IN THE HIGH COURT OF ESWATINI

JUDGMENT

CASE NO. 1114/18

HELD IN MBABANE

In the matter between:

AFRICAN OXYGEN LIMITED **APPLICANT**

And

TONY COSTER **1st RESPONDENT**

ELCOR INDUSTRIES (PTY) LTD **2nd RESPONDENT**

Neutral Citation: *African Oxygen Limited and Tony Coster & Another [1114/18] [2018] SZHC 185 (10 August 2018)*

Coram: **LANGWENYA J.**

Heard: 1 August 2018

Delivered: 10 August 2018

Summary: *Civil Procedure-restraint of trade-essential requirements discussed-restraint precluding first respondent from employment within radius of 100km of applicant's place of business unreasonable and therefore unenforceable.*

JUDGMENT

Introduction

[1] On 1 May 2013, the first respondent was employed by the applicant as its branch manager. The first respondent signed a contract of employment as well as a restraint of trade agreement with the applicant.

[2] In January 2018, the first respondent gave notice of his intention to resign from the applicant's employ with effect from 31 March 2018. Due to agreements between the parties, the first respondent eventually left the applicant's employment at the end of April 2018.

[3] According to the applicant, the first respondent left the applicant's employ ostensibly to work in a joint venture with his step father in the timber business. The first respondent disputes this and says he does not have passion for the forestry industry.

[4] In June 2018, the applicant discovered that the first respondent was employed by Elcor Industries-a major competitor of the applicant in the sale and distribution of liquid petroleum products and the second respondent in this matter.

[5] According to the applicant, Elcor Industries (Pty) Ltd is situated 'a stone throw away from the place of business of the applicant[1]'

Notice of Motion

[6] According to the Notice of Motion, the applicant sought relief in the following terms:

1. Dispensing with the normal Rules of the Court regarding time, form and manner of service and hearing the application as one of urgency in terms of the provisions of Rule 6 (25);
2. Condoning the applicant's non-compliance with the Rules of the Court;
3. Interdicting and restraining the first respondent from breaching the restraint of trade agreement by inducing, approaching and or enticing the applicant's customers to do business with his employer (the second respondent);
4. Interdicting and restraining the first respondent from continuing with his employment with the second respondent and with any of the

[1] Page 7 of the Book of Pleadings and paragraph 19 of Corne Coetzee's founding affidavit

applicant's competitors within one hundred (100km) kilometres radius as per the restraint of trade agreement;

Alternatively

5. Interdicting and restraining the first respondent from continuing with his employment with the second respondent and from taking up employment with the applicant's competitors within a radius deemed suitable and reasonable by the Honourable Court;
6. Costs of suit against the first respondent in the event of opposition.

[7] In reply, the first respondent raised two points in *limine* namely:

a) That this court lacks jurisdiction to hear this matter because the restraint of trade emanates from an employment relationship: that Section 8 (3) of the Industrial Relations Act (IRA), 2000 gives the Industrial Court exclusive jurisdiction to grant the prayers sought by the applicant in the notice of motion.

b) That the matter is not urgent as it fails to meet the requirements of Rule 6 (25) (a) (b) of the High Court Rules. That the applicant failed to approach the Court soon after it discovered that the first respondent was in breach of the restraint of trade agreement on 6 June 2018.

[8] The respondents raised two points *limine* namely that the restraint of trade is a result of an employer/employee relationship between the parties as such the Industrial Court and not the High Court has jurisdiction to hear it. When the matter was argued, Mr. Gamedze for the respondents, conceded wisely in my view that the employer/employee relationship between the applicant and the

first respondent came to an end when the first respondent left the applicant's employ. Consequently Section 8 of the IRA finds no application to the matter.

Urgency

[9] I am of the view that matters of this nature-regardless of their merits- are inherently urgent. It is on that basis that I have dealt with the matter[2].

Relevant Factual Background

[10] A number of important facts are common cause. I shall set these out first before dealing with the disputed facts.

[11] The applicant is a company registered and incorporated in terms of the company laws of Swaziland and with its principal place of business in Matsapha in the district of Manzini. The applicant trades in the sale and distribution of liquid petroleum products in Swaziland.

[12] On 22 January 2014, the first respondent concluded a written agreement of employment with the applicant as a branch manager[3]. According to the contract of employment, the appointment of the first respondent as branch manager was to be effective from 1 May 2013. It was also a material term of the contract that the first respondent should not, without prior consent of the

[2] See- *Absa Insurance and Financial Advisors (Pty) Ltd v Johan Leon Jonker & Another and Absa Insurance and Financial Advisors (Pty) Ltd and Teresa Jonker & Momentum Consult (Pty) Ltd* Labour Court of South Africa Case No. C741/17 & Case No 742/17 at para 18.

[3] See Paragraph 8 of Corne Coetzee's Founding affidavit, page 9 of the Book of Pleadings.

applicant disclose information of a confidential and protectable nature to third parties[4].

[13] On 2 January 2014 the applicant and the first respondent entered into a restraint of trade agreement. Some of the material terms of the restraint of trade agreement which are more fully set out in Clause 2.1.1 and 2.1.2 respectively are as follows:

> *1.'That the first respondent shall not in any way, whether directly or indirectly use any information of the customers of the applicant save in the normal course of the first respondent's employment nor shall the first respondent divulge or disclose this information to any other person whomsoever without the prior consent of the applicant.*
>
> *2. That the first respondent shall not solicit, pursue and/or engage in business contact with an enterprise that applicant regards as a customer or a competitor in a capacity in which first respondent may use his specialist knowledge to disadvantage the applicant or damage its competitive advantage of the applicant for a period of six (6) months from the date of termination of the contract of employment and within a geographic area comprising a radius of one hundred kilometres (100km) from the region or branch for which the respondent was responsible[5].'*

[14] It is not disputed that the first respondent signed the restraint of trade agreement and in so doing bound himself to Clause 2.1.1 and Clause 2.1.2 of the restraint of trade agreement.

[15] In January 2018 the first respondent resigned from his employment with the applicant with effect from 31 March 2018. Due to agreements between the

[4] See paragraph 9; 9.1 and 9.4 of Corne Coetzee's Founding affidavit , page 9 of the Book of Pleadings.
[5] See page 9 of the Book of Pleadings at paragraph 9, 9.1 and 9.2.

parties, the first respondent eventually left the applicant's employment at the end of April 2018[6].

[16] In June 2018 the applicant learnt for the first time that the first respondent was employed by Elcor Industries (Pty) Ltd- a company that is a 'stone throw away' from the applicant's business premises.

[17] It is not denied that the premises of the second respondent are not far from the and premises of the applicant. It cannot be disputed that, as both the applicant the second respondent are in the trade of sale and distribution of liquid petroleum products, they are in direct competition with each other.

[18] It is not in dispute that six months have not lapsed from the date of resignation of the first respondent to the date of the first respondent taking employment with the second respondent.

[19] The first respondent does not dispute that the second respondent's premises are within the prohibited 100km radius provided for in the restraint of trade agreement that the parties voluntarily entered into.

[20] The applicant avers that immediately before the first respondent left its employ he worked on a major tender for welding, consumables for the Royal

[6] The first respondent was asked to stay on until the end of April 2018 to enable the applicant to find a suitable replacement; and also to assist the applicant in the investigation of the disappearance of 9000 stock of gas cylinders within the company.

Eswatini Sugar Corporation and in the process he got to know of the pricing structure of the applicant pertaining that tender[7]. No sooner had the first respondent left the applicant's employ than he assisted the Elcor Industries (Pty) Ltd file for the same tender for the Royal Eswatini Sugar Corporation in June 2018.

[21] The first respondent is alleged to have used the applicant's pricing system to help the second respond file a tender for welding with the Royal Eswatini Sugar Corporation. The first respondent argues that the tender with the Royal Eswatini Sugar Corporation was a public tender as such there is nothing sinister with the second respondent filing a tender for welding with the Sugar Corporation. The first respondent acknowledges that the second respondent is a competitor with the applicant as it is in the business of sale and distribution of petroleum liquid products too.

[22] The first respondent notes that he was not involved in the preparation of the second respondent's tender to the Ministry of Health for medical installation. Although he was present at the tender opening meeting on 6 June 2018 whereat the prices of the second respondent were found to be lower than those of the applicant, he states that the second respondent is just as capable to win tenders as it has been in the industry for some time and has a wide customer base[8].

[7] Page 57, paragraph 20 of the first respondent's answering affidavit.
[8] Pages 57-58 of the Book of Pleadings, paragraphs 21 and 22 of the respondent's answering affidavit.

[23] Certain facts are in dispute. Corne Coetzee and Rudolph van de Venter, the Director and Head of Security for the applicant respectively- aver that the first respondent informed them that he was terminating his employment with applicant to work with his step-father in the timber industry. The first respondent denies this assertion. He states that he has no passion for the forestry industry[9] in as much as he never had any conversation with Venter regarding his movement post- employment with the applicant[10]. It is remarkable that the first respondent left the applicant's employ without explaining where he was herded.

[24] It is the case for the applicant that the first respondent has approached certain clients of the applicant and induced them to do business with the second respondent to the prejudice of the applicant. The first respondent denies that he has breached the restraint of trade agreement in this regard.

The Issues

[25] The issues I have been called upon to decide are these: first, whether it has been established on the papers that while in the employment of the applicant, the first respondent obtained trade secrets of the applicant; second, whether the first respondent is now using the applicant's trade secrets to compete unfairly with the applicants; third, whether it has been established on the papers that the first respondent solicited and or enticed the applicant's clients away from the applicant to do business with Elcor Industries (Pty) Ltd;

[9] Page 55, paragraph 12 of the First Respondent's Answering Affidavit.
[10] Page 55, paragraph 13 of the First Respondent's answering affidavit.

fourth, whether the provision in the restraint of trade agreement that for a period of six months after leaving the applicant's employ, the first respondent is barred from taking up employment with the applicant's competitor within a 100km radius of the applicant's business is unreasonable.

[26] The above questions are best answered in the context of a short restatement of the legal principles governing restraint of trade agreements. In this regard in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*[11] the Appellate Division decided that an agreement in restraint of trade is, *ex facie* valid and therefore enforceable-and will only be invalid and unenforceable if it is contrary to public policy on account of it unreasonably restricting a person's right to trade or work.

[27] It is in the insightful judgment by Didcott J in *J Louw and Co (Pty) Ltd v Richter and Others*[12] that the result of *Magna Alloys* was summarized as follows:

> 'Covenants in restraint of trade are valid. Like all other contractual stipulations, however, they are unenforceable when, and to the extent that, their enforcement would be contrary to public policy. It is against public policy to enforce a covenant which is unreasonable, one which unreasonably restricts the covenantor's freedom to trade or to work. In so far as it has that effect, the covenant will not therefore be enforced. Whether it is indeed unreasonable must be determined with reference to the circumstances of the case. Such circumstances are not limited to those that existed when the parties entered into the covenant. Account must also be taken of what has happened since then and, in particular, of the situation prevailing at the time enforcement is sought.'

[11] 1984 (4) SA 874 (A), 891A-C
[12] 1987 (2) SA 237 (N), 243B-D.

[28] The question of who bears the *onus* to prove that an agreement in restraint of trade is unreasonable rests on the party who attacks its validity as he has to establish that the agreement is unreasonable[13].

[29] In determining the reasonableness or otherwise of an agreement in restraint of trade the Court has to engage in some balancing act of two competing policy considerations: the first is that it is in the public interest that people should be held to their agreements; second, it is also in the public interest that people should be free to engage in economic activity of their choice[14]. The Constitution of Eswatini now protects the right to practice a profession and to choose an occupation, trade or business freely[15].

[30] It is now trite that the common law rules relating to restraints of trade are not unconstitutional[16].

[31] When a Court considers whether to enforce a restraint of trade it is required to exercise a 'value judgment on its assessment of the facts and this it must consider in light of both common law principles as well as the constitutional values encapsulated in the *pacta sunt servanda* maxim and the provision in section 32 of the Constitution respectively.

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[13] *Magna Alloys* 893C-G.
[14] *Magna Alloys* 893H-C.
[15] Section 32 (1) of the Constitution of Eswatini Act 1/2005.
[16] *Knox D'Arcy Ltd and Another v Shaw and another* 1996 (2) SA 651 (W), 6601-661A; *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* 2001 (2) SA 853 (SE), 862B-F.

[32] The cases of *Basson v Chilwan and other*[17] and that of *Reddy v Siemens Telecommunications (Pty) Ltd*[18] give guidance on how to approach the value judgment referred to in the preceding paragraph.

[33] In *Reddy*, the court held as follows:

> 'In applying these two principal considerations, the particular interests must be examined. A restraint would be unenforceable if it prevents a party after termination of his or her employment from partaking in trade or commerce without a corresponding interest of the other party deserving of protection. Such a restraint is not in the public interest.
>
> Moreover, a restraint which is reasonable as between the parties may for some other reason be contrary to the public interest. In *Basson v Chilwan and Others*, Nienaber JA identified four questions that should be asked when considering the reasonableness of a restraint: (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? Where the interest of the party sought to be restrained weighs more than the interest to be protected, the restraint is unreasonable and consequently unenforceable. The enquiry which is undertaken at the time of enforcement covers a wide field and includes the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests.'

[34] It was also said by the Court that in order to properly reflect section 36 of the Constitution in cases pertaining to restraints of trade, a fifth question had to be asked, namely 'whether the restraint goes further than necessary to protect the interest[19]'

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[17] 1993 (3) SA 742 (A)

[18] 2007 (2) SA 486 (SCA).

[19] Paragraph 17 of *Reddy v Siemens Telecommunications (Pty) Ltd (supra)*.

[35] I will now address the issues raised. The applicant employed the first respondent as branch manager for a period of four years and three months. The first respondent's offer of employment and the restraint of trade he signed thereafter contain confidentiality undertakings in terms of which he agreed that during his employment with the applicant he would acquire confidential information of the applicant and deal with the applicant's customers. As a result, the first respondent agreed to refrain from being employed by the competitor of the applicant within the radius of 100km from the applicant's business for six months after leaving applicant's employ.

[36] I am of the view that in the four years the first respondent was employed as a branch manager, the nature and requirements of the position he held for no less than four years or service, he did acquire intimate knowledge of the applicant's trade secrets relating to pricing systems, tender processes as well as applicant's customers. He says so much in his answering affidavit.

[37] The applicant argues that the first respondent uses the applicant's trade secrets- particularly the pricing structure of the applicant unlawfully to the benefit of the second respondent. It is the applicant's contention that when the first respondent's period to serve notice at the applicant's employ was extended, he had visibility of the applicant's internal processes and of tenders to the Ministry of Health and that of the Royal Eswatini Sugar Association. The first respondent was subsequently involved in the same tenders on behalf of the second respondent where it emerged that the prices of the second respondent were lower than those of the applicant. The applicant

argues that this was possible because the first respondent using his intimate knowledge of the applicant's pricing system tweaked the second respondent's prices downward and in that way prejudiced the applicant's tender.

[38] The first respondent does not deny that during the period of extension of serving notice with the applicant he had visibility of the applicant's internal processes and of tenders to the Ministry of Health and the Royal Eswatini Sugar Corporations and that he was later involved in the same tenders on behalf of the second respondent against the applicant. In this regard, the first respondent argues that the second respondent is a major competitor of the applicant as such is knowledgeable on pricing structures that would win it tenders.

[39] The first respondent has conceded that as a branch manager he had access to the applicant's trade secrets but says there is no evidence to suggest that he used the applicant's trade secrets to compete unfairly with the applicant to the disadvantage of the applicant.

[40] The law relating to trade secrets is aptly set out in the case of *Experian SA (Pty) Ltd v Haynes and Another*[20] as follows:

> '[19] It is trite that the law enjoins confidential information with protection. Whether information constitutes a trade secret is a factual question. For information to be confidential it must be capable of application in the trade or industry, that is, it must be useful and not be public knowledge and property; known only to a

[20] (2013) 34 ILJ 529 (GSJ)

restricted number of people or a close circle; and be of economic value to the person seeking to protect it…'

[20] …the onus is on the respondent to prove the unreasonableness of the restraint. He must establish that he had no access to confidential information and that he never acquired any significant personal knowledge of, or influence over, the applicant's customers whilst in the applicant's employ. It suffices if it is shown that trade connections through customer contact exist and that they can be exploited if the former employee were employed by a competitor. Once that conclusion has been reached and it is demonstrated that the prospective new employer is a competitor of the applicant, the risk of harm to the applicant, if its former employee were to take up employment, becomes apparent[21].

[21] Where an applicant as employer, has endeavoured to safeguard itself against the unpoliceable danger of the respondent communicating its trade secrets to, or utilizing its customer connection on behalf of a rival concern after entering that rival concern's employ by obtaining a restraint preventing the respondent from being employed by a competitor, the risk that the respondent will do so is one which the applicant does not have to run and neither is it incumbent upon the applicant to enquire into the *bona fides* of the respondent, and demonstrate that he is *mala fides* before being allowed to enforce its contractually agreed right to restrain the respondent from entering the employ of a direct competitor[22]. In such circumstances, all that the applicant needs to do is to show that there is secret information to which the respondent had access, and which, in theory, the respondent could transmit to the new employer should he desire to do so.

[23] The ex-employer seeking to enforce against his ex-employee a protectable interest recorded in a restraint, does not have to show that the ex-employee has in fact utilized information confidential to it: it need merely show that the ex-employee could do so. The very purpose of the restraint agreement is to relieve the applicant from having to show *bona fides* or lack of retained knowledge on the part of the respondent concerning the confidential information. In these circumstances, it is reasonable for the applicant to enforce the bargain it has exacted to protect itself. Indeed, the very *ratio* underlying the bargain it has exacted to protect itself. Indeed, the very *ratio* underlying the bargain is that the applicant should not have to contend itself with crossing his fingers and hoping that the respondent would act honourably or abide by the undertakings that he has given. It does not lie in the mouth of the ex-employee, who has breached a restraint agreement by taking up employment with a competitor to say to the ex-employer 'Trust me: I will not breach the restraint further than I have already been proved to have done'.

[21] See also Den Braven SA (Pty) Limited v Pillay and Another (2008) 3 All SA 518 (D) at paragraphs [17] to [18]

[22] See IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Tarita and Others 2004 (4) SA 156 (W) at 166I to 167/C).

[41] The applicant argues further that since leaving its employ at the end of April 2018, the first respondent has been soliciting and pursuing the applicant's clients with a view to luring them to do business with the second respondent much against the provisions of the restraint of trade agreement. It is the applicant's assertion that the first respondent is enticing the applicant's clients by offering them much lower prices than those offered by the applicant. In response, the first respondent makes a bare denial to this allegation. The bare denial is exposed as untrue by the affidavit of Nomsa Mngomezulu who states that specific clients of the applicants informed her that they had been approached by the first respondent and asked to do business with the second respondent.

[42] I am of the view that the first respondent's bare denial amounts to a 'catch me if you can' type of defence as it does not engage with the true issues raised and is therefore glib. Accordingly, I reject the first respondent's denial in this regard.

Is Restraint of trade Reasonable

[43] The restraint of trade preclude the first respondent from being economically active in competition with the applicant within a radius of 100 km from the applicant's business and for a period of six months after termination of employment with the applicant.

[44] When balancing the interest of the applicant to keep its trade secrets and customers against the countervailing right of the first respondent to work in the only trade in which he enjoys any prospects of income commensurate with what he had I must evaluate whether a 100km restraint from the applicant's place of employment is reasonable. This is, in its nature, a judgment call.

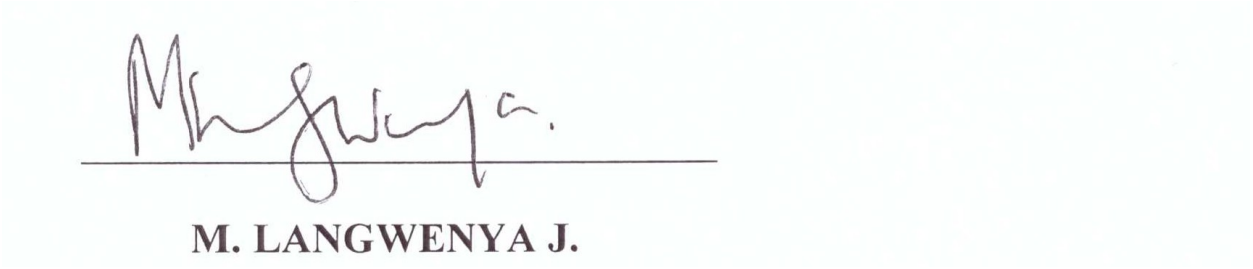
[45] The restraint clause is unreasonable in as far as it seeks to prevent the first respondent from finding employment within the radius of 100km from the applicant's place of business. The restraint virtually banishes the first respondent from finding employment within the country where he is resident. I am of the view that the first respondent will likely lose far more than the applicant should the restraint be enforced.

[46] It is common knowledge that at Eswatini the economy is currently sluggish and in the doldrums. For any employee to lose a job in the present depressed economic climate should not be lightly contemplated and does not seem justified in light of all the nature of the interests the applicant has established it has.

Order

[47] Accordingly, the application is dismissed.

There is no order as to costs



M. LANGWENYA J.

For the Applicant: Mr. D. Smith SC (instructed by Henwood & Company)

For Respondents: Mr. Gamedze