# *Oomph Out of Home Media (Pty) Limited v Brien and another* [2021] JOL 49492 (GJ)

**HIGH COURT OF SOUTH AFRICA**
**(GAUTENG DIVISION, JOHANNESBURG)**

(1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED.

03-02-2021 P.P. [signature]
Date Judge M. Mbongwe

**CASE NO: 10233/2020**

**IN THE MATTER:**

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| **OOMPH OUT OF HOME MEDIA (PTY) LIMITED** | **Applicant** |
| **and** | |
| **RORY LAWRENCE BRIEN** | **First Respondent** |
| **PROVANTAGE (PTY) LIMITED** | **Second Respondent** |

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**JUDGMENT**

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**MBONGWE AJ:**

**SUMMARY**

**[1] This opposed application was initially launched as an urgent application which was before the court on the 19th May 2020, but struck off the roll for lack of urgency with the applicant ordered to pay the costs. The present application is in pursuit of the relief the applicant had sought in the urgent court against both respondents. The list of orders sought against the 1st respondent is long and occupies two pages of the papers filed and will not be repeated, save the main orders sought which are aimed at the enforcement of compliance with a restraint of trade and shareholders agreements that were concluded between the applicant and him. The 1st respondent is an erstwhile employee and director of the applicant and remains a shareholder in the applicant. His resignation and employment by the 2nd respondent shortly thereafter in alleged breach of the restraint of**

**trade agreement is at the heart of these proceedings. The challenged reasonableness of the restraint of trade agreement is valuated with the invasion and effects of the covid 19 pandemic considered. Held that with all circumstances considered since the conclusion of the restraint of trade contract and the sudden invasion and economic effects of the covid 19 pandemic, the restraint of trade agreement is contrary to public policy and constitutional values and therefore unenforceable.**

**[2] Against the 2nd respondent the applicant seeks an order prohibiting the 2nd respondent from employing and associating with the 1st respondent and using the applicant's confidential information the 1st respondent may disclose to it. This relief is based on applicant's apprehension that such employment would result in the 1st respondent not only disclosing the applicant's confidential information and trade secrets to the 2nd respondent, but also enticing applicant's customers, business associates and employees and/or encouraging them to leave the applicant. These eventualities, the applicant contends, would give the 2nd respondent an unlawful competitive edge. The relief sought is meant to prevent these eventualities. The application is opposed only by the 1st respondent. Held that: 1) the horse had bolted as the 1st respondent was already in the employ of the 2nd respondent at the time this application was launched; 2) The absence of proof that the 2nd respondent had knowledge of the restraint on the 1st respondent at the time of taking him in employment is fatal to the applicant's claim against the 2nd respondent and 3) That the shareholders agreement is not binding on the 2nd respondent who is not a party thereto and the absence of proof of its knowledge of the existence and contents of both agreements prior to or at the time of employment of the 1st respondent is fatal to the applicant's claim.**

**BACKGROUND FACTS**

**[3] The 1st respondent became an employee of the applicant in March 2015 and served in various capacities including becoming a director and shareholder. He left the employ of the applicant in February 2020, but remains its shareholder. The 1st respondent proffers two reasons for exiting the applicant's employ; being the breakdown in his relationship with Mr Cornelius, a director and deponent to the founding affidavit, and the fact that he had not been paid his full salary for a while resulting in him being owed in excess of R1.2 million. He took up employment with the 2nd respondent, who is a business competitor of the applicant both in South Africa and other countries in the African Continent. The applicant alleges to have become aware of the 1st respondent's employment in March 2020.**

**[4] While in the employ of the applicant the 1st respondent and the applicant had concluded both a Restraint of Trade Agreement and a Shareholders Agreement. The applicant relies on these documents for the relief it seeks against the 1st respondent.**

**BUSINESS OF THE APPLICANT**

**[5] The applicant describes its business as specialised media and marketing activations offering marketing and advertising solutions ('the prescribed services") to its clients ("the prescribed clients"). The applicant lists, in paragraph 2 of the orders sought, the following**

countries in which it conducts business: South Africa, Angola, Botswana, Mozambique, Tanzania, Kenya, Uganda, Nigeria, Ghana, Cameroon, Cote d'ivoire, Congo, Brazzaville, DRC, Gabon, Toga, Sierra Leone, Liberia, Mali, Senegal, Namibia, Mauritius, Swaziland, Lesotho, Rwanda, Ethopia, Malawi, Zambia and Zimbabwe ("the prescribed territories").

RESTRAINT OF TRADE AGREEMENT

[6] The Restraint of Trade Agreement is a lengthy document consisting of numerous paragraphs and sub paragraphs. It would therefore suffice to merely mention the main restraint. In short, this agreement restrains the 1st respondent for a period of eighteen months from the date he exits the employ of the applicant, from individually or in conjunction with any person/entity or through employment by or association with any competitor of the applicant, particularly the 2nd respondent, in any capacity whatsoever, and engaging directly or indirectly in a business similar to and in competition with that of applicant. The 1st respondent may not have business dealings with and/or entice present and previous customers of the applicant to whom the applicant renders or had rendered prescribed services in the period of two years calculated backwards from the date on which the 1st respondent exits the employ of the applicant. The 1st respondent may not engage in any capacity whatsoever, directly or indirectly, in any business rendering services similar to those rendered by and in competition with the applicant and its associates in any of the prescribed countries. The 1st respondent is also prohibited from enticing or encouraging employees of the applicant to leave the applicant.

THE SHAREHOLDERS AGREEMENT

[7] The gist of the restraint on the 1st respondent in terms of the Shareholders Agreement relates to his prohibition from disclosing the applicant's confidential information and trade secrets to the 2nd respondent. The applicant contends that such disclosure would result in the 2nd respondent gaining an unlawful competitive edge over it.

THE IMPUGNED CONDUCT OF THE 1st RESPONDENT

[8] It is not in dispute that soon after exiting the employ of the applicant the 1st respondent became employed by the 2nd respondent. The applicant alleges that by so joining its competitor the 1st respondent had breached a prohibitive clause in the Restraint of Trade Agreement. In further alleged breaches the applicant lists the 1st respondent's disregard of the period of restraint from engaging in a business similar to the applicant's in any capacity whatsoever for a period of eighteen months from the date of exiting the employ of the applicant.

[9] The applicant has shown through annexures to its papers that the 1st respondent has made contact with applicant's customers and business associates such as Mandelez and Tradeway whom the 1st respondent allegedly enticed and engaged in business with in competition with the applicant; conduct the applicant contends constituted a breach of a prohibition contained in the Restraint of Trade Agreement. The applicant attributes a retraction from a joint venture it was to embark on with both Mandelez and Tradeway soon after the exit from its employ by the 1st respondent, to the latter's conduct in breach

of the Restraint of Trade Agreement. These breaches by 1st respondent triggered the applicant's resolve to launch the urgent application to enforce compliance by the 1st respondent with the Restraint of Trade Agreement. The applicant has annexed sufficient proof to its papers that the said two entities were indeed its customers and business associates as well as proof that the 1st respondent flew to Mauritius early in March 2020 at the expense of Tradeway.

[10] In his defence the 1st respondent does not specifically deny his conduct aforementioned and, in fact, confirms that he is employed by the 2nd respondent. The 1st respondent alleges, as a justification for his conduct, the unreasonableness and, therefore, the invalidity of the Restraint of Trade Agreement; this despite a further letter/email he had personally sent to the applicant's Mr Cornelius containing his undertakings not to engage in conduct that may be harmful to the business of the applicant. The 1st respondent grounds his allegation of unreasonableness and invalidity of the Restraint Agreement on the fact that the restraint will preclude him from earning a living. He further alleges inconsistencies on the part of the applicant in its enforcement of the Restraint of Trade. In this regard the 1st respondent mentions names of previous employees of the applicant who had left and either took up employment in entities which the 1st respondent deem to be competitors of the applicant or commenced their own business rendering the same services as the applicant and in respect of whom the applicant did not take action. In addition, it is noted that the 1st respondent puts meanings to certain terms and descriptions thereof employed in the Restraint of Trade Agreement in a manner that are calculated to extricate him from the alleged breaches. The 1st respondent could not refute, amongst others, the applicant's explanation that its former employee specifically referred to by the 1st respondent had not concluded a restraint of trade agreement with the applicant. I find that most of the contentious issues raised by the 1st respondent, save the reasonableness or lack thereof are mere attempts at parrying the allegations of breaches of the restraint of trade contract levelled against him. At face value the conduct of the 1st respondent points to breaches of the restraint of trade agreement, but there are other considerations at play, dealt with later in this judgment, which direct otherwise.

THE SHAREHOLDERS AGREEMENT

[11] There are two pillars on which the applicant relies in its charge of breaches of the Shareholders Agreement by the 1st respondent, namely, that as a shareholder the 1st respondent has shown through his conduct an abrogation of his fiduciary duty to the applicant. In the second instance the applicant avers that as a senior employee of the applicant the 1st respondent had access to and was privy to confidential information of the applicant which he has or was likely to disclose to the 2nd respondent as a result of his employment. It is apparent that the applicant relies merely on his apprehension and speculates that a breach through disclosure of confidential information may occur. Despite his denial of having or having had the applicant's clients information in particular, in my view and finding the 1st respondent had and may be still has, at the least, the applicant's confidential information; how else, for instance, would he know that the

applicant did not have a complete database of its clients and, on his own version, he went to the police station, subsequent to the seizure by police of a stolen laptop that was provided to him by the applicant, and successfully obtained from that laptop information of a named customer of the applicant. This the 1st respondent did obviously knowing that the concerned customer's information was in that laptop. I consequently reject the 1st respondent's purported defence that he did not have the applicant's confidential client information.

[12] The 1st respondent also challenges the eligibility of the applicant to rely on the Shareholders Agreement to prove a breach on the basis that the agreement subjects the resolution of any dispute that may occur to arbitration. The 1st respondent contends that the applicant's failure to pursue arbitration proceedings renders the restraint unenforceable. In response the applicant contends that as the 2nd respondent is not a party to the Shareholders Agreement and that it would have been an unnecessary and costly exercise to have the issues it has against the respondents determined piecemeal by the court on the one hand and the arbitrator on the other. I agree with the applicant's reasoning in this regard particularly in that applicant had initially hoped, albeit incorrectly, for the matter to be heard first by the urgent court.

"THE PRESCRIBED TERRITORY"

[13] The applicant has listed the countries in which it carries on business which appear in paragraph 3, supra, and further stated that the 2nd respondent operates in at least some of those countries. It is the applicant's own version that it gained knowledge during 2018 of the 2nd respondent's intention to expand its business in the African continent. Despite the 1st respondent's denial that the applicant has a footprint in African countries other than South Africa, the applicant has attached to its papers proof of its registered companies in those countries including the proof of some business it has engaged in there. Moreover the applicant has attached proof of a presentation that was done by the 1st respondent to Standard Bank on behalf of the applicant in which the 1st respondent had himself alluded to the applicant's footprint in African countries outside South Africa. The 1st respondent is clearly contradicted in this regard and that justifies a rejection of his version.

UNLAWFUL COMPETITION

[14] The applicant, who had not amended its prayers against the 2nd respondent at the hearing before me, sought an interdict against the 2nd respondent prohibiting it from employing the 1st respondent for the reasons alluded to above; this, firstly, despite the applicant's own version that it discovered in March 2020 that the 1st respondent was already employed by the 2nd respondent. The applicant has no remedy against the 2nd respondent, not even in respect of its alleged unlawful competition, unless the applicant can show, which it has not done, that the 2nd respondent had knowledge of the existence of and the restraints imposed on the 1st respondent by the restraint of trade and the shareholders agreements at the time of its employment of the 1st respondent.

THE LEGAL POSITION

[15] While I find the 1st respondent's challenge of the validity of the restraint of trade agreement to be without merit, the issue of the reasonableness of the restraint, or lack thereof, calls for consideration in light of the principle laid down in MAGNA ALLOYS AND RESEARCH SA (PTY) LTD v ELLIS 1984 4 SA 874 (A) which reads thus:

> *" Covenants in restraint of trade are valid. Like all other contractual stipulations however they are unenforceable to the extent that the enforcement would be contrary to public policy. It is against public policy to enforce a covenant which is unreasonable, one which unreasonably restricts the covenanter's freedom to trade or to work. Insofar as it has that effect the covenant will be not therefore be enforced. Whether it is 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 in 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".*

[16] I now consider the circumstances which prevailed in this case in the period between the conclusion of the trade restraint contract and the point of exit by the 1st respondent from the employ of the applicant. The relevant circumstances are the following: the common cause inability of the applicant to pay the 1st respondent his full salary resulting in him being owed in excess of R1.2m at the time of his exit from the employ of the applicant. This situation must have prevailed for some time considering the applicant own version that the 1st respondent was, due to the applicant's cash flow problems, paid around R57 000 per months which is said to have been more than what was paid to the other director(s). The normal monthly salary of the first respondent is unfortunately not disclosed. It is curious that the applicant admits cash flow problems leading to under payment of salaries and further states that discussions took place regarding the issue, but in the same breath allege that the 1st respondent is not owed any money without stating how that is the situation. It is unlikely that a healthy working relationship would endure in such a situation alone. The ultimate exit of the 1st respondent is proof of that. The controversy around the different positions the 1st respondent occupied and his titles given is another factor that both parties denounce responsibility for and calling it the initiative of the other. The departure of the 1st respondent appears to have been his most viable option, albeit leaving each party still with festering wounds seeing from the 1st respondent's persistence in being paid the amount outstanding and demand the convening of the applicant's board of directors to discuss the sale of his shareholding in the applicant, demands the applicant has undisputedly not responded to.

[17] Considering the last of the circumstances mentioned in the Magna Alloys Research case, being the circumstances prevailing at the time the enforcement of compliance with the restraint of trade is sought one cannot overlook the unexpected invasion of the covid

19 pandemic which resulted in a lockdown barely a week after the applicant's urgent application was unsuccessful. The relevance of stating this globally devastating situation is the applicant's insistence, while the pandemic continues to wreak havoc in the country, on the relief it seeks. In disputing the 1st respondent's claim that the restrictions would preclude him from earning a living, the applicant contends that the 1st respondent can remain active in the economy by the working in the field of communications, for instance, in which he has the necessary qualifications. This is clearly absurd and unreasonable considering that despite having the relevant qualifications, the 1st respondent had since 2012 pursued a carrier in the advertising and marketing industry. For him to be forced out of a carrier of choice to start working in a different field at a time when many businesses are closing down, retrenchments and lay-offs being common place and individuals doing everything possible to survive and cope with the health and economic devastating effects of the covid 19 pandemic, is plainly unreasonable and contrary to public policy and constitutional values. For these reasons given in this judgment I find that the restraint of trade agreement cannot be enforced. This conclusion coupled with the findings in respect of the shareholders agreement are therefore dispositive of this matter.

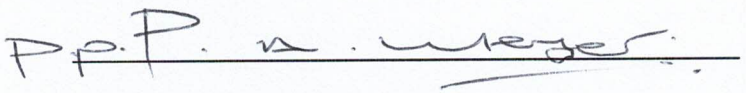
COSTS

[18] In considering costs I take into account that the applicant as a business entity plying its trade inside and beyond the borders of South Africa must have in one way or the other experienced the global economic devastating effects of the covid 19 pandemic to many businesses and individuals alike. Even more, the applicant had ample opportunity since the striking off the roll of its urgent application in March 2020, the imposition of the stringent lockdown regulations barely a week thereafter and the hearing of this application virtually in July 2020 to realistically reflect and reconsider its stance on the matter. The covid 19 pandemic and its effects still show no signs of abating. In any fathomable way the 1st respondent had no option but to defend his station by opposing this application. For its lack of sight and reasonableness the applicant must pay the costs.

ORDER

[19] In light of the conclusion in this judgment the following order is made:

1. The application is dismissed.
2. The applicant is ordered to pay the costs on the opposed party and party scale.



MBONGWE AJ

ACTING JUDGE OF THE GAUTENG LOCAL DIVISION OF

HIGH COURT, JOHANNESBURG.

**PARTIES' REPRESENTATIVES**

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|---|---|
| **For the applicant** | **Adv. L. Hollander** |
| **Instructed by** | **Swartz Weil Van der Merwe Greenberg Inc.** |
| | **Houghton, Johannesbrg** |
| **For the Respondent** | **Adv. S. N. Swiegers** |
| **Instructed by** | **Gerhold and Van Wyk Attorneys** |
| | **Bryanston, Johannesburg** |

**Date of hearing** **28 July 2020**

**ELETRONICALLY TRANSMITTED/HANDED DOWN ON 3 February 2021.**