



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 2277 / 19

In the matter between:

PECSSER (PTY) LTD

Applicant

and

MARIO BOSHOFF

First Respondent

GRW ENGINEERING (PTY) LTD

Second Respondent

GRW COMMERCIALS (PTY) LTD

Third Respondent

GRW HOLDINGS (PTY) LTD

Fourth Respondent

Heard: 26 November 2019

Delivered: 5 December 2019

Summary: Restraint of trade – principles stated – application of principles to matter – issue of protectable interest considered

Restraint of trade – nature of confidential information – no evidence of employee having confidential information – no protectable interest with regard to confidential information shown

Restraint of trade – nature of customer connections – no protectable interest with regard to customer connections shown

Restraint of trade – nature of positions of employee considered – no threat to protectable interest of employer – particular skill and expertise accruing to employee – does not form part of protectable interest of employer.

Restraint of trade – no reason for enforcing restraint other than stifling competition – impermissible purpose for enforcing restraint

Interdict – no clear right shown for final relief – interdict refused

Costs – no real basis for bringing application – costs order justified

REASONS

SNYMAN, AJ

Introduction

[1] The applicant, in the current application, seeks to enforce a restraint of trade against the first respondent, so as to prevent him from taking up employment with the second to fourth respondents. The second to fourth respondents have been joined in the application only on the basis of having an interest in the matter, as a result of the contemplated employment of the first respondent with them, at the time this application was brought. I will, for the sake of convenience, refer to the second to fourth respondents jointly as 'GRW'. The first respondent has opposed the application, whilst GRW did not engage in the application.

[2] Even though the first respondent did grumble about urgency in the answering affidavit, urgency was in reality not strenuously opposed when the matter was argued. Considering that the first respondent was due to start work with GRW on 2 December 2019, and the application was of a preventative nature, I

accept that the applicant satisfied all the requirements of urgency,¹ in that it first tried to resolve the matter with the first respondent and tried to convince him to withdraw his resignation, and when this failed it brought this application expeditiously so as to ensure that was heard before the eventuality of the actual employment of the first respondent with GRW occurred. Also, and being preventative, there is no other form of substantial redress available to the applicant in due course.² I also consider that restraint of trade applications have an inherent quality of urgency.³ The application is in my view urgent, and I am therefore willing to entertain the application on the merits thereof.

[3] The application came before me on 27 November 2018. After hearing argument from the applicant and first respondent, I made an order in the following terms:

1. The application is dismissed with costs.
2. Written reasons for this order will be handed down on 5 December 2019.

This judgment now constitutes the written reasons as contemplated by paragraph 2 of my order, above.

[4] When this matter was argued, an issue arose concerning the *onus* in restraint applications, and also how factual disputes that arose in the course of restraint of trade applications fell to be resolved. Dealing first with the issue of the *onus*, it is true that the issue is somewhat controversial. One the one hand, it has been held that the correct position in law is that the respondent party seeking to defeat the application of the restraint of trade had the *onus* to prove the restraint of trade is unreasonable and not enforceable.⁴ On the other hand, recent developments in the jurisprudence however steer away from the

¹ For the requirements of urgency see *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another* (2016) 37 ILJ 2840 (LC) at paras 20 – 26, and in particular where it comes to restraint of trade applications:- *Vumatel (Pty) Ltd v Majra and Others* (2018) 39 ILJ 2771 (LC) at paras 4 – 5; *Ecolab (Pty) Ltd v Thoabala and Another* (2017) 38 ILJ 2741 (LC) at para 20.

² See *Maqubela v SA Graduates Development Association and Others* (2014) 35 ILJ 2479 (LC) at para 32; *Transport and Allied Workers Union of SA v Algoa Bus Co (Pty) Ltd and Others* (2015) 36 ILJ 2148 (LC) at para 11.

³ In *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff and Another* (2009) 30 ILJ 1750 (C) at 1761 the Court held: ‘... I accept that breaches of restraints of trade have an inherent quality of urgency....’. See also *Vumatel (supra)* at para 4.

⁴ See *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 875H-I; *Dickinson Holdings Group (Pty) Ltd and Others v Du Plessis and Another* (2008) 29 ILJ 1665 (N) para 89; *Bridgestone Firestone Maxiprest Ltd v Taylor* [2003] 1 All SA 299 (N) at 302J-303B; *Jonsson Workwear (Pty) Ltd v Williamson and Another* (2014) 35 ILJ 712 (LC) at para 8.

existence of an *onus* as traditionally understood. In *Reddy v Siemens Telecommunications (Pty) Ltd*⁵ the Court said that:

‘... If the facts disclosed in the affidavits, ... disclose that the restraint is reasonable, then Siemens must succeed: if, on the other hand, those facts disclose that the restraint is unreasonable then Reddy must succeed. What that calls for is a value judgment, rather than a determination of what facts have been proved’.

[5] However, and irrespective of where the *onus* may or may not lie, this simply does not change the manner in which factual disputes are to be resolved, considering that restraint proceedings are motion proceedings in which final relief is sought.⁶ In *Reddy supra*⁷ the Court said that:

‘... A final order can only be granted in motion proceedings if the facts stated by the respondent together with the admitted facts in the applicant's affidavits justify the order, and this applies irrespective of where the *onus* lies.’

[6] It follows that even in restraint applications, factual disputes must resolved by way of the application of the well-known principles established in the judgment of *Plascon Evans Paints v Van Riebeeck Paints*.⁸ These principles are, in short, that it is the facts as stated by the respondent together with the admitted or undenied facts in the applicant's' founding affidavit which provide the factual basis for the determination, unless: (1) the factual dispute raised by the respondent is not real or genuine; (2) denials presented are bald or uncreditworthy; (3) the respondent's version raises obviously fictitious disputes of fact; or (4) the respondent's version is palpably implausible or far-fetched or so clearly untenable that the court is justified in rejecting it.⁹

⁵ (2007) 28 ILJ 317 (SCA) at para 14. This approach was applied by the LAC in *Labournet (Pty) Ltd v Jankielsohn and Another* (2017) 38 ILJ 1302 (LAC) at para 40; *Ball v Bambalela Bolts (Pty) Ltd and Another* (2013) 34 ILJ 2821 (LAC) at para 14.

⁶ *Jonsson (supra)* at para 9.

⁷ *Id* at para 4. See also *Labournet (supra)* at para 40; *Ball (supra)* at para 14; *Vumatel (supra)* at para 29; *New Justfun Group (Pty) Ltd v Turner and Others* (2018) 39 ILJ 2721 (LC) at para 10.

⁸ 1984 (3) SA 623 (A) at 634E-635C; See also *Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 259C – 263D; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) at paras 26 – 27; *Molapo Technology (Pty) Ltd v Schreuder and Others* (2002) 23 ILJ 2031 (LAC) at para 38.

⁹ See the summaries in *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* 2005 (2) SA 359 (CC) at para 53 and *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another* 2009 (3) SA 187 (W) para 19.

[7] Because the applicant seeks final relief, the applicant must satisfy three essential requisites in order to succeed, being (a) the existence of a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.¹⁰ Applying the value judgment referred to in *Reddy supra*, and utilizing the *Plascon Evans* principles, I shall now set out the proper background facts that would be pertinent in deciding whether the applicant has satisfied these requirements.

The relevant facts

[8] The applicant is in the business of installing and maintaining refrigeration units in trucks, delivery vehicles and truck trailers, and in particular, installing the Carrier Transicold brand of units. The applicant does not manufacture such units, but act as a distributor, installer and servicing agent. The applicant also installs and services Eberspacher bus air conditioning and BAR cargo lifts.

[9] The first respondent was first employed by an international organization called Carrier Transicold in South Africa, commencing employment with it on 1 October 2010. Carrier Transicold, as stated above, is the brand currently distributed and maintained by the applicant. The first respondent received all his essential training, experience and expertise at Carrier Transicold. He progressed to become the national technical and training manager of Carrier Transicold.

[10] In 2013, Carrier Transicold decided to withdraw its local presence within the entire SADC region. That meant that going forward, Carrier Transicold would only operate through local representatives distributing and maintaining its products. That is how the applicant came into the picture, and by virtue of a commercial agreement with Carrier Transicold, it became the local distributor of the Carrier Transicold products.

¹⁰ *Setlogelo v Setlogelo* 1914 AD 221 at 227; *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) para 20. In particular, and where it comes to restraint applications, see *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronjé and Another* (2011) 32 ILJ 601 (LC) at para 38 – 40; *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes and Another* (2012) 33 ILJ 629 (LC) at para 26; *Experian SA (Pty) Ltd v Haynes and Another* (2013) 34 ILJ 529 (GSJ) at para 59; *Jonsson (supra)* at para 54; *FMW Admin Services CC v Stander and Others* (2015) 36 ILJ 1051 (LC) at para 1.

- [11] Pursuant to the agreement between Carrier Transicold and the applicant, the employees of Carrier Transicold, which included the first respondent, would move across to the applicant. It is unclear from the affidavits on what basis this transfer happened, but what is indeed clear is the first respondent was required to sign a new contract of employment with the applicant.
- [12] The first respondent's new contract of employment with the applicant was signed by him on 24 January 2014. In terms of this contract of employment, his effective date of employment with the applicant was agreed to be 14 December 2013. He was employed as manager technical, quality and training. His defined responsibilities in terms of the contract was '*to manage all aspects of Engineering and Technical issues with Carrier Transicold, Design of new Installations, Quality control, training and development of technicians and managing contracts and expenses from agents*' (sic).
- [13] The employment contract also contained a restraint of trade provision. The sum total of it read:

'Please note that should you leave the company, it is a specific condition of service that you will not be allowed to join one of the Company's competitors/operate in the same business as the Company for your own account or indirectly for anyone else's account within six of the termination of your employment with the Company, within a range of 200km'

It is not indicated in the employment contract what the basis of the interest was that the applicant sought to protect by way of this provision, which one normally finds in restraint of trade covenants. The provision is, generally speaking, rather bare.

- [14] In June 2016, the first respondent sought to resign from the employment of the applicant. He explained in the answering affidavit that he had received an offer of employment from HFR Schaefer Vervoer, which was the cause for his resignation. He also stated that he decided to consider being employed elsewhere, not for an increase in remuneration, but because he was dissatisfied with his working conditions at the applicant. His issue was that his workload was too high and he did not receive enough assistance in the carrying out of his duties.

- [15] In an attempt to retain the services of the first respondent, the applicant, in effect, threw money at him. According to the first respondent, the applicant also agreed to resolve the difficulties with his working conditions. The first respondent then agreed to stay, and on 1 July 2016, the parties signed an addendum to the first respondent's contract of employment in which his increased salary was recorded, and also his restraint of trade was updated. The restraint clause in this addendum was identical to the restraint in his original contract of employment, save for the fact that 200km radius was removed.
- [16] On 2 September 2019, the first respondent again resigned. He explained that the applicant did not come to the party with the promised assistance, and that his workload in the period between January 2019 and July 2019 had increased to the extent that he was struggling to cope. When he received an offer employment from GRW on 31 August 2019, the first respondent decided to accept it. In terms of the addendum to his contract of employment, he was required to give three months' notice, meaning that his employment with the applicant would finally terminate on 30 November 2019. The first respondent was required by the applicant to work out his notice.
- [17] The applicant again tried to convince the first respondent to stay. The founding affidavit contains some detail about discussions in this regard, which is not relevant for the purposes of deciding this application. Suffice it to say, this time the first respondent was not willing to reconsider. Hence the current application.
- [18] It is at this juncture appropriate to set out what GRW does. It is in the business of the manufacture of truck bodies and trailers. It is not in the business of the distribution and maintenance of refrigeration units. Customers come to GRW to order and purchase a truck trailer. That trailer is then manufactured by GRW according to the specifications the customer requires. This may include a refrigerated trailer. GRW also manufactures a variety of other trailers that are not refrigerated, which includes tanker trailers.

- [19] In the past, and where a customer required a refrigerated trailer, GRW would utilize the services of third party service providers to provide and install a refrigeration unit in a trailer. These service providers would include the applicant as well. Other products used by GRW is Thermo King and Transfrig, existing competitors of the applicant. GRW was never in the business of providing and selling refrigeration units to third parties and other trailer manufacturers, which was what the applicant did. The applicant also never manufactured and supplied trailers to customers.
- [20] In the replying affidavit, the applicant in fact establishes why GRW would later come to have an interest in the employment of an employee such as the first respondent. The applicant sets out, in some detail, the existence of a competing product to Carrier Transicold and Thermo King, the primary products supplied locally, in the European market place. This competing product is manufactured and supplied by an organization called Schmitz Cargobuild AG ('Schmitz'). Schmitz decided, as from about 2012, to enter the market of manufacturing and supplying refrigeration units for truck bodies and trailers, and thus compete directly with Carrier Transicold and Thermo King. According to the applicant, Schmitz invested in GRW, to the extent of acquiring 33% of the shares of GRW, effective 1 August 2017. I accept that on the evidence, it appears that GRW and Schmitz are now operating in a joint venture, locally.
- [21] This new joint venture, which is a purely business transaction, obviously has negative implications for the business of the applicant. This clearly, in my view, left it with a distinct case of sour grapes. With Schmitz being a manufacturer of refrigeration units for truck bodies and trailers, it is patently obvious that going forward, those units would be installed into the truck bodies and trailers manufactured by GRW for customers that require these units, without GRW having the need to contract with a third party service provider such as the applicant to supply and install the same. It followed that the applicant would lose this business where it comes to trailers supplied by GRW to customers, as a result of this commercial transaction. That, unfortunately for the applicant, is life in the open and competing market.

- [22] But this commercial reality did not stop the applicant from nonetheless complaining. In its replying affidavit, it stated that in July 2018, it had a purchase order from Unitrans (a road freight transport service provider) to install 10 refrigeration units into 10 new trailers ordered by Unitrans from GRW. The value of the order was just short of R3.8 million. However, Unitrans then cancelled the order, before it could be carried out. The applicant met with Unitrans about this, and was told that Unitrans would, going forward, in effect acquire complete trailers from GRW with the Schmitz refrigeration unit already installed. What is however significant is that the applicant lost this business long before the first respondent resigned, and obviously not due to any violation of the restraint of trade by the first respondent.
- [23] The simple commercial reality that faced the applicant was that customers that ordered refrigerated trailers or truck bodies from GRW, now did not need the applicant. They could get a complete 'in house' service, so to speak, from GRW, because of its joint venture with Schmitz. That had been the case at least since the latter part of 2017. However, and unlike the applicant, GRW does not distribute Schmitz refrigeration units to other manufacturers or end users. It installs Schmitz refrigeration units only in the trailers and truck bodies made by it. Ms Davies, representing the first respondent, gave what I believe to be quite an illustrative analogy. One does not build a house for the air conditioner. The fact that the builder may have his own air conditioner supplier, does not mean that the builder deals in air conditioners.
- [24] GRW, now installing its own refrigeration units, so to speak, would need personnel to do so. It would also need personnel to maintain these units. After all, it provides a maintenance service to its customers, just like any other motor industry manufacturer (trailer manufacture resorts under MIBCO). This is where the first respondent comes in, and why GRW would be interested in employing him. This then leads the crisp question to be answered in this application, being whether this employment in this context constitutes a violation of the restraint of trade. This is the question I will answer below.

Restraint principles

- [25] I will commence deciding this matter by first setting out the pertinent restraint principles, which lie at the heart of deciding any restraint of trade case. It is the application of these principles that establish the existence of a clear right, as the first requirement for the applicant obtaining the relief it seeks.
- [26] Restraints of trade are valid and binding, and as a matter of principle enforceable, unless the enforcement thereof is considered to be unreasonable.¹¹ A restraint of trade does not infringe on the constitutional right to free economic activity.¹² The general principles applicable to the enforcement of restraints of trade as set out in *Basson v Chilwan and Others*¹³ are consistently applied, and are now trite.¹⁴ These principles entails answering the following questions: (a) Does the applicant 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? and (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? More recent developments of these restraint enforcement principles includes answering a further question, being whether the restraint goes further than necessary to protect the relevant interest?¹⁵ This approach of answering these five questions in total, in deciding whether the enforcement of a restraint of trade would be reasonable, is now trite and has been consistently applied in this Court and the Labour Appeal Court.¹⁶ Answering these five questions involves

¹¹ *Magna Alloys (supra)* at 891B-C; *Reddy (supra)* at para 14; *Labournet (supra)* at para 39; *Ball (supra)* at para 13; *Esquire (supra)* at para 26; *SPP Pumps (SA) (Pty) Ltd v Stoop and Another* (2015) 36 ILJ 1134 (LC) at para 26; *Shoprite Checkers (Pty) Ltd v Jordaan and Another* (2013) 34 ILJ 2105 (LC) at para 20.

¹² *Reddy (supra)* at paras 15 – 16. See also *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* 2001 (2) SA 853 (SE) where the Court said: ‘The Constitution does not take such a meddlesome interest in the private affairs of individuals that it would seek, as a matter of policy, to protect them against their own foolhardy or rash decisions’.

¹³ 1993 (3) SA 742 (A) at 767G-H.

¹⁴ See *Jonsson (supra)* at para 44; *SPP Pumps (supra)* at para 26; *Medtronic (Africa) (Pty) Ltd v Van Wyk and Another* (2016) 37 ILJ 1165 (LC) at para 15; *Esquire (supra)* at para 16; *Henred Freuhauf (Pty) Ltd v Davel and Another* (2011) 32 ILJ 618 (LC) at para 15.

¹⁵ *Jonsson (supra)* at para 44; *Medtronic (supra)* at para 15; *Esquire (supra)* at paras 50 – 51.

¹⁶ *Labournet (supra)* at para 42; *Jonsson (supra)* at para 44; *Medtronic (supra)* at paras 14 – 15; *Vox Telecommunications (Pty) Ltd v Steyn and Another* (2016) 37 ILJ 1255 (LC) at paras 28 – 29; *Shoprite Checkers (supra)* at paras 23 – 24; *Benchmark Signs Incorporated v Muller and another* [2016] JOL 36587 (LC) at para 15.

a determination on the facts of that particular case, applying, as held in *Ball v Bambalela Bolts (Pty) Ltd and Another*¹⁷, the following approach:

‘... the determination of reasonableness is, essentially, a balancing of interests that is to be undertaken at the time of enforcement and includes a consideration of ‘the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests’

[27] A protectable interest of the applicant in a restraint of trade can mostly be found in one or both of two considerations, being confidential information (trade secrets), or trade connections.¹⁸ In *Labournet (Pty) Ltd v Jankielsohn and Another*¹⁹ the Court held:

‘...A restraint is only reasonable and enforceable if it serves to protect an interest, which, in terms of the law, requires and deserves protection. The list of such interests is not closed, but confidential information (or trade secrets) and customer (or trade) connections are recognised as being such interests. ...’

[28] Considering first what constitutes confidential information, it can be summarized as follows:²⁰ (a) Information received by an employee about business opportunities available to an employer; (b) the information is useful or potentially useful to a competitor, who would find value in it; (c) Information relating to proposals, marketing to submissions made to procure business; (d) information relating to price and/or pricing arrangements, not generally available to third parties; (e) the information has actual economic value to the person seeking to protect it; (f) customer information, details and particulars; (g) information the employee is contractually, regulatory or statutory required to keep confidential; (h) Information relating to the specifications of a product, or a process of manufacture, either of which has been arrived at by the

¹⁷ (2013) 34 ILJ 2821 (LAC) at para 17. See also *Labournet (supra)* at para 40.

¹⁸ *Dickinson Holdings Group (Pty) Ltd and Others v Du Plessis and Another* (2008) 29 ILJ 1665 (N) at para 32; *Basson (supra)* at 769 G – H; *Bonnet and Another v Schofield* 1989 (2) SA 156 (D) at 160B-C; *Hirt and Carter (Pty) Ltd v Mansfield and Another* (2008) 29 ILJ 1075 (D) at para 37; *Esquire (supra)* at para 27; *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) at 502E-F; *Medtronic (supra)* at para 16 – 17; *FMW (supra)* at para 36; *Vox (supra)* at para 30.

¹⁹ (2017) 38 ILJ 1302 (LAC) at para 41.

²⁰ See *Dickinson (supra)* at para 33; *Jonsson (supra)* at paras 46 – 49; *David Crouch Marketing CC v Du Plessis* (2009) 30 ILJ 1828 (LC) at para 21; *Esquire (supra)* at para 29; *Experian (supra)* at para 19; *Medtronic (supra)* at para 16.

expenditure of skill and industry which is kept confidential; and (i) information relating to know-how, technology or method that is unique and peculiar to a business. Importantly, the information summarized above must not be public knowledge or public property or in the public domain. In short, the confidential information must be objectively worthy of protection and have value.

[29] Next, trade connections is where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he leaves employment and becomes employed by a competitor, the employee could easily or readily induce the customers to follow the employee to the new business.²¹ Whether the employee can be seen to have the ability to exert this kind of influence, is dependent upon the duties of the employee, the employee's particular personality and skill, the frequency and duration of contact between the employee and the customer, the nature of the relationship between the employee and the customer and in particular whether the relationship carried with it a notion of trust and confidence, the knowledge of the employee of the particular requirements of the customer and the nature of its business, how competitive the rival businesses are, and the nature of the product or services at stake.²²

[30] The seniority of the employee concerned is also a relevant factor when deciding if a protectable interest exists.²³ The more senior the employee, the more likely it is that the employee would be entrenched with what can legitimately be considered to be a protectable interest based on the above two considerations.²⁴ Seniority is not just the level of the employee in the organization of the erstwhile employer, but also includes factors such as the influence, knowledge, expertise, nature of duties, relationships and even the particular person of the employee.

[31] In deciding whether a protectable interest has been infringed upon, it is not necessary to show that there has been actual harm to the employer. It is about

²¹ See *Rawlins and another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at 541D-F; *FMW (supra)* at paras 46 – 48; *Esquire (supra)* at paras 31 – 32; *Experian (supra)* at para 18; *LR Plastics (Pty) Ltd v Pelser* [2006] JOL 17855 (D) at para 26.

²² *Caravantruck (supra)* at 541F-I; *FMW (supra)* at para 45; *Aquatan (Pty) Ltd v Jansen van Vuuren and Another* (2017) 38 ILJ 2730 (LC) at para 24; *Medtronic (supra)* at para 17.

²³ See *Dickinson (supra)* at para 38; *Stewart Wrightson (Pty) Ltd v Minnitt* 1979 (3) SA 399 (C) at 404B-C; *Random Logic (Pty) Ltd t/a Nashua, Cape Town v Dempster* (2009) 30 ILJ 1762 (C) at para 32; *Experian (supra)* at para 43; *Jonsson (supra)* at para 51.

²⁴ See *David Crouch (supra)* at para 21.

the risk created to the employer.²⁵ It is not necessary to show that the employee had actually solicited the custom of the customers he or she dealt with whilst employed at the employer, and all that must be shown is that the employee indeed had a close working relationship with customers, and that it is likely that the employee is in a position to convince these customers to take their business elsewhere. In sum, is the employee in a position to act to the detriment of the erstwhile employer?²⁶ The same risk consideration applies to confidential information, the only consideration being whether it could harm the employer or lead to an unfair advantage to the competitor if disclosed.²⁷

[32] Where it comes to the quantitative and qualitative weigh off to be conducted, the scope and period of the restraint is relevant. A shorter restraint and properly limited geographical area (if applicable) would mitigate in favour of enforcement, whilst an unduly long and broad restraint would mitigate against it.²⁸ It must also be considered whether the employee was possessed of the skills, expertise, qualifications and experience before joining the employer, as it could be seen as unfair in the weigh off to prevent the employee from earning a living under such circumstances.²⁹ The nature of the industry is also an important consideration, in that the more specialized the industry, the more the weigh off will favour the employer, as it limits the scope of the restraint and leaves much more avenues open to the employee to procure gainful employment in other industries. Whether the employee is wholly or partly remunerated for the restraint period is also a consideration in favour of enforcement, but this is not a requirement.

[33] It does not matter whether the employee, where employment with a competitor can be seen to be a violation of the restraint, gives an undertaking that the employee will not exploit trade connections or disclose confidential

²⁵ See *Reddy (supra)* at para 20; *Den Braven SA (Pty) Ltd v Pillay and Another* 2008 (6) SA 229 (D) at para 17; *Point 2 Point Same Day Express CC v Stewart and Another* 2009 (2) SA 414 (W) at para 14; *SPP Pumps (supra)* at paras 30 and 37; *Esquire (supra)* at para 27; *Continuous Oxygen (supra)* at para 34.

²⁶ *Continuous Oxygen (supra)* at para 42; *Medtronic (supra)* at para 30; *Vox (supra)* at para 31.

²⁷ *IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Hall (Aka Baghas) and Another* 2004 (4) SA 174 (W) at para 13.4.1; *Medtronic v Kleyhans and Another* (2016) 37 ILJ 1154 (LC) at para 40; *Medtronic (supra)* at para 34; *New Justfun (supra)* at para 12; *SPP Pumps (supra)* at para 30; *Vumatel (supra)* at para 37.

²⁸ *Labournet (supra)* at para 43; *Continuous Oxygen (supra)* at para 47

²⁹ *Automotive Tooling Systems (Pty) Ltd v Wilkens and Others* (2007) 28 ILJ 145 (SCA) at para 8; *Labournet (supra)* at paras 43 - 44; *Jonsson (supra)* at para 51; *Vumatel (supra)* at para 39.

information, as this is not a consideration that can be applied in favour of the employee and simply does not serve as a defence.³⁰

[34] As to whether the restraint goes further than needed to protect a protectable interest, the essence of the enquiry is to establish whether restraint only serves to stifle competition.³¹ In other words, enforcing the restraint does nothing more than spiting the employee and the competitor for whom the employee intends to work, and does nothing to protect the business or interests of the erstwhile employer.³²

[35] Finally, and where it comes to public interest, this consideration would arise where the enforcement of the restraint may be *contra bonos mores*, or seek to support some kind of device or illegality or prohibited business model.³³ That which is unlawful cannot be protected.

Analysis

[36] In next applying the aforesaid principles, I will first consider whether the applicant has a protectable interest. The applicant has sought to rely on both aspects, being confidential information and trade connections, to seek to establish the existence of a protectable interest.

Confidential information

[37] As to confidential information, the applicant contends in the founding affidavit that the first respondent is possessed of confidential information, worthy of establishing a protectable interest. According to the applicant, the first respondent participated in and was privy to management meetings of the applicant. In those meetings, according to the applicant, the first respondent was privy to the applicant's strategies and trade secrets, which included

³⁰ As said in *BHT Water Treatment (Pty) Ltd v Leslie and Another* 1993 (1) SA 47 (W) at 57J-H: '... the applicant should not have to content itself with crossing its fingers and hoping that the first respondent would act honourably or abide by the undertakings he has given...'. See also *Reddy (supra)* at para 20; *Ball (supra)* at para 22; *Shoprite Checkers (supra)* at para 43; *Vox (supra)* at para 32; *Medtronic (supra)* at para 34; *New Justfun (supra)* at para 21; *Vumatel (supra)* at para 40.

³¹ *North Safety Products (Africa) (Pty) Ltd v Nicolay* (2007) 28 ILJ 350 (C) at 353H-I; *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) at 507A-B; *Labournet (supra)* at paras 41 and 62; *FMW (supra)* at para 43.

³² *Vumatel (supra)* at para 41.

³³ *FMW (supra)* at paras 62 – 63.

developing the applicant's refurbishment business, conducting training at the facilities of the applicant's suppliers, the weaknesses and strengths of the applicant's products, and the marketing and sales and pricing of the applicant's products. The applicant also states that the first respondent was exposed to the applicant's business strategies which included plans to grow the business, its financial results, and profit margins. Lastly, the applicant stated that the first respondent knew the identity of the applicant's customers and their needs.

[38] The first respondent states in his answering affidavit that he was not party to strategic management meetings. According to the first respondent, his role which was primarily focussed on technical assistance and training, and did not involve strategic issues at all. He also states that he was not in any way involved in the sales divisions which had the connections with customers. He added that because the applicant was not in any manner involved in the manufacture of the units, he was not privy to any technical information or manufacturing process relating to the manufacture of the units. The first respondent was adamant that strategic and financial decision making vested solely with Daniel Coetser, the CEO of the applicant, and that he was not privy to it. The difficulty the applicant therefore has, from the outset, is that this version of the first respondent is not a mere bald denial, or so unlikely or uncreditworthy that it falls to be rejected. The application of *Plascon Evans* must mean that the version of the first respondent in this regard prevail, and this does serious harm to the applicant's case.

[39] The further problem I have with the applicant's case of the first respondent having access to confidential information, is the unfortunate lack of sufficient particularity in the founding affidavit. Overall, the statements made by the applicant in this regard are merely bold and general in nature. The applicant has to take the Court into its confidence and at least supply the Court with sufficient detail so as to assess that the contentions have substance. For example, and if it said that the first respondent had access to confidential pricing, it must at least be explained why that pricing would be confidential, and what makes it so.

- [40] But what does the evidence actually show in this regard? The actual job of the first respondent provides part of the answer. The first respondent was in effect responsible for the installation and maintenance of the applicant's refrigeration units and to train technicians. The applicant, as said, does not manufacture these units. It is simply a distributor. The first respondent can thus have no confidential information about design, manufacture, product development and proprietary information in this regard. That is simply not part of his job, nor would he be required to know this.
- [41] There is no evidence that the first respondent was involved in any kind of marketing. Again, and considering his position, it is unlikely that he would be. The first respondent was not responsible for securing orders. He becomes involved once the order is obtained, for the purposes of executing it. He manages the technicians to ensure they execute their duties properly. He also trains them. Undoubtedly, he is a valuable resource to the applicant. But his value and his knowledge are operational in nature, and there is nothing confidential in it. It certainly does not involve marketing and sales.
- [42] There is nothing unique in the applicant's products, or in the installation and maintenance methodology relating to the same. I am satisfied that on the evidence, there is little difference between the refrigeration units manufactured by Carrier Transicold, Thermo King or Schmitz for that matter. Also, installing such a unit on a trailer can hardly be unique only to the business of the applicant. No case has been made out of any specialized or proprietary installation technique or methodology unique to the applicant which is not used by any other competitor. The applicant's case is actually defeating. If what the first respondent knows about the installation and maintenance of the applicant's products can be used as is on the Schmitz unit, then surely there can hardly be any difference between the products. A refrigeration unit is then a refrigeration unit, no matter who makes it. There is accordingly no confidential information to protect in this regard.
- [43] Any technical information the first respondent may have about the applicant's products is of little value to GRW. There are a number of reasons for this. Firstly, the applicant has been installing the Carrier Transicold units in trailers manufactured by GRW for years, so it hardly be said that GRW would not be

aware of all its technical specifications. Secondly, GRW does not manufacture refrigeration units. It gets those from Schmitz in Europe. All GRW does is to get the unit, and install it in a trailer. It then maintains the unit. What the first respondent may do where it came to Carrier Transicold products cannot be useful where it comes to Schmitz products, unless the products are very similar, in which events there is nothing unique with regard to the applicant's products that justifies its insulation from competitors.

[44] This then brings me neatly to the first respondent's version. According to the first respondent, he would in fact be starting a new career at GRW. He indicated that he would be able to use very little of what he knows about the applicant's products at GRW, and would undergo complete new training on Schmitz products at GRW. Added to the aforesaid, GRW is not in any way involved in bus air conditioning, cargo lifts, telematics and climate control systems, the other aspects of the applicant's business, and therefore none of the knowledge the first respondent has in this regard is in any manner relevant.

[45] In *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronjé and Another*³⁴ the Court held as follows where it comes to confidential information worthy of protection:

Information is confidential if it meets the following requirements:

- (a) It must be capable of application in a trade or industry.
- (b) It must not be public knowledge or public property (in other words, it must be known only to a restricted number or closed circle of people).
- (c) It must, objectively, be of economic value to the person seeking to protect it.'

Considering what has been summarized above, the information the first respondent has about the applicant's products tick none of these boxes. It is not capable of application in GRW, it is not just knowledge limited to a select group of persons, and most certainly is of no economic value.

[46] The information on product offerings, specifications and pricing of the applicant's products are not confidential. It is readily available in the open

³⁴ (2011) 32 ILJ 601 (LC) at para 29. See also *Experian (supra)* at para 19.

market, and published on the applicant's website. There is no evidence that the first respondent was privy to any particular pricing arrangements or discount / rebate structures that may be in place where it comes to the applicant's larger and repeat customers. There is equally no evidence that the first respondent was aware of the costing that goes into the manufacture of the applicant's products, and in any event, he would not have that knowledge, as the applicant does not manufacture the products but is a distributor. Finally, and because GRW does not distribute and sell refrigeration units to third parties and only installs it as part of its own trailer manufacturing process, it would have no interest in or use for the pricing of the applicant.

[47] I also accept that the first respondent had no information concerning the applicant's customer base, other than knowing the names of the customers he installed the refrigeration units for. This information however had no value to either the applicant, or GRW for that matter, and cannot be confidential. The first respondent is not the custodian of the customer relationship. As such, he is not in any position to provide information on what the customer buys, pays, or who the contact person at the customer may be. The above being said, this kind of information would in any event be useless to GRW, as it does not sell and supply the Schmitz refrigeration units into the open market, and only installs the same on its own trailers. Thus, a customer that buys a trailer is not a customer that is looking to buy a refrigeration unit.

[48] Therefore, and on the facts, the first respondent had no knowledge of information relating to business opportunities, or any kind of information in respect of which skill, industry and labour have been expended in order to make it valuable. The first respondent was not privy to marketing strategies, pricing, costing or any unique manufacturing or installation process (which has not even been shown to exist). The applicant has failed to make out any case that the refrigeration products supplied by it are special and unique, to the extent of distinguishing it from other competing products. The applicant has also completely failed to make out a case that the manner of installation it applies is in any manner exceptional, special and unique, so as to distinguish it from any other installations process applied by competitors in respect of

competing products in the marketplace. In this regard, the Court in *Automotive Tooling Systems (Pty) Ltd v Wilkens and Others*³⁵ held:

‘There are, I think, a number of difficulties that confront the appellant. First, the mere assertion by the appellant that the processes and methodologies in the design, manufacture and commissioning of customized marking machines are confidential does not make it so. The appellant does not identify any part of the process or method which is unique nor point to any other reason why such process or method is deserving of protection. There is no indication on the papers that the first and second respondents were placed in possession of any formulae, or designs or special methods of manufacturing relating to the processes and methodologies which, if done on a confidential basis, would have amounted to an interest worthy of protection.’

[49] Insofar as it can be argued that because the first respondent obtained his skills, experience and expertise whilst working at the applicant, it is in some way confidential, this contention simply has no merit. This knowledge that accrued to the first respondent in this regard does not form part of the categories of confidential information worthy of protection as set out above. In *David Crouch Marketing v Du Plessis*³⁶ the Court held that if the confidential information did not resort under the categories referred to above, then: ‘it forms part of the employee's general knowledge and skill, which he is free to use for his own benefit or for the benefit of others after the termination of the contract of employment ...’.

[50] Therefore, and in my view, the applicant has failed to establish the existence of a protectable interest where it comes to the issue of confidential information. The first respondent was simply not privy to the kind of confidential information worthy of protection, in terms of the authorities discussed above.

Trade connections

[51] The applicant has made out no proper case of trade connections in the founding affidavit. Undoubtedly, the first respondent did not deal with customers and did not cultivate a relationship with them, as this was simply not his job. There is no evidence that the first respondent was in a position to

³⁵ (2007) 28 ILJ 145 (SCA) para 20. See also *David Crouch Marketing (supra)* at para 31.

³⁶ (2009) 30 ILJ 1828 (LC) at para 21.

convince customers to take their business elsewhere. Even the job description in the first respondent's employment contract shows that he does not deal with customers, but principally with the technicians in order to ensure proper standards on the jobs. In *Rawlins and another v Caravantruck (Pty) Ltd*³⁷ the Court said the following:

'The need of an employer to protect his trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he leaves the employer's service he could easily induce the customers to follow him to a new business (Joubert General Principles of the Law of Contract at 149). Heydon *The Restraint of Trade Doctrine* (1971) at 108, quoting an American case, says that the "customer contact" depends on the notion that –

"the employee, by contact with the customer, gets the customer so strongly attached to him that when the employee quits and joins a rival he automatically carries the customer with him in his pocket'.

In *Morris (Herbert) Ltd v Saxelby* [1916] 1 AC 688 (HL) at 709 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 would enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer's trade connection . . . '.

This statement has been applied in our Courts (for example, by Eksteen J in *Recycling Industries (Pty) Ltd v Mohammed and Another* 1981 (3) SA 250 (E) at 256C-F). Whether the criteria referred to are satisfied is essentially a question of fact in each case, and in many, one of degree. Much will depend on the duties of the employee; his personality; the frequency and duration of contact between him and the customers; where such contact takes place; what knowledge he gains of their requirements and business; the general nature of their relationship (including whether an attachment is formed between them, the extent to which customers rely on the employee and how personal their association is); how competitive the rival businesses are; in the case of a salesman, the type of product being sold; and whether there is evidence that customers were lost after the employee left (*Heydon (op cit* at 108-120); and see also *Drewtons (Pty) Ltd v Carlie* 1981 (4) SA 305 (C) at 307G-H and 314C and G).'

³⁷ 1993 (1) SA 537 (A) at 541D-I. See also *Esquire (supra)* at paras 31 – 32; *Continuous Oxygen (supra)* at paras 34 – 36; *Medtronic (Africa) (Pty) Ltd v Kleynhans and Another* (2016) 37 ILJ 1154 (LC) at paras 37 – 38.

- [52] Considering the aforesaid, and in addition to the fact that the duties of the first respondent do not lend themselves to the establishment and maintenance of trade connections, there is no case made by the applicant of any particular personal knowledge of and influence over any customers of the applicant, by the first respondent. Considering the nature of the applicant's products as well as the nature of the customers of the applicant, it is highly unlikely that someone like the first respondent would be able to convince a customer to take its business elsewhere. Having regard to the applicant's own replying affidavit, it appears that the real customer relationship lies at a much higher level than the first respondent.
- [53] I will accept what is contained in the replying affidavit to the effect that the applicant lost business. But no *nexus* between the loss of this business and the first respondent seeking to take up employment with GRW has been established by the applicant. There is no evidence or even allegation that the first respondent called on or dealt with Unitrans (the customer that was lost). And GRW stopped using the applicant because it procured its own product from its own joint venture supplier. Added to the above, the applicant lost Unitrans business to GRW's in-house product in 2018, long before the first respondent even contemplated leaving the employment of the applicant. It is therefore clear that the risk to the applicant's business has nothing to do with the first respondent, what he knows, or what he may do. The applicant lost the Unitrans business to GRW using the Schmitz units without any information about the applicant's product being passed along to GRW or any trade connection being used. The risk to the applicant is purely commercial, in that GRW has decided to fit refrigeration units in-house, instead of using third party suppliers such as the applicant.
- [54] The applicant and GRW are not competitors. GRW makes all kinds of trailers and truck bodies. This includes some refrigerated trailers. GRW does not sell or supply Schmitz refrigeration units to third parties or other trailer manufacturers. GRW is not in the business of the distribution of refrigeration units. In simple terms, a customer comes to GRW to purchase a trailer. It does not come to GRW to purchase a refrigeration unit. A customer comes to the applicant to buy a refrigeration unit. It does not come to the applicant to buy a

trailer. The businesses are simply not in the same market place, and in reality do not compete.

- [55] Therefore, and for all the reasons as set out above, the applicant has failed to establish the existence of a protectable interest where it comes to trade connections.

Position of the first respondent

- [56] In the end, the first respondent is simply a very good technical manager. He acquired those skills and expertise of his own accord, and whilst he was employed with and trained at Carrier Transicold. He obtained no training or skills at the applicant. The applicant took him into employment when Carrier Transicold pulled out, and in effect received a competent technical manager as part of the local distributor deal. The first respondent developed his particular skill, experience and knowledge through his own work. As a result, this particular skill, experience and knowledge accrued to the first respondent himself, and not to the applicant as his employer. In *Automotive Tooling supra*³⁸ the Court said:

'... the interest must be one that might properly be described as belonging to the employer, rather than to the employee, and in that sense 'proprietary to the employer'. The question in the present case is whether the interest that is relied upon - the skill, expertise and 'know-how' that the employees undoubtedly acquired in the techniques for manufacturing these machines - was one that accrued to the employer or to the employees themselves.

The rationale for this policy was succinctly explained by Kroon J in *Aranda Textile Mills (Pty) Ltd v L D Hurn* as follows:

'A man's skills and abilities are a part of himself and he cannot ordinarily be precluded from making use of them by a contract in restraint of trade. An employer who has been to the trouble and expense of training a workman in an established field of work, and who has thereby provided the workman with knowledge and skills in the public domain, which the workman might not otherwise have gained, has an obvious interest in retaining the services of the workman. In the eye of the law, however, such an interest is not in the nature of property in the hands of the employer. It affords the employer no proprietary

³⁸ Id para 8 – 9.

interest in the workman, his know-how or skills. Such know-how and skills in the public domain become attributes of the workman himself, do not belong in any way to the employer and the use thereof cannot be subjected to restriction by way of a restraint of trade provision. Such a restriction, impinging as it would on the workman's ability to compete freely and fairly in the market place, is unreasonable and contrary to public policy.'

Thus the mere fact that the first and second respondents have taken up employment with AMS Manufacturing, assuming that it is in competition with the appellant, does not in itself entitle the appellant to any relief if all they will be doing is applying their skills and knowledge acquired whilst in the employ of the appellant. It is only if the restriction on their activities serves to protect a proprietary interest relied on by the appellant that they would be in breach of their contractual obligations.'

The Court concluded:³⁹

'In my view, the facts establish that the know-how for which the appellant seeks protection is nothing other than skills in manufacturing machines albeit it that they are specialised skills. These skills have been acquired by the first and second respondents in the course of developing their trade and do not belong to the employer - they do not constitute a proprietary interest vesting in the employer - but accrue to the first and second respondents as part of their general stock of skill and knowledge which they may not be prevented from exploiting. As such the appellant has no proprietary interest that might legitimately be protected.'

[57] I am satisfied that the quoted *ratio* in *Automotive Tooling* directly applies *in casu*. Whatever skills, expertise and experience the first respondent has, accrues to him. It is not a protectable interest belonging to the applicant. In seeking to prevent the first respondent from taking up employment with GRW, the applicant, in my view, is doing no more than seeking to stifle competition, which cannot be done by way of a restraint of trade.

[58] The applicant's true motives in fact became apparent in the course of argument, when the applicant's counsel, advocate Campanella, made a rather

³⁹ Id at para 20.

astounding submission. He stated that with GRW now installing its own Schmitz refrigeration units in its trailers, it would need someone competent to oversee such installation and maintenance thereof. This part of the statement would in my view be correct, and is uncontroversial. However, counsel then added that if GRW is deprived of someone like the first respondent, there may well be difficulties experienced by GRW in the installation and maintenance of its own units, which should then convince customers to come back to the applicant. This part of the submission, brings the true motive to the fore, and is in essence unacceptable and nothing more than abusing the restraint to eliminate competition. As held in *Jonsson supra*⁴⁰:

'In this matter, there is in my view a strong inclination that all that the applicant is trying to do is to stifle competition from one of its principal competitors. I am inclined to accept that the applicant actually realizes the value of the first respondent and wishes to deprive the second respondent as its competitor of such value. This is not what is envisaged as a protectable interest in a restraint of trade.'

[59] Therefore, the position of the first respondent, and the knowledge, experience and skill accruing to the first respondent by virtue of that position, is such that it cannot serve to establish a protectable interest that accrues to the applicant. It belongs to the first respondent.

Conclusion

[60] Because I am of the view that the applicant has failed to establish the existence of a protectable interest, that must be the end of the matter. The applicant has thus failed to make out a clear right to the relief sought. As said in *Jonsson supra*:⁴¹

'In my view, the applicant has thus failed to demonstrate a clear right in this matter. I conclude that the applicant has no protectable interest To enforce the restraint of trade in these circumstances would be unreasonable. As the applicant has not demonstrated a clear right, this is where the enquiry

⁴⁰ Id at para 61.

⁴¹ Id at para 64. See also *Henred Fruehauf (supra)* at para 24.

stops. The applicant has thus not discharged the onus on it to obtain the relief sought.’

[61] It is consequently unnecessary to consider the other restraint principles set out in the judgment of *Basson*, or the other interdict requirements. The applicant’s application falls to be dismissed.

Costs

[62] This then only leaves the issue of costs. There is no reason why costs should not follow the result, for the reasons to follow. Firstly, both parties suggested that costs follow the result. However, and despite this position of the parties, I must nonetheless exercise the wide discretion I have in terms of section 162(1) where it comes to costs.⁴² In this case, I consider the fact that the applicant’s application was severely lacking in the requisite particularity. I also consider that as far as I am concerned, the real reason for the application was to stifle competition, and not really to protect a legitimate protectable interest. Another factor is that the applicant sought to substantially supplement its case on reply, which is deserving of some censure. In the end, and in my view, the applicant was dissatisfied with the first respondent, because it gave him more money to stay, and despite this he still left. Overall considered, this is a case where fairness dictates that the first respondent should have his costs.

[63] It is for all the reasons as set out above that I made the order that I did in paragraph 3 of this judgment, *supra*.

S Snyman

Acting Judge of the Labour Court of South Africa

⁴² See *Long v SA Breweries (Pty) Ltd and Others* (2019) 40 ILJ 965 (CC) at paras 28 – 29.

Appearances:

For the Applicant: Adv J Campanella

Instructed by: Moss Cohen & Partners Attorneys

For the First Respondent: Ms A Davies of Johanette Rheeder Attorneys