IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**NO**
Circulate to Magistrates:	**NO**

Case no: **113/2022**

In the matter between:

DIY SUPERSTORES (PTY) LTD Applicant

and

BAZIL ANTON KRUGER 1st Respondent

BUILD IT CORNER 2nd Respondent

CORAM: JP DAFFUE J

HEARD ON: 17 FEBRUARY 2022

DELIVERED ON: 19 APRIL 2022

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 15h30 on 19 April 2022.

I INTRODUCTION

[1] A well-known and established business, to wit "the largest privately owned DIY Store in South Africa" that has been doing business for the last 33 years[1] decided to rely on a restraint of trade clause in an employment contract to interdict and restrain an ex-employee from taking up employment with one of its competitors in Bloemfontein for a period of two years from the date of termination of the ex-employee's employment with it.

[1] Founding affidavit: para 13.3, p 11

[2] This application, which was brought on alleged urgency, has not only been met with a detailed response to the merits, but reliance was also placed on the applicant's failure to comply with Rule 41A, a relatively new rule which allows parties to consider mediation as a dispute resolution mechanism.

II THE PARTIES

[3] The applicant is DIY Superstores (Pty) Ltd (herein later referred to "DIY"), a private company with its main place of business situated at Oranjesig, Bloemfontein. It was represented by Adv S Grobler SC, duly instructed by Kramer Weihmann Inc of Bloemfontein.

[4] The first respondent is Bazil Anton Kruger (herein later referred to as "Kruger"), a major male person who is presently in the employ of the Build It Corner in Dan Pienaar, Bloemfontein. He was represented by Adv A Sander, duly instructed by Lovius Block Attorneys, Bloemfontein.

[5] The second respondent, Build It Corner, has filed a notice to abide the decision of the court.

III THE RELIEF CLAIMED

[6] The applicant seeks the following relief as is evident from the notice of motion which reads *verbatim* as follows:

> "1. To the extent necessary, the applicant's noncompliance with the rules of this Court related to time periods is condoned and the application is heard as an urgent application in terms of Rule 6(12).
>
> 2. For a period of two years after 17 December 2021, and in Bloemfontein, the First Respondent is interdicted and restrained from being an employee, shareholder, partner, member of a close corporation, director of any company or in any other capacity whatsoever associated with any entity that directly or indirectly competes with the Applicant's business.
>
> 3. The First Respondent is ordered to immediately terminate his employment with the Second Respondent.

4. The First Respondent is ordered to pay the costs of this application. Should the Second Respondent oppose, then and in that event the Second Respondent is to pay the costs of the application together with the First Respondent, payment by one the other to be absolved."

IV THE DEFENCES

[7] Kruger has raised the following defences:

7.1 DIY has not made out a case for urgency and it has merely relied on unfounded and vague allegations for the abridgement of the time periods.[2]

7.2 It is also alleged that DIY failed to comply with the provisions of rule 41A of the Uniform Rules of Court insofar as it did not file, together with the notice of motion, a notice indicating whether it agrees to or opposes a referral of the dispute to mediation as contemplated in the rule. Therefore, the court was requested to stay the application pending compliance by DIY.[3]

7.3 Kruger dealt with the merits of the application in detail in a further 26 pages.[4] It is recorded that a three months' fixed term contract was entered into between the parties for the period 20 July 2020 to 31 October 2020 which contract contained a restraint of trade clause. Firstly, in this regard, it is Kruger's submission that, properly interpreted, the clause does not prohibit him from taking up employment as a salaried employee with one of DIY's competitors. Secondly, the fixed term contract automatically lapsed at the end of October 2020 and although he remained in the employ of DIY thereafter, the restraint did not apply to his further employment which was in terms of an oral agreement entered into with the Human Resources Manager of DIY.

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[2] Answering affidavit: paras 15 – 22, pp 65 - 66
[3] *Ibid*: paras 23 – 28, pp 66 - 67
[4] *Ibid*: pp 67 - 93

7.4 Furthermore, the restraint of trade clause, insofar as it applies to his further employment, is unreasonable and against public policy. He was a logistics supervisor who performed his duties in the DIY's yard and did not work in the hardware store. He was neither involved in the general management of the business, nor in its sales department and hardware store and was not involved in the conclusion of any transactions with any of DIY's customers and suppliers.[5] He is not involved in the management of his new employer, but is merely responsible for sales to customers inside the store and does not liaise with or approach suppliers or customers for new business. According to him DIY has no interest that is deserving of protection. The new employer is one of DIY's customers and can never compete on a competitive basis with DIY.[6]

7.5 It is also Kruger's case that DIY did not provide him with any training to become a salesperson. The only purpose with the enforcement of the restraint of trade is to prevent him from earning a living and to stifle the free and fair use of his own skills, knowledge and experience.[7]

V THE UNDISPUTED FACTS

[8] The following facts are common cause or not seriously disputed:

8.1 As mentioned, DIY is a well-known and established business and the largest privately owned DIY store in South Africa which specialises in the sale of any kind of building materials and related products to customers, including other hardware stores.

8.2 Build It Corner, the second respondent, is a material supply store that provides some of the services delivered by DIY, although on a much smaller scale. No doubt, it to an extent competes with DIY although it is also one of its customers.

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[5] *Ibid*: paras 42-45, p 70
[6] *Ibid:* paras 80-109, pp 77-83
[7] *Ibid*: paras 98 – 103, p 81

8.3 Kruger worked for DIY earlier, *i.e.* from 2003 to 2008, again from 2009 to 2014 and also during 2015,[8] but this is apparently not relevant for purposes of the relief sought by DIY insofar as no reference is made thereto in the founding affidavit. Fact of the matter is that Kruger took up employment with DIY again on 20 July 2020, this time as a supervisor in DIY's yard, in accordance with a written fixed term contract entered into between the parties.[9]

8.4 Clause 1.1 of this employment contract reads as follows:

"1.1 **Vastetermyn Aanstelling**

Die werknemer word hiermee aangestel vir 'n beperkte periode en hierdie kontrak tree in werking op 20/7/2020 en sal **outomaties termineer** word op 31/10/2020 sonder kennis, soos na verwys in klousule 17 hieronder, (vir 'n periode van 03 (drie) maande / jare)." (sic).

Clearly, the employer failed to delete the words "jare". I emphasise the words "outomaties termineer". It would not be necessary for any of the parties to give notice of termination insofar as the employment contract would automatically terminate on 31 October 2020. No doubt, the employment contract was drafted to in essence deal with permanent employees as numerous clauses in the agreement are totally irrelevant to a fixed term contract. I do not deem it necessary to mention any of these.

8.5 The contentious clause, to wit the restraint of trade clause, is encapsulated in clause 28, which reads as follows:[10]

"28. **BEPERKING OP HANDELSVRYHEID**

28.1 Die werknemer onderneem om nie binne 'n tydperk van twee (02) jaar nadat die werknemer se diensverhouding by die werkgewer beëndig is, betrokke te wees as aandeelhouer, vennoot of lid van 'n Beslote Korporasie, direkteur van 'n Maatskappy of enige ander hoedanigheid hetsy direk of indirek in 'n besigheid wat met die werkgewer kompeteer in die gebied bekend as Bloemfontein nie.

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[8] *Ibid*: paras 29 – 35, pp 67 & 68
[9] Job offer, annexure "FA1", p 21 and employment contract, annexure "FA2", pp 22 - 41
[10] "FA2", p 39

28.2 Die werknemer erken en stem saam dat die voormelde beperking op handelsvryheid redelik, billik en noodsaaklik is vir die beskerming van die werkgewer se besigheid, besigheidsnaam en wat daarmee verband hou.

28.3 Met voorbehoud van regte en sonder om afbreuk te doen aan enige regte wat die werkgewer in terme van die gemenereg of statutêre reg besit, stem die werknemer toe tot skade van 'n bedrag van R5 000-00 (vyf duisend rand) vir elke maand waaraan die werknemer hom skuldig maak aan verbreking van hierdie klousule en vir solank die verbreking voortduur en dat die werkgewer geregtig is om sodanige skade te verhaal, asook kostes verbonde aan verhaling, van die werkgewer ten opsigte van sodanige verbreking."

8.6 Notwithstanding the lapse of the fixed term contract on 31 October 2020 Kruger remained in the employ of DIY until 17 December 2021. The circumstances giving rise to the further employment are in dispute and will be dealt with later herein.

8.7 On 17 December 2021 an incident occurred which caused Kruger to immediately leave the premises of DIY during the early morning in a clear and emphatic fashion not to return to work. There is a dispute as to what exactly happened, but it is no doubt apparent that one of DIY's two directors, Mr Marius Eksteen, was furious. I shall deal later herein with the manner in which the dispute should be considered in application proceedings.

8.8 At the beginning of January 2022 Kruger took up employment with the second respondent, Build It Corner, as a sales manager. This triggered an immediate response from DIY which eventually led to the present litigation.

8.9 Within days, *i.e.* on 4 January 2022, the first letter of demand by DIY's attorneys was served upon Kruger and second respondent in terms whereof Kruger was instructed to immediately terminate his employment with second respondent.[11] There was a response from

[11] Founding affidavit: paras 42 – 47 & annexures "FA3" & "FA4"

Tiaan Smuts Attorneys who at that stage apparently had instructions from the second respondent, but this letter was followed by a further letter from DIY's attorneys dated 5 January 2022, insisting upon Kruger's immediate resignation by the next day, to wit 6 January 2022.[12]

8.10 On 6 January 2022 Tiaan Smuts Attorneys forwarded a letter in which they requested a copy of the agreement applicable when their client resigned as logistics supervisor. Clearly a request was made for a copy of the employment contract that was entered into after termination of the three months' fixed term contract. It was also placed on record that Kruger resigned whilst he was a logistics supervisor with DIY, but was appointed by the new employer as a salesman and that he had no intention to compete unlawfully with DIY.[13]

8.11 Hereafter the urgent application was issued without complying with rule 41A, followed by answering and replying affidavits.

8.12 Tiaan Smuts Attorneys and their Bloemfontein correspondents, Phatshoane Henney Inc, withdrew as Kruger's attorneys of record two days before the hearing of the application. Lovius Block Attorneys hereafter came on record as Kruger's new attorneys. As indicated, second respondent abides the judgment of this court.

VI THE 1st DEFENCE: LACK OF URGENCY

[9] In my view no proper defence has been raised in this regard. The time periods have been truncated to a certain extent, but Kruger had sufficient opportunity to place all relevant evidence on record in support of his defence on the merits. I also accept that applications of this nature are generally considered sufficiently urgent, requiring speedy adjudication thereof.

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[12] Annexure "FA6", pp 50 & 51
[13] Annexure "FA9", pp 58 & 59

VII THE 2nd DEFENCE: NON-COMPLIANCE WITH RULE 41A

[10] Rule 41A reads as follows and for purposes hereof I merely quote sub-rules 1, 2, 3 and 9 thereof:

"(1) In this rule-

'dispute' means the subject matter of litigation between parties, or an aspect thereof.
'mediation' means a voluntary process entered into by agreement between the parties to a dispute, in which an impartial and independent person, the mediator, assists the parties to either resolve the dispute between them, or identify issues upon which agreement can be reached, or explore areas of compromise, or generate options to resolve the dispute, or clarify priorities, by facilitating discussions between the parties and assisting them in their negotiations to resolve the dispute.

(2) (a) In every new action or application proceeding, the plaintiff or applicant shall, together with the summons or combined summons or notice of motion, serve on each defendant or respondent a notice indicating whether such plaintiff or applicant agrees to or opposes referral of the dispute to mediation.

(b) A defendant or respondent shall, when delivering a notice of intention to defend or a notice of intention to oppose, or at any time thereafter, but not later than the delivery of a plea or answering affidavit, serve on each plaintiff or applicant or the plaintiff's or applicant's attorneys, a notice indicating whether such defendant or respondent agrees to or opposes referral of the dispute to mediation.

(c) The notices referred to in paragraphs (a) and (b) shall be substantially in accordance with Form 27 of the First Schedule and shall clearly and concisely indicate the reasons for such party's belief that the dispute is or is not capable of being mediate.

(d) Subject to the provisions of subrule 9(b) the notices referred to in this subrule shall be of a without prejudice and shall not be filed with the registrar.

(3) (a) Notwithstanding the provisions of subrule (2), the parties may at any stage before judgment, agree to refer the dispute between them to mediation: Provided that where the trial or opposed application has commenced the parties shall obtain the leave of the court.

(b) A Judge, or a Case Management Judge referred to in rule 37A or the court may at any stage before judgment direct the parties to consider referral of a dispute to mediation, whereupon the parties may agree to refer the dispute to mediation.

(9) (a) Unless the parties agree otherwise, liability for the fees of a mediator shall be borne equally by the parties participating in mediation.

(b) When an order for costs of the action or application is considered, the court may have regard to the notices referred to in subrule (2) or any offer or tender referred to in subrule (8)(d) and any party shall be entitled to bring such notices or offer or tender to the attention of the court." (emphasis added)

[11] It is important to consider the definition of "mediation". No doubt, the new rule provides for a voluntary process entered into by agreement between the parties to a dispute. The aim is that an independent person, a mediator, should be instructed to assist the parties in order to come to a possible settlement of the dispute or disputes between them. The word "shall" is found in sub-rules 2(a), 2(b) and 2(c) which is indicative of a peremptory provision. The notices mentioned in sub-rules 2(a) and (b) must be substantially in accordance with Form 27 of the First Schedule to the Uniform Rules of Court. The parties must indicate clearly the reasons for the belief that the dispute is capable of being mediated or not.

[12] It is evident that the fees of the mediator must be paid by the parties equally, unless they agree otherwise. When the costs of the application or action is considered, the court is entitled to have regard to the notices filed in terms of sub-rule 2. I have serious reservations as to the relevance of rule 41A at present. The rule makers apparently believed that speedy and less expensive resolution of disputes between parties would be achieved and possibly also an avoidance of over-congested court rolls. Unfortunately, this is a pie in the sky. Unless mediation is peremptory and provision is made for payment of mediators by the State, litigants will in most cases endeavour to obtain adjudication of their disputes by the court. This is especially true for plaintiffs and applicants who believe that they are entitled to certain relief. Obviously, some defendants and respondents who prefer not to be dragged into litigation may well try their level best to delay adjudication of the applicants' or plaintiffs' claims and in the process insist on compliance with Rule 41A.

[13] Mediation is a costly affair. If it is not agreed to and/or stated clearly in the rules that the parties shall not be presented by legal representatives during the mediation process, the same legal representatives eventually appearing for the parties during the action, trial or opposed application, would elect to appear on behalf of the parties during mediation. The mediator, who should be a qualified, experienced and legally trained person, will charge his/her fees in line with what trained lawyers charge and the parties would have to pay these fees, contrary to the situation in court where presiding judges and magistrates are being paid their salaries from public funds.

[14] Having said this, I am satisfied that if I an experienced lawyer was approached prior to the commencement of proceedings to act as mediator, there might have been a good possibility of a settlement. Sub-rule 3(b) provides a discretion to the court to direct the parties to consider referral of a dispute to mediation, but again, the parties do not have to adhere to such a request. I reiterate, unless mediation is made compulsory and provision is made for the payment of the mediator's fees and services accessory thereto, such as accommodation facilities, microphones and recording machines and interpreters, the purpose of the rule makers will not be achieved.

[15] I have come across only one reported judgment in this regard, to wit *Nomandela and Another v Nyandeni Local Municipality and Others*.[14] In that case the respondents raised the preliminary point of non-compliance with rule 41A(2)(a) when the applicants approached the court on an urgent basis for the determination of *interim* relief. I fully agree with the following *dictum* by Majiki J:

"[9] Having said that, the rule became effective in March 2020. I have not been made aware that there are available, adaptable instruments in place, including personnel, for effective implementation of the rule in this division. More significant, though, is the respondents' own silence about their stance on mediation. Rule 41A(2)*(b)* compels the respondents to also file their notice as to whether they agree or oppose referral of the dispute to mediation. The rule does not suggest that their compliance is dependent on the applicants' filing of a rule 41A(2)*(a)* notice. Even if it were, nowhere have they stated in the answering affidavit that they would have wished to explore or not explore the mediation process, but could not do so for reason of the applicants' nonfiling. I am of the view that they could have complied with their part of the obligation in terms of the rule, or communicated their stance on mediation regardless of the applicants' failure."

[16] I am also in full agreement with the learned judge's comment that "rules are meant for the court and not the other way around",

as well as the following comment:

"It is ideal that in the near future litigants should comply with this rule. That would ease the congested court rolls and achieve less costly and speedier resolution of disputes."[15]

However, I reiterate what I have said earlier pertaining to who should foot the bill.

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[14] 2021 (5) SA 619 (ECM)
[15] Para 10 of the judgment

[17] Having said all this, I am satisfied that an applicant's failure to comply with Rule 41A, either to agree to a process of mediation, or at least to consider the procedure and explain why it is not a viable option, may have a bearing on the award of costs.

VIII THE CASE LAW IN RESPECT OF *PACTA SERVANDA SUNT* AND RESTRAINT OF TRADE DISPUTES

[18] I recently had to adjudicate two identical matters, the facts which are not too dissimilar from the facts *in casu*. I then had the opportunity to consider relevant case law and deem it apposite to quote extensively from that judgment, to wit *Mangaung Building Materials v Zulu and Sekhoane*[16]:

"[14] The authorities in restraint of trade disputes are well known and it would suffice to briefly mention a few judgments. We learned from the Romans: *pacta servanda sunt*, *i.e.* contracts must be complied with. This remains an important principle, but many years before the enactment of both the *interim* and final Constitutions, the Appeal Court (as it was then called) held in its landmark decision of nearly 40 years ago in *Magna Alloys and Research (Pty) Ltd v Ellis* that agreements in restraint of trade are valid and enforceable, unless they are unreasonable and thus contrary to public policy. The court held that the party challenging the enforceability of the agreement bears the *onus* to allege and prove that it is unreasonable.

[15] Many years after *Magna Alloys* the Constitutional Court confirmed in *Barkhuizen v Napier* that *pacta servanda sunt,* but courts are allowed to decline to enforce contracts, or terms thereof, that are in conflict with constitutional values, even where the parties consented thereto.

[16] Although restraint of trade agreements should not be regarded as special contracts separate from any other type of contract, it is no doubt so that restraint of trade agreements give effect to a wide range of circumstances 'spanning the spectrum from the hugely successful businessperson who sells the business that he or she has built up for massive amounts of money and is required to sign a restraint of trade agreement in order that the purchaser may protect its investment, to relatively humble employees who may be required to sign such an agreement as a matter of rote and possibly *in terrorem* to deter them from seeking a more advantageous position ...' as Wallis AJ (as he then was) stated in *Den Braven SA (Pty) Ltd v Pillay and another.* Later on, in the same paragraph quoted, the learned judge stipulated that where a business seeks to

[16] 3387/2020 and 3388/2020 [2020] ZAFSHC 188 (26 October 2020)

protect itself, there is no reason for the courts to view this with disfavour, unless the bounds of public policy are overstepped in which case the court will withhold its assistance.

[17] Although the public interest requires parties to comply with their contractual undertakings, it is also in the public interest that all persons shall be granted an opportunity to remain economically productive to enable them to earn a living and to support their families. This was again reiterated in *Reddy v Siemens Telecommunications (Pty) Ltd.* The court continued in *Reddy* as follows:
'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. Such a restraint is not in the public interest.'

[18] In conclusion, and as Malan AJA did in *Reddy*, a court should follow the approach adopted in *Basson v Chilwan and Others* where four questions were identified that should be asked to consider the reasonableness of a restraint of trade:
'(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 the restraint to be maintained or rejected?'"
(footnotes omitted)

[19] I shall say more about the facts in *Den Braven SA (Pty) Ltd v Pillay and another* and *Reddy v Siemens Telecommunications (Pty) Ltd,* referred to in my judgment quoted in the previous paragraph when I evaluate the evidence. In *Automative Tooling Systems (Pty) Ltd v Wilkens and another*[17] the Supreme Court of Appeal dealt with the know-how acquired by an ex-employee where such know-how forms part of the stock of skill and knowledge acquired by him in the course of developing his trade. That case dealt with the manufacturing of machines which in my view is a much more specialized field than the position occupied by Kruger during his employ with DIY. The court held that the employer had no proprietary interest that might legitimately be protected and that the restraint was inimical to public policy and unenforceable. *In casu*, the acumen of a salesperson to sell various building materials who has been

[17] 2007 (2) SA 271 (SCA) at para 8 and further and para 20 in particular

employed as such by more than one hardware store over the years, including the applicant some years ago, is in the spotlight.

[20] In *Digicor Fleet Management v Steyn*[18] the Supreme Court of Appeal, while acknowledging the trite legal principle that the *onus* is on the person trying to escape the consequences of a restraint of trade clause to prove that the employer has no propriety interest which needs protection,[19] emphasised that insofar as motion proceedings were instituted, the version of Mrs Steyn as the respondent had to be accepted. In that case Mrs Steyn had previous experience in the particular field in which she was employed and although she made contact with customers of Digicore after termination of her employment, the Supreme Court of Appeal had no hesitation to confirm the correctness of the High Court's decision to dismiss the application. The court distinguished the facts before it from that in *Reddy* to be discussed later herein. It also accepted the fourfold test enunciated in *Basson v Chilwan*[20] which I also quoted in my aforementioned judgment. In this regard it *inter alia* held that Digicore had a proprietary interest in its client base and information about it which deserves protection, but that Mrs Steyn presented no threat to that interest.[21]

[21] In *Barkhuizen v Napier,*[22] referred to in my judgment quoted in detail *supra*[23] the Constitutional Court held that "the proper approach to constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights."
Ngcobo J, writing for the majority, made the point that such an approach "leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even where the parties have consented to them."

[22] It is also important to mention more recent authorities in order to appropriately adjudicate the dispute. Perhaps the latest judgment of the Constitutional Court pertaining to *pacta servanda sunt* is *Beadica 231 CC and Others v Trustees,*

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[18] [2009] 1 All SA 442 (SCA)
[19] *Ibid*: para 7
[20] 1993 (3) SA 742 (A) at p 768F – H
[21] *Digicore, loc cit* at paras 14 &15
[22] 2007 (5) SA 323 (CC) at para 30
[23] Para 18 *supra*

Oregon Trust and Others (Beadica).[24] I can do no better than to quote the judgment of Unterhalter AJA, a unanimous judgment of the full bench of the Supreme Court of Appeal where the learned judge of appeal dealt as follows with *Beadica* in *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others (Capitec)*[25]:

"[63] Beadica affirms the following. First, the principle that contracts freely and voluntarily entered into must be honoured remains central to the law of contract. This principle, often captured under the phrase freedom of contract, recognises that persons, through voluntary exchange, may freely take responsibility for the promises they make, and have their contracts enforced. Second, at common law, now infused with the values of the constitution, there are principles expressed in the detailed doctrines that make up the law of contract, that determine how freedom of contract is exercised and contracts are enforced. Third, one such doctrine concerns the enforcement of contract terms that offend against public policy. Both the scope of public policy and its application, to invalidate contract terms, should be undertaken with circumspection, but without timidity, in upholding fundamental constitutional values. Fourth, while good faith underlies the law of contract and informs its substantive rules, good faith and fairness are not substantive, free-standing principles to which direct recourse may be had so as to interfere with contractual bargains or decline to enforce contracts." (emphasis added)

IX EVALUATION OF THE EVIDENCE AND SUBMISSIONS OF THE PARTIES PERTAINING TO THE MERITS OF THE APPLICATION

[23] Mr Sander's submission pertaining to the lack of proper attestation needs to be dealt with immediately before all else. He submitted that Mrs Jackie Oosthuizen's affidavit should be ignored and in such case the version of Mr Marius Eksteen, who deposed to the founding affidavit, contains inadmissible hearsay pertaining to the alleged further agreement between the parties relating to Kruger's employment beyond the three months' fixed term contract. This submission is without substance and rejected. There cannot be any doubt that the HR manager of DIY is a female. Kruger himself said so. She is described by Mr Eksteen as female, being Mrs Jackie Oosthuizen, exactly as Kruger described her. The applicant's attorney, the typist, the deponent and the commissioner of oaths – all four of them - should have noted that the attestation

[24] 2020 (5) SA 247 (CC)
[25] 2022 (1) SA 100 (SCA) at para 63

clause of Mrs Oosthuizen's affidavit is wrong in only single respect: a typographical error occurs in that the word "he" in the first line should have been "she." The remainder of the attestation clause clearly reflects that the affidavit is binding on "her" - the deponent's conscience – and that "she" has signed and sworn to before the commissioner of oaths. Such a technical approach to litigation is not in the interests of justice and should not be countenanced. I conveyed my stance clearly during oral argument and nothing more needs to be said. Consequently, I shall consider the evidence of Mr Eksteen insofar as it is confirmed by Mrs Oosthuizen.

[24] This is opposed motion proceedings. In adjudicating the various disputes, the version of the respondent must be accepted unless it is so far-fetched or improbable that it should be rejected as false. I bear in mind that the inherent probabilities do not play a role. Clearly on both versions, that of Mrs Oosthuizen and Kruger, there was a discussion between the two upon termination of the fixed term contract. DIY's version is that all the terms of the written agreement would remain in place with the necessary amendments pertaining to remuneration and post designation issues. Kruger's version is that he was told to continue with his employment and that no written contract would be presented to him. According to him, he was never informed that his permanent employment would be on the same terms as set out in the fixed term contract and he also did not agree thereto. I am satisfied that Kruger did not play open cards in this regard. He did not say with which terms and conditions he did not agree or which new terms would govern the permanent relationship. I accept that he knew that the restraint of trade clause would apply also to his permanent employment. I mentioned above that the terms of the written fixed term contract contained all those terms usually encountered in permanent employment contracts.

[25] I also reject the defence and submissions on behalf of Kruger that the restraint of trade clause did not prohibit him from taking up employment as a salaried employee with one of DIY's competitors. I do not intend to waste much time on this aspect, bearing in mind the eventual conclusion arrived at in this judgment. The Afrikaans language is unambiguous and clear. No reasonable interpretation can lead to anything else: Kruger was prohibited to become

involved, directly or indirectly, in any other capacity than those specifically mentioned, with any competitor of DIY in Bloemfontein. No doubt, it includes being employed as an employee and being paid a salary for his services.

[26] In his most able address and in his usual eloquent approach Mr Grobler did his best to convince me that the applicant is entitled to relief although he eventually spontaneously conceded that a restraint of trade of two years is far too broad. I shall come back to this aspect. Mr Grobler submitted that Kruger occupied such an important position at DIY that his employment with a competitor could seriously undermine DIY's business. I do not agree. Kruger can never be equated with Messrs Reddy and Pillay, the employees in the aforementioned judgments.[26]

[27] Mr Reddy, the appellant in *Reddy v Siemens*[27] quoted above was a systems engineer in the carrier services high level support network platform department of Siemens which rendered "intelligent network" and value added services to its customers. He had knowledge of confidential technologies which could be utilised when he started employment with a competitor of Siemens, such as Ericsson. Reddy gained experience and was trained both in South Africa and abroad in relation to his ex-employer's products and networks and the use of its software which gave Siemens' intelligence network platform service a unique identity and competitive edge. The process of customising software was confidential and a trade secret of Siemens. Clearly, Reddy was a skilled employee in possession of knowledge of Siemens' "processes, methodologies and systems architecture." In the case of Reddy, the Supreme Court of Appeal held that he would be employed with Ericsson in a similar position to the one he occupied at Siemens, that his loyalty would be to his new employer and the opportunity to disclose confidential information at his disposal, whether deliberately or not, would exist. Therefore, the restraint was intended to relieve Siemens from the risk of disclosure and the court had no difficulty to find that the restraint was neither "unreasonable nor contrary to public policy."[28] The differences

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[26] *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) and *Den Braven SA (Pty) Ltd v Pillay & another* 2008 (6) SA 229 (D & CLD)
[27] *Loc cit* para 9
[28] *Loc cit* para 20

between the experience and expertise of Reddy and that of Kruger are enormous, not to mention Reddy's knowledge of trade secrets.

[28] In the *Den Braven* case, Mr Pillay, the ex-employee, was regarded as an excellent sales representative who in the financial year before his resignation was responsible for close to 50% of Den Braven's sales of its products in KwaZulu-Natal. Pillay conceded that he had knowledge of Den Braven's client base and that he had built-up a close relationship with customers over a period of 8 years. The court had little difficulty to hold that the purchasing decisions of customers are not only influenced by price as opposed to the relationship between the salesperson and customers in that factual scenario. Furthermore, the trade connection established through a specific salesperson may well be the decisive factor in the minds of customers.[29] No doubt, Pillay could be described as an excellent salesman that would most definitely have a detrimental effect on Den Braven's future sales whose commercial interests were deserving of protection.[30] It does not require the intellect of an Einstein to appreciate the differences between the value contributed to the business of his ex-employer by Pillay and the relatively low-impact position held by Kruger.

[29] In *Reddy* the duration of the restraint of trade was one year which the court held was reasonable. In Pillay the duration of the restraint was decreased from two years as contained in the restraint of trade agreement to eight months and Wallis AJ stated the following in support of the decrease:[31]

"In my view the period of the restraint should not be any longer than is necessary to enable the Applicant to place a new salesperson in the field, enable them to become acquainted with the products and the customers and to make it plain to the latter that they are now the person with whom to deal on behalf of the Applicant. Having regard to the nature of the products, the type of customer to whom they are sold and the number of customers who will need to be contacted I think that a period of 8 months is sufficient for those purposes." (emphasis added)

[30] Mr Grobler relied during oral argument on a case not referred to in his heads of argument, to wit *Kwikspace Modular Buildings v Sabodala Mining CO SARL*,[32] in order to convince me that DIY did not have to explain in its founding affidavit

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[29] *Loc cit* para 17
[30] At para 19
[31] At para 55
[32] 2010 (6) SA 477 (SCA) at para 20

why public policy did not come into play *in casu* and also why it was unnecessary to set out facts to show that the restraint was necessary to protect its business interests. Therefore, he submitted that insofar as DIY dealt with these issues in detail in the replying affidavit, it was expected of Kruger to obtain leave from the court to file a fourth set of affidavits in order to try and counter DIY's version in reply which he failed to do. It was submitted that without a response from Kruger in a further affidavit, DIY's version stands unchallenged and that the issues of public policy and the threat of applicant's business interests are not live anymore. This is not the law. The court must consider all the evidence and also bear in mind the manner in which opposed motions should be adjudicated, *i.e.* on the respondent's version, unless it is so far-fetched that it stands to be rejected. I reiterate that the approach in B*asson v Chilwan* has stood the test of times. I do not intend to repeat it. The test was applied in numerous judgments thereafter. A court should always consider the reasonableness of a restraint of trade and whether or not it offends public policy. I referred to several other judgments dealing specifically with restraints of trade above, but the reader is also reminded to consider the *Beadica* judgment of the Constitutional Court and the *Capitec Holdings* judgment of the Supreme Court of Appeal that deal with contracts in general – the *pacta servanda sunt* principle and the effect of fundamental constitutional values upon contracts freely entered into.

[31] I noted from the notice of motion that DIY provided for "further affidavits to be filed by 10 February 2022", three days after the filing of its replying affidavit. I must say I find it astonishing that an applicant may reserve the right for the respondent to file a fourth set of affidavits. Only three sets of affidavits are permitted in motion procedure although further sets of affidavits may be allowed by the court in exceptional circumstances and upon application for leave by the particular party.[33] It is trite that a party electing to make use of motion procedure must make out a case for relief in the founding affidavit.

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[33] *Hano Trading CC v JR 209 Investments (Pty) Ltd* (650/11) [2012] ZASCA 127 (21 September 2012)

[32] The *Kwikspace* judgment relied upon by Mr Grobler is not relevant to the present dispute as it is distinguishable on the facts. Furthermore, the *dictum* relied upon was in any event *obiter.* I quote: "In the present appeal it may be convenient to include the term for which the contractor contends; but it is not necessary to do so. If a contractor really was unaware of the basis on which the principal would rely to present the guarantee, and the contractor was of the view that there could not be any valid basis, it could swear an affidavit to this effect - and, absent an undertaking by the principal, it could obtain an interim interdict to prevent presentation of the guarantee pending determination of the application. The principal's case would then have to be made out in its answering affidavit to which the contractor would be able to reply. This may necessitate an application by the principal for leave to file a fourth set of affidavits. But it is not unusual for a party to be unaware of the details of the case of its adversary. In an application to restrain publication of a defamatory article, the applicant will seldom be able to attach a copy of what a newspaper intends publishing. In applications for the enforcement of a restraint of trade, the applicant is not obliged to set out in its founding affidavit the reason why it contends the restraint is necessary for its protection. And certainly at least before the advent of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998, when an owner brought a *rei vindicatio*, it was not obliged to say why it alleged that the defendant/respondent was in unlawful occupation of its property." (emphasis added).

[33] To the best of my knowledge the aforesaid *dictum* was not referred to at all in any reported judgment over the past 12 years. I acknowledge that, in principle, the applicant relying on a restraint of trade clause only needs to prove the contract and breach thereof by the other party. Insofar as public policy and the constitutionality of a restraint of trade need to be considered, an applicant will be ill-advised if these aspects are not addressed in the founding affidavit. Obviously, once that has been done and bearing in mind the respondent's response, it would be possible to deal with the issues again in the replying affidavit. The learned judge referred to the principles applicable to applications based on the *rei vindicatio* and conceded that the situation has changed since the promulgation of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, 19 of 1998. In my view, and although the *onus* has not changed, an applicant in restraint of trade applications cannot wait to deal with the aforementioned issues in the replying affidavit for the first time.

[34] Mr Grobler also handed up from the bar the Labour Court judgment, *ITE Events SA (Pty) Ltd v Kilian & others*[34] which he submitted supported his submission that Kruger's failure to file an affidavit in response to the averments in the replying affidavit was the end of the matter insofar as unreasonableness and public policy were concerned. The judgment does not support DIY's case at all. In that case the employees without leave from the court filed a fourth affidavit a day before the hearing to which the applicant objected. The court reiterated the trite principles regarding the number of sets and sequence of affidavits and that a party seeking leave to file a further affidavit must advance proper reasons for the indulgence sought.[35] The court mentioned that a fourth set of affidavits may sometimes be necessary in restraint of trade litigation, for example insofar as the applicant seeks to rebut allegations of unreasonableness or contrary to public policy, but to allow a departure from the general rule remains in the discretion of the court.[36] I find it difficult to understand why an applicant would want to seek permission to file a fourth set of affidavits in the circumstances mentioned by the court. Surely, the respondent may raise these issues in the answering affidavit to which the applicant may respond in a replying affidavit as DIY did *in casu*.

[35] I cannot for one moment accept that Kruger could disclose confidential information if he so chose. No case has been made out in the founding affidavit. The facts, even the allegations in the replying affidavit, are insufficient. Kruger might have known at what prices DIY obtain products from suppliers, but I fail to understand how this can assist him to damage DIY's business. Prices differ over time and it would be impossible for Kruger to memorise the prices of various products. In any event, it is DIY's competitive edge in the market that allows it to negotiate the best prices, as it's deponent made clear in reply.[37] I fail to understand on what basis would Kruger be able to negotiate the same prices on behalf of his new employer. He was never involved with any deal making. I also do not accept the version that Kruger's new employer will be able to "undercut" DIY's prices merely because Kruger is employed by them. All and sundry can obtain quotations from any hardware shop either over the

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[34] Case no J 3394/2017, a judgment delivered on 31 January 2018
[35] *Ibid*: para 10
[36] *Ibid*: para 12
[37] Replying affidavit: para 10, pp 176 - 179

internet or by entering the shop. All these shops, like other businesses, market themselves and advertise so-called specials on a regular basis. Prices are really not a secret anymore. I also find it highly improbable that a former logistics supervisor, and now a salesman selling products over the counter, is able to persuade potential customers to buy from his new employer and thereby enticing them away from DIY. Surely, there is no evidence that Kruger has any of DIY's customers "in his pocket" as was the case with Mr Pillay, the superb salesman mentioned above. The matter is totally distinguishable from *Reddy* and *Den Braven*. In my assessment of the evidence no potential exploitation has been shown by DIY, let alone proven exploitation. The mere fact that DIY has an existing clientele and that Kruger had limited contact with customers in his position as logistics manager/supervisor is just not enough for a finding that Kruger is in a position to threaten DIY's interests. I also point out that in order to establish urgency, DIY pertinently stated that Kruger's involvement with 2nd respondent was a "threat to the DIY business" and his employment with it "is causing to DIY harm." No evidence whatsoever has been provided, either in the founding, or the replying affidavit, to support these vague and unsubstantiated averments.

[36] I find it unbelievable that the applicant could reason for one moment that it could restrain Kruger to work for the opposition for a period of two years after the expiry of the three months' fixed term contract. Yet, this is exactly the deal that it insisted Kruger to agree upon. This is unreasonable in the extreme. Notwithstanding this observation, I accepted above that the parties came to a new oral agreement upon expiry of the fixed term contract based on the same terms as set out in the written contract, subject to the changes mentioned by DIY's HR manager, Mrs Jackie Oosthuizen. I rejected Kruger's version in this regard and held that the restraint of trade clause quoted above governed the new employment relationship.

[37] Kruger's right – like the right of any other citizen in this country - to choose his trade, occupation or profession freely, subject to being regulated by law[38] – is a fundamental constitutional right which plays an important role in the weighing up of the parties' interests. Already before the promulgation of the final

[38] Section 22 of the Constitution, 108 of 1996

Constitution the court held in *Basson v Chilwan* that a restraint is unreasonable if it prevents a party from participating freely in the commercial and professional world without a protectable interest of the other party being properly served thereby.[39] Even if is accepted that there was an interest to protect, employers such as DIY who insist on overly broad restraints, such as two years in this case, may find out soon that courts may not be prepared to come to their assistance as these time limits are in most cases totally unreasonable and cannot serve any purpose, but to prevent an ex-employee to earn an income. Mr Grobler conceded that the period was unreasonable. He suggested that the court may consider a period of one year, or at best for Kruger, six months. Kruger stated in his answering affidavit that if the court held that DIY did in fact have an interest worthy of protection, a period of three months would be sufficient to protect such interest.[40] This is a logical submission and if DIY was prepared to accede thereto, the matter could have been settled without incurring the enormous costs of an opposed application. Why should courts continue to assist recalcitrant employers who should know that they rely on unreasonable restraint of trade clauses, especially when their counsel more often than not concede the unreasonableness and opt for lesser periods? Courts are not in the business of making contracts for parties. I should not be understood to be averse to all agreements in restraint of trade. The contrary is true. An employer may rely on a restraint of trade period which is reasonable if it has an interest worthy of protection. Bearing in mind the facts in this case, the period should be no longer than required to find a suitable substitute. Obviously, a longer period may be reasonable if it concerns key personnel like the chief executive officer of a business, or its financial manager, or some other high ranking employee, especially if such employee is privy to confidential information that may be used to compete unlawfully with the ex-employer.

[38] It is not necessary to dwell on the reasons why Kruger left his employment with DIY so suddenly. According to him he was degraded and insulted by Messrs Marius and Jan Eksteen, the DIY directors, in the presence of co-employees over a period of time, causing the relationship between them to deteriorate. On the morning of 17 December 2021 a furious Mr Marius Eksteen used foul

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[39] *Loc cit* at 767D
[40] Answering affidavit: para 108, pp 82/3 & para 165, p 92

language, degraded the employees and threatened them with written warnings for something beyond their control. He left and tendered his resignation by email at 09h35. His version is disputed, but Mr Eksteen admits that he was furious and intimated to him that disciplinary steps would ensue. I need not have to decide the dispute in light of the weighing up of the conflicting interests.

[39] I might have decided in the exercise of my discretion to dismiss the application with costs to show my repugnance of the high-handed approach adopted by DIY, firstly by insisting on a two year restraint when a three months' fixed term contract was entered into (bearing in mind that it avoided the possible negative consequences of labour legislation insofar as probation periods and employees' rights are concerned), secondly, for failing to enter into a proper written employment contract pertaining to permanent employment embodying the restraint of trade clause although written contracts are not compulsory, thirdly, for making further employment so intolerable that Kruger was prepared to quit a few days before Christmas, fourthly, for failing to consider mediation and neglect to utilize rule 41A in circumstances where the matter could easily be settled if DIY was prepared to decrease the period of the restraint of trade, for example to three months which would have been reasonable in the circumstances, and lastly, for insisting until the day of the hearing that its business was under such serious threat that Kruger should be interdicted from working for the opposition for a period of two years as he was causing harm to DIY.

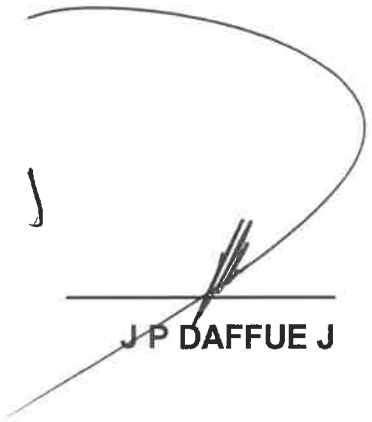
[40] I accept that DIY might well have been entitled to some assistance in different circumstances. Kruger can never be seen in the same vein as a specialist like Reddy or a superb salesman like Pillay. I do not want to degrade him, but he was such a small cog in the mighty DIY machine that a three months' restraint period would be more than sufficient to allow DIY to replace him with a suitable substitute. Bearing in mind the time lapse since the date of termination of the employment relationship, any order at this stage would be of academic value only. If this judgment was delivered within three months from termination of the employment relationship, DIY might have been successful. Even in such a case, I would have shown my discontent with DIY's approach and refused to grant costs in its favour. I considered ordering Kruger to pay DIY's costs until

the filing of the answering affidavit when the concession was made mentioned above and to order DIY to pay Kruger's costs in opposing the application since then, but eventually decided against that. In the exercise of my discretion I deem it fair to both parties to order them to pay their own costs.

X ORDER

[41] The following order is issued:

(1) The application is dismissed.
(2) Each party shall pay its/his own costs.



On behalf of the Applicant	:	Adv S Grobler SC
Instructed by	:	Kramer Weihmann Inc Bloemfontein
On behalf of the 1st Respondent	:	Adv A Sander
Instructed by	:	Lovius Block Inc Bloemfontein