

REPUBLIC OF SOUTH AFRICA



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

(1)	REPORTABLE: Yes
(2)	OF INTEREST TO OTHER JUDGES: Yes
(3)	REVISED: Yes
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<u>17 OCTOBER 2023</u>	
DATE	SIGNATURE

Case Number: 2023/0817898

In the matter between:

AVIS SOUTHERN AFRICA (PTY) LIMITED
(Registration No. 1967-01032-07)

First Applicant

ZENITH CAR RENTAL (PTY) LTD
(Registration No. 2019-420358-07)

Second Applicant

ZEDA CAR RENTAL (PTY) LTD
(Registration No. 1965-003534-07)

Third Applicant

and

DAVID PORTEOUS

First Respondent

BELINDA PORTEOUS

Second Respondent

JUDGMENT

C BESTER AJ:**Summary:**

Commercial urgency - Commercial interests are equally worthy of protection to justify reliance on Rule 6(12) as are matters that concern a threat to liberty, life or some other basic essential of everyday life. Whether commercial interests justify an urgent hearing will always depend on the facts of each case with reference to whether substantial redress can be secured at a hearing in due course. Courts should not decline to hear matters that implicate commercial interests simply because judicial resources may be strained in a particular week in the urgent Court.

Transmissibility of Benefit of Restraint of Trade to New Business - determining whether a restraint agreement survives the transfer of a business is a fact specific enquiry that involves ascertaining if the benefit created by the restraint constituted a component of the goodwill transferred to the purchaser. Where senior employees subject to restraint covenants undergo changes in their employment over many years and the business is subjected to one or more changes in ownership during this time, it is essential to plead as part of the cause of action to enforce the restraint obligations, the facts which establish that the transfer of ownership of the business included a cession of the contractual rights created by the restraint in favour of the new owner of the business.

Establishing a Confidentiality Claim in Information – Courts should be slow find that a proprietary interest in a general body of information has been established without first scrutinising the papers to establish if the requirements for confidentiality have been met.

Introduction

- [1] The first applicant is Avis Southern Africa (Pty) Limited, traditionally better known as Avis. It trades as a car rental company across South Africa.
- [2] The second and third applicants are wholly owned subsidiaries of the first applicant and together with the first applicant, they approached this Court on an

urgent basis for interim relief to restrain the first and second respondents from acting in breach of certain restraint of trade covenants.

- [3] The first and second respondents are married to each other. The first respondent commenced employment with Avis Southern Africa Limited on 1 October 1988 which was later acquired by Barloworld South Africa (Pty) Limited.
- [4] By the time of his resignation on 31 May 2023, which took effect on 31 August 2023, he held the position of Chief Operations Officer of the Avis car rental and leasing business. The business was unbundled from Barloworld in favour of Zeda Limited with effect from 13 December 2022 when Zeda listed on the main board of the Johannesburg Securities Exchange.
- [5] The second respondent assumed employment with the third applicant in 1999 and on 10 December 2008, she became the Manager: International Sales for the Avis Rent a Car business of Barloworld and retained this position until the transfer of her employment to the second applicant with effect from 7 September 2021. She remained in the employ of the second applicant until her resignation on 26 April 2023 which took effect on 31 May 2023.
- [6] Although the matter was brought under one case number, it really concerns two applications with discrete restraint covenants arising from the employment relationship with each respondent based on their own set of facts and the adjudication of separate heads of relief.
- [7] The relief claimed from the first respondent was premised on the enforcement of a restraint for a period of three months calculated from 31 August 2023. The applicants seek an order from the second respondent that *inter alia* interdicts her from competing in breach of her restraint undertakings for twelve months from 31 May 2023. She has not sought employment from a direct competitor of the applicants but has commenced with the process of registering a company in Mauritius that intends to provide consulting services in the mobility and tourism industry. The first respondent intends to provide consulting services through this entity to the likes of Dollar Thrifty on a contract basis.

[8] At the hearing of the application, I found that the application against the first respondent lacked the requisite urgency to justify a hearing in the urgent Court and consequently struck the matter from the roll with costs. I ordered that the matter should proceed against the second respondent since I found the application brought against her to be sufficiently urgent.

Reasons for Urgency Ruling – the First Respondent

[9] The first respondent did not conceal his intention to render consulting services to a direct competitor of the applicants upon his resignation. The applicants had knowledge of this fact from the end of May 2023 but only brought the application more than two and a half months later when this application was issued on 17 August 2023.

[10] It is not suggested that they did not know from the outset that this conduct would implicate his restraint obligations. All indicators are that they were cognisant of this fact but took no further steps for reasons that were not adequately explained in the founding affidavit.

[11] The applicants did not have to wait for the first respondent to commence formal contractual relations with a new company that provides services to Dollar Thrifty. His disclosure of the fact that he would do so was enough.

[12] It is not a legal requirement that an employer seeking to enforce a protectable interest forming the subject of a restraint covenant must wait for evidence of the actual utilisation of confidential information upon the assumption of employment with the competition.¹ Having protected itself against the risk of a former employee exploiting trade secrets or employing customer connections for the benefit of his new employer, the prospect of such employment commencing immediately after the termination of his employment was sufficient to justify an approach to this Court long before 17 August 2023.

[13] As the Constitutional Court reminded in **City of Tshwane Metropolitan Municipality v Afriforum and Another** (2016 (6) SA 279 (CC)), before an interim

¹ **Experian South Africa v Haynes and Another** 2013 (1) SA 135 (GSJ) at paragraphs 21 and 22.

interdict can be granted, an applicant must prove a reasonable apprehension of irreparable harm which must be anticipated or ongoing.²

[14] The harm the applicants complained of at the hearing was capable of anticipation at the end of May 2023 already when the first respondent made a candid disclosure of his intentions.

[15] It should have triggered the launch of an application on an urgent or even semi-urgent basis with some expedition at the time to ensure the applicants ventilated the dispute concerning the first respondent's alleged breach of his restraint obligations before he assumed a contractual relationship with a new company. The obligation to do so with haste was particularly important in circumstances where the restraint period would only last for three months.

[16] Their failure to explain the delay from the end of May to 17 August 2023 meant that any urgency was decidedly self-created by the time the matter was heard a week later on severely truncated timeframes that left the first respondent with hopelessly insufficient time to prepare a proper answering affidavit.

The Case Against the Second Respondent

Urgency

[17] In the recent judgment of **Volvo Financial Services Southern Africa (Pty) Ltd v Adamas Tkolose Trading CC** (2023/067290) [2023] ZAGPJHC 846 (1 August 2023), in finding that there is no category of proceeding that is intrinsically urgent, the Court remarked that a crippling commercial loss was likely to be urgent in the context of commercial matters.³

[18] The judgment must not be understood to constitute a departure from the existing legal position which enjoys a rich tradition in this division since at least **Twentieth Century Fox Film Corporation v Anthony Black Films (Pty) Ltd** 1982 (3) SA

² At paragraph 55.

³ See paragraph 6 where Wilson J found that there is "no category of proceeding that enjoys inherent preference". These remarks are supported by the finding of Cameron JA (as he then was) in **Commissioner for SARS v Hawker Services (Pty) Limited** 2006 (4) SA 292 (SCA) at paragraph 9 where it was explained that urgency "is a reason that may justify deviation from the times and forms the rules prescribe. It relates to form, not substance, and is not a prerequisite to a claim for substantive relief."

582 (W) which holds that commercial interests are equally worthy of protection to justify reliance on Rule 6(12) as are matters that concern a threat to liberty, life or some other basic essential of everyday life.

[19] Whether commercial interests justify an urgent hearing will always depend on the facts of each case with reference to whether substantial redress can be secured at a hearing in due course.⁴ **Volvo** does not signal that the bar has now been heightened to require evidence of the existence of a crippling commercial loss before a commercial matter can be said to be urgent, nor should Courts decline to hear matters that implicate commercial interests simply because judicial resources may be strained in a particular week in the urgent Court.

[20] The prospect of a crippling economic loss may be but one manifestation of commercial urgency but should not be viewed as the only iteration thereof to justify an approach to the urgent Court when important commercial interests are at stake.

[21] The precise outline of what constitutes commercial interests necessary to invoke Rule 6(12) need not be defined with any degree of exactness but remains a matter for the Court to exercise at the hand of its judicial discretion on a case-by-case basis, with due regard to the fact that a litigant with commercial interests at stake enjoys the same constitutional right of access to Court enshrined by section 34 of the Constitution as any other category of litigant.

[22] I previously found the application to be urgent in the case of the second respondent.

[23] On 15 June 2023, the applicants commenced with a forensic investigation following a discovery that the second respondent had transmitted work related documents to her personal email address in the period from 7 February 2023 to 7 May 2023, the full import of which was not immediately apparent to the applicants. A preliminary report was received on 30 July 2023 which the applicants allege suggested a breach of the second respondent's confidentiality

⁴ **East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others** (11/33767) [2011] ZAGPJHC 196 (23 September 2011) at paragraphs 6 to 7.

obligations whereafter legal advice was procured and this application was launched against the second respondent.

[24] The delay in prosecuting the application against the second respondent was not inordinate, and I was persuaded that the applicants established urgency in that they would not obtain substantial redress at a hearing in due course.⁵

[25] In the circumstances, I informed counsel that I was prepared to enrol and hear the matter against the second respondent as one of urgency.

The Merits: General Remarks

[26] Agreements in restraint of trade are presumptively valid and enforceable unless they impose an unreasonable restriction on a person's freedom to trade, in which case they are likely to be unconstitutional, against public policy and therefore illegal and unenforceable.⁶

[27] After the seminal decision of **Magna Alloys and Research (SA) (Pty) Ltd v Ellis**,⁷ it became settled law that a party seeking to enforce a contract in restraint of trade is required to invoke the restraint agreement and prove a breach thereof. Thereupon, a respondent who seeks to avoid the restraint bears an onus to demonstrate on a balance of probabilities that the restraint agreement is unenforceable because it is unreasonable.

[28] The decision has survived constitutional scrutiny with the result that where the terms of a restraint undertaking are found to be reasonable, public policy requires that the restraint be enforced which is consistent with the constitutional values of dignity and autonomy.⁸

[29] The second respondent does not dispute having entered into an agreement of restraint of trade with the third applicant on 23 July 2003 ("**the restraint**") in terms of which she agreed that she would not for a period of twelve months following the termination of her employment, directly or indirectly carry on or be interested

⁵ **Twentieth Century Fox Film** at 586E-H.

⁶ *Saner Agreements in Restraint of Trade in South African Law* 1-5, Nov 2022, Lexis Nexis.

⁷ **Magna Alloys and Research (SA) (Pty) Ltd v Ellis** 1984 (4) SA 874 (A) at 892I to 893E.

⁸ **Reddy v Siemens Telecommunications (Pty) Ltd** 2007 (2) SA 486 (SCA) at para 21.

or engaged or concerned with any firm, business or company carrying on business in any part of the territories of South Africa, Namibia as well as Lesotho and Eswatini.⁹

[30] The second respondent does not challenge the enforceability of the restraint on the basis that it is not reasonable as it would render her economically inactive. There is in the circumstances no need to address the question of whether the second respondent has discharged the onus of demonstrating that the enforcement of the restraint would be unreasonable.

[31] The main issues concern the following two questions, which are entirely dispositive of the relief claimed against the second respondent:

- a. whether the benefit of the restraints was transmitted to the second applicant, being the entity that employed the second respondent until her resignation on 31 May 2023;
- b. the existence of a valid protectable interest since a contract in restraint of trade must protect some protectable interest of the person who seeks to enforce it and which may take the form of trade secrets (confidential information) or trade connections, the most important component of goodwill.¹⁰

[32] In view of the approach that I take, it is not necessary to consider in any detail whether a breach of the restraint has been established since the applicants have not shown the existence of a *prima facie* right that would entitle them to interim relief against the second respondent.

The Transmissibility of the Benefits of the Restraint

[33] Having entered into the restraint in favour of the third applicant on 23 July 2003, the second respondent's employment was transferred to Barloworld and she

⁹ "FA5.1", CaseLines 03-27; see respondent's heads of argument, para 8.1, CaseLines 04-35. The agreement recorded that she assumed employment with the third applicant on 8 July 2003 as a Product Manager in terms of a separate service agreement which was not included as part of the papers filed on behalf of the applicants.

¹⁰ **Sibex Engineering Services (Pty) Ltd v Van Wyk and Another** 1991 (2) SA 482 T; **Rawlins & Another v Caravantruck (Pty) Ltd** 1993 (1) SA 537 (A) at 540J-541I.

entered into a contract of employment with the latter on 10 December 2008 to assume the position of Manager: International Sales for the Avis Rent a Car business of Barloworld.¹¹

[34] Although the Barloworld contract of employment contained a standard confidentiality clause which enjoined the second respondent to keep confidential her employer's trade secrets, know-how and the like, the contract did not include any restraint undertakings.

[35] Her employment was subsequently transferred to the second applicant with effect from 7 September 2021 until her resignation on 31 May 2023 with her new employment contract recording that it superseded all previous contracts of employment.¹²

[36] The applicants rest their case entirely on the restraint entered into by the second respondent in favour of the third applicant on 23 July 2003. They do not contend that it was replaced by a subsequent document that recorded a fresh covenant in restraint of trade.¹³ They argue that was incorporated into the second respondent's contract of employment with Barloworld, and continued to apply when she was employed by the second applicant in 2021.

[37] The question is whether the benefits associated with the restraint were transmitted from the third applicant to Barloworld and subsequently to the second applicant pursuant to the transfer of her employment to the latter on 7 September 2021. If Barloworld took no cession of the contractual rights derived from the restraint, it must follow that the second applicant could not have acquired the benefits associated with the restraint from Barloworld as it could not have vested the second applicant with more rights than what it already had.¹⁴

[38] The answer to this question requires an examination of certain legal principles that inform the transfer of restraint benefits from one business to another.

¹¹ "FA5", CaseLines 03-20.

¹² CaseLines 03-17.

¹³ RA, para 18, CaseLines 01-92.

¹⁴ **Glatthaar v Hussan** 1912 TPD 322.

[39] The advantages conferred by an express undertaking embodied in an agreement of restraint of trade, like an implied prohibition, form part of the goodwill of a business as it is entered into for the benefit of the business.¹⁵ Goodwill represents the various components of a business undertaking that act as “the attractive force that brings in custom”.¹⁶

[40] It does not lend itself to easy characterisation and may mean different things to accountants and lawyers but as Harms JA noted in **Caterham Car Sales and Coach Works Limited v Barkin Cars (Pty) Limited** 1998 (3) SA 938 (SCA) at 947G:

“Goodwill is the totality of attributes that lure or entice clients or potential clients to support a particular business (cf. **A Becker and Co (Pty) Ltd v Becker and others** 1981 (3) SA 406 (A) 417A). The components of goodwill are many and diverse (**O’Kennedy v Smit** 1948 (2) SA 63 (C) 66; **Jacobs v Minister of Agriculture** 1972 (4) SA 608 (W) 624A–625F). Well recognised are the locality and the personality of the driving force behind the business (*ibid*), business licences (**Receiver of Revenue, Cape v Cavanagh** 1912 AD 459), agreements such as restraints of trade (**Botha and another v Carapax Shadeports (Pty) Ltd** 1992 (1) SA 202 (A) 211H–I) and reputation. These components are not necessarily all present in the goodwill any particular business.”

[41] The goodwill of an undertaking is an intangible asset (i.e., an incorporeal movable)¹⁷ of an established business of considerable value that enjoys legal recognition as an immaterial property right.¹⁸

[42] It helps to generate turnover and with that profit for the business, a feature which has resulted in our Courts often referring to goodwill as the “*werfkrag*” of a business which is in some ways a more apt description¹⁹ It may include the benefits conferred by a restraint undertaking.

¹⁵ **Botha & Another v Carapax Shadeports (Pty) Limited** 1992 (1) SA 202 at 213I; **Grainco (Pty) Limited v Van der Merwe** 2014 (5) SA 444 (WC) at para 42.

¹⁶ **The Commissioner of Inland Revenue v Muller & Co’s Margarine Limited** [1901] AC 217 at 224; see also Van-Heerden Neethling, *Unlawful Competition*, Second Edition, page 107.

¹⁷ **Slims (Pty) Limited v Morris** 1988 (1) SA 715 (AD) at 272I–J.

¹⁸ See the judgment of Mostert J in **Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk** 1977 (4) SA 376 (T) at 386A.

¹⁹ **Rosenbach & CO (Pty) Limited v Delmonte** 1962 (2) SA 155 (N) at 209 to 210; **Tommie Meyer Films (Edms) Bpk** at 386A; see also **A Becker & Co (Pty) Limited v Becker** 1981 (3) SA 406 (A) at 416. see also **Altas Organic Fertilisers (Pty) Limited v Pikkewyn Ghwano (Pty) Limited** 1981 (2) SA 173 (T) at 182D–E where the Court referred to goodwill as equivalent to a trader’s “*reg op werfkrag*”.

- [43] Following a review of English and South African authorities, the Appellate Division in **Carapax** concluded that the benefit of an agreement in restraint of trade, entered into for the benefit of a business rather than the owner, is transferred to the purchaser of that business as part of its goodwill.²⁰
- [44] Goodwill represents the glue that holds the benefit of a restraint together as part of the subject of the sale and without goodwill forming an ingredient of the *merx*, the benefit of a restraint does not pass upon the sale of the business. This accords with the doctrinal principles that underpin restraints of trade and which hold that the protection of the proprietary interest of the employer's business in its trade secrets and trade connections contribute to the goodwill of the business.²¹
- [45] Where a business is sold, the subject of the sale is to be determined from the terms of the agreement of sale and if the goodwill forms a component of the sale, what precise elements of the goodwill are included as part of the sale constitute a factual question.²² Whether the benefit created by a restraint of trade agreement is acquired by the purchaser of the business depends largely on the terms of the agreement reached between the seller and the purchaser and if it is included as a component of the goodwill.
- [46] When a restraint agreement is entered into for the benefit of the business, the benefit so created is incidental to the business and part of its goodwill with the result that the benefit will ordinarily pass to the purchaser, unless the parties intended the contrary to be true.²³ The question however always remains a *factual one* which the Court in **Carapax** pointed out is based on a factual inference as to "*the intention of the parties*" to the sale of business agreement.²⁴
- [47] **Carapax** was decided twenty years before **Endumeni**,²⁵ and the task of interpreting contractual documents is today no longer conducted with reference to the intention of the parties since this impermissibly starts with a search for the

²⁰ **Carapax** at 212H.

²¹ **Carapax** at 211H with reference to English authorities cited therein; **Grainco** at para 61.

²² **Carapax** at 213A.

²³ **Carapax** at 213AI-J.

²⁴ *Ibid.*

²⁵ **Natal Joint Municipal Pension Fund v Endumeni Municipality** 2012 (4) SA 593 (SCA).

meaning of words in isolation, followed by giving context a secondary role whereas **Endumeni** requires us to embark on a unitary journey of interpretation that involves the trilogy of text, context and purpose.²⁶

[48] This does not alter the fact that the exercise of determining whether the benefits created by a restraint form part of the goodwill and consequently passed to the purchaser must be conducted with reference to the facts of the case by asking if the composition of the goodwill component of the *merx* of the sale includes those benefits.

[49] The benefits created by a restraint are characterised in law as one or more contractual rights enforceable against an employee and when those benefits are transferred as part of the goodwill under a sale of business agreement, the transfer takes place by way of a cession and must meet the common law requirements for a valid cession, which involve two kinds of agreements: the obligatory agreement and the transfer agreement.²⁷ The former entails an agreement whereby the cedent undertakes to cede the personal rights to the cessionary comprising the goodwill and as a component thereof but does effect the transfer according to Scott.²⁸

[50] Actual transfer of the rights from the cedent to the cessionary's estate is conducted in terms of the transfer agreement. In practice they are often embodied in the same document but remain discrete juristic acts, with the obligatory agreement creating the duty to cede and the transfer agreement effecting the discharge of the duty.²⁹

[51] **Carapax** was decided before the introduction of section 197 of the Labour Relations Act 66 of 1995, but its characterisation of the enquiry as fact specific

²⁶ **Endumeni** at para 24.

²⁷ **Johnson v Incorporated General Insurances Ltd** 1983 (1) SA 318 (A) at 331G-H; **Standard General Insurance CO Ltd v SA Brake CC** 1995 (3) SA 806 (A) at 814J to 815D.

²⁸ Susan Scott, **Scott on Cession, A Treatise on the Law in South Africa**, First Edition, 2018, page 28.

²⁹ See the unreported judgment of Malan JA in **Grobbelaar v Shoprite Checkers** 2011 JDR 0197 (SCA) with reference to MP Nienaber "Cession" 2 LAWSA, Second Edition, para 8 and **Botha v Fick** 1995 (2) SA 750 (A) at 765A-B.

remains undisturbed following the enactment of section 197 which did not alter the common law position set out in **Carapax**.

[52] As Froneman J writing for the full Court in **Securicor (SA) (Pty) Limited and Others v Lotter and Others** 2005 (5) SA 540 (E) observed in the context of whether a restraint of trade agreement survived the transfer of a business as “a going concern” under section 197:

- a. the effect of section 197:
 - i. is to result in an automatic substitution of the old employer with a new employer in respect of all contracts of employment so as to transfer all rights and obligations arising from the employment relationship to the new employer;³⁰
 - ii. does not impact on the substance of the rights and obligations existing at the time of the transfer of a business but rather the identity of the persons or legal entity against whom employees may now look toward to enforce their rights;³¹
- b. whether a restraint agreement survives the transfer of a business under section 197 must be determined against the backdrop of the facts by asking whether the restraint formed part of the goodwill of the business and whether the goodwill was a component of the business transferred as a going concern in terms of section 197;³²
- c. the enquiry remains an objective factual one to be conducted with reference to the circumstances of each case;³³ and

³⁰ At 546F-G.

³¹ Ibid.

³² At 548B. Froneman J made reference to the judgment of Ngcobo J (as he then was) in **Nehawu v University of Cape Town and Others** 2003 (1) SA (1) (CC) at paragraph 56 where it was held that in deciding if a business as a going concern was transferred under section 197, the circumstances of each transaction had to be examined with the substance and not the form of the transaction relevant including whether the transfer included assets of a tangible and intangible nature. **Nehawu** was found to be reconcilable with the principles set out in **Carapax** on the basis that section 197 did not change the scope of the enquiry as a fact specific one.

³³ Ibid.

- d. if the factual enquiry establishes that the restraint formed part of the transfer of business, the employee's obligations under the restraint are owed to the new employer who is entitled to enforce the restraint against the employee.³⁴

[53] The introduction of the statutory regime envisaged by section 197 therefore did not result in an automatic statutory assignment of the contractual rights created by a restraint agreement that facilitated their ease of transfer without first satisfying the ordinary principles of cession set out in **Carapax**.

[54] They continue to remain of legal application.

[55] When these principles are applied to the facts of this case, the following emerges.

[56] The restraint of trade entered into by the second respondent in favour of the third applicant in 2003 was entered into for the benefit of the business itself as distinct from the personal benefit of the owner.

[57] The benefit created thereby was thus incidental to the business as part of its goodwill.

[58] The factual case advanced by the applicants however falls short on at least two levels:

- a. the papers do not show that the transfer of the second respondent's employment to Barloworld was part of a sale of business from the third applicant to Barloworld that included as part of the *merx*, a cession of the goodwill of the third applicant's business and that included the benefits created by the restraint;
- b. the affidavits do not set out facts to show:
 - i. a transfer of the Avis car rental and leasing business from Barloworld to the second applicant upon the unbundling of the business from Barloworld or how it was implemented;

³⁴ At 548D.

- ii. that such a transfer from Barloworld included the cession of the goodwill of the business inclusive of the restraint benefits to the second applicant when it became the second respondent's new employer with effect from 7 September 2021.

[59] These omissions are fatal for the applicants' case in my view.

[60] I am not prepared, nor can I read the necessary factual allegations into the papers. In application proceedings the affidavits take the place not only of the pleadings in an action, but also of the essential evidence which would be led at a trial and must therefore be sufficiently fulsome to detail the *facta probanda* relevant to the cause of action but also the *facta probantia*, being every piece of necessary evidence to prove the material facts.³⁵

[61] **Carapax** and its progeny make clear that determining whether a restraint agreement survives the transfer of a business is a *fact specific enquiry* that involves at the very least, ascertaining if the benefit created by the restraint constituted a component of the goodwill transferred to the purchaser.³⁶ Those facts do not emerge from the applicants' papers.

[62] One would have expected allegations to show that a formal transfer of business took place and that the composition of the goodwill included as one of its elements, the benefit created by the restraint and that this part of the *merx* was ceded to Barloworld³⁷ There is no evidence to suggest that in concluding a fresh contract of employment with the second respondent, Barloworld intended to persist with the terms of employment (including a restraint) that governed the contractual relationship between the third applicant and the second respondent.

³⁵ **Mostert v FirstRand Bank Ltd t/a RMB Private Bank** 2018 (4) SA 443 (SCA) at 448D.

³⁶ **Carapax** at 213A.

³⁷ **Branco and Another t/a Mr Cool v Gale** 1996 (1) SA 163 (E) at 168F-I is an apt illustration of where the material facts giving rise to a sale of goodwill inclusive of the benefit of a restraint was sufficiently pleaded to enable the Court to conclude that the applicant acquired the right to enforce the restraint by means of a cession of the right which was incorporated into an agreement holding that it extended to "all the seller's right, title and interest in and to all and any restraint of trade agreements with employees of former employees".

- [63] Where senior employees subject to restraint covenants undergo changes in their employment over many years by virtue of them assuming new positions higher up the organisation's corporate hierarchy and the business is subjected to one or more changes in ownership during this time, it is essential to plead as part of the cause of action designed to enforce the restraint obligations, the facts which establish that the transfer of ownership of the business included a cession of the contractual rights created by the restraint in favour of the new owner of the business. It was incumbent on the applicants to make out a case on this basis.
- [64] The transfer of employment from the third applicant to Barloworld and years later from Barloworld to the second applicant does not cure this deficiency since the answer to the question of whether the restraint survives the transfer of employment from one entity to another does not concern the transfer of the second respondent's employment. It centres on the cession of the intangible asset comprising the contractual rights to enforce the restraint against the second respondent. This asset belongs to the business and is severable from an employee's agreement to work.
- [65] In the absence of the basic building blocks necessary to link the restraint to her employment by Barloworld from 10 December 2008, it must follow that I am unable to find that the obligations created under the restraint entered into with the third applicant during 2003 were ceded to Barloworld. Arising from this conclusion it follows that Barloworld did not become entitled to enforce the restraint obligations against the second respondent, not having received a cession of the contractual rights from the third applicant.
- [66] If the restraint did not survive the transfer of the second respondent's employment to Barloworld, the transfer of her employment to the second applicant with effect from 7 September 2021 could not have vested the second applicant with stronger rights to enforce the restraint. The maxim *nemo plus iuris transferre potest quam ipse habet* applies here and has the consequence that Barloworld could not have transferred more rights to the second applicant than what it held.

[67] The Labour Appeal Court recently found in **Beedle v Slo-Jo Innovations Hub (Pty) Limited**³⁸ that where an employee under restraint of trade had her employment transferred to a newly established company as part of an internal restructuring of an existing business, this did not alter the terms of her employment which remained on the same terms and conditions. On the facts before it, the Court found that there was no sale of the business to a third party as in **Carapax** and **Securicor**. There was in the circumstances no need to consider the question of whether the restraint formed part of the goodwill of the business as there was no sale of the goodwill given that it was an internal transaction only that resulted in the creation of a new subsidiary that would employ the appellant.

[68] While the applicants allege that Barloworld “is a division under the Applicant”³⁹ the organogram setting out the corporate structure of the group does not include Barloworld as part of the Zeda Group with no reference made to the company.⁴⁰

[69] I find for this reason that Barloworld is an external third party. The reasoning in **Beedle** which carves out an exception to the application of the general principles in **Carapax** and **Securicor** is limited to instances where the transfer of employment concerns an internal transfer within a group. It does not implicate the question of whether the restraint survives a transfer of employment to a third party as part of the goodwill of the sale of business which accompanies the transfer of employment.

[70] The decision therefore does not assist the applicants since there is no evidence that the transfer to Barloworld was an internal one only.

[71] I deem it necessary to briefly address certain of the arguments raised on behalf of the applicants.

[72] The applicants submitted that because it was recorded in writing that the second respondent’s current terms and condition would not be impacted but would remain the same upon her assuming employment with the second applicant on

³⁸ (JA21/23; JA37/22) [2023] ZALAC (17 August 2023).

³⁹ FA, para 12, CaseLines 01-4.

⁴⁰ FA,03-1.

7 September 2021,⁴¹ this had the consequence that the right to enforce the restraint by implication continued to apply as part of the terms and conditions of her employment. I disagree.

[73] There is no evidence to show that the second applicant took cession of the benefit created by the restraint from Barloworld. The fact that the balance of her terms and conditions remained the same is of no assistance to the applicants. It does not address this obvious *lacuna* in their case of how the benefit of the restraint as a component of the goodwill of the business was ceded to the second applicant as part of the bundle of assets forming part of such a transaction between Barloworld and the second applicant.

[74] The status of the first applicant as its holding company is of no consequence either. This does not vest it with any special rights to enforce the restraint. A holding company remains a separate juristic person from its subsidiaries and unless a cession of the goodwill which must include the benefit of the restraint was effected to the first applicant, the first applicant cannot enforce the contractual rights forming the subject of the benefit.

[75] I know of no principle in law that allows a holding company to do so. Its status as the holding company does not mean it is automatically entitled to exercise the contractual rights of a subsidiary. The goodwill that attaches to a business remains the property of the subsidiary and at best for a holding company, it holds an interest in the subsidiary through its shareholding.

[76] The applicants submit that the restraint must be read to function on an interdependent basis with the employment contracts the second respondent entered into over the years on the basis that they would compliment each other.

[77] Reliance was placed on the decision of **National Health Laboratory Service v Lloyd-Jansen van Vuuren** 2015 (5) SA 426 (SCA) in support of the proposition that the failure of a later contract of employment to make reference to an earlier

⁴¹ CaseLines 03-17.

employment contract that contains its own set of obligations does not invalidate the agreement concluded earlier in time.

[78] The judgment is distinguishable in law and on the facts. In **Lloyd-Jansen van Vuuren** the parties had entered into two agreement, the first of which was in 2006 (the 2006 contract) that required the respondent to complete her studies for a medical degree within five years, and that if she resigned before two years after completion of her training as a specialist. she would have to pay the appellant R2 million it paid towards her training costs.

[79] She completed her studies and training within the stipulated five-year period. In April 2010 the appellant employed her as a specialist pathologist. The employment contract (the 2010 contract) made no reference to the two-year period mentioned in the 2006 contract and recorded that it constituted the whole agreement between the parties. When the respondent resigned in July 2010, she refused to pay the R2 million on the ground that the 2010 contract had novated the 2006 contract and hence terminated her obligations under it.

[80] Mhlantla JA found that on a proper interpretation of the two agreements against the backdrop of the relevant circumstances of the case and the intention of the parties, the two contracts served different purposes and for this reason could co-exist without the 2010 contract having novated the 2006 contract which created obligations that remained binding and enforceable.

[81] The question is not whether the restraint was novated by any of the subsequent employment contracts entered by the second respondent with Barloworld and the second applicant thereafter.

[82] It is indeed often so that a covenant in restraint of trade operates in conjunction with an employment agreement, but this is not the panacea to the obstacle the applicants face in not having demonstrated that the contractual rights created by the restraint were successfully ceded from the third applicant to Barloworld and then most recently to the second applicant upon the second respondent assuming employment with it on 7 September 2021.

[83] The judgment in **Lloyd-Jansen van Vuuren** is for this reason of no assistance to the applicants.

[84] The rights to enforce the restraint remained vested in the third applicant. The applicants have not demonstrated that when the second respondent assumed employment with Barloworld in 2008, those rights were carried over to Barloworld.

[85] As the restraint was only valid for twelve months from date of termination of her employment on 10 December 2008, the contractual rights to restrain the second respondent from acting in breach of her restraint lapsed on 9 December 2009.

Protectable Interest

[86] If I am wrong and the applicants have established contractual privity with the second respondent that allows them to assert extant contractual rights it remains necessary to briefly deal with the question of whether a protectable interest has been established.

[87] The following principles require mention:

- a. to be enforceable, a contract in restraint of trade must protect some proprietary interest of the person who seeks to enforce it which may take the form of trade secrets (confidential information) or trade connections, the most important component of goodwill⁴² since it is accepted that a bare covenant not to compete cannot be upheld;⁴³
- b. whether or not a protectable proprietary interest exists is a question of fact in each case, and in many, one of degree.⁴⁴

[88] As the Labour Appeal Court recently made clear, it is only once the party seeking to enforce the restraint of trade has established an interest worthy of protection

⁴² **Sibex** at 482 T.
Rawlins at 540J-541I.

⁴³ **Super Safes (Pty) Limited v Voulgarides** 1975 (2) SA 783 (W) at 785.

⁴⁴ **Rawlins** at 626b.

and that the other party is threatening that interest, that the onus shifts on the party resisting its enforcement to prove that it would be unreasonable.⁴⁵

[89] The existence of a protectable interest is for this reason a jurisdictional requirement before the breach of the restraint can be considered since the absence of a protectable interest means that there is no interest worthy of protecting through the restraint. The mere elimination of competition as such is not the kind of interest which can be protected by a restraint.⁴⁶

[90] Not all customer connections are protected. The enquiry is factual in nature and examines the extent to which the employee can take the customer with her to her new employer as a result of a close relationship established during the course of her employment. In **Morris (Herbert) Ltd v Saxelby**⁴⁷ it was said that the relationship must be such that the employee acquires “*such personal knowledge of and influence over the customers of his employer ... as will enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer’s trade connection*”.⁴⁸

[91] The papers do not make out a case to show that the second respondent established customer connections which she is likely to exploit in the future. No protectable interest has therefore been established on this front.

[92] Whether information constitutes a trade secret is similarly a factual question. Calling something secret does not turn it into confidential information. The enquiry is objective and the facts must be proved from which it may be inferred by the Court that the matters alleged to be secret are indeed secret. In **Telefund Raisers CC v Isaacs** 1998 1 SA 521 (C) at 528E the following was said:

“Of course, it is true that **the mere fact that a trader chooses to call something secret or confidential does not per se make it so . . .** To be confidential, the information concerned must have the necessary quality of confidence about it, namely it must not be something which is public property

⁴⁵ **Sadan & Another v Workforce Staffing (Pty) Limited** [2023] ZALAC 14 (17 Aug 2023) at para 19.

⁴⁶ **Humphreys v Laser Transport Holdings Ltd and Another** 1994 (4) SA 388 C at 402C. 403I-J; **Paragon Business Forms (Pty) Ltd v Du Preez** 1994 (1) SA 434 at 442G.

⁴⁷ **Morris (Herbert) Ltd v Saxelby** [1916] 1 AC 688 (HL) at 709.

⁴⁸ **Recycling Industries (Pty) Ltd v Mohammed & Another** 1981 (3) SA 250 (E) at 256 C-F; **Drewtons (Pty) Ltd v Carlie** 1981 (4) SA 305 (C) at 307G-H & 314C-G.

or public knowledge”.

[93] The same conclusion was arrived at in **Petre & Madco Ltd v Sanderson-Kasner** 1984 3 SA 850 (W) at 858E–H where the following was remarked:

“... it is trite law that one cannot make something secret by calling it secret. Facts must be proved from which it may be inferred that the matter alleged to be secret are indeed secret. In the nature of things it seems to me that it is unlikely that the applicant will operate in a way that is markedly different from the way in which its numerous competitors operate. There is nothing to show what is so unique about the product demonstrations or what is so special about the sales methods. Nor is there anything to show why the information said to be confidential can properly be regarded as confidential.”

(emphasis added)

[94] For information to be confidential it must meet three requirements, namely that the information must be:

- a. capable of application in trade or industry, that is, it must be useful and not be public knowledge;
- b. known only to a restricted number of people or a closed circle;
- c. of economic value to the person seeking to protect it.⁴⁹

[95] It does not suffice if only one of the requirements are met. There are sound reasons why the common law requires an applicant to establish the existence of all three requirements. Courts should be slow find that a proprietary interest in a general body of information has been established without first scrutinising the papers to establish if the requirements for confidentiality have been met.

[96] Evidence must be led to give content to each of the three requirements. Lowering the bar would mean that a competitor is allowed to acquire a proprietary interest in a body of general information that it is objectively not entitled to and that operates at the exclusion of third-party competitors. This has potentially deleterious consequences for healthy competition which is the lifeblood of the

⁴⁹ **Townsend Productions (Pty) Ltd v Leech & Others** 2001 (4) SA 33 (C) at 53J-54B; **Mossgas (Pty) Ltd v Sasol Technology (Pty) Ltd** [1999] 3 All SA 321 (W) at 333F.

free market.⁵⁰ This was the position before the new constitutional dispensation and it remains an important policy consideration today with the Constitutional Court having emphasised the role of free competition in preventing parties from acquiring an unlimited monopoly.⁵¹

[97] The applicants rely on a series of documents that the second respondent transmitted to her personal email address. The common denominator in each instance was the assertion that the information was confidential and commercially sensitive. The papers however do not engage with the three requirements for confidentiality with any degree of tolerable satisfaction at a factual level. One is left with the distinct impression that the claim of confidentiality is at best a conclusion drawn in the absence of the facts that underpin the claim with reference to the three requirements for confidentiality to subsist. If upheld on such a tenuous basis, it may give rise to the stifling of free competition our Courts have guarded against.

[98] The necessary degree of confidentiality has in the circumstances not been established and I am unable to find the existence of a protectable interest based on confidential information.

Conclusion

[99] I am mindful of the fact that this is an application for an interim interdict and that it is not necessary for an applicant to prove a clear right in order to obtain relief. It is sufficient for an applicant, in addition to establishing a well-grounded apprehension of irreparable injury and the absence of an ordinary remedy, to rely on a right which though *prima facie* established, is open to some doubt.⁵²

[100] There is in my judgment no or insufficient foundation to support a possible “right” to enforce the provisions of the restraint. Accordingly, however one views the other factors relevant to the exercise by the Court of its discretion, there is no basis upon which an interim interdict could be granted at its instance. For this

⁵⁰ **Silver Crystal Trading (Pty) Limited v Namibia Diamond Corporation (Pty) Limited** 1983 (4) SA 884 (D) at 888.

⁵¹ **Masstores (Pty) Limited v Pick n Pay Retailers (Pty) Limited** 2017 (1) SA 613 (CC) at 628C.

⁵² **Setlogelo v Setlogelo** 1914 AD 221 at 227.

reason, it would be appropriate for the applicants to bear the second respondent's costs.

[101] I accordingly make an order in the following terms:

- [1] The application against the second respondent is dismissed.
- [2] The applicants are ordered to pay the second respondent's costs jointly and severally the one paying the others to be absolved.



C BESTER AJ
JUDGE OF THE HIGH COURT
JOHANNESBURG

Heard: 23 and 25 August 2023

Delivered: 16 October 2023

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