

Judgment No. SC 15/07
Civil Appeal No. 103/06

GREENDALE HARDWARE & ELECTRICAL (PVT) LTD v
GOODFELLOW BANGABA

SUPREME COURT OF ZIMBABWE
SANDURA JA, CHEDA JA & MALABA JA
HARARE, FEBRUARY 5, 2007 & JULY 10, 2007

T Biti, for the appellant

D. Pundu, for the respondent

MALABA JA: This is an appeal from a judgment of the High Court dated 7 April 2006, dismissing with costs an application for an order enforcing a restraint of trade contained in the respondent's contract of employment with the appellant on the ground that the restriction was unreasonable and unenforceable.

The appellant is a member of the Crundal Group of companies carrying on the business of retail and wholesale of general hardware, specialized mining and industrial cutting tools and protective clothing from No. 2 Hood Road, Southerton, Harare under the name "Mining and Industrial Suppliers".

The respondent is a former employee of the appellant. He was engaged as a clerk/counter salesman on 28 August 1998 and was later promoted to the position of external sales representative. On 31 October 2004 the respondent left employment with the appellant and entered the services of an undertaking

known as RG Tools Zimbabwe ("RG Tools") carrying on business from No. 196 Glen Eagles Road, Willowvale, Southerton, Harare.

When the appellant and the respondent entered into the contract of employment they acknowledged that, by virtue of his duties, the respondent would become possessed of knowledge of proprietary rights of the appellant in the business carried on. Such proprietary interests listed in Clause D of the agreement included trade secrets and details of trade connections. They also agreed that for the purpose of protecting the proprietary rights listed in clause D, against the abuse of their knowledge by the respondent during the period of employment and after he left employment with the appellant, it was necessary for the respondent to undertake a restraint of trade.

The parties agreed that:

- "1. Unless he obtains the express written authority of the Managing Director of the specific company within the Crundal Group by which he is employed, the employee warrants and undertakes unto and in favour of the group that during the period of his employment with the group and for a period of two years after his employment with the group terminates for any reason whatsoever, he shall be restrained from being interested either directly or indirectly and whether as a Director, Partner, Owner, Promoter, Principal, Agent, Representative, Shareholder, Financier or Employee in any undertaking involved directly or indirectly in any of the business undertaken by the Group and the Employee agrees that he will not:
 - 1.1. Use any such knowledge or exercise any such influence as is referred to in Clause D of the preamble hereto in any way directly or indirectly prejudicial to or in competition with the group;
 - 1.2. Perform any service of a type, class or kind similar to or in competition with the services of the type, class or kind performed by the group;
 - 1.3. Be employed by any business, firm, undertaking or company (all of which are hereinafter called 'any undertaking') or be the agent of, or the advisor to any

undertaking which performs any activity to or in competition with those of the group;

- 1.4. In any manner whatsoever assist in the activities of any undertaking which carries on business similar to or in competition with the activities of the group;
 - 1.5. Be financially interested directly or indirectly in any undertaking which carries on activities similar or in competition with those of the group;
 - 1.6. Take part in any undertaking carrying on business of a type, class or kind similar to or in competition with the type, class or kind of business carried on by the group.
2. Each restraint aforesaid shall be deemed to be a separate restraint for the purpose of this agreement."

As an external sales representative the duties of the respondent involved the promotion and sale of appellant's products to old and new customers. He would visit customers at their places of business to discuss with and explain to them the qualities of the products sold by the appellant. As a result the respondent acquired knowledge of the names and addresses of the customers. He got to know of their special requirements which the appellant had to meet. The business of the appellant was very extensive. The list of names of customers with whom the respondent came into contact shows that they were located in almost all the urban centres of the country including Harare.

Annexure "J" is a business card belonging to the respondent. It shows that he got employment with RG Tools as a salesman. RG Tools carried on the business of "suppliers of mining and industrial tools and equipment, electrical, building materials, abrasives and general hardware". It was involved in the business of selling specialized mining and industrial tools. It also dealt in general hardware like the appellant.

On 18 November 2004 the respondent placed an order with "SANDVIK Tools" on behalf of RG Tools for 33 facing tools and 15 external tools. "SANDVIK TOOLS" was one of the appellant's customers with whom the respondent had personal contact during the period of his employment with the appellant.

On 16 August 2005 the appellant through its legal practitioners wrote to the respondent informing him of the fact that his taking up of employment with RG Tools before the expiry of the period of two years from the date of termination of employment with it was in breach of the contract in restraint of trade. It demanded an immediate cessation of the respondent's association with RG Tools. By letter dated 26 August 2005 written on his behalf by legal practitioners the respondent rejected the appellant's demands on the ground that the restraint of trade was unreasonable and unenforceable.

On 27 September 2005 the appellant made an application to the High Court for an order in the following terms:

- "1. That the respondent be and is hereby restrained from being interested either directly or indirectly and whether as a director, partner, owner, promoter, principal, agent, representative, shareholder, financier or employee in any business similar to and/or in competition with the business undertaken by the applicant.
2. That this restraint shall operate throughout Zimbabwe for a period of two (2) years reckoned from the date of judgment.
3. That the respondent and his legal practitioners *Pundu and Company* pay the costs of the application on the legal practitioner and client scale, the one paying the other to be absolved."

The respondent admitted that he was employed by RG Tools as a salesman. He denied the allegation that RG tools carried on business similar to and in competition with that undertaken by the appellant. The court *a quo* found that RG Tools was not involved in the business of retail and wholesale of specialized mining

and industrial cutting tools undertaken by the appellant. It found that RG Tools carried on the business of selling general hardware.

Whilst holding that the respondent was in breach of the restraint of trade undertaken by him, in that he got employment with RG Tools as a salesman and sold general hardware, the court *a quo* determined that the restraint of trade was unreasonable and unenforceable. The learned Judge said at p 15 of the cyclostyled judgment:

"It became apparent that the applicant was concerned, not so much with the general hardware operations of the respondent but feared that he was also involved in the field of special cutting tools used in mines. It also feared that he was introducing unwelcome competition in its overall broad business operations.

Implicit in Mr *Biti's* submissions was a reluctant acceptance that the applicant could not contract competition out in a restraint of trade agreement because the line in which the respondent was involved in was prevalent throughout Zimbabwe. In my view the respondent has established that he is intimately involved with RG Tools in general hardware business and that RG Tools does not pose any threats to the applicant's business activities especially in the special cutting tools line of business. It would be unreasonable in my view to deny the respondent a calling in the profession in which, he has been involved since leaving school in 1990 ... in a bid just to protect a general fear of competition in the general hardware business operations."

The application was dismissed with costs. The appellant appealed against the judgment on the grounds that:

- "1. Having held that the respondent was in breach of the restraint agreement the court *a quo* erred in holding that the restraint was unreasonably wide and unenforceable.
2. More importantly the court *a quo* erred in failing to hold that the respondent had failed to dislodge the *onus* upon his shoulders of showing that the restraint was unreasonable, too wide and unenforceable.
3. Further and in any event the court *a quo* erred in ignoring the fundamental fact that the restraint in question could only be enforced after the respondent had approached the appellant for his approval or not. To the extent that this was not done the court *a quo* erred in not

holding that the respondent was estopped from making a challenge on the restraint of trade.”

Grounds of appeal (1) and (2) can be disposed of right away. A finding of the fact that the respondent breached the restraint of trade did not bar the court *a quo* from enquiring into and determining the question whether the restraint was unreasonable. The unreasonableness of a restraint of trade is a question of law. Its determination involves the application by a court of a legal standard to the facts of a particular case. The relevant circumstances are those existing at the time the restraint of trade is sought to be enforced in so far as they impinge upon public interest. What constitutes public interest changes from time to time. As such the unreasonableness of a restraint of trade would not depend upon the fact of approval or disapproval of the conduct of the respondent by the Managing Director of the appellant. A restraint of trade which is otherwise unreasonable would not become reasonable merely because of a provision that the consent of the covenantee shall be sought before the prohibited conduct is undertaken. It is not a question of the restraint. It is a question of the legality of the restraint.

The only question for determination is therefore whether or not the court *a quo* was correct in holding that the restraint of trade sought to be enforced by the appellant against the respondent was unreasonable. Before I answer the question it is necessary to comment on the correctness of the findings of fact made by the court *a quo*.

The learned Judge found that RG Tools was not carrying on the business of retail and wholesale of specialized mining and industrial cutting tools. The business card belonging to the respondent shows that RG Tools traded in mining and industrial tools. The order (Annexure “K”) placed by the respondent with

“SANDVIK Tools” on behalf of RG Tools was for industrial tools. In the opposing affidavit the respondent admitted that these industrial tools were used in machining. Although he alleged that general hardware was what he sold he did not deny that RG Tools carried on the business of retail and wholesale of mining and industrial tools like the appellant. What he denied was that he acquired the knowledge and skill of salesmanship from employment with the appellant.

In light of the evidence contained in the founding affidavit and the opposing affidavit, the finding by the court *a quo* that RG Tools did not carry on the business of retail of mining and industrial tools was wrong.

I now turn to answer the question for determination in the appeal. The correct test for the validity of a restraint of trade in a contract of employment is whether there are proprietary rights for the protection of which the restraint was imposed by the employer and undertaken by the employee. If there are proprietary interests to be protected the next question is what are they being protected against and is the restraint more than is reasonably necessary for the protection of the proprietary interests.

In *Herbert Morris Limited v Saxelby* [1916] AC 688 at 710, LORD PARKER said:

“... the reason, and the only reason, for upholding such a restraint on the part of an employee is that the employer has some proprietary right, whether in the nature of trade connection, or in the nature of trade secrets for the protection of which such a restraint is ... having regard to the duties of the employee ... reasonably necessary.”

A restraint of trade is an obligation voluntarily undertaken by the employee to refrain from the exercise of freedom of trade in favour of the employer

in the exercise of freedom of contract. It is therefore *prima facie* valid and the *onus* is on the employee who seeks to resile from its burden to show that it is nonetheless against public interest and unenforceable. See *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874(A); *Book v Davidson* 1988(1) ZLR 365(S) at 385D.

A restraint of trade which does no more than protect the employer against mere competition from a former employee by preventing him or her from carrying on business similar to that undertaken by him or entering the services of an undertaking carrying on business similar to that undertaken by him in fear that in doing so the employee would exercise the knowledge and skill acquired during employment with him is an unreasonable restraint. So is a restraint of trade which is too wide as to time or place or scope depending, of course, on the nature of the business carried on and the duties of the employee.

In *Saxelby's case supra* LORD PARKER said that a purchaser of the goodwill of a business may take a covenant against competition from his vendor to protect what he is contracting to buy. It was quite different in the case of an employer taking such a restraint from his employee. His LORDSHIP at 709 said:

"The goodwill of his business is under the conditions in which we live necessarily subject to the competition of all persons (including the servant or apprentice) who choose to engage in similar trade. The employer in such a case is not endeavouring to protect what he has, but to gain a special advantage which he could not otherwise secure. I cannot find any case in which a covenant against competition by a servant or apprentice has, as such, ever been upheld by the Court. Wherever such covenants have been upheld it has been on the ground, not that the servant or apprentice would, by reason of his employment or training, obtain the skill and knowledge necessary to equip him as a possible competitor in the trade, but that he might obtain such personal knowledge of and influence over the customers of his employer, or such an acquaintance with his employer's trade secrets as would enable him, if competition were allowed, to take advantage of his employer's trade connection or utilize information confidentially obtained."

In *Super Safes (Pty) Ltd & Ors v Voulgarides & Ors* 1975(2) SA 783

(W) at 785E NICHOLAS J said:

“A bare covenant not to compete cannot be upheld. A restraint against competition must, if it is to be valid, serve some interest of the person in whose favour it was inserted ... the purchaser of a business, for example, who requires protection against the erosion of its goodwill by the competition of the seller; or the employer who requires that his trade secrets and his trade connections be protected against exploitation by the man whom he is taking into his employment.”

The accepted proposition that an employer is not entitled to protection from mere competition by a former employee means that the employee is entitled to use to the full any personal skill or experience even if it has been acquired in the service of his employer. It is this freedom to use to the full a man's improving ability and talent which lies at the root of the policy of the law regarding this type of restraint. The additional knowledge and skill acquired during employment belong to the employee and their exercise cannot be lawfully restrained by an employer as they are not his property.

The first question is: Was there a proprietary right for the protection of which the appellant needed a restraint of trade to be undertaken by the respondent? It is clear from the founding affidavit and the list of names of customers with whom the respondent had established personal contact in the performance of his duties as sales representative, that the appellant had trade connections against the abuse by the respondent of the knowledge of which it required protection.

In *Paragon Business Forms (Pty) Ltd v Du Preez* 1994 (1) SA 434,

LEACH J at 444C said:

“Where an employee has access to customers and is in a position to build up a particular relationship with customers so that when he leaves his employer's

service he could easily influence them to follow him to his new business, there does not seem to me to be any reason why, in principle, a restraint should not be enforced to protect the employer's trade connections."

The order the respondent placed with "SANDVIK Tools" on behalf of RG Tools induced a reasonable apprehension in the appellant that he could use the knowledge of and influence over its customers to take them with him to RG Tools.

The next question is this: Was the restraint of trade, sought to be enforced by the appellant against the respondent, an appropriate remedy for the protection of its trade connections? The restriction is undoubtedly a no-competition restraint. As stated by LORD PARKER in the *Saxelby's case supra* a no-competition restraint can be used for the protection of trade connections where, if competition were allowed, the employee would take advantage of the employer's customer connections. It must, however, be shown that the proprietary rights in the trade connections could only be adequately protected against prejudicial interference by the employee, if the no-competition restraint is imposed and enforced. In other words, there must be no other restraint protecting the same proprietary rights. No-competition restraints were upheld as appropriate methods of protecting trade connections in *Paragon Business Forms (Pty) Ltd v Du Preez supra* and *Basson v Chilwan & Ors supra*.

In my view, the no-competition restraint in this case does not protect the appellant's proprietary rights. It is not in collocation with the other restraints. It stands alongside the other restraints from which it is severable. The intention of the parties in Clause 2 of the agreement was that each restraint should be deemed to be a separate restraint of trade. Clause 1.1 is the special restraint for the protection of the appellant's proprietary rights in the trade connections against the exploitation by

the respondent upon termination of his employment. The anti-solicitation restraint covered the trade connection and being severable from the no-competition restraint, would have been enforceable. The presence of an enforceable anti-solicitation restraint diminished the need for a wider restraint for the protection of the same trade connections.

The restraint of trade sought to be enforced in this case is under clause 1 and not Clause 1.1. Clause 1 does not even prohibit the use of knowledge of and influence over appellant's customers, suggesting that it was not intended to protect trade connections against exploitation by the respondent upon termination of his employment with the appellant. It is too wide as it prevented the respondent from being engaged by any undertaking carrying on business similar to that undertaken by the appellant in any part of the country.

To preclude a former employee from carrying on his natural trade in any part of the country on his own, or in association with others, is a very strong prohibition which requires exceptional justification. It appears to me that the restraint sought to be enforced by the appellant in this case is in effect a restraint against mere competition from the respondent in the use after termination of employment, of personal knowledge and skill in the trade in which he is involved, acquired during the period of employment with the appellant.

In *American Building Maintenance Co v Shandley* 58 DLR (2d) (1966) 525 the appellant sought to enforce a no-competition restraint to protect proprietary rights in trade connections when there was a separate and severable no-solicitation restraint covering the same proprietary interests. BULL JA held that the restraint was invalid and unenforceable because it was directed primarily to the prevention of

competition and the use of the personal skills and knowledge acquired by the respondent in the appellant's business.

The learned JUDGE OF APPEAL had this to say at 534:

"If the 'no-competition' clause were merely an extension of the 'no-disclosure' and 'no-solicitation' covenants there might well be merit in the submission (that the restraint was no more than was reasonably necessary to protect the appellant's proprietary rights in trade marks, confidential information and customer connections, the subject-matter of the two earlier specific restrictive covenants) but to this conclusion I cannot come. Each of the three covenants, in my opinion, is severable, clear and unambiguous, and can be separately and adequately enforced without reference to or affecting the others. It is obvious that to prevent the respondent from engaging at all in a similar business in the appellant's area likely would be an effective way to discourage or prevent any disclosures and, particularly, any solicitations being made. But they are not in *pari materia*, because one can still disclose information and solicit regardless of whether or not a like business is being carried on. Therefore, where such a restriction against engaging in business is added to specific covenants clearly forbidding the actions of disclosure and solicitation, that restriction of necessity must constitute nothing more or less than a covenant to restrain the respondent from business competition. The appellant relies on *Putsman v Taylor* (1927) 1 KB 637 and *Herbert Morris, Ltd v Saxelby* (1916) 1 AC 688, to support its position that such 'no-competition' clauses have been upheld on the ground that if restraint against the competition were not allowed the former employee could take advantage of his employer's 'trade connections or utilize information confidentially obtained'. But it is to be observed that in both those cases, and I venture to say in others where such clauses have been upheld on such grounds, the only covenant being considered by the courts was the one preventing the engagement in the competitive business and if there were present any special covenants specifically forbidding those very things which it was alleged that the no-competition clause was aimed to prevent, no mention was made of them. I conclude that the presence of the 'no-competition' clause in the case at bar cannot be based or justified on the hypothesis that its purpose is merely to give reasonable protection to the proprietary rights of the appellant already fully covered by the other two clauses, but on the contrary that the clause is directed primarily to the prevention of competition and the use of the personal skills and knowledge acquired by the respondent in the appellant's business. It is, therefore, invalid and unenforceable."

See *Maguire v Northland Drug Co.* [1935] 3 DLR 521 at 526; *Herbert Morris Ltd v Saxelby supra* at 710; *Attwood v Lamont* (1920) 3 KB & 571 at 136; *Stenhouse Ltd v Phillips* [1974] AC 391 at 403.

This, in my judgment, was not a case in which from the nature of the respondent's duties, the only method by which the appellant could obtain protection for its trade connections was by prohibiting competition on the part of the respondent after he left its employment. The restraint was, in the circumstances of this case, a restraint against competition only. It is, therefore, unreasonable and unenforceable.

The appeal is accordingly dismissed with costs.

SANDURA JA: I agree.

CHEDA JA: I agree.

Honey & Blanckenberg, appellant's legal practitioners

Pundu & Company, respondent's legal practitioners