REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 42861/2017

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES / NO
(3) REVISED.

DATE 15/12/2017 SIGNATURE

In the application between:

HELUKABLE S.A.(PTY)LTD	**APPLICANT**
And	
AMELIA O'TOOLE	**FIRST RESPONDENT**
VELOCITY CABLE COMPANY	**SECOND RESPONDENT**

J U D G M E N T

MAIER-FRAWLEY AJ

Introduction

1. The applicant brought urgent motion proceedings against the respondents for an order interdicting and restraining the first respondent ("O'Toole") from conducting business, or taking up employment, or remaining in the employ of the second respondent ("Velocity Cable"), in contravention of a restraint of trade agreement. Relief is also sought to enforce confidentiality undertakings given by the first respondent in favour of the applicant ("Helukabel"). For convenience, I will refer to the parties intermittently in this judgment by their names, as abbreviated by me.

2. Both the first and second respondents opposed the application. The basis for the opposition is that the applicant is not entitled to enforce the restraint of trade provision in the employment contract, for the following reasons:

> " the Applicant does not possess any trade secrets and therefore no such trade secrets have been...disclosed;
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> the clients which the applicant seeks to restrain me from contacting are existing and long standing clients of the Second Respondent.
>
> the Applicant has failed to establish a protectable interest worthy of protection...
>
> Accordingly, the interdict sought by the Applicant is:
> merely an attempt to eliminate competition and reinforce the Applicant's dominance in the industry;
>
> contrary to public policy;
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> unreasonable; and
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> an unlawful restriction of my right to freedom of trade. "[1]

3. The applicant is a local subsidiary of a multinational German-based company, which conducts business as a retail supplier of cable and wire products and accessories. The second respondent, although a smaller concern, is a direct competitor of the applicant in the cable industry. The first respondent is an experienced sales representative who was previously employed by the applicant for a period of 18

[1] p.68 of the papers, paras 14 and 15.

months. She is presently employed by the second respondent, Velocity Cable. Although the date on which she commenced employment at Velocity Cable is not stated, the facts indicate that she has been in its employ at least since September 2017. Velocity Cable operates in Gauteng. It also has a branch in the Western Cape and employs a sales representative in Kwazulu Natal.

Urgency

4. The respondents opposed the hearing of the matter on the basis of a lack of urgency. It is common cause that O'Toole signed a restraint of trade agreement in favour of the applicant, which became operative upon her resignation from the applicant's employ on 31 March 2017. The restraint is due to expire by effluxion of time on 31 March 2018. When a restraint is of such limited duration, and it is clear that substantial redress will not be afforded to the applicant if the matter is only heard in the normal course, then such a matter should be treated as a matter of urgency.[2]

5. In any event, it is well established that restraint of trade matters are inherently urgent,[3] which necessarily entails that they are heard in urgent court, ahead of the claims of other litigants who proceed in the ordinary course.

6. On the applicant's version, Helukabel launched the application as soon as was reasonably possible upon its discovery that O'Toole had taken up employment at Velocity Cable (a direct competitor of Helukabel) and had approached various customers of Helukabel, in contravention of the restraint of trade agreement.

7. Had the application been brought in the normal course, it is more than likely that the period of the restraint would have expired by the time the matter was heard, leaving the applicant without recourse to secure protection against an ongoing erosion of its contractual rights, particularly where such rights are due to expire by effluxion of

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[2] See: *The Waste Group (Pty) Ltd v Brereton* 2017 JDR 1019 (GP) at p.3, para 4.
[3] See: *ARB Electrical Wholesalers (Pty) Ltd v Texan grove*, an unreported decision of the labour Court (Cape Town) under case no. 335/2014 at [20]; *Boomerang Trade CC v Groenewald* 2012 JDR 1713 (ECG) at p.14, para 36.

time within the next few months. This was clearly demonstrated in the applicant's affidavits.

8. In my view, a proper case was made out in respect of urgency. Accordingly, I entertained a hearing of the matter on the merits.

9. Before turning to the facts and the issues that arise from them, I will set out the basic legal principles applicable to disputes concerning agreements in restraint of trade. It is not necessary to canvass them in vast detail, as they are well established.

Relevant Legal Principles

10. In our law, an agreement in restraint of trade is, on the face of it, valid –and hence enforceable –and will only be invalid and unenforceable if it is contrary to public policy on account of it unreasonably restricting a person's right to trade or to work.[4] Where a party to an agreement in restraint of trade attacks its validity, he or she bears the onus of establishing that it is unreasonable on a balance of probabilities.[5] Even where enforcement of a covenant in restraint of trade in restricted form is sought, the onus of showing that enforcement of the cut down restraint is unreasonable, remains on the respondent.[6]

11. In determining the reasonableness of restraint covenants, two competing policy considerations come into play and have to be balanced in the light of the particular circumstances of the case. The first is that it is in the public interest that people should be held to their agreements. The second is that it is also in the public interest that people should be free to engage in economic activity.[7]

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[4] See: *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 891 A-C;
[5] *Magna Alloys*, at 893 C-G
[6] See: *BHT Water Treatment (Pty) Ltd v Leslie and Another* 1993 (1) SA 47 (W) at 52 H- 54 I-J; *Rawlins and another v Caravantruck (Pty) Ltd* 1993 (1) 537 (A) at 540I-541A.
[7] *Magna Alloys*, at 893 H-C. Section 22 of the Constitution now protects the right to choose a 'trade, occupation or profession freely'. It has been held, however, that the common law rules relating to restraint of trades are not unconstitutional. . See: *Knox D' Arcy Ltd and another v Shaw and another* 1996 (2) 651 (W) at 660I-661A

12. When a court considers whether to enforce a restraint of trade it is required to exercise a value judgment on its assessment of the facts seen in the light of both common law principles as well as constitutional values.[8] Guidance on how to approach this value judgment is to be found in judgments such as *Basson v Chilwan and others*[9] and *Reddy v Siemens Telecommunications (Pty) Ltd*[10] and *Kwik Kopy (SA) (Pty) Ltd v Van Haarlem and Another.*[11] Public interest requires that, generally speaking, the freedom of each individual to work and compete in the field for which he or she is qualified should not be curtailed. To hold an individual to such a contractual obligation remains reasonable for as long as, and to the extent that, such curtailment is necessary for the legitimate protection of the trade connection and trade secrets of a former employee.[12] The enquiry that is undertaken at the time of enforcement covers a wide field and includes the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests.[13]

13. It is trite that the law endows confidential information with protection. Whether information constitutes a trade secret is a factual question. For information to be confidential it must be capable of application in the trade or industry, that is, it must be useful and not be public knowledge and property; known only to a restricted number of people or a close circle; and be of economic value to the person seeking to protect it.[14] All that the applicant needs to do is to show that there is secret

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[8] This involves a balancing of competing interests, the first being embodied in the maxim *pacta sunt servanda* (meaning, 'agreements must be kept', based upon the principle of good faith) and the second being reflected in the provision in s22 of the Constitution that every citizen has the right to freely choose his occupation.

[9] 1993 (3) SA 742 (A) at 767 G-H, where the test for determining the reasonableness or otherwise of the restraint provision is set out.

[10] 2007 (2) SA 486 (SCA). At para 16, Malan AJA stated as follows: "*In applying these two principal considerations, the particular interests must be examined. A restraint would be unenforceable if it prevents a party after termination of his or her employment from partaking in trade or commerce without a corresponding interest of the other party deserving of protection.*"

[11] 1999 (1) SA 472 (W), where Wunsch J added a further enquiry, namely, whether the restraint goes further than is necessary to protect the interest.

[12] See: *The Waste Group (Pty) Ltd v Brereton* 2017 JDR 1019 (GP) at para 22, quoting *Sibex Engineering Services (Pty) Ltd v Van Wyk* 1991 (2) SA 482 (T) at 505 H-I.

[13] Ibid *Reddy.*

[14] See: *Experian South Africa (Pty) Ltd v Haynes and another* 2013 (1) SA 135 (GSJ) at para 19 and authorities there cited.

information to which the first respondent had access, and which in theory the first respondent *could* transmit to the second respondent should he desire to do so.[15]

14. Knowledge of a customer base and pricing structures are proprietal information which can be protected by a restraint of trade clause.[16]

15. In *Rawlins supra,* Nestadt JA pointed out that "The need of an employer to protect his trade connections arises where the employee had access to customers and is in a position to build up a particular relationship with the customers so that when he leaves the employer's service, he could easily induce the customers to follow him to a new business." [17]

And further:

"Even though the persons to whom an employee sells and whom he canvasses were previously known to him and in this sense 'his customers', he may nevertheless during his employment and because of it, form an attachment to and acquire an influence over them which he never had before. Where this occurs, what I call the customer goodwill which is created or enhanced, is at least in part an asset of the employer. As such, it becomes a trade connection of the employer which is capable of protection by means of a restraint of trade clause." [18] (own emphasis)

The Facts

16. A number of important facts are either common cause or not disputed. I shall set these out first before dealing with the disputed facts.

17. O'Toole accepted a written offer of employment from the applicant for appointment to the position of External Sales Consultant-Gauteng, on 27 August 2015. She became formally engaged on 1 October 2017. Upon signing the written offer, a binding contract of employment came into being, the offer thereupon constituting the letter of appointment. In terms of her employment contract, O'Toole, *inter alia,*

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[15] Ibid *BHT Water Treatment,* p.57 at I-J.
[16] See: *BoomerangTrade CC v Groenewald* 2012 JDR 1713 (ECG) at para 63; *Rawlins and another v Caravantruck (Pty) Ltd* 1993 (1) SA 573 (A) at 541D-F. In *BHT Water Treatment (Pty) Ltd v Leslie and another* 1993 (1) SA 47 (W) at p.56 B, Marais J pointed out that *'Trade secrets, or trade or customer connection, are the traditional matters which an employer can legitimately seek to protect by means of a restraint of trade clause'.*
[17] At 541 C-D
[18] At 542 G-H

undertook to perform her duties 'diligently in accordance with this letter of appointment and the Job Description of External Sales Consultant'. (own emphasis)

18. On 4 January 2017, O'Toole signed and accepted a written 'Job Description' in which some of her duties as sales representative/executive, were delineated.[19] In terms thereof, O'Toole was responsible, in the position of sales representative, for selling Helukabel's products or services 'through the achievement of opportunity-based sales quotas,' and was required to visit customer sites and develop ongoing, profitable relationships with customers. Further, O'Toole was duty bound, *inter alia*, to: radiate sales from within Helukabel's client base; generate and develop new customer accounts; build and foster a network of referrals to create new opportunities for revenue growth; emphasise product/service and benefits, quote prices, discuss credit terms, prepare sales order forms and reports; overcome objections of prospective customers and provide feedback from customers on a weekly basis when reporting to internal sales and management thereon.

19. Paragraph 21 of the letter of appointment contains a Restraint provision and Confidentiality undertaking. The relevant part thereof reads as follows:

> " You...shall not disclose to any person any information concerning the activities of the Company and shall not, during the period of your employment, or after termination thereof, be entitled, whether for your own benefit or that of another, to make use of or derive profit from any such information or knowledge.
>
> A restraint of trade applies for the duration of one year for direct cable competitors, Lapp Group, Nexams & Distributors, APT, Innomatic and going in direct competition to Helukabel SA (Pty) Ltd. "

20. The written Job Description contains a similar clause, save that the restraint of trade provision includes two additional prohibited employers for purposes of the restraint. The relevant provision, as amended in January 2017, reads as follows:

> " A restraint of trade applies for the duration of one year for direct cable competitors, Lapp Group, Velocity, PSA technologies & TDK, APT, Innomatic and going in direct competition to Helukabel SA (Pty) Ltd. "

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[19] The same document was signed on behalf of the applicant by the managing director, Mr. D. Gunnewegh.

21. O'Toole's duties *inter alia,* entailed that she develop ongoing, profitable relationships with customers of the applicant and one of the requirements for the position held by her, was the ability to build and maintain lasting relationships with customers.

22. Due to her position, O'Toole had access[20] to Helukabel's company information pertaining to its products and services, including documentation detailing where and at what price its products are procured, its pricing structures and lists for purposes of giving quotations, which included profit margins of the applicant, credit terms and order forms and sales reports. She also had access to customer information that detailed the customer's address and telephone numbers, contact information of key persons responsible for orders, products purchased and prices paid by the customer, including discounts given to each customer, credit and payment terms of each customer as well as details regarding the volume of business derived from each customer in respect of Helukabel's national and international customer base.

23. O'Toole was employed at the applicant from 1 October 2015 until 31 March 2017. On 9 March 2017, she resigned from the applicant's employ. Her resignation was accepted by the applicant in writing. The applicant agreed to release her from her duties on 9 March 2017, although O'Toole was paid her full salary until the last day of the month. She was directed to return all of the applicant's property by 10 March 2017. She signed the written acceptance of her resignation, in which she declared that she had not retained copies of any of the applicant's documents.

24. During the latter part of March 2017, the applicant discovered that O'Toole had electronically forwarded a list of the applicant's pricing, credit terms and detailed product information, including all customer information[21] from her company mobile

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[20] Albeit that O'Toole, in a seemingly deliberate ambivalent statement, refers to her access to company information as '*limited*' access, in paragraph 36.3 at p.76 of the papers, whilst conceding, in a later statement, that she could have emailed such company and customer information to her private email account.

[21] Containing contact details of the applicant's customers, as well as pricing and credit terms and business volume information pertaining to such customers.

phone to her private email account. This was discovered by O'Toole's erstwhile Sales Manager, Mr. J. Van Dyk ("Van Dyk"), who deposed to a confirmatory affidavit in support thereof. Van Dyk informed the management of the applicant thereof but a decision was taken not to pursue the return thereof at that juncture, as O'Toole had indicated at the time of her resignation that she intended to take up employment with an employer who did not compete with the applicant.

25. Around the middle of October 2017, the applicant discovered that O'Toole had been approaching some of the applicant's customers and that she had become employed by Velocity Cable (second respondent). Confirmatory affidavits deposed to by Marius Van Wyk of Berkit Manufacturing (Pty) Ltd ("Berkit") and Kenneth Marktl of Innomatic (Pty) Ltd ("Innomatic") were provided in the founding affidavit. Both Van Wyk and Marktl confirmed that O'Toole had approached them during September 2017 in her capacity as a sales consultant on behalf of Velocity Cable, with the intention to promote Velocity Cable's business and sell its products. Van Wyk confirmed that he had not been doing business with Velocity Cable for some time, that is, until O'Toole approached him on behalf of Velocity Cable. He thereafter placed orders with Velocity Cable, as its prices were lower than Helukabel.

26. It is common cause that the applicant and first respondent share certain customers in common and that retailers in the industry purchase product from 'mostly the same suppliers'.

27. Certain facts are in dispute. I deal with these when evaluating the opposing contentions of the parties. The respondents deny that the applicant is possessed of trade secrets or customer connections, such as to constitute protectable interests, or that the restraint sought to be imposed is reasonable.

Protectable Interests

28. It is well established that proprietary interests that can be protected by a restraint agreement are essentially of two kinds, namely:

28.1. the relationships with customers, potential customers, suppliers and others that go to make up what is compendiously referred to as the 'trade connections' of the business, being an important aspect of its incorporeal property known as goodwill; and

28.2. 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 him, to gain a relative competitive advantage. Such confidential material is sometimes compendiously referred to a 'trade secrets.'[22]

29. For the reasons that follow, I am of the view that the applicant has established its protectable interests for purposes of enforcing the restraint in question.

[A] Trade secrets

30. The applicant contends that its company information, particularly concerning its pricing structures and profit margins, is confidential and constitutes its trade secrets and that the first respondent, due to her position, had access to certain confidential and sensitive documents that contained company information detailing, *inter alia,* its products and services, where and what price its products are procured, its pricing structures and profit margins, and its credit terms.

31. The first respondent admits that she had access to the applicant's catalogue, which contained information about the applicant's products and services,[23] but avers that she had limited access to the other information pertaining to pricing. In this regard, she avers that since cable and wire products are made primarily from copper, product pricing is closely linked to the copper commodity price. The applicant's pricing of its products is therefore determined 'primarily by external factors which suppliers impose' on retailers such as the applicant and second respondent, 'which

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[22] See: *Sibex Engineering Services (Pty) Ltd v Van Wyk and another* 1991 (2) SA 482 (T) at 502D-F; *Experian supra,* at para 17.

[23] O'Toole avers that the catalogue is not confidential in that is available on the applicant's website and via its mobile application and likely in possession of its customers.

leaves little room for internal pricing strategy'. Therefore, so it was contended, retailers will ordinarily provide customers with daily quotes so as to factor in such external considerations and the fact that retailers by and large purchase from the same suppliers, also contributes to pricing inflexibility.

32. The applicant's *riposte* to the aforegoing is that even if external factors play a role in product pricing, knowledge by the first respondent of the applicant's peculiar pricing structures and profit margins, would always afford a competitor of the applicant an unfair advantage in dealing with customers in the industry, as such knowledge would allow the competitor to consistently undercut the prices charged by the applicant. The argument is persuasive. In terms of her job description, the applicant had knowledge of where and at what price the applicant's products were procured and of the applicant's profit margins. The amount of profit the applicant is able to make in selling its products is directly linked to the price at which it sells the products to its customers vis-a vis the price at which it purchases the products from its suppliers.

33. When regard is had to the undisputed facts, namely, that the applicant competes with more than 60 other companies in Gauteng alone, it would be reasonable to infer that intimate knowledge by the first respondent of the applicant's pricing structures and profit margins, when utilised for purposes of securing business for the second respondent, would allow the second respondent to undercut the applicant's prices to customers, particularly those that are shared between the applicant and the second respondent and in respect of which the applicant and second respondent compete for business. Seen from this perspective, the applicant's financial information pertaining to its pricing structures and profit margins would comprise information that is peculiar to it, and as such, would not be known to competitors.

34. Although the applicant admits that she performed some of the activities outlined in her job description, she sought to distance herself from being responsible for quoting prices to customers on the basis that this was processed using the applicant's accounting software by other employees who were allocated to quote on

leads generated by her. On her own version, she had access to the financial and pricing information of the applicant. As evidenced by Van Wyk's affidavit, she was able to quote lower prices than that charged by the applicant in respect of the supply of cable products by the second respondent to Berkit.[24] As pointed out by the applicant's counsel, in terms of the first respondent's job description, she was responsible for providing feedback from customers to management on a weekly basis. This would have entailed feedback on prices quoted. To provide feedback, the sales representative would have had to convey information to the customer. Furthermore, the first respondent was tasked with the duty to close deals [business] whilst with a customer, and she would only have been able to close a deal if she was able to supply prices in respect of the products required by the customer. For these reasons, it was contended that the first respondent's denials simply do not hold water. I am inclined to agree. The first respondent's version is not sustainable on the facts or on the probabilities.

35. As a matter of law, it is not necessary for the purpose of granting an interdict to find that the first respondent would use the applicant's trade secrets and confidential information in her new employment. It is sufficient if she *could* do so. The restraint is aimed at preventing a person with knowledge of confidential information as a result of his or her employment, from utilising it to the detriment of the employer.[25]

36. The applicant contends that the first respondent had built up a relationship with the applicant's customers, which was so strong and effective, that she was able to take the customer Berkit away with her. The facts show that the First respondent, on behalf of the second respondent, convinced the customer Berkit on the basis of her visit,[26] and by offering lower prices, to again proceed to purchase from the Second Respondent. The first respondent did not deny having emailed the applicant's pricing

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[24] The affidavit deposed to by Mr. Van Wyk on behalf of Berkit, was not disputed or gainsayed by controverting evidence.
[25] Ibid *Reddy*.
[26] That is, by virtue of the relationship she had built up with Van Wyk during her employment with the Applicant.

information to her personal email address.[27] The inference is inescapable that she was able to utilise her knowledge of the applicant's pricing structures in so doing.

[B]Customer connections

37. As indicated earlier, the applicant and the second respondent share certain common customers within the cable industry. By reason thereof, the applicant contends that it is even more necessary to protect the relationships that it has built up with its customers.[28] It is also not in dispute that of the 200 customers that the first respondent was tasked to service whilst in the applicant's employ, 12 of such customers were introduced to the applicant by the first respondent.[29] The first respondent admits that she had access to the applicant's customer information,[30] but contends that the applicant's customer relationships do not constitute a protectable interest. In this regard, the first respondent contends that customers which the applicant seeks to restrain her from contacting are long standing customers of the second respondent, in respect of whom she had built up relationships through her own network of customers that she had established during the course of her career. Even if this were true, it does not amount to a defence cognisable in law.

38. As a matter of law, any relationships that were enhanced during the first respondent's employment at the applicant, is protectable in the hands of the applicant, as employer.[31] Any opportunity which the first respondent might have had

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[27] This is referred to in paragraph 23 above. The first respondent returned the applicant's catalogue to it but remained silent about her failure to return of the information which she had transmitted to her personal email address, preferring rather to criticize the applicant for its inability to retrieve the email from its main server in Germany, even though the applicant had explained such the reason for its inability to retrieve same, in its replying affidavit.

[28] See too, the sentiments expressed by Nestadt J in this regard in *Rawlins supra*, at p. 544 B-C.

[29] Even though this was alleged in the replying affidavit, the respondents chose not to avail themselves of the opportunity to file a response thereto. To borrow from the words of Leach JA in *Lagoon Beach Hotel v Lehane* 2016 (3) SA 143 at 152 I: "[T]he appellant, as respondent *a quo*, did not seek to avail itself of the opportunity to deal with the additional matter ...set out in reply, and I see no reason why these allegations should therefore be ignored."

[30] Referred to in paragraph 21 above.

[31] See: *Den Braven SA (Pty) Ltd v Pillay and another* 2008 (6) SA 229 (D) at 237-238.

to build and solidify her relationships with customers qualifies as and forms part of the employer's goodwill.[32]

39. The applicant's case is that the first respondent is approaching its customers on behalf of the second respondent. The customers are approached for the purpose of placing orders with the second respondent by the utilisation by the first respondent of the applicant's trade secrets and trade connections. The applicant avers that the first respondent has contacted 16 of its customers on behalf of the second respondent. The first respondent does not dispute doing so, but avers that these are 'existing' customers of the second respondent and that therefore her conduct did not amount to a solicitation of the applicant's customers. However, the fact that the second respondent did business with the applicant's customers in the past, does not necessarily mean that they are 'existing' customers of the second respondent; nor does it mean derogate from the fact that meaningful relationships were either established or enhanced by the first respondent with the applicant's customers during her employment with the applicant. The connection that was established with relevant contact persons at the applicant's customers was meaningful in the sense that it enabled the first respondent to induce the applicant's customers to transfer their business to the first respondent whilst in the employ of a competitor. A prime example thereof is in relation to the customer 'Berkit'.

40. The first respondent avers that she introduced the customer 'Berkit' to the applicant. It is clear from Van Wyk's affidavit, that Berkit started doing business with the applicant 6 months before the first respondent commenced employment with the applicant. Van Wyk's affidavit also makes it clear that it was not until the first respondent approached him on behalf of the second respondent that he was prepared to again do business with the second respondent, particularly as she had quoted lower prices. It seems clear that the switch of active purchasing[33] happened as a result of the first respondent's influence and inducement as well as the

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[32] See: R*awlins supra*, at 542.

[33] Berkit (represented by Van Wyk) transferred its business from the applicant to the second respondent as a direct result of the relationship with O'Toole and her quoting of lower prices than those charged by the applicant.

incentive given by the first respondent to supply products at lower prices. Having regard to the affidavits deposed to by Van Wyk, Marktl and Rick Steynberg ('Steynberg'),[34] it appears more probable than not that the respondents are utilising and benefitting from the trade secrets (pricing information) and trade connections of the applicant.

Breach of Restraint Provision

41. It is common cause that the first respondent has taken up employment at the second respondent in breach of the restraint provision contained in her employment contract with the applicant. In terms of the letter of appointment, as indicated earlier, the employment contract is made up of the signed offer of employment and the Job Description of 'External Sales Consultant'.

42. The applicant avers that it is unable to locate the original job description that would have formed part of the written offer. In any event, the initial job description was replaced or varied by the later Job Description signed by the first respondent and Gunnewegh, on behalf of the applicant, in January 2017. The applicant required all employees to agree to an updated job description, which included an undertaking of confidentiality in respect of the applicant's affairs. According to the applicant, the term 'consultant' or 'executive' or 'representative' is used interchangeably in such job description.

43. In terms of the relevant restraint provision, the first respondent is restrained from working for a list of prohibited employers for a period of one year following the termination of her employment at the applicant. The second respondent is one such company that is specified as a prohibited employer.

44. The first respondent did not deny that a job description formed part of her employment contract at the applicant. Her version is that 'no such initial job

[34] The evidence put up by the applicant in this regard was not disputed or gainsaid by controverting evidence from the respondents.

description exists.' It might well not exist presently, as the applicant is unable to locate it. That does not necessarily mean that it never existed. The version is based on a vague and ambivalent statement that is unsupported by fact and in my view, therefore lacks credence.

45. The respondents sought to rely on various other technical objections in attacking the applicability or enforceability of the signed written job description of 4 January 2017. One objection was that the letter of appointment referred to the position of 'Sales *Consultant*' whereas the job description pertained to the position of Sales *Executive*'. It is abundantly clear that the documents are required to be read together as the letter of appointment itself records an undertaking by the first respondent to perform her duties in accordance with the letter of appointment and the Job Description of External Sales Consultant. The Job description refers to the title of External Sales Representative interchangeably with that of External Sales Executive. In her letter of resignation, the first respondent herself referred to her title as being that of External Sales Representative. It is abundantly clear that the terms were used interchangeably to mean the same thing. Another objection was that the job description failed to contain a stipulation to the effect that that the January 2017 job description was to supersede the initial job description. No reason is given as to why such a stipulation would be necessary in the light of the provisions of clause 24.3 of the letter of appointment. In terms of clause 24.3, any variation of the terms or conditions of the employment contract to be recorded in writing and signed by both parties. The job description was indeed recorded in writing and signed by both parties and was therefore valid. The objections do not therefore hold merit.

46. Lastly, the respondents contend that the job description was signed by the first respondent under duress and as a result of pressure having been exerted by the first respondent's superior, one 'Van Dyk' upon the first respondent. The first respondent avers that she was presented with the job description for signature in a 'non-negotiable manner that can only be described as duress' and that she had no option but to sign same for fear of disobeying her newly appointed superior. The applicant

disputes the version of duress, particularly, since Van Dyk did not even sign the document. The job description was signed on 4 January 2017 by the first respondent and Gunnewegh on behalf of the applicant.

47. It is not in dispute that the job description contains the same restraint provision as that provided for in the letter of appointment, save that it includes two additional companies in the list of prohibited employers for purposes of the restraint. The first respondent has not indicated why the inclusion of two additional prohibited employers in the restraint provision was something which she would not have been prepared to agree to, nor has she furnished any reason as to why duress would have been needed to be applied. Furthermore, her letter of resignation contained a glowing commendation of the applicant as employer, and no mention is made therein of duress or untoward conduct on the part of the applicant's employees. In the light of these factors, the first respondent's version cannot be said to be either plausible or probable.

48. Accordingly, it merely remains to be said that the first respondent has breached the terms of the restraint by taking up employment with a prohibited employer, namely, the second respondent, within the period of the restraint.

Reasonableness of the Restraint

49. The applicant seeks to enforce the restraint[35] only for the limited area of Gauteng,[36] and only as pertains to particular competitors of the applicant.[37] The period of 12 months of the restraint will expire on 31 March 2018. The applicant's case in this regard is that although the first respondent had access to its full national and international database of customers, her actual exposure was in relation to customers in Gauteng.

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[35] Being the original restraint contained in the offer of employment, as amended by the job description as regards the list of prohibited employers. The original restraint did not refer to Velocity Cable as a prohibited employer, however, in January 2017, Velocity Cable was included in the list of prohibited employers.

[36] Not in respect of an unlimited area, as per the original restraint.

[37] The restraint, as amended in the job description, refers to five prohibited employers, of which Velocity Cable is one.

50. The applicant contends that the limited application of the restraint to only 5 of the applicant's competitors and only in the Gauteng area, where there are at least 65 cable distributor competitors in Gauteng alone, and where the second respondent also has a branch in the Western Cape, for the limited remaining period of 4 months, is not unreasonable. The first respondent submits that as the Gauteng area constitutes the hub of the second respondent's activities, it would be unreasonable to restrain her from employment in such area.

51. When considering the totality of the facts, it is clear that the first respondent can still apply her sales skills in the current industry (or any other industry), either by being employed at one of the non-prohibited competitors of the applicant within the Gauteng area, or by being employed at the second respondent in a location outside of Gauteng. Accordingly, it cannot be said that her freedom to trade has been unreasonably restricted by means of the restraint which is sought to be enforced. On the contrary, the restraint still allows the first respondent the freedom to apply her trade within the cable industry by means of employment at various non-prohibited employers.[38]

52. Furthermore, this is not a case such as *Basson v Chilwan*[39] where an employer's application to assert a protectable interest in respect of customer connections against an ex-employee who had no such connections, was dismissed. In the present case, the first respondent is employed by the second respondent to apply her sales skills in a concern which carries on the same business as the applicant and which competes with the applicant within the same industry. The first respondent's loyalty will be to her new employer and the opportunity to disclose confidential information

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[38] A list of all the non-prohibited cable distributors, where the first respondent is able to apply her trade, appears at pp.130-131 of the papers.
[39] *Supra*, at 769 I-770B

at her disposal, whether deliberately or not, will exist.[40] The restraint was intended to relieve the applicant precisely of this risk of disclosure.

53. In my view, in the particular circumstances, it has not been shown that the restraint is unreasonable and that its enforcement is therefore against public policy. It follows therefrom that that the first respondent should be held to her contractual undertaking.

Requirements for Interdict

54. As the restraint is for a limited period, the matter should be treated as involving substantially an application for final relief.[41]

55. The requirements for the grant of a final interdict have been met. The applicant has shown a clear right in relation to its protectable interests, namely, its customer connections and trade secrets. Not only has the applicant's clear right been demonstrated, but also its breach. The very breach is an 'injury actually committed' in the formulation of the second requirement for a final interdict, being an 'injury actually committed or reasonably apprehended'.[42] The applicant has demonstrated that it has already suffered harm in the loss of business from one of its customers, Berkit, in that such customer placed orders with the second respondent due to the influence of the first respondent. It is also clear that there exists a possibility of further harm being suffered by the applicant if the first respondent were not restrained from contacting its customers for purposes of influencing them to transfer their business away from the applicant. The second respondent was clearly aware of the restraint under which the first respondent finds herself. The wrong is in the nature of a continuing wrong, as was clearly demonstrated by Van Wyk and Steynberg's affidavits, neither of which were disputed, or refuted by means of gainsaying evidence.

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[40] See: *Reddy supra,* at 499, para 20.
[41] See: *Reddy supra,* at para 4.
[42] See: *V& A Waterfront Properties (Pty) Ltd and another v Helicopter and Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) [2006] 2 ALL SA 523, at paras 20-21.

56. The applicant has no other satisfactory remedy available to it for purposes of enforcing the remaining period of the restraint. The respondents contend that the applicant could have avoided the litigation by means of appropriate undertakings provided by the respondents. The difficulty with this contention is that firstly, no undertakings were tendered by the respondents, and secondly, even if they had been tendered, as was stated by Marais J in *BHT Water Treatment supra,* 'an ex-employee bound by a restraint, the purpose of which is to protect the existing confidential information of his former employer, cannot defeat an application to enforce such a restraint by giving an undertaking that he will not divulge the information if he is allowed, contrary to the restraint, to enter the employment of a competitor of the applicant.' [43] The respondents also contend that the applicant has an action for damages at its disposal in respect of any financial losses it may have sustained as a result of the breach of the restraint. However, it has been reiterated in several cases that proceedings for the enforcement of a restraint of trade agreement invariably seek to interdict ongoing unlawful action in respect of which an applicant continues to suffer financial losses, which are notoriously difficult to quantify, or recover by way of action. [44]

57. The respondents further contend that the relief sought in prayers 3(ii) and 3(iii) and 4 of the notice of motion is not supported on the papers. As regards prayers 3(ii) and (iii), the respondents submit that the applicant has failed to demonstrate a breach of the restraint in relation to the other four prohibited employers listed therein, nor is there 'any hint of anticipated breach' in relation to such employers or even as regards prayer 3(iii), which provides for a prohibition against 'going into direct competition with the applicant'. However, all the facts must be considered. The first respondent has approached various customers of the applicant with a view to soliciting their business for the benefit of the second respondent[45] and has made use

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[43] At p.58,57 J-58B. Similar remarks have been made in other cases. These are conveniently cited in *Reddy supra,* p.500, par 20, read with fn 38.

[44] See: *Boomerang supra,* at p.14, para 35; *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and another* 2009 (3) SA 78 (C) at 88J.

[45] This is supported by the facts set out in the affidavits of Van Wyk, Marktl and Steynberg, and, at the risk of sounding repetitive, the affidavits all stand uncontroverted.. Steynberg's affidavit, in particular, provides a factual basis for inferring that the applicant will likely continue to approach the customers of the applicant in order to entice them to give her their business for the benefit of the second respondent, unless interdicted from doing so. And unless the first respondent is interdicted, there remains a realistic and reasonable apprehension that the wrongdoing will continue.

of the applicant's confidential information and taken advantage of the applicant's customer connections in so doing.

58. As regards the relief sought in prayer 4, namely, that the first respondent be interdicted and restrained 'from contacting any clients of the applicant', the respondents submit that to restrain the first respondent *'absolutely, in this blanket fashion, is draconian'* in that it prohibits any contact whatsoever, and is not limited to contact that is made the first respondent for purposes of enticing the applicant's customers to give the second respondent their business.

59. The way in which the relief is framed in prayer 4 contains no limitation in regard to the nature or purpose of the contact sought to be restrained and in my view, cannot therefore be granted in the terms sought. As pointed out by Nestadt J in *Rawlins supra,* 'the need of an employer to protect his trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he leaves the employer's service he could easily induce the customers to follow him to a new business.'[46] It was suggested by the applicant's counsel that a limitation be imposed as to area and period along the lines employed by the court in Rawlins *supra.*[47] As pointed out in *BHT Water Treatment supra,*[48] in suitable circumstances, where the issues have been adequately canvassed, the court could *mero motu,* or at the invitation of one of the parties, cut down a restraint and enforce it in its truncated form. The present case is suitable for the employment of such an approach. In my view, the restraint, when cut down in the manner proposed, will not be unduly repressive towards the first respondent.

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[46] At 541 C-F. As stated in *Morris (Herbert) Ltd v Saxelby* [1916] 1 AC 688 (HL) at 709, the relationship must be such that the employee acquires 'such personal knowledge of and influence over the customers of his employer…as would enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer's trade connection…'

[47] In *Rawlins supra,* the court a quo granted an interdict *inter alia,* restraining Rawlins from 'contacting and/or soliciting' any of the respondent's customers as at the date of termination of his employment with the respondent. On appeal, the order was altered, in relation to that portion, to read: 'The first respondent be and is hereby interdicted for the period and within the area referred to in para 1 from contacting and/or soliciting as customers of the second respondent any of the applicant's customers as at the date of termination of his employment with the applicant.' (own emphasis)

[48] At p.53D-E.

Conclusion

60. I am satisfied that the applicant has discharged its onus of proving the existence of the restraint agreement and that the first respondent is in breach thereof by taking up employment with the second respondent, a prohibited employer thereunder. In addition, the applicant has shown that the first respondent has contacted various of its customers and has accordingly demonstrated the need for the protection sought in respect of its customer connections. The respondents, however, have failed to prove that the restraint, subject to constraints as to area and period,[49] is unreasonably restrictive or oppressive and therefore unenforceable. The respondents were afforded an opportunity to remedy the breach prior to the launch of the application and chose not to avail themselves thereof. The general rule is that costs follow the result. I see no reason to depart therefrom.

61. The following order is made:

1. The applicant's failure to comply with the forms, service requirements and time periods provided for in the Uniform rules of court is condoned and the application is allowed to be heard as one of urgency;

2. The first respondent is interdicted from utilising and/or directly or indirectly divulging and/or disclosing to any third party, and in particular, to the second respondent, any of the applicant's trade secrets, including the list of the applicant's pricing, credit terms, and detailed product information including, any of the applicant's trade connections, including customer lists containing full relevant details of customers, and the pricing and credit terms pertaining to such customers, and business volume information pertaining to such customers.

3. The first respondent is interdicted and restrained, until 31 March 2018, for the area of Gauteng, from: (i) remaining in the employ of the second respondent; (ii) being employed by the Lapp Group Southern Africa (Pty) Ltd; Advanced Product Technology (Pty) Ltd ('APT'); Innomatic (Pty) Ltd; and PSA Technologies & THD; (iii) going into direct competition with the applicant.

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[49] The applicant has disavowed interest in protecting itself by enforcing the restraint in areas other than Gauteng or in relation to its customers who are based outside of Gauteng. The applicant therefore seeks enforcement of the restraint but with the limitation that the restraint should only apply in the area of Gauteng and for the remaining period of the restraint, that is, until 31 March 2018.

4. The first respondent is interdicted and restrained for the period and within the area referred to in para 3 from contacting any of the clients of the Applicant;

5. The first respondent is to hand over to the applicant or its attorneys within 7 days of this order, (i) all hardcopies of any of the applicant's trade secrets, including the list of the applicant's pricing, credit terms, and detailed product information and including any of the applicant's trade connections, including customer lists containing full relevant details of customers, and the pricing and credit terms pertaining to such customers, and business volume information pertaining to such customers that are in her possession, as well as (ii) all electronic copies of such, and is to destroy any remaining electronic copies that the second respondent has on any of its computers or stored electronically elsewhere;

6. The first and second respondents are to pay the costs of this application jointly and severally, the one paying the other to be absolved.

MAIER-FRAWLEY AJ

Date of hearing:	22 November 2017
Date of judgment:	12 December 2017
Judgment delivered	15 December 2017

APPEARANCES:

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