

SOUTH AFRICA / JUDGMENT

Showgroupworld (Pty) Ltd v Johannes and Another (J1876/15) [2015] ZALCJHB 353 (12 October 2015) [2015] ZALCJHB 353

COURT

Labour Court Johannesburg

BEFORE

Rabkin-Naicker

CASE / FILE NUMBER

J1876/15

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: J1876/15

In the matter between:

SHOWGROUPWORLD (PTY) LTD Applicant And JOHANNES IZAK ELS First Respondent EPH
PRODUCTIONS Second Respondent

Heard: 1 October 2015

Delivered: 12 October 2015

RABKIN-NAICKER, J

[1] This matter heard in urgent court, concerns the enforcement of a restraint of trade agreement. The second respondent abides the order of this court. The relief sought is as follows:

“2. That the first respondent be interdicted and restrained from being employed by the second respondent within the Republic of South Africa for a period of 30 (thirty) months until 25 March 2018;

3. That the first respondent be interdicted and restrained from being employed by any entity (including the Second Respondent) which conducts activities in competition with the applicant within the Republic of South Africa for a period of 30 (thirty) months, until 25 March 2018;

4. That the first respondent be interdicted and restrained from encouraging and/or enticing any employee of the applicant to terminate his or her employment with the Applicant.
5. That the First Respondent be interdicted and restrained for a period of 30 (thirty) months, until 25 March 2018, from:

5.1 Furnishing any information or advice to any employee or prospective employer of such employee, to result in any such employee terminating his/her employment with the company and/or becoming employed by or directly or indirectly in any interested in or associated with any other entity which competes with the Applicant.

5.2 Furnishing any information or advice to any customer or using any other means or taking any other action which is directly or indirectly designed, or in the ordinary course of events calculated, to result in such customer terminating its association with the Applicant or transferring its business to or purchasing any products or services from any person other than the Applicant; and

5.3 Furnishing any information or advice to any supplier or using any other means or taking any other action which is directly or indirectly designed, or in the ordinary course of events calculated, to result in such supplier terminating its association with the Applicant or transferring its business to or supplying any products or services to any person other than the Applicant.”

[2] The first respondent (Els) has been employed by the applicant (the company) since 1 January 2001 and was appointed as a Key Accounts Manager during 2004. The company operates nationally and is in the business of organising events. Two agreements, an employment contract and a stockholders agreement both containing the restraint of trade,

were entered into between the parties in June and September 2012 respectively. Els avers that these agreements followed on the

expansion of the business and following negotiations. He acquired 18,25% of the shares of the company in terms of the stockholders

agreement which at that time represented a value of R3 200 000.

[3] Els resigned on the 21 August 2015. The company sets out its averments regarding the alleged breach of the restraint and the association between Els and the second respondent in detail in its founding affidavit. It is not necessary for me to traverse the details in the papers. I do not find Els' denials of the breach to raise a bona fide dispute of facts on the papers. As the SCA in *Fakie NO v CCII Systems (Pty) Ltd*[1] put it:

“[55] That conflicting affidavits are not a suitable means for determining disputes of fact has been doctrine in this court for more than 80 years. Yet motion proceedings are quicker and cheaper than trial proceedings and, in the interests of justice, courts have been at pains not to permit unvirtuous respondents to shelter behind patently implausible affidavit versions or bald denials. More than 60 years ago, this Court determined that a Judge should not allow a respondent to raise 'fictitious' disputes

of fact to delay the hearing of the matter or to deny the applicant its order. There had to be 'a bona fide dispute of fact on a material matter'. This means that an uncreditworthy denial, or a palpably implausible version, can be rejected out of hand, without recourse to oral evidence. In Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd, this Court extended the ambit of uncreditworthy denials. They now encompassed not merely those that fail to raise a real, genuine or bona fide dispute of fact but also allegations or denials that are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers."

[4] Essentially the defence to the application is the following:

4.1 The restraint of trade agreement is incorporated in both an employment contract and a stockholders agreement;

4.2 The stockholders agreement provides background and surrounding circumstances pertinent to the interpretation of the restraint of trade provision in both agreements;

4.3 The restraint agreement is unreasonable and unenforceable.

[5] The law in respect of restraints of trade has been most usefully summarised in *Experian South Africa (Pty) Ltd v Haynes and Another* 2013 (1) SA 135 (GSJ):

"[12] The locus classicus on this subject is Magna Alloys and Research (SA) (Pty) Ltd v Ellis

[1984] ZASCA 116; 1984 (4) SA 874 (A) at 897F – 898E, where Rabie CJ summarised the legal position, inter alia, as follows:

[12.1] There is nothing in our common law which states that a restraint of trade agreement is invalid or unenforceable.

[12.2] It is a principle of our law that agreements which are contrary to the public interest are unenforceable. Accordingly, an agreement in restraint of trade is unenforceable if the circumstances of the particular case are such, in the court's view, as to render enforcement of the restraint prejudicial to the public interest.

[12.3] It is in the public interest that agreements entered into freely should be honoured and that everyone should, as far as possible, be able to operate freely in the commercial and professional world.

[12.4] In our law the enforceability of a restraint should be determined by asking whether enforcement will prejudice the public interest.

[12.5] When someone alleges that he is not bound by a restraint to which he had assented in a contract, he bears the onus of proving that enforcement of the restraint is contrary to the public interest.....

[14] The position in our law is, therefore, that a party seeking to enforce a contract in restraint of trade is required only to invoke the restraint agreement and prove a breach thereof. Thereupon, a party who seeks to avoid the restraint bears the onus to demonstrate, on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable.

[15] The test set out in *Basson v Chilwan and Others* supra at 767G – H for determining the reasonableness or otherwise of the restraint of trade provision, is the following:

[15.1] Is there an interest of the one party which is deserving of protection at the determination of the agreement?

[15.2] Is such interest being prejudiced by the other party?

[15.3] 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?

[15.4] 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?

[16] In *Kwik Kopy (SA) (Pty) Ltd v Van Haarlem and Another* 1999 (1) SA 472 (W) ([1998] 2 All SA 362) at 484E Wunsh J added a further enquiry, namely whether the restraint goes further than is necessary to protect the interest.

[17] It is well established that the proprietary interests that can be protected by a restraint agreement are essentially of two kinds, namely:

[17.1] The first kind consists of the relationships with customers, potential customers, suppliers and others that go to make up what is compendiously referred to as the 'trade connections' of the business, being an important aspect of its incorporeal property known as goodwill.

[17.2] The second kind consists of all confidential matter which 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. Such confidential material is sometimes compendiously referred to as 'trade secrets'.

See *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) at 502D – F”

[5] It is not disputed that Els was employed as the key accounts manager with his primary function and duty to secure events and establish relationships and connections with customers and clients of the company. Further Els does not dispute that he was exposed to the company's trade secrets, customer connections and products in that he had all customer related information on his cellphone and computer. There is clearly a protectable interest in casu.

[6] It was submitted by on behalf of Els that the restraint of trade is unreasonable and unenforceable in that:

6.1 It covers the whole of South Africa ;

6.2 It endures for a period of 30 months.

6.3. Els is not qualified or equipped for any form of commercial activity or income generation other than the coordination of events.

6.4 The effect of the restraint will be that he will be unable to be economically active and to earn a living for a period of 30 months;

6.5 His interest evidently outweighs the protectable interest of the Applicant.

[7] It is further averred by Els that at the time of the concluding of both the agreements it was contemplated by the parties that the shareholding would serve as a quid quo pro for the restraint. It is undisputed that the shares are now of an insignificant value in the market and as a consequence Els submits that the allocation of shares to him cannot serve as a justification for the unreasonable terms of the restraint whereby his commercial autonomy is effectively terminated for a period of 30 months.

[8] In Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn & Another[2], Davis J had this to say about the determination of reasonableness:

“[17] The fact that parties to an agreement choose to describe a restraint as being reasonable, as in the present case, is not itself decisive. The reasonableness or otherwise thereof is a matter for the court to determine (Basson (supra) at 768A - C). The party seeking to avoid enforcement of the restraint is required to prove, on a balance of probabilities, that, in all the circumstances of the particular case, it will be unreasonable to enforce the restraint. In this connection in Reeves and Another v Marfield Insurance Brokers CC and Another

[1996] ZASCA 39; 1996 (3) SA 766 (A) the court observed at 776E - F:

[18] The circumstances to which regard may be had cover a wide field and include typically those pertaining to the nature, extent and duration of the restraint and the legitimate interests of the respective parties in relation thereto. . . . Even factors such as equality or otherwise of the bargaining power of the respective parties may be taken into account.”

[9] It was submitted on behalf of the applicant that Els has the skills to obtain employment outside of the events industry with reference to his Curriculum Vitae. This reflects that he had been in sales and fashion and involved in the design of corporate wear up until the year 2000. Although in the events industry for 15 years, it appears from the C.V. that he has considerable experience in the fashion and design industry.

[10] However, I agree with the submissions for the respondent that the restraint should be considered having regard to the surrounding circumstances and context of its conclusion, and that the fact that it is also contained in the shareholders agreement (i.e. the quid pro quo issue) should weigh with this court in deciding whether in the circumstances, it is reasonable.

[11] It was raised in argument on behalf of the applicant that should this court find the restraint over broad, the time period of its operation could be lessened in terms of the court order. The applicant operates nationally however, and it did not submit that the territorial application should be tampered with. In response to this submission, Mr Leeuwner on behalf of Els argued that given the applicant did not raise this in his papers, the court was precluded from making such an order. He relied on *Sunshine Records (Pty) Ltd v Frohling*

[3] where the court stated that:

“If the appellant had wished to rely on less than the complete contract, it was, in my view, obliged to raise this pertinently as an issue to be dealt with in evidence and argument. Vide the National Chemsearch case supra at 1114D - F, 1116G - H. The appellant has not done so, and this Court should not in my view decide an issue on appeal which was not properly canvassed in the Court a quo.”

[12] The matter was pertinently raised in submissions in this court and I do not consider the dictum above, which deals with an issue on appeal, as precluding this court from fashioning an order which seeks to give proportionality to the ambit of the restraint. This case really rests on the balancing of the interests of the parties in a context in which there is a protectable interest at stake. I do find that Els has met the onus in establishing that the restraint infringes his right to ply his trade to an unreasonable extent, given the changed circumstances of the company as reflected in its share value. I therefore consider that the duration of the restraint should be lessened to a period of 12 months from his date of resignation from the applicant.

[13] I consider that given the terms of the following order, each party should pay its own costs. My order is as follows:

1. The First Respondent is interdicted and restrained from being employed by the Second Respondent within the Republic of South Africa until 25 August 2016;
2. The First Respondent be interdicted and restrained from being employed by any entity (including the Second Respondent) which conducts activities in competition with the Applicant within the Republic of South Africa until 25 August 2016;
3. That the First Respondent be interdicted and restrained from

encouraging and/or enticing any employee of the applicant to terminate his or her employment with the Applicant.

4. The First Respondent is interdicted and restrained, until 25 August 2016, from:

4.1 Furnishing any information or advice to any employee or prospective employer of such employee, to result in any such employee terminating his/her employment with the company and/or becoming employed by or directly or indirectly in any interested in or associated with any other entity which competes with the Applicant.

4.2 Furnishing any information or advice to any customer or using any other means or taking any other action which is directly or indirectly designed, or in the ordinary course of events calculated, to result in such customer terminating its association with the Applicant or transferring its business to or purchasing any products or services from any person other than the Applicant; and

4.3 Furnishing any information or advice to any supplier or using any other means or taking any other action which is directly or indirectly designed, or in the ordinary course of events calculated, to result in such supplier terminating its association with the Applicant or transferring its business to or supplying any products or services to any person other than the Applicant.

Rabkin-Naicker, J

Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant:

McLarens Attorneys

On behalf of the First Respondent: P.G. Leeuwner of Leeuwner Maritz Attorneys

[1] 2006 (4) SA 326 (SCA)

[2] 2008 (2) SA 375 (C)

[3] 1990 (4) SA 782 (A)

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