

SOUTH AFRICA / JUDGMENT

SMD Technologies (Pty) Ltd v Tavares and Another (118592/24) [2024] ZALCJHB 546 (13 December 2024) [2024] ZALCJHB 546

COURT

Labour Court Johannesburg

BEFORE

Baloyi

CASE / FILE NUMBER

118592/24

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THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG
Not Reportable
Case no: 118592/24

In the matter between:

SMD TECHNOLOGIES (PTY)
LTD
Applicant
and
KAYLYN VERONICA
TAVARES
First Respondent
SYNTECH DISTRIBUTION
(PTY) LTD
Second Respondent
Heard: 4 December 2024
Delivered: 13 December
2024

JUDGMENT

BALOYI, AJ

Introduction

[1] The applicant seeks, on an urgent basis, to enforce, by way of an interdict, a restraint of trade agreement entered into with the first respondent during her employment with the applicant. The applicant is presently employed by the second respondent. The second respondent is joined in the application by the applicant for any interest it may have in the matter and no order is sought against it save for costs in the event it opposes the application. The first respondent opposes the application and the second respondent abides the outcome of the application.

Urgency

[2] The applicant asserts urgency on the ground that the first respondent has taken up employment with a competitor in breach of the restraint agreement and has refused to resign and will therefore continue to breach her restraint of trade undertaking. The matter is urgent, so the applicant contends, having regard to the harm sought to be protected against and the duration of the restraint

of trade period. Further, the applicant will not find substantial redress in the ordinary course and it did not delay in bringing this application. On this last aspect, the applicant states that after it became aware on 7 October 2024 that the first respondent had taken employment with the second respondent, it requested undertakings from her, inter alia, that she would resign from her new employment. The undertakings were requested a day after the applicant became aware of the first

respondent's employment with the second respondent and, the first respondent answered on 10 October 2024 refusing to give the undertaking. This application was issued on 16 October 2024, with the founding affidavit having been prepared in the intervening period between 10 and 16 October 2024.

[3] It is settled law that restraint of trade disputes are inherently urgent – see *Homemed (Pty) Ltd v Claasen and Others*[1] where the court accepted the inherent urgency of restraint of trade litigation. Notwithstanding the accepted inherent urgency of

restraint of trade litigation, an applicant must account for the period when it first became aware of the alleged breach of the

agreement and when it approached the court for relief. A delay in seeking enforcement of the agreement and the absence of a satisfactory explanation for the delay may well defeat a case for urgency.

- [4] I am satisfied that the applicant instituted this application without delay after it became aware of the first respondent's employment with the second respondent. I am further satisfied that to require that the applicant seek relief in due course would defeat the very protection that the applicant sought to safeguard with the restraint of trade agreement. Should the harm apprehended be realised in the intervening period of the restraint period of 12 months, an interdict may very well at that point prove to be a pyrrhic victory. The applicant should not be required to tolerate such a situation and nothing in the first respondent's contentions for lack of urgency justify or warrant that the applicant should endure the risk while waiting to be heard in due course.
- [5] I accept that the matter is urgent and that it should be heard on an urgent basis. I now turn to consider the merits.

The facts

- [6] Most of the facts were either common cause, not denied at all or not seriously denied, as will become apparent. The following is common cause or not denied by the first respondent.
- [7] The first respondent was employed by the applicant from 19 December 2019 until 6 September 2024 when she resigned from their employment. She was first employed as a Key Accounts Manager Assistant when she joined the employ of the applicant and, a year later, was promoted to a Key Account Manager.

The applicant first resigned from her employment in May 2024 which she withdrew and with final effect on 6 September 2024. After she resigned in September 2024, the applicant offered her alternative employment in a non-competing sister company which she declined.

- [8] The written employment contract contains the restraint of trade agreement which applies for a period of 12 months from the date of termination of employment and applies to the whole of South Africa. The restraint and confidentiality undertakings are contained in clauses 16 and 17 of the employment contract and in clause 17.4, the first respondent undertook that:

8.1 she will not, for the duration of the restraint, be interested or engaged in any capacity whatsoever, including as, inter alia, employee for any person directly or indirectly engaged, interested or concerned in any competitive activity in South Africa with the Applicant; and

8.2 during any part of the restraint period and thereafter, to the extent that same is protected by law, disclose any trade secrets and or confidential information of the business other than to persons connected with the business and who are required to know such secrets or to have such confidential information.

- [9] The applicant is a leading brand originator, product developer, manufacturer and distributor of consumer goods and electronics with offices in Johannesburg, Cape Town and Durban as well as global operations in various jurisdictions such as the United States of America, Hong Kong, China, Australia, and Dubai and has been in business since 2005. It is common cause

that the applicant develops, manufactures, and imports products under its own brand and manufactures and distributes products under other prominent brands through distribution agreements. In addition to distributing products under its own brand, the applicant also distributes products under the Disney and Marvel brands through a licensing agreement and has been appointed as a distributor in South Africa for various other brands, including, Sony personal audio products, TP-Link, Carmen, HP, Lenovo, Logitech, Sharp in respect of calculators and Creative Labs; and manufactures and distributes small appliances under Eiger to Massmart. The applicant and the second respondent supply similar products to their customers, they compete for the same customers. It is not denied that the first respondent has detailed insight into and knowledge of the applicant's confidential information and trade secrets in relation to various products in respect of which the second respondent is a direct competitor to the applicant.

- [10] During the first respondent's employment with the applicant, she had access to the applicant's confidential information on a daily basis in order to carry out her daily responsibilities – pricing strategies; costing of products and profit margins; client database; marketing material; and business strategies and financial information and has not denied that she is in possession of confidential information. She formed relationships with the applicant's customers, who are also customers, or potential customers of the second respondent and, should the first respondent disclose the applicant's confidential information and trade secrets to the second respondent or any of its employees – utilising the relationships formed with the applicant's customers, or knowledge of specific customer requirements to incite these customers away from the applicant and/or take floor space and market share from the applicant – the applicant will suffer almost impossible to quantify financial loss.
- [11] The industry in which the second respondent and the applicant operate is price-sensitive and responds well to various marketing strategies, promotional projects and similar activities. It is common for retailers to seek suppliers who can offer the most cost-effective deal and who have stock readily available. Access by a competitor to the applicant's pricing, trading terms, the availability of pricing support, profit margins on products and the like would allow that competitor a significant competitive advantage over the applicant. Being competitors, selling competing products to the same customer base, the aforesaid confidential information, which relates specifically to the applicant's products in the stores of its own customers, would be extremely useful to any competitor in order to gain a competitive advantage over the applicant.
- [12] As a Key Account Manager, the first respondent's main roles and functions included sales and the responsibility over key customers, among others, Makro, Game, Builders Warehouse, Buco and Vodacom, customers who contributed a significant amount to the applicant's monthly income and revenue. She was the point of contact for these customers, thus strengthening the business relationship, retaining top customers, and nurturing those key relationships over time. This role included travelling to new store openings of these key

customers throughout the country.

Reasonableness of the restraint of trade

- [13] In the answering affidavit, the first respondent admits the existence of a restraint agreement and that it may be enforced but asserts that based on the work that she performs in her new employ, she alleges that she is employed as an Administrator and not Key Account Manager, and based on the wide range of products sold by the applicant and its wide range of clients, the enforcement of the restraint agreement in the whole territory of South Africa is unreasonable in that it unfairly limits her ability to exercise her right to freedom of association, to choose her trade, and to fair labour practices. In short, the first respondent laments that the restraint agreement makes her unable to perform any similar duties and therefore unreasonably infringes and limits her rights.
- [14] The protectable interest in a restraint of trade mostly comprises confidential information (trade secrets), or trade connections. Confidential information is information received by an employee about business opportunities available to an employer; information that is useful or potentially useful to a competitor, who would find value in it; information relating to proposals, marketing submissions made to procure business; information relating to price and/or pricing arrangements, not generally available to third parties; information that is of actual economic value to the person seeking to protect it; customer information, details, and particulars; information the employee is contractually, regulatory, or statutory required to keep confidential; information relating to the specifications of a product, or a process of manufacture, either of which has been arrived at by the expenditure of skill and industry which is kept confidential; and information relating to know-how, technology or method that is unique and peculiar to a business, and is not publicly available – confidential information must be objectively worthy of protection and have value.
- [15] Trade connections are 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 leaves employment and becomes employed by a competitor, the employee could easily already induce the customers to follow the employee to the new business.
- [16] In deciding whether a protectable interest has been infringed upon, it is not necessary to show that there has been actual harm to the employer. It is about the risk created for the employer. All that must be shown is that the employee indeed had a close working relationship with customers and that it is likely that the employee is in a position to convince these customers to take their business elsewhere. In sum, is the employee in a position to act to the detriment of the erstwhile employer?
- [17] When one considers that the second respondent is a direct competitor of the applicant, the risk to the applicant is self-evident. The same risk consideration applies to confidential information, the consideration

being whether it could harm the employer or lead to an unfair advantage to the competitor if disclosed. In order to defeat this,

the first respondent must “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 instance, the applicant's customers while in the applicant's employ...”[2]

Protectable interests

[18] The first respondent does not deny that she has had access to the applicant's confidential information and to its trade connections. She also does not deny that the confidential information, if disclosed to a competitor, would give a competitive advantage to a competitor over the applicant. She nonetheless contests the existence of a protectable interest on the basis that the products sold by the applicant are not unique to it and are sold by many other competitors, and it does not have the exclusive right to resell the products it has listed as products it manufactures or resells, “... their focus range of products was different enough that the restraint of trade need not be enforced”, and “[she] does not have a strong enough connection to influence the whole of South Africa as clients to make the switch to buy only from the [the second respondent]”. She denies that she is able to influence applicant's customers to switch to the second respondent because she is not employed as a Key Account Manager but offers an undertaking that she will not disclose any confidential information if she has any and ‘complains’ that the applicant did not seek from her a confidentiality undertaking other than contained in the employment contract.

[19] The first respondent's denial that the applicant has a protectable interest is misguided because a party seeking to enforce a restraint of trade is required only to invoke the restraint agreement and prove a breach thereof. As I have already stated, the first respondent admits the restraint agreement and that she is employed by a competitor of the applicant. Thus, the next enquiry is whether the first respondent, the party who seeks to avoid the restraint, has discharged the onus to demonstrate, on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable – see *Basson v Chilwan and Others*[3] (*Basson*) where Botha AJ said:

'The incidence of the onus in a case concerning the enforceability of a contractual provision in restraint of trade does not appear to me in principle to entail any greater or more significant consequences than in any other civil case in general. The effect of it in practical terms is this: the covenantee seeking to enforce the restraint need do no more than to invoke the provisions of the contract and prove the breach; the covenantor seeking to avert enforcement is required to prove on a preponderance of probability that in all the circumstances of the particular case it will be unreasonable to enforce the restraint; if the Court is unable to make up its mind on the point, the restraint will be enforced. The covenantor is burdened with the onus because public policy requires that people should be bound by their contractual undertakings. The covenantor is not so bound, however, if the restraint is unreasonable, because public policy discountenances unreasonable restrictions on people's freedom of trade. In regard to these two opposing

considerations of public policy, it seems to me that the operation of the former is exhausted by the placing of the onus on the covenantor; it has no further role to play thereafter, when the reasonableness or otherwise of the restraint is being enquired into.'

And as stated by the High Court in *Hard Hat Equipment Hire Pty Ltd v Mclean and Another*[4]:

'He 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 while in the applicant's employ. It suffices if it is shown that trade connections through 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 apparent. ...'

[20] Similarly, and as the Court said in *IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Tarita and Others*[5]:

'... it does not lie in the mouth of the ex-employee who has breached her restraint agreement to say to her ex-employer "Trust me: I will not breach the restraint further than I have already been proved to have done".'

See also *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain*[6] where the Court held that the undertaking given by the respondent therein could not assist him and that the applicant need not show actual harm in order to obtain the relief it seeks. All it needs to show is that the respondent is potentially able to exploit its trade secrets or business connections in his new employment.

[21] The offer of a confidentiality undertaking therefore does not assist the first respondent to avoid the enforcement of the restraint agreement.

[22] The first respondent accepts that a restraint of trade agreement is valid, binding, and enforceable unless its enforcement would be unreasonable. The test to determine the reasonableness of a restraint of trade agreement is set out in *Basson* as follows:

22.1 does one party have an interest that deserves protection after termination of the agreement?

22.2 Is that interest threatened or being prejudiced by the other party?

22.3 If so, does that interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?

22.4 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?

[23] In *Reddy v Siemens Telecommunications (Pty) Ltd*[7] (*Reddy*), the Supreme Court of Appeal posited a fifth consideration, namely, whether the restraint goes further than necessary to protect the interest.

- [24] Thus, 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. The first respondent therefore bears the onus of proving that the enforcement of the restraint will be unreasonable, both in respect of its territorial operation and duration.
- [25] As Ms Adams for the applicant submitted, it is so that the decision whether it would be reasonable to enforce a restraint of trade is a value judgment, to be exercised mindful that public interest requires that parties should comply with their contractual obligations and all persons should, in the interests of society, be productive and permitted to engage in trade and commerce of their profession.
- [26] The first respondent has failed to discharge the onus of proving that the enforcement of the restraint will be unreasonable. It is not sufficient that she states only that enforcing the restraint agreement “limits [her] ability to exercise [her] right to freedom of association, to choose [her] trade, and to fair labour practices” and that she should be free “to sell [her] skills and to practice [her] trade in the market to make a living”, a fundamental constitutional right so she asserts. She does not state that she is unable to do any work and in fact, if her allegation that she is now employed as an administrator is correct, it is evident that she is able to find employment in a different role. She also does not allege that she is not employable by, or that she is or will be unable to find employment with a non-competitor of the applicant. The first respondent has plainly failed to discharge the onus to show the unreasonableness of the restraint agreement.
- [27] For the above reasons, enforcement of the restraint agreement does not offend the public interest. As the Supreme Court of Appeal said in Reddy, a restraint that is found to be reasonably required for the protection of the party who seeks to enforce it is constitutionally permitted. Indeed, it is in the public interest that the first respondent should be required to abide the restraint agreement which she admits she willingly signed. As the applicant states, she is free to exercise her skills, expertise, and services to any other companies, other than the direct competitors of the applicant.
- [28] In *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*[8], the Appellate Division (as it then was) held that a Court has a discretion and may, in the public interest, order either the whole or only a part of the restraint of trade be enforced. The court in *Beedle v Slo-Jo Innovations Hub (Pty) Ltd*[9] said the following which is of assistance in determining the reasonableness of the terms of a restraint agreement:

[34] ... Although the onus is upon the Appellant to show the unreasonableness of the restraint into which it has entered, the public policy enquiry which is central to such a dispute involves considering a balance between the restraint concluded by the parties and the consequence thereof, whereby the employee can be prevented from utilising her skill and knowledge in the pursuit of her chosen trade or profession; as guaranteed in s 22 of the Constitution, in this case, in the specific beverage industry throughout South Africa and for a period of two years.

[35] ... The exercise of determining the correct balance in such a case requires a Court to carefully examine the justification offered for the extent of the duration, notwithstanding that ultimately, it is the employee upon whom the onus rests.'

[29] Whilst confirming the power of a court to invalidate or refuse to enforce a contract, the Supreme Court of Appeal cautioned in *AB and Another v Pridwin Preparatory School and Others*[10] that the power to invalidate or refuse to enforce a contract freely entered into should be exercised sparingly.

[30] The restraint period agreed by the parties is 12 months and the first respondent has not contended for a shorter period to be enforced. The applicant states that a restraint for 12 months is reasonable because (i) it will allow for a dilution of the applicant's confidential information and trade secrets that the first respondent has knowledge of; (ii) the applicant plans its marketing strategies and applicable pricing at least six months in advance and the first respondent participated in one such meeting in September 2024 before she resigned from employment; and (iii) the majority of the applicant's trading terms are negotiated and concluded annually and therefore remain in operation for at least 12 months. I am satisfied with the explanation and justification for a restraint of 12 months, and note that 3 months of that period has already lapsed.

[31] The next issue to consider is the geographic application of the restraint i.e. whether it is unreasonable that the restraint should apply to the entire territory of South Africa. I have already alluded to the first respondent's position in this regard that this infringes and limits her right to use her skills and her freedom of association. None of this is a reason to limit the territorial application of the restraint agreement, if only because restraint agreements have been accepted as not unconstitutional. In support of the application of the restraint to the whole of the territory of South Africa, the applicant relies on the following facts not denied or disputed by the applicant – (i) its businesses operate throughout the Republic of South Africa and it is therefore not unreasonable that the restraint of trade undertaking be enforced in the Republic as a whole; (ii) the first respondent built relations and worked with its clients within and across the whole of South Africa, which the first respondent has not denied and is therefore common cause; (iii) it trades, sells and distributes its products through various retailers across the Republic of South Africa and the first respondent travelled throughout South Africa in fulfilment of her role as Key Account Manager.

- [32] In considering the reasonableness of the restraint period and the extent of the territorial application, I have also considered and taken into account that the first respondent was offered employment in a sister and non-competing company of the applicant and she declined the offer.
- [33] The applicant has thus satisfied all the other requirements necessary for the final relief it seeks against the first respondent to be granted. In short, the weigh-off favours the applicant, it faces real prejudice if relief is not granted, in the form of the risk created to it by way of the first respondent's continued association with the directly competing business of the

second respondent. The restraint period (as moderated) and restraint area are reasonable, and there is no suitable alternative remedy available.

Conclusion

- [34] In summary, the applicant has demonstrated the existence of a clear right, having a legitimate and proper restraint of trade covenant in place with the first respondent, susceptible to being enforced, when it comes to both confidential information and trade connections. The applicant has also established that the first respondent is indeed infringing on such protectable interest. The weighing off of interests favours the applicant and there is no intervening issue of public interest. Finally, the applicant demonstrated the existence of an injury reasonably apprehended and has no proper alternative remedy available to it.

Costs

- [35] This Court has a wide discretion when it comes to the issue of costs, considering the provisions of section 162(1) of the Labour Relations Act[11] (LRA). It must of course be considered that the applicant was ultimately successful and that the current dispute is principally a contract dispute and not an LRA dispute where ordinarily costs do not follow the result. The applicant has been successful in the relief it sought and there is no reason that it should not be awarded costs. I propose to make an order on the ordinary scale of party and party, and considering that the first respondent will be without employment, I consider that costs on scale A is appropriate.

- [36] I accordingly make the following order:

Order

1. The matter is heard as one of urgency.
2. The first respondent is interdicted and restrained from being employed by the second respondent for a period of 12 months from the date on which the first respondent's employment with the applicant terminated on 6 September 2024.

3. The first respondent is interdicted and restrained for a period of 12 months from the date on which the first respondent's employment with the applicant terminated on 6 September 2024, and in the territory of the Republic of South Africa from:

3.1 either alone or jointly or together with any other person:

3.1.1 being interested or engaged in any capacity whatsoever, including, but without prejudice to the generality of the afore-going, as trustee, proprietor, shareholder, member, manager, director, advisor, consultant, partner, employee, financier or agent in or for any person which is directly or indirectly engaged, interested or concerned in any competitive activity in the territory, including any client or supplier of the applicant or any persons identified through or due to the first respondent's employment with the applicant.

3.1.2 disclosing any trade secrets and/or confidential information of the business other than to persons connected with the business and who are required to know such secrets or to have such confidential information. Trade secrets and confidential information shall include (but not be limited to) all and whatever information relating to the business and their suppliers and customers which is not readily available in the ordinary course of business to their competitors.

3.2 In any manner, collude with any competitor of the applicant to the detriment or prejudice of the applicant:

3.2.1 Be employed or have any interest in any business undertaking which competes with the applicant;

3.2.2 Be employed by or have any interest in any business that sells or competes with any of the products sold and/or distributed by the applicant;

3.3 Interdicting and restraining the first respondent from disclosing to any third party any information acquired by her by virtue of her employment with the applicant which would be of assistance to such third party to enable it to compete against the applicant and which would not otherwise be known by such third party.

3.4 The first respondent is ordered to return to the applicant, within 5 days of this order, and thereafter to destroy all the documents and confidential information belonging to the applicant which are in her possession whether in hard copy or stored electronically on any computer, cellular telephone, external hard-drives or cloud storage device and all copies thereof, and to provide the applicant with an affidavit, deposed to before a commissioner of oaths, within 7 days of this order, confirming that she has done so;

4. The first respondent is to pay costs on the scale of party and party, scale A.

MS Baloyi

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv RS Adams

Instructed by: Theron & Maybery Attorneys

For the First Respondent: Adv HJ Horn

Instructed by: Leandre Theys Attorneys

[1] (2022/004040)

[2022] ZAGPJHC 494 (1 August 2022).

[2] New Justfun Group (Pty) Ltd v Turner & others

[2014] ZALCJHB 177; (2018) 39 ILJ 2721 (LC) at para 14.

[3] [1993] ZASCA 61; 1993 (3) SA 742 (A) at 776H - 777B

[4] (15214/2019)

[2019] ZAGPJHC 215 (7 June 2019) at para 30.

[5] 2004

(4) SA 156 (W).

[6] 2001

(2) SA 853 (SE) at 859.

[7] [2006] ZASCA 135; 2007 (2) SA 486 (SCA).

[8] [1984] ZASCA 116; 1984 (4) SA 874 (A).

[9] (JA21/23; JA37/22) [2023] ZALAC 17 (17 August 2023).

[10] [2018] ZASCA 150; 2019 (1) SA 327 (SCA).

[11] Act 66 of 1995, as amended.

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