THE LABOUR COURT OF SOUTH AFRICA

AT CAPE TOWN

Not Reportable/Of interest to other judges

Case no:C306/2024

In the matter between:

INTERWASTE (PTY) LIMITED Applicant

And

LIZA PRETORIUS First Respondent

AVERDA SOUTH AFRICA (PTY) LIMITED Second Respondent

Heard: 29 August 2024

Delivered: 17 September 2024

Summary: (Urgent – Restraint of trade - Overlap between services rendered by old and new employer – internal arrangements to offer the same service not material to the question whether they compete – protectible interest established in relation to business of applicant in the region where the employee was a salesperson – interest of employee outweighed by need to protect the applicant's confidential information being exploited by a competitor – relief granted to balance interests)

JUDGMENT

LAGRANGE, J

Introduction

[1] This is an urgent application to enforce a restraint of trade agreement and certain confidentiality provisions in a contract of employment. The applicant ('Interwaste') employed the first respondent ('Potgieter') until she left its employment on 8 July 2024, and took up employment with the third respondent ('Averda').

[2] The application was launched on 22 July 2024. In addition to the normal founding, answering and replying affidavits, Pretorius also filed a supplementary answering affidavit in response to issues in the replying affidavit, as sometimes occurs in restraint of trade applications. Interwaste also filed a confidential affidavit to which Pretorius replied. Averda did not oppose the application. Interwaste and Pretorius were agreed that the application could be heard as a matter of urgency.

[3] It is common cause that Pretorius was bound by the restraint provisions in her contract. The central issues to be determined are whether her employment with Averda was in breach thereof and, if it was, whether it would be reasonable to enforce the restraint.

[4] The dispute about whether Averda competes for the same business in the waste management industry as Interwaste does revolves around the extent of any overlap between the services the two firms offer to clients in the industry and, in particular, whether Averda chiefly offers a specialist service in the management of medical waste, and whether Averda's ability to handle different waste streams in-house using its own infrastructure, distinguish the nature of its business sufficiently from that of Interwaste because the latter does not have its own internal capacity to handle medical waste using its own infrastructure.

[5] To the extent that the court might find that they do compete, Pretorius argues that it would be unreasonable to enforce the restraint agreement in circumstances where:

5.1 she is engaged in managing sales of medical waste management services for Averda, not general waste management services;

5.2 as a sales manager, she will have little to do with the conclusion of actual sales, which is different from the salesperson role she performed at Interwaste;

5.3 Interwaste is already a customer of Averda, and so Avderda is already privy to supposedly confidential information about Interwaste's business as a result of that relationship, as are other businesses Interwaste subcontracts its work to;

5.4 the information Interwaste seeks to protect is in the public domain and is known to customers;

5.5 Interwaste does not have a protectible interest in the form of confidential information or customer connections that the restraint could protect;

5.6 enforcement of the restraint will merely sterilise Pretorius's earning capacity, and

5.7 the restraint goes further than it need to, to the extent Interwaste does have protectible interests.

Factual issues

[6] Pretorius commenced working for Interwaste in December 2021 a Sales Representative – Sales (Western Cape), which was the position she still held when she left Interwaste to join Averda, though the title of the job had changed to that of a Sales Executive.

[7] The existence of the restraint and confidentiality provisions in Pretorius's contract of employment are common cause. The pertinent provisions read:

"19. Restraint of Trade

19.3 You undertake by your signature hereto, and in favour of Interwaste, that you will not, for a period of 2 (two) years calculated from the date of termination of your employment with the Company, for any reason whatsoever, be directly interested, engaged or concerned whether as principal, agent, partner, representative, shareholder, director, employee, consultant, advisor, financier, administrator, subcontractor or in any other like capacity in any business:

19.3.1 carried on in the Republic of South Africa (hereinafter referred to as "the Area"); and

19.3.2 which is a competitor of Interwaste or Interwaste Holdings Limited; or

19.3.3 which is a competitor of any of the subsidiaries or divisions of Interwaste or Interwaste Holdings or that carries on business that is the same or similar to the said business or any aspect thereof."

[8] Clause 18 of the contract read:

"18 GOOD FAITH/CONFIDENTIALITY

You undertake, by your signature here too, to remain just and faithful to the Company in the performance of your duties and, other than in the ordinary course of business and in the best interests of the Company, shall not disclose to any person any information concerning the activities of the Company and shall not, during the period of your employment, or after the termination thereof, be entitled, whether for your own benefit or that of another, to make use of order of profit from such information or knowledge."

[9] On 2 July 2024, Pretorius tendered her resignation. On 3 July 2024, Interwaste notified her it was aware that she had accepted an offer of employment from Averda and reminded her that for two years she could not join a competitor. A conversation between Pretorius and representatives of Averda took place on 5 July, during which Pretorius expressed her unhappiness about having to share a major account and the company expressed the view that she was being disloyal to it in joining Averda. Pretorius does not dispute that she asked Interwaste for leniency in relation to enforcing the restraint.

[10] On 8 July, Pretorius emailed Interwaste to state she was leaving it with immediate effect, allegedly owing to how she had recently been treated by various staff members. Interwaste responded the following day disputing her allegations of mistreatment and claimed payment in lieu of her failing to work her notice period. The company's attorneys also sent her a letter claiming that her employment with Averda was a breach of the restraint provisions of her contract because the latter was a direct competitor, and demanded written undertakings from her that she would abide by them, failing which it would approach the court on an urgent basis.

The competitive status of Interwaste and Averda

[11] It is common cause that Interwaste cannot process medical waste itself, whereas Averda does and, in some instances, Interwaste has even subcontracted such work to Averda, which does have the specialised technology necessary to do so. Interwaste also uses other firms to perform this service. What is important is that Interwaste still offers potential and existing customers a medical waste management service as part of its waste management offering. Thus, customers of Interwaste can obtain medical waste management services from it, albeit that it has to subcontract that work to other companies. The operational model of the two firms differs in this sense. Unlike Averda, Interwaste outsources a lot the services it provides to clients to third parties. It refers to these subcontractors as 'off-takers'. Off-takers use their own facilities to assist Interwaste with the disposal, re-use, and recycling of waste materials from Interwaste's customers. Interwaste delivers waste material to the off-taker. The off-taker charges a fee for the processing service but might also pay Interwaste a rebate for the material if it can re-use it.

[12] Nonetheless, from the perspective of a customer looking for a medical waste management service, it could approach either Averda or Interwaste to address that need. There was no evidence to suggest that potential customers perceive that the medical waste management service each firm offers are distinctly different types of service, simply because each firm manages how it

offers the provision of a medical waste service differently. Consequently, it is difficult to escape the conclusion that they do compete with each other in providing medical waste management services, even if their respective abilities to perform the work in-house is different.

[13] The next issue is whether the firms compete in the provision of other waste management services. It is not disputed that Interwaste's business consists, amongst other things, of the collection of general inorganic and organic waste and hazardous waste, the sorting, transportation and disposal thereof. It also manages and separates waste on a customer's premises and manages landfills. It provides these services to clients in the public and private sectors. It also recycles waste of various kinds for re-use. On her own version, Pretorius confirms that Averda also offers a full-service waste disposal management service, but unlike Interwaste performs all the work in-house. Pretorius maintains that Averda focuses 'primarily' on medical waste and the two firms operate in distinct sectors of the waste industry in the Western Cape and, consequently, the two firms do not compete. Nevertheless, she confirms that Averda provides a wide range of waste and recycling services to both the public and private sectors and has done so for 30 years. The services include but are not limited to the: collection of municipal waste, street cleaning, sorting, composting, recycling and disposal of household waste and managing hazardous waste streams including medical and chemical waste. Pretorius also mentions being advised by Averda that it has "built a country-wide company able to provide end-to-end waste management and recycling solutions for most types of waste".

[14] Moreover, on its own website, Averda describes the services it offers in the following terms:

> *"We handle the collection, transportation, recycling and disposal of all kinds of waste. Whether you're looking to hire a single skip for a home clear out, or to develop an integrated waste management plan for a complex industrial site, our experts can tailor a cost-effective solution just right for you.*

We collect, sort, recycle, compost and responsibly dispose of waste in a sustainable and responsible way. From food waste to old electronics; Paints to plastics, even hard-to-handle materials like asbestos, we know how to manage your waste to the highest standards of human and environmental safety.

[15] It is readily apparent that a prospective customer might approach either Interwaste or Averda for the provision and management of any of an entire gamut of types of waste disposal. There is no evidence to suggest that Averda's waste services offering in the Western Cape is restricted to medical waste service. As customers have a choice to go to one or the other for the same waste problem, the firms clearly are in competition with each other. It follows that, by taking up employment with Averda immediately after leaving Interwaste that Pretorius is in breach of clause 19.3.2 of her employment contract.

[16] The next question is whether it would be unreasonable to enforce the restraint.

Legal principles

[17] The prevailing legal policy on the enforceability of restraint of trade agreements was laid down in *Reddy v Siemens Telecommunications (Pty) Ltd*[1]. The case confirms that the pre-constitutional policy approach adopted by the courts during that era still applies. In terms thereof contracts in restraint of trade are enforceable unless the person seeking to escape being bound by such a provision can show that it would be unreasonable to do so.[2] The determination of the reasonableness of enforcing the restraint, entails a court making a value judgment considering the proven facts.[3]

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[1] 2007 (2) SA 486 (SCA)

[2] *Reddy* at paragraph [14]. In the pre-constitutional era, the courts had adopted the view that the value attached by the law to the enforceability of contracts was greater than the value attached to the freedom to trade (see *Roffey v Catterall, Edwards & Goudré (Pty) Ltd* 1977 (4) SA 494 (N) at 505D–H and *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 893C–D).

[3] *Reddy* at paragraph [14].

[18] The issues which must be determined in deciding if it would be unreasonable to enforce the restraint are well established. In *Reddy*, the Supreme Court of Appeal reaffirmed the test enunciated by its predecessor in *Basson v Chilwan and Others*[4]:

> *"[15] A court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint. The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim pacta servanda sunt. The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions. Both considerations reflect not only common-law but also constitutional values. Contractual autonomy is part of freedom informing the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life. In this sense, freedom to contract is an integral part of the fundamental right referred to in s 22. Section 22 of the Constitution guarantees '[e]very citizen . . . the right to choose their trade, occupation or profession freely' reflecting the closeness of the relationship between the freedom to choose a vocation and the nature of a society based on human dignity as contemplated by the Constitution. It is also an incident of the right to property to the extent that s 25 protects the acquisition, use, enjoyment and exploitation of property, and of the fundamental rights in respect of freedom of association (s 18), labour relations (s 23) and cultural, religious and linguistic communities (s 31).*
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> *[16] In applying these two principal considerations, the particular interests must be examined. A restraint would be unenforceable if it prevents a party after termination of his or her employment from partaking in trade or commerce without a corresponding interest of the other party deserving of protection. Such a restraint is not in the public interest. Moreover, a restraint which is reasonable as between the parties may for some other reason be contrary to the public interest. In*

[4] 1993 (3) SA 742 (A)

Basson v Chilwan and Others, Nienaber JA identified four questions that should be asked when considering the reasonableness of a restraint: (a) Does the one party have an interest that deserves protection after termination of the agreement? (b) If so, is that interest threatened by the other party? (c) In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive? (d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected? Where the interest of the party sought to be restrained weighs more than the interest to be protected, the restraint is unreasonable and consequently unenforceable. The enquiry which is undertaken at the time of enforcement covers a wide field and includes the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests."
(emphasis added)

Is it reasonable to enforce the restraint?

Existence of a protectible interest and whether it could be threatened by Pretorius's employment by Averda.

[19] Interwaste claims that Pretorius's access to its monthly 'Customer Movement Reports' ('CMRs') was integral to the performance of her duties and gave her knowledge of significant proprietary customer information. This information included: updated details of all client spending on Interwaste's services; rates charged for each type of service provided; customer waste volumes; personnel, equipment and vehicles utilised by customers in the provision of waste services; the frequency of services provided to customers, and management fees charged to each customer.

[20] Pretorius does not dispute she had access to CMRs, nor does she dispute their content. Her main defence to such information constituting a protectible interest is that it is not confidential, for two reasons. Firstly, the

CMRs are also in the possession of Interwaste's customers and secondly, because Interwaste subcontracts medical waste management services to Averda, Averda is already privy to the information pertaining to a customer of Interwaste because it obtains such information by virtue of being subcontracted to provide its specialised service to that client.

[21] However, Interwaste's evidence was that, even though it does make use of Averda's specialist services, it does not do so in the Western Cape. Instead, it uses similar services provided by another firm, Enviroserv. Secondly, even if Averda could glean information from services it rendered to a client of Interwaste's in Gauteng, it is apparent that information only relates to the service provided by Averda and does not include the entire history of Interwaste's dealings with that customer which are obtainable from the CMRs. Accordingly, Averda would not already be privy to information about the medical waste services offered by Interwaste to its Western Cape customers, using the service of Enviroserv. Still less would Averda be aware of information about Interwaste's arrangements with other clients for the handling of other waste.

[22] Pretorius also contended that the information obtainable from the CMR's was subject to frequent change, but Interwaste retorts that the CMR nonetheless reveals the entire history of Interwaste's relationship to a client, which is not readily available to Averda. Moreover, price information is determined annually and not subject to frequent change as Pretorius alleged.

[23] Interwaste also stated that Pretorius had direct knowledge of Service Level Agreements ('SLAs') concluded between it and major customers and that she was the interface between Interwaste' legal department and the customer when an SLA was negotiated. Pretorius does not dispute this.

[24] Another category of information, which Interwaste alleged that Pretorius was privy to, was its profitability model. It is described as a costing model which encapsulates the financial offer and performance of contracts with each customer. It is a tool used across Interwaste's whole business nationally and is

used for pricing tenders profitably and is designed to promote new business or to retain customers.

[25] As a sales representative, Pretorius would enter data obtained from a customer's CRM and other client data, and the model would assist Interwaste in assessing the financial performance of a contract and to identify if changes should be made to Interwaste's gross profit margin in order to retain customers. Data entered by Pretorius would include labour costs, third party off-taker fees and transport distances. The internal transport rate would be provided by the Sales Manager. Pretorius stated that the profitability model could only be determined for a particular client if a costing model programme and access to the costing model was only the preserve of managers. Even if Pretorius had to be told what transport cost was to apply, she nonetheless obtained that knowledge from a manger, so she could compare it with Averda's rate. However, Interwaste agrees that the workings of the profitability model were not known to Pretorius, but she knew the results it produced.

[26] On the question of customer relationships, it is common cause that Pretorius was required to obtain new customers and secure new business from existing customers. She was an extremely able salesperson who had been the top performer for new business in the 2022/2023 period. Part of her duty was to secure client retention, and she managed all aspects of contracts concluded with her customer base, which included contacting a potential new customer, securing the business and concluding the necessary contracts, and then managing the relationship by providing monthly updates to customers and handling any issues or customer escalations.

[27] From the above, it is clear by virtue of her role and duties, that Pretorius had access to extensive information about the business relationship between Interwaste and the customers she dealt with. Although she denies she dealt with all queries or complaints of her clients, she was plainly a primary link between clients and Interwaste and she would have been familiar to them as a significant role-player in the commercial relationship between them and Interwaste. It is difficult to see how her knowledge of that information and her

relationship with customers of her former employer would not be of commercial value to a competitor of Interwaste, which it could exploit to the detriment of Interwaste. Moreover, most of the information she had access to was acquired by her in the course of her work for Interwaste and is not in the public domain. To the extent some of that information was also within the knowledge of Interwaste's clients, that is no different from any contract between one business and another, where the parties will both have knowledge of the terms governing their commercial arrangement. It does not follow that a customer of Interwaste would necessarily share that information with Interwaste's competitor if it was asking it to tender for similar work. Considering the discussion above, I am satisfied that Interwaste has established it has a protectible interest in safeguarding against Pretorius sharing such knowledge with Averda and that interest is threatened by Pretorius's employment by Averda.

Is Interwaste's interest qualitatively and quantitatively outweighed by Pretorius's interest in remaining economically active?

[28] Pretorius obviously has an interest in using her skills and know-how elsewhere after termination of her employment with Interwaste and has a right to engage in economic activity to that end. She claims that the role she plays in sales at Averda is purely a management one and she is not directly involved in sales. Moreover, Averda's allegedly exclusive focus on the medical waste sector in the Western Cape renders means that she will not be engaged in a role which encroaches on the general waste disposal business that Interwaste is engaged in. As such, her previous work at Interwaste is of limited relevance and usefulness to the work she is now required to perform.

[29] As regards the restricted sale's managerial role Pretorius claims she performs at Averda, based on the confidential affidavits exchanged, Interwaste has cause to be concerned that in in the performance of that role her activities are not restricted to the medical waste sector. In one instance she played an active role in communicating with a transporter to assist a client who needed muddy sludge removed. Pretorius maintains she was performing a purely a supervisory role in doing so, and the contract had been concluded previously by

another member of her sales team. Further, she avers that she was required to attend at the client's site to "*familiarise"* herself with Averda's clients "*and the processes they implement".* While this is only one example, it demonstrates that Pretorius's role encompasses supervision of other types of waste contracts and her activities extend beyond medical waste disposal. There is little reason to believe that she would not also be involved with familiarising herself with potential clients and their processes when new business is being canvassed by her sales team. In such an interaction, any knowledge she had of that potential clients' prior dealings with Interwaste, might usefully be conveyed to her subordinates attempting to secure a contract for Averda. It must also be borne in mind that nowhere does Pretorius claim that Averda has no reason, interest or intention of offering all types of waste services in the Western Cape or of not competing for anything other than medical waste management. The example mentioned also demonstrates that Averda's activities in the Western Cape are not confined to the narrow category of medical waste management.

[30] Pretorius does not dispute that she had worked successfully in a bank for a number of years as a sales manager, so her sales expertise is not confined to waste management. This is not a case of an employee who needed to find other employment, and the only available job where her expertise could be utilised was working for a competitor.

[31] I am not persuaded in the circumstances that it would be unreasonable to prevent Pretorius from working for Interwaste's direct competitor at least to extent necessary to protect Interwaste's interests in preserving the value of information she had acquired about its business in the Western Cape in the course of working for it.

[32] The next question which arises is whether it is necessary to enforce the full extent of the restraint to provide adequate protection of Interwaste's protectible interests. Interwaste does not seek to enforce the restraint for longer than a year since Pretorius ceased working for it, and this seems to a reasonable limitation of given the fact that pricing information will not remain valid for longer than a year and that Interwaste should be able to replace

Pretorius within six months given the time it took to replace another sales representative.

[33] As to the geographical scope of the restraint, Pretorius's knowledge of Interwaste's customers is confined to the Western Cape. It is true that she might have some insight into the workings of the profitability model that Interwaste uses nationally, but on the evidence, I am not persuaded that Pretorius would be able to predict the outcome that model will produce for a particular client because certain information had to be provided to her by a manager in order to complete the data inputs required by the mode, and mechanics of the model were not known to her. I do not believe this is a sufficient basis to bar her working outside of the Western Cape for a competitor of Interwaste, where her knowledge of Interwaste's Western Cape operations will be of little value.

[34] It would not be reasonable in my view to restrict her opportunity to work for a competitor of Interwaste in regions in which she did not previously perform sales work for Interwaste.

Disclosure of confidential information

[35] The question of information generated by Interwaste, to which Pretorius had access, has already been discussed in some detail in the preceding analysis. There is no dispute that Pretorius had access to the information in question. The real challenge raised by her was whether it was already in the public domain and easily obtainable from other sources. Apart from the fact that it if the employee obtained the information in the context of a confidential relationship, it does not matter that it might be sourced elsewhere[5], it is trite law that once an employee has access to such information, which would could be exploited by a competitor then the former employer is entitled to protection against the risk of if falling into the competitor's hands. For the reasons mentioned, Interwaste is entitled to preserve the confidentiality of that information to the extent it is possible and Pretorius must respect its right to limit

[5] See e.g., *Van Castricum v Theunissen and Another* 1993 (2) SA 726 (T) at 731F-H

its dissemination to third parties. Apart from the prohibition against the disclosure of confidential information contained in the confidentiality undertakings, it is the restraint, which provides the former employer with some assurance that the risk of disclosure of such information to a competitor will not eventuate[6]. The risk of disclosure in the present circumstances arises primarily from Pretorius being in a supervisory position of staff engaged in looking for business in a region where she had intimate knowledge of Interwaste's activities in the same area. In that capacity, there will be a natural pressure on her to utilise that knowledge in her new role.

Conclusion

[36] In light of the above, I am satisfied that the restraint should be enforced subject to the qualifications mentioned. The qualification of the ambit of the restraint necessitates an amended form of the relief sought. As the matter is a contractual dispute, there is no reason why costs should not follow the result, but with some allowance should be made for Pretorius being partly successful in the limitation of the relief granted.

Order

1. The application is dealt with as one of urgency, and any non-compliance with forms and service provided for in the Rules of the Labour Court is condoned.
2. Until 8 July 2025, the First Respondent is interdicted and restrained from being employed or engaged, in any capacity whatsoever, by the Second Respondent to perform any work or render any service directly or indirectly related to the waste management and disposal business it carries on in the Western Cape Province, including any activity which is ancillary to that business.

[6] See *Reddy V Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at paragraph [20].

3. The First Respondent is restrained and interdicted from using and, or alternatively, disclosing any of the Applicant's confidential information to the Second Respondent, or any third party.

4. The First Respondent must pay half the costs of the Applicant, including the costs of counsel.

R Lagrange
Judge of the Labour Court of South Africa.

Representatives:

For the Applicant:	C Whitcutt SC assisted by C De Wet
Instructed by:	Fluxmans Inc.
For the First respondent:	S Meyer
Instructed by:	Van Zyl Johnson Attorneys