

OF INTEREST



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH)**

In the matter between:

Case No: 981/2021

CJP CHEMICALS (PTY) LTD

Applicant

and

JOHNATHON DAPSHIS

First Respondent

GRANGE HILL INVESTMENTS (PTY) LTD

t/a CARSTEN CHEMICALA AND CONSULTANTS

Second Respondent

JUDGMENT

Govindjee AJ:

Background

[1] The applicant is a company carrying on business as a wholesaler and distributor of chemical raw materials and allied products. It approaches the court on a semi-urgent basis to enforce a restraint of trade covenant and seeks an interim

interdict preventing the first respondent's involvement and employment with the second respondent anywhere in the country. It seeks immediate application of the interdict ('the interim interdict') pending the final determination of relief set forth in part B of the Notice of Motion (but not beyond 30 October 2022). That part reflects the applicant's intention to approach the court in future to seek relief in almost identical terms for a period of two years from 30 October 2020 ('the final interdict'). No relief is sought against the second respondent.

[2] The first respondent ('Dapshis') is presently employed by the second respondent ('Carsten Chemicals') as its National Sales Manager, living and working in Gqeberha. Carsten Chemicals operates in direct competition to the applicant.

[3] The court is required to decide the following issues:

- (a) Whether Dapshis' application to strike out certain parts of the applicant's replying affidavit should be granted;
- (b) Whether the matter was sufficiently urgent to justify the departure from the Rules of Court;
- (c) Whether the applicant is effectively seeking final relief;
- (d) Whether the requirements for interim or final relief have been met;
- (e) Whether the restraint provisions in question offend against public policy and whether the applicant has established it has any protectable proprietary interest.

The application to strike out

[4] Rule 23(2) provides as follows: 'Where any pleading contains averments which are scandalous, vexatious, or irrelevant, the opposite party may, within the period allowed for filing any subsequent pleading, apply for the striking out of the matter aforesaid, and may set such application down for hearing in terms of paragraph (f) of subrule (5) of rule (6), but the court shall not grant the same unless it is satisfied that the applicant will be prejudiced in the conduct of his claim or defence if it be not granted.'

[5] Importantly, the key consideration is that of prejudice.¹ If the court is in doubt as to the relevancy of any matter, such matter will not be struck out.²

[6] The first issue raised by the application to strike relates to portions of the replying affidavit pertaining to the alleged lack of disclosure on the part of the first respondent at the time of his resignation, and confirmatory affidavits of Breytenbach and Msimang.³ Given that there is no dispute that the first respondent left the service of the applicant to take up employment with the second respondent,⁴ it is doubtful whether the details pertaining to the alleged failure are relevant. Given that doubt, the paragraphs in question (and the confirmatory affidavits) will not be struck out. I am in any event not satisfied that the applicant will be prejudiced in this regard. I hold

¹ *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa and Others* 1999 (2) SA 279 (T) at 337C.

² *Harding and Parker v John Pierce & Co* 1919 OPD 113 at 122.

³ Paragraphs 11.6.1 to 11.6.7 of the replying affidavit.

⁴ In any event, paragraph 11.6 of the replying affidavit, which is not the subject of an application to strike, states: 'The first respondent does not set forth a single fact to contradict the clear statement by the applicant that the first respondent at the time of his resignation did not inform the applicant of his intention to work for a competitor.'

the same view in respect of paragraphs 11.10 to 11.12 (including the confirmatory affidavit of Stemmet), and the third sentence of paragraph 11.21.

[7] I do agree, however, that the last two sentences of paragraphs 11.8; the second sentence of paragraph 11.16 and the words “he misled the Applicant as to his intentions, and designedly so”, in paragraph 11.24, should be struck out due to their scandalous wording.⁵ Paragraph 11.20 consists of irrelevant hearsay evidence to be struck out.

[8] The other paragraphs or sentences that form the basis for the application to strike are alleged to contain ‘new evidence material’ that the respondent argues ought to have been included in the founding affidavit. These paragraphs (12.2.2; 12.2.4; 12.2.6; 12.3.1; 12.3.2; 14.3; 15.2; 15.3; 16; 23; 25; 27.2; 27.3; 27.4; 27.5; 28.5; 29.2; 29.3; 32.2 and 34) relate to the merits of the matter and contain material facts. They respond, in essence, to the first respondent’s averments (in paragraphs 40; 49; 50; 51; 67.2; 69.4, 75.3; 75.4; 77.2; 79.5; 81.5) relating to the nature of the applicant’s business, commodities raw materials, suppliers, customers, costs, tenders, procurement, the role of regional managers, the first respondent’s lack of contact with suppliers, whether the information he held was secret, the process leading to a quotation, limited access to ‘commercially sensitive information’ or ‘new customers’. They constitute a response to the first respondent’s answering affidavit, which seeks to discharge the onus of proving that enforcement of the restraint would be contrary to the public interest.⁶

⁵ See *Laser Junction (Pty) Ltd v Fick* (case no. 6970 / 2017, KZN Local Division, Durban) at para 52.

⁶ The papers make it clear that the first respondent accepts this onus. See, for example, para 30.5 of the first respondent’s heads of argument. Also see *Rawlins and another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A).

[9] There is clear authority supporting the applicant's approach:⁷

'Counsel for the respondents complained that the applicant's affidavits in reply contain new matter and that the applicant has attempted to make out a case in reply. The *onus* is on the respondents to establish, as their defence, that the applicant has no proprietary interests worthy of protection, and they were required to set out facts germane to those contentions in their answering affidavits. The applicant was entitled to deal with such facts in its replying affidavits. The respondents would have been entitled to apply for leave to file further affidavits to deal with the matter raised in reply by the applicant...'

[10] Mr Richards sought to rely on various judgments, particularly ***Smart Office Connexion EC (Pty) Ltd v Van der Merwe and Another***,⁸ to support the contention that the applicant had provided insufficient detail in its founding affidavit to trigger the onus on the first respondent. The essence of the case in respect of the protectable interest should, in other words, appear in the founding affidavit. As Mr Blou SC pointed out, the remaining authorities cited in the paragraph relied upon in ***Smart Office Connexion*** in fact suggest something different. Botha JA in ***Basson v Chilwan and Others***,⁹ for example, states as follows:

⁷ *Townsend Productions (Pty) Ltd v Leech and others* 2001 (4) SA 33 (C) at 41A-C. Also see the judgments of Eksteen JA in *Basson v Chilwan and others* 1993 (3) SA 742 (A) at 752I-753B, Stegmann J in *Sibex Engineering supra* at 494A and Myburgh JA in *Vox Telecommunications (Pty) Ltd v Steyn and another* [2015] ZALCJHB 278 at para 18.

⁸ Unreported Eastern Cape Local Division, Port Elizabeth (case no. 847/2019) at para 22. The paragraph in question relies on *Den Braven SA (Pty) Ltd v Pillay and another* 2008 (6) SA 229 (D) at para 17: 'It is not in my view necessary for an applicant in this situation to winnow the wheat of trade connections and customer contact from the chaff of other factors that may influence purchasing decisions. It suffices for the applicant to show that trade connections through customer contact exist and can be exploited by the former employee if employed by a competitor. The applicant in this case has discharged that onus.'

⁹ 1993 (3) SA 742 (A) at 776H-777B. Also see J Saner *Agreements in Restraint of Trade in South African Law* (Issue 22) (March 2018) at 5.4.

‘The incidence of the onus in a case concerning the enforceability of a contractual provision in restraint of trade does not appear to me in principle to entail any greater or more significant consequences than in any other civil case in general. The effect of it in practical terms is this: the covenantee seeking to enforce the restraint need do no more than to invoke the provisions of the contract and prove the breach; the covenantor seeking to avert enforcement is required to prove on a preponderance of probability that in all the circumstances of the particular case it will be unreasonable to enforce the restraint...’

And in ***Experian South Africa (Pty) Ltd v Haynes and Another***.¹⁰

‘The position in our law is, therefore, that a party seeking to enforce a contract in restraint of trade is required only to invoke the restraint agreement and prove a breach thereof. Thereupon, a party who seeks to avoid the restraint bears the *onus* to demonstrate, on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable.’

[11] Cases such as ***Rawlins*** confirm the correct position:¹¹

‘Applying the principles laid down in *Magna Alloys and Research (SA) Lty Ltd v Ellis*...the matter turns on whether Rawlins has shown that, judged at the time of the application, the restraint was an unreasonable one and

¹⁰ 2013 (1) SA 135 (GSJ) at para 14.

¹¹ Also see Saner 5-17.

therefore against the public interest. He sought to do this along traditional lines. His case was that the respondent had no proprietary interest which required protection; in particular no misuse or exploitation of either its trade secrets or trade connections was involved. It was furthermore argued that the restraint was in any event too wide, particularly as to time...I shall assume in favour of Rawlins that he discharged the *onus* of proving that no information confidential to the respondent was disclosed to him during his employment. This leaves for consideration the question whether Rawlins negated the second type of proprietary interest, ie trade connections. It follows from what I have said that, unless he did, the restraint clause, not having been shown to be unreasonable, was enforceable.’

[12] And yet, various cases cite the applicable principle in respect of onus, only to seemingly apply that principle in a fashion that requires something more on the part of the party seeking to enforce the restraint.¹² The judgment of the court *a quo* in ***Sibex Engineering Services (Pty) Ltd v Van Wyk***¹³ was criticised for precisely that reason by Harms J (as he then was) on appeal:¹⁴

‘The Court *a quo* correctly held that in the light of *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*...the *onus* was upon the first respondent to prove that the clause should not be enforced since its enforcement would be contrary to public policy...it need only be pointed out that the question is not whether “the public interest does not require” enforcement, but rather

¹² See *Experian supra* at para 20; *Longfields Trading CC v Bradfield & another* [2011] JOL 28113 (KZD) at para 22; *Vox Telecommunications supra* at para 31; *Laser Junction supra* at para 37, 44. In *Automotive Tooling Systems (Pty) Ltd v Wilkens* 2007 (2) SA 271 (SCA) at para 9, the suggestion seems to be that absence of a proprietary interest would negate the possibility of a breach of contract.

¹³ 1988 (2) SA 54 (T).

¹⁴ *Sibex Engineering Services (Pty) Ltd v Van Wyk and another* 1991 (2) SA 482 (T) at 485I-486D.

whether the public interest requires non-enforcement. A complete *volte face* appears immediately after the quoted sentence and the learned Judge stated that: “The applicant therefore has to put facts before the Court that its right to enforce this clause, which it is common cause is a valid clause, is a right which protects its interests, confidentiality of trade secrets, chemical formulae...” Whether a *volte face* was intended does not appear from the rest of the judgment. The last-quoted statement, as it stands, cannot be reconciled with *Magna Alloys*.¹⁵

[13] The root of that approach in more recent times appears to be the comments in *Den Braven*.¹⁶ In the case at hand, the existence of a restraint agreement and the first respondent’s breach is not in dispute.¹⁷ In so far as the onus might be relevant, the authorities that suggest the need for an applicant to demonstrate trade connections through customer contact that can be exploited, before the onus shifts to the party seeking to avoid the restraint, would appear to go too far.¹⁸ It is the party seeking to avoid the restraint that bears the onus of proving that the enforcement of an agreed restrictive condition would be contrary to public policy – perhaps because that restrictive condition is against policy due to its extent or effect, because there is no protectable interest (normally linked to goodwill in the form of trade

¹⁵ The majority went on to note that the issue of a protectable interest, and earlier cases which suggested that a restraint had to serve some interest of the person in whose favour it was inserted to be valid, were based on a different, pre-*Magna Alloys* premise: at 486G.

¹⁶ For a critique of other aspects of this judgment, see *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff and another* 2009 (3) SA 78 (C).

¹⁷ Para 96 of the answering affidavit. Cf *Boomerang Trade CC t/a Border Sheet Metals v Groenewald and another* [2012] JOL 29426 (ECG) at para 46 *et seq*.

¹⁸ See, for example, *Townsend Productions (Pty) Ltd v Leech and others* 2001 (4) SA 33 (C) at 41A-B: the onus is on the first respondent to establish, as his defence, that the applicant has no proprietary interests worthy of protection. See *Vox Telecommunications supra* at paras 44 and 45 and *Sibex Engineering supra* at 494A. Cf *Handico (Pty) Ltd t/a Hardware Centre v Vallabh and another* [2019] ZAGPJHC 90 at para 14: ‘The employer has the onus to show that it has a protectable interest to protect in the restraint agreement which may be in the form of trade secrets, pricing or customer connections. It will suffice if the employer can show that the acquisition of such protectable knowledge or interest prevailed during the term of employment of the respondent and that it had the potential to be used or has been used in competition against him.’

connection and trade secrets) or because it is directed solely to the restriction of fair competition with the ex-employer.¹⁹ In ***Sibex Engineering Services (Pty) Ltd v Van Wyk and Another***,²⁰ the court confirmed that a covenant in restraint is enforceable unless the *first respondent discharges the onus of proving that*:

‘...at the time the enforcement is sought, the restraint is directed solely to the restriction of fair competition with the ex-employer (the covenantee); and that the restraint is not at that time reasonably necessary for the legitimate protection of the covenantee’s protectable proprietary interest, being his goodwill in the form of trade connection, and his trade secrets.’

[14] As discussed below, the perceived role and importance of onus in restraint of trade cases has been altered by the remarks of the SCA in ***Reddy v Siemens Telecommunications (Pty) Ltd***,²¹ even though the Supreme Court of Appeal was not called upon to pronounce on that issue given the facts of that matter.²² The incidence of onus remains directly relevant, however, for purposes of considering whether portions of the applicant’s replying affidavit should be struck out for containing new material. The first respondent’s opportunity to discharge its onus was

¹⁹ The onus of proving that enforcement would be against public policy is on the person resisting enforcement: *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A). See the comments of Stegmann J in *Thorpe Timber Co (Pty) Ltd v CJ Griffin* (WLD case No 9111/89, 23 June 1989) cited in the minority judgment in *Sibex Engineering supra* at 499B-506G. In particular: ‘I accordingly reach the conclusion that, in order to prove that the enforcement of a contractual obligation by which he has curtailed his freedom to work would be unreasonable and contrary to public policy, a former employee has to do nothing more than to prove that his former employer, seeking to enforce the restraint, has no trade connection and no trade secrets to protect; or, if he has, that the restraint is such that its enforcement would not serve to protect him. Alternatively, he may show, if he can, that the restraint is wider than is reasonably necessary for the protection of the former employer’s trade connection and trade secrets. There are no other relevant aspects of the matter that need to be addressed for the purpose of arriving at a conclusion on the question whether enforcement of such a restraint should be refused, or allowed in part only, on the grounds of unreasonableness and public policy.’ (at 505I-506B).

²⁰ 1991 (2) SA 482 (T) at 503A. For a detailed exposition of the circumstances recognised by the law as sufficient to justify on grounds of public policy a decision not to enforce a restraint, see 500C *et seq.*

²¹ 2007 (2) SA 486 (SCA).

²² See Saner 5.5.

in his answering affidavit, to which the applicant was entitled to reply, as indicated above.²³ Aside from what is referred to in paragraph 7, above, the application to strike out stands to be dismissed with costs.

Urgency

[15] Proceedings for the enforcement of a restraint of trade agreement are usually, by their very nature, urgent.²⁴ Rule 6(12) of the Uniform Rules of Court provides that a judge may dispense with the forms and service provided for in the rules and may dispose of a matter at such time and place and in such manner and in accordance with such procedure as it deems fit. The procedure to be adopted should as far as practicable be in terms of the Rules. In this case the truncated time frames afforded the respondents just over a week to deliver an answering affidavit in the event of opposition, and also curtailed the time period for submission of heads of argument.

[16] It is trite that urgency of commercial interests may justify the invocation of the subrule no less than any other interests.²⁵ The degree of relaxation of the rules and of the ordinary practice of the court depends upon the degree of urgency of a case.²⁶

The founding affidavit explains the urgency as follows:²⁷

²³ The position would have been different if the issue of breach of the restraint was in dispute, because the onus of proving a breach rests on the applicant: see *Kelly Group Ltd v Capazorio* 2011 (JDR 0221 (GSJ) at para 17.

²⁴ *Boomerang Trade CC t/a Border Sheet Metals v Groenewald and another* [2012] JOL 29426 (ECG) at para 36; *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidhoff and another* 2009 (3) SA 78 (C); *Inter-Waste (Pty) Ltd v Smith* (unreported, case no: J197/2021, Labour Court, Johannesburg) at para 5.

²⁵ *Twentieth Century Fox Film Corporation v Anthony Black Films (Pty) Ltd* 1982 (3) SA 582 (W) at 586G.

²⁶ *Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers)* 1977 (4) SA 135 (W) at 137E.

²⁷ At paras 57-62 of the founding affidavit. It may also be accepted that the applicant only obtained confirmation that the first respondent was working for a competitor sometime during the middle of March 2021, and that it has not been dilatory in launching these proceedings.

'The nature of the applicant's business is that supplier and customer contracts come up for renewal on a constant basis. The urgency is thus ongoing. The first respondent has already taken up employment with the second respondent. The damage that can be done to the applicant's business as a result of the first respondent's breach of the restraint provisions contained in the Agreement is enormous. The longer that the first respondent remains in the employ of the second respondent, the more damage will be caused to the applicant's business. This is inevitable, particularly given the first respondent's attitude.'

[17] I am satisfied that the applicant set forth sufficient assertions in its founding affidavit, read as a whole, to establish the type of urgency warranting the truncation of time periods as described.²⁸

Interim or final relief

[18] I have already concluded, with reasons provided at the time this matter was argued, that the application should be treated as one for interim relief, as prayed for by the applicant. For the sake of completeness, the reasons for this decision are repeated in the paragraphs that follow.

[19] The applicant at this stage seeks only interim relief in accordance with part A of the notice of motion. The first respondent raises the issue of whether, in seeking the relief in part A and part B (dealing with final relief), the applicant has in fact stipulated a process which will require this court to consider the same facts and hear the same argument twice, with the only difference being the approach to be applied to disputes of fact on the papers. As Mr Richards' put it in his heads, 'Whether the

²⁸ *Swissborough supra* at 323.

relief sought in part A, whilst notionally formulated as being interim relief, is in fact final relief in its effect and whether the application should be heard on that basis.’

[20] Both parties referred me to ***Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation and Others***²⁹ as the leading authority applicable. I have also briefly considered the judgment in ***Cronshaw and Another v Coin Security Group (Pty) Ltd***,³⁰ which was a case dealing specifically with a restraint of trade agreement. Notably, Gorven AJA, writing for the majority, found the two cases to be indistinguishable, and concluded that an order that had been granted was not final in effect, was in form and effect an interlocutory interdict and not appealable.

[21] The judgment makes it clear that granting an interim order at the culmination of this hearing would be genuinely ‘interim’. It also confirms that a court may, of course, impose reasonable conditions along the lines mentioned in ***Cronshaw*** so as to limit prejudice, if necessary, in dealing with a matter on the basis that an interim interdict is sought.³¹

[22] In ***Cronshaw***, it had been contended that prejudice rendered an interlocutory interdict appealable. ***Cronshaw***, as is the position in this matter, concerned an interim interdict in support of a two-year restraint of trade. By the time the matter was heard by the Supreme Court of Appeal the restraint period had expired. The prejudice raised was that the final determination would not be made before the restraint expired. It was submitted that what was in form interlocutory was in effect final since the interdict had operated during the entire restraint period. From this

²⁹ 2018 (6) SA 440 (SCA).

³⁰ 1996 (3) SA 686 (A).

³¹ Also see *International Executive Communications Ltd t/a Institute for International Research v Turnley and another* 1996 (3) SA 1043 (W) at 1059A-E.

judgment, which contains a detailed survey of the issue, it becomes apparent that an interim interdict is always final in the limited sense that ‘time run cannot be recalled’. There is some prejudice as a result, but this must be taken into account in judging the balance of convenience. The matter was struck from the roll, the point being that not every kind of prejudice is relevant when considering such matters, only that which directly affects the issue of the ultimate suit.

[23] The majority stopped short of confirming *BHT Water Treatment (Pty) LTd v Leslie and Another*.³² The minority judgment of Rogers AJA considered that matter in some depth, together with the effect of *Reddy*³³ – those cases dealt with attempts to enforce 12-month restraints, and where it was seemingly appropriate to consider the applications as being substantially an application for final relief.

[24] Significantly, a different approach operates in cases where it is clear at the time the court grants an interdict that the matter will not be able to be finally determined before the interdict in any event expires. The *BHT* approach is concerned with whether the trial court will have the opportunity to actually decide the case finally, given the limited duration of the legal restraint (particularly in one-year restraint cases). *BHT* and *Reddy* were cases of that kind and the *BHT* approach, in treating an application for an interim interdict as a final interdict, should be reserved for such instances. The case at hand is different, involving a two-year restraint which only expires in October 2022. Counsel conceded that there will be ample time for the final relief sought in part B to be addressed, whether on an expedited, accelerated

³² 1993 (1) SA 47 (W).

³³ *Reddy supra* at para 4.

basis occasioned by either of the parties or otherwise. As Rodgers JA noted in *Cipla*:³⁴

‘The legal test, according to *BHT* (as apparently confirmed in *Reddy*), is that an interdict is final in effect if the trial court will not have another opportunity to make a final determination before the restraint expires. If that legal test is right, there is no avoiding an enquiry into whether in the present case the CCP would have had an opportunity to make a final determination...’

[25] I have given serious consideration to Mr Richards’ submissions that the material is before the court to consider the matter as an application for a final interdict, including the impact on the first respondent’s employment with the second respondent, in respect of the difference between ‘interim’ and ‘final’. For the reasons described, an interim order in this case would not only be interim in form but also interim in substance and I am satisfied that this matter be approached on that basis.³⁵

Whether the requirements for interim relief have been met

[26] In an application for interim relief an applicant is not required to establish its right to relief on a balance of probabilities. It is sufficient to show that such a right is

³⁴ *Cipla supra* at para 29.

³⁵ See *Knox D’Arcy Ltd and Others v Jamieson and Others* 1995 (2) SA 579 (W) at 603J-605B.

prima facie established though open to some doubt. An applicant seeking interim relief must establish.³⁶

- (a) A clear right or, if not clear, that it has a *prima facie* right;
- (b) An infringement of such a right by the respondent or a well-grounded apprehension of such an infringement;
- (c) A well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted, and the ultimate relief is eventually granted;
- (d) That the applicant has no other satisfactory remedy; and
- (e) That the balance of convenience favours the grant of an interim interdict.

The court must, finally, apply a judicial discretion

[27] The accepted test for a *prima facie* right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts as set out by the respondent that are not or cannot be disputed and to consider whether, having regard to the inherent probabilities, the applicant should from those facts obtain final relief at the trial. In this case, the final relief sought is to interdict the first respondent for a period of two years from 30 October 2020 from being engaged in or concerned with or employed by the second respondent anywhere in South Africa. The facts set up in contradiction by the respondent should then be considered and, if serious doubt is thrown upon the case of the applicant, it cannot succeed.³⁷ If the facts

³⁶ *Reckitt & Colman SA (Pty) Ltd v SC Johnson & Son (SA) (Pty) Ltd* 1995 (1) SA 725 (T) 729I-730G; *LF Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 (2) SA 256 (C) at 267B-E. Also see *Knox D'Arcy supra* at 593B-E.

³⁷ *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189-1190 and *Gool v Minister of Justice and another* 1955 (2) SA 682 (C) at 688B-F, cited with approval in *Simon NO v Air Operations of Europe Ab and Others* 1999 (1) SA 217 (SCA) at 228 F-I. Also see *Knox D'Arcy supra* at 600H-601C.

disclosed on the affidavits, assessed in the manner described, disclose that the restraint is reasonable, the applicant succeeds on that score and the interim interdict will be granted if the remaining requirements are established. If, however, those facts disclose that the restraint is unreasonable, the first respondent must succeed.³⁸ Applied in this way, the incidence of the onus plays no role in this value judgment.³⁹ As stated in ***Ball v Bambalela Bolts (Pty) Ltd and Another*** (in the context of an application for final relief):⁴⁰

‘In *Reddy v Siemens Telecommunications (Pty) Ltd*, it was held that the reasonableness of a restraint could be determined without becoming embroiled in the issue of onus. This could be done if the facts regarding reasonableness have been adequately explored in the evidence...if the facts, assessed as aforementioned, disclose that the restraint is reasonable then the party, seeking the restraint order, must succeed, but if those facts show that the restraint is unreasonable, then the party, sought to be restrained, must succeed...’

[28] Determining whether or not an agreement is contrary to public policy requires a balancing of competing values.⁴¹ The enquiry into the reasonableness of a restraint is a value judgment that involves a consideration of two policy

³⁸ *Reddy supra* at para 14.

³⁹ *Ibid.* See Saner 5-15: in a case where a determination of which facts had been proved was not called for, a value judgment has to be made between the *pacta sunt servanda* principle and every person’s constitutional right freely to engage in his or her profession.

⁴⁰ (2013) 34 *ILJ* 2821 (LAC) at para 14. Also see *Laser Junction supra* at para 32 (with reference to I Rautenbach ‘Enforcement’ in *Bill of Rights Compendium* para 1A97): the incidence of onus should not play a role where there are no factual disputes and only the application of standards such as reasonableness is at issue, which ameliorates the burden on the respondent to prove the unreasonableness of the restraint.

⁴¹ *Bredenkamp and others v Standard Bank of SA Ltd* 2010 (9) BCLR 892 (SCA) at para 38. The value judgment necessarily requires a determination whether the restraint (or limitation of a fundamental right/s) is, in terms of section 36 of the Constitution, reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom: *Omni Technologies supra* at para 11.

considerations, namely the public interest, which requires that parties to a contract must comply with their contractual obligations, and the principle, supported by the Constitution of the Republic of South Africa, 1996 ('the Constitution'), that a citizen should be free to engage or follow a trade, occupation or profession of his or her choice.⁴² A restraint that is found to be reasonably required for the protection of the party who seeks to enforce it, in accordance with the test laid down in the cases, is constitutionally permitted.⁴³

[29] In *Basson v Chilwan and Others*, Nienaber JA identified four questions that should be asked when considering the reasonableness of a restraint, to which a fifth was subsequently added through the cases:⁴⁴

- (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 an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected?
- (e) Does the restraint go further than necessary to protect the interest?

⁴² *Ball v Bambalela Bolts (Pty) Ltd and another* [2013] 9 BLLR 843 (LAC) at para 15; *Reddy supra* at para 15.

⁴³ See *Omni Technologies (Pty) Ltd v Barnard* [2008] 2 All SA 207 (SE) at para 11, with reference to *Reddy supra* at paras 11-13.

⁴⁴ *Basson supra* at 767G-H. The fifth question, corresponds with section 36(1)(e) of the Constitution requiring a consideration of less restrictive measures to achieve the purpose of the limitation: *Siemens supra* at para 17; *Kwik Kopy (SA) (Pty) Ltd v Van Haarlem and Another* 1999 (1) SA 472 (W) at 484D-E.

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.⁴⁵

[30] In amplification of the above, the following may be added. The proprietary interests that can be protected by a restraint agreement are essentially of two kinds. The first is all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to it, to gain a relative advantage. This is sometimes referred to as 'trade secrets'.⁴⁶ The second is the relationships with customers, potential customers, suppliers and others that go to make up what is referred to as the 'trade connection' of the business.⁴⁷ Whether information constitutes a trade secret or whether a trade connection exists is a factual question.⁴⁸ Even where it cannot be found that confidential information or trade secrets have been communicated to a competitor, a restraint may nevertheless be enforceable, as it is not expected of an applicant to run the risk of such communication.⁴⁹

[31] The essential facts averred by the applicant include the following:

- The applicant is a stockist and distributor of speciality and commodity raw materials to a variety of industries throughout South Africa;

⁴⁵ See *Siemens supra* at para 16, 17, also in respect of how the common-law approach in balancing or reconciling the interests give effect to the precepts of section 36(1) of the Constitution of the Republic of South Africa, 1996.

⁴⁶ See *Meter Systems Holdings Ltd v Venter and another* [1993] 3 All SA 574 (W) at 588.

⁴⁷ *Vox Telecommunications supra* at para 30.

⁴⁸ See *Walter McNaughtan (Pty) Ltd v Schwartz and others* 2004 (3) SA 381 (C) at 388J-398B.

⁴⁹ See *IIR South Africa BV t/a Institute for International Research v Tarita and others* 2004 (4) SA 156 (W) at 166G-J; *IIR South Africa BV t/a Institute for International Research v Hall (aka Baghas) and another* 2004 (4) SA 174 (W) at 179H.

- The first respondent was employed by the applicant as the Key Account Manager and Branch Manager of the applicant's Eastern Cape branch, also acting as the Regional Manager of the Eastern Cape;
- The applicant and first respondent concluded a written service agreement on 28 August 2015. This agreement included restraint of trade undertakings given by the first respondent to the applicant;⁵⁰
- The first respondent has taken up employment with the second respondent as its National Sales Manager, in breach of the restraint, and without informing the applicant of his intention to work for a competitor;

⁵⁰ Clauses 12.3 and 13.5 of the service agreement provide as follows: Clause 12.3: '...the Employee shall not, during the period of his employment and for a period of 2 (two) years from the Termination Date, whether as proprietor, partner, director, shareholder, member, employee, consultant, contractor, financier, agent, representative, assistant, trustee or beneficiary of a trust or otherwise and whether for reward or not, directly or indirectly –

12.3.1 carry on; or

12.3.2 be interested or engaged in or concerned with or employed by any company, close corporation, firm, undertaking or concern which carries on in any of the Prescribed Areas any business which sells Prescribed Goods or Competing Goods or renders Prescribed Services or Competing Services or in the course of which Prescribed Goods or Competing Goods are sold or Prescribed Services or Competing Services are rendered...'

Clause 13.5: 'Without derogating from the obligations imposed by this clause 13 the Employee undertakes that neither he nor any company, firm, undertaking or concern in or by which he is directly or indirectly interested, engaged, concerned or employed, will for a period of 2 (two) years after the Termination Date directly or indirectly, whether as proprietor, partner, director, shareholder, employee, consultant, contractor, financier, agent, representative, assistant, trustee or beneficiary of a trust or otherwise in any part of the Prescribed Areas and whether for reward or not –

13.5.1 solicit orders from Prescribed Customers for the Prescribed Goods or any Competing Goods and / or the Prescribed Services or any Competing Services;

13.5.2 canvass business in respect of the Prescribed Goods or any Competing Goods and / or the Prescribed Services or Competing Services from Prescribed Customers;

13.5.3 sell or otherwise supply any Prescribed Goods or Competing Goods to any Prescribed Customer;

13.5.4 render any Prescribed Services or Competing Services to any Prescribed Customer;

13.5.5 purchase any Prescribed Goods from any Prescribed Supplier or accept the rendering of any Prescribed Services from it;

13.5.6 solicit appointment as a distributor, licensee, agent or representative of any Prescribed Supplier in respect of Prescribed Goods and / or Prescribed Services, including on behalf of or for the benefit of a Prescribed Supplier.'

- The first respondent's duties as National Sales Manager of the second respondent are to oversee the second respondent's customers nationally throughout South Africa;
- The second respondent is a direct competitor of the applicant in South Africa as a supplier of commodities raw materials, which constitutes approximately 70 percent of the total of the applicant's business in the food and industrial sections of its business (which are large sections of the applicant's total business);⁵¹
- The second respondent competes with the applicant directly in the same market in the food manufacturing industry. The second respondent's business sells goods (products) in competition with those the applicant sells and the target market is the same as that of the applicant, both in respect of existing customers and in respect of potential customers.
- The first respondent had access to and gained knowledge of the applicant's suppliers, the products each supplier supplied and the prices at which each supplier supplied those products. This took place via the applicant's central database to which the first respondent was given access because of his seniority and the trusted position held. Not all employees of the applicant enjoyed such access.
- The applicant alleges a protectable interest in confidential information⁵² and in customer connections.⁵³ In particular, it is averred that the first respondent:

⁵¹ Para 12.3.1 of the replying affidavit.

⁵² See *Townsend Productions (Pty) Ltd v Leech and others* 2001 (4) SA 33 (C).

⁵³ See *Rawlins and another v Caravantrucks (Pty) Ltd* 1993 (1) SA 537 (A) at 541D-H.

'is a very intelligent and astute individual...[and] has had access to the internal pricings and internal methodology of the Applicant of applying various direct and indirect costs within and to the applicant in regard *inter alia* to the Applicant's commodities raw materials business and the prices charged therein by the Applicant to its various customers...he even went so far as to begin developing while he was employed by the Applicant a costing model in regard to the costing of commodities raw materials.'⁵⁴

- In addition:

'...because of that knowledge, the First Respondent's access to and insight into the applicant's internal costings, which includes knowledge of what costings the Applicant takes into account in determining its prices to its customers and how it takes those costings into account, the First Respondent knows everything about how the Applicant as a system costs its products as well as the Applicant's margins or mark-ups. This system is applied across the board within the Applicant and extends to how it deals with clearing costs, working capital charges and items of that nature. All of this goes into the Applicant's mark-up or margin on the various products it deals in. All of this information is highly

⁵⁴ Paras 12.2.1, 12.2.2 and 12.2.4 of the replying affidavit.

confidential to the Applicant and clearly of great use to a competitor of the Applicant such as the Second Respondent.⁵⁵

- The first respondent received a daily sales report which covered all the regions across the applicant's sales nationally and could also access the applicant's 'Enterprise Resource Program', which is the applicant's internal database and accounting system containing the entire record of its trade activities, including the sales and prices of all products sold to all customers.⁵⁶
- The first respondent's knowledge of the applicant's internal workings pertains to the differential on particular prices which could affect the awarding of tenders for commodities raw materials.⁵⁷ The first respondent had full access to the applicant's internal costing methodology and weighting.⁵⁸
- Prior to employment with the applicant, the first respondent had no prior knowledge of the industry and gained all his knowledge from his employment with the applicant.⁵⁹
- The first respondent was privy to the applicant's shipping lists which indicated which suppliers supplied particular chemicals to the applicant and which constituted confidential information that would be useful to a competitor.⁶⁰ The second respondent could spring-board the potentially lengthy process of gaining approval from customers for particular

⁵⁵ At para 12.2.6 of the replying affidavit.

⁵⁶ Para 14.3 of the replying affidavit.

⁵⁷ Para 15.3 of the replying affidavit.

⁵⁸ Para 16 of the replying affidavit.

⁵⁹ Para 18.2 of the replying affidavit.

⁶⁰ Para 27.2 of the replying affidavit.

products supplied.⁶¹ Enormous damage to the applicant's business could result.

[32] Applying these facts to the questions posed in *Basson*, the applicant has an interest worthy of protection after termination of its contract with the first respondent. This relates, at the very least, to the confidential information pertaining to the applicant's pricing methodology known only by a select group of senior people.⁶² It constitutes useful information which is not in the public knowledge, of economic value to the applicant and capable of application in setting prices for the distribution of commodities raw materials.⁶³ That interest is threatened, objectively speaking, by the first respondent's employment with the second respondent, a direct competitor of the applicant, due to the possibility of the disclosure of such trade secrets.⁶⁴ That interest also weighs favourably, quantitatively and qualitatively, against the first respondent's interest not to be economically inactive and unproductive, without going further than necessary to protect the interest. There does not appear to be any aspect of public policy in this instance, having nothing to do with the relationship between the applicant and first respondent, that requires the restraint to be maintained or rejected. It cannot be said that the interests of the first respondent weighs more than the applicant's interests to be protected, so that the restraint is unreasonable and unenforceable.

⁶¹ Paras 27.3-27.4 of the replying affidavit.

⁶² See *Meter Systems supra* at 593 citing *Sibex Construction supra* at 64D and 67F-68C. On the relevance of the seniority of the first respondent to this enquiry, see *Dickinson supra* at para 38.

⁶³ See *Walter McNaughtan supra* at 389A-B. Also see *Knox D'Arcy supra* at 613E-F.

⁶⁴ *International Executive Communications Ltd t/a Institute for International Research v Turnley and another* 1996 (3) SA 1043 (W). A court is accordingly not influenced by undertakings by the ex-employee not to disclose such information, and will not typically investigate the *bona fides* of the ex-employee in tendering such undertakings: at 1056C/D-F, read with 1056H/I-1057A/B.

[33] Taking the facts set out by the applicant together with the facts set out by the first respondent which the applicant cannot dispute, and having regard to the inherent probabilities, I am satisfied that the applicant should on these facts obtain final relief when part B is ultimately argued. The facts set up in contradiction by the respondent must still be assessed to determine if serious doubt has been thrown upon the applicant's case. These facts include the following:

- The second respondent's business is exclusively in the commodities raw material field, and operates on an entirely different business model, outsourcing all storage and delivery costs as well as the calculation of landed cost of any particular material.
- The Gqeberha (Port Elizabeth) branch of the applicant generated only between 4% and 6% of the turnover of the applicant's business as a whole during the time the first respondent was employed by the applicant.
- The cost of commodities raw materials is extremely volatile and there is little or no customer loyalty – users typically purchase from the supplier able to offer the commodity at the cheapest price.
- While working for the applicant, the first respondent would request the purchasing division of the applicant (in Johannesburg) to approach all available suppliers to obtain the best prices and available quantities if a request for a quotation was received. A demand planner would be asked to calculate the best means of delivering the required supply over the period in question.

- The price contained in a quote would be dependent upon a number of constantly changing variables and was not based on any secrets or special strategies, or pricing methodology, which the applicant did not possess. Most of the components of any price were determined as a result of a calculation based on information not available to the first respondent.
- The first respondent had only limited access to the applicant's suppliers, products supplied and prices and this could, in any event, not constitute 'commercially sensitive' or 'confidential' information. The applicant has not established that it has any protectable proprietary interest and the restraint is against public policy and not enforceable, also being directed to the restriction of fair competition with the applicant and for an unreasonable period of time.
- The first respondent has an academic background in cost accounting and was aware that pricing would be a combination of the price from the supplier, being the base price in the relevant currency, applied to the exchange rate at payment date, together with the applicant's overhead cost and the application of a profit factor. The cost calculation occurred in terms of a spreadsheet developed and applied by a head office team consisting of finance and procurement employees. Any calculations undertaken by the first respondent were based on values provided by the applicant (supplier cost price from purchasing, forward exchange rate from finance, shipment details from purchasing, which resulted in a spreadsheet being created by finance and purchasing to

calculate the cost price). This was later the work of the demand planner appointed.

- All of the applicant's regular customers in the commodities raw material field were also regular (and simultaneous) customers of other suppliers, including the second respondent.
- It would in any event be against the first respondent's principles to use any inside knowledge. The first respondent engaged an employment consultant for a period of some six months in an attempt to find and secure alternative employment, without success.
- Despite the first respondent being employed by the second respondent for a period of six months, the applicant has been unable to demonstrate any damage or loss incurred during that period.

[34] In **Webster**, the *locus classicus* on opposed applications for interim relief, the court explained what is required for a right '*prima facie* established though open to some doubt':

'...more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required...If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, *prima facie* established, may only be open to "some doubt". But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal or interim relief.'

[35] A restraint which does not protect some legally recognisable interest of the employer and merely seeks to exclude or eliminate competition would be unreasonable, contrary to public policy and unenforceable.⁶⁵ Similarly, a restraint which is wider than reasonably necessary for the legitimate protection of any such proprietary interest will be held to be unreasonable and therefore contrary to public policy.⁶⁶ Such restraints would negate the applicant's ability to demonstrate a *prima facie* entitlement to the final relief sought. It is only if the restriction on the first respondent's activities serves to protect a proprietary interest relied on by the applicant that would result in an enforceable restraint.

[36] Bearing in mind the inherent probabilities, the respondent's averments are, in my view, of the kind that contradict the applicant's position and cast some doubt on the applicant's entitlement to relief – without throwing 'serious doubt' on the applicant's case. As such, the applicant has shown that it has a right, *prima facie* established though open to some doubt, to the final relief noted in the notice of motion. There is also a well-grounded apprehension of infringement through potential disclosure of confidential information to a competitor⁶⁷ and a similar apprehension of irreparable harm to the applicant if the interim relief is not granted, and the ultimate relief is granted. There is, furthermore, no suggestion that an alternative remedy is available to the applicant in the circumstances.

[37] As to the balance of convenience, I must consider the prospect of prejudice which appears to threaten the applicant if at this stage its claim for an interim

⁶⁵ *Automotive Tooling Systems supra* at para 8.

⁶⁶ Saner 5.6.

⁶⁷ See *Longfields Trading CC v Bradfield & another* [2011] JOL 28113 (KZD) at para 21, citing *Turner Morris (Pty) Ltd v Riddell* 1996 (4) SA 397 (E).

interdict is refused, and it is ultimately able to prove that the first respondent should be restrained from being connected to the second respondent for the full duration of the restraint. I must also consider the prospect of prejudice which appears to threaten the respondents if I should at this stage grant the interim interdict sought, and if it should later transpire that the defences raised by the first respondent have always been sound. In effect, I must form a view on the question as to which of the parties are liable to be the more seriously inconvenienced by the prospective prejudice.⁶⁸

[38] It is important that the application does not seek to restrict the first respondent from working or obtaining other forms of employment – it is only his involvement with the second respondent that is prohibited. The first respondent is clearly a person with significant skills, having risen to occupy a position as National Sales Manager. He also has an academic background in cost accounting and could seek work or temporary employment in various ways pending the final determination of the part B relief, which counsel agreed could be heard on an expedited basis. An unfortunate consequence of the enforcement of any restraint clause is the imposition of some degree of hardship on the party to whom it applies. In our law, this on its own is insufficient to deprive the applicant of the relief sought.⁶⁹ The position of the applicant is tenuous while the first respondent continues to render services to the second respondent, which poses a threat to the applicant's business.⁷⁰ The balance of convenience, in my view, favours the granting of an interim interdict.

⁶⁸ *Knox D'Arcy supra* at 601C-F. It may be added that Mr Blou SC suggested that the court could approach the applicant in the event that a tender for damages was considered to be necessary to settle the issue of the balance of convenience. On the approach I take to the matter this is unnecessary in this instance.

⁶⁹ See *Branco and another t/a Mr Cool v Gale* 1996 (1) SA 163(E) at 179E-F.

⁷⁰ See *Turnley supra* at 1058B-H.

[39] Finally, this court must weigh its assessment of the strength of the applicant's *prima facie* case together with the balance of convenience and exercise a judicial discretion in deciding whether or not the interim relief sought ought to be granted.⁷¹ In the circumstances, I am minded to grant the interim interdict. I also order that the costs of the proceedings shall be reserved for determination with the part B proceedings directed towards the final interdict, and direct that the applicant proceed to prosecute that matter expeditiously to minimise the prejudice to the first respondent in the event that the final relief is refused. Should the applicant unreasonably fail to do so, the first respondent may approach the court (whether as presently constituted or not), on notice to the applicant, for an order that the interim interdict has lapsed, together with further relief. The first respondent may, of course, also claim damages from the applicant in the event that the final relief is not granted.

Order

[40] In the result I make the following order:

1. The application to strike out is dismissed with costs, other than the following parts of the replying affidavit, which are struck out:
 - (a) The last two sentences of paragraphs 11.8;
 - (b) The second sentence of paragraph 11.16;
 - (c) The words "he misled the Applicant as to his intentions, and designedly so", in paragraph 11.24;
 - (d) Paragraph 11.20.

⁷¹ *Knox D'Arcy supra* at 601E-G.

2. The matter is dealt with on the basis of urgency, in accordance with Rule 6(12)(a) of the Uniform Rules of Court.
3. The first respondent is interdicted from being directly or indirectly interested or engaged in or connected with or employed by the second respondent anywhere in South Africa, whether as proprietor, partner, director, shareholder, member, employee, consultant, contractor, financier, agent, representative, assistant, trustee or beneficiary of a trust or otherwise and whether for reward or not.
4. This interim interdict shall apply with immediate effect pending the final determination of the relief set forth in part B of the notice of motion, but not beyond 30 October 2022.
5. The costs of the proceedings in part A are reserved for determination with the relief in part B.
6. The applicant is directed to prosecute the part B proceedings expeditiously, failing which the first respondent may approach the court, on notice to the applicant, for an order that the interim interdict has lapsed and for further relief.

A. GOVINDJEE

ACTING JUDGE OF THE HIGH COURT

Appearances:

Obo the Applicant : *Adv Blou SC / Adv Bosman*

Instructed by : *Knowles Husain Lindsau Inc. c/o Boqwana Burns*
84 Sixth Ave, Newton Park, Port Elizabeth

Obo the Respondent : *Adv Richards*

Instructed by : *Rushmere Noach Inc, 5 Ascot Office Park,*
Conyngham Road, Greenacres

Heard : *20 May 2021*

Delivered : *29 June 2021*