IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL DIVISION, DURBAN

CASE NO. 14495/14

In the matter between:

FIRSTRAND BANK LIMITED t/a FNB INSURANCE BROKERS	Applicant
and	
ANILCHUND PRITHIPAL	First Respondent
WESTWOOD INSURANCE BROKERS (PTY) LTD	Second Respondent

JUDGMENT

THATCHER AJ:

[1] The applicant conducts the business of an insurance brokerage, selling short term insurance policies to both commercial and private clients. In August 2008, FNB Insurance Brokers (Pty) Ltd ("FNBIB") acquired a business which traded as Southern Natal Insurance Brokers ("SNIB"). During 2010, the applicant acquired the business of FNBIB.

[2] The first respondent is 65 years old, having been born on 21 May 1949. In 1968, when he was approximately 20 years old, he commenced work in the short term insurance industry. He became a broker in 1987 and began his own insurance brokerage business in 1990, and in 2004 joined SNIB, at the same time joining their pension and medical aid schemes. When FNBIB acquired the business of SNIB in 2008, the first respondent was still employed at the latter and FNBIB concluded a contact with him in terms of which he would be employed for a period of five years at a fixed monthly salary. That contract was concluded on 21 October 2008 and was to operate with effect from 1 November 2008. On the 31 October 2013 the first respondent concluded a further employment contract as well as a "Confidentiality and Restraint Agreement" which are annexures "B" and "J" respectively to the founding affidavit. In terms of the further employment contract, it would be "reviewed" annually, and, contrary to the five year employment contract concluded in 2008, provided that the first respondent would be remunerated on a "commission only" basis.

[3] Upon the expiry of the one year contract on the 31 October 2014, the first respondent left the applicant's employ and on the next day commenced employment with the second respondent which is in competition with the applicant. In consequence of this, the applicant launched this application to enforce compliance with the restraint of trade agreement, annexure "J".

[4] The relief sought by the applicant is couched in a form of a *rule nisi*. However, counsel for the respondents, Mr *Pammenter* SC, in his heads of argument, contended that the application should be treated as one for final relief, an approach with which Mr *Phillips* SC, counsel for the applicant, at the commencement of the hearing, agreed. That being so, I must grant the applicant final relief only if the facts stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order.

See: *BHT Water Treatment (Pty) Ltd v Leslie & Ano.* 1993(1) SA 47 (W) at 55 A-F;

Walter McNaughtan (Pty) Ltd v Schwartz & Others 2004(3) SA 381 (C) at 387J – 388C.

[5] In the respondents' answering affidavits, the applicant's *locus standi* was placed in dispute, but at the hearing the respondents' counsel advised that the respondents accept that the applicant does have *locus standi* to seek to enforce the restraint of trade agreement signed by the first respondent.

[6] At the commencement of the hearing, Mr *Phillips*, moved that a further affidavit on behalf of the applicant be admitted, the purpose of which was, he submitted, to "bring the court up to date" with events. Mr *Pammenter* objected to the reception of this further affidavit, submitting that a formal application was required and the court's consent obtained before it could be received in evidence. Mr *Pammenter* submitted that its reception at this stage was prejudicial to the respondents because they had not had an opportunity of investigating whether the facts contained in the affidavit were true. Furthermore there was no indication as to whether the names of the alleged customers which appeared in that affidavit were the applicant's customers before 2004, and if they were, why they had moved their business from the applicant. Mr *Pammenter* submitted that if the applicant persisted in seeking the admission of that affidavit into evidence, the matter should be adjourned and the applicant ordered to pay the wasted costs of the hearing. Mr *Phillips* then withdrew his request that the affidavit be received in evidence and accordingly I have not had regard to it.

[7] While the restraint of trade agreement provides that the first respondent be prohibited for a period of 24 months from being employed by any competitor of the applicant, the applicant from the outset merely sought an order that the first respondent be so restrained for a period of 12 months from the 31 October 2014.

[8] It is not disputed by the respondents that the first respondent's employment with the second respondent is in contravention of the restraint of trade agreement. It is common cause between the parties that the protectable interest contended for by the applicant is the risk of damage to its customer connection.

[9] The approach to the enforcement of agreements in restraint of trade was summarised by Malan AJA (as he then was) in *Reddy v Siemens Telecommunications (Pty) Ltd* 2007(2) SA 486 (SCA) at page 493E – 498G. In summary, agreements in restraints of trade are valid, but are unenforceable when, and to the extent that, their enforcement would be contrary to public policy. The learned judge quoted with approval the dictum in *J Louw & Co. (Pty) Ltd v Richter & Others* 1987(2) SA 237 (N) at 243 B-C where the learned judge in that case stated as follows:

> "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. Insofar 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 … Account must also be taken of … the situation prevailing at the time enforcement is sought."

[10] Malan AJA stressed the important part played by the Constitution at page 494C to 495B:

> "[11] All agreements including agreements in restraint of trade are subject to constitutional rights obliging courts to consider fundamental constitutional values when applying … the law of contract in accordance with the Constitution of the Republic of South Africa, 1996. Section 8 of the Constitution is imperative. The Bill of Rights applies to all law, also private law, and binds, *inter alia*, the Judiciary (section 8(1)). Its provisions bind natural and juristic persons if, and to the extent that, they are applicable, taking into account the nature of the right and the nature of any duty imposed by the right (section 8(2)). In their application to natural and juristic persons a court must apply … the common law to give effect to the right when legislation does not do so (section 8(3)(a)). … The exercise of a right may be limited

by the exercise of another person of his own fundamental right. To determine whether there has been an unconstitutional limitation of a right, the purpose of the limitation has to be considered in conjunction with all the other factors referred to in section 36(1). This situation may occur when the enforceability of agreements in restraint of trade and the balancing or reconciling of the concurring private and public interests are considered. "

[11] Malan AJA further stated the following at page 496D to 497G:

"A court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint. The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maximum *pacta servanda sunt*. The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions … 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 J 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 any 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."

Whether the applicant has a protectable interest

[12] The interest that the applicant seeks to protect is the risk of damage to its customer connection. Nestadt JA in the case of *Rawlins & Another v Caravantruck (Pty) Ltd* 1993(1) SA 537 (AD) at 541 C-H stated as follows with regard to customer connection:-

> "The need of an employer to protect his trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he leaves the employer's service he could easily induce the customers to follow him to a new business. … Heydon *The Restraint of Trade Doctrine* (1971) at 108, quoting an American case, says that the 'customer contact' doctrine depends 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.'
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> In *Morris (Herbert) Ltd v Saxelby* [1916] 1 AC 688 (HL) at 709 it was said that a relationship must be such that the employee acquires 'such personal knowledge of and influence over the customers of his employer … as would enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer's trade connection …'
>
> This statement has been applied in our Courts … Whether the criteria referred to are satisfied is essentially a question of fact in each case, and in many, one of degree. Much will depend on the duties of the employee; his personality; the frequency and duration of contact between him and the customers; where such contact takes place; what knowledge he gains of their requirements and business; the general nature of their relationship (including whether an attachment is formed between them, the extent to which customers rely on the employee and how personal their association is); how competitive the rival businesses are; in the case of a salesman, the type of product being sold; and whether there is evidence that customers were lost after the employee left …".

[13] In *Rawlins*, the former employee stated that during his employment with his former employer, he largely dealt, not with its existing customers, but with his own

pre-existing following or buyers whom he later found. Nestadt JA at page 542 G-I stated as follows:

> "Does this establish that the [former employer] did not have a proprietary interest of the kind under consideration? It is, of course, a factor in [the former employee's] favour; but not conclusively so … Even though the persons to whom an employee sells and whom he canvasses were previously known to him and in this sense 'his customers', he may nevertheless during his employment, and because of it, form an attachment to and acquire an influence over them which he never had before. When this occurs, what I call the customer goodwill which is created or enhanced is at least in part an asset of the employer. As such it becomes a trade connection of the employer which is capable of protection by means of a restraint of trade clause.
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> The onus being on Rawlins to prove the unreasonableness of the restraint, it was for him to show that he never acquired any significant personal knowledge of or influence over the persons he dealt with as a salesman of the [former employer] over and above that which previously existed."

[14] And so to the facts of this case. At the end of October 2013, towards the end of his five year contract, the first respondent was advised that he could be re-employed, not on a fixed term basis, but on a contract which would be reviewed annually, and which provided that his remuneration would change from a fixed salary to a commission based remuneration. Notwithstanding that he signed the "commission only" contract on 31 October 2013, it would appear that it came into operation from 1 August 2014. At that time, he was advised that the applicant's pension and medical fund rules did not permit him to remain as a member after he turned 65, which was on 21 May 2014. As a result, with effect from August 2014, the first respondent's income was reduced by some 40% and he was no longer a member of the applicant's pension fund or medical aid fund. These constituted terms far less favourable than he had hitherto being employed. The applicant is probably unable to change the rules of its pension fund and medical aid scheme which prevented the applicant from being a member of either after he turned 65. However it would appear from the papers that no attempt was made by the applicant to consider the individual personal circumstances of the first respondent to ameliorate the impact not only of his no longer having a fixed salary but also not

being a member of the pension fund or medical aid scheme. He was simply presented with terms which the applicant regarded as not negotiable.

[15] It is common cause that when the five year contract was concluded in 2008 the applicant paid the first respondent R200 000,00. Mr *Phillips* submitted that that sum was paid by the applicant for the first respondent's goodwill so that the first respondent's customers as at 2008 became those of the applicant. In support of this he cited the case of *Grainco (Pty) Ltd v Van der Merwe & Other* 2014(5) SA 444 (WCC), where the court reiterated the principle that the seller of a business inclusive of its goodwill is precluded from competing by canvassing persons who were customers of the business at the time of the sale.

[16] Mr *Pammenter* countered this by referring to what was stated in the applicant's founding affidavit which was as follows:-

> "11.
>
> The first respondent was considered by FNBIB and SNIB to be a valuable part of SNIB's business.
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> 12.
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> As such, it was important for SNIB and FNBIB that the first respondent be retained in employment once the acquisition of SNIB had taken place.
>
> 13.
>
> In order to achieve that goal, FNBIB reached an agreement with the first respondent in terms of which would pay to him the sum of R200 000,00 <u>in order to retain him in employment</u> with it after the acquisition." (my underlining)

[17] In dealing with those paragraphs, the first respondent stated as follows:-

"11.

(a) FNBIB, having acquired the business of SNIB, obviously wanted to retain the services of the latter's employees.

(b) Without the services of those employees, what they had purchased would have been valueless.

(c) Accordingly, the employees of SNIB, or certain of them, were paid certain amounts as an inducement to sign an agreement which bound them to work for FNBIB for a period of five years."

[18] These allegations are not dealt with by the applicant in reply and accordingly the applicant must be taken to have admitted them.

[19] It would have been a relatively simple matter for the applicant to state that the amount of R200 000,00 was paid to the first respondent for the latter's goodwill. However it did not do so. It is clear from both the founding affidavit and the answering affidavit that the amount was paid to the first respondent to induce him to conclude a contract to work for FNBIB for five years.

[20] It is thus not correct to describe the payment of R200 000,00 as the purchase price of the first respondent's goodwill. Therefore the analogy of the restraint binding a seller of his business, including his sale of his goodwill, from canvassing customers of the business at the time of the sale, is not correct and is not evidence that the first respondent's customers became the applicant's.

[21] Mr *Phillips* submitted that the onus was on the first respondent to show that he never acquired any significant influence over the persons he dealt with as a salesman for the applicant over and above that which previously existed prior to his employment with the applicant, and that he had not discharged this onus.

[22] Mr *Pammenter* submitted that the first respondent had discharged this onus. In support of this he referred to an annexure to the first respondent's first answering affidavit which lists 18 names of persons whom he describes as his customers and the dates when their relationships with the first respondent commenced. Twelve of those relationships are recorded as having commenced between 1990 and 1995 while the remaining six commenced between 2001 and 2004, all before he joined SNIB in 2004. Mr *Pammenter* submitted that it can be inferred from this that these customers were longstanding customers of the first respondent and that the first respondent never acquired any personal knowledge of or personal influence over those customers over and above that which existed before 2004.

[23] In the applicant's second replying affidavit, the first respondent's evidence in this regard is simply dismissed as "implausible". The applicant placed no evidence before the court to rebut this evidence of the first respondent by, for instance, putting up evidence of the manner in which the fist respondent and those who do the same work as the first respondent carry on business. I have in mind the topics listed by Nestadt JA in *Rawlins* (supra) at page 541 G-H referred to above. The applicant provided no evidence of the contact it had made with these customers since the first respondent's departure in order to ascertain the reason for their moving their business from the applicant. At the very least I would have thought that the applicant would have provided evidence of its attempt to contact these customers, and if those attempts had not met with any success, to inform the court of this. That the applicant appears not to have made any attempt to contact any of these customers is supported by the allegation by the first respondent that no attempt has been made by the applicant to establish any form of relationship with those clients since his departure. The first respondent in fact alleges that he did not canvass them to leave and that they had in fact signed statements indicating that they were not solicited, canvassed or induced or persuaded in any way to appoint the second respondent as their brokers, and he put up examples of two such letters. The applicant simply dismissed this evidence as being "improbable in the extreme".

[24] Accordingly the first respondent in my view has discharged the onus which rests upon him to prove that he never acquired any significant personal knowledge of or influence over the persons he dealt with as a salesman of the applicant, over and above that which previously existed. Thus I find that the applicant has no interest that deserves protection after the first respondent left the applicant's employ.

Balancing of the Parties' Interests

[25] If I am incorrect in this regard, I must consider whether that protectable interest is threatened by the first respondent, and if that is the case, whether that interest of the applicant weighs qualitatively and quantitatively against the first respondent not to be economically inactive and unproductive. I have set out earlier in this judgment the applicant's work experience. It is common cause that the first respondent is capable of carrying out the functions for which the applicant employed him. He has a wife of 63 years old who has never been employed and together they have a combined retirement some R2 100 000,00. A living annuity purchased with this would give him a monthly income of some R10 500,00 per month upon which he could barely survive. Accordingly it is imperative for him, and his wife, that he continue in employment for as long as he is able.

[26] In contrast, the applicant is one of the four largest banks in South Africa. The consequence to the first respondent of being unemployed is, *vis a vis* him and his wife, far more serious than the impact would be on the applicant if the first respondent is able to work.

[27] Thus the interest of the applicant does not outweigh the first respondent's interest in not being economically active.

Public Policy

[28] Is there an aspect of public policy that requires that the restraint be maintained or rejected?

[29] The public interest requires that parties should comply with their contractual obligations.

[30] Mr *Pammenter* argued that public policy is dictated by the provisions of the Bill of Rights. This is so. See *Barkhuizen v Napier* 2007(5) SA 323(CC) paragraph [29]. In this regard, Mr *Pammenter* referred to the provisions of the Older Persons Act, No. 13 of 2006 and in particular sections 5(2) and 5(3) which require *inter alia* that older persons be treated fairly and equitably and protected from unfair discrimination on any ground and that in any matter concerning an older person an approach conducive to conciliation should be followed and a confrontational approach avoided. In particular he referred to section 7(d) which provides that older persons may not be unfairly denied the right to participate in activities that enhance their income-generating capacity. The first respondent is an older person within the meaning of that term in the Older Persons Act and accordingly the Act applies to him. He was able to carry out his duties in the industry in which he had worked for over 40 years and public policy dictates that he should not be denied the opportunity to do so that his income generating capacity if not enhanced, at least remains in place. The first respondent's age and the stage he has reached in his working life is an important factor in making the value judgment that the public interest requires that people such as the first respondent should be productive and permitted to work.

[31] In the particular circumstances of this case, and I refer specifically to the personal circumstances of the respondent I have set out above, public policy requires that the restraint should not be enforced.

[32] Insofar as the position of the second respondent is concerned, its approach has been to abide the decision of the court. In the light of the conclusion I have reached and the order I propose to make, it is unnecessary to deal with the position of the second respondent.

I make the following order:

> The application is dismissed with costs including the costs consequent upon the employment by the respondents of senior counsel.

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Date of Hearing	:	6 March 2015
Date of Judgment	:	18 March 2015
Counsel for Applicant	:	Adv. D Phillips SC
Instructed by	:	Norton Rose Fulbright Attorneys 031-5825600
Counsel for Respondents	:	Adv. CJ Pammenter SC
Instructed by	:	Larson Falconer Hassan Parsee Inc. 031-5341600