IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 074523/2023

DATE: 03-10-2023

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO.
(3) REVISED.
DATE 03.10.2023.
SIGNATURE

In the matter between

PARROT PRODUCTS (PTY) LTD	Applicant
and	
ASHLEIGH VAN STADEN	1st Respondent
JACQUES-LOUIS ERASMUS	2nd Respondent
SMD TECHNOLOGIES (PTY) LTD	3rd Respondent

J U D G M E N T

CRUTCHFIELD, J:

The applicant, Parrot Products (Pty) Limited, brought urgent proceedings for the enforcement of a restraint of trade.

The first and second respondents, Ashleigh van Staden and Jacques-Louis Erasmus respectively, opposed

the application.

The applicant did not seek relief against the third respondent, SMD Technologies (Pty) Limited, registration number 2015/107801/07, which did not oppose the application. The applicant cited the third respondent pursuant to the latter's interest in the relief sought in the application.

The applicant alleged that it became aware of the first and second respondents' employment with the third respondent ("SMD") on 14 July 2023, the deponent to the applicant's affidavit having been informed thereof by an employee of the applicant.

The applicant sought undertakings from the first and second respondents to terminate their employment with SMD, which undertakings were refused on 19 July 202, although the first and second respondents did undertake not to disclose the applicant's confidential information. The first and second respondents did not, however, undertake not to have dealings with customers of the applicant whilst in the employ of the third respondent, SMD.

The applicant did not delay unduly in pursuing this application, issuing it on 27 July 2023 and setting it down for hearing in the urgent court on Tuesday, 15 August 2023.

The first and second respondents delivered their respective answering affidavits on 7 August 2023. They did

not challenge the issue of urgency in their heads of argument. The first and second respondents opposed the application on the following bases; that the applicant and SMD were not competitors of one another, the restraint of trade was overly broad, there was no protectable interest in the hands of the applicant, the respondents provided the undertakings not to disclose the applicant's confidential information and the restraint was unreasonable in both its duration and its scope.

The first and second respondents were tasked with demonstrating that the restraint of trade was unreasonable.

The applicant alleged that SMD was a competitor and the first and second respondent's employment with SMD, which the first and second respondents admitted, and their refusal to terminate that employment constituted a breach of the restraint of trade clause signed by each of them.

The restraint of trade clause read as follows:

> "... the employee being the first and/or second respondent undertake: that he shall not during his employment and for a period of two years after the termination of his employment, for any reason whatsoever, be directly or indirectly interested, engaged or concerned, whether as principal, agent, partner,

> representative, shareholder, director, employee, consultant, advisor, financier, administrator, or in any other capacity in any competitive business carried on within the Republic of South Africa."

The first and second respondents signed agreements acknowledging that they would become possessed of and would have access to the applicant's trade secrets and confidential information, being the applicant's property. Further, that if the first and second respondents became employed by a competitor of the applicant, the applicant's proprietary interest in its trade secrets and confidential information would be prejudiced as a result.

The applicant conducted business as a supplier of presentation and signage products to businesses, chain stores, schools and individuals, operating throughout South Africa and in various countries outside of the borders of South Africa. The applicant alleged that its national call centre operators, of which the first and second respondent were participants, offered advice and product knowledge, processed quotations and orders and arranged installation of any of the applicant's product lines.

SMD, according to the applicant, traded in personal consumer electronics and was a competitor of the applicant, operating throughout South Africa. The applicant alleged

that its products corresponded largely with those in which SMD traded. The first and second respondents alleged that the overlap between the applicant and SMD's products was slim and that SMD did not qualify as a competitor of the applicant.

The applicant demonstrated, however, the significant overlap between the applicant and SMD's products, their pricing and the various customers serviced by the applicant and SMD. It was apparent that sufficient overlap existed between the products and the customers serviced by the applicant and SMD to qualify the applicant and SMD as competitors of each other.

Accordingly, the applicant alleged that insight into the applicant's customers' requirements, relationships built with customers and knowledge of their requirements as well as insight into the applicant's sale techniques were important, valuable, confidential and worthy of protection.

Even if the overlap in products and customers between the applicant and SMD was slim as alleged by the first and second respondents, the benefit of the employment by SMD of the first and second respondents given the confidential information of the applicant to which they had access as referred to by me hereunder, would potentially be of marked valued to SMD and potentially prejudicial to the applicant.

The applicant, pursuant to the first and second respondents' employment by SMD and their refusal to terminate that employment, invoked the restraint clause signed by the first and second respondents. Given that SMD was a "competitive business" operating within the Republic of South Africa, as required by the restraint clause, the applicant proved the breach by the first and second respondent of the restraint clause.

It was therefore up to the first and second respondents to show on a balance of probabilities that the restraint clause was unenforceable because it was unreasonable. The enquiry into the reasonableness of a restraint effectively considers two principles; the obligation on parties to comply with their contractual obligations and their right to freely chose and practice a trade, occupation and/or profession. See in this regard *Labournet (Pty) Limited v Jankielsohn & Another* (2017) 38 ILJ 1302 (LAC) at [41].

Furthermore, at [43], the court stated that the reasonableness and enforceability of a restraint depends on the nature of the activity sought to be restrained, the rationale or purpose for the restraint, the duration and area of the restraint as well as the parties' respective bargaining positions at the time. The reasonableness of the restraint is determined with reference to the circumstances that apply at

the time the restraint is enforced.

The test for reasonableness of a restraint of trade provision is set out in *Basson v Chilwa and Others* 1993(3) SA 742 A at 767 G-H and was referred to by both the applicant and the first and second respondents before me.

The test interrogates whether one party has an interest that is deserving of protection upon the determination of the agreement, whether that interest is being prejudiced by the other party, being the first and second respondents before me. If so, whether such interest weighs up qualitatively and quantitatively against the interests of the latter, such that the latter should not be economically inactive and unproductive, whether public policy requires that the restraint should be maintained or rejected and whether the restraint goes further than is strictly necessary to protect the interest. The latter requirement refers to the duration, subject matter and geographical area of the restraint sought to be enforced by the applicant. See *Basson v Chilwa and Others* 1993(3) SA 742 A.

The law protects two kinds of proprietary interests by way of restraint of trade clauses. See in this regard *Sibex Engineering Services (Pty) Limited v Van Dyk & Another*, 1991(2) SA 482 (T) at 502 D-F. Firstly, relationships with customers, suppliers and those that comprise the ‘trade

connections' of the business, and secondly, confidential information or trade secrets that would prove useful to a competitor to gain a competitive edge or advantage over the former, being the applicant before me.

In order to qualify as a trade secret, three requirements must be met, the information must be capable of application in trade or industry, it must be secret or confidential, known only to a restricted number of people and not in the public domain, and thirdly, it must objectively be of economic value. See in this regard *Pexmart CC and Others v H Mocke Construction (Pty) Limited and Another*, (159/2018) [2018] ZASCA 167; 2019(3) SA 117 SCA ("*Pexmart*").

It was for the first and second respondents to demonstrate that they did not have access to the applicant's confidential information, did not acquire any significant personal knowledge of or influence over the applicant's trade connections. It was not necessary for the applicant to show that the first and second respondents had exploited the applicant's trade connections or confidential information whilst in the employ of SMD. It was sufficient for the applicant to demonstrate that there was a potential opportunity for the first and second respondent to do so pursuant to their employment with SMD, a competitor of the applicant and to which the first and second respondents now

owed their loyalty and were loyal.

The applicant alleged that the first and second respondents had detailed knowledge of the applicant's confidential information regarding various products in respect of which SMD was the applicant's competitor. Furthermore, that the first and second respondents formed relationships with the applicant's customers who were also customers or potential customers of SMD. Those alleged relationships, together with the first and second respondents' alleged knowledge of specific customer requirements gained whilst employed by the applicant, were allegedly potentially useful to SMD or any other of the applicant's competitors. The applicant alleged that disclosure or use of its trade secrets and/or customer connections would be prejudicial to the applicant in an unquantifiable extent.

The applicant did not make out any case against SMD in respect of the poaching of the applicant's two additional staff members other than the first and second respondents. Nor did the applicant make out any case in respect of the poaching of staff members of the applicant by the first and second respondents. Such a case required that the respondents be intent on collapsing the business of the applicant. No such case was made out before me.

The first respondent was employed by the applicant

as a call centre administrator from December 2018 to August 2021 and thereafter as a key accounts manager until June 2023. The first respondent's assertion that as a key accounts manager, she was tasked with ensuring that sufficient quantities of stock were present at the stores under her purview and that this was her primary function, was difficult to accept. This was more so regard being had to the particularity around the confidential information of the applicant that the applicant demonstrated the first and second respondents had access to.

The second respondent was employed as a call centre administrator from August 2016 to November 2021 and as a supervisor from November 2021 to July 2023. He had access to similar, if not the same, confidential information of the applicant as the first respondent had access to. The second respondent denied that he had any influence over clients or suppliers of the applicant.

The applicant referred to the nature and extent of information that the first respondent and the second respondent had access to, *inter alia* as call centre administrators as well as the training that they received whilst employed in the call centre, including on the system referred to as the "ERP" system, which hosted various sales information regarding the applicant, client information and marketing and sales information.

It was apparent from the description of the information and the details furnished in respect thereof that that information was highly detailed, extensive and covered various aspects of the applicant's operation. It stands to reason that any competitor of the applicant that gained access to such information would have a reasonably substantial advantage over the applicant, to the detriment of the applicant.

The applicant had approximately 18 staff members in the national call centre, two of which were the first and second respondents.

The applicant alleged that the call centre staff formed relationships with customers. It was not apparent to me that this was possible or even probable given that it was a national call centre with 18 staff members together with the impersonal nature of a call centre. The applicant alleged that various customers called frequently. Whilst that may well be so, that did not demonstrate that customers form relationships with call centre staff members to the extent that such staff members were able to influence the applicant's customers.

This was not an instance of company representatives calling, as in visiting specific customers at regular intervals and meeting with those customers face to face, having scheduled meetings to discuss a specific customer's needs

at any particular time.

Whilst I accept that call centre operators of the applicant were trained to sell and were trained to sell in respect of particular products of the applicant, it was not apparent how they would have been able to build customer relationships given that a customer contacting the call centre could be connected to any one of the various call centre staff members.

Even if those call centre staff members were limited to nine of the 18, (whilst the remaining nine performed paper based duties), it was not apparent how those call centre staff members would form relationships with the applicant's customers such that they could influence those customers, in the absence of certain customers being allocated to specific and specified call centre staff. Nor was it apparent to me how the first and second respondents, when occupying those positions, would have been able to influence or shape the decisions of the applicant's customers.

Much of the applicant's concerns related to the first and second respondents' knowledge of pricing strategies and discounts offered by the applicant, both to customers of particular sizes in general and to specific and specified customers, and that the respondents had knowledge thereof. Such information, however, has a lifespan, meaning that it

is relevant and thus of economic value for limited periods of time. The applicant did not set out the duration for which such information remained relevant and thus economically valuable. The first and second respondents alleged however that the applicant refreshed its pricing and marketing strategies on an approximately annual basis.

The first and second respondents argued that they could not recall the applicant's confidential information. Whether or not that was correct, I accept that the applicant does not have to rely on the first and second respondents' alleged recall or otherwise of the applicant's confidential information. Nor does the applicant have o rely on the alleged *bona fides* of the first and second respondents or on their undertakings as proffered by them in the light of them not undertaking to refrain from dealing with former customers of the applicant. See in this regard *BHT Water Treatment (Pty) Limited v Leslie & Another* 1993(1) SA 47 (W).

The first respondent was employed by SMD as an e-commerce key account manager and the second respondent as a key account manager, in circumstances where the first and second respondents are potentially able to make use of the applicant’s confidential information to the benefit of SMD and the detriment of the applicant.

The first and second respondents argued that the

applicant's forecasting took place approximately annually in advance and that the pace of technological change and price changes made this a fast moving and fast changing sales environment. As a result, the first and second respondents contended that a period of two years in respect of the enforcement of the restraint as claimed by the applicant, was excessive and that one year was more appropriate.

I am persuaded that the applicant's confidential information to which the first and second respondents had access constitutes a protectable interest for a limited period of time or duration. The applicant is not entitled to a permanent advantage. I am not persuaded, however, that the applicant has a protectable interest in respect of its alleged trade connections in that the applicant relied in the main on the first and second respondents' employment as call centre employees.

The first and second respondents are skilled and talented sales people. They are well able to use their skills in different industries outside of that in which the applicant operates.

The first and second respondents argued that it would be unfair to order them to pay the costs of the application, even if the outcome of the judgment favoured the applicant. The respondents relied on s162 of the Labour Relations Act

which does not apply in the matter before me in this court. The applicant argued that there was no reason that the costs of this application should not follow the outcome on the merits.

As regards the order sought by the applicant, I hold a discretion to ensure that the order that I grant is not unreasonably onerous on the first and second respondents, regard being had to their constitutional right to participate in the economy, to earn a living and society's interests in the first and second respondents being held to the bargain struck by them with the applicant as well as society's interest in the first and second respondent not being idle.

The applicant sought an order for a duration of two years. There is no basis for that period given the applicant's annual forecasting.

There is also no basis for the enforcement of the restraint against the first and second respondents throughout South Africa. I accept that the applicant's call centre in which the first and second respondents were employed, is a national call centre dealing with customers throughout South Africa. The first and second respondents, however, operated as I understand these papers, from Johannesburg, not from Cape Town or from Durban. In the circumstances, I am not persuaded that the first and second respondents ought reasonably to be restrained from

operating throughout the Republic as opposed to their restraint being limited to within the borders of the Gauteng Province. This correlates with my finding that the applicant did not show a proprietary interest in the customer relations. The first and second respondents' interaction with the applicant's customers across South Africa was a function simply of the national nature of the call centre operated by the applicant.

In the circumstances, I am of the view that an order that is effective in the province of Gauteng's geographical area is sufficient enforcement of the restraint of trade.

As already stated by me, the applicant did not make out a case that the first and second respondents sought to influence other employees of the applicant to terminate their services with the applicant and seek employment with SMD.

In the circumstances, I grant the following order:

1. For a period of one year from 7 July 2023, the first respondent is interdicted and restrained from being directly or indirectly interested, engaged or concerned, whether as principal, agent, partner, representative, shareholder, director, employee, consultant, advisor, financier, administrator or in any other likely capacity in any business carried on within the province of Gauteng which competes with the business of the applicant;

1.1 being employed by the third respondent;

1.2 using or directly or indirectly divulging or disclosing to others any of the applicant's trade secrets;

1.3 furnishing any information or advice acquired by herself as a result of her employment with the applicant, to any business, firm, undertaking or company directly or indirectly in competition with the business of the applicant;

2. That for a period of one year from 24 July 2023, the second respondent is interdicted and restrained from:

2.1 being directly or indirectly interested, engaged or concerned, whether as principal, agent, partner, representative, shareholder, director, employee, consultant, advisor, financier, administrator, or in any other likely capacity in any business carried on within the province of Gauteng which competes with the business of the applicant;

2.2 being employed by the third respondent;

2.3 using or directly or indirectly divulging or disclosing to others any of the applicant's

trade secrets;

2.4 furnishing any information or advice acquired by him as a result of his employment with the applicant to any business, firm, undertaking or company directly or indirectly in competition with the business of the applicant.

2. The first and second respondents are to pay the costs of this application jointly and severally.

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CRUTCHFIELD, J

JUDGE OF THE HIGH COURT

DATE: 3 October 2023.