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

Case No: D12620/2023

In the matter between:

B & B PLUMBING AND BUILDING SUPPLIES (PTY) LTD	**APPLICANT**

and

VISHNU GOVENDER	**FIRST RESPONDENT**
NAEEM LOKHAT	**SECOND RESPONDENT**
HEMRAJ RAMNATH	**THIRD RESPONDENT**
PLUMBKOR (PTY) LTD	**FOURTH RESPONDENT**

ORDER

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1 The first to fourth respondents are interdicted and restrained until the date in paragraph 2 below, and in the province of KwaZulu-Natal from:

1.1 soliciting the custom of or dealing with or in any way transacting with, in competition to the applicant, any business, company, firm, undertaking, association or person, which during the last twelve months preceding the date of termination of the employment of the first, second and third respondents had been a competitor or a customer of the applicant in the province of KwaZulu Natal;

1.2 directly or indirectly offering employment to or in any way causing to be employed any person who was employed by the applicant as at the termination of the employment of the first, second and third respondents with the applicant or at any time within twelve months preceding such termination.

2 The period of the interdict in paragraph 1 above shall be until:

2.1 15 July 2024 in respect to the first respondent;

2.2 5 August 2024, in respect to the second respondent; and

2.3 11 September 2024 in respect of the third and fourth respondents.

3 The first to third respondents are interdicted and restrained from directly or indirectly using or disclosing the confidential information of the applicant for their own benefit or for the benefit of any third party, including the fourth respondent.

4 Each party shall pay their own costs of the application.

JUDGMENT

Shapiro AJ:

[1] The applicant is a family run supplier of plumbing material in KwaZulu-Natal, having been in business for approximately 38 years. The first to third respondents were erstwhile employees of the applicant and have all been employed by the fourth respondent, which commenced business on 3 November 2023.

[2] The fourth respondent is also a supplier of plumbing materials in KwaZulu-Natal. There is no dispute that the applicant and the fourth respondent trade in the same industry and geographical area. The fourth respondent also intends to do business with the same suppliers with whom the applicant deals.

[3] Although the first to third respondents were employed by the applicant before 2021, they all signed new contracts of employment in December that year after the applicant changed from a partnership to a company.

[4] Given the dispute between the parties about the nature and enforceability of the restraint of trade provisions contained in all the contracts of employment, it is necessary to quote the relevant clauses in full:

‘23. Restraint of Trade

23.1 In this clause, the following words shall have the following meaning:

23.1.1 "Business" shall mean any person, business, company, association, corporation, partnership, or undertaking, whether incorporated or not.

23.1.2 "Interest/Interested" shall mean interested or concerned, directly or indirectly, whether as proprietor, partner, shareholder, employee, agent, financier, or in any other capacity whatsoever, and/or permitting his or her name being used in connection with or in any manner relating thereto.

23.1.3 "The territory" shall mean KwaZulu Natal.

23.2 …

23.3 In terms of the restraint of trade, the employee specifically undertakes and agrees to:

23.3.1 Not to be interested in any business in the territory which carries on business, manufactures, sells or supplies any commodity or goods, brokers, or acts as an agent in the sale or supply of any commodity or goods and/or performs or renders any service in competition with or identical or similar or comparative to that carried on, sold, supplied, brokered or performed by the company during the period of the employment of the employee up to and including the last day of the employment of the employee;

23.3.2 Not to solicit the custom of or deal with or in any way transact with, in competition to the company, any business, company, firm, undertaking, association or person, which during the period of twelve (12) months preceding the date of termination of the employment of the employee has

been a competitor, a customer or supplier of the company and the territory; and

23.3.3 Not to directly or indirectly offer employment to or in any way cause to be employed any person who was employed by the company as at the termination of the employment of the employee with the company or at any time within twelve (12) months immediately preceding such termination.

23.4 Each restraint in this entire clause shall operate and be valid and binding for a period of twelve (12) months, calculated from the date of termination of the employment of the employee with the company.

23.5 Each restraint in this entire clause shall be construed as being severable and divisible and applicable to the employee, with whether that restraint is in respect of:

23.5.1 Nature of the business or concern.

23.5.2 Area or Territory.

23.5.3 Article, commodities, or goods sold and/or supplied.

23.5.4 Services performed or rendered.

23.5.5 Company or concern entitled to the benefit thereof.'

[5] The applicant's affidavits reveal a certain lack of clarity about which clauses of the restraint applied to its erstwhile employees. The respondents, in turn, initially sought to advance an interpretation of the restraint that it prohibited "moonlighting" during employment with the applicant and not employment with a competitor because clause 23.3.1 prohibits employees from being interested in competing businesses or undertakings "during the period of the employment of the employee up to and including the last day of the employment of the employee".

[6] I will not repeat the oft-cited method of interpretation set out by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.[1] In summary, I must consider the language used, the context in which the restraint appears and the apparent purpose to which it is directed, as well as the material known to those responsible for its production. A sensible meaning must be preferred to one that leads

[1] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) S A 593 (SCA).

to insensible or unbusinesslike results or undermines the apparent purpose of the document.

[7] The restraint of trade must be read in context. The reference to the period of employment of the employee and/or the period of twelve months preceding the date of termination of the employment is not to prohibit moonlighting but instead to identify the time period in which the company itself rendered services, supplied goods to its customers, did business with its suppliers, etc.

[8] The restraint clause seeks to identify and protect current relationships between the applicant and its customers on the one hand, and with its suppliers on the other. There is no other common sense or businesslike interpretation that I can apply to the restraint, especially given the specific wording of clause 23.4, which refers to "each restraint in this entire clause" that will be binding for twelve months after the date of termination of employment. The restraints "in this entire clause" must then mean the restraints set out in clause 23.3 because these are the only restraints contained in the agreement. The respondents' interpretation ignores the express wording and purpose of clause 23.4 or seeks to read words into that clause to limit its application, contrary to the express words "this *entire* clause". (My emphasis.)

[9] The applicant sought to rely on the whole of clause 23. The relief sought in the Notice of Motion also make this clear. Therefore, and if I find that the applicant has made out a case, I will have no difficulty in applying the provisions of clause 23 in the way that it was both intended and expressly stated to apply.

[10] The respondents have not levelled any meaningful challenge either to the duration of the restraint or its geographical area and the core question (as always) is then whether the applicant has established protectable interests that justify the enforcement of the restraint. In assessing whether the applicant has made out a case for the relief it seeks, I must answer the four questions set out by the Appellate Division

in *Basson v Chilwan and Others*[2] namely, (a) does the one party have an interest that deserves protection after termination of the agreement? (b) If so, is that interest threatened by the other party? (c) In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive? (d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected?

[11] The first respondent was employed by the applicant in September 2017 as a buyer and resigned on 14 June 2023. The second respondent was employed as an estimator in January 2014 and resigned on 4 July 2023. The third respondent was initially employed as a driver in 2013 and was promoted to salesperson in 2018. He resigned on 10 August 2023.

[12] The applicant described its business, and why it asserted the need to protect trade connections and trade secrets. The applicant alleged that there is an integral link between its relationship to its suppliers and its contract customers and employed the example of a tender being advertised by a government department, which would include a quantity surveyor drawing up a bill of quantities, which will then be sent to contractors and subcontractors to tender for the items contained on the bill. Those contractors and subcontractors would, in turn, approach the applicant to provide a quotation and the applicant's estimator (the second respondent) would consider the bill specific to the materials that the applicant sold and provide a quote.

[13] To make that quote competitive, the applicant would contact its suppliers with whom it had spent many years building relationships and would request the best price based on a discount structure, which in turn was based on the relationship between the applicant and the supplier, the size of the bill, the spread of the material, the distance to the construction site and so on. Once that discount had been agreed, the applicant would negotiate and apply a discount structure between itself and its contract customer,

[2] *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 767G-H.

being the contractor or subcontractor. Alleging that there were different categories of discount structures, the purpose of the exercise was to provide the most competitive quotation to the contract customer who would compare it to other quotes and, if accepted, would include it in its tender application. When the discount structures are properly negotiated between the applicant, its suppliers and customers, this ensures the continuation of the applicant's customer relationships and secures repeat business from that customer. Therefore, according to the applicant, its trade connections and trade secrets in the form of the discount structures and pricing structures (which are confidential) constituted a protectable interest.

[14] According to the applicant, the first to third respondents had direct access to this information which was necessary for them properly to service the applicant's customers. The first to third respondents' connections with customers and suppliers is set out in seven paragraphs of the founding affidavit. Essentially, the applicant alleged that the first to third respondents were very competent at their jobs and building relationships with its customers and suppliers over a period of many years as well as having access to confidential information that I have described above. That was as far as the allegations went.

[15] None of this was really in dispute. The first to third respondents admitted that they had relationships with suppliers and customers but denied that the relationship was as personal as the applicant suggested. They argued that customer connections were really between the customer and the applicant, in that the customers were choosing to do business with the applicant itself regardless of the sales representatives because of the applicant’s reputation and decades in the industry. As far as suppliers were concerned, the same applied: the discounts that suppliers offered to the applicant were based on the applicant's record and good credit and had nothing to do with the identity of the buyer or his personal relationship with anyone at the supplier.

[16] The first to third respondents admitted that they had previously had access to confidential information about the applicant's customers but alleged they no longer had

this access and had not taken any of the records with them. They accepted that out of 500 customers on the list, there were only 100 active customers and, at least, by implication, acknowledged that they knew who the active or "elite" customers were.

[17] As far as their own attempt, directly and through the fourth respondent, to contact suppliers of the applicant and establish new business relationships with them were concerned, the first to third respondents stated that suppliers were not prepared to offer the fourth respondent anywhere near the discounts offered to the applicant because the fourth respondent was new in the market and had neither order nor credit history. Therefore, regardless of the relationships that individual respondents may have with representatives of these suppliers, those connections were of no benefit to the fourth respondent as the scale of discount had no relationship to the intimacy of the relationship between the representatives.

[18] Mr *Ploos Van Amstel*, who appeared for the applicant, argued that I should ignore the allegations about discounts offered to the fourth respondent because these allegations were not supported by any objective evidence. Whilst that criticism has some merit, the respondents' version does appear to be logical commercially and is not so implausible or uncreditworthy that I can summarily reject it on the papers.[3]

[19] Although they denied that the applicant established any protectable interests, or that there was an enforceable restraint, the first to third respondents offered conditional undertakings in the answering affidavit to the effect that the three of them would not contact, solicit or do business with the applicant's customers for the duration of the restraints. I will return to this presently.

[20] The respondents have argued that the question of protectable interests does not really arise because they are not bound by any restraint of trade agreement in the first place. They allege that they were handed the documents in December 2021 and forced to sign them without having had an opportunity to read or consider them and that they

[3] The applicant seeks final relief on motion, and therefore the *Plascon Evans* rule applies.

had not expected to see restraint of trade provisions in the agreement as their previous contracts of employment had not contained a restraint.

[21] In reply, the applicant put up the second respondent's contract of employment that he signed in 2016, which contained a restraint of trade that would have operated for two years and not one year, as contemplated in the 2021 restraint. In a fourth affidavit, the second respondent acknowledged that he had signed the 2016 contract and sought to explain the failure to disclose this as being at the result of his confusion as a lay person, together with the pressurised time periods under which the answering affidavit had been prepared.

[22] Whilst the second respondent's explanation stretches credulity somewhat, I cannot reject it outright and I do not do so. What is material is that the 2016 contract (and another example of a contract put up from the same period for a different employee) contained a restraint of trade covenant. The second respondent alleged that he did not think the 2016 restraint was binding because it had not been enforced when other employees had left the applicant. Again, I have some difficulty with this explanation, but either way, what is clear is that restraint of trade covenants were contained in the applicant's previous iterations of its contract of employment, and therefore it would have come as no surprise to the respondents to see the same covenants (with a shorter restraint period) contained in the 2021 employment contract.

[23] Whilst the bargaining relationship between the applicant and its employees was not perhaps equal, the respondents do not establish at any level that they concluded their contracts of employment under duress or agreed to terms to which they had not expected to agree. In my view, the first to third respondents were being opportunistic in attacking not only the applicability of the restraint but its very existence. To my mind, the first to third respondents were not forthright in this regard and this has weighed on the conclusion to which I have come in this matter.

[24] I have no difficulty in concluding that the first to third respondents were aware of

the restraint of trade contained in the contracts of employment.

[25] I therefore conclude that the restraints of trade are valid and binding on the first to third respondents, who resigned from their employment with the applicant to take up employment with a competitor. The first to third respondents therefore are all in breach of their respective covenants in restraint of trade.

[26] The fact of the breach is not in itself sufficient reason to enforce the restraint of trade, and there must still exist protectable interests sufficient to justify the enforcement of the restraint.

[27] It is convenient to deal separately with the applicant's relationships with its suppliers and whether those constitute a protectable interest, before considering the applicant's customer connections.

[28] The applicant's suppliers will grant discounts when it is in their interests to do so, and the scale of that discount will be informed by the supplier's own calculation of the value of the client, the potential scale of the orders that will be secured and the ability of that client to pay what is due. In this regard, I accept what the respondents say about their attempt to open accounts with suppliers who also supply the applicant, and what the results of those attempts have been. On the papers before me, there is nothing to controvert the at least plausible allegation that the fourth respondent will need not only time but success before it can create the kind of confidence in suppliers that will unlock more generous discounts.

[29] It therefore seems to me that whatever relationship the first to third respondents might have with representatives of the applicant's suppliers, those relationships have not been demonstrated to be so powerful or so intimate that they could overcome a supplier's own credit policies and practices and reticence to deal with the newcomer in the market.

[30] In my view, the applicant has not established that its relationships with its suppliers constitute a legitimate protectable interest and I decline to enforce the provisions of the restraint in this regard.

[31] In support of his argument that the applicant had established that its customer connections required protection, Mr *Ploos Van Amstel* referred me to *Den Braven SA (Pty) Ltd v Pillay and Another*.[4] The difficulty for the applicant is that *Den Braven* highlights the difference between the kind of customer connections that justifies the full enforcement of a restraint and one that does not do so. In *Den Braven*, the ex-employee, Mr Pillay, was an excellent sales representative who was responsible for nearly half of the applicant's turnover for KwaZulu-Natal in the financial year before he resigned. In that case, the applicant established that Mr Pillay had sufficiently close personal connections with customers that he would have been able to take those customers with him to a new employer.

[32] That level of intimacy and connection has not been established on the papers before me. It was not shown that the first to third respondents were able to build up such a relationship with the applicant's customers that they could easily induce those customers to follow them to the fourth respondent[5].

[33] Having said that, I am troubled by the approach that the respondents took in this case, and what that approach portends. They did not act in good faith when seeking to avoid the applicability of the restraint for the reasons of that I have set out above. Instead of acknowledging that the applicant had legitimate concerns and offering the undertakings that were belatedly offered in the answering affidavit, the approach in the correspondence sent by the respondents' attorneys prior to the launch of the application was again to deny that the restraint was either applicable or enforceable. The second and third respondents were unstinting in the criticism of the applicant in the answering affidavit but did not explain why they were complimentary in their letters of resignation.

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[4] *Den Braven SA (Pty) Ltd Pillay and Another* 2008 (6) SA 229 (D).
[5] *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at 541C-E

[34] Furthermore, the first to third respondents acknowledged that they did have connections with the applicant's customers. Whilst those connections are not as intimate as the applicant has asserted, I conclude that they are not as removed as the respondents allege either. In my view, this is why the qualified undertakings were given in the answering affidavit that the first to third respondents would not approach or solicit the applicant's customers for the periods of the restraints.

[35] These undertakings were given to avoid the enforcement of the restraint and, by implication, concede that there must have been connections worthy and capable of protection. In the absence of this, the undertakings would have been worthless.

[36] In argument, Ms *Nicholson*, who appeared for the respondents, was constrained to agree that, to be effective, the content of the undertakings had to bind the fourth respondent as well or there would be nothing to stop the fourth respondent evading the undertakings by deploying other sales representatives as the client-facing representative but armed with the knowledge and perhaps the introductions of the first to third respondents. In my view, this concession was wisely made and a reluctance to have done so may well have tipped the scales in favour of enforcing the restraint in the manner sought by the applicant.

[37] If in fact the first to third respondents have no intention of approaching the applicant's customers, there can be no legitimate objection to any restraint binding the fourth respondent as well. The fourth respondent was incorporated in 2023 and has just started trading – and it required the services of the first to third respondents before it did so. This is not a company that has independent relationships with either suppliers or customers such that a real distinction can be drawn between its operations, and the activities of the first to third respondents. To exclude the fourth respondent from the ambit of the interdict would essentially render the order to be meaningless, and would give a license for its abuse.

[38] Whilst such an interdict might not be convenient to the fourth respondent, it would

still have the benefit of the employment of the first to third respondents, who, ultimately, it employed knowing that they were bound by restraints in favour of its direct competitor.

[39] I agree with Mr *Ploos Van Amstel* that the applicant should not be required to rely on undertakings, especially in the face of a binding restraint. I do not propose to record that undertakings were given but instead to make orders interdicting commerce with the applicant's customers during the restraint periods.

[40] In the exercise of my discretion, a tailored enforcement of the restraint that prohibits the respondents from doing business with the applicant's customers for the periods of the restraints is sufficient and reasonable protection of the applicant's customer connections. This narrower order will also mean that any confidential information still in the hands of the first to third respondents in respect of those customers will be of no use to it or the fourth respondent for the periods of the restraint. This will also allow the applicant "breathing room" to establish a relationship between its new sales representative and its customers.

[41] On a conspectus of the facts, it would be contrary to public policy and unreasonable to restrain the first to third respondents from employment with the fourth respondent and I decline to do so.

[42] In my view, this approach is consistent with the answers to the questions set out in *Basson v Chilwan*.[6] Whilst there is an interest that is deserving of some protection, that interest does not weigh up so qualitatively and quantitatively that the first to third respondents should not be economically active or productive at all.

[43] The last issue to deal with is the alleged solicitation of the applicant's employees by the first to third respondents. In terms of the restraints, the first to third respondents agreed that they would not solicit any of the applicant's employees. On the papers, there is evidence that they have attempted to do so, even if they attempt to put an

[6] *Basson v Chilwan and Others* 1993 (3) SA 742 (A).

innocuous spin on the conversation with Mr Naidoo of the applicant and the first respondent. The first respondent solicited the employment of the second and third respondents, in breach of his restraint and, *prima facie*, attempted the same with Mr Naidoo. I can think of no reason, and the respondents have not advanced one, why the agreement that they concluded with the applicant should not be enforced in this regard. If the fourth respondent requires employees, it will have to look elsewhere until the periods of the restraints in this regard expire.

[44] Both parties have sought orders directing the other to pay the costs. In my view, this is not a matter where either party has been overwhelmingly successful, such that they should be entitled to their costs. The applicant successfully has established the existence and enforceability of a restraint of trade but has failed in obtaining the full enforcement of the restraint on the terms sought in the Notice of Motion. Conversely, the respondents' attempt to avoid the enforcement of the restraints was unsuccessful, as was the challenge to the restraints' validity. Protectable customer connections were established by the applicant that require some protection.

[45] I do not consider that the respondents acted in good faith and the giving of undertakings in the answering affidavit and not in the correspondence that preceded it was born of a strategic calculation and not a good faith attempt to resolve the dispute between the parties.

[46] In all of these circumstances, the fairest outcome would be for each party to pay their own costs.

[47] I make the following orders:

1 The first to fourth respondents are interdicted and restrained until the date in paragraph 2 below, and in the province of KwaZulu-Natal from:

1.1 soliciting the custom of or dealing with or in any way transacting with, in

competition to the applicant, any business, company, firm, undertaking, association or person, which during the last twelve months preceding the date of termination of the employment of the first, second and third respondents had been a competitor or a customer of the applicant in the province of KwaZulu Natal;

1.2 directly or indirectly offering employment to or in any way causing to be employed any person who was employed by the applicant as at the termination of the employment of the first, second and third respondents with the applicant or at any time within twelve months preceding such termination.

2 The period of the interdict in paragraph 1 above shall be until:

2.1 15 July 2024 in respect to the first respondent;

2.2 5 August 2024, in respect to the second respondent; and

2.3 11 September 2024 in respect of the third and fourth respondents.

3 The first to third respondents are interdicted and restrained from directly or indirectly using or disclosing the confidential information of the applicant for their own benefit or for the benefit of any third party, including the fourth respondent.

4 Each party shall pay their own costs of the application.

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SHAPIRO AJ

JUDGMENT RESERVED: 23 NOVEMBER 2023

JUDGMENT HANDED DOWN: 30 NOVEMBER 2023

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