IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case No. 13029/2022

In the matter between:

CONSUPAQ, A DIVISION OF ASTRAPAK MANUFACTURING HOLDINGS (PTY) LTD **APPLICANT**

and

SHIVESH SOHAWAN **FIRST RESPONDENT**

TEQAL (PTY) LTD **SECOND RESPONDENT**

JUDGMENT

MSIWA AJ

Introduction

[1] The applicant manufactures tubes and closures for the home and person and care market. It employed the first respondent as a production planner in its business until 30 November 2022.

[2] He had signed his employment contract at the end of the document and initialled all pages except the pages on which a restraint of trade appears. He returned

the document to the applicant but there is no suggestion that he told the applicant that he disagreed with the restraint of trade in the contract.

[3] The first respondent conducted himself as the employee of the applicant in his capacity. He enjoyed a status of being in a high tier of management. The first respondent was groomed for a more senior position as part of the management team because of his illustrious performance.

[4] The first respondent was not confined only to duties of a production planner with skills, but also assumed high level roles by virtue of his acumen and enthusiasm at work. He was afforded the greatest opportunities, *inter alia* to acquire knowledge of the applicants' customers. He was responsible for planning the applicants' production and ensured that the applicant's production line was efficient and economically possible.

[5] Consequently, the first respondent was entrusted with the applicants' confidential and proprietary information about all aspects of the applicants' business and:

(a) He took part in monthly management meetings and daily meetings which he sometimes led.

(b) Until March/April 2022, the applicant's management team was provided with a "*Monthly Management Report Pack*" dealing in detail with every single aspect of the applicants' business. The executive summary disclosed a summary of the applicants' sales and whether it was above or below budget. Further, it set out the applicant's working capital and a summary of its sales performances.

(c) Members of the management, including the first respondent, were provided with every piece of information in detail necessary to run the applicant's business successfully and profitably.

(d) An excel spreadsheet setting out the applicants' strongest and weakest performing classes between October 2021 to February 2022 and March 2022 to September 2022 was presented to the management, including the first respondent.

[6] This is what constituted a protectable interest in this application.

[7] The above information is highly confidential and sensitive and would benefit any competitor to assess and gauge in great detail the position of the applicant, allowing it to target its shortcomings to its own advantage to the financial prejudice of the applicant.

[8] The first respondent, as a member of the management, was also given unrestricted access to the applicants' detailed financial and a whole range of confidential information; entire order books, expense analysis and income statements online, until his last day of employment on 30 November 2022.

(a) Even on 31 August 2022, upon notifying the applicant of his resignation, he chaired the MDT meetings.

(b) Amongst the responsibilities, he led the applicant's "lean *savings*" project. All the aforementioned is demonstrative proof that the first respondent acquired confidential information about the applicant's business's confidential and highly sensitive information.

[9] By virtue of possession of the applicant's confidential information, on 1 September 2022, the applicants' executives were averse to his resignation and his joining of the second respondent.

[10] The first respondent was adamant and aware of the restraint of trade obligations but persisted that he would not be acting in breach of it. An effort was made to remind him of the covenant in restraint of trade. He was implored and reminded that he was precluded to take employment with the second respondent for a period of six months from 1 December 2022. The second respondent never headed to that admonishment.

[11] The applicant seeks to interdict the first respondent being employed by its direct competitor in circumstances where he has been privy to the applicant's *most confidentia*l and *sensitive information* about every aspect of its performance as a business, including its financial position, forecasts, budget, pricing, applicants' customers and their needs.

[12] In the first respondent's new employment designation, so the applicant argues, he will probably disclose every secret the applicant has to the second respondent. It

is the applicants' contention that the first respondent has already breached his commitment by taking up the new employment with a direct competitor in breach of a restraint of trade, to which he had agreed.

[13] It is argued that the applicant is not required now to rely on his good faith that he will not disclose confidential information, or to believe that he did not access or copy any of the highly confidential information about the applicants' business strategies in place.

[14] It is further submitted that the applicant does not seek to remove the first respondent from the market unreasonably and claims only a six-month restraint during which the market dynamics would have changed.

[15] In defence, the first respondent avers that in July 2022, the applicant communicated to the Numsa Office, a notification contemplating of a possible dismissal of its employees in terms of s 189A of the Labour Relations Act 66 of 1995, which instilled fear in him that he might be retrenched. However, according to the applicant, the first respondent was never retrenched but was groomed for a senior management post instead, so the applicant argues. Secondly, he takes issue that the applicant never paid him a salary increase in February 2021, albeit the unfulfilled promises made by Mitchell, a manager of the applicant.

[16] The first respondent attempts to make a claim that he also performed additional work over and above his job description. He alleges that he was performing the work of a person who is paid R45 000 per month, while he was paid R28 000. In hindsight, this amounts to an unfair labour practice and exploitation of the first respondent.

[17] He further states he was fobbed off when expressing his disgruntlement until he protested.[1]He expressed his concerns in a meeting between Kalick, also a manager of the applicant, Mitchell and first respondent. [2]

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[1] Page 74 paragraphs 23; 24; and 25 of the first respondent's answering affidavit.
[2] Page 78 paragraphs 32 and 33 of the first respondent's answering affidavit.

[18] The first respondent stated that he had limited information in respect of the affairs of the applicant via his additional responsibilities for which he had not been remunerated.[3]

[19] He denied having any dealings with the applicant's customers, nor having spoken to them.[4]

[20] He further denied that he was marked for advancement and dismissed any prospects and future progress with the applicant. He also denied ever being groomed for a senior management post.[5]

[21] He refuted having knowledge of the applicants' cash flow and working capital, claiming that he was provided with very limited knowledge on the applicants' performance versus its budget until March/April 2022.[6]

[22] He denied that he was a member of the management team and provided with information in respect of the running of the applicants' up until March/April 2022.[7]

[23] He concedes that the last time he had access to 125 ML Lux Lid and jar in respect of which he would arrive at the applicant in February 2021 and he would have never been commissioned thereafter. [8]

[24] He also concedes that he was involved in the "*Lean Savings*" project until March/April 2022.[9]

[25] He denied having accepted any restraint of trade obligations.[10]

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[3] Page 78 paragraphs 44 of the first respondent's answering affidavit.
[4] Page 79 paragraphs 45 and 46 of the first respondent's answering affidavit.
[5] Page 81 paragraphs 55, 56, and 57 of the first respondent's answering affidavit.
[6] Page 85, paragraph 57 of the first respondent's answering affidavit.
[7] Page 86 para 74 of the first respondent's answering affidavit.
[8] Page 89 para 92 of the first respondent's answering affidavit.
[9] Page 90 para 94 of the first respondent's answering affidavit.
[10] Page 92 para 102 of the first respondent's answering affidavit.

[26] The first and second respondents reverted to be applicants' attorneys conveying undertakings that the first and second respondents were prepared to allay any concerns that the applicant had to avoid the litigation.

[27] In deciding whether the application be granted or not, the court must determine:

(a) Is there an agreement of restraint of trade between the applicant and the first respondent;

(b) Is there a protectable interest;

(c) Is that interest threatened by the respondents?

(d) Is the granting of restraint order not against public policy?

The onus of proving that the restraint is against the public policy and why it should not be enforced rests with the first respondent.

[28] The relevant part of the employment contract between the applicant and the first respondent reads:

'INTRODUCTION

The employee acknowledges that during his time in the employment of the company and the group he has been and will be exposed and/or have access to confidential information. On termination of employment; if the employee were to join or become associated with any competitor of the company or the groups or convene business on his/her own competition with the company or group, the benefit of the confidential information would inevitably become available to employer, or to the competitor and enable the employee to complete unfairly with the company or the group, and cause the company or the group great prejudice.

The company and the group would suffer substantial damage if the employer were to tolerate or be involved in a business similar to the business carried on by the company or the group within the territory.

There is a real possibility of damage inflicted on the company or the group of the employee were to attract away other employees of the group or constancy.'

[29] The restraints in the circumstances, during his/her employment within the company and for a period 6 (six) months after the termination date, whatever the reason for termination of the employee's employment may be the Employee shall not:

'In any capacity whatsoever including as partner, proprietor, director, shareholder, employee, consultant, financier, agent, representative, assistant, trustee, or beneficiary of a trust or member of a close corporation, directly or indirectly, carry on or be interested or engaged in or concerned with any company, firm, partnership, close corporation, trust, undertaking or concern which carries on business in competition directly or indirectly, with the business carried on by the company at the termination date...
Furnish or disclose any information, whether confidential or otherwise, of or relating to the company or group to any other person except with the prior written consent of the company or Astrapak as the case may be...'

[30] The general legal principle is that contracts, freely and voluntarily entered into, must be honoured, unless they are contrary to public policy or enforcement of the terms, in the circumstances of the case, is contrary to public policy.[11] The above approach finds a great support in agreements of restraint of trade even in our constitutional era.[12]

[31] A party who wishes to enforce a restraint of trade agreement need only allege and prove the agreement and its breach by the respondent. In the instant case, I find that the applicant has proven an agreement, notwithstanding the first respondent's contention that he did not sign the agreement, but later conceding that he signed the agreement but did not initial the page with the restraint clause. Pursuant to a conclusion of the employment agreement, the first respondent performed contractual obligations under it until he resigned from the applicant's employment.

[32] On behalf of the first respondent it was vehemently argued that the initialled document does not constitute an agreement of restraint of trade.

[33] A restraint of trade will not be enforced if there is no protectable interest. The first respondent bears the onus to prove that the restraint should not be enforced.[13] The protectable interest may take the form of trade secrets, confidential information, goodwill or trade conventions.

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[11] *Beadica 321 CC and Others v Trustees, Oregon Trust and Others* 2020 (5) SA 247 CC para 89,90 and 92.
[12] *Den Braven SA (Pty) Ltd v Pillay* 2008 (6) SA 229 (D) paras 32 and 35.
[13] *Digicore Fleet Management v Steyn* [2009] 1 ALL SA 442 (SCA) para 7.

[34] In determining whether the agreement should be enforced, regard is had to the circumstances then present – not to those circumstances arising when the agreement was concluded.

[35] A party who wishes to be absolved from his restraint of trade must allege and prove that the enforcement of the restraint of trade would be contrary to public policy.[14] The onus rests with the respondent to prove that the restraint should not be enforced. Whether a restraint of trade is contrary to public policy or should not be enforced requires a balancing exercise between two conflicting public interest considerations.[15]

[36] The first respondent admitted employment by the applicant but added information about the date; he denied that the document annexed was a copy of his contract of employment and stated that it is not initialled; and denied that the contract of employment contains the provisions in respect of *confidentiality and covenant of trade.*[16]

[37] The first respondent is obliged to seriously and plainly address the fact to be disputed, namely that the contract of employment concluded by him never contained the provision in respect of confidentiality and covenant in restraint of trade.[17] The first respondent has failed to discharge his onus.

[38] It is desirable that the first respondent's denial was not bona fide when the applicant, in a further affidavit, explained that unfortunately an incorrect annexure (a draft employment contract) had been attached when the urgent application papers were compiled. The applicant then annexed a copy of the signed contract between the applicant and the first respondent.[18]

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[14] *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA (A) 874 at 897F-898E.
[15] *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) para 15.
[16] Page 80, paragraph 53 of the first respondent's replying affidavit.
[17] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at 375-376.
[18] Page 143 paragraphs 7-9 of the founding affidavit; pages 149-161 Annexure "PRA1".

[39] In his answering affidavit thereto, the first respondent was constrained to admit that he had in fact signed a contract of employment with the applicant, which contained the provisions in respect of *confidentiality and a covenant in restraint of trade*. He subsequently changed his version. This is mala fides on the part of the first respondent.

[40] The first respondent signed the contract on the last page thereof and he returned it to the applicant without demurring any clauses or terms of the agreement. Therefore, I find that he in fact signed the contract with a restraint of trade.

[41] The legal consequences are enshrined in various authorities:
'When a man makes an offer in plain and unambiguous language, which is understood in its ordinary sense by the person to whom it is addressed, and accepted by him in *bona fide* in that sense, then there is a concluded contract. Any unexpressed reservations hidden in the mind of the promisor are in such circumstances irrelevant. He cannot be heard to say that he meant his promise to be subject to a condition which he omitted to mention, and of which the other party was unaware.'[19]

Protectable interest

[42] The first respondent, in disputing that there is a protectable interest, avers that he had "limited information" (after refusing to carry on with certain additional responsibilities) and limited involvement in management strategies and savings initiatives. He further states:

(a) That he had no dealings with customers and no relationship with them.
(b) That customers' details including value of sales, changes rapidly.
(c) That the knowledge of some of the order information was irrelevant for the purpose of his employment by the second respondent and thus *"inconsequential to his employment"*.
(d) That he did not "access" or had any reason to "access" any information.

I am not convinced that the response hereof by the first respondent actually offers a good answer legally.

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[19] *I Pieters and Company v Salomon* 1911 Ad 121 at 137.

[43] The first respondent is in possession of confidential information and whose disclosures to his new employment is inevitable as he will be employed in a similar position with the second respondent, a direct competitor of the applicant.

[44] I am satisfied that there was a restraint of trade concluded by the first respondent with the applicant. The restraint was intended to save the applicant of this probable risk of disclosure. I am of the view that the restraint in the circumstances is neither unreasonable nor contrary to the public policy.

[45] The applicant is justified not to take the word of the first respondent that he will not disclose or utilise the applicants' highly sensitive and confidential information in his possession, which he acquired during his employment with him.

[46] The first respondent lacked candidness in his initial answer to the application papers, namely, falsely denying that he had concluded an employment agreement with the applicant to which he agreed to a restraint of trade. In addition, the respondent did not disclose the 45% increase he received in 2021. An inescapable conclusion is that he is not a person whom you can accept his word in confidence.

[47] The period of the restraint is six months, which is a short period. I am satisfied that it is reasonable and in the public interest to consider it enforceable.

[48] The first respondent has referred to a fear of being retrenched. He relied on correspondence and a report by a trade union obtained by him after resignation. I am not persuaded that, that might have any bearing in him resigning as his knowledge of the report is post facto his resignation. I am of the view that his fear of being retrenched is not supported by any parity of reasoning.

[49] The second respondent entered the fray, by describing how he started the applicant and later resigned. Thereafter he established the second respondent business. This does not advance a good legal basis whatsoever to oppose the application.

[50] The second respondent also contends that the applicant should have been satisfied with the undertaking by the first respondent. I am not persuaded that this contention had merit and I reject it on the basis that there is an agreement of restraint of trade concluded between the applicant and the first respondent. The compliance with the terms thereof by any of the parties does not need to policed.

[51] The second respondent has unnecessarily and unwisely defended the application. He also states that the products of the applicants and the second respondent are not identical and the first respondent would not provide "*beneficial*" information.

[52] I find that there is restraint of trade agreement and it is a protectable interest to the applicant. The applicant has reason to fear that the confidential and sensitive information in possession of the first respondent will definitely harm his business if given to the respondent

[53] The respondents have failed to refute the applicants' version that the confidential information in possession of the first respondent is protectable. Further, the respondent failed to prove that the restraint of trade should not been enforced and/or that its enforcement is against the public policy.

[54] The applicant herein is seeking to enforce a protectable interest recorded in a restraint of trade contained in the agreement. He does not have to show that the first respondent used confidential information, it suffices to demonstrate only that the first respondent could do so.

[55] The first respondents' answering affidavit in material aspects consists of bare denials or is unsubstantiated without demonstrating that there is no other way open to him and nothing more could be expected of him.[20]

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[20] *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA); *National Scrap Metal (Cape Town) (Pty) Ltd and Another v Murray & Roberts Ltd and Others* 2012 (5) SA 300 SCA at 305E.

[56] It is trite that a final order be granted, if facts stated by applicant and admitted by the respondent, together with facts alleged by the respondent, justify such an order unless the court is satisfied that the respondent's version consists of bald or uncreditworthy denials or so clearly untenable or so palpably implausible as to warrant its rejection merely on the papers.[21]

[57] In the instant application, the first respondent not only demonstrated a lack of candidness, but his answering affidavit consists of a bald, uncreditworthy and implausible version.

[58] In the circumstances, I am satisfied that the first respondent has not discharged, in the main, the onus resting upon him that there is no agreement of restraint of trade, with a protectable interest. Further, that enforcement thereof will not be in the public interest.

[59] In the result, I make the following order:

1 The first respondent is interdicted and restrained from employment with the second respondent and shall not in any capacity whatsoever, including, as proprietor, partner, director, shareholder, employee, consultant, contractor, financier, agent, representative, assistant, trustee or beneficiary of a trust or member of a close corporation, directly or indirectly, carry on or be interested or engaged in or concerned with the second respondent or any company, firm, partnership, close corporation, trust, undertaking or concern, which carries on business in competition, directly or indirectly, with the business as carried on by the applicant for a period of 6 (six) months from 1 December 2022;

2 The first respondent is interdicted and restrained from disclosing the applicant's confidential and/or proprietary information to any of the applicant's competitors, including the second respondent.

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[21] *Plascon- Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

3 The second respondent is interdicted and restrained from employing the first respondent and/or contracting for the services of and/or engaging the services of the first respondent to compete with the applicant's business either directly or indirectly, either personally or as a shareholder, partner, director, employee or in any other capacity for a period of 6 (six) months from 1 December 2022.

4 The first and second respondents are directed to pay the costs of this application, jointly and severally the one paying, the other to be absolved, such costs to include the costs reserved on 14 December 2022 and the costs of the appearance on 16 January 2023, and the costs reserved on 10 March 2023.

MSIWA AJ

APPEARANCES

Case Number	:	D13029/2022
Applicant	:	CONSUPAQ, A DIVISION OF ASTRAPAK MANUFACTURING HOLDINGS (PTY) LTD
Represented by	:	VOORMOLEN (SC)
Applicant attorney	:	NORTON ROSE FULBRIGHT SOUTH AFRICA INC
Respondent	:	GEY VAN PITTIUS ATTORNEYS
Represented by	:	ADVOCATE VA ROOYEN
Respondent's Attorney	:	NORTON ROSE FULBRIGHT SOUTH AFRICA INC
Date of Hearing	:	13 MARCH 2023
Date of Judgment	:	24 MARCH 2023