
SOUTH AFRICA / JUDGMENT

TWK Agriculture Ltd v Wagner and Another (C633/15) [2015] ZALCCT 50 (12 August 2015) [2015] ZALCCT 50

COURT

Labour Court Cape Town

BEFORE

Lagrange

CASE / FILE NUMBER

C633/15

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REPUBLIC OF SOUTH AFRICA

Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: c 633/15

In the matter between:

TWK AGRICULTURE LTD Applicant and WAGNER, WYNAND JOHANNES (SNR.) First Respondent
WAGNER, WYNAND JOHANNES (JNR.) Second Respondent

Heard: 7 August 2015

Delivered: 12 August 2015

Summary: (Restraint of trade – urgent – protectable interest established – restraint reasonable except for duration given client base sought to be protected and closure of branch from which clients were serviced)

LAGRANGE J

Introduction

- [1] This is an urgent application to prevent the individual respondents in this matter from soliciting the custom of clients or accepting business from clients of the applicant for a period of two years from 30 June 2015 and to prevent them from using any confidential information, trade secrets or particulars of clients for their own or for a third party's purposes.
- [2] The respondents are both short-term insurance brokers formerly employed in the Mossel Bay branch of the applicant's business. Previously the first respondent burned his own brokerage business Wagner & Van Zyl (Pty) Ltd, which he sold to the applicant with effect from 1 June 2013.
- [3] The applicant decided to close the branch and to service its existing clients in the Mossel Bay area from its Knysna branch, pursuant to which it retrenched the respondents with effect from 30 June 2015. The respondents are contesting the fairness of their retrenchment in other proceedings.
- [4] In mid-July 2015 the applicant received numerous cancellations of their mandate as brokers from clients who had transferred their mandate to All about Insurance Brokers or UMA Underwriting Consultants with effect from 1 August 2015. A number of the change of mandate forms contained a written statement to the effect that the policyholder had decided, of their own choice, to retain one of the respondents as their broker. The respondents are now registered as brokers with the two entities in question. The respondents claim that the applicant's former clients, entirely of their own accord, cancelled the applicant's appointment as their broker and transferred their mandates and not at the instance of the respondents' solicitations.
- [5] In terms of the respective restraint of trade agreements signed by the respondents they undertook, in any capacity, not to be involved or interested in any undertaking in the insurance industry for a period of 24 months after the termination of their service, for whatever reason, in the Mossel Bay area in respect of the first respondent and in the Eastern Cape area in respect of the second respondent. They also undertook not to make use of any information or knowledge, inter-alia of the applicant's clients acquired by the respondents by virtue of their positions or arising from the business of the applicant. Lastly, they undertook for the duration of the restraint period not to solicit the business of any party that had been a client of the applicant in the 12 months prior

to the termination of their services and the inception of the restraint period.

- [6] The respondents do not dispute the existence of the restraint of trade agreements they both concluded with the applicant. Similarly they do not deny that they have a close relationship with the clients, whom they describe as "friends of the respondents". They maintain that the clients are free to choose their own insurance broker and cannot be forced to stay with the applicant. Consequently, the respondents contend that the cancellation of the applicant's

mandate and the appointment of the new brokers does not amount to a breach of their restraints. They also contended that the period of the restraint is unreasonably long and it is also unenforceable owing to the unfairness of their dismissals.

- [7] In *Omni Technologies (Pty) Ltd t/a Gestetner Eastern Cape v Barnard and others*[1], the court reiterated the primary competing policy considerations in deciding on the enforceability of a restraint, namely that the public interest requires that parties should comply with their contractual obligations (the maxim applicable is *pacta servanda sunt*) and that all persons should in the interests of society be productive and permitted to engage in trade and commerce or the professions.

Elaborating on this balancing of rights, the court stated:

“A restraint is against public policy and unenforceable if it would prevent a party after termination of his or her employment from

participating in trade or commerce without a corresponding interest of the other party deserving of protection. Five questions require to be answered when the reasonableness of a complaint is considered (the fifth one being implied by the third).

- (i) Does the one party have an interest that deserves protection after termination of the agreement?
- (ii) If so, is that interest threatened by the other party?
- (iii) In that case, does such interest weigh up 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 the restraint to be maintained or rejected?
- (iv) Does the restraint go further than necessary to protect the interest?”[2]

The existence of a protectable interest

- [8] The applicant does not seek to enforce the geographical restraint preventing the respondents from pursuing the business of insurance broking in the areas mentioned. All it seeks is to preserve its interest in its trade connections with clients with whom it did business in the 12 months prior to the termination of the respondents’ services. The applicant’s interest in those connections is an important aspect of the applicant’s incorporeal property in the form of goodwill and it is trite law that it is entitled to protect that interest. When the respondents dealt with those clients, they did so on behalf of the applicant’s business and not for their own account. Whether those clients were ones that they had originally brought into the applicant’s business through the sale agreement, or whether those with clients they acquired in the course of working for the applicant, the insurance business and relationship developed with those clients and was that of their employer and not theirs to exploit for their own personal gain, even if they had been

responsible for obtaining such business or sustaining it through their personal relationship with those clients. The respondents argued that the protectable interest which the applicant had ended when it closed the Mossel Bay office in which they were employed.

- [9] The applicant's right to immunise itself from the prospective exploitation of its confidential client information is also a proprietary interest it is entitled to protect.

The threat to the applicant's protectable interest

- [10] The respondents contend that there is no proof that the respondents had influenced the choice of the applicant's clients to transfer their business to the brokerages in which they are presently engaged, in the absence of any affidavits from the applicant's erstwhile clients. They also argued that there was no evidence of any further cancellations by the applicant's clients after the initial surge of applications and therefore no reason to believe that a further loss of clients to the respondents' current brokerage agencies would occur, and it was suggested in argument that the applicant had an alternative claim in damages which it could pursue in respect of the business it had lost.
- [11] Firstly, it may be so that the applicant did not obtain an affidavit from any of the former clients who transferred their business to the respondents. It may also be true that those clients might not have required much inducement to cease doing business with the applicant after it closed the office where the respondents were employed. However, it is apparent that the vast majority of the approximately 70 forms revoking the applicant's mandate and appointing the new brokerages appear to have been signed on 1 July 2015, the day after the respondents were retrenched. It seems highly improbable that this simultaneous mass cancellation

immediately after the respondents' services were terminated would have occurred without active canvassing by the respondents.

Secondly, the fact that such a large number of cancellations were effected initially provides little reassurance that if the respondents are not restrained at this point they will not redouble their efforts thereafter to obtain more of the applicant's existing business.

The balance of competing interests and other public policy considerations.

- [12] As mentioned, the applicant seeks to prevent the respondents from re-launching independent careers as insurance brokers by exploiting the applicant's trade connections. The applicant does not seek to prevent them from pursuing those careers by soliciting insurance business from other potential clients within the ambit of the applicant's geographical sphere of operation. Granting the relief would not require the respondents to abandon their work as insurance brokers, but merely not to engage with the applicant's clients for a defined period. It would curtail their ability to use the applicant's client base as a foundation for their future business. They may feel aggrieved that they had personally cultivated those clients during their employment with the applicant, but that did not make those clients 'theirs'. On this basis the applicant's interest in enforcing the restraint outweigh

those of the respondents in not enforcing it.

- [13] It was also argued by the respondents that the circumstances of their retrenchment should be considered as a factor militating against the enforcement of the restraint. In support of this, the respondent's cited the judgment of the industrial court in *Sharp v New Wave Surfing Promotions CC t/a Island Style*.^[3] In that case the court awarded an employee compensation for his unfair retrenchment calculated on the basis of the financial loss

suffered by the employee as a result of the imposition of a restraint of trade. However, there is ample later authority that the question of determining whether or not an employer has demonstrated a proprietary interest worthy of protection after an employee is dismissed is quite distinct from the question whether or not the employee was fairly dismissed.^[4]

- [14] The applicant seeks to prevent the respondent's from doing business with those of its clients who were doing business with it in the 12 months preceding the inception of the restraint but seeks to extend its right to exploit that base for two years hence, in circumstances where it has also closed the branch in which that business was generated and from which clients were serviced. While its interest in that client base is undeniable and though it maintains it will service those clients from its other branches in that part of the country, its commitment to the client base of that branch is clearly not what it was when it maintained a local branch office to service that clientele more conveniently. In the circumstances, I think a restraint period of twenty four

months is unreasonable to try and preserve clients who were not necessarily clients for longer than a year and given the applicant's

reduced branch profile and dedicated resources in that area. A period of twelve months would constitute a more reasonable limitation in my view.

Existence of an alternative remedy

- [15] It was argued that the applicant could simply sue the respondent's for damages rather than stopping them from doing business with its former clients. The applicant can do this in any event, but curtailing the respondent's unlawful business activities is not what a damages claim in due course would achieve, nor would it stop them committing further breaches of the restraint agreement in the near future.

Urgency

- [16] The application was launched on 29 July and was set down for hearing on 7 August 2015. The evidence of the cancellations came to light in July. It might have been brought earlier in July, but it was brought within reasonable time. On the facts of the case, the respondents had sufficient time to adequately oppose the application. I am satisfied the matter is urgent enough to be heard within 10 days of it being filed.

Costs

[17] As the respondents appear to have solicited a significant number of the applicant's former clients and the applicant is largely successful, costs should follow the result.

Order

[18] The matter is heard as one of urgency.

[19] The first and second respondents are interdicted from directly or indirectly: –

19.1 Soliciting the custom of clients of the applicant and/or accepting any business or custom from the clients of the applicant, and/or in any manner enticing the clients of the applicant to terminate their business with the applicant, in particular those clients appearing on the schedule annexed hereto as Annexure "A", for a period of 12 (twelve) months; and

19.2 Conducting any business with, or having any business relationship with, any of the cancelled clients of the applicant that have cancelled their business with the applicant after 30 June 2015, and in particular any clients appearing on the schedule annexed hereto as Annexure "A", for a period of 12 (twelve) months; and

19.3 Revealing or disclosing or in any way utilising, whether for the first and second respondent's own purposes, or for the purposes of any third party, any of the applicant's confidential information and/or client particulars relating to any clients appearing on the schedule which is Annexure "A" to this order.

19.4 This order applies only to clients that were clients of the applicant during the period 1 July 2014 to 30 June 2015.

19.5 The respondents are jointly and severally liable for the applicant's costs, the one paying the other to be absolved.

Lagrange J

Judge of the Labour Court of South Africa

APPEARANCES Applicant: S Snyman of Snyman Attorneys Respondents: Instructed by: J O Hanekom Leon Frank & Partners.

[1] [2008] 2 All SA 207 (SE)

[2] At 211

[3] [1994] 10 BLLR 149 (IC)

[4] See Bonfiglioli SA (Pty) Ltd v Panaino

(2015) 36 ILJ 947 (LAC) at 954, para [24].

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