

SOUTH AFRICA / JUDGMENT

Turbo Direct SA (PTY) Ltd v Lipnicki (004236/2021) [2022] ZAGPJHC 563 (15 August 2022) [2022] ZAGPJHC 563

COURT

South Gauteng High Court, Johannesburg

BEFORE

M A Makume

CASE / FILE NUMBER

004236/2021

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

CASE

NO: 004236/2021

REPORTABLE:

YES / NO

OF INTEREST TO OTHER JUDGES: YES/NO

REVISED.

15/8/2022

In the matter between:

TURBO

DIRECT SA (PTY)

LTD

Applicant

and

ANGILENE

LIPNICKI

Respondent

JUDGMENT

MAKUME, J:

- [1] In this application the Applicant seeks an interdict to enforce the provisions of a restraint of trade agreement concluded between the Applicant and the Respondent Ms Angilene Lipnicki (Angilene).

BACKGROUND**FACTS**

- [2] Ms Angilene commenced employment with the Applicant Turbo Direct SA (Pty) Ltd (Turbo) on the 1st February 2021. She left their employment on the 31st May 2022 and on the 1st June 2022 she took up employment with another company known as Turbo Magnificent (Magnificent).
- [3] Angilene was employed as an internal sales person and according to the Applicant she in no time became an effective representative. She succeeded to build a reputation with each of the Applicant's customers.
- [4] On taking up employment with the Applicant Angilene signed a contract of employment on which is included a Restraint of Trade Agreement (restraint). The restraint was for a period of 18 (eighteen) months. The relevant clauses of the restraint which Angilene agreed to recorded inter alia:

4.1 She will not for a period of 18 months after termination of her employment with the Applicant for whatever reasons solicit, entice or cause whether directly or indirectly or on behalf of another party current or past employees of the company to leave the company.

4.2 She will not solicit or attempt to solicit or accept business whether directly or indirectly on his or her own behalf or on behalf of another party from the company customers or prospective customers with whom she transacted with on behalf of the company during the last 18 months of her employment with the company.

4.3 She agreed not to perform directly or indirectly and in any capacity the same duties with another company that will be in competition with the business of the company. As long as that company's premises is within a radius of 180 kilometres from that of the Applicant.

4.4 She in conclusion agreed that the restraint agreement is reasonable and necessary to protect the business of Turbo.

- [5] On the 1st June 2022 Angilene took up employment with Magnificent a company situated in Alberton a distance of less than 180 kilometres from the Applicant's premises in Kempton Park.

- [6] It is common cause that the Applicant conducts business as an importer and distributor of turbo chargers in Southern Africa. This has been the case for the past six (6) years. Applicant trades with a vast variety of turbo chargers and related equipment which it sells and services for various markets in Southern Africa.
- [7] In addition to distributing turbo chargers throughout Southern Africa the Applicant also offers its own in-house testing and repair services to its customers.

PRINCIPAL SUBMISSION

- [8] It is common cause although this is denied by Angilene that Turbo and Magnificent are competitors in the turbo chargers market. According to Turbo the nature of Angilene's employment with Magnificent is in breach of the restraint which she voluntarily entered into with the Applicant.
- [9] The Applicant relies on both its customer connection and confidential information to enforce the restraint against the Respondent. The Applicant says that the crux of its protectable interest which must be protected rests in the type of product sold by the Respondent and in her customer connection with the specific customers.
- [10] The Respondent's contention in essence is that the Applicant is unlawfully seeking to prevent her from being gainfully employed given the current economic climate. She then maintains that she signed the restraint without really knowing what it meant.
- [11] The Respondent also maintains that she left the employment of the Applicant because of bad working conditions which were deteriorating each day, and in the final result she argues that Turbo Magnificent is not in competition with the Applicant because so she says Magnificent's mainline of business is aftermarket turbo chargers repairs and parts and gerone vehicle parts which has nothing to do with the Applicant, as the Applicant is the direct importer for original equipment manufacturer turbo chargers and the only one in South Africa,
- [12] The Respondent's assets that the Restraint of Trade Agreement is not in accordance with Public Policy, further that the agreement may be unlawful in view of the undue constraint placed on her seeking employment. She contends that the terms of the restraint are excessive, being cast in widest possible terms for 18 months with a radius of 180 kilometres.
- [13] The Respondent's other contention is that she is being restrained from using her own managerial sales skills thereby rendering her destitute.

THE LAW

- [14] Reference has been made by the Respondent as well as by the Applicant to the applicable law with specific reference amongst others to the matter of MAGNA ALLOYS & RESEARCH (SA) (PTY) LTD vs ELLIS [1984] ZASCA 116; 1984
- (4) SA 874 (A).

[15] The decision in *Magna Alloys (supra)* brought about a significant change to the approach by the courts in regard to Restraint of Trade Agreements. It recognised that restraint of trade agreements are valid and enforceable and should be honoured unless they unreasonably restrict a person's rights to trade or work and are in conflict with Public Policy.

[16] The law recognises the right to trade freely but this freedom is clearly not unfettered. A balance has to be struck between the obligations of the contracting parties to honour their contracts entered into by them voluntarily and the rights of the individual to trade and to practice his chosen profession.

[17] The Supreme Court of Appeal in *Reddy v Siemens Telecommunication (Pty) Ltd 2007 (2) SA 486 (SCA)* at page 496 paragraphs 15 and 16 and page 497 held as follows:

"[15] All persons should in the interest of society be productive and be permitted to engage in trade and commerce or the professions. Both considerations reflect not only common law but also constitutional values. Contractual 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.

[16] A restraint would be unenforceable if it prevents a party after termination of his or her employment from partaking in trade or commerce without a corresponding interest of the other party deserving of protection. Such a restraint is not in the public interest."

[18] In *Reddy (supra)* two principal considerations come into play firstly it is the public interest and secondly it is the right to engage in trade, commerce or a particular profession. The reality of the present situation is that Angilene has made contact with clients of the Applicant telling them that she has now left the employment of the Applicant and that if they need services she will avail herself now as an employee of the Applicant's competitor.

[19] The Respondent has in answer tendered an undertaking not to divulge the trade secrets and or other information of the Applicant. Such an undertaking confirms that she is in possession of such knowledge which she has already divulged to her new employer.

[20] Malan AJA in *Reddy* said the following:

"Reddy is in possession of confidential information in respect of which the risk of disclosure by his employment with a competitor assessed objectively is obvious. It is not that the mere possession of knowledge is sufficient and this is not what was suggested by Marais J in BHT Water. Reddy will be employed by Ericson a concern which carries on the same business as (Siemens) in a position similar to the one occupied with Siemens. His loyalty will be to his new employers and the opportunity to disclose confidential information at his disposal whether deliberately or not will exist. The restraint was intended to relieve Siemens precisely of the risk of disclosure."

- [21] In as far as her complaint of being restricted and being denied the right to be gainfully employed the Respondent has failed to state why she could not obtain employment in any sector of the motor industry wherein she was previously employed. She has also not stated why she cannot or has not been able to obtain employment in any other business as a sales person. I agree with the Applicant that the skills of any person trained in sales and marketing can be utilised in a number of commercial concerns.
- [22] Public Policy requires that contracts be enforced (See: Knox D'Arcy Ltd and Another vs Shaw & Another 1996 (2) SA 651 (W)). Accordingly, courts will not be reluctant to enforce the provisions of a restraint of trade agreement entered into by the parties where the terms are reasonable and not against Public Policy.
- [23] In *Basson v Chilwan & Others* [1993] ZASCA 61; 1993 (3) SA 742 (A) at 767 G the Court held that the reasonableness or otherwise of a restraint is determined with reference to the following considerations:
- 23.1 Is there an interest deserving of protection at the termination of the agreement?
- 23.2 Is that interest being prejudiced?
- 23.3 If so how does that interest weigh up qualitatively and quantitatively against the interests of the other party not to be economically inactive and unproductive.
- 23.4 Is there another facet of Public Policy not having anything to do with the relationship between the parties which requires that the restraint should either be enforced or disallowed.
- [24] An employer has an interest in enforcing the restraint of trade agreement concluded with its employees to protect its confidential information. Confidential information includes pricing strategies, knowledge of business conditions and customer relationships. It also includes customer lists, information about business opportunities available to the employer and confidential information received by an employee during her tenure of employment (*Bassons vs Chilwan supra*).
- [25] In *Paragon Business Forms (Pty) Ltd vs Du Preez* 1994 (1) SA 434 at 444 A-C it was held that where an employee has had access to an employer's customers and is in a position to build up a particular relationship with them, so that when he leaves an employer's services he could easily influence them to follow him, there appears no reason why a restraint to protect the employer's customers' connections should not be enforced.

THE RESPONDENT'S EMPLOYMENT WITH APPLICANT

- [26] It is not disputed that Angilene was in the employment of the Applicant for close to 15 months during which time she developed ties with the Applicant's customers and must have developed a good relationship with them as part of her duty as an internal sales person.

- [27] She must have during that period forged personal links with them and gained knowledge about their requirements. The Respondent's argument that Magnificent is not in competition with the Applicant is not true if that was the case why did she sent whatsapp messages to the Applicant's client inviting them to do business with her new employer.
- [28] I am persuaded that her new employment with a competitor constitutes a threat to the Applicant's commercial viability.

URGENCY

- [29] The Respondent maintains that this application is not urgent and does not say why the Applicant does not meet the requirements of Rule 6 (12) read with the Practice Directive. All that the Respondent says is the urgency is self-created and says that the Applicant is opportunistic and is attempting to obtain an unfair advantage over her.
- [30] This is not correct. The Respondent did not waste time in that in the very first month that she took up employment with Magnificent she wasted no time in making contact with the Applicant's customers. Surely she did not expect Applicant to sit back and do nothing. I am therefore persuaded that the application was correctly brought before me as an urgent application.

MERITS

- [31] The Respondent has been unable to seriously and effectively deny that she gained knowledge and insight into the Applicant's business, it's methodologies and its operations.
- [32] The Respondent has not only agreed that the restraint was reasonable and that she would for a period of 18 months after her termination of employment with the Applicant not become interested in or engaged in any capacity with any entity that is in competition with the Applicant.
- [33] The territorial reasonableness of a restraint is determined with reference to whether or not it is necessary to protect a legitimate interest (See *Weinberg v Merris* 1953 (3) SA 863 (C)). The Applicant has successfully demonstrated that it has legitimate interest in the area that it seeks to restrain the Respondent.
- [34] On her own version the Respondent conceded being employed by Magnificent a direct competitor. She is thus in breach of the restraint. The right of any person to engage in economic activity is entrenched in the Constitution. This does not mean that this right is unfettered. An ex-employer should be held to the terms of a fair, enforceable and reasonable restraint agreement which she voluntarily concluded.
- [35] What is interesting is that the Respondent can find employment with a competitor as long as it is outside the radius of 180 kilometres.

CONCLUSION

[36] In my view the Respondent has not effectively rebutted the Applicant's claim that it has protectable interests. The requirements of a final interdict have been met. It is the Respondent who has acted unlawfully and with mala fides in that she has deliberately and intentionally failed to comply with her contractual obligation and has acted in contravention thereof.

[37] The Applicant's rights to enforce the restraint is clear. The restraint itself is fair, reasonable and enforceable. It is not against Public Policy.

[38] In the result I make the following order:

ORDER

1. The form and services provided for in the Uniform Rules is hereby dispensed with and this matter is declared as urgent in terms of Rules 6(12).
2. The Respondent is hereby interdicted and restrained for the period 1st June 2022 to 1st December 2023 from being employed or acting as a consultant either directly or indirectly by any entity that sells, repairs, distributes

or maintain any turbo chargers of any type whatever within a radius of 180 kilometres.

3. The Respondent is ordered to pay the Applicant's party and party costs.

Dated at Johannesburg on this day of August 2022

M A MAKUME

JUDGE OF THE HIGH COURT

Appearances:

DATE OF HEARING

: 28 JUNE 2022

DATE OF JUDGMENT : AUGUST 2022

FOR APPLICANT

: ADV RILEY

INSTRUCTED BY

: MESSRS DARRYL FURMAN & ASSOCIATS

FOR RESPONDENT : ADV PILLAY

INSTRUCTED BY

: MESSRS RUARC DHABI PILLAY ATTORNEYS

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Prepared on 14 October 2026 · Esheria