] ZALCJHB 414

COURT

Labour Court Johannesburg

BEFORE

Myburgh, AJ

CASE / FILE NUMBER

J853/2024

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IN

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not

reportable

Case

No: J853/2024

Court

Online Case No: 2024-092127

In

the matter between:

ROHA

SA INGREDIENTS (PTY) LTD

Applicant

and

BRIAN-MARK

GERHARDT

First

Respondent

NICOLA-J

FLAVOURS AND

FRAGRANCES

(PTY) LTD

Second

Respondent

Heard:

19 September 2024

Delivered: 17 October 2024
(This judgment was handed down electronically by circulation to the parties' representatives by email. The date for hand-down is deemed to be on 17 October 2024.)

JUDGMENT

MYBURGH, AJ

Introduction

[1] The first respondent (Mr Gerhardt) was employed by the applicant (Roha) as national sales account manager until 31 August 2024, and thereupon took up employment with the second respondent (Nicola-J) as sales manager.

[2] Roha now seeks to enforce this restraint of trade contained in Mr Gerhardt's contract of employment:

"The employee undertakes not to be engaged in any other business, in competition with the employer's business, be it direct or indirect, or as a shareholder, partner, member of a close corporation, director of a company or in any other capacity, within one (1) year after termination of this agreement, in any area known as Food Colourants. This is applicable in any market within Sub-Saharan Africa, including South Africa."

[3] The papers are lengthy, the heads of argument comprehensive and thorough oral submissions were presented at the hearing of the matter. In deciding it, I intend to focus on what I consider to be the essence of the various issues.

Broad factual matrix

[4] Roha specialises in the manufacturing, marketing, and selling of food colours, industrial colours and dehydrated ingredients throughout South Africa and Sub-Saharan Africa. It falls within the food and beverage industry. Importantly, it does not provide flavourants or do any business relating to flavourants whatsoever.

[5] Mr Gerhardt took up employment with Roha on 6 March 2023. Although his title was "national sales account manager", he was purely a salesperson responsible for sales in Sub-Saharan Africa, with almost all of his work being in Zambia and Zimbabwe. Before taking up employment with Roha, Mr Gerhardt worked for Kerry International for a number of years as national sales manager – it being a global leader in flavourants.

[6] On Mr Gerhardt's version, which stands to be accepted on the Plascon-Evans test, the following events preceded his departure from Roha. On 8 July 2024, he informed both Mr Reis (executive director) and Mr Terblanche (financial and HR manager) that he was going to apply for a position at Nicola-J – this being a position in South Africa not requiring extensive travel, which was taking its toll on Mr Gerhardt's family. In response, Messrs Reis and Terblanche told Mr Gerhardt to "go for it" and "gee dit gas", respectively. Neither of them said

anything about the restraint. On 15 July 2024, Mr Gerhardt tendered his resignation during a meeting with Mr Reis, it having been agreed that his last working day would be 30 August 2024. On 18 July 2024, Mr Gerhardt received a letter from Mr Reis, in which Roha sought (for the first time) to enforce the restraint. On 22 July 2024, Mr Reis made a counter-offer of a position in South Africa, which Mr Gerhardt declined on 23 July 2024. Mr Gerhardt then wrote a resignation letter on 31 July 2024, which confirmed his resignation date as being 15 July 2024 and that his last working day would be 30 August 2024.

[7] On 13 August 2024, the present application was launched. The application is opposed by Mr Gerhardt. Although Nicola-J abides the decision of the court, its CEO has filed a confirmatory affidavit confirming Mr Gerhardt's version insofar as it relates to Nicola-J.

[8] On 2 September 2024, Mr Gerhardt took up employment with Nicola-J as its sales manager.

[9] Different to Roha, which is exclusively involved in food colourants, Nicola-J's business is based on developing and selling food flavours and fragrances (which accounts for 90% of its revenue), with it having a small colourant component with existing clients. So while both companies fall within the food and beverage industry, they operate (at least principally) in different markets – Roha in the colourant market, and Nicola-J in the flavours and fragrances market. Nicola-J wishes to grow revenue based on flavour sales (and is not looking to grow its limited colourant client base) with Mr Gerhardt's appointment being aimed at achieving this goal.

[10] Also important is the fact that the geographic scope of Mr Gerhardt's new job is entirely different. When employed by Roha he worked outside of South Africa (mostly in Zambia and Zimbabwe), while he now works exclusively within South Africa.

[11] When the matter came before me on 19 September 2024, Mr Gerhardt had already been in the employ of Nicola-J for the better part of a month.

Preliminary

issues

[12] There are two preliminary issues – urgency and waiver.

- [13] Regarding urgency, Mr Gerhardt contends that it was self-created, in circumstances where the application was brought a month after he resigned verbally on 15 July 2024. I am not persuaded by this. As the sequence of events sketched above reflects, there were various interactions between the parties after 15 July 2024, which culminated in Mr Gerhardt's letter of resignation on 31 July 2024, and there was not an undue delay thereafter in launching the application.
- [14] Regarding waiver, Mr Gerhardt contends that because he was told "to go for it" and "gee dit gas" on 8 July 2024 by Messrs Reis and Terblanche, respectively, it follows that Roha elected to waive its right to enforce the restraint. In my view, this on its own falls short of meeting the test for waiver, namely that it must be shown (by Mr Gerhardt) that the other party with full knowledge of the right decided to abandon it.[1]
- [15] What thus stands to be determined are the merits of the application. Before doing so, it is useful to outline briefly the general principles applicable to restraints of trade.

Restraints of trade: general principles

- [16] It is trite that restraints of trade are valid and binding, and as a matter of principle enforceable, unless the enforcement thereof is considered to be unreasonable.[2]
- [17] A party seeking to enforce a restraint agreement is required only to invoke the restraint and to prove a breach of its terms (this being Roha's onus). Once this has been done, the onus is on the respondent to prove on a balance of probabilities that the restraint agreement is unenforceable because it is unreasonable (this being Mr Gerhardt's onus).[3]
- [18] In Basson,[4] the court set the following test for determining the reasonableness or otherwise of a restraint agreement: (i) Does one party have an interest that deserves protection after termination of the agreement? (ii) Is that interest threatened or being prejudiced by the other party? (iii) If so, does that interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive? (iv) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected?
- [19] In Reddy, the court posited a fifth consideration, namely whether the restraint goes further than necessary to protect the interest, which involves a consideration of less restrictive measures to achieve the purpose of the limitation.[5]
- [20] The proprietary interests (see Basson question (i)) that can be protected by a restraint agreement are essentially of two kinds: confidential information (trade secrets) and trade connections.

- [21] In order to qualify as confidential information, the information must comply with three requirements: (i) it must involve and be capable of application in the trade or industry, i.e. it must be useful (in this sense); (ii) it must not be public knowledge and public property – that is, objectively determined, it must be known only to a restricted number of people or to a closed circle; and (iii) the information objectively determined must be of economic value to the person seeking to protect it.[6]
- [22] It is for the respondent to establish that he or she had no access to that information or that he or she had never acquired any significant personal knowledge of, for example, the applicant's customer base while in its employ. All that the applicant need show is that there is secret information to which the respondent had access to and which in theory the respondent could transmit to the new employer if he or she was inclined to do so. In order to enforce the restraint, the applicant does not have to show that the respondent has in fact utilised information confidential to it; it is sufficient to show that the respondent could do so. [7]
- [23] Turning to trade connections, they would constitute an interest worthy of protection 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.[8]

Did Mr Gerhardt breach the restraint by taking up employment with Nicola-J?

- [24] For present purposes, the key part of Mr Gerhardt's restraint reads that, for a year after termination of employment, "[t]he employee undertakes not to be engaged in any other business, in competition with the employer's business, ... in any area known as food colourants". In argument, Mr Gerber SC (who appeared for Mr Gerhardt) submitted that the word "area"

is here synonymous with "market".

- [25] Mr Gerhardt contends that he has not breached the restraint on two bases: firstly, he contends that Roha and Nicola-J are not competitors in the food colourants market; and secondly, he contends that, even if they are, he himself is not engaged in the food colourants market at Nicola-J.
- [26] I am not persuaded by this. Roha and Nicola-J do compete in the colourants market, albeit that this only accounts for 10% of Nicola-J's revenue derived from an existing client base (which it is not looking to grow through Mr Gerhardt's employment). Furthermore, while Mr Gerhardt has been appointed as the sales manager of Nicola-J to drive sales in the flavours market with his own client portfolio being limited to clients in this market (and not colours), I tend to agree with Mr Grundlingh (who appeared for Roha) that the restraint relates to employment with a competitor in the colourants market, as opposed to employment with a competitor in a competing job (or division).

[27] In the result, I find that in taking up employment with Nicola-J, Mr Gerhardt breached the restraint. However, the limited extent of the competition between Roha and Nicola-J and the fact that Mr Gerhardt himself is not engaged in competing with his former employer, are considerations that feature in the qualitative / quantitative weigh off, which I deal with later. But first, I turn to consider whether Roha has established a protectable interest in the enforcement of the restraint.

Has Roha established a protectable interest in the enforcement of the restraint?

[28] Roha contends that it has protectable interests in the form of confidential information and trade / customer connections that are served by the restraint, and that it is accordingly valid and enforceable.

[29] To begin with trade connections, Roha's case is stillborn. While employed by Roha, Mr Gerhardt attended to customers in Sub-Saharan Africa outside of South Africa (mostly in Zambia and Zimbabwe) and was not exposed to customers in South Africa. In his new position of sales manager at Nicola-J, Mr Gerhardt works exclusively within South Africa, with the result that the trade connections he built up in Africa are of no value to Nicola-J (this notwithstanding the fact that Mr Gerhardt's customers in Africa purchased colourants, which is not a market Nicola-J is seeking to grow).

[30] As Mr Gerhardt puts it (dispositively) in his answering affidavit:

"I will not be able to solicit the applicant's clients. I worked with clients at the applicant, mainly based in Zambia and Zimbabwe. They are not operating in South Africa at all. I will be employed by the second respondent to only operate in South Africa. The geographical markets are entirely different, with completely different clients. I had no customer connections from the applicant that I could use for the benefit of the second respondent."

[31] Turning then to the issue of confidential information, two preliminary observations are warranted regarding the contents of Roha's founding affidavit in this regard.

- a) The first is that the founding affidavit is deposed to by Mr Terblanche (the HR and financial manager) who has (at least according to Mr Gerhardt) no personal knowledge of these issues, with the result that much of what he has to say is hearsay. Why Mr Reis, who was Mr Gerhardt's line manager, did not depose to the founding affidavit is unclear, and his confirmatory affidavit does little (if anything) to fix the problem – it simply records that he confirms the contents of the founding affidavit "insofar as same refer and/or relates to me". What this means in the context of a founding affidavit running to 141 paragraphs, which includes only a handful of references to Mr Reis (or his position as executive director), is anyone's guess.
- b) The second is that the allegations about confidential information lack particularity (and border on the generic). This passage in Pecsser applies here:[9]

“The problem I have with the applicant’s case of the respondent having access to confidential information, is the unfortunate lack of sufficient particularity in the founding affidavit. Overall, the statements made by the applicant in this regard are merely bald and general in nature. The applicant has to take the court into its confidence and at least supply the court with sufficient detail so as to assess that the contentions have substance. For example, and if it said that the first respondent had access to confidential pricing, it must at least be explained why that pricing would be confidential, and what makes it so.”

[32] With this by way of background, in argument, Mr Gerber SC correctly identified that the primary categories of (alleged) confidential information identified in the founding affidavit are: (i) information contained on the so-called J Drive on Roha’s server; (ii) information shared during sales meetings; and (iii) information contained in sales reports.

[33] Regarding the J Drive, the founding affidavit reads:

“The complete data base with the various clients and transactions concluded inclusive of pricing structures and rebates is known to the first respondent and stored with the full knowledge of the first respondent on the applicant’s J Drive found on the server. The first respondent at all times had access to the J Drive.”

[34] In his answering affidavit, Mr Gerhardt says:

“I admit that I had access to the applicant’s J Drive to effectively complete my duties towards the applicant. I was only concerned with my customers in the countries that formed part of my portfolio. ... I did not need to look at the South African customers. The question could rightly be asked: Why would I wish to do so? They were not my concern. I never engaged with them and did not intend to do so. My job and interest were my customers.”

[35] Regarding the weekly sales meetings and reports, the founding affidavit records:

“The first respondent and even though he worked predominantly in African countries, he is privilege to confidential information dealing with the applicant’s customers in South Africa and Africa Sub-Saharan. This is evident from the weekly sales meeting the

applicant attended from which comprehensive minutes of the weekly sales meetings held, were distributed to all sales representatives,

including the first respondent.

From being placed in possession of those various sales reports due to the nature of the position of the first respondent holds with the applicant, the first respondent became known to highly confidential and company sensitive information on the ongoing sales reporting of clients both in South African and Africa Sub-Sahara.

Information shared with the applicant and fellow sales representatives included inter alia new clients, pricing structures for existing clients, margins, deals and contracts concluded etc. Annexed hereto are some of the latest various sales reports shared with the first respondent following weekly sales meetings held which he attended most of the time ..." (Emphasis added.)

[36] Calling something confidential does not make it confidential, with the result that Roha's case on the sales reports effectively boils down to the emphasised sentence. Patently, it failed to make out a case in its founding affidavit, which on first principle, it was required to do.[10]

[37] In his answering affidavit, Mr Gerhardt says:

"I deny that I was privileged to any confidential information dealing with the applicant's customers. The only information I had about any of the applicant's customers was a general analysis for sales and orders of the said customers. This information did not relate to any particular sales strategies, markup formulas, or other policies or strategies for particular clients. The information constituted nothing more than general sales information."

I did not always attend the meetings and I had to travel to my clients in other countries.

Mr Terblanche has no personal knowledge of the facts that he states under oath in these paragraphs. He fails to disclose his source of information, and his statement constitutes another example of inadmissible hearsay evidence that should be struck out."

[38] Adding to this, Mr Gerber SC made the point in argument that if the sales reports really contained confidential information, then Roha would not simply have attached copies to the founding affidavit.

[39] With reference to the above, I am not persuaded that it has been established that Mr Gerhardt is possessed of confidential information

in relation to South African clients. Firstly, as I have said, Roha's allegations are lacking in particularity and detail (leaving aside the issue of hearsay). Secondly, and allied to this, Roha has not established on the papers the three-pronged test for confidentiality (see above). Thirdly, Mr Gerhardt denies Roha's allegations and puts up a contrary version, which I do not consider to be "palpably implausible, far-fetched or so clearly untenable" so as to justify rejecting it on the papers.[11] In the result, his version prevails on the Plascon-Evans test.

[40] Accordingly, I hold that Roha has not established a protectable interest in the enforcement of the restraint. This is dispositive of the application, making it unnecessary to engage in the qualitative / quantitative weigh off.

The qualitative / quantitative weigh off

[41] On the off chance that the facts have disclosed something of a protectable interest in relation to confidential information, which I do not find, it is in any event my view that the qualitative / quantitative weigh off falls in favour of Mr Gerhardt, with this being a further basis for the enforcement of the restraint being unreasonable. This for the following reasons.

[42] In his leading text on restraints of trade, Saner lists the following amongst the factors that are often considered when the respective

interests of the parties are being weighed in assessing the reasonableness or otherwise of a restraint: (i) the extent to which,

if at all, the respondent's new employer competes with the business of the applicant; and (ii) even if the two businesses do compete, whether the scope of employment of the respondent would mean that, effectively, there is little or no prejudice to the applicant's interests.[12]

[43] Drawing on this, as I have explained above, the extent of competition between Roha and Nicola-J in the colourant market is minimal – not only because colours make up only 10% of Nicola-J's revenue, but also because such revenue derives from a historical / existing client base (which it is not looking to grow through Mr Gerhardt's employment). Added to this, Mr Gerhardt's new job involves growing Nicola-J's flavourant market – its core business – and he has no colourant clients. When these two sets of factors are combined, the threat to Roha's business of Mr Gerhardt sharing confidential information with Nicola-J about Roha's colourant business in South Africa (assuming that he has any such information) appears insubstantial, with the result that it has little to gain by enforcing the restraint. By comparison, Mr Gerhardt has much to lose and disproportionality so: having only been employed by Roha for 17 months exclusively in the colourant market working outside of South Africa, he would be restrained for 12 months from being employed by Nicola-J (at best a minor non-core competitor) in South Africa in an entirely different market – flavourants – which he gained expertise in prior to being employed by Roha.

[44] Before making my order, it warrants mention that, in his heads of argument, Mr Gerber SC records that Mr Gerhardt does not intend to solicit any of Roha's clients for the duration of his restraint of trade, and that there is no objection to such undertaking being made an order of court. I see no harm in providing for this in my order, and I intend to do so.

Order

[45] Accordingly, I make the following order:

1. The application is dismissed;
2. The first respondent shall not solicit any of the applicant's clients for the duration of his restraint of trade; and
3. The applicant shall pay the costs under scale C as determined by Uniform Rule 67A.

Myburgh, AJ

Acting Judge of the Labour Court of South Africa

Appearances

For the applicants: Adv R Grundlingh instructed by Du Plessis Phukubye Smith Attorneys

For the first respondent: Adv H Gerber SC instructed by Welman & Bloem Inc

- [1] Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews & another 2009 (4) SA 529 (CC) at para 81.
- [2] Magna Alloys & Research (SA) (Pty) Ltd v Ellis [1984] ZASCA 116; 1984
- (4) SA 874 (A) at 891B-C; Reddy v Siemens Telecommunications (Pty) Ltd (2007) 28 ILJ 317 (SCA) at para 14.
- [3] Dot Activ (Pty) Ltd v Daubinet & another
(2023) 44 ILJ 785 (LC) at paras 34-35.
- [4] Basson v Chilwan
[1993] ZASCA 61; 1993 (3) SA 742 (A) at 767C-H.
- [5] Reddy at para 17.
- [6] Dot Activ at para 40.
- [7] New Justfun Group (Pty) Ltd v Turner & others (2018) 39 ILJ 2721 (LC) at para 14.
- [8] Dot Activ at para 41.
- [9] Pecsser (Pty) Ltd v Boshoff [2020] JOL 46869 (LC) at para 39.
- [10] It is noteworthy that Mr Gerhardt states in his fourth affidavit that “any of the applicant’s clients and colours are in the public domain, and as such, their information is marked on their products and is available on any supermarket shelf”.
- [11] National Director of Public Prosecutions v Zuma [2009] ZASCA 1; 2009
(2) SA 277 (SCA) at para 26.
- [12] Saner Agreements in Restraint of Trade in South African Law at 6-62, para 6.5.5.

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