IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JA21/23

In the matter between:

CHRISTINE BEEDLE **Appellant**

and

SLO-JO INNOVATIONS HUB (PTY) LTD **Respondent**

Heard: **19 July 2023**

Delivered: **17 August 2023**

Coram: **Waglay JP, Davis *et* Smith AJJA**

JUDGMENT

DAVIS AJA

Introduction

[1] This appeal concerns the implications of a covenant in restraint of trade which was entered into by Slo-Jo Trading (Slo-Jo), a full service designer drinks company specialising in the development of designer beverages and concepts. It is the holding company of the respondent.

[2] The appellant entered into a contract of employment in 2007 with Slo-Jo. From 2007 until 2010, she was responsible for dealing with the managing of the sale of the products of Slo-Jo. Her responsibilities changed in 2010 when she focussed on the research and development aspects of the business which involved working with Slo-Jo's suppliers and manufacturers; in particular to ensure that the taste of its products was maintained as well as the quality thereof. It appears that the appellant was also responsible for introducing new products into the business.

[3] In 2015, Slo-Jo established a research and development team of which the appellant was an important role player, as the head thereof. The appellant played an integral part in forming relationships with Slo-Jo's key and primary manufacturers, including Fruition which used approximately 60% of Slo-Jo's bespoke and exclusive products. In 2018, Slo-Jo initiated an internal restructuring of the company and established three new companies, being the respondent, Slo-Jo Distribution (Pty) Ltd and Slo-Jo International. Employees of Slo-Jo were transferred into one of these entities. In the case of the appellant, she was transferred to the respondent. Mr Jonathan Davis, a director of the respondent, described the continued basis of the appellant's employment thus:

> 'Save for the change in the name of the Transferred Employees' [employer?], no other terms and conditions of employment of the Transferred Employees were altered or affected in any way. Their terms and conditions of employment were, by no means, negatively affected.'

[4] Although the appellant contested this averment and referred to her refusal to sign a new contract as proposed by the respondent pursuant to the restructure, her salary slips revealed, by way of a comparison of a slip of 30 June 2018 (prior to the restructuring) and 31 August 2018 (subsequent thereto), that her salary, travel allowance, risk benefit, medical aid and retirement annuity contributions remained exactly the same, as did her leave benefit. She also retained her employee code of SA013. In addition, the appellant's email address and signature remained the same and the organogram of the Slo-Jo business remained identical during the tenure of the appellant's employment. Indeed, even Mr Bishop, who appeared on

behalf of the appellant, was constrained to submit that after August 2018, there existed a tacit agreement of employment between the appellant and respondent.

[5] The research and development team were all transferred into the respondent because the clear intention of the respondent was to 'house the research and development function and team of Slo-Jo' in the newly created entity, being the respondent.

[6] In summary, save for the change in the name of the employer, no other terms and conditions of employment were altered or affected in any way. As in the case of the appellant, the remaining employees of the research and development team who were transferred retained their same salaries, duties and responsibilities that they had with Slo-Jo, as well as their years of service benefits and entitlements, such as annual leave.

The key dispute

[7] The central issue in this appeal concerns the application of the restraint of trade clause which formed part of the contract of employment entered into between the appellant and Slo-Jo on 1 April 2007 when she commenced her employment with Slo-Jo. To the extent relevant the clause reads as follows:

> 'In terms of this restraint of trade, the employee specifically undertakes and agrees:
>
> 1. not to be interested in any business in the territory which carries on business manufacturers, sells or supplies any commodity or goods, brokers or acts as agent in the sale or supply of any commodity or goods and/or performs or renders any service, in competition with or identical or similar or comparative to that carried on, sold, supplied, brokered or performed by the company during the period of the employment of the employee up to and including the last day of the employment of the employee.
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> 2. not to solicit the custom of or deal with or in any way transact with, in competition to the company, any business, company, firm,

undertaking, association or person which during the period of 2 (two) years preceding the date of termination of the employment of the employee has been a customer or supplier of the company in the territory;

3. not to directly or indirectly offer employment to or in any way cause to be employed any person who was employed by the company as at the termination of the employment of the employee with the company or at any time within the period of 2 (two) years immediately preceding such termination.

Each and every restrain in this entire clause shall operate and be valid and binding for a period of 2 (two) year(s), calculated from the date of termination of the employment of the employee with the company...

...

The employee specifically acknowledges and agrees that:

1. ...he/she has carefully read and considered all the terms and provisions of this clause 12 relating to restraints applicable to him/her;

2. ...this clause and/or the restraints contained therein, after taking all circumstances into account, are fair and reasonable; and

3. ...should he/she at any time dispute the reasonableness or fairness of any of the provisions of this clause and/or restraints, then in such event he/she will have the onus to provide or prove such unreasonableness or unfairness.'

The judgment of the court *a quo*

[8] Before the court *a quo,* Mr Bishop contended that there had been no transfer of a going concern in terms of s 197 of the Labour Relations Act[1] (LRA). The contract

[1] Act 66 of 1995, as amended.

concluded in April 2007 between Slo-Jo and the appellant was thus inapplicable to contractual relationship between the appellant and respondent. The appellant contended that, while she was employed by the respondent from August 2018, she disputed that the employment contract was transferred from Slo-Jo to the respondent. Accordingly, there was no restraint of trade agreement between the parties in that the 2007 contract no longer bound the parties to the present dispute. It therefore followed that the respondent had no right, whether contractual or otherwise, to seek relief against her in terms of the restraint of trade clause.

[9] In dismissing this argument Prinsloo J held:

> '[28] It is evident from the Applicant's pleaded case that it had embarked upon an exercise to update and synchronise the employment agreements with all of its staff, subsequent to the transfer from Slo-Jo, but employees were not pressured into signing new employment contracts and where they did not sign new contracts, they retained the same terms and conditions of employment which they had with Slo-Jo…
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> [29] *in casu* Ms Beedle did not sign a new contract and in terms of s 197(2)(a), the new employer is automatically substituted in the place of the old employer, in respect of contracts of employment in existence immediately before the date of the transfer. If the provisions of s 197 of the LRA apply, the transferee is substituted automatically and by operation of law for the transferor as the employer of those of the transferor's employees engaged in the business on the date of the transfer. The transfer occurs by operation of law and independent from the intentions to parties, equally so was Ms Beedle's consent are not required.'[2]

[10] For these reasons, Prinsloo J rejected the appellant's submission that the terms of the restraint agreement did not pass from Slo-Jo to the respondent and that no contractual restraint of trade agreement was in place which would justify the relief being sought by the respondent. Following the legal position of the enforceability

[2] *Slo Jo Innovation (Pty) Ltd v Beedle and Another* [2022] ZALCJHB 212 (2023) 44 ILJ 839 (LC) at para 28 - 29.

of the restraint of trade clause initially laid down in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*[3] (*Magna Alloys*) to the effect that restraint agreements are enforceable unless they are shown to be unreasonable by the party subject to the restraint, Prinsloo J found against the submission of the appellant. In her view, there was no evidence to sustain an argument that, given the appellant's position as head of the research and development of Slo-Jo, the terms of the restraint clause, as set out above, were in any way unreasonable.

The appeal

[11] On appeal, Mr Bishop essentially repeated the arguments which had been raised by him before the court *a quo*, to the effect that the respondent's ability to establish contractual privity with the appellant was dependent on proving that Slo-Jo's contract of employment with the appellant had transferred in law from Slo-Jo to the respondent and thus to the appellant. In short, he insisted that, on an application of s 197 of the LRA, there had been no transfer of a going concern from Slo-Jo to the respondent and thus no employment contract had been transferred to the respondent in respect of the appellant, in terms of s 197 of the LRA; that is pursuant to a transfer of a business as a going concern. For this reason, the contract which had been entered into by the appellant and Slo-Jo was inapplicable to the present dispute.

[12] Mr Bishop submitted that, in terms of the case made out by the appellant, all that had been transferred to the respondent were certain of Slo-Jo's personnel. There was no assertion that there had been a transfer of a labour-intensive business. The mere transfer of employees, in his view, did not necessarily mean that a s 197 transfer had taken place. Furthermore, there was no disclosure that the respondent's business consisted of assets, labour, customers, customer relationships, goodwill, samples, flavours, confidential information, trade secrets and products and supplier relationships that had been transferred from Slo-Jo to the respondent which would justify the application of s 197 of the LRA.

[3] 1984 (4) SA 874 (A).

[13] In Mr Bishop's view, the respondent was thus not able to invoke the provisions of s 197. All that occurred had been a transfer of certain employees; that is the research and development team was transferred from Slo-Jo to the respondent. It followed that no going concern had been transferred from Slo-Jo to the respondent and hence s 197 was inapplicable in the present context.

[14] On the basis that a s 197 transfer had not taken place, Mr Bishop submitted that, without the appellant's consent to an assignment of her contract of employment from Slo-Jo to the respondent, she was no longer contracted in terms of the original employment agreement which incorporated the restraint of trade clause. In support of this submission, he placed particular importance on the judgment in *Securicor (SA) (Pty) Ltd and others v Lotter and others*[4] (*Securicor*).

[15] Although the distinction between the *Securicor* case and the present dispute was pointed out to counsel during the hearing, he insisted that this judgment constituted a fatal obstacle to any relief being sought by the respondent. Accordingly, it is necessary to explicate upon the distinction between the two cases. In *Securicor*, two employees concluded contracts of employment with predecessors of the appellant. These contracts of employment contained a restraint agreement imposing specific restraints on the employees for a period of two years after the termination date of their contracts of employment. The business which was transferred to the appellants was expressly made subject to the provisions of s 197 of the LRA. About two years later, the employees resigned from their employment with their new employer, being the appellant, and started working for a competitor. As a result thereof, restraint proceedings were launched before the High Court.

[16] On appeal to the full bench, the question which confronted the Court was a decision in *Botha and Another v Carapax Shadeports (Pty) Ltd*[5] (*Carapax*), decided before the advent of s 197 of the LRA. In that case, the court had held that, ordinarily a restraint of trade agreement is entered into for the benefit of the

[4] [2005] 4 All SA 464 (E); 2005 (5) SA 540 (E).
[5] 1992 (1) SA 202 (A).

business itself as distinct from the personal benefit of the owner of the business. It followed that the benefit of the restraint was incidental to the business and part of its goodwill. The owner of the business is vested with a contractual right to enforce the restraint and when he or she sells or disposes of the goodwill of the business, the *merx* of that sale embraces that contractual right. The transfer of the contractual right takes place by way of cession which consists of an obligatory agreement to sell or dispose of the right and an agreement of transfer, being the delivery of the business to the new owner. The new owner then becomes entitled to enforce the contractual restraint. If the benefit of the restraint does not form part of the goodwill of the business of the past and new owner, then the restraint cannot be enforced.

[17] On behalf of a full bench, Froneman J examined what the effect of this decision in *Carapax* was on the subsequently introduced s 197 of the LRA. He noted that the effect of s 197 "…*is not upon the content of the rights and obligations existing at the time of transfer of a business, but on the identity of the person or legal entity against whom the rights may be enforced and to whom the obligations are now owed*"[6]. Section 197 thus removes the requirement of consent but what remains was a cession of a right and the delegation of the obligations, but imposed statutorily. If the restraint formed part of the goodwill of the business and that goodwill formed part of the business and transferred as a going concern in terms of s 197, then the restraint agreement would survive the transfer of the business had taken place.

[18] This is an entirely different set of considerations to that which is applicable in this case. In the present case, there is no sale of a business to a third party as in *Securicor.* There is no consideration of whether the restraint formed part of the goodwill of a business. What had occurred was the transfer of a part of the overall business pursuant to a restructuring of the business. To the extent that the appellant continued to be remunerated in exactly the same fashion as had occurred prior to the restructuring, that her conditions of employment were the

[6] *Carapax* at para 10.

same, including her rights to leave, that various deductions which were taken from her gross salary were exactly the same, suggest that the inference is inescapable that the appellant considered herself to be bound by exactly the same terms and conditions as had applied to her prior to the restructuring. There was no other legal basis for the employment relationship other than the 2007 agreement which continued to govern the employment relationship.

[19] In summary, it is not necessary to engage in the somewhat unique situation of this case as to whether s 197 applies to an internal restructuring where one company creates subsidiaries thereof for administrative convenience and in which no outside party is involved. On the specific facts of this case, the appellant's employment relationship continued in terms of the 2007 agreement which incorporated the relevant restraint of trade clause.

[20] This conclusion necessitates an examination of the validity of the restraint clause which was entered into between the parties.

The validity of the restraint of trade clause

[21] As noted by Malan AJA (as he then was) in *Reddy v Siemens Telecommunications (Pty) Ltd*[7] (*Reddy*) at para 10, *Magna Alloys, supra* was "… *a landmark decision (which) introduced a significant change to the approach of the courts to agreements in restraint of trade by declining to follow earlier decisions based on English precedent that an agreement in restraint of trade is prima facie invalid and unenforceable*." *Magna Alloys* thus reversed this approach and held that agreements in restraint of trade are valid and enforceable unless they are unreasonable and thus contrary to public policy. This necessarily triggers, as a consequence of their common law validity, that a party, who challenges the enforceability of the agreement, bears the burden of alleging and proving that it is unreasonable. That decision was not without its immediate critics.[8] This criticism

[7] [2006] ZASCA 135; 2007 (2) SA 486 (SCA) at para 10.
[8] See: See: Du Plessis, Davis "*Restraint of Trade and Public Policy*" 1984 SALJ 91; and JT Schoombee "*Agreements in Restraint of Trade: the Appellate Divison confirms the new principles*" 1985 48 THRHR 127.

notwithstanding, the approach laid out in *Magna Alloys* has been consistently followed by our Courts as exemplified in *Basson v Chilwan*[9] and confirmed in *Reddy, supra*.

[22] The judgment in *Reddy* is also important because it dealt post the introduction of the Constitution of the Republic of South Africa, 1996 with the argument, that the rule laid down in *Magna Alloys* which had the effect of casting the onus upon a party seeking to avoid the restraint to allege and prove that the restraint was unreasonable. This included an argument that the restraint was in conflict with s 22 of the Constitution which guarantees that every citizen has the right to choose his or her trade or occupation or profession freely. It was argued in *Reddy* that such a restraint limited these rights and it was enforceable only if it was alleged and proved by the person seeking to enforce it that such limitation was reasonable.

[23] Malan AJA in *Reddy*[10], accepted that the challenge in restraint cases was now to reconcile the principle that parties should comply with their contractual obligations as encapsulated in the maxim *pacta servanda sunt* with the constitutional right or engaging freely in trade, commerce or a chosen profession. Malan AJA noted that this balance was not merely required by the common law but constituted an enquiry into constitutional values being contractual autonomy as a component of freedom which informed the constitutional value of dignity and the argument against restraint clauses being enforced, which was sourced in s 22 of the Constitution which guarantees that every citizen has a right to choose their trade of occupation or profession freely.

[24] In seeking to balance these competing values, a court is required to determine that the restraint is unenforceable if it prevents a party, after the termination of his or her employment, from engaging in trade and commerce without a corresponding interest to the other side which deserves legal protection. In such a case, not only is the restraint not in the public interest, but it is contrary to public policy.

[9] [1993] ZASCA 61; 1993 (3) SA 742 (A).
[10] *Reddy supra* at para 15.

[25] Although s 36 of the Constitution, which is not applicable to public interest considerations in that it expressly governs a law which limits an enumerated right in the Bill of Rights, Malan AJA considered that the requirement contained in s 36 (1) (e) of the Constitution, which requires a consideration of less restrictive means to achieve the purpose of the limitation, could be equated with a value judgment confronting a court in determining the reasonableness or lack thereof of a restraint clause. Section 36 would apply in a case where the legal basis of the case brought by the covenantee was directly sourced in the right enumerated in s 22 of the Constitution as opposed to a case based on public policy. Whether the direct applicability of s 36 is relevant to the latter kind of case, the conclusion regarding less restrictive means is a useful guide to a court in dealing with a public policy challenge to a restraint clause based on unreasonableness. Public policy is now shaped by the values underpinning the Constitution and as stated by Ngcobo J in *Barkhuizen v Napier*[11], the concept of ubuntu also is part of policy Public policy viewed through this prism now plays a key role in an inquiry into the validity of a restraint of trade clause.

The application of the existing law to the present dispute

[26] Accepting that the appellant bore the onus of showing the unreasonableness of the restraint, Mr Bishop submitted that the respondent had made no case out for any protectable interest and further that the geographical restraint should not be held to apply to all of South Africa. He also submitted that the duration of the restraint was unreasonable.

[27] By contrast, as Ms Saunders, who appeared on behalf of the respondent submitted in her most able argument, the appellant had access to and had acquainted herself with sensitive trade secrets and confidential information possessed by the respondent in her capacity as head of the research and development team of the respondent. She had information regarding the primary business model and general *modus operandi* of the respondent as well as its process of research and

[11] [2007] ZACC 5; 2007 (5) SA 323 (CC) at para 57.

product development and the recipes and flavour profiles of the main products. She also enjoyed key relationships with Slo-Jo's manufacturers and suppliers.

[28] In particular, the appellant had enjoyed relationships with important customers, including McDonald's, Mugg and Bean, Wimpy, Nando's, KFC and Ocean Basket, all of whom required certain products to be specifically developed for their needs. As an example, in his founding affidavit, Mr Davis described how a product named 'the Mojito mint' was developed exclusively for Nando's and not for an open market for general consumption by consumers.

[29] The point of this reference was to contend that the appellant, as head of research and development, possessed key knowledge with regard to the specific nature of Slo-Jo's produced beverages and the flavour and quality thereof, all of which was required by particular customers.

[30] Ms Saunders also submitted that the purpose of the restraint clause was to ensure that the appellant, with access to confidential information which she possessed and the skill that she had acquired, was prevented from utilising this knowledge only in the beverage industry. She was, however, free to be employed in any position where she could exploit her skill and knowledge, save in the specific context of the beverage industry in which the respondent traded.

[31] Apart from the appellant raising the question as to whether the term 'territory' as defined to mean 'provinces of South Africa' could not be held to apply to all of South Africa, there was no further submission in this regard. There is simply no merit in this submission nor in any restriction of a restraint where, manifestly, the business of the respondent was to service a customer base which included a number of national chains supplying food and beverages which, in turn, then sell to customers throughout South Africa.

[32] Mr Bishop advanced the further argument that, upon the appellant's contract of employment being concluded, she took up the position of a sales representative. In Mr Bishop's view, it therefore followed that Slo-Jo at this stage required a

restraint clause in order to protect its proprietary interests to which the appellant would be subjected in her capacity as a sales representative. There was no indication that the appellant's role would change completely from sales representative to head of research and development. It followed that it could never have been contemplated that the restraint would apply to her later role as head of research and development.

[33] An initial insurmountable difficulty encountered by Mr Bishop in the advance of this argument is that it is uncontested, even on the appellant's s 197 argument, that the appellant was employed by Slo-Jo until 2018, some three years after she was made head of research and development. Her contract of employment remained the same as did all the conditions of her employment. There was no evidence nor argument to the effect that, upon being appointed head of research and development, a fresh contract of employment had been concluded. In addition, the appellant remained an employee, bound to respect the proprietary interests of her employer set out in her employment agreement. To argue to the contrary would mean that upon any promotion to another department of an employer, a new restraint would have to be concluded when the wording of the initial restraint was of a general nature and did not depend on the transient post occupied by the employee at the time of entry into the employment of the employer. There is, in short, no merit in this argument which stands to be dismissed.

[34] That leads to the final question as to the duration of the restraint. Although the onus is upon the appellant to show the unreasonableness of the restraint into which it has entered, the public policy enquiry which is central to such a dispute involves considering a balance between the restraint concluded by the parties and the consequence thereof, whereby the employee can be prevented from utilising her skill and knowledge in the pursuit of her chosen trade or profession; as guaranteed in s 22 of the Constitution, in this case, in the specific beverage industry throughout South Africa and for a period of two years.

[35] This inquiry recalls the less restrictive means test articulated by Malan AJA in *Reddy, supra*. The exercise of determining the correct balance in such a case requires a court to carefully examine the justification offered for the extent of the duration, notwithstanding that ultimately, it is the employee upon whom the onus rests. *Prima facie*, a restraint for two years without any plausible justification being offered by the party seeking to enforce the restraint cannot, on its own, pass legal muster.

[36] In this case, however, the respondent has offered a comprehensive explanation as to why two years is necessary to protect its interests. It explained that the lead time for the conceptualisation of a product required by one of its customers until the product is brought to market, can take between 24 to 36 months. This is set out by Mr Davis as follows:

> ‘1. If a customer were to approach the applicant with a specific request or brief for a beverage, that brief would go via the first respondent to the supplier. Initial price negotiations would take place at this point. The ordinary lead time may be up to 24 months for larger clients, such as McDonalds, particularly if it were a specific or themed brief.
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> 2. Between a period of 24 months to 18 months prior to launch, a product would be developed between the R&D team and the supplier, who would ultimately be responsible for the manufacturing once approved. The product would be ready to be pitched to client approximately 18 months prior to the launch.
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> 3. Between 18 months and 12 months prior to the launch of the product for the customer, the R&D team and the supplier would tweak and refine the product for final launch. This refining process would occasionally involve the customer as well, however the ultimate refining process was left to the R&D team.
>
> 4. Pricing negotiations, to which the first respondent was privy, were conducted initially at the commencement of production, with the final price negotiations occurring much closer to the launch of the product, given that

inevitably the price would be heavily influenced by the ingredient changes during the development and immediate economic factors.

5. Depending on the ultimate customer, the product which is designed and finally sold to the customer, may involve an exclusivity agreement with the customer that gives the customer the exclusive use of that product (and permutations of that product) for anywhere between a period of 6 and 12 months after launch.'

[37] As Ms Saunders submitted, on the basis of this evidence provided by the respondent, a period of at least 24 months is justified. Apart from contending that there was a 'high turnover of products in the industry', there was no evidence nor argument provided by the appellant to gainsay this justification for the two-year duration of the restraint. In the result therefore, the justification for the length of time contained in the restraint is not only plausible but it is not contradicted by any clear argument to the contrary.

[38] It follows that the restraint, given the facts of this case, must be held to be reasonable.

The section 18 procedure

[39] On 22 November 2022, after judgment had been delivered by Prinsloo J, the respondent launched an urgent application in terms of s 18 of the Superior Court Act[12].

[40] On 1 December 2022, Mamabolo AJ granted an order in terms of s 18 of the Superior Courts Act in favour of the respondent which had brought the urgent application to immediately enforce the restraint of trade which had been entered into by the parties pending an appeal to be lodged by appellant.

[41] The question arises as to what costs order should have followed from this successful s 18 application. Given that the respondent had been successful in this

[12] Act 10 of 2013.

appeal, it follows that both the costs of this appeal and those incurred in the s 18 proceedings should follow the result.

[42] In the result, the appeal is dismissed with costs. The appellant is also ordered to pay the costs incurred by the respondent in respect of the application brought in terms of s 18 of the Superior Courts Act.

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Davis AJA

Waglay JP and Smith AJA concur.

APPEARANCES:

FOR THE APPELLANT:	Adv A Bishop Instructed by Gittins Attorneys
FOR THE RESPONDENT:	Adv S Saunders Instructed by Eversheds Sutherland Attorneys