



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

CASE NO: 27373/2022

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

19 /10/23

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Date

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ML TWALA

In the matter between:

CORRAGRI SA (PTY) LIMITED

FIRST APPLICANT

CORRUSEAL GROUP (PTY) LIMITED

SECOND APPLICANT

And

ERNUSTUS JACOBUS EKKERD

FIRST RESPONDENT

E J EKKERD

SECOND RESPONDENT

MICKY WAYNE SCHWARTZ

THIRD RESPONDENT

GUSTAAF EKKERD

FOURTH RESPONDENT

BENTLEY DANIEL

FIFTH RESPONDENT

**INTEGRATED PACKHOUSE SOLUTIONS
(PTY) LIMITED
(REGISTRATION No: 2022/636881/07)**

SIXTH RESPONDENT

JUDGMENT

TWALA, J

- [1] The first and second applicants previously sought, on urgent basis, and obtained an interim interdict against the first to fifth respondents on the 2nd of November 2022 pending the final determination of Part B of the notice of motion in which the final interdictory relief is sought. Before this Court is the determination of Part B of the notice of motion.
- [2] The first to fourth and the sixth respondents did not file any opposition to the application. Although the fifth respondent filed a notice to oppose the application, an order was granted against him by agreement. The order effectively granted the second applicant the interdictory relief it sought against the fifth respondent as prayed for in Part A of the notice of motion pending the final determination of the relief sought in Part B. The fifth respondent has now filed a substantial answering affidavit in opposition to the final relief sought against him by the second applicant.
- [3] Given that the first to fourth respondents did not oppose the application and that the period of restraint against the first to third respondents has expired, the first applicant sought an order for the final interdictory relief only against the fourth respondent, with an order for costs against the first to fourth respondents, jointly and severally, the one paying the other to be absolved, including the costs of

senior counsel. It should be noted that the interim order provided for the issue of costs to be determined together with Part B of the notice of motion.

[4] The genesis of this case is that the first to fifth respondents were the employees of the applicants. The first to fifth respondents left the employ of the applicants between July and August 2022 and took employment with the sixth respondent in different capacities. When the fifth respondent left his employment with the second applicant, he was employed as new product development manager. He was employed under a contract of employment which contained restraint of trade provisions.

[5] When the fifth respondent left his employment with the second applicant, he became a director of the sixth respondent in flagrant disregard of the restraint provisions contained in his employment contract with the second applicant. Although he later resigned as director of the sixth respondent, he continued to work for the sixth respondent in other capacities. This galvanised the second applicant to institute these proceedings. I propose to refer to the second applicant, as the applicant, and the fifth respondent as the respondent going forward in this judgment.

[6] As indicated above, on the 2nd of November 2022, the respondent agreed with the applicant that an order be granted against him in the following terms:

“1. Pending the final determination of the relief sought in part B of the notice of motion, the fifth respondent is interdicted and restrained, for a period of 24 months from 31 July 2022, and within the province of Gauteng, from:

1.1 whether directly or indirectly:

1.1.1 carrying on any business or activity directly or indirectly similar to or in competition with that being carried on by the second applicant during the currency of the contract of employment concluded between the second applicant and the fifth respondent on 11 August 2016 (“the agreement”);

1.1.2 being employee in any way in any such business (which would include the sixth respondent);

1.1.3 being employed in any such business or activity as principle partner, director, agent, shareholder, member of the close corporation, beneficiary or trustee of a trust, consultant, lecturer, employee or otherwise;

1.1.4 Financing or guaranteeing the obligations of any such business or activity; and

1.1.5 Otherwise breaching any of the provisions of the agreement;

2. costs shall stand over for determination at the hearing of the relief sought in part B of the notice of motion."

[7] Counsel for the respondent contended that the Court should ignore the court order dated 2 November 2022 for it was meant as an interim order. Although the respondent filed an intention to oppose the application, so it was contended, due to the voluminous application and the truncated times that come with the urgent court, it was almost impossible for the respondent to meaningfully file an opposing affidavit – hence he agreed to the order as it stands. It was contended further that the sixth respondent is not a competitor of the applicant and therefore, the respondent has not breached the restraint provisions of his employment contract.

[8] It is trite that all court orders are binding unless they are overturned on appeal or through rescission proceedings. There is no merit in the argument that the order of 2 November 2022 is interim and should therefore be ignored when a final order is sought. Since the interim order was granted on 2 November 2022, the respondent has not made any attempt to challenge its validity and it remains valid until it is set aside by the due process of the court. It does not lie in the mouth of the respondent to say the order should be ignored since he filed an answering affidavit to deal with the issues when Part B of the matter is for determination before this Court.

[9] In *Dabner v South African Railways and Harbours*¹ which was quoted with approval by this Court in *Venmop 275 (Pty) Ltd and Another v Cleverlad Projects (Pty) Ltd and Another*,² the court stated the following:

*“The rule with regard to peremption is well settled and has been enunciated on several occasions by this Court. If the conduct of an unsuccessful litigant is such as to point indubitably and necessarily to the conclusion that he does not intend to attack the judgment, then he is held to have acquiesced in it. But the conduct relied upon must be unequivocal and must be inconsistent with any intention to appeal. And the onus of establishing that position is upon the party alleging it. In doubtful cases acquiescence, like waiver, must be held non-proven.”*³

[10] The interim order was obtained by agreement between the parties and the respondent does not dispute that. It is my respectful view that the respondent cannot now in his answering affidavit challenge or raise issues which have been settled between the parties and made an order of court. The order is clear and unambiguous in paragraph 1.1.2 in that the respondent is interdicted from being an employee in any way in such a business which competes with the applicant and that would include the sixth respondent. The respondent cannot come to court now and say that the sixth respondent is not a competitor of the applicant when he agreed with the terms of the order that the sixth respondent is a competitor of the applicant. If the respondent had an issue with the order that was obtained by agreement, he should have challenged the order and has not done so.

[11] The respondent contended further that the restraint is unreasonably long since it is for a period of two years starting from the 31st of July 2022. I am unable to disagree with counsel for the applicant that, except to say that the respondent is presently unemployed, the respondent has failed to take this Court into his confidence and state what efforts he has made to find a job within the Province of Gauteng and what challenges he has encountered in the process.

¹ 1920 AD 583 (“*Dabner*”).

² 2016 (1) SA 78 (GJ).

³ *Dabner* above n 1 at 594.

[12] In *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronje and another*,⁴ the court quoted with approval the principles on restraints of trade enunciated in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*⁵ thus:

“1. Prima facie every restraint agreement signed by a restrainee is enforceable. Where a restrainee wishes to be released from his restraint obligations, the onus lies on the restrainee to show that the restraint is not only unreasonable, but contra bonos mores that is, contrary to public policy.

2. In determining whether a restraint is contra bonos mores, a court will look at the facts and circumstances at the time that the restrainer is attempting to enforce the agreement against the restrainee and weigh up two main considerations. The first is that the public interest requires, in general, that parties should comply with their contractual obligations even if these are unreasonable or unfair (pacta sunt servanda). The second consideration is that all persons should, in the interests of society, be permitted as far as possible to engage in commerce or the professions freely. Expressing this differently, it is detrimental to society if an unreasonable fetter is placed on a person’s freedom of trade or a person’s freedom to pursue a profession.”⁶

[13] It is a trite principle of our law that where parties voluntarily enter into a contract, courts must be slow in interfering with the terms of the contract unless they are against public policy. The principle of *pacta sunt servanda* forms the strong basis of our law of contract and should be observed at all times.

[14] Recently the Constitutional Court in *Beadica 231 and Others v Trustees, Oregon Trust and Others*⁷ also had an opportunity to emphasise the principle of *pacta sunt servanda* and stated the following:

“[84] Moreover, contractual relations are the bedrock of economic activity and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties

⁴ (2011) 32 ILJ 601 (LC) (*Esquire System*”).

⁵ [1984] ZASCA 116; 1984 (4) SA 874 (A).

⁶ *Esquire System* above n 4 at para 15.

⁷ [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC).

for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.

[85] The fulfilment of many of the rights promises made by our Constitution depends on sound and continued economic development of our country. Certainty in contractual relations fosters a fertile environment for the advancement of constitutional rights. The protection of the sanctity of contracts is thus essential to the achievement of the constitutional vision of our society. Indeed, our constitutional project will be imperilled if courts denude the principle of pacta sunt servanda.”

[15] It should be recalled that the respondent was a senior employee of the applicant and held a managerial position. The respondent was manager for new product development which exposed him to private information and or trade secrets of the applicant and was working in direct contact with the clients of the applicant. Although it is in the interests of the society that people should be productive and engage in trade and commerce, the privity of contract must prevail. The respondent has failed to demonstrate that the provisions of the restraint are contrary to public policy.

[16] It is my considered view therefore that the restraint of trade agreement is valid in that the applicant has an interest to protect and the restraint clause is enforceable as it is reasonable considering that the respondent was a senior employee in the employ of the applicant. Moreover, the uncontroverted evidence of the third respondent in his confirmatory affidavit is that the fifth respondent was doing work for the sixth respondent and continued to do so even after the interim interdict was granted against him. The fifth respondent has displayed a flagrant disregard not only of the restraint provisions of his employment contract but also the interim order of the Court. The unavoidable conclusion is therefore that the applicant has established a case against the respondent and is entitled to the relief as sought in the notice of motion.

[17] In the circumstances, I make the following order:

As regards the first to fourth respondents:

1. The fourth respondent is interdicted and restrained, for a period of 24 months from the 13th of July 2022, and within the geographical area of the Republic of South Africa, from:
 - 1.1 whether as proprietor, partner, director, shareholder, member, employee, consultant, contractor, financier, agent, representative, assistant or otherwise, and whether for reward or not, directly or indirectly carrying on being interested in or engaged in or concerned with or employed by any company (which would include the sixth respondent), close corporation, firm, undertaking or concern carried on which performs or makes available services of the type offered by the first applicant, including but not limited to packaging manufacturing, directly or indirectly in competition with the first applicant;
 - 1.2 after termination of his employment with the first applicant, or any companies within the Corroseal Group, being interested or concerned with, in any capacity whatsoever, any person, company or association, organisation or concern in relation with any related companies and the first applicant's direct competitors;
 - 1.3 either personally, or through any company, close corporation, firm, undertaking or concern in or by which he is, directly or indirectly interested or employed, directly or indirectly:
 - 1.3.1 encouraging or enticing or inciting or persuading or inducing any employee of the first applicant to terminate his or her employment with the first applicant;
 - 1.4 either personally or through any company, undertaking or concern in or by which he is, directly or indirectly, interested, engaged, concerned or employed, directly or indirectly, whether as proprietor, partner, director, shareholder, employee, consultant, contractor, financier, agent, representative, assist or otherwise, and whether for reward or not:

- 1.4.1 soliciting orders from customers who were customers of the first applicant at the end of the termination of the employment of the fourth respondent, or who were a prospective customer of the first applicant, within a year of the employment of the fourth respondent, or which had purchased Proscribed Services, or Proscribed Suppliers for Proscribed Services, as those terms are defined;
 - 1.4.2 canvass business in respect of the Proscribed Services from Proscribed Customers or Proscribed Suppliers, as those terms are defined; and
 - 1.5 otherwise acting in breach of the provisions of the contract of employment concluded between him and the first applicant on the 1st of April 2021.
2. The first to fourth respondents, jointly and severally, shall pay the costs of this Part B of the application, including the costs of senior counsel.

As regards the fifth respondent:

3. The fifth respondent is interdicted and restrained, for a period of 24 months from the 31st of July 2022, and within the Province of Gauteng, from:
 - 3.1 whether directly or indirectly:
 - 3.1.1 carrying on any business or activity directly or indirectly similar to or in competition with that being carried on by the second applicant during the currency of the contract of employment concluded between the second applicant and the fifth respondent on 11 August 2016 (“the agreement”);
 - 3.1.2 being employee in any way in any such business (which would include the sixth respondent);
 - 3.1.3 being employed in any such business or activity as principal partner, director, agent, shareholder, member of the close corporation, beneficiary or trustee of a trust, consultant, lecturer, employee or otherwise;

- 3.1.4 financing or guaranteeing the obligations of any such business or activity; and
 - 3.1.5 otherwise breaching any of the provisions of the agreement.
4. The fifth respondent shall pay the costs of this application, including the costs of senior counsel, and including the costs of Part A of the application which were reserved on the 2nd of November 2022.

TWALA M L
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

Delivered: This judgment and order were prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the order is deemed to be the 19th of October 2023.

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Date of Hearing: 9th of October 2023

Date of Judgment: 19th of October 2023