

SOUTH AFRICA / JUDGMENT

Sadan and Another v Workforce Staffing (Pty) Ltd (JA38/23; JA39/23) [2023] ZALAC 23; - (17 August 2023)

[2023] ZALAC 23

COURT

Labour Appeal Court

BEFORE

Waglay, Davis, Smith

CASE / FILE NUMBER

JA38/23; JA39/23

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IN THE LABOUR APPEAL

COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA38/23 /

JA39/23

In

the matter between:

TAZNEEM
SADAN
First
Appellant
NICHOLAS
ARAJUO
Second
Appellant
and
WORKFORCE
STAFFING (PTY) LTD
Respondent

Heard:

19 July 2023

Judgment:

17 August 2023

Coram:

Waglay JP, Davis and Smith AJJA

JUDGMENT

SMITH AJA

Introduction

[1] This appeal is against the judgment of Nkutha-Nkontwana J, delivered on 19 April 2023 enforcing restraint of trade agreements concluded by the parties. The appeal is on limited grounds and directed only against paragraph 3.2, read with paragraph 3 of the order. Those paragraphs effectively prohibit the appellants from taking up employment with the respondent's competitors anywhere in the Republic of South Africa for a period of two years after they were last employed by the respondent. The appellants contend that the restraints are unreasonable and against public policy, both in respect of their territorial reach and duration. They consequently seek partial enforcement of the agreements. The appeal is with the leave of this Court and was heard on an urgent basis.

Findings of the Labour Court

[2] Most of Nkutha-Nkontwana J's findings relate to issues which are not challenged on appeal. It seems that the issue relating to the reasonableness of the restraint was not the main thrust of the appellants' case in the court a quo and, unsurprisingly, that issue has been dealt with rather fleetingly in her judgment. In this regard, the learned Judge was of the view that: "the extent of the [appellants'] connection with the respondent's customers and their conduct post their departure justifies the period of two years" and that "the restraint offers no more than what is reasonably necessary to protect the applicant's [respondent's] proprietary interest"[1].

[3] The relevant portion of the impugned order reads as follows:

'3. The first and second respondents are interdicted and restricted until 15 December 2024, in respect of the first respondent, and until 20 January 2025, in respect of the second respondent, from, directly or indirectly, and whether for the third respondent or individually, together or with another or others, and whether or not for their own account, sole or partial benefit or the benefit solely or partially of the third respondent or any third party, whether natural or juristic:

...

3.2. carrying on or being in any way directly or indirectly engaged, employed or financially interested in any business including but not limited to the third respondent and its respective divisions, which at any time, directly or indirectly, in any way competes with the business conducted by the applicant, and conducts such competing business directly or indirectly within a 50 kilometre radius from the applicant's office anywhere in South Africa...'

- [4] The appellants do not challenge the court a quo's finding that the respondent has established a proprietary interest worthy of protection and that that interest had been threatened by their behaviour. They contend only that the enforcement of the restraint is unreasonable for the reasons set out above.

Factual background

- [5] The respondent provides staffing solutions, human resources, staff placement, and related services throughout the country. Over the years it also designed and developed unique computer programmes for staff management, generation of payrolls and invoicing to clients.
- [6] The first appellant was employed by the respondent as its General Manager of Sales since August 2020. She resigned on 21 November 2022 and her last day of employment was 15 December 2022. The second appellant was employed as the respondent's National Sales Executive since 17 September 2017. He resigned from his position on 31 December 2022 and his last day of employment was 20

January 2023.

- [7] Both appellants concluded restraint of trade agreements with the respondent in the following terms:

'The employee undertakes that he shall not for the period of two (2) years after the termination of his/her employment for whatever reasons and howsoever his employment terminates, with the Company:

"13.4.1. directly or indirectly, and whether alone or with another or others, and whether or not for his/her own sole or partial benefit or the benefit solely or partially for others, carry on or be engaged, employed or financially interested in any business which:

13.4.1.1. at any time during that period compete with the business conducted by the Company; and

13.4.1.2. conduct such business within fifty (50) kilometre radius from any

office, branch where the employee was employed or at which the employee undertook or was given any responsibility during the duration of his/her employment with the Company."

- [8] It is common cause that during their employment, the appellants have established close relationships with the respondent's customers and had become privy to information, inter alia, regarding the respondent's pricing strategies, costing of its products and profit margins. The appellants also had access, inter alia, to the respondent's client database, marketing material, business strategies and financial information.

- [9] During her employment with the respondent, the first appellant was responsible for developing and implementing sales strategies for allocated regions, revenue generation, achievement of sales targets and recruitment, and selling staffing services and solutions to customers.
- [10] The second appellant, in his capacity as National Sales Executive, entertained customers, inter alia, by hosting them for breakfast and arranging social events such as golf days. In the course of executing his responsibilities, which related, inter alia, to the procurement of new business and managing existing customer relationships, the second appellant was intricately involved with the respondent's customers.
- [11] After their resignations they both took up employment with one of the respondent's competitors, namely Rise Up Group (Pty) Ltd (Rise Up). Rise Up also operates in Durban, Secunda and Johannesburg and provides staffing solutions in those areas. It was not disputed that it does so in competition with the respondent.
- [12] Much was made in the court a quo of allegations that the appellants had initially misrepresented to the respondent the details of their new employment, prompting the latter to engage the services of a private investigator. While that factual dispute may have had some relevance to the issues that fell for decision in the court a quo, it has no bearing on the adjudication of the appeal.

Territorial reach of the restraint agreements

- [13] The appellants contend that clause 13.4 of the restraint agreement, reasonably construed, prohibits them from taking up employment with the respondent's competitors within a radius of 50 kilometres from the office or branch where they were employed, namely at Cresta, Johannesburg. They argue that the interpretation contended for by the respondent, and upheld by the court a quo, namely that the prohibition extends to all other branches or offices where they performed their duties or were allocated responsibilities, is unduly harsh and unreasonable in that it precludes them from taking up employment anywhere in the Republic.
- [14] Mr Cassim SC, who appeared for the appellants, stated that in the event of the court upholding their argument regarding the construction of the contested clause, they will be prepared to accept that the period of two years is not unreasonably overbroad, since they would then only be prohibited from taking up employment with the respondent's competitors located within a radius of 50 kilometres from the latter's Cresta office. If, however, the respondent's interpretation is upheld, then they submit that a period of two years is unreasonable and contrary to public policy, because they would then be barred from taking up employment anywhere in the Republic. It would thus be reasonable and proper for that period to be reduced to six months, alternatively to one year, or so Mr Cassim argued.

[15] The restraint agreements must be construed on the basis of the principles enunciated in Natal Joint Municipal Pension Fund v Endumeni Municipality[2]. They must thus be given meaning and business-like efficacy by having regard:

‘...[T]o the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production... The “inevitable point of departure is the language of the provision itself,” read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’[3]

[16] When construed in accordance with the abovementioned legal principles, the impugned clause brooks no other construction than that contended for by the respondent. The clause was drafted in deliberately broad terms and seeks to prohibit the employee from taking up employment within a 50-kilometre radius of the office where he or she has been employed, and explicitly extends the limitation to any other office or branch at which the employee undertook or was

given responsibilities. Such a construction also makes business sense. Both appellants had national responsibilities, had formed

relationships with customers throughout the country and had access to the respondent’s confidential information and national client database. It was not disputed that the appellants were given responsibilities to procure new clients and to manage and retain

existing relationships with clients throughout the country. It thus made business sense for the respondent to protect itself against the possibility of former employees, who had access to its

confidential business information, being employed by a competitor in all areas where they were given responsibilities and would thus have had the opportunity to interact with and establish close relationships with its clients. Accordingly, to my mind, properly

construed, clause 13.4 of the agreement has the effect of prohibiting the appellants from taking up employment with the respondent’s

competitors anywhere in the Republic for a period of two years from their last days of employment with the respondent.

Is the enforcement of the agreements reasonable?

[17] In our law, restraints of trade agreements are valid, binding, and enforceable, unless their enforcement would be unreasonable.[4] The test for determining the reasonableness of a restraint of trade agreement was set out in Basson v Chilwan and Others[5], where Nienaber JA postulated the following considerations: (a) Does one party have an interest that deserves protection after termination of the agreement? (b) Is that interest threatened or being prejudiced by the other party? (c) If so, does that interest weigh qualitatively

and quantitatively against the interest of the other party not to be economically inactive and unproductive? (d) 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?

[18] In *Reddy v Siemens Telecommunications (Pty) Ltd*[6] (Reddy), the Supreme Court of Appeal (SCA) posited a fifth consideration, namely whether the restraint goes further than necessary to protect the interest. The Court held that this consideration corresponds with s 36(1)(e) of the Constitution, requiring a consideration of less restrictive measures to achieve the purpose of the limitation and that “[t]he value judgment required by Basson necessarily requires determining whether the restraint or limitation is “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom”[7].

[19] Once the party seeking to enforce a restraint of trade agreement has established an interest worthy of protection and that the other party is threatening that interest, the onus is on the party resisting the enforcement of the agreement to prove that it would be unreasonable.[8] The appellants thus bore the onus of proving that the enforcement of the restraint will be unreasonable, both in respect of its territorial operation and duration.

[20] In deciding whether or not it would be reasonable to enforce a restraint of trade, the court must make a value judgment, mindful of the following policy considerations: (a) that public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim *pacta servanda sunt*; and (b) all persons should, in the interests of society, be productive and permitted to engage in trade and commerce or their

professions. Both considerations reflect not only common law but also constitutional values. In *Reddy*, the court held that: “[c]ontractual autonomy is part of freedom informing the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life. In this sense freedom to contract is an integral part of the fundamental right referred to in s 22”[9]. In *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*[10], Rabie CJ held that a court may, in the public interest, order that either the whole or only a part of the restraint on trade be

enforced.

[21] The question then arises as to whether the territorial limitation and duration of the restraints are reasonable. Mr Malan SC, who appeared for the respondent, submitted that the appellants failed to discharge

the onus of proving that the enforcement of the restraint will be unreasonable. He argued that allegations put up by the appellants in this regard are ‘bald and unsubstantiated’ and that they have failed to proffer any evidence to show why the enforcement of the restraint will be unreasonable.

[22] It is indeed so that the facts put up by the appellants in support of their contention that the enforcement of the restraint of trade will be unreasonable and against public policy are tenuous and insubstantial. In this regard, they relied only on the following assertions:

‘226 The restraints of trade are unreasonable for the following reasons:

226.1 there is no defined geographical area or territory. The applicant seeks to prevent the respondents from working in any and all provinces within the Republic;

226.2. the period of two years is unreasonable and is unnecessary to protect any interest of the applicant, The industry is highly competitive, fast-paced and ever-changing and a period of two years effectively requires that the respondents not practise their chosen trade and profession for two years.’

[23] As I have demonstrated above, the assertion that the restraint of trade does not relate to a defined geographical area is unsustainable. Reasonably construed in terms of the abovementioned canons of interpretation, clause 13.4 prohibits the appellants from seeking employment with any of the respondent’s competitors anywhere in the country. The undisputed facts establish that both appellants were not confined to the respondent’s Cresta offices but performed their duties nationally and had formed close relationships with the respondent’s clients throughout the Republic. It was thus reasonable for the respondent to expect its employees to commit to a covenant that would protect its interest wherever such employees had the opportunity to form relationships with clients. In the case of the appellants, who were both employed in capacities that required of them to perform their duties nationally, only a country-wide limitation would have achieved that objective.

[24] The SCA in *AB and Another v Pridwin Preparatory School and Others*[11] (Pridwin), held that a court must declare invalid a contract that is prima facie inimical to a constitutional value or principle, or otherwise contrary to public policy. Where a contract is not prima facie invalid, but its enforcement in particular circumstances is, a court will not enforce it. The court pronounced the following principles that govern judicial control of contracts: (a) public policy demands that contracts freely and voluntarily entered into must be honoured; (b) the party who attacks the contract or its enforcement bears the onus of establishing that its enforcement will be contra bonis mores; and (c) a court will use the power to invalidate a contract or not to enforce it, sparingly.

[25] In *Beadicia 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*[12] (Beadicia), the Constitutional Court cited Pridwin with approval and held, in addition, that abstract values such as good faith, fairness or reasonableness do not provide a free-standing basis on which courts may interfere with contractual relationships. They do, however, have relevance in the application of contract law when the question arises as to whether a contractual provision or the enforcement thereof would be against public policy. If the enforcement of a contractual term will implicate constitutional rights, “a careful balancing exercise”[13] is required to determine whether it will offend public policy. The court also cautioned that the caveat that the power to invalidate or not enforce contractual

provisions should be used sparingly, should not deter courts from exercising their duty to infuse public policy with constitutional values.

[26] In this matter the ‘careful balancing exercise’ mentioned in *Beadicia* implies a value judgment pursuant to the balancing of the respondent’s right to hold the appellants to the agreements, on the basis of the principle of *pacta servanda sunt*, against the appellants’ constitutional rights to ply their trade and engage in commerce.

[27] Because clause 13.4 prohibits the appellants from plying their trade or engaging in commerce throughout the Republic, the duration of the limitation must be subjected to rigorous scrutiny. And even though the appellants did not proffer any evidence other than the broad-sweeping statement quoted above, other considerations such as the requirement that parties must be held to covenants freely entered into and the appellants’ rights in terms of section 22 of the Constitution to choose and freely ply their trade, occupation or profession, require serious consideration. The fundamental question that arises is whether there were any less restrictive means available to the respondent effectively to protect its proprietary

interest. In my view, the justification provided by the respondent for the period of two years is manifestly unconvincing. In its

replying affidavit, the respondent asserts that the period is not unreasonable ‘taking into account that the respondents had deep-rooted relationships with the applicant’s clients and that these relationships were established over time and were as a result of numerous engagements as well as social engagements of golf, breakfasts and lunches.’ It asserts furthermore that the appellants’ replacements will require at least two years to meet with clients and develop relationships.

[28] The facts of this case are distinguishable from those in *Beedle v Slo-Jo Innovations (Pty) Ltd*[14], where Davis AJA said that “[p]rima facie, a restraint for two years without any plausible justification being offered by the party seeking to enforce the restraint cannot, on its own, pass legal muster”[15]. The learned Judge, having found that the restraint, in that case, applied throughout the Republic, was, however, satisfied that “the respondent has offered a comprehensive explanation as to why two years is necessary to protect its interests. It explained that the lead time for the conceptualisation of a product required by one of its customers until the product is brought to market, can take between 24 to 36 months”[16]. Moreover, the learned Judge said, “[the appellant] was free to be employed in any position where she could exploit her skill and knowledge, save in the specific context of the beverage industry in which the respondent traded”.

[29] It is common cause that in this case, the operation of paragraph 3.2 of the order effectively serves to prevent the appellants from exploiting the only skills they have and from plying their trades anywhere in the country for a period of two years. Other than relying on the cursory assertion that a restraint of two years is required to protect its proprietary interest, namely its relationships with clients, the respondent has failed to provide any compelling evidence to justify such a manifestly onerous and unreasonable limitation of the appellants’

constitutional rights to ply their trade and engage in commerce. To my mind, a period of two years is an inordinately long time merely to allow new employees to meet with and develop relationships with existing clients. It is also disproportionate, particularly having regard to the fact that the territorial limitation extends to the whole of the Republic.

- [30] I accordingly agree with Mr Cassim that the enforcement of the impugned clause on the basis contended for by the respondent will be unreasonably harsh in that it will effectively preclude the appellants from being gainfully employed anywhere in the country for an inordinately and disproportionately long period. I am therefore of the view that the period is unreasonable, and its enforcement will thus be contrary to public policy.
- [31] A partial enforcement of the restraint for a shorter period will, in my view, suffice to ensure protection of the respondent's proprietary interest. I consequently find that the respondent's proprietary interest will be sufficiently protected if the restriction mentioned in paragraph 3.2 of the order endures for a period of one year from the appellants' last days of employment.

Costs

- [32] Regarding the issue of costs, I am of the view that the appellants' partial success on appeal means that the respondent was substantially successful in the court a quo and the costs order that was issued in that court should therefore not be disturbed. The parties were, however, both partially successful on appeal, the appellants having succeeded in establishing the unreasonableness of the two-year restraint period and the respondent having successfully resisted the attempt to restrict the territorial reach of the restraint to within 50 kilometres of its Cresta office. It will therefore only be fair and reasonable that the parties bear their own costs. As was the case in *Beedle*, costs must include those occasioned by the successful application brought by the respondent in the court a quo in terms of section 18 of the Superior Courts Act[17].

Order

- [33] In the result, the appeal succeeds to the following extent:

1. It is declared that:
 - (a) The restraint of trade agreements concluded by the First and Second Appellants and the Respondent, respectively, apply throughout the Republic of South Africa;
 - (b) The interdicts mentioned in paragraph 3.2 of the court a quo's order shall endure for a period of one year from the last dates of the First and Second Appellants' employment with the Respondent.
 - (c) The parties shall bear their own costs in respect of the appeal.

Smith AJA

Waglay JP and Davis AJA concur.

Appearances: For Appellants: Adv Cassim SC with Adv K Naidoo Instructed by: Shaheed Dollie Inc. For the Respondent: Adv M Malan SC with Adv C Gibson Instructed by: Hunts Inc (Borkhums) Attorneys

[1] Workforce Staffing (Pty) Ltd v Sadan and Others

[2023] ZALCJHB 107 at paras 34 and 35.

[2] 2012

(4) SA 593 (SCA).

[3] Ibid at para 18.

[4] Magna Alloys and Research (SA) (Pty) Ltd v Ellis

[1984] ZASCA 116; 1984 (4) SA 874 (A) (Magna Alloys).

[5]

[1993] ZASCA 61; 1993 (3) SA 742 (A) at 767G-H.

[6] 2007 (2) SA (SCA).

[7] Reddy at para 17.

[8] Reddy at para 10.

[9] Reddy at para 15.

[10] Magna Alloys supra at 896A-E.

[11] 2019

(1) SA 327 (SCA).

[12] 2020

(5) SA 247 (CC).

[13] Ibid at para 87.

[14] Unreported judgment of the LAC under case no JA 21/23 delivered 17 August 2023.

[15] Ibid at para 35.

[16] At para 36.

[17] Act 10 of 2013.

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