IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE LOCAL DIVISION, PORT ELIZABETH

Case No: 2854/2020

Date Heard: 8 December 2020

Date Delivered: 12 January 2021

In the matter between:

VALUE LOGISTICS LIMITED APPLICANT

and

QUINTON KUHN FIRST RESPONDENT

JUNGHEINRICH SOUTH AFRICA (PTY) LIMITED SECOND RESPONDENT

JUDGMENT

MULLINS AJ

INTRODUCTION

[1] The Applicant is a public company that describes its principal business as warehousing and distribution (referred to in the industry as “logistics”), as well as the sale, rental and servicing of vehicles such as forklifts, commercial vehicles and trucks.

[2] The First Respondent was previously employed by the Applicant and is currently employed by the Second Respondent. The nature of the First Respondent’s past and current employment is dealt with below.

[3] The Second Respondent is a private company whose business is the sale, rental and maintenance of vehicles such as forklifts. To this extent only the business of the Applicant and the Second Respondent overlap, and they are competitors.

[4] The purpose of this application is twofold, namely:

(a) To enforce a covenant in restraint of trade and a confidentiality undertaken given by the First Respondent to the Applicant in the employment agreement which he concluded with the Applicant; and

(b) To enforce a "non-solicitation" undertaking given by the Second Respondent to the Applicant in a contract titled Full Maintenance and Rental Agreement, which was concluded between the Applicant and the Second Respondent ("the FML Agreement").

[5] The Applicant was represented by Mr *Kaplan* and both Respondents by Mr *Ossin.* I am indebted to both counsel for the assistance in the matter, which was heard remotely.

BACKGROUND

[6] The background facts to this application, which are either common cause or not in dispute, may be summarised as follows:

(a) The First Respondent was employed by the Applicant in Port Elizabeth in 2012 in terms of a written contract. That contract was not attached to the papers as it was superseded by subsequent events;

(b) The First Respondent was briefly employed as a salesperson and thereafter on the technical side dealing with the maintenance, servicing and repair of forklifts;

(c) In June 2019 the First Respondent resigned his employment with the Applicant as he and his family were emigrating to New Zealand. However, he remained employed by the Applicant on a temporary basis until 30 August 2019 in the same capacity, that is, Area Manager;

(d) The First Respondent's New Zealand plans did not work out and he returned to South Africa and was re-employed by the Applicant in December 2019;

(e) On 10 December 2019 the Applicant and the First Respondent concluded a written contract of employment in terms of which he was again appointed an Area Manager in the Applicant's Port Elizabeth material handling division, as this position had not been filled in his absence;

(f) The contract of employment contained a covenant in restraint of trade and a comprehensive confidentiality policy;

(g) During September 2020 the Applicant's branch manager, one van der Wath, heard rumours that the First Respondent intended taking up employment with the Second Respondent. She approached the First Respondent who confirmed to her that he had been offered employment with the Second Respondent. It should be mentioned that the First Respondent denies having

advised van der Wath at that stage he had been offered a job, merely that he was in discussions with the Second Respondent. In any event, van der Wath reminded him of the restraint and confidentiality policy in his contract of employment;

(h) Van der Wath made a number of enquiries thereafter of the First Respondent, without receiving any definitive response as to his intentions;

(i) On 16 October 2020 the First Respondent handed in his resignation, his last day of work being 13 November 2020. He advised van der Wath that he would be taking up employment with the Second Respondent in Port Elizabeth;

(j) On the same day the First Respondent was handed a letter in which the restraint and confidentiality policy were pertinently brought to his attention. The letter concludes:

> *"5. Should you take up employment with Jungheinrich, alternatively divulge any confidentiality information contrary to the confidentiality policy, we will not hesitate to take such steps against you which may include launching proceedings against you for the necessary interdictory relief. This of course, will be without prejudice to any damages suffered by Value Logistics arising out of your breach of the covenant in restraint of trade".*

(k) There being no response to this letter, after two weeks the Applicant conducted an archive retrieval search of its email server and discovered that, *inter alia*, the First Respondent had emailed from his work email address to his personal email address the service manual for what is described as "*a 1.0t – 5.0t Lead Acid Battery Counterbalanced Forklift Truck manufactured by Hangcha Group Co Ltd"* (the "Service Manual")*;*

(l) The other emails which the First Respondent had sent to himself were his employment contract with the First Respondent and his employment contract with the Second Respondent;

(m) This elicited a letter from the Applicant to both the First and Second Respondents, dated 2 November 2020, to the effect that:

(i) By taking up employment with the Second Respondent the First Respondent was in breach of the covenant in restraint of trade;

(ii) By employing the First Respondent the Second Respondent was in breach of the non-solicitation clause in FML Agreement, in that the Second Respondent had employed the First Respondent in breach of the two year moratorium on employing the Applicant's employees after termination of that contract;

(n) Both Respondents were called upon by no later than 4 November 2020 to give a written undertaking that the First Respondent's employment with the

Second Respondent would be terminated, failing which an urgent application would be launched for the necessary interdictory relief;

(o) On 4 November 2020 the First Respondent sent an email requesting more time to respond to the above. He was granted until 6 November 2020;

(p) On 6 November 2020 attorneys representing the Second Respondent replied, stating that:

(i) The restraint was unreasonable and unnecessary in various respects, in particular the geographical area as it in effect covered the whole of South Africa and Namibia;

(ii) The First Respondent was employed in the Second Respondent's sales department, which is *"different and distinguishable"* from the after-sales position he held with the Applicant;

(iii) In order to respond to the allegation in respect of the FML Agreement a copy thereof was requested;

(iv) The First Respondent's employment with the Second Respondent would not be terminated and any application, urgent or otherwise, would be opposed;

(q) As a result of the above response, on 9 November 2020 the Applicant's internal legal adviser requested instructions from its directors and on 10 November 2020 was given the go-ahead to obtain legal advice, which she did on 11 and 12 November 2020. Based on the legal advice instructions were given to draft papers for an application;

(r) During this process, and on 17 November 2020, a further letter was sent to the Second Respondent attaching the FML Agreement, with specific reference to clause 23, giving the Second Respondent a further opportunity to furnish the undertaking previously requested, which undertaking was demanded by 18 November 2020;

(s) In response the Second Respondent's attorneys refused to give any undertaking, denied that clause 23 was applicable, and disputed urgency;

(t) In the circumstances the application was launched in this Court on 19 November 2020 on an urgent basis, which application both the Respondents, represented by the same firm of attorneys, oppose.

[7] In accordance with the Eastern Cape Practice Rule 12 the matter was set down for argument on 8 December 2020.

[8] The FML Agreement requires some explanation:

(a) Unrelated to the employment relationship between the Applicant and the First Respondent, on 5 April 2019 the Applicant and the Second Respondent concluded a written contract in terms of which the Applicant leased certain equipment to the Second Respondent;

(b) The contract was for a period of six months, commencing on 1 April 2019, and thereafter indefinitely, subject to either party giving the other party one months' written notice of its intention to terminate the contract;

(c) The FML Agreement is a comprehensive document dealing with the lease by, and maintenance of, what is referred to as tow motors (which I understand are forklifts) by the Applicant to the Second Respondent. Of relevance to this application is clause 23, which provides as follows:

"*23 Non-Solicitation*

Neither the Lessee nor its subsidiaries, or affiliates, shall directly or indirectly solicit for employment, and/or actively entice away or endeavour to, and/or employ any of the employees of the Lessor during the term of this agreement and for a period of 2 (two) years after the termination of this agreement."

(d) On 2 March 2020 the Second Respondent terminated the FML Agreement effective as at 31 March 2020. The termination, letter, which is signed by the Second Respondent's short-term rental manager, reads:

"RE: CANCELLATION

Dear Business Partner

This letter serves as termination notice of the current material handling equipment cross hire contract in place with yourselves and Jungheinrich SA for DHL Volkswagen. The last effective date will be 31 March 2020 and the machines may be collected from site from 1 April 2020."

The APPLICANT'S CASE AGAINST THE FIRST RESPONDENT

[9] The Applicant alleges that prior to his resignation the First Respondent was employed in the renting, selling and servicing of forklifts, managing sites at which forklifts were rented out and dealing with service and repair related queries from clients, including after-market services. This, it alleges, is exactly the same business conducted by the Second Respondent, which is a direct competitor, as they both "*… supply, service and rent trucks, forklifts and spare parts"* to the logistics industry.

[10] It alleges that as an Area Manager the First Respondent occupied senior position and his duties included:

(a) Being responsible for the day-to-day managing of forklifts on site;

(b) Daily communication with customers re the breakdown of equipment;

(c) Conducting regular site inspections;

(d) Making sure customers were satisfied;

(e) Building relationships with customers.

[11] The First Respondent also participated in monthly meetings with customers and had access to the Applicant's billings and rates, which information is highly confidential. In the nature of his duties the First Respondent met regularly with the Applicant's customers and built up a relationship with them to the extent that he would be able to solicit their business in the future. He also entertained customers and on occasions had drinks with and lunched with representatives of important customers (the details of which were dealt with in a so-called confidentiality affidavit).

[12] Furthermore, the Second Respondent is not only a competitor of the Applicant, but was also a customer until the FML Agreement was terminated and the First Respondent regularly corresponded with and met with representatives of the Second Respondent to resolve problems. In the process he built up a close relationship with the Second Respondent.

[13] In emailing the Service Manual to himself the First Respondent had appropriated proprietary information of the Applicant's and the question arises as to why he did it in a clandestine manner two days before tendering his resignation. The suggestion is made that it could be used to the benefit of the Second Respondent in various ways, which would be to the detriment of the Applicant.

[14] It was further alleged that the First Respondent's actions were not only a breach of the restraint, but also the prohibited conduct contained in the confidentially policy, of which I quote the following:

"*2.* ***Prohibited Conduct****:*

The employees of the Company unconditionally undertake, during the continuance of the employment and thereafter:

2.1. to keep confidential and not publish, disclose or to otherwise reveal in any way whatsoever nor make commercial use of the confidential information;

2.2 not to copy, use or reproduce the confidential information, whether in documentary or electronic form;

…

2.4 not to use the confidential information for any purpose other than in the course and scope of employment by the company;

…

2.9 not to remove the confidential information from the premises of the Company, whether physically, electronically or otherwise, except where such removal is necessary for the employee to perform his or her functions as an employee;

…"

[15] According to the Applicant the pool of customers in Port Elizabeth is limited and due to the close customer connection the First Respondent established and extensive confidential information which he was privy to during the eight years he was employed by the Applicant he is in a position to solicit business away from the Applicant in favour of the Second Respondent. As the First Respondent's remuneration with the Second Respondent is partly commission based there an incentive to use those connections and confidential information to the ultimate detriment of the Applicant.

[16] In the result, according to the Applicant, it stands to suffer severe financial losses and it would therefore be just and equitable to restrain the First Respondent from being employed by the Second Respondent and/or any other competitor falling within the terms of the terms of the covenant in restraint of trade.

[17] I interpose to mention that in the notice of motion the Applicant seeks to prevent the First Respondent from being employed by a competitor which "*… conducts the business of rendering logistics material handling services being the sale of, supply of or rental of forklifts and spare parts and the rendering of services in regard thereto to customers requiring same…"*. Thus, the Applicant seeks to restrain the First Respondent only in so far as it relates to forklifts.

THE FIRST RESPONDENT'S OPPOSITION

[18] In his answering affidavit the First Respondent deals at length with his personal circumstances. He is currently 41 years old, married with two young children; he has lived his entire life in Port Elizabeth and has strong family ties in the city; the aborted emigration to New Zealand was financially disastrous and the family currently lives with his in-laws; his wife is employed earning R20,0000.00 per month, he has managed to save up R550,000.00 which is to be put towards the purchase of a house.

[19] The First Respondent's work history is as follows: In 2000 he was employed by MCJ Electronics doing electronic repairs to all types of forklifts and battery chargers; in 2002 he joined Toyota Forklift (one of the top three forklift companies in the world, along with Linde and Jungheinrich – the Second Respondent); in 2012 he joined the Applicant.

[20] As is evident from the above the First Respondent's entire working life has revolved around forklifts.

[21] The First Respondent states that the enforcement of the restraint will have a devastating effect on him, both financially and emotionally. Suffice it to state that every employee whose contract of employment contains a restraint will potentially suffer some hardship in the event of the restraint being enforced. The law requires the Courts to do a balancing act.

[22] The First Respondent's employment with the Applicant came about as follows:

(a) While still employed at Toyota Forklifts an erstwhile fellow employee, one Hendricks, who had left Toyota Forklifts to work for the Applicant, contacted him with a view to employing him, but unfortunately there was no appropriate position at the time. He, the First Respondent, was in any event not interested in moving;

(b) In July 2012 Hendricks contacted him again and said that although there was no position available in his field there was one in sales and she offered him the job with a view to him moving to a technical position as and when such became available;

(c) He took up the offer and was employed by the Applicant as Area Sales Manager in Port Elizabeth. He had no experience in sales but did his best,

with very limited success. He was dealing with the lower end of the market and he recalls selling only one forklift in this capacity;

(d) During March 2013 he was appointed National Product Manager, which was a technical position in line with his expertise. In this position he carried out technical training in respect of forklifts that had been sold or rented out by the Applicant, both in-house and to the customers. He travelled to Johannesburg on occasions. He was not involved in the sale of forklifts and his only concern was technical support – repair and maintenance;

(e) At the time the Applicant dealt with Still forklifts, a German make, and he was sent to Germany for technical training in respect of this brand. The Applicant subsequently switched to the Komatsu brand;

(f) At the end of 2016 he was advised that if he wanted to remain National Product Manager you would have to move to Johannesburg. He declined and was re-assigned the post of Area Manager for the Eastern Cape, his supervisor being one van der Wath;

(g) Again, this was a technical position which did not involve sales. The people who reported to him were technicians and service advisers who dealt with repairing and servicing forklifts at the customers' premises;

(h) In his capacity as Area Manager the First Respondent did indeed attend customer meetings with van der Wath, which were held on a monthly basis.

His role was to provide technical input. He was, however, aware of the duration of contracts as this was relevant to the maintenance timetables;

(i) In the course of performing is duties he did on several occasions accompany van der Wath for lunch and/or drinks with customers, which would coincide with the monthly meetings;

(j) At the end of 2017 the Applicant stopped purchasing Still forklifts and around the same time various people resigned or were retrenched. The Applicant's sales division was not flourishing at the time. However, in early 2019 a new Area Sales Manager was appointed, who breathed new life into the Applicant's Port Elizabeth sales and rental division and it was he, together with van der Wath, who established relationships with customers;

(k) At the end of August 2019 he and his family emigrated to New Zealand, but it didn't work out and he returned after a few months and managed to get his old position back, his duties being exactly the same as before. He was, however, not happy because of the unpleasant manner in which he was being treated by van der Wath;

(l) In July 2020 and ex-colleague, who had previously been employed by the Applicant in Cape Town, but who was now employed by the Second Respondent, said he should send in his CV, as the Second Respondent had a area sales manager position available in Port Elizabeth. Although not his field – his "*comfort zone",* as he put it – he did so;

(m) He was interviewed and, in due course, on 15 October 2019, he was offered a job by the Second Respondent. He resigned his employment with the Applicant on 16 October 2020, effective on 13 November 2020;

(n) After the Applicant became aware of this development he continued in his position, the only change being denied access to a shared folder (whatever that is);

(o) Insofar as clause 23 of the FML Agreement is concerned the First Respondent denies he was enticed or solicited to take up employment with the Second Respondent. Clause 23 is in any event contrary to public policy as it acts unfairly against the Applicant's employees. The Applicant had failed to set out any justification for the need for this clause.

(p) Furthermore, as he had already taken up employment with the Second Respondent, terminating his employment at that stage would be contrary to public policy and contrary to various labour laws of the country, namely ss 22 and 23 of the Constitution, ss 1, 4 and 5(4) of the Labour Relations Act of 1995, s 79 of the Basic Conditions of Employment Act of 1997 and s 6 of the Employment Equity Act. Various other provisions contained in the Constitution were thrown in for good measure.

[23] Insofar as the knowledge of the Applicant's business is concerned, the First Respondent states that prior to 2017 the Applicant supplied Still and Komatsu forklifts, which it continued to use until 2019, when it moved to Hangcha, which machines are made

by a Chinese company. While good machines they are entry-level and technologically behind those operated by the Second Respondent and others. They are also cheaper.

[24] The First Respondent states that he received no training in respect of Hangcha forklifts and, in particular, the battery in these machines uses different technology and is inferior to those used by the Second Respondent. The point the First Respondent appears to be making is that, although the Applicant and the Second Respondent both do business selling and hiring out forklifts, they do not compete with each other and he is not in a position to do the Applicant any harm.

[25] His explanation as to why he emailed the Service Manual to himself is as follows:

(a) In the middle of October 2020 he was contacted by an ex-colleague from his Toyota Forklift days, one Crane, who now works for Goscor in East London;

(b) Crane asked him for some professional advice in respect of a Hangcha forklift to which a customer wanted to do alterations. Goscor did not have a copy of the service manual in question;

(c) The First Respondent was of the view that the alterations could not be done, but undertook to email the service manual to Crane, which he did. He goes on to state in his affidavit:

> *"In the back of my mind, I realised that at some level my doing so might not be in keeping with the applicant's policy, and it was for this reason*

that I emailed the manual to my personal email. In retrospect I should not have emailed the manual to my personal account, and realise that it may be regarded as being against the applicant's policy."

[26] Despite this obvious subterfuge the First Respondent alleges that the Service Manual is not confidential information nor a trade secret, as it is readily available and was in any event being sent to someone who was using a Hangcha machine.

[27] He denies having made the Service Manual available to the Second Respondent (which the Second Respondent confirms). Finally, he states that all this happened before he received an offer from the Second Respondent, which came through the following day.

[28] As to the nature of his employment with the Second Respondent, the First Respondent's job is to canvass for customers specifically in order to build up the Second Respondent's small enterprise customer base from scratch. He has approached approximately 50 businesses, none of which *"as far as he can see"* use the Applicant's machines or are the Applicant's customers. He would "*In any event… not dream of approaching any of the applicant's existing customers. This conduct would also not be countenanced by the second respondent."*

[29] From his experience the First Respondent is of the view that the Port Elizabeth and Eastern Cape market is far from saturated and the Applicant probably has only a 15% share of the market, which has shrunk in recent years.

[30] In conclusion the First Respondent denies that the Applicant has made out a case that it has a protectable or proprietary interest and that he is in breach of the restraint.

[31] In the alternative, the First Respondent takes issue with the duration of the restraint and its geographical extent, both of which he alleges are unreasonable. He also points out that whereas the Applicant is involved in a wide range of activities in the logistics industry, the Second Respondent deals only in forklifts, which is the only area where the two businesses overlap. The Applicant's other areas of business include clearing and forwarding of imported and exported goods, warehousing, both general and chemical, truck rental, rental of refrigerated containers, courier services, and more. It would thus be totally unfair to prohibit him from being employed by another company involved in any of the above when his employment with the Applicant was limited to dealing with forklifts.

[32] The First Respondent also challenged urgency on the basis that the Applicant knew as far back as mid-September 2020 of the possibility of his taking up employment with the Second Respondent and that there had been an undue delay in launching the application and, in the result, urgency had been lost.

THE APPLICANT'S REPLY

[33] The Applicant responded to the First Respondent's opposition by pointing out that his version is, to large extent, self-defeating. Thus, the Applicant points out that in his CV (which is a document the First Respondent attaches to his answering affidavit) he describes one of his attributes as follows:

> *"builds strong client relationships based on trust, delivering great results".*

[34] The Applicant also alleges that the First Respondent admitted/conceded that:

(a) He had built strong relations with the Applicant's customers concerning operational and technical matters relevant to forklifts rented to customers in the Eastern Cape;

(b) He assisted in resolving on-site technical problems and would visit customers for this purpose;

(c) He held regular monthly meetings with certain of the Applicant's customers and some of them were taken out on several occasion for drinks or lunch, which he attended;

(d) Insofar as the forklift division is concerned the business of the Applicant and the Second Respondent overlap;

(e) He recognised that in emailing the Hangcha Service Manual to himself and thereafter on to Crane, who works for a direct competitor (which is something the First Respondent omitted to mention), he was in breach of the Applicant's confidentiality policy;

(f) He had knowledge of the Applicant's business and was aware of the contracts with key customers, the duration of such contracts and the rates charged.

[35] The Applicant persisted that the First Respondent was in breach of its confidentiality policy and that it had a proprietary interest to protect and that, therefore, the restraint was reasonable in respect of both duration and geographical extent.

THE SECOND RESPONDENT'S OPPOSITION

[36] I turn now to the Second Respondent's opposition. The Second Respondent describes the nature of its business as follows:

> "*The majority of the second respondent's business revolves around rentals. The priority is to obtain rental contracts in conjunction with maintenance contracts. The second respondent would look to sign customers for long-term rentals (anything from 12 months to 5 years), with short-term rentals becoming more prevalent and appropriate for those machines that are reaching the end of their lifespan."*

And further, in response to the Applicant's description of the nature of its business the Second Respondent states:

> *"The second respondent is not a logistics company. Its sole business is the supply of forklifts and other related material handling equipment, through either rental or purchase agreements. The second respondent also provides servicing, maintenance and repairs."*

[37] The Second Respondent attacked clause 23 of the FML Agreement on the following grounds:

(a) The person who signed the FML Agreement on behalf of the Second Respondent, one Govender, who was a short-term rental manager, did not have the necessary authority to sign the FML Agreement and certainly did not have authority to bind the Second Respondent in respect of clause 23;

(b) Clause 23 is not the sort of provision one would have expected to find in a rental agreement and the Second Respondent's attention should have been specifically drawn to the existence thereof which, if it had been, would not have been agreed to;

(c) Clause 23 is designed to stifle competition *per se* and is contrary to public policy. The unintended consequences thereof is that it would apply to all the Applicant's employees, whatever their capacity;

(d) Clause 23 amounts to an unethical business practice;

(e) The Second Respondent did not solicit nor entice the First Respondent away from the Applicant;

(f) These no justification for the enforcement of the clause;

(g) Having taken up employment with the Second Respondent, terminating the First Respondent's employment would be contrary to public policy;

(h) Clause 23 is in breach of the statutory provisions referred to by the First Respondent (see paragraph [22](p) above).

[38] The Second Respondent explains how the FML Agreement came into existence:

(a) Through its German holding company the Second Respondent has a world-wide contract with DHL, another logistics company, to supply DHL with forklifts;

(b) Volkswagen had a contract with Schnellecke, also a logistics company, and pursuant thereto the Applicant supplied forklifts to Schnellecke in order for Schnellecke to perform its contract with Volkswagen;

(c) When Schnellecke's contract came to an end it was awarded to DHL. Pursuant thereto the Second Respondent had to supply DHL with a new fleet of forklifts;

(d) This fleet had to be imported. While awaiting its arrival the existing fleet (the Applicant's fleet) had to carry on doing the job. To this end a contract was concluded between the Applicant and the Second Respondent that, pending the arrival of the new fleet, the Applicant's existing fleet of forklifts would be utilized by DHL;

(e) This type of contract is known as a cross-hire contract and the Second Respondent was, in effect, the go-between;

(f) Due to the logistical problems the new fleet was delayed, as a result of which the FML Agreement was extended on a monthly basis until the end of April 2020.

[39] As I understand it, the FML Agreement was intended to be a temporary arrangement – a stop-gap – pending the arrival of the Second Respondent's new fleet of forklifts. In these circumstances, according to the Second Respondent, it would never have agreed to clause 23, which is totally inappropriate in the circumstances.

[40] According to the Second Respondent, when it interviewed and subsequently concluded an employment contract with the First Respondent, it was not aware of clause 23, nor did the Applicant draw its attention thereto once it became aware of the First Respondent's intention to take up employment with it, only doing so after the contract of employment had already been concluded. In the circumstances, so it is alleged, reliance on clause 23 was an afterthought.

[41] The Second Respondent denied that the Service Manual was sent to it, which document would, in any event have been of no use to it. The Second Respondent went further, stating that the Service Manual is readily available on the market and is not proprietary to the Applicant. Anyone who has to service a Hangcha machine, and in this regard there are over 500 000 such machines in China, will have a copy of the manual.

[42] Although the Second Respondent denies having dealt "extensively" with the First Respondent, it admits that it did so with regard to repair and maintenance issues. In this regard, there were discussion in respect of the cost of batteries and chargers.

[43] The Second Respondent also challenged the restraint on the same grounds as the First Respondent and accordingly made common cause with the First Respondent.

[44] The Second Respondent also challenged urgency, but does so almost as an afterthought.

THE APPLICANT'S REPLY

[45] The Applicant deals with the Second Applicant's attack on the FML Agreement as follows:

(a) An email sent by the Applicant to Govender states:

> *"Hi Revani*
>
> *Kindly find attached agreement for your signature, please can you ensure the duly authorised person signs.*
>
> *Please take careful note of the following:*
>
> - *Each and every page, including the cover page, must be initialled by the main signatory and TWO witnesses;*
> - *Full signatures and names on page 11 in the designated space;*
> - *The resolution on page 21 is to be completed, alternatively, a copy of Jungheinrich's own resolution may be attached;*
> - *The debit order mandate on page 22 is to be completed;*
> - *The ORIGINAL correctly signed agreement to be returned to the legal department for countersignature, whereafter a copy of the countersigned agreement will be provided for record purposes."*

(b) There followed certain negotiations relating to payment details;

(c) The signed FML Agreement was returned, to which was attached a resolution by a director of the Second Respondent, one Langrish-Smith, addressed to "*To Whom It May Concern*", stating:

> *"I, Lucile Langrish-Smith, Passport Number 15AR81269, hereby give full authorization to Revani Govender, Identity Number 8410250231084 to act on behalf of myself in all matters pertaining Value Logistics LTD. I confirm this delegated authority includes the signing of applications and contracts."*

(d) The FML Agreement was signed by Govender, but had to be returned to Govender for the witnesses to sign.

[46] The Applicant states further:

(a) Where a lease is coupled with a maintenance obligation, clause 23 is common in the industry because there will inevitably be interaction between the lessee and the lessor's employees, the object being to protect its relationship with it own employees;

(b) The FML Agreement is a standard document and since 2010 the Applicant must have concluded about 250 such contracts;

(c) It is highly likely that the contract between the Second Respondent and DHL contains a similar clause and the Second Respondent was invited to disclose that agreement (an invitation which the Second Respondent did not take up);

(d) Clause 23 does not constitute a harmful and unethical business practise, nor is it contrary to public policy;

(e) That Clause 23 offends the various statutory provisions relied upon is also denied.

[47] The Applicant persisted with its case that clause 23 of the FML Agreement was binding on the Second Respondent.

URGENCY

[48] Although dealt with in passing on the papers by both the First and Second Respondents (particularly the Second), in argument counsel argued vociferously that the Applicant had been dilatory and as a consequence urgency had been lost.

[49] It was argued that the Applicant knew as early as mid-September 2020 that the First Respondent had held an interview with the Second Respondent, but it instituted the application only on 19 November 2020, approximately two months later.

[50] On face value this does appear to be an unnecessary delay. However, if one examines the unfolding of the events I am of the view that the Applicant did not drag its feet unduly. The starting point, in my view, is the date upon which the First Respondent handed

in his resignation – 16 October 2020. Prior thereto there was only a possibility that the First Respondent would take up employment with the Second Respondent. In this regard the following is relevant:

(a) In the founding affidavit it is alleged that in mid-September the First Respondent informed van der Wath that he had been offered employment by the Second Respondent;

(b) In response thereto the First Respondent denies this and states as follows:

> *"149.4 I deny that I informed van der Wath that I had been offered employment by second respondent. What I told her was that I had not been offered employment at that stage but would let her know if and when such an offer came through.*
>
> *149.5 I believe that van der Wath did raise the issue with me on several occasions. On each of these occasions the situation had not changed."*

[51] One must accept the First Respondent's version. Thus, on his own version, no decision has been made in mid-September. The Applicant warned the First Respondent of the consequences of taking up employment with the Second Respondent, but it could hardly institute proceedings based on something that might never happen.

[52] However, the resignation letter and the First Respondent's admission that he has been offered a job by the Second Respondent was another matter. This was 24 Court days

prior to the institution of the application. During this time the Applicant was not supine. It engaged both Respondents on a number of occasions in an attempt to resolve the matter without having to resort to litigation. It investigated the matter by going into its server. It took legal advice and acted on that advice. When it was clear that there was no alternative the application was launched without delay, giving the Respondents reasonable time limits in which to oppose and file papers.

[53] In addition, the harm that the Applicant alleges (if it is proven) is on-going. In the circumstances I am satisfied that the matter was of sufficient urgency to warrant the abridgment of the time limits provided for in the Rules of Court.

DISCUSSION: THE FIRST RESPONDENT

[54] The covenant in restraint of trade, clause 16 of the contract of employment, reads as follows:

> *"16.1 You agree that in the nature of your employment you will have access to confidential information of the Company and may develop relations with the Company's customers. You agree that the restraints set out in this clause are reasonable and necessary in duration, scope and area, to protect the Company's proprietary information and business interests.*
>
> *16.2 For the purposes of this clause:*
>
> *16.2.1* ***Group Company*** *means any subsidiary of the Value Group Ltd and/or any subsidiary of Value Logistics Limited;*

16.2.2 ***Restricted Business*** *means the business of the Company or any Group Company at the time of the termination of your employment with which you were involved to a material extent during the period of 24 (twenty-four) months prior to the date of the termination of your employment;*

16.2.3 ***Restricted Customer*** *means any firm, company, business or other person who, during the period of 24 (twenty-four) months prior to the date of the termination of your employment, was a customer or client of the Company or any Group Company and with whom you had regular contact in the course of your employment;*

16.2.4 ***Restricted Employee*** *means any person with whom you had material contact during your employment who, at the date of the termination of your employment, either (i) was employed by the Company or any Group Company, or (ii) was an employee of the Company or any Group Company who could materially damage the interests of the Company or any Group Company if he/she became employed in any business concern in competition with any Restricted Business, or (iii) was employed by the company or any Group Company and perform duties for or with you which materially supported you in the duties you performed for the Company.*

16.3 *During your employment and for a period of 24 (twenty-four) months after the termination of your employment for any reason, you will not:*

16.3.1 *solicit or endeavour to entice away from the Company or any Group Company the business of a Restricted Customer with a view to*

providing services to that Restricted Customer in competition with any Restricted Business;

16.3.2 provide services to, become employed by or otherwise have any business dealings with any Restricted Customer;

16.3.3 have any interest in or be engaged in any business concern which is in competition with any Restricted Business.

16.4 The obligations imposed on you by this clause extend to your acting not only on your own account but also on behalf of any other firm, company, business or other person and shall apply whether such party or person acts directly or indirectly.

16.5 The area in which the restraints set out above shall apply shall be a radius of 75 kilometres of any of the Company's Group Company's premises within South Africa and Namibia.

16.6 By your signature to this agreement, you acknowledge and agree that:

16.6.1 the restraints set out above are reasonable and fair as to the subject matter, area and duration to protect the Company's and/or any Group Company's proprietary interests;

16.6.2 each of the restraints set out above are separate and independent restraints severable from any of the other restraints;

16.6.3 the provisions of clause 16 shall be construed initially in their widest possible cumulative sense provided. However, that if such construction is found for any reason by any court to be unenforceable, the

provisions of clause 16 shall be construed as imposing separate severable and independent restraints in respect of:

16.6.3.1 the magisterial districts of the Territory; and

16.6.3.2 each calendar month within the Restraint Period;

16.6.3.3 each act or activity or nature of interest;

16.6.3.4 on the basis that notwithstanding a finding that the restraints in their widest sense referred to above are unenforceable, it is intention of the parties that you should be bound by such narrower construction as may be found to be enforceable;

16.6.4 if any one or more of the restraints set out above is invalid or unenforceable for any reason, the validity of any of the other restraints shall not be affected thereby."

[55] It is not in dispute that, insofar as the sale, rental and maintenance of forklifts is concerned, the Second Respondent is a direct competitor. It is also not in dispute that the First Respondent's employment with the Second Respondent relates directly to forklifts, albeit in a different capacity as he was employed by the Applicant.

[56] On his own version the First Respondent:

(a) Established relationships with customers, albeit limited to operational and technical matters, subject to approximately a year in sales at the outset;

(b) Made on-site visits to ensure machines were in good running condition;

(c) Attended meetings with the Applicant above a sales team and took part in tender meetings "… *in respect of key accounts which the Applicant would tender on from time to time for the purpose of obtaining national contracts"*;

(d) Had drinks and lunch with some of the Applicant's customers;

(e) Had knowledge of the Applicant's business and knew the details of certain accounts.

[57] On the face of it, on his own version, the First Respondent breached the restraint. In **Basson v Chilwan and Others 1993 (3) SA 742 (A)** at 776H – 777E it was held that:

> *"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; if the Court is unable to make up its mind on the point, the restraint will be enforced. The covenantor is burdened with their onus because public policy requires that people should be bound by the contractual undertakings. The covenantor is not so bound, however, if the restraint is unreasonable,*

because public policy discountenances unreasonable restrictions on people's freedom of trade. In regard to these two opposing considerations of public policy, it seems to me that the operation of the former is exhausted by the placing of the onus on the covenantor, it has no further role to play thereafter, when the reasonableness or otherwise of the restraint is being inquired into. 'The paramount importance of upholding the sanctity of contracts', which is emphasised by Eksteen JA, finds its complete expression in the rule of the law that the onus is on the covenantor; it has no bearing on the issue whether the particular restraint in question is unreasonable. Accordingly I cannot agree with the statement that where parties contract on a basis of equality of bargaining power the principle pacta sunt servanda 'will find strong application'. Equality of bargaining power cannot affect the nature of the onus; it is relevant only as one of the multitude of factors to be taken into account in the enquiry as to the reasonableness of the restraint. And in relation to this enquiry I venture to suggest that it serves no useful purpose to invoke the observation, made with reference to contracts contrary to public policy in general, that the Court's power in this regard should be exercised 'only in the clearest of cases'. By a long process of judicial development it is clearly established that, in the particular case of a contract in restraint of trade, an unreasonable restraint is contrary to public policy, and that the covenantor can avoid contractual liability by discharging the onus of proving unreasonableness, according to the ordinary standard of proof required in a civil case."

[58] **Basson v Chilwan** has been approved and followed countless times by the Courts.

[59] In **Experian South Africa (Pty) Ltd v Haynes and Another 2013 (1) SA 135 (GSJ)** at paras 20 – 22 the principles were expressed thus:

> *"[20] As I have pointed out above, the onus is on the respondent to prove the unreasonableness of the restraint. You must establish that he had no access to confidential information and that he never acquired any significant knowledge of, or influence over, the applicant's customers while in the applicant's employ. It suffices if it is shown that trade connections through customer contact exist and that they can be exploited if the former employee were employed by a competitor. Once the conclusion has been reached and it is demonstrated that the prospective new employer is a competitor of the applicant, the risk of harm to the applicant, if it's former employee were to take up employment, becomes apparent. See Den Braven SA (Pty) Ltd v Pillay and Another 2008 (6) SA 2 to 9 (D) ([2008] 2 All SA 518 paras 17 – 18).*
>
> *[21] Where an applicant as employer has endeavoured to safeguard itself against the unpoliceable danger of the respondent communicating its trade secrets to, or utilising its customer connection on behalf of a rival concern after entering that rival concern's employ, by obtaining a restraint preventing the respondent from being employed by competitor, the risk that the respondent will do so is one which the applicant does not have to run and neither is it incumbent upon the applicant to enquire into the bona fides of the respondent, and demonstrate that he is mala fide, before being allowed to enforce its*

contractually agreed right to restrain the respondent from entering the employ of a direct competitor (see IIR South Africa BV (incorporated in the Netherlands) t/a Institute for International Researchv Tarita and Others 2004 (four) SA 156 (W) ([2003] 3 All SA 188) at 166I – 167C). In such circumstances all that the applicant need do is to show that there is secret information to which the respondent had access, and which, in theory, the respondent could transmit to the new employer should he desire to do so.

[22] The ex-employer seeking to enforce against his ex-employee a protectable interest recorded in a restraint does not have to show that the ex-employee is in fact utilised information confidential to it: it merely show that the ex-employee could do so. The very purpose of the restraint agreement is to relieve the applicant from having to show bona fides or lack of retained knowledge on the part of the respondent concerning the confidential information. In the circumstances, it is reasonable for the applicant to enforce the bargain it is exacted to protect itself. Indeed, the very ratio underlying the bargain is that the applicant should not have to content itself with crossing its fingers and hoping that the respondent would act honourably or abide by the undertakings that it has given. It does not lie in the mouth of the ex-employee who has breached a restraint agreement by taking up employment with a competitor to say to the ex-of an employer, 'Trust me, I will not breach the restraint further then I have already been proved to have done.'" (My underlining)

[60] The First Respondent states that, as far as he is aware, he has not canvassed any businesses with which the Applicant does business, nor would he do so. His protestation rings hollow when one considers his behaviour, and his lame explanation, in respect of the Service Manual, which smacks of *mala fides.* He knew he was doing wrong, hence the subterfuge. What he did, on his own version, was in flagrant breach of the Applicant's confidentiality policy. That the Service Manual may have been obtainable elsewhere, as the Second Respondent alleges, is irrelevant and is also not supported by the objective facts. If this was the case, why did Crane contact the First Respondent in order to obtain a copy of the Service Manual which, apparently, even the owner of the Hangcha machine in question was not in possession of. It is relevant that the First Respondent holds the exclusive distribution rights to Hangcha machines in South Africa. (Thus, the fact that there may be 500 000 manuals circulating in China is actually irrelevant). The alterations to this machine is something the Applicant should have attended to.

[61] It does not help the First Respondent's case that he passed on the Service Manual at a time when he was in the process of negotiating his exit from the Applicant's employ. Nor is it relevant that the Service Manual was forwarded to someone other than the Second Respondent, as the Applicant reasonably assumed at the time. The fact of the matter is, on his own version, the First Respondent was knowingly and intentionally in breach of his contractual obligations to the Applicant.

[62] The First (and Second) Respondent contends that the Applicant has failed to make out a case for a proprietary interest either in the form of customer connections or protectable confidential information deserving of protection and that the Applicant's papers consist of vague and generic allegations in this regard.

[63] That the Applicant's founding papers may lack specificity in certain respects is so. But this is frequently the case in restraint matters as the nature and extent of the ex-employee's breach is peculiarly within his/her knowledge. That is why there is an onus to rebut on a respondent. In any event, I am of the view that the Applicant does indeed make out a case, which case is fortified by the First Respondent's own admissions (dealt with above). The mere fact that the Second Respondent approached the First Respondent and offered him a job speaks volumes.

[64] I am also of the view that the fact that the First Respondent is employed by the Second Respondent in a different capacity is irrelevant. The distinction between his previous and present job descriptions is not such that they do not overlap to a large degree. While he may not have been directly responsible for the conclusion of the sale or rental agreements when employed by the Applicant, he was directly involved in the process. He was also directly involved in the after-service provided by the Applicant. The Second Respondent would not have hired him as a salesperson if it did not believe he was able to add value to its business. In fact, through the FML Agreement the First Respondent and the Second Respondent dealt directly with each other for a period of approximately a year, during which time the Second Respondent was not only a direct competitor but also a customer.

[65] It is also not relevant that the Applicant deals exclusively in Hangcha machines, whereas the Second Respondent deals in Still machines. This is actually a negative factor insofar as the First Respondent is concerned: he is in an ideal position to persuade a potential customer why the Second Respondent's machines are better than the Applicant's.

[66] It would be apposite at this stage to quote from the matter of **Value Logistics Ltd v Da Costa Rosario 2009 JDR 2387 (GJ)**, ironically involving the same applicant**:**

> *"[18] A party seeking to enforce a covenant in restraint of trade is required only to invoke the restraint agreement and prove a breach thereof. Thereupon, a respondent who seeks to avoid the restraint has an onus to demonstrate on a balance of probabilities that the restraint agreement is unenforceable because it is unreasonable. See Basson v Chiwan and Others 1993 (SA) 742 (A at 776I –J; Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A) at 892I – 893E; Reddy v Siemens Telecommunications (Pty) Ltd 2007 (2) SA 46 (SCA) at paras 10 to 14.*
>
> *[19] In Reddy v Siemens Telecommunications (Pty) Ltd (supra) the Supreme Court of Appeal per Malan AJA emphasised that the constitutional values underlay not only a respondent's freedom to engage in economic activity, but also the applicant's corresponding right. At para 15 Malan JA had this to say:*
>
> > *'[15] 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 the party should comply with their contractual obligations, a notion expressed by the maximum 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.'

[20] The onus is on the first respondent to prove the unreasonableness of the restraint. She must establish that she had no access to confidential information and that she never acquired any significant personal knowledge of or influence over the applicant's customers whilst in their employ. This is the first respondent has not done, in fact, she admits that the information she took from the applicant is its confidential information. She says however that she does not intend using same. That being the case and since it has been demonstrated that the prospective new employer is a competitor of the applicant, the risk of harm to the applicant if it's forming employee were to take up employment becomes apparent.

[21] The applicant had put in place certain safeguards to protect itself against the risk of the first respondent, or any other of its other employees, communicating its trade secrets to, or utilising its customer connections on behalf of a rival concerned. This the applicant did by imposing a restraint on the first respondent, which prevented her from being employed by a competitor. This means that it is not necessary for the applicant to have to run after the first respondent and neither is it incumbent upon the applicant to enquire into the bona fides of the first respondent and to demonstrate that she is mala file before being allowed to enforce it contractually agreed right to restrain the first respondent from entering the employ of a direct competitor.

[22] All the applicant is required to demonstrate is that there is secret and confidential information to which the first respondent had access, and which in

theory the first respondent could transmit to the new employer should she desire to do so. This the applicant has clearly done. The first respondent admits that she is in a position to disseminate the confidential information presently in her position, but, so she alleges, she has chosen not to do so.

[23] It is not necessary for the applicant to show that the first respondent has in fact utilise the confidential information. Applicant only has to show that the first respondent could do so. The very purpose of the restraint agreement is that the applicant does not have to rely on the bona fides or lack of retained knowledge on the part of the first respondent of the confidential information. It cannot be unreasonable for the applicant in the circumstances to enforce the bargain it has exacted to protect itself. 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 she had given. It does not lie in the mouth of the first respondent, who has breached the restraint agreement by taking up employment with a competitor, to say to the applicant 'trust me: I will not breach the restraint further than I have already been proved to have done.' (Reddy v Siemens Telecommunications (supra) at pg 499 – 500, para 20)."

[67] The respondent in the **Value Logistics v Da Costa Rosario** matter was employed by the applicant as a sales representative. Her new employment was as a key accounts manager. The restraint was for a period of two years and a 75 km radius from any of the applicant's business premises throughout South Africa and Namibia. It thus appears to be very much along the same lines as the present matter.

[68] The restraint was upheld.

[69] In the short space of time prior to the launch of this application the First Respondent claims to have visited approximately 50 entities in order to canvas business for the Second Respondent. The fact that the Applicant does not do business with these entities, as for as the First Respondent is aware, is irrelevant. Firstly, his *ipse dixit* is equivocal. Secondly, as the authorities quotes above clearly establish, protestations of innocence stand to be ignored.

[70] From the foregoing it is clear that I intend to enforce the restraint. The question which then arises is whether the time period and geographical extent are reasonable. In **Kwik Kopy (SA) (Pty) Ltd v Van Haarlem and Another 1999 (1) SA 472 (W)** at 484E the Court held that in addition to the traditional enquiry enunciated in **Basson v Chilwan** (at 767G –H) should be added the enquiry: is the restraint wider than necessary to protect the protectable interest?

[71] A Court is entitled to interfere with a restraint that is unreasonably wide, but will not fashion a new contract for the parties. In **Nampesca (SA) Products (Pty) Ltd v Zaderer and Others 1999 (1) SA 886 (CPD)** at 896A – C it was held that:

> *"A court may excise unreasonable parts of a restraint only if it does not defeat the parties' intention or offend against the fundamental rule that a court may not make a contract for the parties (see the Coin Sekerheidsgroep case supra at 571H –I). Our Courts furthermore are reluctant to cut down restraint clauses, unless it can be done by deleting the oppressive parts neatly and conveniently (see MacPhail (Pty) Ltd v Janse van Rensburg and Others 1996 (1) SA 594 (E) at 599B)…"*

[72] In addition, the restraint clause in the instant matter specifically enjoins the Court to, if necessary, fashion a reasonable prohibition.

[73] Having regard all the factors already dealt with I am of the view that the restraint is unreasonable in respect of both time and extent. A period of two years is excessive and should only be enforced in exceptional circumstances, which is not the case here. A geographical area of 75 km from any of the Applicant's premises will effectively prevent the First Respondent from taking up employment anywhere in South Africa and Namibia. It is common cause that he was employed in Port Elizabeth for the entire time that he worked for the Applicant, although he did commute to Johannesburg at one stage. Thus his knowledge of the Applicant's business is limited in extent.

[74] It is interesting to note that the contract of employment that the First Respondent concluded with the Second Respondent also contains a covenant in restraint of trade. That contract provides that on the termination of his employment the First Respondent is restrained from being employed by a customer of the Second Respondent for a period of twelve months in the "*Prescription Area*" which is defined as "… *any area in the Republic of South Africa, and any country in which the business is or has been conducted."*

[75] Thus, although the period of the restraint is less onerous the geographical extent is far more onerous and notionally could include the whole world.

[76] Having regard to the competing interests I am of the view that it will do justice to the parties if the restraint is limited to a period of twelve months and to the municipal boundary of the Nelson Mandela Bay Municipality (in effect, Port Elizabeth, Uitenhage and Despatch).

This will permit the First Respondent to take up employment in his chosen field but not in his old stamping grounds (as it were) during the period of the restraint. He is also at liberty to engage in any other activity, provided it does not involve the sale, rental and maintenance of forklifts.

[77] To date the First Respondent has not tendered to return copies of the Service Manual and/or delete copies thereof from any computer device over which he has control. Given his admission that he knew he was doing wrong when he downloaded it to his personal computer, this is indeed strange. The Applicant is also entitled to an order in this regard.

[78] Insofar as the First Respondent's challenge to clause 23 of the FML Agreement is concerned, I deal therewith below.

DISCUSSION: SECOND RESPONDENT

[79] The Second Respondent's half-hearted denial that Govender did not have the necessary authority to bind it in respect of the FML Agreement cannot be taken seriously. The Second Respondent itself describes in detail how and why the contract came into being and it was clearly implemented by the parties. It is difficult to appreciate how a contract which was concluded without authorities could have been terminated by it. That Govender did not have authority to conclude the contract is comprehensively debunked by the blanket authority give to her by one of the Second Respondent's directors.

[80] For the same reason I reject the contention that, even if Govender has authority to bind the Second Respondent to the FML Agreement, she had no authority to do so in

respect of clause 23. She clearly had a blanket delegated authority to as "*… in all matters pertaining Value Logistics Ltd"*, which if one has reference to the date, was obviously given in respect of the FML Agreement.

[81] In addition, the document went back and forth a couple of times and everything was done in the open. There is no suggestion Govender didn't read the document and in any event the maxim *caveat subscriptor* finds application.

[82] Which brings me to the other grounds of objection raised by the Second Respondent (and the First Respondent, for that matter).

[83] For a variety of reasons the Second Respondent alleges that clause 23 is unconstitutional and contrary to public policy. It is trite that all contracts must pass constitutional muster.

[84] It is relevant that at common law it is not unlawful to solicit the services of another business's employee. In **Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd & Other 1981 (2) SA 173 (T)** this very issue arose. At 200D – G the Court stated:

> *"This poses the following question. Is it unfair competition to induce an employee to terminate his contract of employment lawfully? Put differently, can it be unlawful conduct to exhort someone to do something lawfully? This proposition falls strange on the ear. In our competitive economy it is normal for employers to bid for their labour, the price of which is subject to the law of supply and demand. As long as the employee is free to leave others are entitled to offer him terms of employment. The fact that the loss of the employee might cause damage to the employer is incidental*

and irrelevant. Cf New Klipfontein Co Ltd v Superintendent of Labourer 1904 TS 241.

This does not mean that should a businessman systematically induce his competitor's employees to leave, his conduct would necessarily be lawful. In my view, public policy would dictate that, where the aim in inducing a competitor's employees to terminate their employment is not to benefit from their services but to cripple or eliminate the business competitor, this action be branded as unlawful competition. Cf Callmann (supra vol II para 33.1 (a))."

[85] There is no suggestion on the papers that the Second Respondent's motives in offering the First Respondent a job are anything other than legitimate.

[86] There is also merit in the Second Respondent's submission that clause 23 may have unintended consequences. It will apply to all employees, present and future, irrespective of their work description and length of service. It will apply to the cleaning staff. It will apply to someone whose services, at the end of a probationary period, is not retained by the Applicant. It will even apply to someone who is retrenched. It will apply even to those employees not subject to a covenant in restraint of trade. This list is not exhaustive.

[87] This issue was dealt with in **Kores Manufacturing Co Ltd v Kolok Manufacturing Co Ltd [1957] All ER 158** and on appeal, the reference being **[1959] ch. D 108.**

[88] In both the Court *a quo* and on appeal an agreement similar to the present was found to be unenforceable as being contrary to public policy. In **Hanover Insurance**

Brokers Ltd & Another v Schapiro and Others [1994] IRLR 82, in dealing with a similar situation the Court held:

> *"But the difficulties in law in the way of a non poaching agreement between employers are very clearly explained in the decision of the Court in Kores Manufacturing Co. Ltd. v Kolok Manufacturing Co. Ltd [1959] Ch 109. In particular, the employee has the right to work for the employer he wants to work for if that employer is willing to employ him. Moreover the restriction as drawn would apply to all employees of HIB irrespective of expertise or juniority and would apply to those who were employees at the time of the solicitation or enticement, even if they had only become employees after all the defendants had left HIB's service. HIB cannot impose a mere covenant against competition on the defendants. That is why a covenant not to canvass persons who had become customers of HIB only after the defendants had ceased to be employees of HIB would be invalid: (see Konski v Peet [1915] 1 Ch 530). The same must be the case with employees. I agree with the judge on this and would dismiss the cross-appeal."*

[89] What distinguishes clause 23 from a covenant in restraint of trade in an employment contract is that the employee, without being a party thereto and without having any knowledge thereof will be prohibited from taking up employment with another company.

[90] Another factor to be taken into account is that the FML Agreement arose out of the peculiar circumstances dealt with above. It was a temporary arrangement intended to be of relatively short duration. To embargo all the Applicant's employees for a period of two years after the termination of the FML Agreement, including those who might be employed after the date of termination and who never had any contact with the Second Respondent,

from taking up employment with the Second Respondent is, in my view, indefensible and the clause is accordingly unenforceable.

[91] I must hasten to add that my decision must not be construed as a finding that all non-solicitation clauses are bad in law. Counsel for the Respondents did not refer me to any South African authority directly on the point, nor was I able to find any. My finding is confined by the specific circumstances of this case.

[92] Given the views expressed above it is not necessary to deal with the other grounds of opposition to clause 23 raised by both Respondents.

COSTS

[93] Insofar as the First Respondent is concerned there is no reason why costs should not follow the event.

[94] Although the Second Respondent has been successful in respect of its challenge to clause 23 of the FML Agreement, it made common cause with the First Respondent in respect of its opposition to the covenant in restraint of trade by denying on a number of occasions that in taking up employment with the Second Respondent the First Respondent was in breach thereof. In this regard it has also been unsuccessful.

[95] In the circumstances I intend ordering the Second Respondent to pay the costs of the application jointly and severally with the First Respondent.

ORDER

[96] The following order will hereby issue:

1. The First Respondent is hereby interdicted and restrained for a period of one year as from 13 November 2020 from being employed by any business concern (including the Second Respondent), which conducts the business of rendering logistics material handling services, being the sale of, supply of and rental of forklifts and spare parts to customers requiring same, such restraint to be limited to the geographical boundary of the Nelson Mandela Bay Municipality.

2. The First Respondent is hereby ordered to return all copies of the service manual for a 1.0t – 5.0t Lead Acid Battery Counterbalanced Forklift Truck manufactured by Hangcha Group Ltd and to forthwith delete the said service manual from any computer device under his control and to furnish proof to the Applicant that he has done so.

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

_____

N.J. MULLINS

ACTING JUDGE OF THE HIGH COURT

Obo the Applicant:	**Adv. JL Kaplan**
Instructed by:	**IAN LEVITT ATTORNEYS**

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