THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Case no: D 943-19

Reportable

In the matter between:

NORTH SAFETY PRODUCTS **Applicant**

and

MARSHALL NAIDOO **First Respondent**

BRIAN PIENAAR NORTH LTD

T/A PIENAAR BROS (PTY) LTD **Second Respondent**

Heard: **7 August 2019**

Judgment delivered: **10 September 2019**

Summary: **Restraint of trade – employee free to use and disclose general recollected knowledge in his own interests, or in the interest of new employer who competes with the old one**

JUDGMENT

WHITCHER J

[1] The relief sought in this application concerns the enforcement of restraint and confidentiality undertakings against the First and Second Respondents for a period of 12 months within the geographical area of Richards Bay.

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[2] The Applicant's business concerns the design, manufacture and marketing of personal protection and safety equipment products for use in the workplace. First Respondent was employed by the Applicant as a Sales Representative in the Richards Bay area from 6 July 2017 until he resigned at the end of May 2019 to take up employment with a competitor (the Second Respondent) of the Applicant as its Key Contracts Manager.

[3] In deciding restraint of trade disputes, the following questions require investigation: 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 a protectable interest, to determine how that interest weighs up, qualitatively and quantitatively, against the interest of the other party to be economically active and productive. Lastly, to ascertain whether there are any other public policy considerations which require that the restraint be enforced. If the interest of the employee outweighs the interest of the employer – the restraint is unreasonable and unenforceable. [1]

[4] The law on what constitutes a protectable interest recognizes essentially two types. An employer may seek to protect its customer connections and trade secrets. In this matter, the Applicant alleges that it faces risk on both these fronts should the restraint of trade against the First Respondent not be applied.

[5] The same factual crux informs the Applicant's argument that it possesses protectable interests in its customer connections and trade secrets which the First Respondent's work for a competitor, the Second Respondent, threatens.

[6] The Applicant states that the crux of the advantage that the First Respondent has now taken to the Second Respondent is knowledge of specific requirements of the customers with which he dealt during the course of his

[1] *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 767E-I.

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employment, and specifically in regard to products which they deemed important to their basket of products.

Customer Connections

[7] The Applicant claims that as a result of the connection the First Respondent had with its customers, specifically a unique knowledge of customer needs and their specific requirements, these customers might be induced to follow him to his new employer.

[8] First, it is not sufficient to say, as it was in argument, that a former employee had satisfactory dealings with clients and that they "may well" thus follow the First Respondent to another employer. Our law permits an employer to protect connections forged by an employee with its customers under the ambit of an employment contract if these connections are deep enough such that a customer may readily or easily follow the employee.

[9] In *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A), the learned judge endorsed the idea that the '*customer contact'* doctrine depended 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".

[10] In my view, the Applicant did not make out a case that the First Respondent's personality, the frequency and duration of his contact with its customers, the place of such contact, the nature of his relationship with buyers and his knowledge of its customer's businesses was such that he could probably induce them to leave the Applicant.[2]

[2] see *Walter McNaughton (Pty) Ltd v Schwartz and Another* 2004 (3) SA 381 (C)

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[11] Second, while the law prohibits taking away an employer's customer or pricing lists or deliberately memorising these customer details,

> "…it nevertheless recognises that on termination of an employee's employment, some knowledge of his former employer's customers will inevitably remain in the employee's memory and it leaves the employee free to use and disclose such recollected knowledge in his own interests, or in the interest of anyone else including the new employer who competes with the old one. See *Meter Systems Holdings Ltd v Venter and Another* 1993 (1) SA 409 (W)". [3]

[12] Knowledge of the Applicant's client's previous purchases and product preferences strikes me as recollected knowledge in the circumstances of this case. I am reluctant to find that an employer has a protectable interest in this sort of information as it would be unreasonable, verging on dystopian, to expect employees on exit to purge this from their memory or else suffer an impairment to their right to freedom of occupation by way of a court-enforced restraint of trade.

[13] Apart from possessing recollected knowledge, the First Respondent plausibly denied that he was in a position to forge anything more than occupational relationships with the Applicant's customers and, following the *Plascon Evans* rule[4], I accordingly find that no protectable interest in customer connections was established.

[14] In truth the averment that the First Respondent has acquired unique knowledge of customer needs and their specific requirements while working for the Applicant is but a variant of the claim that the Applicant possesses trade secrets which should be protected; a subject to which I now turn.

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[3] *Handico (Pty) Ltd t/a Hardware Centre v Vallabh and Another* (19/06422) [2019] ZAGPJHC 90 (15 March 2019)
[4] See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [*1984] ZASCA 51; 1984 (3) SA 623 (A) at 634. See also: *Labournet (Pty) Ltd v Jankielsohn and Another* [2017] 5 BLLR 466 (LAC) at para 40; *Fry's Metals (Pty) Ltd v Numsa and Others* [2003] 2 BLLR 140 (LAC) and *Ball v Bambalela Bolts (Pty) Ltd and Another* (2013) 34 ILJ 2821 (LAC) at para 14.

Trade secrets

[15] The essence of this dispute concerns how much of what the First Respondent knows about the industry, which may be useful to a competitor, he has gained uniquely, specifically and confidentially in the employ of the Applicant and how much is background or common knowledge of the industry or is recollected knowledge and weight of experience a person inevitably acquires.

[16] In deciding this question I take note of the fact that while the First Respondent may have spent just short of two years working at the Applicant, he spent twelve years prior working for a personal protective equipment manufacturer. This, he plausibly claims, provided him with the wealth of industry-related knowledge. It is, at least, a portion of this knowledge which he used to service the Applicant's customers and which the Applicant now seeks to interdict him from using again.

[17] The First Respondent goes so far as to state that his product knowledge was not enhanced by the Applicant while he worked for it. He transferred *his* extensive existing knowledge of personal protective equipment to the Applicant. This may be true as far as general product knowledge is concerned but I do accept the Applicant's point that the First Respondent, additionally, came to know which products its clients tended to prefer as a result of his employment at the Applicant.

[18] This information too, however, does not automatically bring a protected interest into being. The law on restraint of trade is wary of preventing an employee using the general know-how he carries along with him in his head.[5] This includes the sales experience and wisdom acquired at an employer, which in turn produces a general acumen which other employers may seek to acquire and which an employee should be free to trade on the labour market.

[5] *Labournet (Pty) Ltd v Jankielsohn and Another* (2017) 38 ILJ 1302 (LAC) at para 44.

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Where a trade secret shades into general recollected knowledge and experience can be a difficult line to draw. A trade secret will however usually contain specific knowledge formulated by an employer and conveyed to an employee. It would often be documentary in nature but may, in a sales environment, encompass specific verbal information, advice, strategy, techniques and formulas given to an employee to enable or enhance his or her performance. A key element of a trade secret, to my mind, is its genesis. It is not knowledge passively acquired while working at an employer but knowledge formulated by an employer and transmitted to an employee as an important tool in the performance of his duties. An insight into how to do the job better is different from a confidence primarily in that the latter is shared. To my mind, an employer has no protectable interest in the recollected knowledge, insights and experience garnered by an employee and his or her increasing acumen or mastery of the trade, honed over the years, even if this acumen is acquired and honed while under contract to the employer.[6]

[19] I turn now to consider what concrete information the First Respondent may have gleaned about the needs of specific clients of the Applicant who are in the market for personal protective equipment during the period the restraint would have applied. In doing so, we must consider which information was not in the public domain or of general application in the industry.

[20] The Applicant states that the crux of the advantage that [the First Respondent] has now taken to the Second Respondent is knowledge of specific requirements of the customers with which he dealt during the course of his employment, and specifically in regard to products which they deemed important to their basket of products.

[21] There is another reason embedded in the pleadings that fortifies my view that the First Respondent is not in possession of true trade secrets. As stated

[6] See *Automotive Tooling Systems (Pty) Ltd v Wilkens* 2007 (2) SA 271 (SCA) at 282E-G.

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above, in seeking final relief by way of motion proceedings, the Applicant is subject to the *Plascon Evans* rule. This is important because, in its founding affidavit, the Applicant specifically notes that two significant clients (Rio Tinto and South 32) have indicated their intention to go out to tender for personal protective equipment during late 2019 or early 2020. All too often, wide and generalized allegations of potential harm are made in restraint proceedings to support an argument that a protectable interest exists. However, in this matter, two concrete examples are cited and I am thus able to consider the nature of the risk posed to the Applicant should the First Respondent place his knowledge of customer product preferences at the disposal of the Second Respondent.

[22] The First Respondent's answer to the Applicant's mention that its existing Rio Tinto and South 32 contracts are at risk should the restraint not be enforced is that:

> *"knowledge of the specific requirements of a potential or existing client, that goes out to tender, becomes public knowledge by virtue of the nature of the tender process, which demands that such requirements are published for public consumption. Further, all, or the majority portion, of this knowledge and information is readily ascertainable from various internet sources and documents online in the public domain."*

[23] To this the Applicant issues a general and rather bare denial in reply although referencing averments (scattered) elsewhere in the affidavits which would contradict the First Respondent's answer. This approach has left the Court with the task of searching the Applicant's pleadings for evidence to contradict the First Respondent's assertion that Rio Tinto and South 32 have published their tender specifications and thus he cannot be said to possess *confidential* information of these client's specific needs.

[24] The only relevant reference to tenders in the Applicant's pleadings is that Rio Tinto has issued a closed tender to which only those who are invited are eligible to provide submissions. What is not specifically denied by the

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Applicant is the averment that the tender process renders more or less transparent to all suppliers what the particular client's needs are. The First Respondent cannot convey to his new employer confidential knowledge set out in public calls to tender.

[25] On the papers, there is an insufficient basis to suggest that the Applicant risks being excluded from the list of closed tenderers based on the First Respondent's historical knowledge of their product preferences. Logic would dictate that customers would precisely want the two suppliers who best understand its needs to compete on price.

[26] To the extent that an understanding of a customer's product preferences enables a tenderer to more satisfactorily meet the PPE specifications set out in the call to tender, I have already found that this information, on the facts of this matter, falls short of constituting confidential information and is more in the way of recollected knowledge and sales experience.

[27] I thus find that the Applicant has not shown that it has a protectable interest which the First Respondent is capable of exploiting, which would call for this court to enforce the restraint of trade agreement.

Order

[28] In the premises, I make the following order:

1. The application is dismissed with costs.

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Benita Whitcher

Judge

APPEARANCES:

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For the Applicant:	Futcher & Poppesqou Attorneys
For the Respondents:	Clifford Levin Incorporated

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