Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. 2174/2020

Before: The Hon. Mr Justice Binns-Ward

Date of hearing: 20 February 2020
Date of judgment: 24 February 2020

In the matter between:

TRUWORTHS LIMITED Applicant

and

DANIELLE DE BRUYN First Respondent
ADIDAS (SOUTH AFRICA) (PTY) LTD Second Respondent

JUDGMENT

BINNS-WARD J

[1] The applicant, Truworths Limited, is described in the founding affidavit as 'a leading retailer of fashion, clothing, footwear, homeware and related merchandise in the ladies' men's and children's markets'. It has 728 stores throughout South Africa. The company has a range of 'specialised retail formats and brands'. The deponent to the founding affidavit averred that '[t]hose relevant to this application are not only "*Hey Betty*", but also "*OBR Sport*", "*Outback Red*", "*TRNY*", "*TRS*", [and] "*Hemisphere Sport*"'. The '*Hey Betty*' brand of women's clothing is proprietary to Truworths. It is what I would call an 'inhouse brand'. Some of the other brands just mentioned, such as '*Outback Red*' and '*Hemisphere*', would be recognisable to retail trade cognoscenti as overseas brands. The deponent pointed out that

'Truworths also sells "*Adidas*", "*Reebo*k" and "*Puma*" branded footwear' and proceeded to explain that '[t]he additional brands are relevant because their target market and offering compete with Adidas, and because [Danielle] De Bruyn had access to being exposed to Truworths styles and purchasing for them.'

[2] Danielle de Bruyn is the first respondent. Having then recently graduated from the Durban University of Technology with a national diploma in fashion, she was engaged by Truworths as a trainee buyer in January 2014. She underwent a two-year period of inhouse training before being promoted by the company to the positions of 'designate buyer', and thereafter, buyer. She terminated her employment with Truworths with effect from the end of January 2020, at the conclusion of the four-month notice period that she had been obliged to serve out in terms of her contract of employment. Ms de Bruyn's last working day was 17 January, after which she proceeded on leave. She thereafter, with effect from 17 February 2020, took up a position as a buyer with adidas (South Africa) (Pty) Ltd, which is the local manifestation of the well-known multinational business of the German company, Adidas AG. Adidas (South Africa) (Pty) Ltd is the second respondent. For convenience, I shall refer to the second respondent simply as 'adidas'.

[3] Truworths seeks in these proceedings to obtain an order enforcing a six-month restraint of trade agreement that was concluded between itself and Ms de Bruyn as part and parcel of the latter's terms of employment. The company contends that Ms de Bruyn's employment by adidas has put her in breach of the restraint. Initially, only an interim interdict was sought as a matter of urgency. But as the issues had been fully ventilated on the papers by the time the matter came to a hearing on 20 February 2020, the application was prosecuted on the basis that a final interdict should be granted. Notice of opposition was given by Webber Wentzel attorneys on behalf of both of the respondents. Their answer to the founding papers was given in an affidavit by adidas's Senior Director: Direct to Consumer Adidas Emerging Markets. Ms de Bruyn deposed to a confirmatory affidavit, verifying, insofar as she was able, the averments made in the principal answering affidavit. It goes almost without saying that because final relief is sought the evidence falls to be assessed on the now well entrenched principles set forth in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51 (21 May 1984); 1984 (3) SA 623 (A) at 634E-635C.

[4] The respondents took the preliminary point that the application had been unduly delayed as Truworths' representatives had been aware from December 2019 that Ms de Bruyn had been offered employment by adidas. It must be said, however, that the position at

that stage had not been altogether clear. It would appear that adidas, having accessed her profile on the business networking site LinkedIn, had headhunted Ms de Bruyn towards the end of 2019. Ms de Bruyn had made no secret of the offer of employment that she had received from adidas and had been advised by the relevant personnel at Truworths that she would be in breach of the restraint of trade agreement should she take it up before the period of the restraint had elapsed. It would seem that at that stage Ms de Bruyn's first preference was in fact to emigrate to Portugal, where her partner had reportedly been offered an attractive business opportunity. Emigrating to Portugal turned out to be more complicated than expected, however, and for that reason she accepted the offer to join adidas. Having learned of Ms de Bruyn's decision to commence employment with adidas, Truworths, through its attorneys, addressed letters of demand to both of the respondents. They sought undertakings that the terms of the restraint would be honoured; failing which, so they advised, legal proceedings would be instituted. The respondents requested, and were afforded, extra time to react to the demand. It was only when the demand was refused that the current proceedings were launched.

[5] I do not consider in the circumstances that Truworths can reasonably be accused of failing to act with appropriate expedition, and it is clear, having regard to the duration and intended purpose of the restraint, that it would not be able in proceedings brought and conducted in the ordinary course to obtain the redress to which it contends it is entitled. It was therefore appropriate for the application to be entertained as one of urgency and for the necessary exemptions from the forms and processes in terms of the rules of court to be granted.

[6] When Ms de Bruyn was engaged as a trainee buyer, her contract of employment provided, amongst other matters, as follows:

> Restraint
>
> During your training you will be exposed to highly confidential and commercially sensitive information regarding Truworths. You will also be trained to utilise systems and procedures which have been developed at Truworths at considerable cost and which are key to our Company maintaining its competitive advantage. We therefore require all trainees to sign a Restraint – the full details of which are attached.

The material term, at least for present purposes, in the accompanying 'restraint agreement' that was signed by Ms de Bruyn on the same date as her contract of engagement was framed in these terms:

> (a) Should your employment with Truworths be terminated, you cannot work for any of our competitors in South Africa, either directly or indirectly, or for any of the suppliers of our competitors for seven months after you have left Truworths, i.e. seven months after the date of termination of your employment.

The engagement contract was amended on two occasions during Ms de Bruyn's period in training. The first of these amendments was effected in terms of an addendum agreement concluded on 18 February 2015 and the second in terms of a further addendum, expressly related to the first addendum, that was executed a few days later. The second addendum afforded Ms de Bruyn the option of being subject to giving three months' notice of intention to terminate her employment with an attendant seven-month restraint of trade, alternatively, four months' notice with a six-month restraint of trade. She chose the latter, hence the duration of the restraint in issue in these proceedings. The fact that the amendment of the restraint agreement was effected by way of addenda to the contract of employment demonstrates how fundamentally interrelated the two agreements were. For practical purposes the restraint agreement might just as well be considered as an integral component of the contract of employment.

[7] On the basis of the wording of the engagement contract quoted above, the respondents sought to argue in the answering affidavit and in their counsel's heads of argument that the restraint agreement applied only to Ms de Bruyn's employment as a trainee, and that it had no application in respect of her subsequent engagement as a buyer. The argument was not pursued in the oral submissions, however; advisedly so, in my judgment. The contention was untenable. Not only would such a construction be entirely unbusinesslike; it is irreconcilable with the import of the addendum agreements, which expressly contemplate the continued employment of the first respondent after the completion of her training, as indeed did the original contract of employment, which imposed penalties by way of requiring the repayment of her training costs should Ms de Bruyn leave the company within 24 months of being promoted to any one of various positions, including that of buyer, at the end of her training. It was plain that the training to be undertaken by her pursuant to the contract of engagement was intended to equip her for longer term employment in the company and that the attendant covenant in restraint of trade was intended to operate with effect from the termination of such employment whenever that might be. The intended longer term effect of the restraint agreement is moreover confirmed by the content of clause (b) of that agreement, which read:

> (b) Without detracting from the restraint provisions at the time of Truworths appointing you as a designate buyer or designate merchandise planner or similar (or whatever title is used at the time),

> Truworths will offer you either Truworths International Limited share appreciation rights or a cash amount (whichever Truworths chooses at the time) as at the date when you are appointed as a designate buyer or designate merchandise planner.

[8] Shares to the approximate value of R75 078 were set aside in August 2015 for Ms de Bruyn in terms of paragraph (b) of the restraint agreement. The allocation of 'share appreciation rights' apparently worked in a way that meant that 20% of the earmarked shares would vest in Ms de Bruyn three years later, in August 2018, with a further 40% due to vest in 2019, and the last and remaining 40% in August 2020.

[9] In the event, in March 2018, Ms de Bruyn elected to take a cash payment of approximately R72 500 in lieu of her share options, then apparently valued at R113 295. The agreement in terms of which Ms de Bruyn was permitted to take the cash-out required her to remain in Truworths' employ until at least April 2020, failing which she was required to pay back toTruworths an amount equivalent to the value of the shares when the cash-out was made. Ms de Bruyn was consequently required to sign an acknowledgment of debt in favour of Truworths in the amount of R113 295 when she left their employment in January 2020.

[10] In its founding papers, Truworths alleged that the 'share appreciation rights' constituted a form of financial reward in consideration of the employee's undertaking of the obligations in terms of the restraint agreement. I do not think that claim bears scrutiny, notwithstanding that the provision appears in the restraint agreement, rather than in the contract of engagement where it might more logically belong. It seems to me that the offer of shares, or a cash payment in lieu thereof, was instead intended to operate as an incentive to the employee to remain in the company's employ for a minimum of no less than three, and preferably at least five, years after the date of her appointment to the position of designate buyer or merchandise planner. I therefore do not accept that Ms Bruyn was at any time given any financial consideration for being placed under the contracted restraint. For the same reason, I also reject the respondents' argument that the restraint cannot be enforced because Truworths has required Ms de Bruyn to pay back the value of the shares.

[11] During her employment as a buyer with Truworths, Ms de Bruyn was engaged exclusively in working on the company's '*Hey Betty*' range of casual women's clothing. According to the deponent to the founding affidavit, a buyer at Truworths 'interprets international fashion trends … and then designs or identifies designs to brief suppliers to manufacture merchandise appropriate to the local market. The buyer's focus is on the products themselves, including fabric selection, design, colour, price and the need for variety

within a range . The buyer has knowledge of what will sell, what can be ordered, and how much to order. A buyer must not only know the market, but also understand what suppliers can deliver. A buyer must assist sales and amend orders and revise plans based on her (and her colleagues') assessment'.

[12] Truworths plans what will be put on sale in its shops well ahead of time. For clothing, it divides its sales year into four seasons; two summer seasons ('Summer A' and 'Summer B') and two winter seasons ('Winter C' and 'Winter D'). Summer A is the period from July to the end of September, Summer B is from October to the end of December, Winter C runs from January to the end of March and Winter D from April to the end of June. Planning for selling in these seasons occurs well ahead of time.

[13] A seasonal fashion overview in respect of each season is conducted by Truworths' 'Fashion Studio'. The Fashion Studio is a team of specialist fashion designers. It monitors fashion trends in Europe, Africa and North America. The team travels to markets and fairs abroad. They inform the buyers of their predictions, collaborating with buyers to apply their knowledge in the business. The Fashion Studio provides Truworths with its strategic direction, and is reportedly key to its success.

[14] Ms de Bruyn attended 'the winter 2020 overview' held in May 2019. She had also attended the winter fabric fair at which Truworths' suppliers showcased their winter fabric for 2020 and the winter 2020 knitwear yarn fair, where the suppliers showcased their winter yarns and 'forward focus'. She attended a number of other planning-related events that would bear on the clothing to be marketed in Truworths shops in the first six months of 2020. As part of her duties she was also required to buy in the stock for the first two months of the '*Hey Betty*' summer range (July and August 2020) and to plan product for the whole of Summer A and B. She attended a number of meetings in this regard and was involved in planning for the summer 2020 season. It is alleged that '[t]his means that [Ms] de Bruyn is aware of Truworths intended business direction until December 2020, for which orders have been placed until August 2020'.

[15] It is also alleged that Ms de Bruyn was exposed to Truworths bargaining strategies in respect of supplier price negotiations for the months of January to December 2020. Truworths buyers are reportedly required to develop 'a supplier strategy' that ensures that merchandise to be manufactured is allocated to the best source of supply, and is well balanced across suppliers - so as to mitigate the risk of non-delivery by certain suppliers.

[16] It is clear then that Ms de Bruyn has been closely involved in the preparation of what Truworths will market in its '*Hey Betty*' range during the coming year, especially in the first part of the year. Her exposure in the course of her work to other ranges of clothing marketed by Truworths was tangential. It is also clear from the evidence adduced by the applicant that arrangements for what will appear on the shelves of Truworths shops have to be made months ahead of the relevant selling periods. Fabrics have to be chosen, colours selected, designs settled upon and suppliers contracted in order for the finished clothing to be ready and available in the determined quantities to be put on sale at the scheduled time in the appropriate season. While they might well have their own different ways of going about it, it seems to me to be axiomatic that a comparable process would have to be gone through by any large-scale retailer of fashion clothing.

[17] The detail might be expected to differ depending on the nature of the clothing involved. The nature of the women's clothing in Truworths' '*Hey Betty*' range is described as 'casual wear', whereas as that produced and marketed under the adidas label is described as 'sport' or 'active' wear. It seems to me as a matter of common logic that these differences would obviously affect issues of design, fabric choice and colour, and to some extent, possibly, supply, being the type of matters in which Ms de Bruyn was involved when she worked at Truworths.

[18] The difference between the look and character of '*Hey Betty*' clothing and adidas clothing is graphically illustrated in the respective colour catalogues of clothing advertised online in the '*Hey Betty*' range and the adidas women's clothing range, copies of which were attached to the founding affidavit as annexures FA1 and FA2, respectively. In my judgment, it is difficult to conceive that a customer looking to buy sporting wear of the sort advertised on the adidas website would be tempted to consider the type of clothes advertised on the Truworths site under the '*Hey Betty*' brand. The clothing in the two ranges looks to have been designed to be marketed to two quite different markets for likely use in two quite different contexts. The styles are distinctly different. I accept that the same customer might decide to buy '*Hey Betty*' clothing to be worn on certain occasions and also adidas sportswear for use in other circumstances, but it strikes me as most unlikely that that customer would ever be in a position of having to make a choice between the two brands when deciding on a purchase of clothing for one particular use.

[19] When it comes to the question of sales strategy and planning, the deponent to the answering affidavit has described that adidas operates on an entirely different model to

Truworths' inhouse '*Hey Betty*' range. The adidas ranges are planned and executed overseas in hubs or bases in Germany, Japan and the United States. Buyers employed in adidas's South African company are not involved in the process at all. A buyer in Ms de Bruyn's position, employed in the South African company, would be required to select clothing from an inhouse brochure of available adidas products for sale in the local market. The idea would be not to decide what adidas should design and have manufactured for sale in South Africa, but rather to determine from the products that adidas has already had designed for sale in the relevant period those which should be marketed in this country. The evidence is that the range of products that will be available to be sold in adidas's local markets around the world in 2020 has already been determined, and that in those circumstances any knowledge that Ms de Bruyn might have about Truworths' plans for its clothing ranges for 2020 has no scope for application in influencing what adidas might put on the shelves during that year. Adidas emphasizes that in any event the nature of Ms de Bruyn's job description in her employment with it differs materially from that in her employment with Truworths. She will not be involved in design, fabric and colour choices, or in dealing with suppliers.

[20] The approach to be taken by the courts when determining applications for the enforcement of restraint of trade agreements has been settled in a number of appeal court judgments handed down over the last 35 years. I was referred in argument to an earlier judgment of this court (per Breitenbach AJ) in *Zero Model Management (Pty) Ltd v Barnard and Another* [2009] ZAWCHC 232 (18 December 2009), which, in paras. 34-38, provides the following accurate summary of the import of the pertinent case law that I am grateful, in the context of preparing this judgment under the exigency of urgency, to be able to adopt:

> 34. In *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* [1984] ZASCA 116; 1984 (4) SA 874 (A) the Appellate Division (as it was then known) held that the principle, followed in many earlier South African judgments, that a restraint of trade agreement is *prima facie* invalid or unenforceable stemmed from English law and not our common law, which contains no rule to that effect. The correct approach is to examine a restraint of trade agreement with regard to its own circumstances to ascertain whether enforcing it would be contrary to public policy, in which case it would be unenforceable. When a party alleges that he is not bound by a restraint of trade to which he had agreed, he bears the *onus* of proving that the enforcement of the agreement would be contrary to public policy. Although public policy requires that agreements freely entered into should be complied with, it also requires, generally, that everyone should be free to seek fulfilment in the business and professional world and, consequently, an unreasonable restriction of a person's freedom to do so will not be enforced. The court must have regard to the circumstances obtaining at the time when it is asked to enforce the restriction. The court is

not limited to a finding in regard to the agreement as a whole, but is entitled to declare the agreement partially enforceable or unenforceable.

35. In *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at paragraph 11, the Supreme Court of Appeal ("SCA") endorsed the summary of the effect of the *Magna Alloys* judgment in *J Louw and Co (Pty) Ltd v Richter and Others* 1987 (2) SA 237 (N) at 243B to C:

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

36. In *Reddy* the SCA added that determining whether a restraint agreement unreasonably restricts the freedom to trade or to work of the "*covenantor*" (i.e. the party resisting enforcement), is a value judgment which the court must make with two principal policy considerations in mind (paragraph 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), labour relations (s 23) and cultural, religious and linguistic communities (s 31).*"

37. In *Reddy* the SCA explained the manner in which these two principal considerations should be applied, as follows (at paragraph 16):

"*In applying these two principal considerations, 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. In Basson v Chilwan and Others* [1993] ZASCA 61*;* [1993 (3) SA 742 *(A) at 767G to H*[1]], *Nienaber JA identified four questions that should be asked when considering the reasonableness of a restraint: (a) Does the one*

[1] Also reported at [1993] 2 All SA 373 (A).

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".

38. In *Reddy* at paragraph 17 the SCA added a fifth question 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 ("the Constitution"), namely whether the restraint goes further than necessary to protect the interest of the party that deserves protection after termination of the employment agreement.

[21] The respondents contended that the restraint was indiscriminately wide. It has been held before that restraint agreements that are unduly oppressive are contrary to public policy and unenforceable. The respondents point out that on a literal construction of the agreement Ms de Bruyn would be prohibited from taking up any position whatsoever with any of Truworths' competitors or their suppliers, even if the work involved there bore no relationship whatsoever to that which she had been doing, or any proprietary information she had been exposed to, whilst employed at Truworths. It is possible to construe the agreement to that effect, but I do not think that to do so would give a sensible or businesslike construction of it. On the contrary, I think it is evident, when the relevant agreements are construed holistically and in the manner enjoined in *Endumeni Municipality*,[2] that the object of the restraint would have been commonly understood by the contracting parties to have been directed at affording protection to Truworths' legitimate proprietary interests should the employee have the opportunity within the first six months after leaving Truworths' employment to take up a position with a competitor or a competitor's supplier.

[22] To the extent that certain averments by the deponent to Truworths' founding affidavit appear to suggest that he considered the restraint agreement might be applied merely to protect Truworths against competition he was misguided. If that were the intended effect of the agreement, it would not be enforceable; cf. *Basson v Chilwan* supra, at 767E-F (SALR). The only legitimate object to which a covenant in restraint of trade can be directed is the

[2] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13 (16 March 2012); [2012] 2 All SA 262 (SCA); 2012 (4) SA 593, at para.18.

protection of a legally cognisable proprietary interest of the covenantee ('vermoënsbelang') such as confidential information, customer connections or goodwill; cf. e.g. *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T), [1991] 4 All SA 262, at 507D-F (SALR),[3] *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at 540-541 and *Automotive Tooling Systems (Pty) Ltd v Wilkens and Others* [2006] ZASCA 167 (28 September 2006); 2007 (2) SA 271 (SCA); [2007] 4 All SA 1073, at para. 8.

[23] I think it has been established in the current case that Truworths does indeed have a proprietary interest notionally deserving of protection by means of the imposition of restraint of trade agreements on its employees engaged in the planning, design and marketing of its inhouse '*Hey Betty*' range. I can readily accept that its confidential information in this connection might well be useful if disclosed to competitors in affording them an unfair competitive advantage. The likelihood of such an advantage actually being provided in any given situation will, of course, depend on the peculiar circumstances of the case. It is recognition of that axiom that no doubt explains the approach enunciated in *Magna Alloys* supra, that it is the circumstances that prevail when a covenant in restraint of trade is sought to be enforced, rather than those pertaining when it was entered into, to which particular regard will be had when determining whether or not it would contrary to public policy to give it effect.

[24] Accepting, as I do, that Truworths did have an interest that deserved protection after termination of the contract of employment between itself and Ms de Bruyn, the enquiry concerning whether the restraint should be enforced or not in the given circumstances must move on to the second and third questions in the check list devised by Nienaber JA in *Basson v Chilwan* that is set out in the quotation, above, from *Zero Model Management*, viz. (2) '*is that interest threatened by the other party?*', and (3), if it is, '*does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?*'. The evidence suggests, in line with common experience, that fashion is a constantly changing phenomenon, and that consequently any proprietary information that Ms de Bruyn is able to take with her concerning Truworths' strategies and planning concerning its '*Hey Betty*' range could be of only very limited usefulness to a competitor beyond the end of 2020. If anything, assuming, as I think one reasonably might, that the duration of the agreed restraint had been calculated with regard to the need for

[3] Cited in *Reddy* supra, para. 18 at footnotes 31 and 32.

Truworths' proprietary interests to be adequately protected, the six-month period of the restraint, which in this case would lapse at the end of July 2020, serves to verify that impression. The evidence also demonstrates that any knowledge concerning the '*Hey Betty*' range that Ms de Bruyn has taken with her from her employment at Truworths is unlikely to have any practical application in her work at adidas, where she will be involved in working with a quite distinguishable range of women's clothing in the context of an entirely different work model, and where the marketing plans and strategies for the 2020 calendar year have already been settled. The skills and experience that Ms de Bruyn has developed as a buyer while in the employ of Truworths will, of course, be of practical benefit to adidas under her new employment, but it is trite that those are personal to her, and not proprietary to her employer, even if that employer might have expended time and money on training her.[4] In all the circumstances I do not consider that Truworths' protectable interests are threatened by Ms de Bruyn's employment by adidas.

[25] But were I wrong in my conclusion that the applicant's interests are not threatened, I would in any event consider that in the given circumstances, and for the same reasons as those recorded in the previous paragraph, that Truworths' interest in being protected did not weigh sufficiently, qualitatively or quantitively, against that of Ms de Bruyn not to be economically inactive or unproductive. I therefore hold that it would be unreasonable in the peculiar circumstances for the restraint agreement to be enforced. It was not suggested in argument that there is any aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected. The fourth question in the *Basson v Chilwan* checklist therefore does not call to be answered.

[26] In the result, the following orders are made:

1. Insofar as remains necessary, the applicant's non-compliance with the time periods, forms and manner of service ordinarily prescribed in terms of the rules of court is condoned and the application is entertained as one of urgency in terms of rule 6(12)(a) of the Uniform Rules of Court.
2. The application is dismissed with costs, including the fees of two counsel.

[4] I have described above (at para. [7]) the quite discrete contractual measures that Truworths put in place to protect itself against any unproductive expenditure on training Ms de Bruyn.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

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