REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2021/36845

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

[31 AUGUST 2021] ..... SIGNATURE

In the matter between:

CGS SHOPFITTERS CC **APPLICANT**

And

STEWARD, RICARDO ALEXANDRE **RESPONDENT**

J U D G M E N T

MUDAU, J:

[1] This urgent application, brought pursuant to Rule 6(12) of the Uniform Rules, seeks to enforce a restraint of trade agreement concluded between the applicant and the respondent. The applicant, CGS Shopfitters CC, a close corporation duly incorporated and registered in accordance with the company laws of South Africa, seeks an order interdicting the respondent from breaching his confidentiality and restraint of trade undertakings given in his

employment contract with the applicant and from breaching his fiduciary duties. As a preliminary matter to the main relief, the applicant seeks an order that the employment contract between the parties be rectified to reflect that the applicant is a close corporation and not a company.

Rectification of the employment contract

[2] It is convenient to deal firstly with the rectification relief for the simple reason that it is not seriously contested. The relevant facts are in brief, as follows. The applicant states that, although the employment contract reflect the employer as a company styled CGS Shopfitters (Pty) Ltd, the employer was in fact the applicant, which is a close corporation. The contract was drawn up in a pro forma document created by the applicant's erstwhile labour consultant, Mr de Oliveira, since deceased, whose name appears on the bottom right hand corner of each page. CGS Shopfitters (Pty) Ltd as a company never existed. The applicant has always run as a sole proprietorship since 1994, until its registration in 2006. References to "company" in the respondent's contract of employment, should actually be reference to "close corporation". Similarly, references to "director" should be a reference to "member".

[3] The applicant attached as proof the respondent's final salary remittance, annexure FA 3 which reflect the employer as the applicant, a close corporation. As indicated above, the relief sought in this regard is uncontentious and without any real prejudice. Nothing turns on this. Accordingly, it is appropriate to grant an order rectifying the employment agreement to reflect the employer as a close corporation and not a company. In addition, that reference to a "director" is intended to be a reference to a "member".

Urgency

[4] I am satisfied that the application is urgent. There was no serious argument to the contrary. The period of the restraint of trade provisions that the applicants seek to enforce, from the date of judgment, is months away. By reason thereof and having regard to the time that it takes to enroll an opposed motion before this Court, the applicants evidently cannot seek redress in the ordinary course. If the breach and reasonableness of the restraint of trade provisions are proved, the harm occasioned by the breach is on-going. It is trite that a breach of a restraint of trade is invariably of an urgent nature[1].

[1] *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn* 2008 (2) SA 375 (C) para [4] at 378; See also *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff* 2009 (3) SA 78 (C).

The merits

[5] It is common cause from a reading of the papers that the respondent was employed by the applicant in terms of an oral agreement during February 2016. During March 2017, the applicant and the respondent signed a written contract of the agreement, annexure FA2. Clause 12.2 in the employment contract provides that the *"[E]mployee shall not, except with the prior written consent of the company, undertake any additional employment for remuneration outside the service of the company, nor be a director, member or office bearer of any other company or corporation, nor carry on or be directly or indirectly associated with or interested in any other business, whether competitive with the business of the company or not*". In terms of clause 14.1.4 the respondent is restrained to "*approach, communicate with or attempt to solicit any business of whatsoever nature from any customer, supplier of potential customer of the company to whom the employee was introduced or who the employee met or with whom the employee became acquainted during the course of the employee's employment with the company*".

[6] Although the written contract fails to disclose details relating to the respondent's remuneration, he was paid a salary since commencement of his employment with the applicant. The respondent's position is described in his employment contract as that of a "designer". During the course of his employment, the respondent had contact with his employer's clients, which included Klein Concept, a major client of the applicant. The respondent was introduced to Klein Concepts during and within the course and scope of his employment with the applicant.

[7] It is common cause that the respondent resigned from his position with the applicant on 30 April 2021. It is further common cause that, the respondent advertised himself as a technical designer with 3D modelling, machining drawings as well as manufacturing drawings skills etc. It is not in dispute that, after his resignation respondent carried out certain design work for one of Klein Concepts' clients.

[8] In his answering affidavit, and in summary, the respondent alleges that he signed the restraint of trade and confidentiality undertakings under duress. He asserts that he is not bound by them. He alleges that, in as much as the written contract signed on 16 March 2017 does not reflect the terms of remuneration, the contract is inchoate. He states that he was from the onset

employed as a draughtsman, which entails the compilation of technical drawings for purposes of manufacturing. By his own version however, machine drawings were used by the applicant to manufacture the drawings required by clients. The respondent's affidavit is replete with examples where he referred to himself previously as "a member of the design team" of the applicant[2], but not as a draughtsman. This is also consistent with his letter of resignation in which he expressed a desire to pursue other avenues of designing, consistent with his work with applicant. After receiving the contract document, he sought and obtained advice from his uncle, an admitted attorney.

[9] The respondent subsequently met with the applicant's representatives including De Oliveira, and raised certain concerns which included the restraint of trade and confidentiality, which on his version was being introduced a year after he started his duties. He was consequently given 15 days to consider and deliver the signed employment agreement failing which he faced dismissal. During the beginning of 2019, with the full knowledge and consent of Mr Virgilio of the applicant, he set up his own design consultancy to augment his income and gave assurance that his side work will not interfere with his duties with the applicant. He confirmed that he consulted on a freelance basis with Mr Stephen Klein of Klein Concepts, an interior architecture practice with a focus on luxury retail design, one of the applicant's two major clients, which entailed the creation of client drawings. He maintained that he never breached any confidential information in respect of the applicant's clients. He maintained that the work he engaged in does not in any way overlap with the work he performed for CGS.

[10] The material terms of the contract, the subject matter of the main application are not in dispute. In a replying affidavit, the applicant pointed out that the respondent has been responsible on numerous occasions was in the employ of the applicant to design work commissioned by Klein Concept. The respondent does not deny that he was privy to the applicant's confidential information set out in the founding affidavit but merely denies having breached his confidentiality undertakings. In a confirmatory affidavit, Mr Klein confirmed that the work which the respondent had solicited from Klein Concept was the same kind of work which the applicant carried out on behalf of Klein Concept.

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[2] Paragraphs 49, 52, 55, 60, 70 and 75 of the answering affidavit.

The Law

[11] It trite and entrenched that every citizen has the constitutional right to choose their trade, occupation or profession freely[3]. However, the practice of a trade, occupation or profession may be regulated by law. None of the entrenched rights are absolute but are subject to limitations[4]. It is however settled law that the right to trade or practice and occupation may be limited by agreement. Additionally, it is trite that a restraint of trade agreement is regulated by the law of contract. The party seeking to enforce a restraint need only invoke the restraint agreement and prove a breach of the agreement, nothing more. The party seeking to avoid the restraint bears the onus to establish, on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable[5] 'A restraint of trade can be enforced and it is sufficient for the applicant to show that the customer contact exists and that they can be exploited by the former employee. The principles applicable to restraint agreements are well-established.

[12] In general terms, a restraint will be unreasonable if it does not protect some proprietary interest of the party seeking to enforce a restraint. In other words, a restraint cannot operate only to eliminate competition. The effect of the landmark judgment in *Magna Alloys* is summarised in *J Louw and Co (Pty) Ltd v Richter and Others*[6] thus:

> 'Covenants in restraint of trade are valid. Like all other contractual stipulations, however, they are unenforceable when, and to the extent that, their enforcement would be contrary to public policy. It is against public policy to enforce a covenant which is unreasonable, one which unreasonably restricts the covenantor's freedom to trade or to work. In so far as it has that effect, the covenant will not therefore be enforced. Whether it is indeed unreasonable must be determined with reference to the circumstances of the case. Such circumstances are not limited to those that existed when the parties entered into the covenant. Account must also be taken of what has happened since then and, in particular, of the situation prevailing at the time enforcement is sought.'

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[3] Section 22 of the Constitution of South Africa,1996.
[4] Section 36 of the Constitution of South Africa,1996.
[5] *Magna Alloys & Research (S.A.) (Pty) Ltd. v Ellis* [1984] 2 All SA 583 (A); 1984 (4) SA 874 (A); *Den Braven SA (Pty) Ltd v Pillay and another* 2008 (6) SA 229 (D).
[6] 1987 (2) SA 237 (N) 243B-C.

[13] In *Reddy v Siemens Telecommunications (Pty) Ltd*[7] the Supreme Court of Appeal (SCA) upheld a 12-month restraint against an employee who had joined a competitor (Ericsson). The Court restated the following principles at para [15]:

> 'A Court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint. The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim pacta servanda sunt. The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or professions. Both considerations reflect not only common-law but also constitutional values. Contractual autonomy is part of freedom in forming the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life.'

[14] Against the background facts and the applicable law, it is to the respondent's defences' that I turn to deal with. Duress is raised as a defence. The respondent contends that he was compelled to sign the restraint of trade agreement under circumstances of duress in that he feared losing his job. In this regard, reliance was made to the matter of Pinnacle Technology Shared Management Services (Pty) Limited and Another v Venter and Another[8]. In that matter, the first respondent, Venter alleged in her answering papers that she signed the contract under duress. She was on her version, informed her that if she did not sign the new contract of employment incorporating the restraint of trade she would not be paid her salary and was in fear that her failure to do so would result in her being unable to meet her monthly financial commitments.

[15] In *Arend v Astra Furnishers (Pty) Ltd*[9] Corbett J (as he then was) reminds us that duress may take the form of inflicting physical violence upon the person of a contracting party or of inducing in him a fear by means of threats. Where a person seeks to set aside a contract, or resist the enforcement of a contract,

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7 2007 (2) SA 486 (SCA)
8 (J1095/15) [2015] ZALCJHB 199 (14 July 2015).
9 1974 (1) SA 298 (C) at 305-306B) .

on the ground of duress based upon fear, the following elements must be established:

(i) The fear must be a reasonable one.

(ii) It must be caused by the threat of some considerable evil to the person concerned or his family.

(iii) It must be the threat of an imminent or inevitable evil.

(iv) The threat or intimidation must be unlawful or *contra bonos mores*.

(v) The moral pressure used must have caused damage.

[16] As pointed out by the Supreme Court of Appeal in *Medscheme Holdings (Pty) Ltd and Another v Bhamjee*[10] with reference to *Van den Berg & Kie Rekenkundige Beamptes v Boomprops* 1028 BK[11] , *"hard bargaining is not the equivalent of duress, and that is so even where the bargain is the product of an imbalance in bargaining power. Something more - which is absent in this case - would need to exist for economic bargaining to be illegitimate or unconscionable and thus to constitute duress."*

[17] It remains to determine whether the alleged duress constitutes a basis for the respondent to avoid the consequences of the agreement. The fact that the respondent signed the employment agreement and thus the undertakings with reservations does not necessarily mean that he acted under duress. In this instance, and by his own version, he signed the undertakings after having obtained legal advice from an uncle, an admitted attorney. His reliance on the doctrine of duress is not sustainable. He had the choice to refuse to make the requested undertakings but did so after obtaining legal advice. The respondent has thus failed adequately to set out a defence of duress or for that matter, the requisite elements of duress as contemplated in *Arend v Astra Furnishers*[12].

[18] The allegation by the respondent that the written agreement is inchoate for lack of remuneration terms is also without basis. It is common cause that the

[10] 2005 (5) SA 339 (SCA).
[11] 1999 (1) SA 780 (T).
[12] Footnote 7 above.

respondent had received a salary from the applicant since his employment in 2016. Now, the fact that some of the written terms were contained in a separate document does not detract from the fact that there was an employment agreement between the parties. Accordingly, his defence in this regard is devoid of any merit.

[19] The respondent also alleges that the applicant waived its right to enforce the confidentiality and restraint of trade undertakings. In this regard he alleges that members of the applicant were aware that he was running a side business as they followed him on an Instagram account and did so with their permission. Not only was this disputed by the applicant as they communicated on a different platform, but the law in this regard is also settled.

[20] In our law it is an established principle that there is a strong presumption against waiver. Having gone to all the trouble to acquire contractual rights people are, in general unlikely to give them up[13]. In this regard the onus lies with the respondent asserting waiver to show that the applicant with full knowledge of the applicable rights decided to abandon it whether expressly or by conduct. Accordingly, an intention to waive must be inferred reasonably; no one can be presumed to have waived rights without clear proof[14] .

[21] In *Road Accident Fund v Mothupi*[15], Nienaber JA explained the basis for considering any waiver of a right in the following terms:

> 'Waiver is first and foremost a matter of intention. Whether it is the waiver of a right or a remedy, a privilege or power, an interest or benefit, and whether in unilateral or bilateral form, the starting point invariably is the will of the party said to have waived it. ... The test to determine intention to waive has been said to be objective .... That means, first, that intention to waive, like intention generally, is adjudged by its outward manifestations ...; secondly, that mental reservations, not communicated, are of no legal consequence ...; and, thirdly, that the outward manifestations of intention are adjudged from the perspective of the other party concerned, that is to say, from the perspective

[13] *Christie's Law of Contract, Seventh Vol, page 511.*
[14] 2000 (4) SA 38 SCA paras 15, 16,18 and 19
[15] Supra.

of the latter's notional alter ego, the reasonable person standing in his shoes.' (Citations omitted)

In my view, the respondent fails to establish that CGS waived its rights and concomitant obligation by the respondent to the written contract.

[22] In considering an undertaking made by an employee in relation to the enforcement of the restraint of trade agreement Malan AJA also stated in Reddy v Siemens Telecommunications (Pty) Ltd[16] that: '*Public policy requires contracts to be enforced. This is consistent with the constitutional values of dignity and autonomy. The restraint agreement in this matter is not against public policy and should be enforced. Its terms are reasonable. What Reddy is required to do is to honour the agreement he entered into voluntarily and in the exercise of his own freedom of contract. While it is correct that his employment with Ericsson will be restricted, it remains a breach of his contractual undertaking'.*

[23] The enquiry into the reasonableness of the restraint, as indicated, is essentially a value judgment that encompasses a consideration of two policies, namely the duty on parties to comply with their contractual obligations and the right to freely choose and practice a trade, occupation or profession. 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.

[24] According to the Appellate Division in *Basson v Chilwan and Others*[17],the following questions require investigation; namely, whether the party who seeks to restrain has a protectable interest, and whether it is being prejudiced by the party sought to be restrained. Further, if there is such an interest – to determine how that interest weighs up, qualitatively and quantitatively, against the interest of the other party to be economically active and productive.

[16] Supra at 500E-G and 501C.
[17] 1993 (3) SA 742 (AD)

Fourthly, to ascertain whether there are any other public policy considerations which require that the restraint be enforced. If the interest of the party to be restrained outweighs the interest of the restrainer – the restraint is unreasonable and unenforceable. The onus is on the respondent seeking to avoid the restraint to establish, on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable.

[25] In this instance however, applicant and the respondent as indicated, entered into a contractual agreement. In the instant case however, the respondent was aware of the limitations through the restraint clauses. Not only was he aware of the terms of the agreement and understood the terms, but held certain reservations before he signed, which had been addressed above. But there is more. The respondent stood in a position of trust in relation to the applicant as an employee.

[26] The basic principle being that a person in position of confidence involving duty to protect interests of other, is not entitled to make secret profit at other's expense nor place himself in position where his interests conflicting with such duty[18].The narrow issue to be decided is whether the interest that is sought to be protected is an interest that needs protection; whether the restraint is reasonable in the context of whether the enforcement of the restraint would be against public policy if regard is had to the developing jurisprudence and constitutional imperatives. Parties ought to be bound by agreements into which they freely enter. In the instant matter I hold that it is reasonable to restrain the respondent from poaching the applicant's client base, which he did when he consulted with Klein, CGS's client. It is reasonable also to restrain the respondent from the use of knowledge and skills he obtained through his employment with the applicant limited to the contract period. For all of the above reasons, the applicant has made out a case for the enforcement of the restraint and confidentiality undertakings.

[27] I am satisfied that the restraint will not leave the respondent unproductive or destitute as he would still be able to operate in other spheres as a

[18] See Phillips V Fieldstone Africa (Pty) Ltd and Another 2004 (3) SA 465 (SCA)

draughtsman which market remains available to him to exploit and in which he has previous experience. Accordingly, this court should encapsulate an order which allows the respondent to remain economically active, whilst protecting the interests of the applicant. On the totality of the evidence, I am of the view that the interest that is sought to be protected is an interest that needs protection; that the restraint is reasonable and not contrary to public policy.

[28] It is trite that the issue of costs lies in the unfettered discretion of the court. In the matter of *Ball v Bambelela Bolts (Pty) Ltd & Another*[19] the Labour Appeal Court held that: *'...the enforcement of a restraint, technically, involves a constitutional issue. Restraints of the kind being considered, constitute a limitation on a citizen's right, in terms of s 22 of the Constitution, which, arguably, requires justification...In constitutional matters, the general rule that costs follow the result does not apply. In such matters costs orders are generally eschewed out of concern that they may produce a "chilling effect", in that litigants may be deterred from approaching a court to litigate concerning an alleged violation of their constitutional rights for fear of being penalised with costs if they are unsuccessful.'* I agree.

[29] For all the reasons as set out above, I make the following order:

Order

1. The rules relating to forms and service are dispensed with and this application is heard as one of urgency in terms of rule 6(12);

2. The contract of employment ("the contract") annexed to the founding affidavit herein as annexure "FA2" is rectified by: 2.1 substituting the word "company" wherever it appears in the contract with the words "close corporation"; 2.2 substituting the word "director" wherever it appears in the contract with the word "member";

3. The respondent is forthwith:

   3.1 interdicted and restrained from using or disclosing to any third party any information of whatsoever nature and in whatsoever

[19] (2013) 34 ILJ 2821 (LAC).

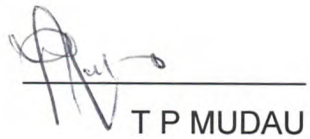
form, whether oral or written or tangible or intangible which was disclosed to the respondent, whether disclosed to the respondent by the applicant or any nominated party or acquired by the respondent elsewhere and whether in the past or in the future, which in any way relates to the applicant's business, or the commercial exploitation thereof, including but not limited to Methods, Processes, Computer Software, Documentation, Lists of clients, Programs, Trade Secrets, Technical Information, Chemical Formulas, sketches, Financial Information, Marketing and business systems, Marketing items or products, strategies, programs, methods, Concepts, Techniques, findings, results or other information which could be damaging to the applicant's business or which could benefit other parties to the detriment of the company.

3.2 interdicted and restrained for a period of twelve (12) months from 30 April 2021 from:

3.2.1 directly or indirectly or through a third party approaching, communicating with or attempting to solicit any business of whatsoever nature from any customer, supplier or potential customer of the applicant to whom the respondent was introduced or who the respondent met or with whom the respondent became acquainted during the course of the respondent's employment with the applicant.

3.2.2 engaging in or being involved with, within the area of the Republic of South Africa, either as an employee, principal, agent, representative, proprietor, partner, shareholder, director, consultant, adviser, financier or member of any closed corporation or enterprise that, as a principal or significant part of its business, trades in products manufactured or designed by the applicant

4. There is no order as to costs.



T P MUDAU

[Judge of the High Court]

Date of Hearing:	12 August 2021
Date of Judgment:	31 August 2021

APPEARANCES

For the Applicant:	Adv. B Hitchings
Instructed by:	Martins Weir Smith Attorneys
For the Respondent:	In person