Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA,

HELD AT CAPE TOWN

Case: C 661/2022

In the matter between:

SHOPRITE CHECKERS (PTY) LTD **Applicant**

and

AIDAN JOHNSON **First Respondent**

ONECART (PTY) LTD **Second Respondent**

MASSMART HOLDINGS LTD **Third Respondent**

Date of Hearing: 27 January 2023

Date of Judgment: 16 February 2023

Summary: (Restraint of trade –Ecommerce delivery platform acting as an agent for Covenentee's competitors, even if not a direct competitor in its own right - Online digital sales platform acting as an agent for different retailers – Employee, in any event in breach of restraint agreement in taking up employment with digital sales platform – Employee being exposed to confidential information – Nature of confidential information such that the employer's interest in protecting such information in the context of type of the

business the employee intends working for, not outweighing employee's right to exercise his right to take up employment in breach of his restraint – costs from date of confidential information undertaking)

JUDGMENT

LAGRANGE J

[1] This is an urgent application brought by the applicant (Shoprite) for the enforcement of a restraint of trade undertaking and the accompanying confidentiality undertaking contained in the employment contract of the first respondent (Johnson).

[2] The application was launched on 21 December 2022 and was enrolled on 27 January 2023. The parties agreed the court could deal with it as an application for final relief.

[3] When the matter was argued, Shoprite also handed up an un-redacted copy of Shoprite's Retail team's objectives and key results (OKRs) as at September 2022. The document was only admitted on a provisional basis and subject to the condition that it would not form part of the public record of the application if admitted, because Johnson objected to it only being made available at the hearing. Ultimately, as Johnson's representatives only had sight of when it was handed up in court and had no opportunity to take proper instructions, I have decided it should not form part of the record.

Brief Chronology

[1] For the sake of contextualising the application a short description of the sequence of events and background to the relevant businesses of Shoprite and OneCart is useful.

[2] In November 2019, Shoprite launched its on-demand delivery service, known as "Checkers Sixty60" (Sixty60). Checkers Sixty60 is an on-demand service that delivers alcohol, groceries and various general merchandise products within an hour, and at the same low prices as in-store. The digital commerce division of Shoprite, of which Sixty60 forms

part, is in turn a division of ShopriteX, the innovation hub of the Shoprite's group.

[3] It was the first on-demand delivery offering from a supermarket in South Africa. It proved to be a great success during the Covid-19 pandemic and lockdown. Sixty60 currently enjoys approximately 75% of the online grocery market.

[4] The Applicant wanted its customers to be able to order products within 60 seconds and have delivery of the product so purchased completed within 60 minutes of the order having been placed. The development of the Sixty60 App made navigation and ordering quick and simple for customers and delivery of shopping within 60 minutes provided the first real scalable on-demand food retail delivery in the marketplace.

[5] On 1 June 2021, Johnson was employed by Shoprite as its Retail Manager: eCommerce.

[6] Prior to his employment by Shoprite, Johnson was studying for his Masters in Business Administration degree (MBA) through the EDHEC Business School in Nice, France. Most of his work experience prior to joining the Applicant was at PepsiCo in South Africa. First Respondent did not have any experience in the online shopping or digital retail environment before being employed by Shoprite. His first exposure to the online grocery on-demand delivery market was with Shoprite.

[7] In October 2021, the third respondent (Massmart) acquired an 87% shareholding in OneCart (OneCart). OneCart, like Sixty60 is as an online delivery service, though there are important distinctions between the two businesses. OneCart was launched in 2018 and has offered an on-demand delivery service on 1 or 2 hours' notice since January that year.

[8] Unlike 60Sixty, which is an online platform for Shoprite's products only, OneCart allows customers to order a wider variety of products from different kinds of stores, including but not limited to Massmart subsidiaries such as Builders Warehouse and Makro. So, for example, a OneCart shopper can choose order fresh produce from Pick n Pay, and other groceries from Makro and get it delivered in one cart.

[9] On 21 June 2022, an online news service Stuff, reported on the intended expansion of the product and store range available to consumers through OneCart. The number of stores available on OneCart was to be doubled. Its founder and CEO, Mr L Peters was quoted as saying that "we are really pleased to be able to leverage OneCart for mutual benefit at Massmart through this expansion, given the high priority that Massmart has placed on on-demand eCommerce at Game, Makro and Builders". The last three mentioned entities are part of the Massmart group.

[10] First Respondent resigned from Applicant's employment on 16 November 2022, giving the required contractual notice of 3 months. The contractual notice period expires on 16 February 2023, his last day of employment with Shoprite. At the time of his resignation, Johnson earned a cost-to-company package of Ridge,74 million. He was placed on "garden leave" for the duration of his notice period, which expires on 16 February 2023.

[11] On the day he gave notice, Johnson convened a meeting with Shoprite's Head of Digital Commerce, Mr A Ridge (Ridge). Ridge claims Johnson advised him he was resigning in order to take up employment with Massmart (the Third Respondent). He further avers that Johnson told him that he had been offered a move to the USA after working first in South Africa, which was part of the attraction of the new position. Johnson agrees that he mentioned the possibility of working for a Walmart-owned business overseas at some future indeterminate time, but no concrete offer of this kind had been made to him. He admits referring to Massmart but meant this in the generic sense of the Massmart group, rather than Massmart the firm.

[12] Two days after the first meeting, Ridge and Mr. N Schreuder, Chief of Strategy and Inovation, had another meeting with Johnson in which they advised him they would enforce the restraint if he resigned given his proximity to competitively sensitive information pertaining to revenue, order volumes, profitability, vendor contacts, strategic intellectual property and the strategic roadmap for the next two years. Johnson denies that he was urged not to resign or that he indicated Massmart would protect him if Shoprite sought to enforce the restraint.

[13] In any event, Shoprite's attorneys advised Johnson of his contractual obligations relating to the use of its confidential information and the restraint. Noting that Massmart is a competitor of Shoprite, it asked him for an undertaking he would not be taking up employment with it, or any other competitor, failing which Shoprite would enforce the restraint.

[14] On 30 November 2022, Johnson's attorneys advised they needed to take instructions and were given an opportunity to do so.

[15] In the course of correspondence from Johnson's attorneys on 6 and 8 December 2022, Shoprite was advised that Johnson would be taking up employment as the CEO of OneCart on 17 February 2023. Ridge states that Johnson had advised him he would be doing a job similar to his own job. Johnson does not dispute this but only that he did not to recall saying this to Ridge.

[16] In a letter written on his behalf by his attorneys of record on 6 December 2022 before this application was launched, Johnson gave an undertaking that he would not disclose the confidential information of Shoprite to the extent that it existed and that he was exposed to it. The undertaking was repeated in his answering affidavit in this application.

<u>The confidentiality and restraint provisions in Johnson's employment contract</u>

[17] Clause 20 of Johnson's employment contract with Shoprite which he signed on 5 May 2021 reads:

> ""20. Confidentiality and Restraint of Trade
>
> 20.1 By virtue of your employment, you will have access to information which is confidential and/or proprietary to the Company. This includes confidential, proprietary information concerning the Company's business, its operations, finances, information systems, policies, practices, planning, purchases, pricing, sales, suppliers, stocks and other matters. You agree that you will not disclose to any person, without the written consent of the Company, any confidential and proprietary information as to the business, operations, dealings or any other affairs of the Company during your employment or after the termination of your contract of employment.

20.2 You agree further that, should you become involved in any business or other activity competing with the Company or its associated operating divisions, this would severely prejudice the business of the Company. You therefore agree and undertake in favour of the Company, that during your employment and for a period of one year from the date of the termination of your appointment with the Company, or with any associated or related Company, you will not within the Republic of South Africa, alone or with any other person, and whether as an agent, employee, consultant, in partnership or as a company, body corporate, franchisor or franchisee, or in any other similar capacity, be engaged, retained, employed or have a material interest in any business, enterprise, undertaking or activity, carrying on a business involving the distribution and / or sale, through retail chain stores or otherwise of any food or related products, household products, furniture, beverages, pharmaceuticals or any other product, product category or other items that are distributed or sold through the operations of the Company or any associated Company.

20.3 …

20.4 You acknowledge that the terms of this restraint are fair and reasonable and go no further than is reasonably required to protect the proprietary interests, trade secrets and confidential information of the Company, to which you would have had access or to which you would have been exposed."

(emphasis added)

It is common cause that Johnson agreed to these provisions.

Legal Principles

[18] A party seeking to enforce a restraint of trade contract is required to invoke the restraint and prove a breach thereof. Thereupon, a respondent who seeks to avoid the restraint of trade bears an onus to demonstrate, on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable.[1] However this second leg of the enquiry (into

[1] Experian South Africa (Pty) Ltd v Haynes and another 2013 (1) SA 135; Basson v Chilwan & Others 1993 SA 742 (A) at 7761I-J; Magna Alloys and Research (SA) (Pty) Ltd v 486 (SCA) at [10] to [14], pp 493E/F to 496D; Sibex Engineering Services (Pty) Limited v Van Wyk & Another 1991 (2) SA 482 (T) at 502D-F; IIR South Africa BV (Incorporated in the Netherlands) ta Institute for International Research v Tarita & Others 2004 (4) SA 156 (W) at 167 B-C; IIR South

reasonableness) only arises where the applicant can demonstrate that the restraint of trade was in fact breached.

[19] It is generally accepted that a restraint will be considered to be unreasonable, and therefore contrary to public policy and unenforceable, if it does not protect a legally recognisable interest of the employer but merely seeks to exclude or eliminate competition.[2]

[20] The court must have regard to the circumstances obtaining at the time when it is asked to enforce the restriction[3].

[21] In *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 406 (SCA) the SCA added that determining whether a restraint agreement unreasonably restricts the freedom to trade or to work of the "covenantor" (the party resisting enforcement), is a value judgment which the court must make with two principal policy considerations in mind:

> "[15] … 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 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. In this sense, freedom to contract is an integral part of the fundamental right referred to in s 22. Section 22 of the Constitution guarantees '[e]very citizen ... the right to choose their trade, occupation or profession freely' reflecting the closeness of the relationship between the freedom to choose a vocation and the nature of a society based on human dignity as contemplated by the Constitution. It is also an incident of the right to property to the extent that s 25 protects the acquisition, use, enjoyment and exploitation of property, and of the fundamental rights in respect of freedom of association (s 18),

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Africa BV (Incorporated in the Netherlands) ta Institute for International Research v Hall (aka Baghas) and Another 2004 (4) SA 174 (W) at 178E-F, para [17]; Reddy v Siemens Telecommunications (Pty) Ltd 2007 (2) SA 406 (SCA); Den Braven SA (Pty) Ltd v Pillay and another 2008 (6) SA 229 (D)

[2] Automotive Tooling Systems (Pty) Ltd v Wilkens & Others 2007 (2) SA 271 (SCA) at [8], p277G-H – 278A; Basson v Chilwan supra; Reddy v Siemens supra

[3] *Magna Alloys & Research* supra at 894F – 895I; Reddy supra p497C-D and the authorities cited in footnote [26] thereof.

labour relations (s 23) and cultural, religious and linguistic communities (s 31)."

[22] The court explained the manner in which these two principal considerations should be applied, as follows:

"[16] ... the particular interests must be examined. 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. Moreover, a restraint which is reasonable as between the parties may for some other reason be contrary to the public interest."

[23] In *Basson v Chilwan & Others* 1993 (3) SA 742 (A), the court identified four questions that should be asked when considering the reasonableness of a restraint:

"(a) Does the one party have an interest that deserves protection after termination of the agreement?

(b) If so, is that interest threatened by the other party?

(c) In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?

(d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected? Where the interest of the party sought to be restrained weighs more than the interest to be protected, the restraint is unreasonable and consequently unenforceable. The enquiry which is undertaken at the time of enforcement covers a wide field and includes the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests."[4]

[24] In *Reddy*[5] the SCA also accepted that there was a fifth question which could be added to the four set out in Basson, which it said was implied by question (c) and corresponds with the factor in s 36(1)(e) of the Constitution of the Republic of South Africa 1996, namely whether the

[4] at 767G-H.

[5] At para [17].

restraint goes further than necessary to protect the interest of the party that deserves protection after termination of the employment agreement.[6]

[25] In terms of the first leg of the test in *Basson*, it is well established that the proprietary interests that can be protected by a restraint agreement are essentially of two kinds, namely –

25.1 all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him, to gain a relative competitive advantage. Such confidential material is sometimes compendiously referred to as *"trade secrets"*; and

25.2 the relationships with customers, potential customers, suppliers and others that go to make up what is compendiously referred to as the "*trade connection*" of the business, being an important aspect of its incorporeal property known as goodwill.[7]

[26] The only legitimate object to which a covenant in restraint of trade can be directed is the protection of such legally cognisable proprietary interests of the covenantee. Whether information constitutes a trade secret is a factual question. For information to be confidential it must be -

26.1 capable of application in trade or industry, that is, it must be useful and not be public knowledge and property;

26.2 known only to a restricted number of people or a closed circle; and

26.3 of economic value to the person seeking to protect it.[8]

[27] There are two conflicting interests that have to be balanced when the applicant asserts a protectable proprietary interest in confidential information: on the one hand, the interest of the applicant in the maintenance and protection of its trade secrets and confidential information and, on the other hand, the interest of the respondent to use

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[6] See also *Kwik Kopy (SA) (Pty) Ltd v van Haarlem & Another* 1999 (1) SA 472 (W) at 484E.

[7] Sibex Engineering, supra, at 502D/E-F

[8] Townsend Productions (Pty) Ltd v Leech & Others 2001 (4) SA 33 (C) at 53J-54B; Mossgas (Pty) Ltd v Sasol Technology (Pty) Ltd [1999] 3 B All SA 321 (W) at 333F; Walter McNaughten (Pty) Ltd v Schwartz & Others 2004 (3) SA (C) at 388J-389B.

his know-how and skills elsewhere after the termination of his employment with the applicant[9] and his right to work.

[28] Insofar as the second leg of the test in *Basson* is concerned, the Courts are required to consider, as a separate enquiry, whether the ex-employee's access to the former employer's proprietary interests (whether in confidential information or customer connection) will, in his new employment environment, afford him with the opportunity to use those interests to the advantage of his new employer. This is a separate factual enquiry. If the two employer entities are alike in operation and scale and the employee is performing like for like tasks, it is more likely that infringement will follow. Where the nature of the businesses are different and the new employment obligations are different from those previously undertaken, it would be much more difficult to show that infringement is likely to arise. Put differently, the mere fact that access to proprietary interests by the ex-employee has been established (the first leg of the enquiry) does not result axiomatically in a finding that such interests will be of benefit to the new employer (the second, separate leg of the enquiry).[10]

[29] In *Vox Telecommunications (Pty) Ltd v Steyn & another* (2016) 37 *ILJohnson*255 (LC) this Court reaffirmed the difficulties of attaching weight to undertakings such as the one given by Johnson in this case:

> "[31] … It is for the respondent to establish that he or she had no access to that information or that he or she had never acquired any significant personal knowledge of, for example, the applicant's customer basis while in its employ. All that the applicant need show is that there is secret information to which the respondent had access and which in theory the respondent could transmit to the new employer if he or she was inclined to do so. In order to enforce the restraint, the applicant does not have to show that the respondent has in fact utilised information confidential to it, it is sufficient to show that the respondent could do so.
>
> [32] Indeed, the very purpose of a restraint agreement is that the applicant does not wish to have to rely on the bona fides or lack of retained

[9] Townsend Productions (Pty) Limited v Leech and Others 2001 (4) SA 33 (C) at 54H – 55C

[10] Payflex (Pty) Ltd v Deacon and others, an unreported decision of the Labour Court, Johannesburg under case number Johnson544/21 at [23]-[29] and [33]-[42]; (copy attached)

> knowledge of confidential information on the part of the respondent. Put differently, the applicant should not have to content itself with crossing its fingers and hoping that the former employee will not breach the restraint. It is for this reason that an application to enforce a restraint of trade is not necessarily defeated by the respondent giving an undertaking that he or she will not disseminate or utilise confidential information."

[30] Obviously, if Johnson has knowledge of confidential information or trade secrets of Shoprite, the risk of harm to Shoprite associated with disclosing the same is directly related to the nature of that information and its value to a competitor. As the question of what constitutes a competitor is closely linked to the scope of activities the restraint seeks to prevent Johnson from working in, so the sequence of analysis will begin with determining if Johnson will breach the restraint by taking up his new appointment with OneCart on 17 February 2023.

Will Johnson be in breach of the restraint in clause 20.2 of his contract?

[31] Shoprite argues that OneCart is a competitor whose business falls within the ambit of clause 20.2. Contrariwise, Johnson contends that not only does the clause exclude OneCart's business from the scope of the business activities Shoprite seeks to prevent him from engaging in but, in any event, it is also not a competitor of Shoprite.

[32] The cardinal principles governing the interpretation of documents is set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA):

> "Interpretation is the process of attributing meaning to the words used in a …. contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax, the context in which the provision appears, the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible

> meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or business like for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation, in a contractual context it is to make a contract for the parties other than the one they in fact made. The inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document." [11]

Does OneCart fall within the ambit of the restraint and is it a competitor of Shoprite?

[33] Shoprite argues that OneCart is a business which carries on a business involving the distribution and, or alternatively, sale of grocery products sold by it. It argues that the fact that it sells such products as an agent of other retailers falls within the category of sales made 'otherwise' than through 'retail chain stores'.

[34] Johnson argues that in the phrase 'through retail sales or otherwise', the words 'or otherwise' must be interpreted in accordance with the *eiusdem generis* principle, namely that that when words of general meaning are used in association with words relating to a specific genus or class of words, the words of general meaning should be restrictively interpreted as relating to the same genus or class of words.[12] It argues further that even if the genus is denoted by a single item, in this "retail chain stores", that is sufficient for the principle to apply.[13] Johnson contends that the reference to retail chain stores clearly denotes 'brick and mortar' retail outlets, which does not include digital online sales platforms.

[35] In support of this interpretation, Johnson argued that Shoprite was the author of his contract of employment and if it had wanted to prevent him from joining an ecommerce or digital business, it would have included specific reference to such business in clause 20.2. He argued that in fact Shoprite simply used a standard contract of employment which would

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11 At para [18].

12 *Imperial Group (Pty) Ltd v NCS Resin (Pty) Ltd* 2007 All SA 483 (SCA) para [7]

13 See *Grobbelaar v Van de Vyver* 1954 (1) All SA 316 (A)

apply most Shoprite employees who work at its many bricks-and-mortar retail stores.

[36] Johnson cites factors which he believes lend weight to such an interpretation, such as clause 3.3 of his employment contract which provides that his duties include assisting with stocktaking and clause 14 requires him to record his work attendance in a register, clock card system or similar device. Clause 19.1 of the contract states that as a member of managerial staff he need to attend different stores and consequently required a driver's license. All of these obligations entail physical activities conducted at stores. However, these bore no relationship to the nature of his employment with Shoprite, meaning it simply applied a generic "boiler plate" contract, without specific regard to the kind of work he would perform.

[37] In rebuttal, Shoprite argues that there is nothing generic about the phrasing of clause 20.2, which specifically caters to the circumstances of Johnson's employment, exposure to confidential information and the risk presented by his employment by a business such as OneCart. It argues that a sensible and business-like interpretation of the phrase 'or otherwise', which does not even appear in the restraint provision under consideration in *Jansen's* case, is to the 'operations' of Shoprite and is not restricted to its 'retail or wholesale operations'. It also alluded to two judgments involving restraint of trade agreements between Shoprite and employees which did not contain the qualifying phrase 'or otherwise' in which the employees were employed in different capacities to Johnson[14]. This supported its contention that Johnson's restraint was not simply a standard restraint provision applicable to all employees.

[38] It contends that Johnson's interpretive approach is unduly narrow and ignores the context and purpose of including such a clause in Johnson's contract, which is encapsulated in clause 20 itself in that it states:

> "By virtue of your employment, you will have access to information which is confidential and/or proprietary to the Company. This includes confidential,

[14] *Shoprite Checkers (Pty) Ltd v Jordaan & another* (2013) 34 *ILJ* 2105 (LC) and *Shoprite Checkers (Pty) Ltd v Jansen and Another* (JA6/2018) dated 5 April 2018.

> proprietary information concerning the Company's business, its operations, finances, information systems, policies, practices, planning, purchases, pricing, sales, suppliers, stocks and other matters. You agree that you will not disclose to any person, without the written consent of the Company, any confidential and proprietary information as to the business, operations, dealings or any other affairs of the Company during your employment or after the termination of your contract of employment….
>
> You agree further that, should you become involved in any business or other activity competing with the Company or its associated operating divisions, this would severely prejudice the business of the Company."
>
> (Applicant's emphasis)

Sixty60 is an operating division of Shoprite and Johnson's involvement in a business competing with that division, would embrace a business such as OneCart's.

[39] Shoprite pertinently points out that the phrase 'or otherwise' cannot simply be assumed to be describing other forms of 'brick and mortar' outlets following the *eiusdem generis* principle. The particular problem for Johnson's reliance on the principle is the implicit assumption that the words 'retail chain stores' is descriptive of the *genus* of 'brick and mortar' retail outlets. There is simply no rational basis for making that assumption. If anything, the words 'retail chain stores' conjure up a particular type of store characterised by being a number of different outlets of the same business rather than a description of a class of retail businesses which deal with customers face-to-fact. only, the caution against blithely resorting to the eiusdem generis principle in the High Court judgment in *Hypercheck (Pty) Ltd v Mutual & Federal Insurance Company Ltd* [15] is apposite here:

> "…, (A)s suggested by L C Steyn in Die Uitleg van Wette, 5th ed (1981) at 3011, in the absence of a distinct species or class of causes or an identifiable link of general application between the stated causes, the eiusdem generis principle cannot apply."[16]

[15] (2010/2695) [2012] ZAGPJHC 2 (11 January 2012).

[16] At para [30].

[40] In this instance, the phrase ‘or otherwise’ also does not appear at the end of list of similar items. In *R v Bono* 1953 (3) SA 506 (C) the court recognised that:

> "The word 'otherwise', denoting something contrary to or different from the concept to which it relates, is the very antithesis of such concept and to that extent conveys a far wider meaning than does the concept itself. The word 'otherwise' is a word of wide generality and, unless good reason is advanced for cutting down that wide meaning, I do not think that this Court should do so.”[17]

[41] Considering the parties’ respective submissions, I am inclined to the view that relying on the *eiusdem generis* principle in view of the provision as a whole, is an unduly narrow way of interpreting the clause. It does not yield a sensible result because it no readily identifiable genus of business can be discerned in the words ‘retail chain stores’. If one simply has regard to the rest of clause 20.2, it appears that the phrase ‘or otherwise’ can more plausibly be regarded as a reference to the covenentor’s involvement in any undertaking engaged in the distribution or sale of the same products sold by Shoprite, or through the operations of Sixty60, which conducts its business utilising retail chain stores or by any other means. In deciding which interpretation is the correct one, the context in which the agreement was concluded must be considered.

[42] Part of that context is that the provision was intended to impose a restraint on a person employed in its digital sales division from working for another entity engaged in the sale or distribution, or both, of the same goods sold by Shoprite. It does not make sense that Shoprite would have intended to exempt Johnson from being restrained from working in a business functionally equivalent to Sixty60, which provide a platform for Shoprite’s competitors to sell their goods. Equally, it is difficult to believe that Johnson could reasonably have believed that working for OneCart would obviously not be a type of business that Shoprite had envisaged as falling within the meaning of a business involving the distribution and/or sale of

[17] At 509D-E.

competing products, whether it did so through retail chain stores or by means of its digital platform.

[43] Moreover, it is important to note that the prohibition concerns Johnson's engagement in a business 'involving' the distribution and/or sale of competing products through retail chain stores or otherwise. It is not confined only to businesses that sell their own wares but extends to entities which are involved in sale of competing goods or the distribution thereof. OneCart's activity as an online digital sales platform on which purchases are made by consumers is clearly involved in the sale of some goods that are also sold by Shoprite. At least a portion of those sales OneCart is involved in actually do entail purchases from other retail chain stores such as Makro or Woolworths.

[44] Considering the text of clause 20.2 as a whole, the context of Johnson's employment in Sixty60, Sixty60's function as the digital online sales arm of Shoprite and the fact that OneCart also provides an online digital sales application for the sale and purchase of goods by competitors of Shoprite, it seems the most sensible and business-like interpretation of clause 20.2 is that OneCart is the type of business that does fall within the scope of the restraint. This accords with a unitary approach to interpretation which attaches due weight to the text, context and purpose of the document under consideration[18].

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[18] See *Capitec Bank Holdings Ltd and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others 2022 (1) SA 100 (SCA)* at paras [25] – [26], viz:

> "[25] Our analysis must commence with the provisions of the … agreement that have relevance for deciding whether Capitec Holdings' consent was indeed required. The much-cited passages from … *Endumeni* offer guidance as to how to approach the interpretation of the words used in a document. It is the language used, understood in the context in which it is used, and having regard to the purpose of the provision that constitutes the unitary exercise of interpretation. I would only add that the triad of text, context and purpose should not be used in a mechanical fashion. It is the relationship between the words used, the concepts expressed by those words and the place of the contested provision within the scheme of the agreement …. as a whole that constitute the enterprise by recourse to which a coherent and salient interpretation is determined. As *Endumeni* emphasised, citing well-known cases, '(t)he inevitable point of departure is the language of the provision itself'."
> (emphasis added)

[45] Accordingly, it follows that Johnson's employment by OneCart will be in breach of the restraint agreement.

OneCart's status as a competitor

[46] It is important to note that the restraint extends to entities which promote Shoprite's competitors' sales to the obvious detriment of Shoprite. Such entities are not necessarily direct competitors of Shoprite *per se*, but are integral to the sales operations of its direct competitors in the market for household goods and groceries. Working for OneCart to promote the sales of any of Shoprite's competitors' goods is in order to achieve a purpose which is no different from someone employed directly in the marketing function of one those competitors, except that the person engaged by OneCart will promote the sales of any competitor and that the mechanism for doing so is the online platform. In the hands of either OneCart or an individual competitor, confidential information about Shoprite's business could potentially be of value to them and to the detriment of Shoprite.

[47] For the sake of completeness, a couple of other observations about the competitive spaces in which Shoprite, Sixty60 and OneCart operate need to be made.

[48] It was argued by Johnson that the offering of OneCart is distinguishable from that of Sixty60 in that it offers 'a mall experience' to the consumer using its application. Unlike Sixty60 which only enables a consumer to buy goods from Shoprite, OneCart gives the consumer a choice of outlets to buy from, apart from offering a much wider range of products than are sold

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[26] None of this would require repetition but for the fact that the judgment of the High Court failed to make its point of departure the relevant provisions of the subscription agreement. *Endumeni* is not a charter for judicial constructs premised upon what a contract should be taken to mean from a vantage point that is not located in the text of what the parties in fact agreed. Nor does Endumeni license judicial interpretation that imports meanings into a contract so as to make it a better contract, or one that is ethically preferable."

by Shoprite. In consequence, in the course of a single transaction a consumer can buy their bread, crockery, bricks and timber. By contrast, the user of 60Sixty is constrained to buy only from the range of bread and crockery available at Shoprite.

[49] I accept that these are material differences between what the two platforms offer. However, those differences do not detract from the inescapable fact that they both enable the online purchase of the class of goods sold by Shoprite. The online market for groceries and household goods made available by OneCart to online consumers overlaps with the online market Sixty60 provides for Shoprite's groceries and household goods. The platforms merely offer alternative online channels for consumers to make those purchases either from Shoprite or from some of its competitors. If OneCart succeeds in becoming the application of choice used by consumers when buying such goods, then that benefits Shoprite's competitors to the detriment of Shoprite, whose goods are not available on that platform.

[50] In conclusion, OneCart may not be the direct competitor of Shoprite, but it effectively performs the role of Shoprite's competitors' agent in the digital online marketplace. Nevertheless, OneCart falls within the ambit of clause 20.2, by virtue of its wording.

Reasonableness of the restraint

What was Johnson's exposure to Shoprite's confidential information?

[51] Shoprite identifies various kinds of information, which it contends constitutes proprietary information to which Johnson is privy and is worthy of protection, each of which are discussed below.

Admissions by Johnson

[52] Shoprite claims that in making undertakings not to disclose confidential information through his attorneys and in his answering affidavit, he has admitted being exposed to the same. All those admissions are qualified by

the wording such as ‘to the extent I was exposed to the confidential information of Shoprite’, which of course does not preclude a defence that he was not exposed to any at all. Similarly, his statement that if he did possess any such information, the fast pace of development of ecommerce means it would not remain confidential for long, does not amount to a concession he did in fact possess any.

Sixty60 application software

[53] Shoprite points out that Johnson had access to the online functioning of the Sixty60 App and knew about the application’s distinctive features and its design which was information provided to the application developers. Shoprite custom built the application which is used to run the business and forms part of Shoprite’s intellectual property.

[54] Johnson says he was not involved in the development of the system to operate the Sixty60 business, and the system was developed by Zulzi, a third party supplier and direct competitor of Shoprite, long before he I joined Shoprite. He concedes that on-going development work is performed by Shoprite, but it is done by distinct, demarcated “silos” within Shoprite who perform development on the back-end and front-end of the system. This work is either outsourced (for example to Zulzi) or run by separate business units. He claims to have no detailed knowledge of this and was only had sporadic high level insight into the system. Johnson further claims that Zulzi sells its technology and development capabilities to other businesses in the market and therefore the technology used by C60 is not unique.

[55] Johnson emphasises that he was employed to perform marketing and merchandising functions. He has no software development expertise and denies any knowledge of the application software’s inner workings. He knowledge of the applications is limited to a knowledge of the broad functions of the application which are obvious and known to all users of it from customers to shelf pickers.

[56] Shoprite does not dispute any of Johnson’s averments above. However, it points out that Johnson admits that his involvement in the development of

any feature of the application was to identify so-called 'customer pain points', which were issues with the application the customers were complaining of. The changes necessary to address those complaints were something he did not play any part in.

Information Johnson was exposed to in his capacity as eCommerce Head of Retail

[57] Johnson was appointed as eCommerce Head of Retail. The digital commerce marketing and merchandising staff teams reported to him. He in turn reported in turn to Ridge, the manager of the digital commerce team. Ridge had been instrumental in developing the Sixty60 business concept, model and service.

[58] Shoprite's job analysis report (JAR) for Johnson's role explained that the main purpose of his job was that he would be "(r)esponsible for driving sales growth of the digital commerce channel and developing the marketing, merchandising and commercialisation of the offer." The introductory paragraph of the JAR identified him as being a member of a team of highly talented people to "shape the face of online shopping in Africa." Johnson admits he received the JAR initially but the language in it was never used subsequently in relation to his role. Shoprite disputes this, saying that there would be no point in drafting an inaccurate job description because it would have attracted the wrong candidates.

[59] The purpose of his appointment included developing the marketing, merchandising and commercialisation "of the offer", namely the service which Sixty60 was required to provide to Shoprite, which was online, on–demand, sale and delivery of the products in question to consumers within an hour of the orders having been placed.

[60] Shoprite claims that in supervising and leading the product selection and merchandising function to ensure the right products were made available to customers and that the product range was merchandised in a manner which would maximise sales and promote customer experience, Johnson acquired confidential proprietary information. Johnson agrees that he was responsible for the marketing and merchandising of Sixty60, but his role

was limited to the Sixty60 business only. Driving sales, increasing the commercialisation of the product, product selection and merchandising, establishing brand identity and developing strategies for these purposes did not entail the use of confidential information but rather relied on generic sales tactics such as 'period promotions'. He contends that product selection and merchandising is a key part of any retail business including ecommerce, which essentially ensures that the right products are put on the shelves at the right price and with the correct description to make them attractive to customers. There is nothing unique about such activity and strategies he had used in other businesses where he performed a marketing role were the same he used at Sixty60.

[61] Shoprite also avers that Johnson knows of and would have been instrumental in determining various sales targets in the course of leading the ecommerce marketing team and working with the brand marketing teams. He would also know this from identifying opportunities to commercialise the offer with suppliers and other stakeholders and Shoprite buying groups and executing that strategy.

[62] While admitting he developed ecommerce sales strategies to meet revenue and growth targets and that he oversaw the use of analytics to track sales trends and identify opportunities for growth, Johnson maintains there is nothing proprietary or confidential about such activities, which were ones he had previously utilised in other marketing roles he has performed.

[63] In relation to the redacted document of Shoprite's marketing team OKRs, while not denying it is confidential to Shoprite, Johnson disputes whether it is worthy of protection. He argues that a competitor's knowledge of the document would not give that competitor an undue advantage over Shoprite. The document sets out a table containing eight columns. The first and second columns specify objectives and the corresponding key result for each objective. One group of objectives concern customer acquisition, retention, re-activation and sentiment as measurable criteria. The remaining columns display the current month (September 2022) and year- to-date actual results with the targeted result for each objective and

the variance between the actual result and the target. Shoprite claims this is an example of information that would be extremely valuable to a competitor. Johnson retorts that these are standard performance measures used to assess business progress, which are not unique to Shoprite.

[64] The remaining listed objectives in the OKR document mainly deal with facets of the functionality of the Sixty60 application, chiefly from the consumer user's perspective. The redacted portions of the document, for the most part, contain the performance outcome figures measured against targets. Shoprite claims it takes all that information (and other unspecified information) in order to optimise these outcomes, not only in order to structure its teams optimally, but also in order to structure its way of working.

[65] Apart from denying he has a copy of the document or a recollection of its details, Johnson argues that the value Shoprite attaches to the document is exaggerated as it contains no strategic information that would enable a competitor to overhaul its business, but merely generic marketing principles and the results captured in the redacted table would not be of assistance to OneCart which he maintains has a different 'value proposition' from Sixty60. I understand the value proposition is a term used to describe the basis on which a potential customer would prefer one supplier to others.

[66] Johnson also makes the point that the marketing strategies that might be applicable to Shoprite, are not readily transferable to a platform like OneCart, which does not market one retailer's products but is a platform for various retailers who have their own independent online digital sales platforms and may compete with each other in selling the same goods on IC's platform. The single supplier marketing strategies applicable on Sixty60 do not lend themselves to simple adoption by OneCart on its multiple seller platform. Johnson go so far as to contend they are actually irrelevant to it. Shoprite concedes that OneCart does not run marketing strategies for the retailers it services, but marketing the OneCart application entails identifying how, where and in what order products are

displayed to achieve the best value proposition for the customer and the confidential strategies Sixty60 has developed to determine how, where and in what order combinations of products displayed to achieve that objective are ones known to Johnson and he can share with OneCart.

[67] In its replying affidavit, Shoprite makes a fresh claim that its proprietary 'secrets' lie in how it is able to optimise the Sixty60 customer experience and ensure that the consumer who has used the service returns and new consumers start using it. It states this is made possible by the information gathering capabilities of the application, which gives Sixty60 more information than individual stores have. The nature of this information and how it can be used is confidential operational information which Shoprite is entitled to protect. Applicant sets and resets goals for its various divisions, including Sixty60, on a monthly and on an annual basis.

[68] Shoprite further states in reply that, once goals are set, the relevant measures of performance are captured and the results are analysed with a view to adapting its operations where required. It sets and resets goals for all divisions, on a monthly and annual basis and Johnson participated in this process and knew also of its current plans for the future including an 'ambitious and far ranging program' which would determine Sixty60's direction for the next few years.

[69] It is common cause Johnson would attend strategy meetings in the ecommerce department, as the Retail Manager: ecommerce. However, the strategic knowledge Johnson admits to being privy to was limited to the marketing and merchandising strategy of his own team as well as high level Key Performance Indicators (KPIs) of the remainder of the digital ecommerce team. Johnson admits to being exposed to financial information in quarterly and bi-monthly presentations, but states these presentations were widely distributed to everyone within the digital ecommerce department. He denies he had knowledge of delivery or software development partnerships besides Pingo. Pingo is the outsourced delivery arm of Sixty60, in which Shoprite has a 50% share.

[70] Shoprite argues that Johnson's knowledge of the business information above would be extremely valuable to a competitor who could mimic Shoprite's business strategies without having to develop them independently using its own resources. Further, knowing the strengths, weaknesses, objectives and opportunities which Shoprite had identified for its own on-demand service would be analysis commercially advantageous to OneCart.

[71] Shoprite concedes that Johnson has qualifications and experience which equip him to perform a number or roles, but argues that, apart from acquiring general expertise in ecommerce through the work he did at Shoprite, he also became privy to business information specific to Shoprite's activities in the online on-demand retail market. Shoprite identified examples of this type of information, specific to its own business. These include knowledge of: sales targets for the year ending April 2023; existing and contemplated improvements made to the Sixty60 application; which products have been most successful and the success rate of various promotional strategies employed; Shoprite's strategies for customer acquisition, such as business retention, preservation and generation of renewed business. Johnson's claim that these are standard marketing performance tools is not contested though.

[72] Shoprite claims that Johnson was exposed to its marketing activities and had unlimited access to business data used by his team. He was personally privy to Management Playback sessions where performance of various teams was discussed and decisions taken on what they should be focussing on. Johnson denies he had unlimited access to team members. If he had the technology product lead or a software developer for something sensitive, which he says he never did, they would have referred him back to Ridge and would not simply have shared details with him. Johnson states that during his tenure only two Management Playback sessions were conducted and his contribution to those sessions was only to make 15 minute high level presentations of work done and work focus areas, and to be present while other team members presented at a similarly high level. He states the IT department presented almost no numbers during the session and he did not fully understand what the IT

department lead was talking about most of the time. Apart from this he did not participate in strategy sessions outside the department. Accordingly, he argues that he had limited access to the Shoprite's wider and overall ecommerce strategies.

[73] Johnson states that the marketing strategy of Sixty60, by its very nature is visible in the public domain. Consequently, much of the Sixty60 marketing has been adopted by its competitors, who can view and appropriate it. The merchandising that is used on the Sixty60 application, that is to say, how goods are displayed on the application and appear to customers is also by its very nature visible to anyone shopping on the application. The software system behind this function is a SAP type capability and so is also freely available. While conceding that this technology is not the preserve of Sixty60, it claims that it is how this information is used, such as how products are grouped and how categories are displayed to make a compelling shopping experience for the customer that is integral to the business performance of Sixty60 and constitute part of its proprietary information This information is part of Shoprite's intellectual property, and Johnson appreciates its importance.

[74] Johnson admits he had knowledge of the team structure, which Shoprite claimed in its founding affidavit was set up for success. However, Johnson denies the structure was unique and claims it was a generic one common to Shoprite's other competitors. In its replying affidavit, Shoprite disputes this and stated that Johnson has intimate knowledge of the dedicated Sixty60 teams that analyse components of the business on a continual basis. This analysis is then relayed to the other teams to act on. Shoprite claims it operated in a markedly different way from similar businesses in how it monitors its activities and the manner of addressing problems which arise. The structure of teams, the way in which deliveries are monitored, the call centre set up are all operating methods which would be of great value to a competitor. Assessment

[75] It is trite that the principle governing the resolution of disputes of fact in motion proceedings is set out in *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd*, [1957] 1 All SA 123 (C):

> "[W]here there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant's affidavits justify such an order…Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted."

[76] The rule was clarified in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A)) as follows.

> "It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted, if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order."

[77] Applying this principle, to the whether Johnson was exposed to confidential information, what can be determined is that:

77.1 Johnson had no experience in ecommerce marketing prior to working for Shoprite. Accordingly, such knowledge and expertise he has developed is what he learned on the job in his position in Sixty60.

77.2 He made no general admission the was exposed to confidential information.

77.3 His knowledge of the Sixty60 software application entails a knowledge of the broad functions which are obvious to all users of the platform. He has no understanding of the IT design of the application. There does not appear to be a confidential component to this knowledge.

77.4 Johnson's role in influencing the design of the system was limited to n identifying problems with the functioning of the platform based on consumer complaints. The nature of those complaints was obviously information obtained from Shoprite's operation of the platform.

77.5 Johnson was instrumental in determining sales targets and knew Shoprite's sales trends and growth opportunities, which were based

on data analysis. Apart from the utilisation of data analysis for developing sales targeting strategies, there was no claim that there were any unique pricing policies or confidential in-house methodologies applied to derive targets that would be valuable in the hands of a competitor.

77.6 He had knowledge of and developed sales and merchandising strategies to be implemented by Sixty60 to ensure that the right products were made available to customers and that Shoprite's products were promoted in a way that would maximise sales and the customer's experience. These objectives were achieved by the application of generic marketing strategies on the Sixty60 platform. His knowledge of general marketing strategies is a component of his personal skills acquired by himself. Using data analysis to track sales trends and identify growth opportunities is not a marketing technique unique to Shoprite

77.7 The only specific confidential information Shoprite identified was in the teams' OKR document, which did contain information specific to the objectives determined. It was the quantified targets for various standard sales objectives and the actual results achieved that was clearly information that was unique to Sixty60's operation and was proprietary in nature.

77.8 He had access to the general performance levels of different teams in s60 and its financial performance but this information was share with all members of the ecommerce division. Even so, this information was confidential to Shoprite.

77.9 Johnson also was exposed to the financial performance of Sixty60 on a bi-monthly and quarterly basis, which again is information Shoprite is entitled to preserve.

77.10 The redacted numerical data in the OKR document was clearly information about Sixty60's business and would be of value to a competitor while that data remained current. The categories of performance measures analysed in the document are not parameters unique to Shoprite or Sixty60. I agree that it seems improbable that

the redacted document provides a blueprint or template for evaluating marketing performance that is unique to an ecommerce operation.

77.11 It is apparent Johnson would have had a knowledge of the roles of different teams in the ecommerce division and the team structures. He claimed the structure of the team was not out of the ordinary. In reply Shoprite disputes his contention that its ecommerce work teams do not represent a distinct form of operational structure. Shoprite's claims about the importance of the distinctiveness of its ecommerce team structure and the very specialised roles certain teams perform which it says is not the same as the way its competitors' teams are structured or function really ought to have been included in its founding affidavit if it is so important. In its founding affidavit Shoprite merely claimed the team structure was set up for success, which one would assume was the case as no business structure would be set up with a view to failure. That proposition does not provide the basis on which a small edifice about the distinctive character of its team structure and the specialist roles performed by different teams can be constructed to try and prove the existence of another element of Shoprite's intellectual property deserving of protection, only in the replying affidavit.

[78] From the above, it can be concluded that Johnson had proprietary knowledge about: consumer complaints about Shoprite's platform; knowledge of Shoprite's sales targets based on data received and analysed; historical performance of the ecommerce division relative to marketing and sales objectives; historical high level information on the performance of different teams, and the financial performance of the ecommerce division.

[79] There is no doubt that as a result of the position he held in Shoprite, Johnson learned about the application of marketing and merchandising techniques, in which he was trained and of which he had experience, in the ecommerce environment. The skills he acquired no doubt would make

him an attractive candidate for other retail operations looking for someone with prior ecommerce marketing experience. However it is trite that Shoprite has no proprietary claim to prevent him using those skills in the employment of a competitor, as they are attributes which inhere to him, even though he acquired them through working for it.[19]

[80] Nevertheless, what of the confidential information he was exposed to? Much of it would be of interest to another competing chain store competing in the same market at least while it was current in the sense that it is useful to know how well or badly your competitor is doing in certain respects. It might help a competitor to refocus the way it markets certain lines of products or identify aspects of its sales strategy it should strengthen. How valuable the figures of a single chain store's degree of success in achieving its own sales and marketing objectives, would be to a digital sales platform designed to promote the sales of a variety of different chain stores, some of which compete in the same market as Shoprite, but which also compete with each other, is less obvious. The value to OneCart of Johnson's knowledge of consumer gripes about the Sixty60 platform as a way of obtain some competitive advantage is not clear. At best it might help it know what could go wrong with a platform from a consumer's perspective, but what will be far more important to it is fixing its own user's gripes.

[81] I do not think that the confidential information Johnson was exposed to and which he might share with OneCart, assuming his undertaking is not honoured, would be of such value to OneCart and so detrimental to Shoprite if it were leaked that it outweighs Johnson's right to take up an opportunity to work in a more complex ecommerce platform catering to multiple chain stores but attempting to achieve an on-demand service standard achieved by Sixty60 underpinned as it is by a single strong retail business.

[82] Consequently, even though Johnson's employment by OneCart is in breach of his restraint agreement with Shoprite, it would not be reasonable to enforce it.

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[19] *Aranda Textile Mills (Pty) Ltd v Hurn & Another* [2000] 4 All SA 183[E] at para [33]

[83] There is no reason why in a contractual matter of this nature, costs should not follow the result.

Order

[1] The un-redacted version of Annexure AMR-5 to the Applicant's founding affidavit is not admitted as part of the record of the proceedings.

[2] The First Respondent must comply with the provisions of Clause 20.1 of his contract of employment with the Applicant (cited in paragraph [17] of this judgment).

[3] The application is dismissed with costs calculated from 6 December 2022.

Lagrange J
Judge of the Labour Court of South Africa

Appearances/Representatives

For the Applicant	R Stelzner SC, instructed by Cliffe Dekker Hofmeyr Inc
For the First Respondent	D Whitcutt SC, instructed by Edward Nathan Sonnenbergs Inc.