THE LABOUR COURT OF SOUTH AFRICA
AT CAPE TOWN

Of interest to other judges
Case no: C2024-128373

In the matter between:

MEDTRONIC (AFRICA) PTY LTD **Applicant**

and

JEAN-PIERRE MULLER **First Respondent**

CREATORI HEALTH PROPRIETARY LTD. **Second Respondent**

Heard: 4 December 2024
Delivered: 2 January 2025
Summary: (Restraint of trade – urgent – Applicant adopting leisurely approach to urgency while exploring settlement proposals and in filing application once settlement discussions were unsuccessful – struck off the roll for lack of urgency)

JUDGMENT

LAGRANGE, J

Introduction

[1] This is an application to enforce a restraint of trade brought on an urgent basis, which is opposed by the First Respondent, Mr Jean-Pierre Muller ('Muller'). The application was filed digitally on CaseLines. The second respondent ('Creatori') agreed to abide by the outcome.

[2] The applicant ('Medtronic') seeks an interdict in the following terms:

1. *dispensing with the forms and service provided for in the Rules of the above Honourable Court and disposing of this matter in such a manner and in accordance with such procedure as it seems meet in terms of Rule 39 of the Rules of the above honourable Court and permitting the matter to be dealt with as an urgent application;*

2. *interdicting and restraining the First Respondent from the date of the order until 18 July 2025 and within the Western Cape Province, from:*

   2.1 being interested or engaged, whether directly or indirectly, with the Second Respondent in any manner whatsoever, whether as a proprietor, partner,shareholder, director, employee, agent, consultant, manager, officer, executive, representative, financier or otherwise, in the promotion or sale of any products which compete with the products in the Applicant's Cranial Spine Technologies portfolio;

   2.2 being interested or engaged, whether directly or indirectly, as a proprietor, partner, shareholder, director, employee, agent, consultant, manager, officer, executive, representative, financier or otherwise, in any firm, business or undertaking, which carries on any activity, either solely or in conjunction with any other party, in the promotion or sale of any products which compete with the products in the Applicant's Cranial Spine Technologies portfolio; and

2.3 approaching the Applicant's employees in order to induce them to leave Applicant's employ and to become interested or engaged, whether directly or indirectly, as a proprietor, partner, shareholder, director, employee, agent, consultant, manager, officer, executive, representative, financier or otherwise, in any firm, business or undertaking, which carries on any activity, either solely or in conjunction with any other party, in the promotion or sale of any products which compete with the products in the Applicant's Cranial Spine Technologies portfolio.

3. Interdicting and restraining the First Respondent from:

3.1 disclosing, disseminating, divulging, relaying or in any other way conveying the Applicant's confidential information to any third party, including the Second Respondent; and

3.2 using, disclosing, disseminating, divulging, relaying or in any other way conveying the Applicant's confidential information for the purpose of promoting or selling of any products which compete with the products in the Applicant's Cranial Spine Technologies portfolio.

4. Ordering the First Respondent to pay the Applicant's costs save in the event of opposition by the Second Respondent, in which case ordering the Respondents who oppose the application to pay the costs, one paying the other being absolved."

[3] In keeping with provisions of Rule 39 of the Labour Court rules, which makes allowance for the filling of a supplementary (fourth) affidavit by the respondent in restraint applications, four affidavits were filed.

Background

[4] Muller has been employed by Medtronic since 1 June 2010 until he was retrenched on 31 August 2024, following a short period of 'garden leave'. His final working day was 18 July 2024.

[5] It is common cause that his contract of employment contained a confidentiality and restraint of trade clause, which imposed on him all the obligations described in the relief sought, except that the geographic scope of the restraint in his contract encompasses the entire country and the prohibition of competitive activities is not confined to the cranial spine technologies ('CST') portfolio of Medtronic.

[6] In May and June, Medtronic underwent a restructuring process which led to Muller's retrenchment. A retrenchment agreement was concluded with employee representatives on 20 June 2024. Both parties accept that it governed Muller's retrenchment though their interpretation of two clauses were at odds with each other.

[7] Clauses 9.1 and 9.2 of his retrenchment agreement state that:

> *"9.1 The restraint of trade provisions in terms of the affected employees' employment contracts with the company shall remain in place should the affected employee be retrenched pursuant to this greement where the affected employee declined any offer re- or alternative employment by the company or any of its affiliates.*
>
> *9.2 In the event that there are no alternatives to retrenchment and the affected employee is retrenched, the company will consider waiving or limiting the scope of the application of the restraint, taking into consideration the affected employee's current business and customer base. Where a restraint is waived or the scope of its application is limited, a specific agreement will be concluded with the employee in writing."*

(capitalisation removed, emphasis added)

[8] Muller contends that clause 9.1 implies that he is not bound by the restraint because he was not offered alternative employment. Whether there was an offer of alternative employment made to him by Medtronic is a matter of dispute. He insists that he had to reject an offer, which had been made to him formally in writing. Failing that, clause 9.1 did not apply to him. Medtronic maintains two other jobs were mentioned to him as possible alternatives, but he made it clear, he was not interested. Muller admits discussions on two positions took place, but claims Medtronic advised him he was not suitable for one of them. In any event, Medtronic argues that even if he was not offered alternative employment, before he could be released from the restraint obligations it was its own decision whether to waive the restraint wholly or in part and conclude a specific written agreement with him. As this never happened, the restraint provisions remain applicable after his retrenchment. This issue will be dealt with further below.

[9] At the time of his retrenchment, Muller was the territory manager of the Western Cape. In that capacity, he was only responsible for Medtronic's neuroscience and neurosurgery portfolio, which included the spine portfolio. Despite acknowledging his responsibility for the specialised portfolio described, Muller says he is at a loss to know which products and technology fall within the ambit of such a portfolio.

[10] Muller maintains that since he held this position from June 2021 he no longer developed or maintained relationships with doctors for whom he was previously responsible. In that role, he claims he no longer had 'access' to his former customer connections. Medtronic accepts that his interaction with customers as a sales representative might have diminished, but that did not end the relationships he had with them. In fact, in an email dated 18 July 2024, in which he provided information on his role and functions as "*District sales manager for Western Cape, Neuroscience"* he had identified "*meetings with key decision makers*" (*"e.g. surgeons"*) and *"maintaining and improving strong customer relations"*, amongst other things, as part of his job responsibilities. The purpose of the email was to assist Medtronic to draw up a work reference letter for Muller,

though he disavowed its significance as an indication of what he did. Another document makes reference to him accompanying a sales representative on visits to doctors, which he does not dispute but maintained it was not a regular occurrence.

Evaluation

Urgency

[11] Medtronic claims that it first became aware that Muller was acting in breach of his restraint agreement in early September 2024 when it was advised that he had been seen visiting doctors at Cape Gate Mediclinic Hospital in the company of Creatori's spine national sales manager. On 10 September 2024 its lawyers wrote to the respondents claiming that Muller had taken up employment with Creatori in breach of his restraint agreement and sought undertakings from Muller to terminate his breach and comply with the provisions of the restraint. The following day Creatori responded, asking for details of the circumstances of Muller's termination and whether the restraint was discussed during retrenchment discussions. It also claimed that Muller was not an employee and the agreement it had concluded with him was an "*independent contractors agreement*". Creatori's letter was followed by a letter from Muller on 12 September 2024 in which he stated that he was an independent contractor to several companies. He also asserted that clause 9.1 of the retrenchment agreement was inapplicable to him and requested Medtronic to honour the agreement and agree to waive or limit the restraint. Medtronic replied on 13 September rejecting his interpretation of the agreement and pointing out that even if he was an independent contractor he was still in breach of the restraint. It extended the ultimatum it had issued for him to adhere to the restraint until 17 September. Creatori was copied with the letter. Muller requested until 20 September to consider the undertaking sought and undertook not to use confidential information in the meantime. The requested extension of time was acceded to by Medtronic. When Muller responded on 20 September, he advanced various reasons why he was not bound by the restraint. He declined to agree not to be involved in any

entity which competed with Medtronic, nor would he agree not to sell or promote similar products to those offered by it. Nonetheless, he undertook not to approach any of its clients it had dealt with during the three years prior to his retrenchment. The last-mentioned undertaking was nevertheless subject to a proviso that he would not turn away Medtronic's clients who approached him to do business with any entity he was involved with. He also undertook not to try and entice employees to leave Medtronic and not to disclose any of its confidential information to third parties.

[12] Medtronic's view was that such undertakings were of little value if he was free to sell competing products of Creatori to the same customers, he was previously acquainted with at Medtronic. Muller maintains that the confidential information he had access to was so complex and intricate it would be impossible to reduce it to memory. Medtronic rejects this assertion and states that his knowledge, particularly of its business strategies for its spine and neuro-technology business units is not beyond the capacity of a person to remember. Furthermore, he would have been very familiar with these, because he was responsible for preparing some of the strategies to expand Medtronic's Western Cape business.

[13] Medtronic responded to Muller's letter only on 30 September, ten days later. Medtronic disputed various claims made in Muller's letter but mentioned that it viewed his undertakings as the beginning of a basis for a compromise that would enable it to protect its interests without resorting to litigation. It made a counter-proposal with the following terms: Muller would agree not to sell or promote products, which competed with Medtronic's CST products to 49 named doctors working at 22 medical facilities; he would not be able to assist such doctors even if they approached him; he would not be able to advise or assist any other person in the sale or promotion of such products and, would not disclose or utilise Medtronic's confidential information in his work for Creatori. The offer remained open to 3 October, failing which Medtronic would launch an application.

[14] Further correspondence ensued and a draft settlement agreement was under consideration by the parties. By 16 October, Medtronic reluctantly

agreed to amendments proposed by Muller, save that it would not accept his proposal to excise the names of 14 doctors at five clinics from the list of doctors he would not be able to have dealings with. It disputed his claim that these doctors were ones he had no prior relationship with, when in fact he had close associations with them. Medtronic's proposal was tabled on a 'with prejudice' basis and it remained open for acceptance even at the hearing of the urgent application. Obviously, the offer was not accepted. However, it still took another three weeks before the application was launched.

[15] Because of the provisions of Rule 39 and the practice that restraint applications are ordinarily not enrolled during recess, Medtronic set out a slightly truncated version of the Rule 39 timetable for filing of subsequent affidavits, so the application could be heard in the last week of term. Muller complained that this violated Rule 39 and the application should be struck off the roll for this reason alone. He also argued that any justification for a more truncated period was created by Medtronic's own delay in launching the application.

[16] Rule 39(3) provides that an applicant should allow respondents in urgent restraint applications, 7 days to file an answering affidavit, and should file any replying affidavit 5 days later. The respondents then should be permitted 5 days to file a supplementary affidavit. In this instance, the applicant allowed 3 days to file a notice of opposition, which is not a required step under the Rule. It still gave the respondents 7 days to file any answering affidavit, but only 3 days to file its own replying affidavit. The respondents were then afforded 4 days to file any supplementary one.

[17] Rule 39(1) states:

> *"(1) Unless circumstances warrant a more urgent hearing, an application in restraint of trade will be enrolled only where the procedure outlined below has been strictly adhered to by the applicant."*

[18] Effectively, the only truncation of the timetable set out in Rule 39 was to allow two days less for filing a replying affidavit and one day less for filing

a supplementary affidavit. These deviations from the time periods laid down in the Rule were minimal and, bar one day, potentially more detrimental to Medtronic than to Muller. This slight infraction of the rule was to ensure the application was heard before the end of term. Although no formal application was made to be excused the slight curtailment of Rule 39 time periods, I do not think that any material prejudice was suffered by Muller as a result and the abbreviated timetable set out in the notice of motion should be condoned.

[19] The question that remains is whether the delay between Medtronic discovering Muller's alleged breach of the restraint and launching the application is acceptable. In general, urgent applications are justified when the right an applicant is entitled to enforce cannot be effectively realised if it follows the normal timetable for initiating and prosecuting a claim in the ordinary course of motion or trial proceedings.

[20] In the case of restraint applications, the right an applicant wishes to enforce is the right to compel the respondent to comply with the terms of the restraint, which amounts to an order for specific performance. Suing for damages flowing from a breach in due course by means of an action is a cumbersome and invariably more costly way of obtaining some recompense but is not a direct nor effective way of realising to the employer's contractual right to enforce the terms of the agreement and halt the unlawful action from continuing. Waiting for an application for enforcement to be enrolled in the ordinary course is normally considered inappropriate because the restraint is likely to be near its expiry date by the time the application is heard.

[21] The inability of obtaining substantial relief in due course is a weighty factor in favour of granting urgent relief, because to deny it effectively bars an applicant from accessing their primary remedy. Doubtless this is one reason why it is recognised that applications to enforce restraint of trade

agreements are considered inherently urgent in nature[1], another reason possibly being their limited duration[2].

[22] Factors which might nonetheless preclude the success of an urgent application include whether the urgency is self-created, whether respondents might suffer any procedural prejudice or whether the administration of justice may be prejudiced.

[23] Muller contends that any urgency in this matter is self-created. In *Ecolab (Pty) Ltd v Thoabala & another*[3] this court emphasised that the inherently urgent nature of restraint of trade applications, does not exempt an applicant from acting promptly to launch an urgent application:

> *:[16] The applicant's approach in this case in regard to the issue of urgency was that the enforcement of confidentiality and restraint undertakings is a matter that should be treated as inherently urgent, and that what was required was for it to prove that Thoabala is in breach. It was further submitted on its behalf that it did not matter how long the respondents had been in breach, and that what mattered was when the applicant discovered that there was a breach. Mr Donaldson for the applicant further submitted that it was not required of the applicant to present a substantial explanation as to the reason the matter should be accorded urgency. There are obvious fundamental problems with this approach, which in my view is either a misinterpretation or misunderstanding of the acceptance by Davis J in Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff & another that breaches of restraint of trade undertakings have an inherent quality of urgency.*
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> *[17] One cannot quarrel with the conclusion that there is indeed inherent threat and prejudice to an employer whose ex-employee flagrantly fails to comply with his or her confidentiality and restraint of trade undertakings, and particularly one that immediately joins a competitor. At the same time however, I did not understand the import of Mozart Ice Cream to be an erosion of the requirements of rule 8 of this court's rules, read together with clause 12 of the Practice Manual of this court, 8 or worst*

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[1] *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff & another* (2009) 30 *ILJ* 1750 (C) at 1761.

[2] See *Vumatel (Pty) Ltd v Majra & others* (2018) 39 *ILJ* 2771 (LC) at paragraph 21.

[3] (2017) 38 *ILJ* 2741 (LC)

still, to imply that these disputes should enjoy special privileges in this or any other court. To hold otherwise would lead to absurdity and unmitigated abuse of court processes, in that any party aggrieved by alleged non-compliance with restraint provisions may fold its arms and approach a court at its leisure, and long after the alleged breach, to seek urgent intervention. In such circumstances obviously, any urgency claimed will be regarded as self-created. The court should therefore refuse to assist an applicant who approaches it for urgent relief at its leisure and then claims that it did not matter how long it had known of the alleged breach.

[18] It is my view that even if breaches of restraint of trade may have an inherent quality of urgency, these disputes cannot by mere virtue of that quality, be treated any differently from any other disputes that randomly come before this court on an urgent basis. Thus, for example, an employer faced with the prospects of unprotected strike action is entitled to approach this court on an urgent basis, in the same way as is a union threatened with a mass dismissal of its members flowing from participation in a protected strike. There can be no doubt that these disputes in view of the consequences that flow from the threat or actual conduct in question, also have an element of inherent urgency about them.

[19] In a nutshell therefore, there is nothing inherently special or unique about restraint of trade disputes that makes them deserve more urgent attention from this court than other disputes. To hold otherwise would equally be contrary to the tenets of s 9(1) 10 of the Constitution of the Republic, 11 read together with s 34. 12 Thus, all disputes that come before the court on an urgent basis should be treated equally, without giving preference based on their nature, with the only distinguishing factor being whether the requirements in rule 8 have been met.

[20] To summarise then, parties alleging breaches of restraint of trade agreements are not indemnified from satisfying the requirements in rule 8. Thus, a mere contention that the enforcement of a restraint of trade is inherently urgent and therefore must be treated as such by this court without any further consideration cannot by all accounts be sustainable. The fact that these disputes may have an inherent quality of urgency cannot be equated to a free pass to urgent relief on the already over-burdened urgent roll in this court. Like all other urgent matters, more than a mere allegation that a matter is urgent is

required. This therefore implies inter alia that the court must be placed in a position where it must appreciate that indeed a matter is urgent, and also that an applicant in the face of a threat to it or its interests had acted with the necessary haste to mitigate the effects of that threat to it or its interests had acted with the necessary haste to mitigate the effects of that threat."

[24] In a similar vein, it was held in *Vumatel (Pty) Ltd v Majra & others* [4] that:

"[23] In the case of restraints of trade, to what extent the applicant's failure contributes to the inability to obtain substantial redress in due course is an especially important consideration where it comes to urgency. This is because the clock starts ticking as soon as the employee leaves employment. It follows that as soon as the employer realises that there is a possible violation of the restraint, it must act promptly. If the employer does so, it would be able to successfully argue that the possibility of the restraint period expiring before the matter can be heard in the ordinary course is not due to its own doing. This kind of consideration would be why this requirement is inextricably linked with the other requirements of urgency in the case of restraints.

[24] The court is not saying that when an employer realises there is a violation of the restraint of trade, an application must be launched yesterday. This court has said that it is advisable to first try to avoid litigation by demanding compliance and seeking an undertaking to comply. But at best, this kind of pre-emptive approach can account for a period of a week or two in the whole scheme of things. I do not attach a specific time period to this, as it would naturally depend on the interaction between the parties, and the particular facts of the case."

[25] In *National Union of Metalworkers of SA & others v Bumatech Calcium Aluminates* (2016) 37 *ILJ* 2862 (LC) the Court held:

"[26] Urgency must not be self-created by an applicant, as a consequence of the applicant not having brought the application at the first available opportunity. In other words, the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency. But the longer it takes from the date of the event giving rise to the proceedings, the more urgency is diminished. In short,

[4] (2018) 39 *ILJ* 2771 (LC)

> *the applicant must come to court immediately, or risk failing on urgency. In Collins t/a Waterkloof Farm v Bernickow NO & another the court held that —*
>
> *'if the applicants seeks this court to come to its assistance it must come to the court at the very first opportunity, it cannot stand back and do nothing and some days later seek the court's assistance as a matter of urgency'."* [5]

[26] This means that applicants in restraint of trade matters, must act expeditiously in launching the urgent proceedings. In doing so they also need to bear in mind the length of time before the matter can be enrolled for a hearing taking account of the time periods set out in Rule 39.

[27] In this instance Medtronic initially acted promptly on 10 September once it learnt of Muller's visit to Cape Gate Medical Hospital with Creatori's national sales manager. By 12 September it already had confirmation that he was working for Creatori, albeit allegedly as an independent contractor, which nevertheless would have put him in breach of the provision in his restraint agreement prohibiting him from being in any way involved in an entity promoting the sale of competing products. After indulging Muller with an extended ultimatum to comply with the restraint, Medtronic knew on 20 September that he would not discontinue working with Creatori, and that even though he would not approach former clients he had dealt with in the preceding three years, he would deal with them if they approached him. He said he would honour his confidentiality obligations. Medtronic felt this was of little comfort if he was still free to deal with former clients who approached him.

[28] It took Medtronic a full ten days to respond with a modified proposal, the gist of which was to pin down the identity of former clients, whom he would not assist under any circumstances. Two further weeks' passed at the end of which they could not agree on the inclusion of 14 doctors and a final proposal was tabled by Medtronic and left open for acceptance by Muller. The application was only launched three weeks later. It took nearly a month to enrol the matter because of the provisions of Rule 39, which

[5] Cited with approval in *Radebe and Others v Aurum Institute* (2024) 45 *ILJ* 876 (LC) at paragraph [17].

Medtronic only sought to minimally curtail so it could have the application enrolled before the recess. The upshot is that nearly three months has passed since the breach had taken place by the time the matter was heard.

[29] I accept that the parties appear to have been genuinely engaged in trying to settle the matter without litigating, but Medtronic showed no sense of urgency in the conduct of the discussions, which proceeded at a relatively leisurely pace, added to which it took inordinately long to file the application after making its final offer, so that nearly two months had passed since it came to have knowledge of the breach and the launching of the application. The urgency of the application cannot be determined by the time it takes to exhaust settlement discussions. By the time it was enrolled for hearing nearly three months had passed since Medtronic was alerted to the breach.

[30] In the circumstances, I am not satisfied that Medtronic approached this court with sufficient urgency and it falls to be struck off the roll for that reason. This being an essentially contractual matter, there is no reason for costs not to follow the result.

Order

[1] The application is struck off the roll for lack of urgency, with costs.

R Lagrange
Judge of the Labour Court of South Africa.

Parties' Representatives:

For the Applicant	L Frahm-Arb of Faskens
For the First Respondent	J P Steenkamp instructed by GVS Law