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CASE NO 256/91

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

NEVILLE RICHARD RAWLINS

FIRST APPELLANT

CURNOW M & G LIMITED

SECOND APPELLANT

and

CARVANTRUCK (PTY) LIMITED

RESPONDENT

CORAM: HOEXTER, NESTADT, KUMLEBEN, NIENABER JJA

et HOWIE AJA

DATE HEARD: 2 NOVEMBER 1992

DATE DELIVERED: 24 NOVEMBER 1992

J U D G M E N T

NESTADT, JA:

This is an appeal against the grant of an interdict prohibiting the breach of a restraint of

trade clause consequent upon the termination of the contract of employment in which it was contained.

The respondent was the employer. It carries on business from premises in East London as a distributor of inter alia decorative automobile and industrial paints. With effect from 27 November 1989 it engaged the first appellant (Rawlins) as a so-called sales representative. After an initial three month probationary period a written agreement was entered into between them. In terms of the agreement Rawlins was to be paid a "basic salary" of R1 800 per month plus a commission. The agreement does not define the duration of the employment but one months notice of its termination by either party is provided for. The restraint clause reads as follows:

"You [Rawlins] undertake not to be involved directly or indirectly in any other business or undertaking during your employment. On termination of your employment you will refrain from being

engaged directly or indirectly with our suppliers or competitors in the Eastern Cape, Border, Transkei and Ciskei, for a period of two years."

Rawlins worked for the respondent for about fifteen months. During this period he sold the paint products marketed by the respondent to customers in the East London area and in Transkei. On 28 February 1991, however, he terminated his employment with the respondent. Thereupon he immediately took up a position as a salesman with the second appellant (Curnow). It also carries on business in East London selling the same type and indeed the same brand of paint as the respondent and in most cases to the same customers. In the result, Rawlins, on behalf of Curnow, began calling on and selling paint to persons (in the East London area and the Transkei) whom he had previously dealt with when working for the respondent.

It was in these circumstances that the

respondent, on 5 March 1991, brought an urgent application in the Eastern Cape Division against Rawlins and Curnow. Relying on the restraint of trade clause it claimed an order (as eventually amended) in effect interdicting:

- (i) Rawlins for a period of two years from 1 March 1991 and within the areas of the Eastern Cape, Border, Transkei and Ciskei from working for Curnow;
- (ii) Rawlins from "contacting and/or soliciting" any of the respondent's customers as at the date of termination of his employment with the respondent; and
- (iii) Rawlins and Curnow from using any information or documents relating to the respondent's business or its clients acquired by Rawlins during the course of his employment with the

respondent.

The matter came before VAN RENSBURG J who despite opposition substantially granted the relief sought. However, the area of the interdict referred to in (i) was limited to East London and its environs (as defined by the court) and Transkei. Also, in relation to (iii), the reference to "documents" was deleted. Rawlins and Curnow were ordered to pay the costs of the application jointly and severally. With the leave of the judge a quo Rawlins and Curnow now appeal against the order made.

The wording of the order gives rise to certain problems which it is as well to deal with at the outset. As regards (i), the prohibition is (in accordance with the terms of the restraint clause) against being employed by a competitor in any capacity. Moreover, it may be that on a proper interpretation of (ii) Rawlins

cannot contact or solicit even those customers of the respondent with whom he had no dealings during his employment with the respondent. Rawlins, however, did not complain about these matters. This being so, and assuming that the clause was otherwise enforceable, the respondent was entitled to the order sought. It is clear from what has been said that it and Curnow are competitors. Nor was it in dispute that Rawlins, on leaving the respondent's employ, became "engaged...with" Curnow within the meaning of this term as used in the restraint clause and that this occurred within the East London and Transkei areas. And, as regards paragraph (ii), dealing with the respondent's customers would be a facet of Rawlins' duties as an employee of Curnow and thus fall within the scope of the restraint. In other words this part of the order, though probably superfluous, is really nothing more than an amplification of

and an adjunct to the first order prohibiting Rawlins from being engaged with Curnow. As such it must, even though this is not stated, be read as being restricted to the area and period referred to in (i). And as far as Rawlins is concerned no independent argument against order (iii) was advanced.

The basis on which Rawlins (and, as will be seen, Curnow) opposed the respondent's application was that the restraint clause was unenforceable. VAN RENSBURG J rejected this contention. The issue in this appeal is whether he was right in doing so.

Applying the principles laid down in Magna Alloys and Research (SA) (Pty) Ltd vs Ellis 1984(4) SA 874(A) (and see too Sunshine Records (Pty) Ltd vs Frohling and Others 1990(4) SA 782(A) at 794 D-E and 795 G-I), the matter turns on whether Rawlins has shown that, judged at the time of the application, the

restraint was an unreasonable one and therefore against the public interest. He sought to do this along traditional lines. His case was that the respondent had no proprietary interest which required protection; in particular no misuse or exploitation of either its trade secrets or trade connections was involved. It was furthermore argued that the restraint was in any event too wide, particularly as to time.

I do not propose to analyse what the affidavits say about the issue of trade secrets. I shall assume in favour of Rawlins that he discharged the onus of proving that no information confidential to the respondent was disclosed to him during his employment. This leaves for consideration the question whether Rawlins negatived the second type of proprietary interest, ie trade connections. It follows from what I have said that unless he did, the restraint clause, not having been

shown to be unreasonable, was enforceable.

The need of an employer to protect his trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he leaves the employer's service he could easily induce the customers to follow him to a new business (Joubert: General Principles of the Law of Contract 149). Heydon: The Restraint of Trade Doctrine (1971) 108, quoting an American case, says that the "customer contact" doctrine depends on the notion that "the employee, by contact with the customer, gets the customer so strongly attached to him that when the employee quits and joins a rival he automatically carries the customer with him in his pocket". In Herbert Morris Limited vs Saxelby [1916] 1 AC 688 (HL) at 709 it was said that the relationship must be such that the employee acquires

"such personal knowledge of and influence over the customers of his employer...as would enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer's trade connection..."

This statement has been applied in our courts (by eg EKSTEEN J in Recycling Industries (Pty) Ltd vs Mohammed and Another 1981(3) SA 250 (SE) at 256 C-F). Whether the criteria referred to are satisfied is essentially a question of fact in each case, and in many, one of degree. Much will depend on the duties of the employee; his personality; the frequency and duration of contact between him and the customers; where such contact takes place; what knowledge he gains of their requirements and business; the general nature of their relationship (including whether an attachment is formed between them, the extent to which customers rely on the employee and how personal their association is); how

competitive the rival businesses are; in the case of a salesman, the type of product being sold; and whether there is evidence that customers were lost after the employee left (Heydon: 108-120; and see also Drewtons (Pty) Ltd vs Carlie 1981(4) SA 305(C) at 307 G-H, and 314 C and G).

Many of the facts relevant to the issue whether the respondent's trade connections required protection are in dispute. It is, however, unnecessary to attempt (as the court a quo in certain respects did) to resolve the disputes. The rule (stated in Plascon-Evans Paints Ltd vs Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623(A) at 634-5) to the broad effect that an application for final relief is generally decided on a respondent's version, applies even where the onus of proof is on such respondent (Nggumba en 'n Ander vs Staatspresident en Andere 1988(4) SA 224(A) at 259 D-E

and 262 B). This being so, it suffices to examine only Rawlins' answering affidavit. He denies the allegation made in the respondent's founding affidavit that prior to his employment with the respondent he had not been aware of the respondent's clients; that the respondent introduced him to them; and that he built up clientele as a direct result thereof. Rawlins says that prior to his employment with the respondent he had worked for a number of years for suppliers of automotive products in the areas in question; in this way he already had a "following of (his) own in the automotive industry in the Eastern Cape"; he had developed good relations with the buying staff of the various consumers; he had an intimate knowledge of their identity; save for a few exceptional cases he was never introduced to the respondent's customers; on the contrary his function was to find customers (by introducing the respondent's

products to "my existing clients") or by "using the Yellow Pages in order to make new contacts"; in the result he never built up any appreciable clientele because of any introductions by the respondent. In conclusion he states:

"I do not consider my contacts in the automotive industry in East London and Transkei to be the intellectual property of the Applicant, as I have built up these contacts over very many years and I respectfully submit that it would be against public policy for me to be deprived of my right to earn a living simply because I utilised these contacts whilst in the employ of the Applicant."

In summary then, what Rawlins says is that during his employment with the respondent he largely dealt, not with its existing customers, but with his own pre-existing following or buyers whom he later found. Does this establish that the respondent did not have a proprietary interest of the kind under consideration? It is, of course, a factor in his favour; but not

conclusively so (see Cansa (Pty) Ltd vs Van der Nest 1974(2) SA 64(C) at 69 E-H and M & S Drapers vs Reynolds [1956] 3 All ER 814 (CA) at 820 E; compare, however, the views of DENNING LJ at 821 A-E). Even though the persons to whom an employee sells and whom he canvasses were previously known to him and in this sense "his customers", he may nevertheless during his employment, and because of it, form an attachment to and acquire an influence over them which he never had before. Where this occurs, what I call the customer goodwill which is created or enhanced, is at least in part an asset of the employer. As such it becomes a trade connection of the employer which is capable of protection by means of a restraint of trade clause.

The onus being on Rawlins to prove the unreasonableness of the restraint, it was for him to show that he never acquired any significant personal

knowledge of or influence over the persons he dealt with as a salesman of the respondent, over and above that which previously existed. In my opinion he did not do so. No allegation that he did not acquire such knowledge or influence is made by Rawlins. Nor do I think that it can be inferred. On the contrary, it would appear to be no less probable that Rawlins' relationships with the customers he dealt with as a salesman of the respondent were such as to make it reasonable for the respondent to protect itself. Rawlins worked for the respondent for some fifteen months. During this time he received training in the use and marketing of products sold by the respondent. He was obviously a successful salesman. Taking account of the realities of commerce, it is a fair inference in these circumstances that it was Rawlins' employment with the respondent that gave him the opportunity to

consolidate or even strengthen the prior rapport which he had with his customers. This in substance is what the judge a quo, with justification, found. He states:

"(W)hat is of importance is that in the course of his employment with the applicant the first respondent must have obtained orders from customers for the applicant's products. By so doing the first respondent brought into being a business relationship between the applicant and those customers who had not previously had dealings with the applicant. In the case of existing customers, he furthered an already existing business relationship. This would have been the position irrespective of whether or not the customers concerned were business acquaintances of the first respondent before he entered the employ of the applicant and irrespective of whether the names of customers were obtained from customer lists furnished to the first respondent by the applicant or from the Yellow Pages. The point is that having done business with customers on behalf of the applicant while in the applicant's employ there was every prospect that after leaving the employ of the applicant and entering the employ of one of the applicant's competitors, the first respondent would be in a position to approach the same customers as a salesman who had previously dealt with them on behalf of the applicant and induce them to place orders with his new employer. This is especially

so in the case of the second respondent, in whose employ the first respondent presently is, if regard is had to the fact that the second respondent markets the selfsame products as the applicant produced by the same manufacturer."

It might be that VAN RENSBURG J states the propositions contained in this passage somewhat too strongly. The point is, however, that Rawlins says nothing, along the lines alluded to earlier, about the nature of the relationship that was formed with his customers. In particular, he does not explain how many there were or how frequently or for how long he saw them. Nor, save for a bald statement that he had an "intimate knowledge of the identities of buyers and businesses in the automotive industry", does one know how close his previous ties with such buyers were. Bear in mind also that Rawlins acquired his clientele in relation to the supply of tyres and motor vehicle spare parts and accessories. Prior to his employment with the

respondent he never sold them automotive paint. This consideration must to my mind detract somewhat from the relevance of his trade connections in his subsequent transactions on behalf of the respondent. Finally, and as I have indicated, there would appear to be two categories of customers who cannot be said to have been part of his own trade connections. One was those customers to whom he was admittedly introduced by the respondent. He says of them:

"It is true that occasionally Higson (the managing director of the respondent) requested me to call upon customers who, (to use his words) 'hadn't seen a rep in six months', and that some of these customers were not previously known to me. This, however, accounts for a very small proportion of the activities in which I was engaged whilst in the employ of the Applicant."

The other category consisted of the "Yellow Pages... contacts". Rawlins does not say how many customers these two groups comprised or (save for describing the

one as a "very small proportion") what proportion they formed of the total number of customers he dealt with.

Rawlins, however, relies on a further ground in support of his case that the respondent had no trade connections capable of protection. He avers that because the respondent and Curnow "have historically shared the same customers...there are no customers who could be said to belong exclusively to the Applicant or the second respondent". I do not think this conclusion is at all sound. It must be a common phenomenon in the business world for trade rivals to have mutual customers. No reasons are given why it is inconsistent with one of the suppliers building up and maintaining a trade connection with such customers. On the contrary, it might enhance the need to do so.

No serious attack was made on the reasonableness of the area of the restraint or the

manner in which its sphere of operation was cut down by the court below. Accordingly, the remaining question in regard to the enforceability of the clause is whether its duration is unreasonably long. The answer depends upon a value judgment (National Chemsearch (SA) (Pty) Ltd vs Borrowman and Another 1979(3) SA 1092(T) at 1105 C), taking into account (according to one test) how soon the hold of the old employee over customers will weaken (Haydon, 159). It will be recalled that the restraint is for a period of two years. I confess to thinking that this is rather a long time. It must be close to the limit which would be reasonable in this type of case. Rawlins' salary (excluding commission) was a modest one. He had not been long in the respondent's employ. On the other hand he was a salesman who because of his experience had a particular expertise. Furthermore, for the reasons given by VAN RENSBURG J,

and bearing in mind the limited area to which the restraint applies, it would not seem that its enforcement will appreciably inhibit Rawlins' ability to earn a living. On a conspectus of all the facts and in the absence of anything in his affidavit alleging unreasonableness of the duration of the restraint, I am not persuaded that the two year period is unfair.

It may be that a referral to oral evidence would have enabled Rawlins to make out his case on the issue under consideration. There was, however, no application to the court a quo that this be done. Before us, however, it was (faintly) suggested that the matter be remitted for this purpose. There is no merit in the request if only for the reason that this is a case of a paucity of evidence rather than a case of a material dispute of fact. The result is that, the allegations made by Rawlins being insufficient to show either that

the respondent was not entitled to protect its trade connections or that, as ordered, the restraint was unreasonably wide, he failed to prove that it was unenforceable. It follows that the sanctity of contract must prevail. The interdict against Rawlins was correctly granted. His appeal must fail.

This brings me to to Curnow's appeal. It can be briefly disposed of. Mr Lang, on behalf of the respondent, conceded that it had to succeed. I agree. The application against Curnow could only be granted on a delictual cause of action. In argument only two were referred to viz, the procurement of a breach of contract and unfair competition. Neither, however, was established on the papers.

Plainly, Rawlins as the unsuccessful party must pay the respondent's costs both in the court a quo and on appeal. But a problem as to Curnow's costs

arises. On the basis that costs follow the event, it would normally be entitled to its costs in both courts. However, I do not think that in casu this result should follow. Firstly, Curnow and Rawlins have at all stages of the proceedings in this matter been represented by the same attorneys and counsel. Secondly, Curnow in opposing the application and advancing the appeal made common cause with Rawlins. By this I mean that the main basis on which it denied liability was not that the respondent had no cause of action (as discussed above) against it. It was rather that the restraint was unenforceable. In the result Curnow's actual costs were limited; and its success, in relation to the defences raised, was also limited. In these circumstances it would, I consider, be wrong for Curnow to get all its costs. Were this to happen, the order that Rawlins pay the respondent's costs would be ineffectual. Counsel

estimated that not more than 20% of the argument in the court a quo was devoted to the relief sought against Curnow. Before us, I think it was less than 10%. On an overview of the matter I think the fairest order is that the respondent be directed to pay 15% of Curnow's costs (in both courts).

As I indicated towards the beginning of this judgment, paragraph (ii) of the court a quo's order must be read subject to the constraints as to area and time specified in paragraph (i) thereof. I propose to amend the order to reflect this.

The following order is made:

- (1) (a) The appeal of Rawlins (the first appellant) is dismissed with costs.
- (b) The appeal of Curnow (the second appellant) succeeds. The respondent is to pay Curnow 15% of its costs of appeal.

(2) The order of the court a quo is altered to read:

"1. The First Respondent be and is hereby interdicted for a period of two years from the 1st March 1991 from being engaged directly or indirectly with suppliers or competitors of the Applicant within the areas of Transkei and East London, the East London area being defined as comprising the municipal areas of East London, Cambridge, Beacon Bay and Gonubie.

2. The First Respondent be and is hereby interdicted for the period and within the area referred to in paragraph 1 from contacting and/or soliciting as customers of Second Respondent any of the Applicant's customers as at the date of termination of his employment with the Applicant.

3. The First Respondent be and is hereby interdicted from attempting to utilise in the conduct of the business of the Second Respondent any information relating to the Applicant's business and/or its clients acquired by the First Respondent during the course of his employment by the Applicant.
4. The application against the Second Respondent is dismissed.
- 5 (a) The First Respondent is to pay the applicant's costs.
- (b) The Applicant is to pay the Second Respondent 15% of its costs."

NESTADT, JA

HOEXTER, JA)
 KUMLEBEN, JA) CONCUR
 NIENABER, JA)
 HOWIE, AJA)