REPORTABLE

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2010/26977

DATE: 13/10/2010

In the matter between:

THE DOCUMENT WAREHOUSE (PTY) LIMITED Applicant

and

KAREN LOUISE TRUEBODY First Respondent

METRO FILE LIMITED Second Respondent

J U D G M E N T

SALDULKER, J:

INTRODUCTION

[1] In South Africa's growing economy, the question of the enforceability of restraint of trade clauses is a fertile ground for litigation, both for employers and employees.

[2] In this application, the applicant seeks an interdict to enforce the provisions of a restraint of trade agreement concluded between the first respondent, Karen Louise Truebody (Truebody) and Document Warehouse (the applicant). The second respondent (Metro File) is cited in these proceedings insofar as it may have a direct and substantial interest in the outcome.

BACKGROUND

[3] Ms Truebody was employed by the applicant from August 1999 until May 2010. Initially, she was employed as the applicant's Operations Manager. During 2004 Truebody was promoted to Sales and Marketing Director. Towards the end of her employment with the applicant, she was also involved in Human Resources tasks.

[4] Some two years into her employment, in 2001, a service and restraint of trade agreement (restraint) was entered into between the applicant and Truebody. The restraint was for a period of 36 months.[1] On 31 May 2010 Truebody was dismissed from the employment of the applicant. At that stage she was the applicant's Director of Marketing, Sales and Human Resources. On 1 July 2010, Truebody entered the employment of the second respondent, (Metro File), a competitor, as its Sales and Service Manager and is presently so employed.

[1] In this application the applicant seeks to restrain the first respondent for a period of 24 months.

[5] The relevant clauses of the restraint which Truebody agreed to, recorded *inter alia* that:

5.1 during the course of her employment with the Applicant, Truebody has acquired/will acquire considerable know-how in and will learn of the Applicant's techniques relating to its business;

5.2 she will have access to the names of clients with whom the Applicant does business whether embodied in written form or otherwise;

5.3 she will have the opportunity of forging personal links with clients of the Applicant;

5.4 she will have the opportunity of learning and acquiring the trade secrets, business connections and other confidential information pertaining to the Applicant's business;

5.5 she acknowledged that the only effective and reasonable manner in which the Applicant's rights in respect of its business secrets and client connection can be protected is by means of a restraint of trade covenant imposed on her;

5.6 she undertakes that neither she nor any company, close corporation, firm, undertaking or concern in which she is directly or indirectly interested or by which she is employed whether alone or jointly-

5.6.1 will for a period of 36 months after the termination of her employment with the Applicant, be interested or engaged, directly or indirectly, in any capacity (including but not limited to advisor, agent, consultant, director, employee, financier, manager, member of a close corporation, member of a voluntary association, partner, proprietor, shareholder, trustee) in any entity directly or indirectly that competed with the Applicant in the Republic of South Africa; (my emphasis)

5.6.2 at any time disclose any confidential information[2] other than to entities or persons connected with the company which are entitled to know such confidential information;

5.7 during the restraint period she will not solicit orders from the Applicant's customers or canvass business from the Applicant's customers or sell or supply goods to the Applicant's customers or render services to the Applicant's customers;

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[2] Confidential information is defined in the restraint as follows: '1.2.5 confidential information''includes,but is not limited to;

1.2.5.1 any information in respect of know-how, formulae, processes systems, business methods,markerting methods, promotional plans, financial models,inventions,long-term plans and any other information of the company, in whatever form it may be;

1.2.5.2 all internal control systems of the company;

1.2.5.3 details of the company's financial structure and opening results;

1.2.5.4 the contractual and financial arrangements between the company and others with whom it has business arrangements of whatsoever nature; and

1.2.5.5 all other matters which relate to the company which are of confidential nature, and which are not in the public domain;

5.8 the restraint was reasonable as to subject matter, period and territory.

[6] The applicant conducts business as a document archiving and offsite storage facility. Essentially, it contracts with customers to store for varying fixed periods their documentary records, which are placed for safekeeping in designated storage containers in offsite storage facilities. The details of each file provided by their customers are captured on the applicant's computer database. According to the applicant, it enjoys both national and international representation and has storage facilities in Johannesburg, Cape Town, Pietermaritzburg, Durban, Port Elizabeth, Pretoria, Namibia and Ghana.

[7] Metro File is a dominant firm within the meaning of Section 7 of the Competition Act,[3] and is the market leader in information and records management. It is a large company having many branches in South Africa and the applicant's main competitor in the document filing industry.

PRINCIPAL SUBMISSIONS

[8] It is common cause that the applicant and Metro File are direct competitors in the document filing industry. It is common cause that Truebody was, up to May 2010 employed by the applicant as its Sales, Marketing and Human Resources Manager and is presently employed in the same industry by Metro File, as its Sales and Service Manager. According to the applicant, the nature of Truebody's employment with Metro File, is in breach of the restraint which she voluntarily entered into with the applicant.

[3] Act no 89 of 1998

[9] The applicant has relied on both its customer connection and confidential information to enforce the restraint against Truebody. The applicant contends that its business is now vulnerable and at risk, as Truebody is armed with confidential business secrets which she acquired at the applicant's business and which she is potentially capable of exploiting at her new place of employment, Metro File, a direct competitor, in flagrant disregard of her restraint covenant. Truebody's employment with Metro File, is prejudicial to the rights that the applicant sought to protect by the conclusion of the restraint, which prejudice increases exponentially each day that Truebody is employed by Metro File.

[10] Truebody's contention in essence is that the applicant is unlawfully seeking to prevent her from being employed and to deny her the right to earn a living, its sole purpose aimed at restricting fair competition. The fact that she agreed in 2001, when she concluded the restraint, that its terms were reasonable, was not a determining factor. Truebody asserts that the express terms of the restraint are invalid as they contain restrictive conditions which are, in her belief, *contra bonos mores*, unfair, unlawful and unenforceable. She contends that the terms of the restraint are excessive, being cast in the 'widest possible terms', for a period of 36 months within the geographical area of the whole of the Republic of South Africa, and that she is being restrained from using her own managerial and sales skills, normally associated with a sales and marketing employee, which skill, knowledge and experience she acquired through her own hard work and dedication. She contends that these

skills were developed at Avis where she worked as a rental sales agent prior to her employment with the applicant.

[11] According to Truebody, the applicant does not enjoy any protectable interests in the form of confidential information and customer connection. The products, services and assistance provided by the applicant to its customers are neither unique nor confidential, and the applicant's reliance on the 'springboarding' doctrine,[4] is misplaced.[5] Truebody thus has the onus of showing that the applicant has no protectable business secrets and that therefore the enforcement of the restraint is not reasonable.[6]

[12] Additionally, Truebody contends that her dismissal from the applicant's employment is procedurally and substantially unfair as it involved bad faith on the part of the applicant and that on this ground alone the restraint should not be enforced.

[13] It is common cause that this labour dispute forms the subject-matter of a referral presently pending at the CCMA.[7] In my view it is not necessary in this application to traverse the merits of Truebody's dismissal as it is a matter pending in another forum.

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[4] In its founding papers the applicant states: "This invaluable springboard into the Applicant's market share is not one that Metro File would ordinarily have were it not for their employment of Truebody'.

[5] The concept of springboarding was set out in *Waste Products Utilisation (Pty) Ltd v Wilkes & another* 2003(2) SA 515, at p 582,F to J , where Lewis J stated as follows:"Springboarding' entails not starting at the beginning in developing a technique .. but using as a starting point the fruits of someone else's labour'.

[6] *Reddy v Siemens Telecommunications (Pty)Ltd* 2007(2) SA 486 (SCA) at p493, para [10];p495, para[14].

[7] *Commission for Conciliation, Mediation and Arbitration*

[14] In her papers, Truebody undertakes not to divulge the applicant's trade secrets and contends that it is therefore unnecessary and unreasonable to enforce the restraint.

[15] The applicant bears the *onus* of proof to show that it has a protectable interest, deserving of protection in enforcing the restraint of trade agreement entered into between Truebody and itself and that the present employment that Truebody is engaged in, falls within the ambit of the terms of the restraint.

THE LAW

[16] The decision in *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* [8] brought about a significant change to the approach by the courts in regard to restraint of trade agreements. It recognised that restraint of trade agreements are valid and enforceable and should be honoured unless they unreasonably restrict a person's right to trade or work and are in conflict with s 22 of the Constitution, Act 108 of 1996, which recognises the right of every citizen to choose his or her occupation, trade or profession freely.

[17] In a number of decisions the legal principles governing unlawful competition have been elaborated upon.[9] Depending upon the particular form the complaint of unlawful competition takes, the principles enunciated in the cases that have come before the courts provide an illuminating guide in determining the question of unlawfulness.

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[8] 1984(4) SA 874 (A)

[9] *Waste Products ,* at 570 , F to J;See also: *Nampesca (SA) Products (Pty) Ltd & another v Zaderer & Others* 1999 (1) SA 886 (C) at 894; *Da Silva & Others v CH Chemicals (Pty) Ltd* 2008 (6) SA 620 at 627

[18] The law recognises the right to trade freely, but this freedom is clearly not unfettered.[10]A balance has to be struck between the obligations of contracting parties to honour their contracts entered into by them and the right of the individual to trade and to practice his chosen profession freely.

[19] The Supreme Court of Appeal in *Reddy v Siemens Telecommunications (Pty) Ltd* [11] held as follows:

> "… 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. …
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> …….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."

[20] Malan AJA, writing for the court in *Reddy* remarked that a court must make a value judgment in determining the reasonableness of a restraint. Two principal considerations come into play: the first is public interest and the second is the right to engage in trade, commerce or a particular profession.

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[10] *G A Fichardt Ltd v The Friend Newspapers Ltd* 1916 AD 1 , Innes CJ at 6; *Matthews and Others v Young* 1922 AD 492 De Villiers JA at 507; See also : *Sunshine Records (Pty) Ltd v Frohling & others* 1990 (4) SA 782(A)

[11] 2007(2) SA 486 (SCA), at p 496para [15]; p497,para [16]

[21] The reality of the situation is that an employee who intends to use his ex-employer's confidential information will not do so overtly as he does not want to be 'caught out', to put it colloquially, by his erstwhile employer. Thus, in order to claim an infringement of its proprietary interests an employer need only prove that its erstwhile employee is potentially able to exploit its confidential information or customer connection in his or her new employment. It will be sufficient to create the real probability that the employee will consciously or unconsciously do so in the new employment, because of the loyalty he owes to his new employer. As was stated by Malan AJA in *Reddy*[12]:

> 'Reddy is in possession of confidential information in respect of which the risk of disclosure by his employment with a competitor, assessed objectively, is obvious. It is not that the mere possession of knowledge is sufficient, and this is not what was suggested by Marais J in BHT Water. Reddy will be employed by Ericsson, 'a concern which carries on the same business as [Siemens]'in a position similar to the one occupied with Siemens. His loyalty will be to his new employers and the opportunity to disclose confidential information at his disposal, whether deliberately or not, will exist. The restraint was intended to relieve Siemens precisely of this risk of disclosure'.

[22] Courts will not be reluctant to enforce the provisions of a restraint of trade agreement entered into by parties, where the terms are reasonable and not against public policy. 'Public policy requires contracts to be enforced.'[13] In

[12] *Reddy*, p 499,para[20]F to H
[13] *Reddy*,p 500, para[21]; See *also: Knox D'Arcy Ltd and another v Shaw and another 1996(2) SA 651 (W)*

Reddy, Malan AJA agreed with the following observations by Lord Denning MR, in *The Littlewoods Organisation Ltd v Harris*[14]:

> 'It is thus established that an employer can stipulate for protection against having his confidential information passed on to a rival in trade. But experience has shown that it is not satisfactory to have simply a covenant against disclosing confidential information. The reason is because it is so difficult to draw the line between information which is confidential and information which is not; and it is very difficult to prove a breach when the information is of such a character that a servant can carry it away in his head. The difficulties are such that the only practical solution is to take a covenant from the servant by which he is not to go to work for a rival in trade. Such a covenant may well be held to be reasonable if limited to a short period.'

[23] For the applicant to succeed it must establish that its alleged trade secrets and confidential information or proprietary interests justify protection by the said restraint. If the employer has no proprietary right, the restraint is regarded as being unreasonable and contrary to public policy, serving only to prevent competition.[15]

[24] In *Basson v Chilwan & Others,*[16] the court held that the reasonableness or otherwise of a restraint is determined with reference to the following four considerations:

24.1. Is there an interest deserving of protection at the termination of the agreement?

24.2. Is that interest being prejudiced?

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[14] [1978] 1 ALL ER 1026 (CA) at 1033 c-d.
[15] *Automotive Tooling Systems (Pty) Ltd v Wilkens & Others* 2007 (2) SA 271 (SCA) at 281 B to D;
[16] 1993(3) SA 742(A),at 767G to H; See also *Kwik Kopy (SA) (Pty) Ltd v Van Haarlem and another* 1999 (1) SA 472(W)

24.3. If so, how does that interest weigh up qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?

24.4. Is there another facet of public policy not having anything to do with the relationship between the parties which requires that the restraint should either be enforced or disallowed?

[25] The proprietary interests that are recognised by the courts as being worthy of protection are trade connections and confidential information.[17] To qualify as confidential information the information must comply with three requirements:[18]

25.1 It must involve and be capable of application in trade or industry; that is: it must be useful.

25.2 It must not be public knowledge and public property, that is objectively determined it must be known only to a restricted number of people or to a close circle.

25.3 The information objectively determined must be of economic value to the person seeking to protect it.

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[17] *Rawlins & another v Caravantruck (Pty) Ltd* 1993(1) SA 537 (A); *Meter Systems Holdings Ltd v Venter & another* 1993 (1) SA 409 (W)
[18] *Advtec Resourcing (Pty) Ltd v Kuhn* 2007(4) ALL SA 1386 ,C para51

[26] An employer has an interest in enforcing the restraint of trade agreement concluded with its employee to protect its confidential information. Confidential information includes pricing strategies, knowledge of business conditions and customer relationships. It also includes customer lists, information about business opportunities available to the employer and confidential information received by an employee during her tenure of employment.[19]

[27] Where it is clear that the employee will, upon termination of his/her employment, be in a position to induce customers with whom a close relationship was built, to follow the employee to his new place of employment, an employer will have an interest in enforcing the restraint. It was clearly recognised in *Rawlins and another v Caravantruck (Pty) Ltd*[20] that customer goodwill can be established or enhanced in favour of an employer over customers previously known to an employee. Where an employee has had access to an employer's customers and is in a position to build up a particular relationship with them, so that when he leaves an employer's service he could easily influence them to follow him, there appears to be no reason why a restraint to protect the employer's customer connections should not be enforced.[21]

TRUEBODY'S EMPLOYMENT WITH THE APPLICANT

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[19] *Basson v Chilwan, p767; Dickenson Holdings Group (Pty) Ltd v Du Plessis* 2008 (4) SA 214
[20] 1993(1) SA 537 (A) at 542 E to H;*Nampesca,*p899;*Hirt & Carter (Pty) Ltd v Mansfield* & *Another* [2008] 3 SA 512 (D) para [37];*David Crouch Marketing CC v Du Plessis* (2009) 30 ILJ 1828 (LC),p1839,para[22]
[21] *Paragon Business Forms (Pty) Ltd v Du Preez* 1994(1) SA 434(SE) at 444 A to C; *Turner Morris,(Pty) Ltd v Riddell* 1996 (4) SA 397 (E)at 408I to 409G.

[28] It is not disputed that Truebody who was employed by the applicant for more than a decade, nurtured strong ties with the applicant's customers and developed a good rapport with them, as part of her sales function. She regularly called on them and entertained them at the applicant's expense.

[29] Through this constant and consistent interaction, she forged personal links with them, gained an intimate knowledge of their requirements. Truebody became aware of their special storage needs and acquired peculiar knowledge of the terms and conditions of the service agreements between the applicant and its customers, particularly its key customers. The service agreements were specifically tailored to suit the customer's needs in relation to the pricing and discounting structures. Truebody was aware of which contracts had already expired, which had not been renewed and continued on a month to month basis. It is obvious that, as a sales director, she would have learnt the identity of the decision–makers at each customer of the applicant, and developed relationships with the role players.

[30] Truebody was involved in the formulation of quotes and pricing structures. According to the applicant, the method employed for the latter was unique and highly confidential. The applicant's assertions that this places Truebody in a unique position 'to easily induce customers' of the applicant to migrate their business to Metro File and that 'this invaluable springboard into the applicant's market share is not one that Metro File would ordinarily have were it not for their employment of Truebody', has merit.

[31] The applicant's fears that armed with all this highly confidential information in regard to its customer connections and its business strategies, Truebody would know when to approach a particular customer with a view to securing that customer's work, and place the business of the applicant at risk, are well founded. Truebody's contention that she is 'confined regarding pricing and discounts that she may offer to respondent's customers', at Metro File and that the fears of the applicant are unfounded, is clearly fallacious. In my view, it is a deliberate attempt to downplay her involvement in the pricing structures at a competitor and to reassure the applicant that, despite her knowledge of the applicant's unique pricing structures, which is of economic value to it, she has no intention to 'solicit any work from the applicant's customers or to canvass business from the applicant's customers'. As part of her sales functions, it is obvious that Truebody would have become aware of the prices being paid by particular customers of the applicant, the nature of its confidential costing structures and its mark-up processes and the discounts being offered to them.

[32] According to the applicant, its unique business approach extended to the quoting and bidding for tenders. It is not disputed that Truebody assisted and spearheaded some of the tenders submitted on its behalf. Early in 2010, Truebody presented the applicant's tender to a prospective client in Ghana. Truebody would have acquired knowledge of the financial status of the applicant during the tender processes as the tender documents included the applicant's financial and audited statements.

[33] In her role as a director, at executive board meetings, she would have been privy to confidential information which was not in the public domain and restricted to a select few, concerning the applicant's business, its trade secrets, its confidential future financial plans and the resources available to the applicant for its international expansion plans.

[34] It is not disputed that Truebody was involved in submitting proposals on behalf of the applicant to the South African Police Forensic Laboratory (SAP) for the storage of the documents and forensic evidence. The SAP has called for tenders for its storage requirements and it is not disputed that Metro File a market leader in information and records management and the dominant firm in the document storage industry might 'tender for the storage of the SAP's documents and forensic evidence', The applicant asserts that Truebody is armed with the knowledge of the applicant's confidential methodologies and processes disclosed to her 'during her previous pitch to the SAP', and Metro File, its competitor, having Truebody in its employment, is now in a unique and advantageous position to gear its proposal to the SAP.

[35] Metro File is currently responsible for storing CIPRO's documents, a tender that was awarded to it three years ago, at a time when Truebody was responsible for the preparation and submission of the applicant's tender. The applicant fears that as the CIPRO tender is presently up for renewal, that 'with the knowledge that Truebody has gained of the applicant's business and armed with all the confidential information disclosed to her in her fiduciary capacity as director and employee of the applicant, the second respondent is

now uniquely placed to gear its tender with regard to the potential offering that the applicant can make to CIPRO.'

[36] In my view the employment of Truebody, who has *'insider'* information in regard to the applicant's business methods, including its 'tender' business will enhance Metro File's business to the disadvantage of the applicant. The tender business is a substantial component of the applicant's revenue and it would be prejudicial to the applicant if its business could not continue without this revenue. Clearly Truebody's employment will serve as a 'springboard' for Metro File, as it will benefit from the '*fruits of another's labour*'[22], thus securing for itself a competitive edge, and will perpetuate its dominance in the industry. According to the applicant, there is a grave risk of potential loss and damage to the applicant if Truebody continues to breach the restraint. The SAP and CIPRO tenders alone amount to R35 million.

[37] There has been no effective rebuttal of the applicant's claims that Truebody was involved in and well-trained in conducting tenders in the applicant's unique manner and style, both locally and internationally, and that armed with the applicant's unique approach, will now place the applicant's business at risk.

[38] It is not disputed that during her employment Truebody had unrestricted access to the applicant's server by means of a laptop which contained all the applicant's confidential information. It is also not disputed Truebody had access to the debtor's lists which is a list of active customers

[22] Waste Products,p582,F to J

and that prior to leaving the applicant's employment Truebody e-mailed to her private e-mail address being mrsafrica@gmail.co, (according to the applicant Truebody is/was the reigning Mrs Africa), contact details of some of the applicant's customers. In my view, Truebody's submission that 'it is impossible for me to remember the details contained in any such lists and that the detail that I may remember cannot just be deleted from my memory. I will, however, not disclose any detail that I may remember from time to time to my new employer, since there is no need to do so, neither have I been requested by the Second respondent to disclose such information', is not an undertaking that the applicant can be expected to rely upon.

[39] The applicant should not have to accept the Truebody's *ipse dixit* that she has not or will not disclose the content of the lists to any third party. The applicant correctly asserts that this constitutes evidence that she has appropriated to herself details of the applicant's customer connections which she is now in a position to disclose and use to her advantage in her employment with Metro File.

[40] Truebody built up a longstanding relationship with the applicant's customers over a number of years and personally interacted with them. Her new employment with a competitor, constitutes a threat to the applicant's commercial viability as she is armed with confidential information relating to the applicant's business operations, its costing structures and the mark-up processes and its international expansion plans

[41] Truebody has attempted to defeat the relief sought by the applicant by offering an undertaking not to disclose any confidential information to Metro File and tenders not to contact any of the applicant's customers even though she disputes the validity and enforceability of the restraint. In my view Truebody is an ex-employee of a direct competitor who bound herself to the terms of the restraint. The applicant has a real, substantial and proprietary interest in the enforcement of the restraint.

[42] Truebody's assertion that it did not follow, that she would, in her new employment, use the knowledge she gained of the applicant's business to the detriment of the applicant, and her formal undertaking not to do so, is in my view, a tacit concession on the part of Truebody that the applicant has proprietary rights worthy of protection.

[43] Furthermore, her undertaking is contrary to the terms of the agreed restraint. She is employed with a direct competitor, who according to her is 'well structured' and is not in need of a 'springboard' as its 'business is light years ahead of the applicant's in sheer size, products and services offered, geographical distribution, etc'; and 'the applicant is not even remotely in the same league as the second respondent comparing the size of the two entities'. This description of a competitor's business by an ex-employee in my view strengthens the applicant's case that Truebody's continued employment with Metro File, is prejudicial to the applicant, and is in breach of the restraint entered into by her and the applicant is entitled to seek the full enforcement of its '*contractual pound of flesh*'.[23]

[23] BHT Water , p54

ASSESSMENT

[44] Truebody has been unable to seriously or effectively deny that she gained an intimate knowledge of and insight into the applicant's business, its methodologies and its operations. The facts concerning the relationship between Truebody and the applicant's customers are largely uncontested and thus the existence of the applicant's proprietary interest in my view is not in dispute.

[45] It is not disputed that, initially, Truebody was employed as the applicant's Operations Manager. After her promotion in 2004 she was the director responsible nationally for the applicant's marketing and sales. Although there was a question mark as to the confidentiality of the applicant's business, Truebody conceded that she attended director's meetings where matters relating to the applicant's business were discussed. She admitted that she made business presentations on behalf of the applicant in Ghana, Namibia and Botswana. Whether in her duties as Operations Manager, or in Sales, Marketing or Human Resources, Truebody was a director of the applicant and would have acquired knowledge of the applicant's business secrets, its marketing strategies, including its confidential methodologies in providing goods and services to its customers, which were unique and distinguishable from the services provided by other competitors. It is obvious that Truebody would have acquired knowledge of the applicant's "filerite" software system, in the course of her duties with the applicant.

[46] In terms of the restraint, Truebody acknowledged that she would learn the applicant's techniques, its trade secrets, business connections and other confidential information of the applicant and that 'the only effective and reasonable manner in which the company's rights in respect of its business secrets and client connection can be protected is the restraint imposed' on her. More importantly, Truebody agreed that the restraint was reasonable and that she would not for a period of 36 months after her termination of her employment with the applicant become 'interested or engaged in any capacity with any entity that competed with the applicant'. Initially, she was restrained from being employed at a competitor for a period of three years within the geographical area of the whole of the Republic of South Africa. This has been reduced to a period of 24 months in this application.

[47] The territorial reasonableness of a restraint is determined with reference to whether or not it is necessary to protect a legitimate interest of the applicant.[24] The applicant has demonstrated in these papers that it has legitimate business interests in the areas that it seeks to restrain the first respondent. Both the applicant and Metro File have many branches in South Africa. In my view the period of the restraint as well as the geographical area are reasonable. The fact that the applicant has been willing to reduce the restraint period from three years to two years does not affect its enforceability. In this application however, other than her bald *ipse dixit* that the period is excessive and unreasonable, Truebody makes out no case for such assertions.

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[24] *Nampesca,* p 897; *Weinberg v Mervis* 1953(3) SA 863(C);*Turner Morris (Pty) Ltd v Riddell* 1996(4) SA 397 (E) at 406 C to D

[48] It is common cause that Truebody was dismissed from the applicant's employ after a disciplinary enquiry. In my view her dismissal does not influence the enforcement of the restraint. She is to be held to its terms that 'the termination of the employee's employment for any reason whatsoever shall not affect the operation of any provisions of this agreement'[25].

[49] An employer is in an invidious position after an employee with whom he had a restraint agreement becomes employed with a direct competitor. At best for the employer, it has to show that there is confidential information, which an ex-employee acquired through her employment and which she could disclose to the applicant's direct competitor should she choose to do so. However, the applicant should not have to content itself with crossing its fingers[26] and hope that Truebody would act honourably or abide by the undertakings she has given.

[50] The applicant cannot police the undertaking given by Truebody. The applicant contracted with Truebody to restrain her on the termination of her employment so that it would not have to rely on Truebody's honesty in policing rights which it sought to protect.

[51] It is virtually impossible for the applicant to know or prove what information Truebody could make available to Metro File or has already made available. Truebody cannot just delete the names of the applicant's customers

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[25] *Reeves v Marfield Insurance Brokers CC* 1996 (3) SA 766 (A), p 771I/J to 772B
[26] BHT Water Treatment 1993 (1) SA 47(W) ,at 58

and debtors from her memory.[27] All that the applicant can do, is to show that there are trade secrets which Truebody had access to and acquired as a result of her position, function and exposure to the applicant's confidential information and customer connection during her employment with the applicant and which she could transmit to the second respondent should she choose to do so, and which, in my view the applicant has done. As was stated by Marais J, in *BHT Water Treatment (Pty) Ltd v Leslie & another*[28] :

> 'In my view, all that the applicant can do is to show that there is secret information to which the respondent had access, and which in theory the first respondent could transmit to the second respondent should he desire to do so. The very purpose of the restraint agreement was that the applicant did not wish to have to rely on the bona fides or lack of retained knowledge on the part of the first respondent, of the secret formulae. In my view, it cannot be unreasonable for the applicant in these circumstances to enforce the bargain it has exacted to protect itself. Indeed, the very ratio underlying the bargain was that 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 that he has given.
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> In my view, an ex-employee bound by a restraint, the purpose of which is to protect the existing confidential information of his former employer, cannot defeat an application to enforce such a restraint by giving an undertaking that he will not divulge the information if he is allowed, contrary to the restraint, to enter the employment of a competitor of the applicant. Nor, in my view, can the ex-employee defeat the restraint by saying that he does not remember the confidential information to which it is common cause that he has had access. This would be the more so where the ex-employee, as is the case here, has already breached the terms of the restraint by entering the service of a competitor'.

[52] On her own version, Truebody concedes being employed by the second respondent, a direct competitor. Thus she is in breach of her restraint. She is clearly using skills, knowledge and experience acquired after having been employed for 11 years with the applicant in the same industry. The

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[27] Meter System Holdings Ltd v Venter & another 1993(1) SA 409 (W) , at 428 D to F.
[28] BHT Water,p58

restraint must therefore apply as she is engaged in activities of the kind that she performed whilst employed with the applicant. The two companies are direct competitors. Clearly Truebody's employment with the second respondent as its sales and service manager, is of the nature contemplated by the restraint of trade agreement signed by her.

[53] At the centre of Truebody's contentions, is her right to be employed and to earn a living. According to her, the enforcement of the restraint of trade agreement, by the applicant, is directed solely at the restriction of fair competition. Truebody's assertions that 'it is unreasonable' and 'against public policy' to prohibit a person to work in the entire area of the Republic of South Africa, especially having regard to the nature of the industry and my field of expertise' is without merit. By making the submission that 'I was employed for a period of 11 years in the industry and this is what I do best' , is in my view a direct recognition of the considerable 'know-how' she acquired of the document filing industry, in the course of her duties in the applicant's business since her employment in 1999.

[54] The right of a person to engage in economic activity is entrenched in the Constitution. This does not mean that this right is unfettered. An ex-employee should be held to the terms of a fair, enforceable and reasonable restraint agreement which she voluntarily entered into. Truebody should be held to the terms of the restraint.

[55] Importantly, Truebody voluntarily concluded the restraint limiting her choice of employer. The restraint thus places a limit on Truebody from being employed by a competitor, restricted to a period of 24 months. This is a short period and reasonably necessary for the legitimate protection of the applicant's proprietary interest. Thus, Truebody is restrained in her choice of employer for a limited period and not from her being economically active at all.

[56] The applicant does not seek to prevent Truebody from working in the Republic of South Africa and participating in the economic sphere. Truebody is free to use her sales and managerial skills which are necessarily 'a part of herself', [29] in any industry that does not compete with the applicant. As has been stated by the applicant in its papers, it 'does not seek to prevent Truebody from using her managerial and sales skills. It merely seeks to prevent Truebody from being employed in competition with the Applicant for a period of 2 years.'… 'After the restraint period of two years Truebody is free to be employed with whomsoever she pleases.' The applicant merely seeks to protect its proprietary rights by enforcing the terms of the restraint. Restraining her from being employed at Metro File or any other competitor does not in my view affect her employment elsewhere. The nature and the extent of her employment in terms of the restraint is clearly restricted only to a direct competitor, of which there are many, and MetroFile, a large company with many branches in the Republic of South Africa, including Johannesburg where Truebody is employed, falls into that category.

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[29] *Aranda Textile Mills (Pty) Ltd v Hurn and Another* [2000] 4 ALL SA 183(E) at para33;*Automotive Tooling Systems (pty) Ltd v Wilkins and Others* 2007(2) SA 271 (SCA) at 279

[57] In my view the applicant has demonstrated that Truebody is in possession of trade secrets and confidential information of the applicant, having been employed for more than a decade with the applicant, and that during her employment, she acquired the 'know-how' of the applicant's business processes, methodologies and customer connections and she is in possession of confidential information of the applicant's business in respect of which the risk of disclosure is obvious. The possibility that she may disclose confidential information to a competitor deliberately or not cannot be ruled out. The whole purpose of the restraint was intended to relieve the applicant precisely of this risk of disclosure.

THE URGENT APPLICATION

[58] On Monday 5 July 2010, the applicant discovered that Truebody had taken up employment with the Second Respondent. A letter was written to her calling upon her to terminate her employment with the second respondent. A meeting was held with her attorneys in an attempt to settle the matter but to no avail. The urgent papers were prepared and issued and served on 13 July 2010. The matter was then set down for hearing on 20 July 2010, after giving the parties time to file their respective affidavits. However, it appears that after it was suggested by Coppin J in front of whom the matter came, that the court roll was extremely busy and that there was a possibility that he may not get to the matter that week, the parties agreed to the postponement of the matter to the opposed motion roll of 27 July 2010. In my view the applicant did not delay in bringing these proceedings and acted expeditiously in doing so. In

these circumstances it should be entitled to the costs of the hearing of 20 July 2010.

CONCLUSION

[59] In my view Truebody has not effectively rebutted the applicant's claims that there are protectable interests. I am of the view that the admitted facts.[30] averred by the applicant taken with the first respondent's facts are such that, not only has Truebody not discharged the onus of showing that there is no protectable interest in respect of the applicant's trade secrets in the form of its customer connection and confidential information, but in fact the applicant has clearly demonstrated on the papers before me that it has protectable trade secrets which are protectable by means of the restraint of trade agreement. That this is so, is also underlined by the restraint signed by Truebody.

[60] In my view the requirements of a final interdict have been met. The applicant has shown that it has a clear right which has been breached. Without an interdict the applicant will have its proprietary rights prejudiced by Truebody's employment with Metro File. There is no other satisfactory remedy available to it in order to enforce its rights. In my view a claim for damages would not be an adequate alternative remedy in this case, as the quantum of damages suffered would be difficult to determine and not put an end to the continued employment of Truebody with a competitor. The prejudice to the applicant's proprietary rights increases exponentially on a daily basis for as long as Truebody remains employed with Metro File. It will be impossible for

[30] *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 A*.

the applicant to police Truebody's conduct and for that reason it is vital that her employment with Metro File be immediately terminated.

[61] The applicant is entitled to protect its proprietary rights evidenced by its confidential information and customer connection, by enforcing the provisions of the restraint that Truebody signed, voluntarily and in the exercise of her freedom to contract. The applicant's right to enforce the restraint is clear. The restraint is fair, reasonable and enforceable. It is not against public policy. Truebody must be held to her contractual undertaking.

[62] In the result the following order is made:

62.1 The Applicant's non-compliance with the Rules of Court relating to service under the time periods prescribed by the Rules of the above Honourable Court is condoned.

62.2 The First Respondent is interdicted, whether personally or through any company, close corporation, firm, undertaking or concern in which she is directly or indirectly interested or by which she may be employed whether alone or jointly for a period of 24 months calculated from 31 May 2010 from being interested

or engaged, directly or indirectly, in any capacity (including but not limited to adviser, agent, consultant, director, employee, financier, manager, member of a close corporation, member of a voluntary association, partner, proprietor, shareholder, trustee) in any entity that competes with the Applicant in the Republic of South Africa.

62.3 The Second Respondent is directed to terminate the First Respondent's employment with it.

62.4 The First Respondent is directed to pay the costs of this application, including the costs of 20 July 2010.

H SALDULKER

JUDGE OF THE SOUTH GAUTENG HIGH COURT, JOHANNESBURG

DATE OF HEARING	30 JULY 2010
DATE OF JUDGMENT	13 OCTOBER 2010
COUNSEL FOR APPLICANT	ADV PYE

INSTRUCTED BY	MICHAEL TYMVIOS ATTORNEYS
COUNSEL FOR RESPONDENT	ADV BEKKER
INSTRUCTED BY	DUVENAGE ATTORNEYS