IN THE LABOUR COURT OF SOUTH AFRICA

HELD IN DURBAN

Not Reportable

Case no: D 1627-18

In the matter between:

CONINGHAMLEE AND ASSOCIATES (PTY) LTD **Applicant**

and

LIEZL WATSON **First Respondent**

GARETH DAVID JONES **Second Respondent**

PALESA MBALI GROUP **Third Respondent**

Heard: **11 September 2018**

Delivered: **19 September 2018**

Summary: **Restraint of trade – unreasonable in relation to the duration, geographical area and nature of the protectable interest when balanced against the countervailing right of the employees to work in their trade**

JUDGMENT

WHITCHER J

Nature of application

[1] The applicant, on an urgent basis, seeks final interdictory relief set out in the Notice of Motion. The relief concerns the enforcement of restraint and confidentiality undertakings against the first and second respondents.

[2] The first and second respondents have no objection to the relief sought in prayers 2.2, 2.3 and 4 to 9 of the Notice of Motion, which essentially amounts to undertaking not to canvass and solicit business from a client of the applicant, not to entice any of the employees of the applicant to terminate his or her employment with the applicant and not to use and disclose any confidential information they may have to any competitor of the applicant.[1]

[3] The respondents, however, contend that the applicant is not entitled to restrain them, until 30 June 2019 and within the whole of the Republic of South Africa, from being engaged as employees or business partners with any competitor of the applicant, particularly the third respondent, and is further not entitled to order them to terminate their employment with the third respondent.

[4] This, the respondents submit, is because the applicant has no protectable interests and the restraint is unreasonable and enforceable in both geographical area and duration. The duration of the restraint set out in the contract of employment is 12 months and the geographical area is the whole of the Republic of South Africa.

Background facts

[5] The applicant conducts business as a staff recruitment and placement services provider, which services are provided in all nine provinces of the Republic of South Africa and in Southern Africa. It commenced business in 2009. The business includes keeping a database of clients and potential candidates, matching employer needs with prospective candidates, headhunting, screening and verifications. The applicant's clients include professional individuals, medium and large corporate entities across a wide spectrum, with a strong focus on the financial sector.

[1] The applicant, for the purposes of costs, wants this court to take note that the respondents did not give any of these undertaking during pre-ligation discussions the parties had.

[6] The first respondent commenced her career in recruitment in 2007 with a company called Wisdom Human Capital where she worked for three 3 years focussing on risk recruitment for banking clients. It is in this role where she first gained skills of candidate search, headhunting and dealing with clients.

[7] The first respondent took up employment with the applicant in 2010 as a recruitment consultant. In this regard, she serviced clients in the major banking industry in respect of risk recruitment and risk professionals in Gauteng. In 2014, she was appointed the Managing Director of the applicant.

[8] The second respondent was appointed by the applicant in 2010 as a recruiter specialising in front office roles in banking and serviced clients in all nine provinces.

[9] On 28 May 2018, the first and second respondents terminated their employment with the applicant by tendering their resignation. Their last day of employment was 28 June 2018. They are directors of the third respondent, and became so upon the inception of the third respondent on 12 March 2018, that is two months before their resignation from the applicant.

Is the third respondent a competitor of the applicant?

[10] According to the respondents the third respondent is a black female recruitment firm who specialises in the placement of black females in top employment positions in the workplace, in both the private and public sectors.

[11] It is not in dispute that the applicant also strives to identify and place black females in top positions. During the period May 2017 to April 2018 approximately 35% of the applicant's permanent placement turnover consisted of the placement of top female candidates. Most of these placements took place in the banking sectors, where the first and second respondent primarily performed their functions at the applicant. The financial sector, in which the second respondent was primarily involved accounted for 76% of the applicant's income. It is not the case of the respondents that they would not be doing placements in the banking, financial and other sectors on which the applicants focus.

[12] The third respondent is accordingly a director competitor of the applicant.

Protectable interest

[13] Trade connections of a business, in the form of relationships with existing and potential clients constitute part of its goodwill and capable of protection by a restraint. Confidential information useful for the carrying of a business and capable of being used to gain a relative competitive advantage is similarly capable of protection. The applicant does not have the right to own any particular client or a right to a potential client, but it does have the right to protect the client relationships formed with clients on its behalf.

[14] It is common cause that the applicant established a strong network of business connections with both individual and corporate entities over a period of time, which business connections form the commercial foundation of the applicant's business.

[15] It is also undeniable that goodwill acquired from clients are mainly achieved through personal contact and efforts of key employees strategically placed by the applicant to look after and service them and thereby build strong client relationships, which relationships form the core of the goodwill ultimately acquired by the applicant.

[16] The respondents contend that such goodwill relates to all recruitment agencies, but say that it is not a guarantee that any future placement would solely be placed with a particular agency.

[17] I agree with the applicant that the acknowledgement that goodwill attaches to all recruitment agencies does not assist the respondents. As correctly pointed out by the applicant (with reference to case law), the fact that its competitors may also acquire goodwill from their own clients can never be a defence to the applicant's claim to goodwill.

[18] The following was stated in *Pam Golding Properties (Pty) Ltd v Neille*:[2]

> [11] Added to this is PGP's undisputed evidence that Neille had direct relationships with PGP's clients who had given them selling mandates. *Adv*.

[2](26039/17) [2017] ZAGPJHC 219 (28 July 2017)

Nel for the respondent submitted that the only protectable interest PGP was confined to the sole mandate arrangements concluded with sellers. I disagree. Even if a seller had placed the property in question in the hands of a number of agencies the initial selection of agents by a property seller would be by reference to the agencies' reputation and standing; and even if the reputation of the agency was identified by reference to the individual agent such reputation belonged to the agency itself at the time the seller would have mandated the agency. Accordingly, even if the individual agent drew property sellers or potential buyers to PGP by reason of his or her personality or expertise that was part of its goodwill and therefore an asset in its hands.[3]

[12] Straddling both confidential information and customer contacts is PGP's database comprising lists of sellers of residential property and also potential buyers within the Parks area which is accessible to its agents. The lists are compiled by PGP from referrals, enquiries and those who are prepared to provide their particulars to PGP's agent's at show-houses (which is the common experience of anyone who attends a show-day). Even if an individual agent was to hand out business cards at a shopping mall his or her relationship with the principal would render any contacts made with prospective buyers or sellers the proprietary interest of the agency.

[19] It thus matters not that there is no guarantee of future placements for customer connections and goodwill to be formed. The reputation of the employer and the contact between employee and clients or potential clients on behalf of the employer are sufficient to establish goodwill.

[20] The parties essentially agreed also that in relation to the contingency recruitment model, clients, particularly major corporate client, normally only distributes the vacancy to selected recruitment agencies based on their track record and relationship between client and the recruitment agency – a relationship primarily established by the employee. The relationship between client and the recruitment agency via its employees can thus not be negated or undervalued.

[3] Emphasis added

[21] In my view, the respondents have failed to discharge the onus of showing that the applicant possessed no protectable interest and that they do not constitute some threat to the applicant's goodwill.

[22] The first respondent may have only serviced clients in the banking industry in Gauteng during her employment as a recruiter. This however changed when she became the Managing Director of the applicant in 2014. She then had exposure to, and contact, with all the clients in all nine provinces, and such exposure was not fleeting or superficial. The job profile compiled by the first respondent herself reflects that the Managing Director's role is to develop strategic relationships with all clients at an executive and procurement level and to maintain good key relationships. On her own version she was involved in resolving complaints and basically keeping clients happy. The respondent moreover could not deny that knowledge of key persons within the respective clients who are in a position to take decisions or influence decisions in respect of appointment of recruiters is important.

[23] It is common cause that the second respondent serviced clients in all nine provinces and clearly developed a good reputation with clients as he was one of the highest income earners for the applicant. The financial service sector, in which the second respondent was primarily involved, accounted for 76% of the applicant's income.

[24] I accept, by virtue of their functions and duties and the duration of their employment with the applicant, that the first and second respondent would have developed important customer connections so that when they left the applicant's employ, they could easily induce clients to follow them to a new business.

[25] In essence, the first and second respondents were a valuable component of the applicant's good relationships with its clients.

[26] There is evidence that the second respondent has already engaged with a primary client of the applicant, namely Standard Bank.

[27] It thus follows that the applicant has a protectable interest in the form of customer connections.

[28] However, I am not convinced the applicant has a protectable interest in respect of confidential information. The applicant has not demonstrated what confidential information the respondents have which would place the applicant at a disadvantage given the particular field in which recruitment agencies operate. The applicant did not meaningfully refute the respondents' claim that the applicant does not hold unique pricing structures and strategies, that generally standard fees apply and prospective corporate clients are openly identifiable. There is no evidence that any information on individual clients [job seekers] which may have existed is still useful 6 months down the line.

Reasonableness of the restraint at this point in time

[29] That the applicant has a protectable interest in the form of customer connections is not the end of the enquiry. As re-affirmed by the Labour Appeal Court in *Labournet (Pty) Ltd v Jankielsohn and Another (paras 42 to 45)*:[4]

> [42] According to the Appellate Division in *Basson v Chilwan and Others*, the following questions require investigation, namely whether the party who seeks to restrain has a protectable interest, and whether it is being prejudiced by the party sought to be restrained. Further, if there is such an interest – to determine how that interest *weighs up,* qualitatively and quantitatively, against the interest of the other party to be economically active and productive. Fourthly, to ascertain whether there are any other public policy considerations which require that the restraint be enforced. If the interest of the party to be restrained outweighs the interest of the restrainer – the restraint is unreasonable and unenforceable.
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> [43] It is now clear from, *inter alia*, *Basson* and *Reddy* that the reasonableness and enforceability of a restraint depend on the nature of the activity sought to be restrained, the rationale (purpose) of the restraint, the duration of the restraint, the area of restraint, as well as the parties' respective bargaining positions. The reasonableness is determined with reference to the circumstances at the time the restraint is sought to be enforced. With reference particularly to the facts of this matter, it is an established principle of law that the employee cannot be interdicted or restrained from taking away

[4](2017) 38 ILJ 1302 (LAC)

his or her experience, skills or knowledge, even if those were acquired as a result of the training which the employer provided to the employee.

[45] Also relevant to this matter are the principles relating to the reasonableness of the duration of the restraint. This aspect is generally assessed as part and parcel of the assessing the reasonableness of the restraint, but it bears mentioning that the duration must be rational and reasonable. It cannot be reasonable if it is not rational.

[30] Thus, while it is understandable that the applicant wishes to protect its customer connections, I must ask whether a one-year restraint that covers the entire recruitment industry in the whole of the Republic of South Africa is reasonable in relation to this interest when balanced against the countervailing right of the first and second respondent to work in the only trade in which they enjoy any prospects of income commensurate with what they had. This is, in its nature, a judgment call.

[31] To my mind, on balance, the restraint is not reasonable. The notion that the respondents may not conduct the work which they are trained for one year throughout the Republic of South Africa is simply and patently unreasonable.

[32] At this stage, the respondents' only worthwhile skills and experience lie in the recruitment industry. The first and second respondents have, respectively for the last 10 and 7 years, worked only in the recruitment industry. The first respondent in fact gained skills candidate search, headhunting and dealing with clients prior to working for the applicant.

[33] I have no reason to reject the respondents' undertaking that their business for the period of one year will be the placement of black female candidates in top positions – which is only 35% of the applicant's business.

[34] The applicant has been in the recruitment business for 10 years, and, on its own version, has established a strong network of business connections with both individual and corporate entities and a good reputation in the industry. Moreover, as the applicant itself indicated, major corporate clients normally only distributes the vacancy to selected recruitment agencies based on their reputation and track record. The applicant is thus in a position to counter

competition from just two individuals [the first and second respondent] in a start-up business. Essentially, I do not see how a small fledgling company in its first year of business would cause the applicant irreparable harm.

Order

[35] I make the following order:

(1) The application is dismissed.

(2) The applicant must pay the respondents' costs.

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B Whitcher

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Adv R Grundlingh, instructed by Bester & Roodie Attorneys

For the Respondents: Adv A de Wet, SC instructed by Kruger Attorneys