THE LABOUR COURT OF SOUTH AFRICA

(HELD AT DURBAN)

Not reportable

CASE NO: **D 14/2022**

In the matter between:

BIDVEST PROTEA (COIN) (PTY) LTD Applicant

and

MICHELLE SEETHARAM First Respondent

THORBURN SECURITY (PTY) LTD Second Respondent

Date of hearing: 24 February 2022

Date of judgment: 28 February 2022

JUDGMENT

VAN NIEKERK J

Introduction

Labour Court

[1] The applicant seeks to enforce certain restraint and confidentiality undertakings against the first respondent. In terms of the restraint undertakings, the first respondent agreed, amongst other things, that she would not for a period of 24 months after the termination of employment with the applicant for any reason, become employed by or otherwise interested in any entity that renders security and related services, anywhere in the Republic of South Africa. In addition, the first respondent agreed to certain confidentiality undertakings in terms of which she undertook not to disclose to any third party any of the applicant's trade secrets and other confidential information. Specifically regarded as confidential information for this purpose is the applicant's customer lists, the terms of its contracts with its customers, costing and profitability calculations of those contracts, no, details of any control systems for which the applicant was responsible, and the like.

[2] It is not in dispute that after she resigned from the applicant's employ during December 2021, the first respondent was employed by the second respondent, a direct competitor of the applicant. The first respondent contends that the terms of the restraint undertakings are unreasonable and that they are thus not capable of enforcement. That notwithstanding, the first respondent made a tender in the following terms:

> 3.1 our Client will not call upon any existing clients of Bidvest nor will she, whether directly or indirectly, have any dealings with such Clients and to this extent undertakes that she had not approach them in any way in this regard is had to agree to a list prepared by your Client;
>
> 3.2 our Client will not seek any new clients for the new employer in the same geographical area she was responsible for whilst employed for (sic) Bidvest; and
>
> 3.3 our Client will not use, directly or indirectly, any information of any nature whatsoever she may be privy to regarding and in relation to your Client, its operations, costing and other aspects relating to your Client which he played appropriate; …

Labour Court

The applicant refused the tender and seeks to enforce the agreed restraint.

Authority

[3] The first respondent disputes the authority of the deponent to the founding affidavit to depose to that affidavit, and further challenges the authority to institute and prosecute the application itself. In reply, the deponent to the affidavit, who is employed by the applicant as a member of its executive and to is also a director of the applicant, avers that by virtue of their position, she has the necessary authority to depose to the founding affidavit. The first respondent submits that even if the deponent had the authority to depose to the affidavits, this is irrelevant since the true test is whether the deponent has the authority to watch and persist in the application.

[4] The general rule is that when a juristic or artificial person (such as the applicant) institutes legal proceedings, the institution of those proceedings in its name ought to be properly authorised. An artificial person can function only through its agents and the court is entitled to be satisfied that when an artificial person institutes proceedings, the proceedings are instituted at its instance. More often than not, a copy of a resolution of the board of directors is produced as a form of proof of authorisation, but as the courts have held, this form of proof is not necessary in every case, and each case must necessarily be decided on its merits (see *Mall (Cape) (Pty) Ltd v Merino Ko-operative Bpk* 1957 (2) SA 347 (C)). In *Ganes and another v Telecom Namibia Ltd* (2004) 25 *ILJ* 995 (SCA), the Supreme Court of Appeal held that a deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. What must be authorised is the institution and prosecution of the proceedings. In that instance, proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. The attorney attested to an affidavit to the effect that he was a director of the firm acting on behalf of the respondent and that the firm had been duly appointed to represent the respondent. In the absence of any

Labour Court

challenge to that statement, the court accepted that the institution of the proceedings was duly authorised.

[5] Erasmus's *Superior Court Practice* offers the following observation on Rule 7 of the Uniform Rules (at D1-93, footnotes omitted):

> It is submitted that authorization to institute action or motion proceedings should not be conflated with *locus standi in iudicio*. Authorization concerns the question whether a party is properly before the court in legal proceedings. *Locus standi* materially concerns the direct interest of a party in the relief sought in legal proceedings. For this reason, rule 7(1) should be applied when 'the authority of anyone acting on behalf of a party' is challenged. Contrary to what was found in the *Wilge Hervomde Gemeente* case, the rule does not limit the challenge to the authority of attorneys to act only; the wording of the rule also contemplates a challenge to a general authority by one person to another to represent him in action or motion proceedings. This is clear from the *Eskom* and *Unlawful Occupiers* decisions referred to above. Properly applied, this interpretation of rule 7(1) in motion proceedings should, in the words of Flemming DJP in the *Eskom* case referred to above, 'lead to the elimination of the many pages of resolutions, delegations and substitutions still attached to applications by some litigants'.

[6] In the present instance, it is not in dispute that the deponent to the founding affidavit is a director of the applicant, nor is it in dispute that the applicant's attorneys are properly authorised to sign the notice of motion and file the necessary process in these proceedings.

Urgency

[7] The first respondent contended that the application was not urgent, first, because any urgency was self-created and secondly, because the applicant can have no reasonable apprehension of harm in circumstances where on the applicant's version, any confidential information that the first respondent once possessed is of doubtful value and thus not worthy of protection.

Labour Court

[8] An application to enforce a restraint of trade agreement, by virtue of its nature, is ordinarily urgent. To the extent that the first respondent contends that any urgency is self-created, while it is correct that the applicant was aware as early as 26 November 2021 that the applicant was intending to resign and take up employment with the second respondent. What followed was an engagement between the parties in which the applicant sought to match the remuneration offered by the second respondent, and after that remained open for acceptance until 2 December 2021, and again until 7 December 2021. On 10 December 2021, the applicant's attorneys of record addressed a letter to the first respondent advising her that her taking up employment with the second respondent would constitute a breach of a restraint undertakings, and demanding an undertaking by 13 December 2021. On 17 December 2021, the first respondent provided certain undertakings which the applicant rejected on 21 December 2021. On 23 December 2021, the first respondent's attorney advised the applicant's attorney that it was not prepared to provide the undertakings sought by the applicant and that any proceedings to enforce the restraint undertakings would be opposed. Further, the first respondent remained employed by the applicant until 31 December 2021, confirmation of her employment by the second respondent occurred on 12 January 2022, and that the application was filed on 19 January 2022 in circumstances where the respondents were afforded two weeks to file an answering affidavit. In these circumstances, in my view, the applicant has acted with due diligence and has not unduly delayed bringing the application, certainly not to the extent that it can be said that urgency is self-created.

[9] Insofar as the second basis on which the first respondent disputes urgency is concerned, the submission to the effect that doubt has been cast on the value of any confidential information in respect of which the applicant contends it has a proprietary interest, this is an issue that is inexorably bound up with the merits of the application. This submission is considered below in the context of the requirement of imminent or a reasonable apprehension of harm as a requirement for final relief.

Labour Court

[10] For the above reasons, in my view, the application stands to be heard on an urgent basis.

The applicable legal principles

[11] The principles applicable to onus in disputes such as the present are well-established. A party seeking to enforce a contract in restraint of trade need only invoke the contract and prove a breach of its terms. Thereafter, any respondent who seeks to avoid the restraint bears an onus to demonstrate, on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable (see *Basson V Chilwan* 1993 (3) SA 742 (A); *Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA)).

[12] In the present instance, the first respondent does not dispute signing the restraint agreement, nor does she dispute that she has commenced employment with a direct competitor of the applicant. She is employed by the second respondent (which does not oppose these proceedings) as a senior business development manager. In these circumstances, it is thus for the first respondent to demonstrate that the restraint undertakings given by her in favour of the applicant are not enforceable because they are unreasonable.

[13] To the extent that the first respondent suggests that she signed the restraint undertakings under some form of duress or ignorance on her part, the first respondent has failed to make out a case that remotely suggests that she was induced to sign the agreement on the account or that she was ignorant of the nature and extent of the undertakings that she provided. The first respondent avers that she signed the undertakings a few days after commencing employment and that 'the only reason I signed was because I required a fuel card and my employee number'. This is nothing less than mendacious – the offer of employment made to the first respondent makes clear that the offer was subject to the first respondent signing a restraint and confidentiality agreement.

Labour Court

The first respondent adduces no evidence to suggest that she raised the faintest objection either to the applicant's requirement that she sign the agreement, or to any term of the agreement. Similarly, to the extent that the applicant seeks to avoid enforcement of the restraint agreement on account of circumstances that prevailed in the workplace and that caused her to resign, these averments stand in stark contrast to the effusive thanks extended to her colleagues in her letter of resignation for their insight, mentorship and support, and her expressed hope to return to the applicant's employ after she had learnt 'the competitor inside story'. The first respondent's averments, their irrelevance aside, call her credibility into question.

[14] The starting point is that public policy requires that parties should comply with contractual obligations that have been freely and voluntarily undertaken (often referred to as the freedom of contract doctrine or expressed by the maxim *pacta sunt servanda*). Essential to this doctrine is the idea that individuals should be left free to conclude contracts and that the role of the courts is merely to enforce contracts and that judicial intervention should be kept to a minimum. That notwithstanding, it is generally accepted that a restraint will be considered to be unreasonable (and thus contrary to public policy and unenforceable), if it does not protect some legally recognisable interest of the employer but merely seeks to exclude or eliminate competition. Ordinarily, a restraint will be unenforceable if it does not protect a trade connection and/or confidential information to which the ex-employee was exposed. (For a summary of the relevant principles, see the judgment of the Labour Appeal Court in *Labournet (Pty) Ltd v Jankielson & another* (2017) 38 *ILJ* 1302 (LAC) at paragraphs 39 to 45.)

[15] It warrants emphasis that in an application such as the present all the applicant need do is show that there is confidential information to which the employee had access and which he or she could transmit if so inclined. It is not necessary to show that the employee has in fact used information confidential to the applicant. Similarly, in relation to customer connections, it is necessary to do no more than show that trade connections through customer connections exist,

Labour Court

and that they could be exploited by the former employee if employed by a competitor (see *Den Braven SA (Pty) Ltd v Pillay and Another* 2008 (6) SA 229 (D) at 240H).

[16] In *Basson v Chilwan* (*supra*) the court held that to determine the reasonableness or otherwise of a restraint of trade provision, the following questions should be asked:-

1. Is there an interest of the one party, which is deserving of protection at the termination of the agreement?
2. Is such interest being prejudiced by the other party?
3. If so, does such interest so weigh up qualitatively and quantitatively against the interest of the latter party that the latter should not be economically inactive and unproductive?
4. Is there another facet of public policy having nothing to do with the relationship between the parties but which requires that the restraint should either be maintained or rejected?

[17] The proprietary interests that can legitimately be protected by a restraint agreement, generally speaking, have been held to fall into two categories. The first is confidential information which is useful for the carrying on of the business and which could be used by a competitor, if it were to be disclosed to that competitor, to gain a relative competitive advantage (sometimes referred to as 'trade secrets'). The second is relationships with customers, potential customers, suppliers and others that go to make up what is sometimes referred to as the 'trade connection' of the business, this being an important aspect of its incorporeal property known as goodwill.

[18] Whether information constitutes a trade secret is a question of fact (see *Mossgas (Pty) Ltd v Sasol Technology (Pty) Ltd* [1999] 3 All SA 321 (W) at 333), *Walter McNaughten (Pty) Ltd v Schwartz & others* 2004 (3) SA (C)). For information to be confidential, it must be capable of application in trade or industry, i.e. it must be useful and not public knowledge and property; secondly, it must be known to

Labour Court

a restricted number of people or a close circle; and thirdly, it must be of economic value to the person seeking to protect it (see *Townsend Productions (Pty) Ltd v Leech & others* 2001 (4) SA 33 (C) *Walter McNaughten (Pty) Ltd v Schwartz & others* (supra)).

[19] The need by an employer to protect trade connections arises where an employee has access to customers or suppliers and is in a position to build up a particular relationship with them so that when the employee leaves the service of the employer, he or she could easily induce the employer's customers and suppliers to follow him or her to a new business. Again, this is a question of fact, and more often than not one of degree.

[20] It is incumbent on the employee under restraint to establish that he or she had no access to confidential information and never acquired any significant personal knowledge of confidential information or influence over the applicant's customers while in the applicant's employ (see *Rawlins* supra at 542F-543A). In other words, it is enough for the party seeking to enforce a restraint to show that trade connections through customer or supplier contact exist, and that they can be exploited if the employee was to be employed by a competitor or compete with the business of the applicant. It is not for the applicant to have to run the risk of the employee communicating its trade secrets or utilising its customer connections to the advantage of a competitor. It is also not incumbent on an applicant to enquire into the *bona fides* of the employee or to demonstrate that he or she is *mala fides* before it is entitled to enforce a contractually agreed restraint. The holder of the restraint also does not have to show that the employee in fact utilised information confidential to it – it is enough that the employee could do so. As Marais J stated in *BHT Water treatment (Pty) Ltd v Leslie and another* 1993 (1) SA 47 (W) at 57J-58D:

> In my view, all that the applicant can do is to show that there is secret information to which the respondent had access, and which in theory the first respondent could transmit to the second respondent should he desire to do so. The very purpose of the restraint agreement was that the applicant did not wish to have to

Labour Court

> rely on the bona fides or lack of retained knowledge on the part of the first respondent, of the secret formulae. In my view, it cannot be unreasonable for the applicant in the circumstances to enforce the bargain it has exacted to protect itself. Indeed, the very ratio underlying the bargain was that the applicant should not have to content itself with crossing its fingers and hoping that the first respondent would act honourably or abide by the undertakings that he has given.

[21] In essence, for the first respondent to escape her contractual undertaking, she must establish that the applicant has no proprietary interest that is threatened by her working for the second respondent.

Analysis

[22] In broad terms, the first respondent denies the existence of any protectable interests in the form of confidential information, trade secrets and trade connections. She denies that the services offered by the applicant are unique, at least in the sense that the applicant is one key player in the security industry in circumstances where the formula for the applicant's success is no different to any other company. The first respondent avers that she was unaware of sales models or any specific formula matrix in regard to pricing. At best for the applicant, the first respondent submits that any exposure to tenders and proposals and to the applicant's database was confined to the limited areas within which she operated, being Richards Bay, Durban North and Piet Retief. The first respondent avers that she is currently assigned to the eastern area of the country, in particular, the Eastern Province, which is not an area that was assigned to her during the course of her employment with the applicant. In short, the first respondent submits that if the restraint is not unreasonable in totality, it remains unreasonable in respect of its duration and geographic scope.

[23] A useful starting point is the first respondent's position while employed by the applicant, and the first respondent's efforts to downplay the nature of her employment. In *Den Braven SA (Pty) Ltd v Pillay and another* 2008 (6) SA 229

Labour Court

(D), Wallis AJ cautioned against the subconscious temptation to regard a person engaged in sales as 'just a salesman'. The court went on to say:

> However, in any business dependent for its profits on the sale of its products, the sales function is of fundamental importance and the salesperson's ability to damage the business of the employer may be very considerable or even fatal, notwithstanding the fact that the salesperson may seem to stand fairly low in the staff hierarchy….
>
> It must be borne in mind that what is referred to in the cases as a customer connection is often constituted by intangibles such as the relationship on personal issues between salesperson and purchaser; the reputation of the salesperson for dealing with complaints and problems and his or her all round willingness to 'go the extra mile' in order to secure a sale.

[24] I deal first with the undertaking in respect of confidential information. The first respondent was employed in a senior sales position for a period of three years. The confidentiality undertakings that the applicant seeks to enforce extend to information concerning customer lists, including present customers past customers and prospective customers, the terms, conditions value and/or duration of all and any contracts of the applicant with its customers, the location and/or sites at which contracts are carried out, the costing and profitability calculations contracts, details of any control systems for the implementation and administration of which the first respondent was responsible, to the exclusion of information that is public knowledge when the public domain.

[25] It is not in dispute that the first respondent was furnished with information that one might expect to be available to sales managers – for example, the applicant's new pricing for 2022 was made available to the first respondent. Further the first respondent does not dispute that she was present at sales meetings where new business, tender calendars and marketing methods were discussed, in respect of business across the country, and not limited to the first respondent's area of responsibility. The first respondent downplays the value of this information, and indeed, her role in the applicant's business so far as to aver

Labour Court

that she was employed to ‘sell guards’. The evidence discloses that this is an exceptionally modest characterisation of the first respondent’s responsibilities. The applicant has provided evidence of email exchanges between the first respondent and other employees, the latter requesting quotes from her, sending invoices to her and typically engaging in pricing, quoting and invoicing to clients. It is not disputed (by way of a fourth set of affidavits or otherwise) that the first respondent was afforded the opportunity to do the pricing for a tender issued by the eThekwini Municipality, that she was privy to meetings where pricing strategies were discussed. Certain of the documents annexed to the answering affidavit would fall into the category of confidential information as defined by the terms of the confidentiality undertaking. For example, the first respondent annexes a top competitor analysis. Other inconsistencies and contradictions in the answering affidavit suggest that the first respondent is being less than candid in her response to the applicant’s averments. For example, the first respondent denies that pricing is crucial in the security industry. She later submits that the applicant has lost tenders ‘mainly due to price’. This serves only to highlight the significance of sales strategies, pricing and service delivery models, and the proprietary interest that the applicant has in that information.

[26] What is of particular concern is that the first respondent copied emails from her work address to a private Gmail account, including a list of clients of the first respondent’s previous employer. In her answering affidavit, the first respondent avers that the purpose of sending the emails to a personal address was to enable her to work from home in August 2021. In reply, the applicant has annexed further emails sent by the first respondent to her Gmail address as later as 7 November 2021, including multiple client and potential client lists with contact names and numbers.

[27] It should be recalled that it is sufficient for the party seeking to enforce a restraint to show that trade connections through customer contact exist, and that they can be exploited if the employee was to be employed by a competitor. It is not for the applicant to have to run the risk of the employee communicating its trade secrets

Labour Court

or utilising its customer connections to the advantage of a competitor. The applicant does not have to show that the first respondent in fact used information confidential to it – it is enough that she could do so. This is not one of those cases where the first respondent leaves the applicant's employ with no more than general know-how, or what the court once described as 'the sales experience and wisdom acquired at an employer, which in turn produces a general acumen which other employers may seek to acquire and which an employee should be free to trade on the labour market (see *North Safety Products v Naidoo & another* (2020) 41 *ILJ* 1736 (LC)). The first respondent had access to confidential information. She is employed by a competitor of the applicant. The confidentiality undertakings given by the first respondent extend to agreement on her part not to use the applicant's confidential information for her own benefit or the benefit of any third party. In short, the first respondent had access to the applicant's confidential information and ought appropriately to be interdicted from disclosing that information to the second respondent and any other party, consistent with the terms of her restraint undertaking.

[28] Turning next to the restraint undertakings, the applicant avers that given that its operations extend to the entire country, and that the first respondent has had access to information at a national level, the geographic component of the restraint that it seeks to enforce is not unreasonable. The first respondent avers that while employed by the applicant, she had a responsibility only for certain areas within the province of KwaZulu-Natal. That is not disputed; the applicant's concern is the first respondent's exposure to a national database containing client lists and the like at a national level. The first respondent cannot seriously dispute that their exposure to information held by the applicant was at this level – indeed, minutes of national sales meetings at which the first respondent was present are in themselves proof of this. In my view, and to the extent that the restraint undertakings prohibits the first respondent from being employed within the security sector within the Republic of South Africa, the restraint is not unreasonable. In regard to the temporal component of the restraint, there is no case made out in express terms, by either party, as to the reasonableness or

Labour Court

otherwise of the 24- month period of the restraint. A reading of the affidavits suggests that information of the sort to which the first respondent has had exposure has a shelf life of some 12 months. Contracts concluded pursuant to closed invitations to quote or in respect of which open tenders are issued, appear to endure for that period in these circumstances, it seems to me that a period of 24 months is excessive, and that reduced period of 12 months is reasonable.

[29] Finally, and to the extent that the first respondent's counsel submitted that the first respondent would be excluded from the labour market where the restraint undertakings to be enforced, while the first respondent has experience in the security sector, skills are essentially sales based and these would be capable of application in a different sector. Even within the security sector, as Ms Lancaster, who represented the applicant, pointed out, there are activities within the sector in which the applicant does not operate (e.g. cash in transit) in which the first respondent would be free to be engaged without objection from the applicant.

[30] To the extent that counsel for the first respondent submitted that the application should fail because the applicant cannot harbour any reasonable apprehension of harm given that on its version, the first respondent has likely disclosed information in her possession to the second respondent, this submission overlooks the nature of the dispute between the parties and the purpose of an application to hold an employee to restraint undertakings. The first respondent is in breach of her contract of employment. She seeks to avoid the consequences of that breach by contending that the confidentiality and restraint undertakings to which she agreed and which the applicant seeks to enforce are unreasonable. For the reasons recorded above, but for the duration of the restraint, in my view, the restraint undertakings are not unreasonable given the proprietary interests that the applicant seeks to protect. The first respondent's breach of contract remains ongoing – and the applicant is entitled to an order that seeks to rectify that breach by enforcing the terms of the contract. It is no answer to say, in respect of the confidentiality undertakings particularly, that 'the horse has bolted' and that the applicant is thus disentitled to the relief it seeks. This is one of those

Labour Court

instances where the confidential information to which the first respondent has had access and her continued employment by the second respondent, a direct competitor of the applicant, in combination serve to undermine the proprietary interests that the applicant has sought to protect. In short, the irreparable harm caused to the applicant consequent on the first respondent's breach of her confidentiality and restraint undertakings is ongoing, and the applicant is entitled to the protection it seeks.

[31] Finally, in relation to costs, the Labour Appeal Court has held that when this court exercises its concurrent jurisdiction with the civil courts in terms of section 77 (3) of the Basic Conditions of Employment Act, the rule is that costs follow the result, absent special considerations. In other words, the rule established by section 162 of the LRA that costs ought to be determined according to the requirements of the law and fairness, where costs do not ordinarily follow the result, does not apply. I am aware of decisions in this court to the contrary, but I am bound by the LAC's judgment (*Biase v Mianzo Asset Management (Pty) Ltd* (2019) 40 *ILJ* 1987 (LAC). The applicant has largely succeeded in obtaining the relief that it sought, but for the period of the restraint. In these circumstances, the appropriate order is that the first respondent be responsible for 50% of the applicants taxed costs. There is no basis for an award of costs on a punitive scale is contended for by the applicant. When this matter was enrolled for hearing and postponed on 18 February 2022, costs were reserved in circumstances where the acting judge appointed to hear the matter recused herself. The parties agreed to a hearing on a virtual platform during the course of the next week. Given the circumstances of the postponement, each party is to pay its own costs for that date.

I make the following order:

1. The first respondent is interdicted and restrained for a period of 12 months, calculated from 1 January 2022, from:
   1.1 in any capacity, including but not limited to an employee, partner, proprietor, director, shareholder, member, consultant, contractor, agent, assistant, associate or otherwise and whether for reward or

Labour Court

not, directly or indirectly, any way in the Republic of South Africa, to be employed by and/or engaged and/or in any way become interested in any company, close corporation, firm, undertaking which renders security and/or related services connected therewith and ancillary thereto and which competes with the applicant's business;

1.2 diverging or disclosing to any person, directly or indirectly, any of the applicant's trade secrets and confidential information to any third party in accordance with the provisions of the restraint agreement concluded between the applicant and the first respondent.

2. The first respondent is to pay the applicant's costs, limited to 50% of the costs taxed on a party and party scale, excluding the costs of the postponement on 18 February 2022 for which each party is to bear its own costs.

André van Niekerk
Judge of the Labour Court

Labour Court

APPEARANCES

For the applicant: Ms S Lancaster, Lancaster Kungoane Attorneys

For the first respondent: Adv DS Rorick, instructed by Taylor and Finlay Attorneys