IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: J 673/21

In the matter between:

BIOBEE INTERGRATED CROP SOLUTIONS (PTY) LTD **Applicant**

and

BADINE CAROL BOTHA **First Respondent**

DESTRIMIX (PTY) LTD **Second Respondent**

INSECTEC (PTY) LTD **Third Respondent**

Heard: **30 June 2021 (*via* zoom)**
Delivered: **06 July 2021 (*via* email to the parties)**

Summary: A restraint of trade undertaking remains a contract and the principle of *pacta sunt servanda* finds application despite the provisions of section 22 of the Constitution of the Republic of South Africa, 1996. Thus, unless a party upon whom the agreement is to be enforced, raises a constitutional protection squarely in the papers, a Court must simply apply the principles as they apply in a breach of contract; namely (a) is there a contract in place; (b) has it been breached by the other party. If the answer is in the affirmative, a restraint of trade undertaking must be enforced. Where the party against whom the agreement is to be enforced

allege unreasonableness, that party must prove the alleged unreasonableness.

The first respondent does not dispute the existence of the restraint of trade and confidentiality undertakings. She contends that the terms are widely and vaguely couched to a point that enforceability should be refused. With regard to the breach, it is common cause that the first respondent took up employment with the applicant's competitor. However, she contends that she is entitled to do so despite the non-compete undertaking. With regard to confidentiality, she contends that she does not know the applicant's trade secrets and she was never exposed to such. That which the applicant labels trade secret is generic information freely available to anybody. The first respondent bore the *onus* to prove all those defences. The first respondent failed to prove those defences. Held: (1) The restraint of trade is enforced and the draft order presented by the applicant is adopted. Held: (2) The first respondent to pay the costs of this application including the costs of employing one counsel.

JUDGMENT

MOSHOANA, J

Introduction

[1] Routinely, this Court is inundated with applications seeking to enforce restraint of trade agreements. It is worth repeating that restraint of trade undertakings disputes are purely contractual disputes. It is for that reason that they are brought in terms of section 77 (3) of the Basic Conditions of Employment Act (BCEA).[1] As a reminder, the section provides that the Labour

[1] Act 75 of 1997.

Court has concurrent jurisdiction with the civil Courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.

[2] It being a contractual dispute, the principles applicable to the law of contract finds application. In most cases, former employers come to this Court in order to protect the fruits of their bargain. In some instances there is a breach of the undertaking and in other instances there is a potential breach of the undertaking.

[3] Often times, employees fail to draw the important distinction between the principle of *contra boni mores* and the application of the provisions of section 22 of the Constitution of the Republic of South Africa, 1996 (the Constitution). I find it behoveful to upfront in this judgment mention the distinction. Inasmuch as public policy requires that agreements must be kept – *pacta sunt servanda*, public policy also prohibits Courts to uphold and enforce those provisions of an agreement which are *contra bonis mores* – unreasonable[2]. With regard to section 22 of the Constitution, every citizen has the right to choose their trade, occupation, or profession freely. The practice of a trade, occupation or profession may be regulated by law. Where an employee believes that this right (section 22 right) is implicated, such an employee must plead the right. Generally, a restraint of trade does not prevent an employee to be employed even where such an employment is not in breach of the undertaking – protecting an interest. Therefore, in my view an employee must demonstrate that he or she is completely gagged from plying a trade, occupation or profession by the enforcement of the restraint undertaking[3]. As pointed out in *Reddy v Siemens Telecommunications (Pty) Ltd*[4], where there is no protectable interest upholding a restraint is not in the public interest.

[2] See :*J Louw and Co (Pty) Ltd v Richter and others* 1987 (2) SA 237 (N)
[3] I do accept that the Supreme Court of Appeal in *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 406 (SCA) has taken a view that the incidence of *onus* plays no role but a value judgment does play a role. However, I take a view that value judgment cannot be exercised in *vacuum*. Some facts must be presented to weigh against the accepted common law principle of *pacta sunt servanda*. Differently put, an employee must put facts that supports a view that he or she is not permitted to engage in trade, commerce or profession.
[4] 2007 (2) SA 486 (SCA)

[4] The application before me is one where Biobee Integrated Crop Solutions (Pty) Ltd (Biobee) seeks to enforce a restraint undertaking. Nadine Carol Botha (Botha) is a former employee of Biobee. She has since terminated her employment with Biobee and took up employment with Destrimix (Pty) Ltd t/a Noordchem (Noordchem). On the applicant's version, taking up employment with Noordchem is in breach of the restraint undertaking. Following failed salary increment discussions after Botha was allegedly poached by the COO of Noordchem, on 24 May 2021, Botha handed a resignation letter with her resignation taking effect on 4 June 2021. She commenced employment with Noordchem on 8 June 2021. Consequent upon failed discussion to obtain an undertaking not to breach the restraint, on or about 14 June 2021, Biobee launched the present application seeking various reliefs. The application was enrolled before me on 30 June 2021. It is opposed by Botha.

Background facts

[5] Biobee provides integrated pest management services. It specializes in biological control solutions to assist South African Farmers in growing quality fruits, vegetables and flowers that are free from chemical residues. Its focus is on vineyards (grapes), citrus orchards, tomatoes, strawberries and capsicum. Following a research and trials Biobee developed an Integrated Pest Management (IPM) solution that it offers to South African growers. This IPM solution is provided to the customers and clients of Biobee countrywide.

[6] Providing of IPM requires field service. A highly trained technical team of Field Services and Marketing Representatives (FSMR) was put together to supervise the timely applications of natural enemies according to the supervised frequent monitoring of the pests and biological control agents. This concept of FSMR was first introduced in South Africa by Biobee and has since been copied by most of its competitors. These FSMRs are intensely trained on IPM solution. The FSMR services, on a continuous basis, the clients and customers of Biobee. They (FSMRs) become the reliable link to maintain

good relationships with customers and clients of Biobee. The pest control industry is a cut throat industry.

[7] Botha is an appropriately qualified person endowed with an MSc (Environmental Science – Integrated Pest Management) degree. She is 28 years old. On 1 June 2020, she commenced employment with Biobee as a FSMR in the Northern region (comprising of Limpopo and Mpumalanga provinces). This after she concluded a written contract of employment with Biobee. The employment contract incorporated a confidentiality and restraint of trade terms. Biobee adopted several techniques and methods to ensure that it is able to optimally provide biological control solutions. These techniques and methods are unique to Biobee and have been developed over a number of years. Botha received in-house training and was exposed to all these techniques. Botha disputes such an exposure. According to Biobee should those techniques fall in the hands of a competitor such a competitor would be in a position to unlawfully compete with it. Developing those techniques takes about 5 – 6 years whereas implementing them does not require a huge capital outlay. Yet the said techniques are hugely beneficial and timeless.

[8] According to Biobee, Botha in her capacity as a FSMR was exposed to extensive training and had frequent direct contact with Biobee's customers and clients in the Northern region. This is disputed by Botha. She managed to amass few valuable customers for Biobee and was responsible for business to the tune of about R22 million rands. She had access to the database of Biobee's customers. She ran the social media pages of Biobee in the region. She was excellent in building relationships and she built and maintained good relationship with the customers.

[9] She was exposed to pricing terms and discounts as well as contractual arrangements with the customers. Such was not information readily available for public consumption and pleasurable access.

[10] As indicated earlier, the confidentiality agreement prevented Botha from disclosing confidential information. She agreed that upon termination of the contract of employment she shall not, for a period of up to 3 years after the said termination perform any services or do any work for any organization engaged in similar activities and or services of the same nature as provided by Biobee, whether as an employee, consultant, principal, be on association or in any other form.

[11] The process leading to the resignation of Botha commenced in April 2021 and culminated in 4 June 2021. In that process, Botha was poached and Biobee made counter offers to retain her services. Ultimately on 8 June 2021, she took up employment with Noordchem which offered her about 88% increased salary. The job description of Botha at Noordchem compares favourably pound for pound with that of her at Biobee. Biobee took a view that Botha is in breach of the restraint of trade agreement and could potentially breach the confidentiality undertaking. As a result, on or about 27 May 2021, Biobee took legal advice from its attorneys of record. On 2 June 2021, the attorneys swiftly addressed a letter of demand to Botha to not, for a reduced period of one year commencing on 4 June 2021 until 4 June 2022, breach the confidentiality clause and perform any services or do work in the same or similar business to that of Biobee. Such an undertaking was not provided instead the restraint was impugned and scandalised as not providing a protectable interest. It was however accepted that Noordchem is a competitor of Biobee.

[12] In seeking to protect its interest Biobee on or about 14 June 2021 launched the present application. As indicated above the application is fully opposed by Botha.

Argument

[13] Both counsel offered this Court very useful heads of argument which collated the relevant authorities in matters of this nature. In addition they made oral submissions. Mr Nieuwoudt who appeared for Botha persistently orally argued

that on application of the *Plascon-Evans* rule, this being motion proceedings, Biobee must fail. He passionately argued that that which Biobee argues is a unique technique is not unique as it is easily accessible on the web. He argued that the agreement is too vague and contains repetitive terms to a point that this Court should not attempt any surgery of the terms but simply refuse enforcement. He argued that Botha was not exposed to the alleged unique techniques.

[14] On the other hand Mr South SC who appeared for Biobee together with Mr Grundlingh passionately submitted that a case has been made yearning for protection of Biobee's interests. He submitted that the fact that the confidentiality clauses are repeated at various places in the agreement does not suggest that the restraint and the undertakings are not enforceable. He implored this Court to perform a balancing act. That balancing exercise shall reveal that the interests of Biobee are protectable. He submitted that Botha as an entomologist[5] can be employed anywhere except in an area where she will breach the undertaking. He argued that Botha is in breach and has failed to discharge her *onus* of demonstrating that the enforceability is unreasonable and *contra bonis mores*.

[15] With regard to costs, he submitted that this being a civil claim the principle of cost following the results finds application. To that submission he placed reliance on the judgment of this Court[6] and that of the Labour Appeal Court[7]. He persisted that awarding the costs of the employment of two counsel is justified.

Evaluation

[16] These type of applications are about a breach of a contract. What the aggrieved party seeks is compliance and/or specific performance. There is no dispute that a contract exists. With regard to the breach Botha disputes that

[5] Entomology is a study of insects.
[6] *Bulldog Abrasives SA (Pty) Ltd v Davies and another* [2021] ZALCJHB 58 (20 May 2021).
[7] *Biase v Mianzo Asset Management (Pty) Ltd* (2019) 40 ILJ 1987 (LAC).

she is in breach. This is clearly surprising because Botha signed an agreement that expressly provides that three years after termination she will not take up employment in the same or similar industry. It is common cause that Noordchem is a competitor of Biobee. Also it is undisputed that since 8 June 2021, Botha took up employment with the competitor of Biobee. All of that points to a clear breach of the undertaking. Other than pleading that the management of pest control by Biobee is one that is generic, Botha does not plead that the enforcement will be unreasonable and against public policy. The *onus* is on her to allege and prove that. She has failed to do so. She does not specifically plead that the enforcement of the restraint infringes on her section 22 of the Constitution rights. As indicated earlier in this judgment, a party who seeks to place reliance on section 22 must place facts to justify a conclusion that the section has been infringed[8]. Nowhere does Botha allege and prove that the restraint completely handicaps her to be economically active. To my mind such an allegation is critical to justify a section 22 infringement. It is one thing for an employee to dispute breach and it is another to justify the breach. A breach occurs when a party does not perform as promised. The obligations imposed by the terms of a contract are meant to be performed, and if they are not performed at all, or performed late or performed in the wrong manner, the party on whom the duty of performance lay is said to have committed a breach of contract[9].

[17] It bears mentioning that there is a marked difference between *contra bonis mores* and a breach of section 22 of the Constitution. An unreasonableness defence goes to public policy whilst a section 22 infringement goes to breach of a constitutional right. Such a breach of a constitutional right has not been attempted by Botha in these proceedings. Accordingly, there is nothing, in applying a value judgment, which prevents enforceability.

[18] With regard to the confidentiality issue, the law is clear. In terms of the common law, it is implied that an employee is not entitled to disclose

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[8] See paragraph 33 of the *Bulldog* judgment *supra*. Ibid fn 7

[9] See Christie's *The Law of Contract in SA* 6th edition page 515.

confidential information of his or her former employer. I agree with Mr South SC that the fact that the clauses of confidentiality were repeated is neither here nor there with regard to enforceability. There can be no doubt that trade secrets like pricing and discount strategies are protectable. Botha does not seriously dispute the fact that Biobee had developed a unique technique. She only pleads non-involvement. This version of non-involvement cannot be true when regard is had to the undisputed evidence that she was employed as a FSMR. It remained undisputed that field service is an indispensable part of the IPM solution. Claiming limited exposure to IPM is not helpful to Botha. Also claiming that field service is generic and not worthy of protection does not assist Botha. Considering herself as not being a threat stands in paradox with her undertakings not to breach confidentiality.

[19] Ultimately, the test is not that she has disclosed but that she has the potential to do so. She had contact with customers and the designed solution. The fact that not a single customer has left is not relevant to the question of the potential. For a period of almost 11 months, Botha kept a relationship with the customers of Biobee in the Northern region and implemented Biobee solutions for them. Clearly, Botha has in a business sense endeared herself to the Northern region customers. She was the only representative of that region. She commanded business of R22 million rands. She is no minnow in the industry particularly in the Northern region.

[20] The conclusion this Court reaches is that Botha is in breach of the restraint and such breach is clearly prejudicing Biobee. Therefore, Biobee is entitled to the relief it seeks in the circumstances.

Costs

[21] Turning to the issue of costs. Both counsel are in agreement that this being a civil claim the principle of costs following the results finds application. This Court is also in agreement. However, Mr Nieuwoudt resists a submission that Biobee is entitled to the costs of the employment of two counsel. The decision

to employ two counsel is a solitary decision and does not involve the other party to the litigation. Therefore, it is only a Court that can sanction the recovery of the costs of employing two counsel. The question is whether it was indeed a reasonable and prudent precaution to enlist the services of two counsel. There are factors to be taken into account in order to answer the question. Those are (a) the importance of the issues; (b) the complexity of legal and factual issues to be decided; (c) the quantum of the claim; and (d) the volume of the evidence to be considered.

[22] On consideration of those factors, I take a view that this was an ordinary run of the mill restraint application. The law on the issue raised herein has become settled a long time ago and the volume of the evidence did not justify the employment of the second counsel. Mr South SC submitted that the quantum involved is R22 million rands. I do not agree. This is a specific performance claim and does not involve any quantum. There is no alternative claim for damages before me. Accordingly, the conclusion I reach is that only the costs of employing one counsel should be allowed in this regard.

[23] In the results, I make the following order:

Order

1. The First Respondent is interdicted and restrained until 24 May 2022, and for the area comprising the Mpumalanga and Limpopo provinces, from being concerned or interested, either directly or indirectly in the manufacture, marketing, sale, services or commercialisation which are like or similar to the business of the Applicant, or which might otherwise compete or interfere with the business of the Applicant, without the prior written consent of the Applicant;

2. The First Respondent is ordered to forthwith terminate her employment with the Second Respondent;

3. The First Respondent is interdicted and restrained until 24 May 2022 and for the area comprising the Mpumalanga and Limpopo provinces from soliciting any existing customers and/or clients for any business in competition, directly or indirectly with Applicant;

4. The First Respondent is interdicted and restrained until 24 May 2022 and for the area comprising the Mpumalanga and Limpopo provinces, from performing any service or doing any work for existing customer or client of the Applicant of the same nature as provided by the Applicant, whether as employee, consultant, principal, in association or in any other form unless the service or work is generic to a number of industries;

5. The First Respondent is interdicted and restrained until 24 May 2022 and for the area comprising the Mpumalanga and Limpopo provinces, from performing any services or doing any work for any organization engaged in similar activities and/or services of the same nature as provided by the Applicant, whether as employee, consultant, in association or in any other form

6. The First Respondent is interdicted and restrained from using, disclosing or divulging to any person or entity until 24 May 2022 any confidential information or trade secrets of the Applicant, which information shall include but not be limited to products, new developments, business methods and techniques; all discoveries, inventions, devices, improvements, machines and processes, the identity of clients and customers together with the contractual relationships with these clients and customers, any and all financial details of the relationships with its clients and business associates and details of remuneration paid to its employees and/or contractors.

7. The First Respondent is ordered to pay the costs of this application, such costs to include the costs of one counsel.

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G. N. Moshoana

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant:	Mr A G South SC and Mr R Grundlingh
Instructed by:	Adams and Adams Attorneys, Pretoria.

For the First Respondent:	Mr H C Nieuwoudt
Instructed by:	Tim Du Toit Attorneys, Johannesburg.