IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C516-2017

In the matter between:

ARAMEX SOUTH AFRICA (PTY) LIMITED **Applicant**

and

CARLE VAN SCHALKWYK **First Respondent**

WORLD NET EXPRESS (A DIVISION OF WORLD NET LOGISTICS (PTY) LTD) **Second Respondent**

Heard: **12 September 2017**

Delivered: **4 October 2017**

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

[1] The Applicant (Aramex) approached the Court on an urgent basis to seek final relief enforcing certain restraint of trade, confidentiality and non-solicitation undertakings as furnished by the First Respondent (Van Schalkwyk) in terms of a Memorandum of Agreement between the parties. Aramex seeks to enforce the restraint for a period of 12 months and anywhere within a 70

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kilometres radius of any of its 17 business premises located throughout the Republic until 11 May 2018. Van Schalkwyk opposed the application, whilst the Second Respondent (World Net Express) filed a notice to abide.

[2] Van Schalkwyk, as reiterated during argument had consented to certain of Aramex's prayers in the Notice of Motion, and more specifically, not to solicit, interfere, or entice or attempt to entice away from Aramex any customers, and not to divulge or use confidential information of Aramex to any third party. Aramex is nevertheless not content with those concessions or undertakings.

Background:

[3] Aramex conducts business as an express courier, transport and logistics company. It transports goods locally and internationally on behalf of private clients including companies and individuals. The industry within which Aramex operates is known to be extremely competitive, and there is a constant drive amongst competitors to win large volumes of work and/or repeat business.

[4] Van Schalkwyk joined Aramex with effect from 30 September 2013 as a Senior Sales Executive in its Stellenbosch branch. On 9 October 2013, she had furnished Aramex with restraint and confidentiality undertakings by signing a Memorandum of Agreement in its favour. The Agreement is extensive and contains the standard restraint of trade, non-solicitation, and confidentiality clauses.

[5] On 5 May 2017, Van Schalkwyk resigned from Aramex and had on the same date, accepted an offer of employment from World Net Express which she had received on 3 May 2017. It is common cause that that World Net Express is Aramex's direct competitor, as it also provides express courier, transport and logistics services. World Net Express operates throughout the Republic, Europe and South-East Asia, and services individuals, small and large companies. Services provided by both World Net Express and Aramex overlap, and the two entities often compete for work and tender for the same projects.

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Urgency:

[6] Van Schalkwyk opposed the application on a variety of grounds. Chief amongst them was that the application should be dismissed for want of urgency, as Aramex had failed to set out sufficient reasons for deviating from the provisions of the Rules of this Court.

[7] As to whether the matter is urgent or not must be determined within the factual background leading to and after Van Schalkwyk's departure from Aramex. The application was brought before the Court on 22 August 2017 following upon the following common cause facts;

7.1 After Van Schalkwyk had resigned from Aramex and upon accepting an offer of employment made by World Net Express, Aramex on 7 May 2017 discovered through an automated 'data leak prevention system' from its international operations based in Amman that on the same day that Van Schalkwyk resigned, she had copied confidential files from her computer to her personal USB external device.

7.2 The information copied included February billings, express rate templates, and client contact details (inclusive of 2016/2017 client list, key clients, decision makers, pricing, rates and billings per clients);

7.3 On 8 May 2017, Aramex's Branch Manager for the Stellenbosch operations, Andre Cronje, discussed the matter surrounding the copying of confidential information with Van Schalkwyk. Her response was that she had deleted the files while cleaning her laptop, and that her computer port was blocked and she therefore could not have downloaded the information on her external USB;

7.4 Cronje on the same date received further information from Amman that Van Schalkwyk's computer was on a 'level 2' security setting, and she was thus able to connect any USB to her computer, and had in fact copied the confidential files despite her denials;

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7.5 On 10 May 2017, Van Schalkwyk had an exit interview and had informed Aramex's Mianda van Niekerk that she was leaving to take up employment in the steel industry. She had also stated that she had four other offers of employment with a better salary than that offered by Aramex;

7.6 Van Schalkwyk's last day of employment with Aramex was on 11 May 2017. Before she left, she had handed in the USB drive to which she had downloaded the confidential information, and Cronje had deleted all the Aramex files. She had also signed an undertaking to confirm that all of Aramex's information had been deleted and that she was no longer in possession thereof. She further warranted that she had not distributed the information to a third party;

7.7 Aramex had on 28 July 2017 discovered through one of its sales team members, Melanie Van Bank that Van Schalkwyk was employed by World Net Express at its Airport Industria branch, some 33 km from Stellenbosch. Van Bank had also reported that she had called one Derick Boonzaaier, a representative of an entity known as 'Ossur' which was Aramex' existing client, and was informed that Van Schalkwyk had cold-called 'Ossur';

7.8 On 2 August 2017, Aramex' attorneys of record, Cliffe Dekker Hofmeyr (CDH), sent correspondence to Van Schalkwyk, which was also copied to World Net Express to seek undertakings from her that she would comply with her undertakings in terms of the Memorandum of Agreement. In the letter, she was also advised of the misrepresentations she had made, and it was demanded that she comply with the terms of the restraint agreement, and to with immediate effect, terminate her employment with World Net Express;

7.9 Van Schalkwyk's response on 3 August 2017 through her attorneys of record, Burger Potgieter Attorneys, was to admit that she was indeed employed by World Net Express. She had however denied that she had made any misrepresentations during her exit interview, as the

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offer from Pacific Steel was real together with other offers from courier companies. In her response, she also reiterated her undertaking not to use or disclose or divulge to third parties, any of Aramex's trade secrets, and warranted that she was not in possession of any trade secrets, written instructions, drawings, notes, memoranda or records related to trade secrets. She had further stated that her new role in World Net Express was essentially to maintain relations with existing clients and to service areas other than those serviced by her during her employ with Aramex. She also disputed that the restraint agreement was enforceable;

7.10 According to Chantal Adamstein, the deponent to the Founding Affidavit and Aramex's Regional Human Resources Executive, a decision was taken on 8 August 2017 to enforce the restraint agreement, and CDH was accordingly instructed to secure counsel. Counsel was only available for consultation on 14 August 2017 and papers were then prepared for serving and filing.

[8] Aramex in the light of the above contended that it had acted with the necessary diligence and expediency in bringing this application, and had taken active steps once it was discovered that Van Schalkwyk had joined the competition in breach of her restraint undertakings. It was further submitted that matters such as these were by their very nature urgent, and that the undertakings given by Van Schalkwyk were of limited duration. To this end, it was submitted that if this application was to be brought in the ordinary course, Aramex would not be able to obtain substantial redress, and that by the time the matter is heard, the undertakings would have expired and irreparable harm would have been suffered.

[9] Van Schalkwyk contended that on Aramex's own version, it had learned of her employment with World Net Express on 28 July 2017, and had received her undertakings on 3 August 2017. She submitted that the application was only launched some three weeks later on 22 August 2017, and she was given a short period within which to respond. She denied that the application was

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urgent, and contended that the undertakings she had made dispensed with any alleged urgency in its entirety.

[10] The principles surrounding urgency are fairly-well established. An applicant seeking urgent relief as contemplated in Rule 8 of the Rules of this Court must adequately and in detail, set out in the founding affidavit, the reasons for the urgency, the circumstances which render the matter urgent, and the reasons why substantial redress cannot be obtained at a hearing in due cause. It therefore follows that where the Court is not satisfied that sufficient reasons exists for the matter to be treated as urgent, the application ought to be struck off from the roll on that ground alone[1].

[11] Furthermore, where it is found that the urgency claimed is ultimately self-created, the Court should refuse to grant relief[2]. It has also been held that disputes pertaining to enforcement of restraint undertakings are by their very nature urgent[3]. Even if this might be the case, the Court must be satisfied that the requirements set out in Rule 8 have been complied with.

[12] One of the factors to be considered in determining whether a matter should be accorded any urgent attention is the haste with which a party approached the Court. In this case, Aramex contended that it took 11 court days in view of the timeline of events as summarised above.

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[1] See *Commissioner For the South African Revenue Services v Hawker Air Services (Pty) Ltd and Another* (supra) where it was held that:

> *"Urgency is a reason that may justify deviation from the times and forms the rules prescribe. It relates to form, not substance, and is not a prerequisite to a claim for substantive relief. Where an application is brought on the basis of urgency, the rules of court permit a court (or a judge in chambers) to dispense with the forms and service usually required, and to dispose of it 'as to it seems meet' (Rule 6(12) (a)). This in effect permits an urgent applicant, subject to the court's control, to forge its own rules (See Republikeinses Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk 1972(1) SA 773 (A) 782A-783H) which must 'as far as practicable be in accordance with' the rules). Where the application lacks the requisite element or degree of urgency, the court can for that reason decline to exercise its powers under Rule 6(12) (a). The matter is then not properly on the court's roll, and it declines to hear it. The appropriate order is generally to strike the application from the roll. This enables the applicant to set the matter down again, on proper notice and compliance".*

[2] See *Jiba v Minister: Department of Justice and Constitutional Development and Others 2010) 31 ILJ 112* at para 18, where it was held that;

> *"Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and the degree to which the ordinary applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self-created when seeking deviation from the rules".*

[3] See *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff and Another 2009 (3) SA 78 (C)* at 88J

[13] Having had regard to the founding affidavit, and in particular, the timeline of events as summarised above, I am satisfied that the period of delay complained of by Van Schalkwyk is not egregious. I am further satisfied that the application has properly set out reasons why the matter should be treated as urgent, and has also made out a case to justify the extent of departure from the ordinary time periods set out in the Rule 8. I am also satisfied that Van Schalkwyk cannot complain of not being granted adequate time to respond to the allegations contained in the application, more specifically since she had filed a substantive answering affidavit, and was further granted leave by the Court to file a further answering affidavit. She therefore has no cause to claim that she has been prejudiced in any manner.

[14] Crucially however is the correspondence between the parties' attorneys of record in securing undertakings from Van Schalkwyk and her responses thereto. Taking into account the events that took place between her resignation and departure from Aramex, it would be remiss of the Court not to treat the matter as urgent in view of the irreparable harm that Aramex may suffer as a result. The undertakings she had made were obviously of little comfort to Aramex as shall further be illustrated in this judgment, and Aramex was clearly within its rights to launch this application at the time that it did. There is therefore no basis for any conclusion to be made that the urgency claimed by Aramex is self-created.

The restraint of trade agreement and breach:

[15] Aramex seeks final relief, and it is trite that it must satisfy three requirements, viz, a clear right; secondly, an interference with that right actually committed or reasonably apprehended; and, thirdly, the absence of suitable alternative remedy[4].

[16] Aramex's right is grounded on the existence of a valid restraint of trade agreement. It is trite that a party that seeks to enforce a contract in restraint of trade is required to invoke the restraint agreement and prove a breach thereof. In her answering affidavit, Van Schalkwyk conceded that she had

[4] *Setlogelo v Setlogelo 2014 AD 221* at 227

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signed the agreement in October 2013, but contended that she was compelled to do so as she was still new in her job. She alleged that she signed the agreement as she did not want to 'cause any ruptions'.

[17] It is not clear as to whether Van Schalkwyk sought to disavow the agreement or not, as in the submissions made on her behalf, it was conceded that she admitted the agreement. Even if she sought to disavow the agreement, in my view, this was a half-hearted attempt at doing so. Furthermore, it is trite that the principles of *caveat subscripto* applies in such cases, particularly since the nature of that 'compulsion', or alleged undue influence (if any) remains unknown. To this end, I am satisfied that there is a valid restraint of trade between the parties.

[18] To the extent that it was found that there is a valid restraint of trade between the parties, it is further common cause that Van Schalkwyk has taken up employment with World Net Express, and that she is based at its Airport Industria premises, some 33 km from Stellenbosch. Van Schalkwyk had conceded that that the two entities were competitors, and I am satisfied that Aramex has discharged its onus in demonstrating a competitive interface between it and World Net Express.

[19] Van Schalkwyk however contended that the division she was employed in by World Net Express did not offer warehousing or freight solutions. I am however not convinced that the mere fact that Van Schalkwyk works in a particular division makes World Net Express less of a competitor. By taking up employment with World Net Express, coupled with the fact that she is based 33 km from Stellenbosch, Van Schalkwyk is clearly in direct breach of clause 4 of the Memorandum of Agreement, which provide that;

> *'You undertake and warrant in favour of the Company that you will not, during your employment with the company and for a period of 12 (TWELVE) calendar months after the termination thereof for whatsoever reason,* ***anywhere within, a 70 kilometre radius of any business premises of the Company, including but not limited to the premises of your employment****, be directly or indirectly interested, engaged, concerned, associated with or employed*

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> *whether as proprietor, partner, director, shareholder, employee, consultant, contractor, financier, principal agent, representative, assistant, adviser, administrator or otherwise and whether for reward or not in any company, firm, business undertaking, concern or other association of any* ***nature which furnishes or renders, directly or indirectly, any form of service as set out in clause 2.1 above***[5]*'*

[20] In the light of the above conclusions, Van Schalkwyk therefore must discharge the onus demonstrating on a balance of probabilities that the restraint is unenforceable as it is unreasonable and/or contrary to public policy[6]. At most, she must demonstrate that the restraint in question does not seek to protect a legally recognisable interest of Aramex in any manner, and that it merely seeks to limit competition, or at worst[7], it goes beyond the terms intended or agreed to by the parties[8].

[21] The enquiry into the reasonableness of the restraint 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[9]. Central to an enquiry into the reasonableness of the restraint are four interrelated questions as identified in *Basson v Chilwan and others*[10]*,* viz;

i. Does the one party have an interest that deserves protection at the termination of the employment?

ii. If so, is that interest threatened/prejudiced by the other party?

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[5] Clause 2.1 provides that;

> *'The Company conducts the business of providing full supply chain services that include; clearing and forwarding, warehousing, packaging, mailroom and the international and domestic collection and delivery of packages and parcels'*

[6] *Magna Alloys and Research SA (Pty) Ltd v Ellis 1994 (4) SA 574 (A).* See also *Experian South Africa (Pty) Ltd v Heyns and Another [2013] (1) SA 135 (GSJ)* at para 14*, where it was held that;*

> *'The position in our law is, therefore, that a party seeking to enforce a contract in restraint of trade is required only to invoke the restraint agreement and prove a breach thereof. Thereupon, a party who seeks to avoid the restraint, bears the onus to demonstrate on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable'.*

[7] *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* at 893C-G and 897H – 898D

[8] See *Ball v Bambalela Bolts (Pty) Ltd and Another (2013) 34 ILJ 2821 (LAC)*

[9] *See Labournet (Pty) Ltd v Jankielsohn and Another [2017] 5 BLLR 466 (LAC)* at para 41; *Sunshine Records (Pty) Ltd v Frohling and others 1990 (4) SA 782 (A)* at 794C-E

[10] [1993] (3) SA 742 (A) at 767 G-H

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iii. Does such interest weight qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?

iv. Is there an aspect of public policy having nothing to do with the relationship between the parties, which requires that the restraint be maintained or rejected? Thus, where the interest of the party sought to be restrained outweighs the interest to be protected, the restraint is unreasonable and consequently unenforceable.

Protectable proprietary interests:

[22] Regarding the first leg of the enquiry, it is now accepted that protectable interests worthy of protection are of two kinds. The first relates to the 'trade connections' of the business, which essentially entails the goodwill of the business encompassing relationships with customers, potential customers, suppliers and others[11]. The second relates to 'trade secrets' of the company, which involves all confidential matters which are useful for the carrying on of the business and which could be useful to a competitor[12]. To the extent that Van Schalkwyk contends that the restraint is unreasonable, it is upon her to establish that she had no access to confidential information and further that she never acquired any significant personal knowledge of, or influence over Aramex's customers whilst in its employ.

[23] As further stated in *Experian*, it is sufficient if Aramex can show that trade connections through customer contact exists and that they can be exploited if Van Schalkwyk were employed by World Net Express, a competitor. Once that conclusion was reached and it is demonstrated that World Net Express is a competitor, the risk of harm to Aramex, if Van Schalkwyk were to take up employment, becomes apparent[13].

[24] Principal amongst Van Schalkwyk's defences was that Aramex did not have a protectable interest; that the restraint provision was not enforceable, alternatively that it is not enforceable to the extent alleged by Aramex as it is too wide. She further contended that she had not disclosed any trade secrets

[11] See *Basson supra*
[12] *Experian* at paras 17, 17.1 and 17.2
[13] *Experian* at para 20

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or confidential information of Aramex, and that she had already provided undertakings in respect of the non-solicitation and confidentiality clauses.

[25] Insofar as the requirements of final relief are concerned, Van Schalkwyk further contended that Aramex has not established a clear right nor an injury actually committed or reasonably apprehended, and that even if a clear right can be shown, her undertakings dispose of any reasonable apprehension of irreparable harm.

[26] As to whether Aramex has interests worthy of protection needs to be considered within the context of Van Schalkwyk's duties whilst still employed by it. She did not seriously dispute the fact that in her role as Senior Sales Executive at Aramex, her duties entailed the daily scheduling of new business appointments; client visits; direct sales of fully fledged courier services to clients; cold calling; achieving individual sales targets set in respect of new business, generating new sales leads and acquiring new customers, selling Aramex's full supply chain products; establishing customer needs, developing and expanding Aramex's customer base; uploading customer contact details onto Aramex's systems; dealing with clients' and elevated queries; assisting with quotations; administrative duties; liaising with potential international clients and local branches; generating new sales; securing new business; preparation and presentation of proposals to new clients; liaising between Aramex and customers; and negotiating rates with customers. She had also in the course of her duties, attended sales and marketing meetings, where both the national and regional sales strategies were discussed.

[27] Van Schalkwyk conceded that she performed some of the duties outlined above, but contended that some of those duties were aimed exclusively at potentially new clients, and not any of Aramex's existing clientele, which she had no relationships with.

Confidential Information:

[28] Aramex's contention was that Van Schalkwyk during her employment with it enjoyed access to its centralised computer server and the files and confidential information contained therein; access to client mandates

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incorporating details of rates, credit terms, cancellation clauses, discounts, terms of engagement and details proprietary to the type and frequency of services that each client used; Aramex's regional and national sales strategies around both existing and new customers regarding the retention of such customers and the approach being adopted to secure new business; information concerning customers' daily, monthly and annual spend; contact information and details of key clients and decision makers. Aramex further contended that contrary to Van Schalkwyk's contention, the above information was unknown to competitors, and was made known to her in the context of a confidential relationship, which remained protectable.

[29] Van Schalkwyk's contention was that to constitute protectable confidential information, such information must be treated as confidential by Aramex, in the sense that it should have been restricted to a limited class of employees. She contended that this was not the case in this matter as Aramex had the pricing structures of its competitors, whilst World Net Express had Aramex's pricing structure and of other competitors prior to her employment with Aramex.

[30] In her view, the information alleged by Aramex to be confidential was in any event within the public domain and thus not protectable. In this regard, she contended that any person can simply contact Aramex to request a copy of its credit application form which will disclose all information in respect of credit terms, cancellation clauses and the like. She further argued that there was no evidence to suggest that the information of Aramex, or the trade secrets or pricing model was unique to it; and that even if it were to be found that she had been privy to any of Aramex's confidential information, she had already undertaken and confirmed in writing that she did not have any information confidential or proprietary to Aramex in her possession, that she would not make use of any such information, and that she will not disclose such information to third parties. In her view, the attempt to enforce the restraint of trade provisions over and above her undertakings she had already given was superfluous, moot and extended beyond what was required to protect any protectable interests Aramex may have.

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[31] The very essence of enforcement of any restraint of trade agreement is to prevent the use of confidential information by a former employee to the detriment of the ex-employer. For information to be regarded as confidential, it must be objectively established that it could reasonably be useful to, and enable a competitor to gain an advantage over the ex-employer[14], and it is therefore not necessary to find that the ex-employee did or would actually use trade secrets and confidential information in his new employment, but that is was sufficient if *he could do so*[15].

[32] In this case, it should be accepted that Van Schalkwyk was indeed exposed to the information as outlined by Aramex. She had conceded that she had access to Aramex's centralised computer server which contained client contact information. Her contention however was that having such access was of little use unless one had a strong trade connection or rapport with clients. This however does not in my view, derogate from the invariable conclusion that she had access to the information in question, which could prove to be useful to a competitor.

[33] By virtue of the provisions of clause 2.2 of the Memorandum of Agreement, Van Schalkwyk had consented to becoming possessed of Aramex's trade secrets as outlined in clause 1, and she had made certain undertakings in that regard. It is therefore not sufficient for her to simply allege that the information in question is not confidential. The fact of the matter is that confidentiality is relative, and she had acquired that information in the course of her confidential employment relationship with Aramex. The fact that such information might have been in the public domain does not make it less confidential[16]. It remains protectable.

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[14] See *Coolair Ventilator Co SA (Pty) Ltd v Liebenberg and Another* 1967 (1) SA 686 (W) at 689G, where it was held that;

> *'If . . . it is objectively established that a particular item of information could reasonably be useful to a competitor as such, i.e. to gain an advantage over the plaintiff, it would seem that such knowledge is prima facie confidential as between an employee and third parties. . . .'*

[15] In *Reddy v. Siemens Telecommunications (Pty) Ltd supra*

[16] See *Experian* at para 44, where it was held that;

> *'All of the above, in my view, constitute confidential information which is proprietary to the applicant and which it is entitled to protect. It follows that first respondent's contention that this information to which he had access whilst employed by the applicant is not confidential cannot be sustained. In any event, the contention is legally untenable in that it is clear from*

[34] It has also been held that for information to be regarded as confidential and thus protectable, it must be capable of application in trade or industry, must be useful, and be of economic value to the person seeking to protect it.[17] There can be no doubt that the information in question given the competitive nature of the courier industry is indeed useful and applicable in that industry. The high watermark of Van Schalkwyk's defence was that any perceived prejudice or threats to Aramex's interests is covered by her undertakings; that she had no further information within her knowledge that can prejudice Aramex by her employment with World net Express; and that there was nothing unique about the information, particularly Aramex's pricing model.

[35] It is further my view that the circumstances of this case dictate that an enquiry into whether the information in question was capable of application in the industry, or whether it had any economic value, need not go beyond the facts surrounding Van Schalkwyk's resignation from Aramex and her subsequent undertakings. This is also in line with the principle that the reasonableness of the restraint must be determined with reference to the circumstances at the time the restraint is sought to be enforced[18].

[36] On the common cause facts, it is accepted that Van Schalkwyk handed in her resignation on the same date that she accepted an offer of employment from World Net Express. In her resignation letter[19], she had specifically mentioned that she was leaving Aramex to pursue other career opportunities outside of the industry and to grow further in her career. *Prima facie*, Aramex had no reason to believe at the time of the resignation that there might be a breach of restraint undertakings.

[37] More concerning however is that on the date of her resignation, she had downloaded certain confidential information that appears to be clearly of great importance to her. One can only conclude that such information, would prove

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several reported judgments on this issue, that irrespective of whether or not information is in the public domain, the fact that the first respondent has obtained such information within the context of a confidential relationship means that it in fact is protectable….'

[17] See *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff and Another; Waste Products Utilisation (Pty) Ltd v Wilkes and another* 2003 (2) SA 515 (W) at 577B C.

[18] See *Labournet (Pty) Ltd v Jankielsohn and Another* at para 43

[19] Annexure 'FA4' to the Founding Affidavit

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to be beneficial to her in her new employment, and be beneficial to World Net Express. It took about a week for that information to be retrieved from her private USB and for it to be erased from it. Her contention therefore that she no longer has that information or does not intend to use it at some point during her employment with World Net Express is of little comfort to Aramex, specifically since it is not known what was done with that information between 5 and 11 May 2017

[38] Furthermore, Van Schalkwyk's other conduct including a misrepresentation in her resignation letter that she intended to pursue her career outside of the industry, when in fact she had already accepted an offer of employment from World Net Express; her failure to disclose in her exit interview that she had already accepted that offer and her misrepresentation that she was interested in the steel industry further makes any undertakings made by her to be treated with scepticism. Furthermore, she had denied when confronted by Cronje that she had indeed downloaded the information in question, when it was ultimately established that she had in fact done so.

[39] Even more worrisome for Aramex is that subsequent to Van Schalkwyk having left, it was discovered that a white file containing the company profiles of customers she was looking to canvass for business, notes of meetings she had with customers and contact details, was missing from the office. Her denials that she took the file need to be assessed within the overall context of her conduct already elaborated upon.

[40] In the light of Van Schalkwyk's conduct, this is the type of case where the undertakings given by her not to disclose any of Aramex's confidential information she might have acquired in the course of her employment, cannot be regarded as a sufficient safeguard, in the light of the apparent commercial threat the potential disclosure of such information to Aramex might hold. Aramex is correct in being sceptical of Van Schalkwyk's *bona fides* flowing from her conduct and outright misrepresentations she had made. She had copied the information for one specific purpose, which was to assist her in her new role in World Net Express, which on her limited concessions, would have been to focus on new clients and business development. In the absence of

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any justifiable excuse for her conduct, there is clearly no reason to believe why that information cannot be viewed as confidential, and therefore protectable. In summary, her undertakings are not worth the paper they are written on.

[41] In any event, to the extent that Van Schalkwyk wanted to dispute that the information copied to her USB was not confidential, she had in her own voluntary undertaking made on 11 May 2017[20], confirmed that she had indeed transferred Company confidential and proprietary data (Company Data) to an external data storage device (external hard drive) during her employment with the company, while aware that the act in question was contrary to the law and to her employment contract. In my view, that confirmation disposes of any doubt about the confidential nature of the information in question.

Customer Connections:

[42] Customer connections are protectable provided it is established on the facts, that the attachment between the ex-employee and the ex-employer's customers, was of such a nature that the ex-employee would be able to induce those customers to follow him or her to the new employer[21]. In placing emphasis on the issue of attachment or relationships, the Court in *Rawlins and Another v Caravantruck Ltd,* held that;

> "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

[20] Annexure 'FA9' to the Founding Affidavit
[21] See *Reddy* at para 20; *Den Braven SA (Pty) Ltd v Pillay and Another 2008 (6) SA 229 (D)* at 236 D-E

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> 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)"

[43] As further stated in *Experian*, it is sufficient if the ex-employer can show that trade connections through customer contact exists and that they can be exploited if the ex-employee were to be employed by the new employer.

[44] Aramex's contention was that Van Schalkwyk, by virtue of her position, was during her employment with it, exposed to and had developed relationships with all new and existing clients, and that those relationships are proprietary to it and protectable. Aramex mentioned Ossur as an example of the risk of irreparable harm being caused to it if Van Schalkwyk were to exploit the relationships in question, whether directly or indirectly. Aramex had further pointed out that Van Schalkwyk had conceded that she had a friendly relationship with at least three customers (Fairview Wine Estate, Cyber Cellar and Hermanuspieterfontein Wines) who are in the wine industry, and had forged relationships with nine other customers as evinced by her social media (Facebook), who are also her 'friends' on that platform.

[45] Van Schalkwyk however disputed that she had any relationships with existing clients, particularly since her main function was to identify new customers, and that as soon as she had signed up a customer, she would pass it on to one of the business development managers. She submitted that her duties did not involve entertaining, maintaining or building client relations with existing customers, but rather to generate new clients. She contended that she had no influence over or rapport with any particular client of the applicant which she could leverage to solicit custom away from Aramex. The three customers she had friendly relations with were in the wine industry based in Boland and Overberg, and World Net Express did not service them, and she had not

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formed a relationship strong enough with them to take their custom elsewhere.

[46] As already indicated elsewhere in this judgment, Van Schalkwyk was granted leave to file a further answering affidavit. Despite being afforded an opportunity to deal with new issues arising from Aramex's replying affidavit, she failed to respond to the latter's assertion that contrary to her contentions, she had indeed built up a rapport with customers with whom she dealt. In this regard, it was Aramex's assertion that whilst the customers secured by Van Schalkwyk would have a customer relations manager assigned to them, her personality was such that she remained involved with those customers and continued to look after them. This omission in my view is fatal, as it was Aramex's case that in the course of her employment, Van Schalkwyk had built and maintained such relationships.

[47] It is trite that once it is established that the new employer is a competitor, the risk of harm to the new employer, if the ex-employee were to take up employment, becomes apparent[22]. This principle is equally apt in this case. Aramex also made two pertinent submissions which I am of the view disposes of the issue surrounding Van Schalkwyk's relationship with the three customer she had conceded she enjoyed a friendly relationship with. The first is that World Net Express did not oppose this application and therefore, had not confirmed that it did not service the wine industry. Secondly, World Net Express has not made any undertaking that it will not seek customers in the wine industry. The mere fact that it chose to abide by the Court's decision cannot by any account be deemed to any acquiescence to any undertaking made by Van Schalkwyk.

[48] The significance of these omissions is that in the light of Van Schalkwyk's own version, she had built a relationship with the customers in the wine industry. The fact that World Net Express does not service the wine industry is of no consequence, particularly since her new tasks would involve attracting and maintaining new clients. Given the nature of the industry Aramex operates in, all that is needed amongst other things is indeed a 'friendly relationship' or

[22] *Experian* at para 20

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'getting on well' (as Van Schalkwyk described it), with existing or potential customers to lure them away.

[49] Other than the above, the conclusions reached elsewhere in this judgment pertaining to Van Schalkwyk's undertakings are equally applicable in regard to the trade connections she had established whilst in the employ of Aramex. In the light of Van Schalkwyk's conduct already elaborated upon, it is not for Aramex to fold its arms and trust that Van Schalkwyk will not exploit those trade connections for the benefit of World Net Express, particularly in the light of her already being in breach of the restraint by joining it[23]. Furthermore, the undertaking, irrespective of how sincere Van Schalkwyk wishes to portray it is unpoliceable, specifically since World Net Express appears to have distanced itself from matter.

Weighing of interests:

[50] The issue for consideration is how Aramex's interests weighs qualitatively and quantitatively against those of Van Schalkwyk to be economically active and productive. Her contention was that she is from the Northern Suburbs in Western Cape where her family is also based, and that she had been in sales and client liaison all her working life. She further submitted that the enforcement of the restraint will preclude her from working in the industry she had most recently worked in, and that the only job offers she had received were within the courier industry. She further contended that she would not harm Aramex's interests as she would not be involved with servicing the wine industry or in the Stellenbosch area.

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[23] See *Experian* at para 22, where it was held that;

> *"The ex-employer seeking to enforce against his ex-employee a protectable interest recorded in a restraint, does not have to show that the ex-employee has in fact utilised information confidential to it: it need merely show that the ex-employee could do so. The very purpose of the restraint agreement is to relieve the applicant from having to show bona fides or lack of retained knowledge on the part of the respondent concerning the confidential information. In these circumstances, it is reasonable for the applicant to enforce the bargain it has exacted to protect itself. Indeed, the very ratio underlying the bargain is that the applicant should not have to contend itself with crossing his fingers and hoping that the respondent would act honourably or abide by the undertakings that he has given. It does not lie in the mouth of the ex-employee, who has breached a restraint agreement by taking up employment with a competitor to say to the ex-employer "Trust me: I will not breach the restraint further than I have already been proved to have done"*

[51] This issue of how Aramex's interests weighs qualitatively and quantitatively against those of Van Schalkwyk to be economically active and productive needs to be considered against the following factors;

a) Van Schalkwyk left Aramex's employ on her own accord. In her resignation letter, she had indicated that her future employment would be outside the courier industry. In her exit interview, she also indicated that she was taking up employment in the steel industry.

b) She had joined Aramex's direct competitor, in circumstances where she had not only lied in her resignation letter and exit interview about where she was going to be employed, but had also for what appeared to be nefarious reasons, downloaded Aramex's confidential information on the same date that she had resigned and then accepted an offer from World Net Express.

c) Van Schalkwyk in her answering affidavit had in elaborate terms, outlined her academic background and various job experiences. She has extensive skills in public relations (especially in the wine industry), sourcing new clients, brand building, product marketing, administration, new business development, client liaison, management of stock, rental services etc

[52] In the light of the above factors, there is no basis for a conclusion to be reached that Van Schalkwyk is not employable outside of the courier industry, and I did not understand her case to be that the skills and expertise she had acquired over the years were industry specific or not transferrable. Furthermore, on her own version as evident from her attorneys of record response[24] to CDH's letter of demand, she had stated that at the time of her exit interview, she had indeed indicated her intention to take up employment with an entity known as Pacific Steele within the steel industry. She therefore remains free to be economically active outside the business of Aramex and she could utilise her skills and expertise in the public domain and in the open labour market, provided that she does not do so in competition with Aramex.

[24] Annexure 'FA12' to the Founding Affidavit

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[53] Further in the light of the factors above, I am satisfied that Aramex has demonstrated that there is more than a likelihood that Van Schalkwyk can and will economically exploit its proprietary interests. Aramex's interests in the light of the common cause background facts far outweigh those of Van Schalkwyk, particularly since the enforcement of the restraint provisions would not in any event preclude her from being economically active in any industry other than the courier industry, including in her home base.

Is the duration and area covered by the restraint not reasonable?

[54] Van Schalkwyk's contention was that a case had not been made out as to why the restraint should be for a period of 12 months, and that the mere fact that Aramex serviced its clients throughout South Africa did not entitle it to prevent her from plying her trade effectively throughout the country with the imposition of the 70-km radius.

[55] As to whether the area and duration of the restraint is reasonable must first be determined within the provisions of clause 5 of the Memorandum of Agreement, in terms of which Van Schalkwyk had acknowledged and agreed that the restrictions and the restraints contained therein were reasonable and fair. She cannot now in the face of an enforcement complain that the restrictions are unfair or unreasonable.

[56] A second consideration is that Aramex services its clients across South Africa and is seeking to protect its proprietary interests in relation to its economic activity. I have no reason to doubt its contention that Van Schalkwyk was privy to its regional and national sales strategies, including rates applicable throughout the country, which information could prove to be useful to a competitor such as World Net Express. I am of the view that the geographical area covered by the restraint is not too wide as alleged by Van Schalkwyk, and in the light of the interests that Aramex seeks to protect, this cannot be achieved if Van Schalkwyk is allowed to work for World Net Express or any other competitor anywhere within 70 km radius of Aramex's 17 branches country wide.

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[57] As further correctly pointed out on behalf of Aramex, Van Schalkwyk's reasons for alleging that the area and duration of the restraint is unreasonable are purely self-serving. These reasons cannot in my view prevail in circumstances where she had voluntarily resigned from Aramex for a more lucrative job offer, displayed her willingness to not only blatantly join the competition when she was aware of her restraint undertakings, but also where in order to give herself a head-start in her new job, she had unlawfully copied Aramex's confidential information.

[58] The Courts, given the balance necessary to be created in restraint of trade disputes between competing interests, should in my view, be reluctant to be sympathetic to an employee in Van Schalkwyk's case, whose conduct surrounding her resignation fell short of basic decency and candour towards her ex-employer.

Conclusions:

[59] To summarise then, it is concluded that there is a valid Memorandum of Agreement between the parties, in terms of which Van Schalkwyk made certain undertakings. That agreement is enforceable, and Van Schalkwyk has by taking up employment with World Net Express, breached its provisions. Aramex has demonstrated that it has proprietary interests worth protecting, and it follows that Aramex will suffer irreparable harm if the agreement is not enforced. The potential harm that can be caused by Van Schalkwyk taking up employment with World Net Express given the circumstances of this case cannot be easily remedied by a claim for damages in due course. To this end, it is thus concluded that Aramex has satisfied the requirements of the relief it seeks.

Costs:

[60] Aramex sought a cost order to the extent that it was successful. The provisions of section 162 of the Labour Relations Act enjoin the Court to take into account the requirements of law and fairness when making an award of costs. Van Schalkwyk's conduct leading to and after her resignation from Aramex deserves rebuke from this court, and for her to have opposed this

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application on the basis that she had made undertakings was clearly ill-conceived. Those undertakings are clearly unpoliceable, and it could not have been expected of Aramex to trust her *bona fides* in the light of her conduct after her resignation.

[61] Guidance however is sought from the approach set out in *Trevlyn Ball v Bambalela Bolts (Pty) Ltd*[25], in which the Labour Appeal Court held that in awarding costs in disputes involving enforcement of restraint of trade, the Court should be mindful of the fact that such disputes invariably impacts on the provisions of section 22 of the Constitution of the Republic, and litigants should not be deterred from defending or prosecuting *bona fide* actions for fear of adverse costs orders. Inasmuch as one should be mindful of these constraints, where the circumstances of the case such as this one, are such that the conduct of a party was reprehensible, and thus compelled another to approach the Court, there is no reason in fairness why costs should not be awarded. In any event, it is trite that purpose of awarding costs is to indemnify the successful litigant for the expense he or she has been put through by having been unjustly compelled to initiate or defend litigation. To this end, and taking into account that the restraint of trade will be enforced in its entirety, I am nevertheless satisfied that fairness dictates that Van Schalkwyk be burdened with some and not all of the costs incurred by Aramex.

Order:

[62] In the premises, the following order is made;

1. The forms and service provided for in the Rules of this Court are dispensed with, and the matter is dealt with as an urgent application.

2. The First Respondent is interdicted and restrained for (12) twelve months and until 11 May 2018, and anywhere within a (70) seventy kilometre radius of any business premises of the Applicant (namely its

[25] at paras 29 - 30

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17 branch offices located as follows: Johannesburg, Pretoria, Nelspruit, the Vaal Triangle, Pietermaritzburg, Rustenburg, Durban, Richards Bay, South Coast, Bloemfontein, Kimberley, Polokwane, East London, Port Elizabeth, George, Stellenbosch and Milnerton – Cape Town), including but not limited to the premises of the First Respondent's employment with the Applicant, namely that of Stellenbosch, from directly or indirectly,

2.1 being employed by the Second Respondent;

2.2 rendering or attempting to do so, any services which were rendered by the Applicant during the First Respondent's employment with the Applicant, to or for the benefit of any customer of the Applicant;

2.3 soliciting, interfering with, or enticing or attempting to entice away from the Applicant any such customer; and

2.4 being interested, engaged, concerned, associated with or employed whether as proprietor, director, shareholder, employee, consultant, contractor, financier, principal, agent, representative, assistant, adviser, administrator or otherwise, and whether for reward or not in any company, firm, business undertaking, concern or other association of any nature which furnishes or renders, directly or indirectly, any form of services that involve full supply chain logistics services that include: clearing and forwarding, warehousing, packaging, mailroom and international and domestic collection and delivery of packages and parcels.

3. The First Respondent is interdicted and restrained from divulging or using the confidential information of the Applicant to any third party including the Second Respondent.

4. The First Respondent is ordered to pay the costs of the Applicant, excluding the costs of the employment Counsel.

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E. Tlhotlhalemaje

Judge of the Labour Court of South Africa

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Appearances:

For the Applicant:	Adv. C. De Witt
Instructed by:	Cliffe Dekker Hofmeyr INC
For the First Respondent:	Adv. MA McChesney
Instructed by:	Burger Potgieter Attorneys

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