IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / (NO.)
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.
17/01/2018
DATE SIGNATURE

CASE NO: 85149/2017
DATE: 17/01/2018

IN THE MATTER BETWEEN:

CASH CRUSADERS FRANCHISING (PTY) LTD	**Applicant**
and	
THEO EDUAN SWART	**First Respondent**
CASH CRUSADERS SOUTHERN AFRICA (PTY) LTD	**Second Respondent**

JUDGMENT

KOLLAPEN J:

1. In this application the applicant seeks relief *inter alia* in the following terms:

1. An order dispensing with the forms and services prescribed by the Rules of this Honourable Court, and directing that this matter be heard as one of urgency in terms of the provisions of Rule 6(12);
2. An order interdicting and preventing First Respondent from being employed by Second Respondent, in any capacity, in the period up until 7 April 2019;
3. An order interdicting and preventing First Respondent, in the period up until 7 April 2019, from either directly or indirectly:
   3.1 being employed in;
   3.2 carrying on;
   3.3 being engaged, concerned or interested, whether financially or otherwise in;
   3.4 acting as a consultant or advisor to or as agent for any person who carries on;
   3.5 being a director and/or other officer of, or be a shareholder or have any interest, whether registered or beneficial, in any Company or close corporation which carries on

   the same, similar or competitive business to that of Applicant, provided that this order shall not preclude First Respondent from being the beneficial holder of shares issued in the capital of any Company, the whole of the equity share capital of which is listed on any recognised Stock Exchange.

Both respondent oppose the relief sought

Background

2. The Applicant operates on a franchise basis, a chain of retail outlets under the name 'Cash Crusaders' selling pre-owned and new goods throughout the Republic of South Africa and Southern Africa.

3. The first Respondent was in the employ of the Applicant from September 2003 until April 2017. He was initially employed as a Junior Operations Manager for Gauteng. In 2005 he was promoted to Operations Manager for Gauteng and in September 2008 to the post of National General Manager. He became a shareholder of the Applicant and was appointed to its Board in March 2014. His directorship and shareholding, however, terminated when he left the Applicant's employ in April 2017.

4. The second respondent also operates on a franchise basis, retail outlets that sell largely pre-owned goods with a limited component of new goods.

5. It is not in dispute that the Applicant and the second Respondent are competitors and that they together established the National Association of Franchised Second-Hand Dealers and are its only members.

6. On the 2nd of February 2005 the Applicant and the first Respondent concluded a written Employment Agreement ("the February 2005 Agreement") that regulated the First Respondent's terms of employment. Some of the relevant provisions of that agreement are:

"1.1 Business Operations means franchising the establishment and operation of retail businesses selling pre-owned and new goods;

1.2 Competitors means any legal persona, joint venture, association or business undertaking, which directly or indirectly competes with the Business Operations;

1.10 Termination Date means the date upon which the Employee's employment by the Employer ceases for any reason whatsoever, whether in terms of this Agreement or any renewal thereof;

10.1 The employee acknowledges that he:

10.1.1 will have access to the Intellectual Property during the course of his employment and, that in order to fulfil his obligations hereunder, it is necessary for the Employer to disclose the Intellectual Property to the Employee;

10.1.2 will be in a position, upon termination of his employment with the Employer, should he choose so to do so, to cause the Employer considerable financial loss if he uses Intellectual Property for his own benefit or for the benefit of a Competitor or for the benefit of any other legal persona;

10.2 Having regard to such acknowledgments and to the terms of this Agreement, the Employee has agreed to a restraint of trade in favour of the Employer as hereinafter set out.

10.3 The Employee agrees and undertakes to and in favour of the Employer that:

10.3.1 he shall not at any time after the Termination Date, represent himself as still being in any way connected with or interested in the Employer's Business Operations;

10.3.2 he shall not, for a period of two (2) years as and from the Termination Date anywhere in the Republic of South Africa, either directly or indirectly in any manner whatsoever and without prejudicing the generality of the aforegoing, whether alone or jointly or together with or in partnership with or as the agent for any person:

(a) be employed in;

(b) carry on any;

(c) be engaged, concerned or interested, whether financially or otherwise in;

(d) act as a consultant or advisor to or as agent for any person who carries on;

(e) *be a director and/or other officer of, or be shareholder or have any interest, whether registered or beneficial, in any Company or close corporation which carries on the same, similar or competitive business to that of the Employer, provided that this restraint shall not preclude the Employee from being the beneficial holder of shares issued in the capital of any Company, the whole of the equity share capital of which is listed on any recognised Stock Exchange.*

10.4 *It is expressly recorded and acknowledged by the Employee that the restraints imposed upon him in terms of this Agreement are fair and reasonable as regards their nature, extent and period and go no further than is reasonably necessary to protect the Employer's business interests. The Employee hereby accepts the onus of proving the unreasonableness of any such restraints if he chooses to contest any of them.*

10.5 *The Employee confirms that he is consenting to the restraint provisions imposed upon him hereinabove with a full and clear understanding of the nature, significance and effect thereof and freely and voluntarily without duress.*

10.6 *The parties agree that each part of each undertaking given by the Employee in favour of the Employer are deemed to be, in respect of each part thereof, entire, separate severable and separately enforceable in the widest sense, from the other parts thereof. An undertaking or restraint shall be deemed to be a separate undertaking or restraint, notwithstanding the fact that it appears in the same clause, sub-clause or sentence of any other undertaking, or is imposed by the*

introduction of a word or a phrase conjunctively with or disjunctively from or alternatively to other words or phrases.

10.7 If Employee engages in any litigation in connection with the provisions of this paragraph, and if the terms and provisions of this paragraph are upheld, then Employee agrees not to engage in any of the acts prohibited herein for a period of three (3) years from the date of such unappealed final judgment of the highest Court taking jurisdiction in this matter."

7. On the 22nd of September 2008 the Applicant was appointed to the post of National General Manager, a letter of appointment accompanied the appointment. It dealt with areas such as his position, his package and his functions and responsibilities. While the letter provided that his employment was "conditional/subject to: signature of an employment agreement by both employer and employee parties; which incorporates a confidentiality clause and restraint of trade agreement, it is not in dispute that such an agreement as contemplated was not entered into and that the first Respondent took up the post of National General Manager and was so employed until April 2017.

8. Following his resignation from the employ of the Applicant, the first Respondent took up employment with the second respondent as National Franchise Sales Manager with effect from the 1st of July 2017. This fact however only came to the attention of the Applicant on the 4th of December 2017.

9. The Applicant, on becoming aware of the first Respondent's employment with the second Respondent, took the position that such conduct constituted a direct breach of the Employment Agreement and on the 8th of December 2017, called on the first Respondent to resign and to undertake that he would henceforth comply with the provisions of the restraint of trade.

10. The first Respondent refused and on the 11th of December 2017 took the position through his legal advisors that the restraint was unconstitutional. The Applicant then launched these proceedings on the 15th of December 2017 and enrolled the matter for hearing for the 9th of January 2018.

The opposition

11. Both Respondents oppose the relief sought and they do so on a number of grounds:

❖ **Urgency**

12.

(a) The Respondents contend that the matter is not urgent in that the first Respondent has been in the employ of the second Respondent since July 2017 and while denying that any confidential information was passed on or used, point out that if this were to have happened, it would have happened in the past seven months since July 2017, removing, as it were, any urgency that the Applicant seeks to associate with the application.

(b) In addition they point out that the period of time from when the Applicant became aware of the alleged breach, until the enrolment of the matter (almost a month) must suggest that the matter is not urgent as it was open to the Applicant to enrol the matter much earlier and its election not to do so is indicative of a lack of urgency.

13. I am not convinced that there is any appeal in either of these submissions. The passage of time from July 2017 is not dispositive of the question of urgency. It warrants mention that the first Respondent was in the employ of the Applicant for some 14 years in very senior positions acquiring a wealth of knowledge and experience along the way.

14. The suggestion therefore that if there was anything to disclose it would have already happened has no attraction as there is simply no way of knowing or monitoring when information in the possession of such a person may become useful in a particular situation and when it may be utilised; it is purely speculative to suggest that if there was anything to disclose it would have already happened. In any event the first Respondent cannot keep the knowledge of his new employment away from the Applicant and then seek to extract a benefit from that non-disclosure. The challenge to urgency on this ground must thus fail.

    (See ***BHT Water Treatment (Pty) Ltd v Leslie and Another*** **1993 (1) SA 47 (WLD)**)

15. The second leg of the challenge is also without merit. The Applicant acted with the necessary urgency in launching the application on the 15th of December 2017 but took the view that the matter was not urgent enough to warrant being heard during the Christmas and New Year period and so enrolled it for the first date after that period. My view is that such an approach is a reasonable one in that the Applicant in setting a time line for the hearing of the application, assessed the degree of urgency attached to the matter, the need to afford the Respondent a fair opportunity to file papers and the limitations that the holiday period places upon the functioning of the Court system. I can't find any criticism with that approach and the suggestion that it constitutes a concession that the matter is not urgent is hardly warranted.

(See ***Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)*** **1977 (4) SA 135 (W)**)

Merits

16. The law with regard to the enforcement of restraints requires the consideration and the balancing of four questions:

    i. Does the one party have an interest that deserves protection after termination of the agreement;
    ii. If so, is that interest threatened by the other party?
    iii. In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?
    iv. 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?

    (See ***Reddy v Siemens Telecommunications (Pty) Ltd*** **2007 (2) SA 486 (SCA)** at 497D-E)

17. The Applicant in its Supplementary Founding Affidavit describes in some detail the various operational systems it has developed and implemented and in respect of which it states the first Respondent has detailed knowledge, and was involved in their conception, development and implementation, given the position of seniority he held in the business of the first Respondent. They include:

    a) The Key Line System which is a system devised to identify the top selling brands in the franchise outlets and combined both purchase and sales

data from each outlet as well as management analysis and input on a number of factors including price, size of the product, the general product mix and sales turnaround time in order to generate a list of 350 top selling products. Each outlet was required to stock these 350 products. The list was reviewed every 90 days using this methodology. The Applicant attributed the success of its business in part to this system and contends that any competitor who acquires information of both the contents of the lists generated as well as the method used in doing so will gain a considerable advantage and its stance is that the first Respondent enjoyed access to this system and was part of the management process that developed and produced the list every 90 days.

b) The Content Management System was developed with the assistance of the Applicant's Information Technology personnel and was designed to capture information from all stores relevant to the purchase and sale of pre-owned goods. It would be able to provide detailed particularity in respect of model, age, capacity etc. of the relevant product and by so doing would give each Buyshop manager data that would enable informed decisions with regard to the price at which an item should be purchased and resold. Again it is the stance of the Applicant that this information would not only be valuable to any competitor, but that the first Respondent was intimately involved in the roll out of the system.

c) The Operations Manual and Training Packs constitute detailed instructions on all aspects relating to the operation of the Applicant's outlets. It is expansive in its scope and covers areas such as store layout and appearance, product mix, trading density and the age of stock on display. The Training Packs have been developed for the training of staff which occurs full time over a 7 week period and trainees are given training packs covering areas such as sales orientation, cashier orientation, buyer

orientation, franchise orientation, customer service manuals and product knowledge manuals to name but a few. These manuals were compiled over time at considerable expense and effort on the part of the Applicant, and its stance is that the Applicant had access to all of this material and intimate knowledge of its content and that it would be of assistance to any competitor including the second Respondent.

d) The Centre of Excellence Document deals with establishing benchmarks with the object of identifying key performing areas that would contribute to the success of a franchise outlet.

e) The Applicant makes mention of information relating to Support Level Visits which deal with the ongoing visits and support by regional managerial staff to franchise outlets contending that such information is both within the knowledge of the first Respondent and valuable to any competitor.

f) Finally the Applicant contends that first Respondent was privy to its discussion on its expansion plans and its future developments, knew which premises were earmarked for future possible retail locations, and was aware of market surveys done to establish the need for this type of business.

<u>The Respondents' various grounds of opposition on the merits include:</u>

- **The employment agreement of February 2005 came to an end in September 2008**

18. The stance of the first Respondent is that the terms of the 2005 agreement only endured until his appointment as National General Manager in

September 2008 and that to the extent that the confidentiality and restraint agreement contemplated in the letter of September 2008 did not materialise, there were no confidentiality or restraint provisions that governed his employment from the 1st of September 2008.

19. In this regard the Court referred the parties to the matter of ***Laser Junction (Pty) Ltd v Karl Leeson Fick*** (Kwazulu-Natal Local Division case 6970/2017 (25 September 2017)) where that Court in broad terms took the stance that where the original restraint was specifically addressed to the respondent in his capacity as sales clerk, it fell away when he ceased to be a salesman and was promoted to procurement.

20. In my view the decision in ***Laser Junction*** is distinguishable. While *in casu* it is so that the Employment is described as "Operations Manager – Gauteng" there are a number of features in the agreement of February 2005 that both point in the direction that the restraint continued after September 2008:

    a) The restraint is meant to become operative after the Termination Date which in turn is defined as the date upon which the employee's employment with the employer ceases for any reason whatsoever.

    b) The provisions of Clause 10.1.1 of the February 2005 agreement make reference to access to intellectual property during the course of the first Respondent's employment and seek to protect this.

21. The employment of the first Respondent with the Applicant commenced in 2003 and terminated in April 2017. To suggest, as the Respondents do, that it terminated in September 2008 and that a new period of employment commenced then upon different terms and conditions is formalistic, highly technical and offends common sense and logic. Simply put there was no

break in the employment of the first Respondent with the Applicant albeit that the positions he held during that time changed. In addition and when one has regard to the *dicta* in ***Laser Junction*** then it cannot be said that the February 2005 restraint was specifically addressed to the first Respondent as Operations Manager – Gauteng. For the reasons already given it is clear that the restraint provisions were intended to cover the period of his employment with the first Respondent.

22. For these reasons I conclude that the restraint provisions in the February 2005 agreement continued to endure during the period February 2005 until April 2017.

❖ **Denial that the information is confidential or that it deserves protection as well as denial of knowledge and possession of confidential information**

23. The general stance of the first Respondent is that the information that the Applicant seeks to protect is not confidential and generally comprises of systems used in the retail industry. While in general terms it would seem logical that the industry would generally look at such systems that the Applicant has described, what is of relevance is that these systems that the Applicant has described in some detail were developed by it using data generated from its operations and the collective input of its staff including senior management. While it may have been uniquely located within the Applicant's franchise operations, the methodology used and the considerable attention to detail for example in the Operations Manual, all militate against the contention that this information is generally available in the industry. I am of the view that even though the systems developed were done in the context of the Applicant's own needs and history, they are of such a nature that they constitute an interest that deserves protection.

24. The first Respondent states that his position with the second Respondent is that of Network Growth Manager and that he is not in a position to convey to the second Respondent the confidential information dealt with by the Applicant and that he is not in possession of any documentation relating to confidential information and thus denies that he is in any position to assist the second Respondent in introducing the Applicant's confidential information into the second Respondent's business.

25. Finally there is the suggestion that the business of the Applicant and that of the second Respondent are materially different, rendering information from the Applicant's business of little value to the second Respondent.

26. While there are differences in the two businesses, what they have in common is that they both operate on a franchise basis and both are involved in the business of selling pre-owned goods. They are the only two members of the National Association of Franchised Second-Hand Dealers, which is rather telling and clearly establishes their status as competitors. In my view there is sufficient commonality between them to conclude that confidential information from one would have relevance for the other.

27. In so far as the first Respondent denies that he is in possession of documentation that relates to the various areas of confidential information described above, the law is clear on this aspect and offers little, if any support for the first Respondent.

    The Court in the matter of ***BHT Water Treatment*** stated the following at 57H to 58D:

> *"The respondent could, as the applicant points out, (in theory) have made copies of the formulae. He could (again in theory) carry sufficient detail of some or all of the important formulae to enable him to transmit them to the second respondent. Whether the first respondent has such*

knowledge or has such copies of the applicant"s secret trade formulae cannot be known by the applicant. Should the first respondent breach his undertaking by disclosing such formulae to the second respondent, the last person to know would be the applicant. It is quite impossible for the applicant to police the undertakings given by the first respondent or to know or prove what information the first respondent can make available to the second respondent, or has made available.

In my view, all that the applicant can do is to show that there is secret information to which the respondent had access, and which in theory the first respondent could transmit to the second respondent should he desire to do so. The very purpose of the restraint agreement was that the applicant did not wish to have to rely on the bona fides or lack of retained knowledge on the part of the first respondent, of the secret formulae. In my view, it cannot be unreasonable for the applicant in these circumstances to enforce the bargain it has exacted to protect itself. Indeed, the very ratio underlying the bargain was that the applicant should not have to content itself with crossing its fingers and hoping that the first respondent would act honourably or abide by the undertakings that he has given.

In my view, 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. Nor, in my view, can the ex-employee defeat the restraint by saying that he does not remember the confidential information to which it is common cause that he has had access. This would be the more so where the ex-employee, as is the case here, has already breached the terms of the restraint by entering the service of a competitor."

- **The restraint is unreasonable in that it bars the first Respondent from employment in the retail industry**

28. During argument the Court engaged Counsel on the contention advanced by the first Respondent that the restraint, if upheld, would effectively bar him from employment in the retail industry. The parties were afforded the opportunity to

make additional written submissions for which the Court expresses its appreciation.

29. The view may also have been formed during argument that the restraint was such that it effectively precluded the first Respondent from being employed in the retail industry that sold goods in the following categories: home appliances, kitchen appliances, sound equipment, cellular telephones, musical equipment, home entertainment systems, car audio equipment, and DIY tools.

30. On careful reflection this is not the case and the restraint is hardly as wide as it was made out to be. While the relief in the Notice of Motion seeks an order interdicting the first Respondent from being employed in the same, similar or competitive business to that of the Applicant, the February 2005 agreement provides significant guidance on what the scope of the restraint is.

31. In the definition section of the February 2005 agreement, "Business Operations" is defined as "*franchising the establishment and operation of retail businesses selling pre-owned and used goods*", while "Competitors" is defined as "*any legal persona, joint venture, association or business undertaking, which directly or indirectly competes with the Business Operations*".

32. It thus must follow that a competitor would only be a franchise operation selling pre-owned and new goods and for now may well only be the second Respondent. The suggestion that groups such as Edcon, Makro, and Builders Warehouse would be entities that carried on the same, similar or competitive business to that of the Applicant, is defeated by the definition of both "business operations" and "competitors" in the Employment Agreement.

33. For these reasons there is no substance in the complaint that the restraint is overly broad and accordingly unreasonable, and the question of the partial enforcement of the restraint is rendered academic.

34. Finally, the Court must make a value judgment which was described in ***Reddy*** at 496E-497F in the following terms:

> *"A court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint. The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim* pacta servanda sunt. *The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions. Both considerations reflect not only common-law but also constitutional values. Contractual autonomy is part of freedom informing the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life. In this sense, freedom to contract is an integral part of the fundamental right referred to in s 22. Section 22 of the Constitution guarantees '[e]very citizen…the right to choose their trade, occupation or profession freely' reflecting the closeness of the relationship between the freedom to choose a vocation and the nature of a society based on human dignity as contemplated by the Constitution. It is also an incident of the right to property to the extent that s 25 protects the acquisition, use, enjoyment and exploitation of property, and of the fundamental rights in respect of freedom of association (s 18), labour relations (s 23) and cultural, religious and linguistic communities (s 31)*
>
> *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. Moreover, a restraint which is reasonable as between the parties may for some other reason be contrary to the public interest. In Basson v Chilwan and Others, Nienaber JA identified four questions that should be asked when considering the*

reasonableness of a restraint: (a) Does the one party have an interest that deserves protection after termination of the agreement?
(b) If so, is that interest threatened by the other party?

(c) In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?
(d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected?.
Where the interest of the party sought to be restrained weighs more than the interest to be protected, the restraint is unreasonable and consequently unenforceable. The enquiry which is undertaken at the time of enforcement covers a wide field and includes the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests."

35. That being said there are in my view a number of factors that compel me to uphold the claim of the Applicant and they include my conclusion that the Applicant has demonstrated that the confidential information that it generated and to which the first Respondent at the very least had access, and knowledge about, is an interest that requires protection, and that the employment of the first Respondent by the second Respondent threatens that interest.

36. In addition the limited nature of the restraint will not render the first Respondent economically inactive as his considerable experience in the retail industry must be an attraction to others. In this regard it is clear that he has misconstrued the scope of the restraint as being as wide as he contends it is. It is not. Finally I can think of no aspect of public policy that requires the restraint to be rejected. On the contrary, I am of the view that the long period of employment the first Respondent enjoyed with the Applicant, coupled with his very senior status at the second Respondent must point in the direction of

upholding the restraint which I am also satisfied is reasonable in respect of time.

37. Accordingly and for the reasons given I am satisfied that the Applicant has made out a case for the relief it seeks.

Order

38. The following order is made:

1. The first Respondent is Interdicted and prevented from being employed by the Second Respondent, in any capacity, in the period from the date of this order until 7 April 2019;
2. The first Respondent is Interdicted and prevented, in the period until 7 April 2019, from either directly or indirectly:

2.1 being employed in;

2.2 carrying on;

2.3 being engaged, concerned or interested, whether financially or otherwise, in;

2.4 acting as a consultant or advisor to, or as agent for any person who carries on;

2.5 being a director and/or other officer of, or being a shareholder or having any interest, whether registered or beneficial, in any Company or close corporation which carries on

the same, similar or competitive business to that of the Applicant, provided that this order shall not preclude the First Respondent from being the beneficial holder of shares issued in the capital of any Company, the whole of the equity share capital of which is listed on any recognised Stock Exchange.

3. The Respondents, jointly and severally, the one paying, the other to be absolved, are ordered to pay the costs of the application including the costs of senior counsel.

N KOLLAPEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA

85149/2017

HEARD ON: 09 January 2018

FOR THE APPLICANT: Adv. A Oosthuizen SC

INSTRUCTED BY: Ashersons Attorneys (ref.: S Zackon)

(Correspondent Attorneys: Jacobson & Levy Inc (ref.: Jonathan Levy/K4504))

FOR THE FIRST RESPONDENT: Adv. W J van Wyk

INSTRUCTED BY: Erasmus Scheepers Attorneys (ref.: DJ de Waal/mw/S/1347/17)

FOR THE SECOND RESPONDENT: Adv. L Hollander

INSTRUCTED BY: Thomson Wilks Inc (ref.: S Thomson/Mat13897)

(Correspondent Attorneys: Barnard Inc & Pretorius Le Roux)