



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 011160/2022

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

DATE: 4 December 2023

In the matter between:

THERMASPRAY (PTY) LTD

Applicant

And

DR JAN J LOURENS

1 st Respondent

ADVANCE MATERIAL SCIENCE
ENGINEERING (PTY) LTD

2nd Respondent

JUDGMENT

BOTHA AJ

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Introduction

This matter originated as an urgent application in August 2022. The material relief claimed was an interdict that the 1st respondent be prohibited and interdicted from:

1.1 Either for his own account, or as a representative, or an agent for any third party (including the 2nd respondent), persuading, inducing, encouraging, procuring or soliciting:

1.1.1 any customer of the applicant to enter into a supply and/or other agreement with the 2nd Respondent, or any other business that competes with the applicant;

1.1.2 any customer of the applicant to purchase any product and/or service supplied by the 2nd respondent or any other business that competes with the applicant; or

1.2 Either for his own account or as a representative, or agent for any third party, persuading, inducing, encouraging, procuring or soliciting any employee or independent contractor engaged by the applicant, to become employed by, contracted by, or have an interest directly or indirectly in any manner whatsoever, in the business of the 2nd respondent which is a competing business of the applicant.

1.3 Being engaged, interested or concerned, whether financially or as an employee or either wise or whether directly or indirectly in any competing business (which

includes 2nd respondent);

1.4 Be a member, partner, trustee, director or shareholder of a close corporation, partnership, trust or company, as the case may be, carrying on or concerned directly or indirectly with any competing business (which includes 2nd respondent);

1.5 Act as a consultant or adviser to any competing business(which includes 2nd respondent);

1.6 The prohibitory interdict will remain operative until 26 February 2025.

1.7 The prohibitory interdict is limited to the geographical area of Gauteng.

1.8 On 17 August 2022 an order was granted by agreement that prohibited and interdicted the 1st respondent as per the Notice of Motion pertaining to the applicant's list of customers annexed to the order.

1.9 The matter was postponed to the opposed roll.

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The parties

2.1 The applicant is a private company that specializes in providing advanced coating facilities to original equipment manufacturers that served to extend, upgrade and restore the service life of components.

2.2 The 1st respondent was employed by the applicant as its managing director from 2011 until termination on 28 February 2022.

2.3 The 2nd respondent is a private company registered on 4 January 2022 with the 1st respondent as its only director. The main business of the 2nd respondent is similar to the business of the applicant. It is to be noted that the 2nd respondent was registered whilst 1st respondent was still in the employ of the applicant.

Contract of employment

3.1 On 13 May 2011 the applicant and the 1st respondent entered into a written agreement termed “Service and Restraint Agreement” annexed as Annexure “D” to the founding affidavit.

3.2 Annexure “D” is a voluminous document containing various definitions and interpretations of technical terms, employment conditions, capacity, functions and duties, confidentiality, cession on ownership of intellectual property, and, relevant to this proceedings, clause 12 which covers the Restraint.

3.3 The terms contained in clause 12 is in line with the interdictory provisions captured in the Notice of Motion and the order granted by the urgent court in August 2022.

3.4 Of importance is clause 12.5 which reads as follows:” The executive acknowledges and agrees that the undertakings given in terms of clause 12 are:

12.5.1 fair and reasonable as regards its nature, restraint and period;

12.5.2 necessary to protect the proprietary interests of the company”

3.5 The existence and validity of Annexure “D” is common cause and not in dispute.

Breach of the Employee restraint

The applicant accuses the 1st respondent of breaching the employee restraint by:

Soliciting the customers of the applicant (customer restraint)

Competing with the applicant (competing restraint)

Soliciting the employees of the applicant (employee restraint)

4.1 Customer restraint

4.1.1 It is common cause that the 1st respondent was in the employ of the applicant for a number of years and had therefore acquired intimate knowledge of the customers that the applicant had built up over a long time.

4.1.2 According to the affidavit of Ms A Glennie, an erstwhile employee of the applicant who took up employment with the 2nd respondent, she, during her tenure with the 2nd respondent, came across a copy of the complete customer list of the applicant which the 1st respondent was using as the 2nd respondent's primary target when selling and/or advertising.

4.1.3 It is admitted by the 1st respondent that he contacted at least one of the customers of the applicant to wit Mr R Botha of "Sulzer" which entity is an existing customer of the applicant. The 1st respondent states that the purpose was to "introduce" the business of the 2nd respondent.

4.2

Competing restraint

4.2.1 Whilst still in the employ of the applicant. The 1st respondent registered the 2nd respondent without the knowledge of the applicant. The 1st respondent proceeded to introduce and advertise coating solutions offered by the 2nd respondent to the existing clients of the applicant. This was done in a clandestine manner under the nose of the applicant.

4.2.2 Both the applicant and 2nd respondent specialise in coating solutions although the 1st respondent claims that the application method is different and that the selling DIAMANT products does not constitute a major part of the applicant's business. Needless to say, that can never be a justification.

4.2.3 The defence put forward by the 1st respondent that the 2nd respondent is not a

competing business do not hold water. On the evidence, viewed with a holistic approach, it is clear that the 2nd respondent is indeed a competing entity. Why else would the customer list of the applicant be in the possession of the respondents?

4.3

Employee restraint

4.3.1 From the affidavit of Mr J Ngobeni the following emerges:

(i) Mr Ngobeni is a long standing employee of the applicant;

(ii) He (Ngobeni) was contacted by the 1st respondent towards the end of June 2022 and offered employment with the 2nd respondent;

(iii) He attended an interview on the premises of the 2nd respondent where he was interviewed by the 1st respondent and his son;

(iv) At that time he was still in the employ of the applicant and the 1st respondent was aware of that. He did not inform the 1st respondent otherwise;

(v) Immediately after the interview the 1st respondent presented him with a written offer of employment which is annexed as Annexure "G" to the founding affidavit. Ironically this employment offer contains a restraint clause.

(vi) He did not accept the offer but instead informed his supervisor and handed the written offer to the applicant.

4.3.2 The 1st respondent admits that he offered employment to Mr Ngobeni but asserts that he was led to believe that Ngobeni resigned his employment with the applicant. Ngobeni specifically disputes this.

4.3.3 1st Respondent failed to provide any reason why he mistakenly believed that Ngobeni resigned.

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Legal framework

5.1 The law and the authority with regard to the legal principles governing restraint of trade is clear.

5.2 a Party wishing to enforce a restraint agreement need only allege and prove the agreement and the breach thereof by the other party.

5.3 In **Experian South Africa (Pty) LTD v Haynes and Another 2013 (1) SA 135 (GSJ)** it was held that: “ For the employer it suffices to show that there was confidential information or trade connections to which the employee had access and which could, in theory, be exploited by the new employee”

5.4 The general principle in our law is that contracts, if concluded freely and voluntary , and not *contra bonis mores* ought to be honoured. A Restraint of trade is an agreement between the parties that can be assailable if it damages the public interest and therefor in conflict with public policy. It can be unreasonable and contra public policy if it prevents one party at the termination of the contractual relationship from participating freely in the commercial and professional world without a protectable interest of the other party served thereby.

See: **Basson v Chilwan 1993 (3) SA 742 (A)**

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6.1 In the instant case it is common cause that the restraint exists. On the evidence it is clear to me that the restraint was breached by the respondents.

6.2 It is not necessary for breaches to be multiple or continuous. One breach is enough.

6.3 To exacerbate the situation for the 1st respondent, he continued his relationship with the 2nd respondent as the sole or managing director despite the court order of Van der Westhuisen J on 17 August 2022. This basically amounts to contempt.

6.4 In my view, the evidence is conclusive for a finding that the restraint was enforceable, not contrary to public policy and that several breaches on the part of the respondents occurred. Consequently the application must succeed.

6.5 As a punitive measure the Applicant moved for a cost order on attorney and client scale. Costs is in the discretion of the court and a punitive cost order is not warranted.

6.6 The order annexed hereto marked "X" is the order of court.

GB BOTHA

Acting Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 17 October 2023

Judgment delivered: 4 December 2023

Attorneys for applicant: Jarvis Jacobs
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Counsel for respondent:Adv N Louw