IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 4996 / 2023

In the matter between:

SHOPRITE CHECKERS (PTY) LTD	Applicant
and	
TEBOGO KGATLE	First Respondent
CLICKS RETAILERS (PTY) LTD	Second Respondent

Coram: Wille, J

Heard: 12 April 2023

Interim order: 14 April 2023

Final Order: 15 June 2023

Reasons: 4 July 2023

REASONS

WILLE, J:

Introduction:

[1] This was an urgent application to enforce a covenant of confidentiality and a restraint of trade undertaking. I shall refer to these respectively as the undertaking and the restraint. The undertaking and the restraint were featured in the first respondent's employment contract with the applicant. The first respondent signed this employment contract with the applicant when he was promoted to the position of a 'Design Planner'. This is the position he held when he resigned.

[2] The application was launched because the first respondent indicated that he would be taking up employment with the second respondent with effect from 3 April 2023. The second respondent is a significant and direct competitor of the applicant. The second respondent is one of the largest retail chain stores selling, among other things, the same pharmaceutical and household products as the applicant. The first respondent's employment with the applicant was extended to 2 May 2023 because (a) the applicant undertook to pay his remuneration for April 2023 and (b) the second respondent was prepared to keep his position open for him, pending the outcome of the interdict application by the applicant.

[3] Further, the applicant undertook to re-appoint the first respondent into his old position, should his restraint be enforced. On 14 April 2023, I granted an interim order in favour of the applicant in the following terms:

1. *Leave is granted that the application is heard on an urgent basis following the provisions of Rule 6(12) of the Uniform Rules of Court and, in so far as may be necessary, the time limits and forms of service provided for in the Uniform Rules of Court are with this, dispensed with.*

2. *A rule nisi is issued returnable on 15 June 2023, calling upon the first respondent to show cause why a final order should not be granted in the following terms:*

2.1 *Interdicting and restraining the first respondent from disclosing to any person, including the second respondent, any confidential and proprietary information of the applicant, including but not limited to confidential information concerning the applicant's business, its operations, finances, information systems, policies, practices, planning, purchases, pricing, sales, suppliers, stocks, and other confidential matters.*

2.2 *Interdicting and restraining the first respondent for a period of one (1) year from the date of termination of his appointment with the applicant (being 3 April 2023) until 2 April 2024, and within the Republic of South Africa, whether alone or with any other person, and whether as an agent, employee, consultant in a partnership or as a company, body corporate, franchiser or franchisee, or in any other similar capacity, from being engaged, retained, employed or having a material interest in any business, enterprise, undertaking or activity, carrying on business involving the distribution and/or sale through retail chain stores or otherwise of any food or related products, handled products, furniture, beverages, pharmaceuticals or any other product, product category or other items that are distributed or sold through the operations the company or any associated company, including but not limited to the business of the second respondent.*

3. *The orders under paragraphs 2.1 and 2.2 are granted as interim orders with immediate effect pending the return day of the rule nisi.*

4. *The parties are given leave to file further papers (if any) on the limited issue of whether (or not) final relief should be granted to the applicant.*

5. *The second respondent is granted leave to file further papers (if any) on the limited issue of whether (or not) costs should be awarded against the second respondent either separately or jointly and severally with the first respondent. The applicant is directed to serve a copy of this order on the second respondent as soon as circumstances permit.*

6. *The "confidential affidavits" filed by the parties are to remain sealed in the chambers of Justice Wille, pending the upliftment thereof by the parties in terms*

of an agreement concluded between the parties as to how these confidential affidavits are to remain sealed.

7. *All costs (including the fees of senior counsel, where so employed) are to stand over for later determination.*

Overview:

[4] The applicant awarded the first respondent a bursary to enable him to obtain his Honours Degree from the University of Stellenbosch. After that, he started working for the applicant as a trainee in their logistics division. On 1 July 2021, he was employed by the applicant as a Design Planner. At this time, he signed his employment contract with the two covenants therein. The first respondent averred that he was underpaid, did not have a career path, and had no prospects of advancement with the applicant. These were the reasons for his resignation. In summary, the restraint prohibits the first respondent from being employed by any business that sells and distributes the same products as the applicant through retail chain stores.

Consideration:

[5] The core shield raised by the first respondent is that the restraint should not be enforced because of reasons of public policy. Put in another way, the second respondent will not stand to benefit from the applicant's confidential information and trade secrets if it can gain access to them. This is one of the grounds for restraint enforcement being against public policy.

[6] The first respondent averred that it would be unfair, unreasonable and not in the public interest to enforce the restraint against him because; (a) he has given an undertaking that he will keep the applicant's information confidential and not share it with the second respondent; (b) that his undertaking is sufficient protection for the applicant; (c) that the enforcement of the restraint is unreasonable; (d) that the confidential information he may have been exposed to is of no commercial benefit to the second respondent and, (e) that weighing up

the interests of the first respondent compared to those of the applicant, qualitatively and quantitatively, it does not justify enforcing the restraint to his detriment. The applicant argued that the first respondent had been promoted to a managerial level. Accordingly, he was required to (and did) sign both the covenants relied upon by the applicant (the restraint and the confidentiality undertaking).

[7] The applicant did not require the restraint covenant when the first respondent held a trainee position. Thus, it is contended by the applicant that the shield raised by the first respondent that the restraint should not be enforced because he occupied a junior position is not sustainable on the facts.

[8] At the time of his resignation, the first respondent was one of fourteen 'Design Planners' reporting to the group head of the department. Thus, it was contended that on these facts alone, the first respondent did have access to the applicant's confidential information. As a matter of pure logic, this must be so. Significantly, the second respondent had a similar confidentiality clause in its proposed new contract with the first respondent.

[9] This indicates that the second respondent considers the information it intends to share with the first respondent confidential and worthy of protection. No challenge was chartered by the first respondent against the duration of the restraint nor its geographical scope of application.

[10] In addition, the second respondent should have engaged with or challenged what was stated about its operations and reports annexed to the papers presented at the hearing. Thus, it must be accepted (at least for the purposes of this application) that the second respondent is a direct competitor of the applicant, with its own expansionistic ambitions, who sought to appoint the first respondent in the same position that he occupied with the applicant and for a similar purpose. By the subsequent fresh undertaking given by the first respondent, the first respondent had also belatedly conceded that the applicant

gave him access to confidential information belonging to the applicant, worthy of protection.

[11] Undoubtedly, it was demonstrated that the first respondent intended to do the same work in the same area as the second respondent and as a direct competitor with the applicant with similar expansionistic ideals and strategies, thereby (it was argued) rendering the restraint enforcement in the public interest. Thus the core issue in this application was whether the restraint application should be enforced or not.

[12] The applicant's case is that the first respondent must be contractually held to his agreement with the applicant. This is because the applicant partially educated him and entrusted him with its confidential information. Accordingly, it was argued that his undertakings with the applicant must be honoured.

[13] The applicant argued that on the papers, the first respondent needs to put up an adequate factual basis upon which he has discharged the onus of proving that the enforcement of the restraint in these circumstances is contrary to public policy. The argument is that all the shields raised by the first respondent were technical arguments that needed more legal and factual substance.

[14] This was so, it was argued, among other things, because the first respondent conceded that the applicant gave him access to its confidential information, which was worthy of protection. This is precisely why the first respondent offered the applicant a repeat of his confidentiality undertaking before the launch of the application and as the application process unfolded.

[15] What remained undisputed was that the first respondent's employment with the second respondent was not permitted in terms of the wording of the restraint covenant. Thus, the first respondent averred that the restraint must not be enforced, claiming that it would be unfair, unreasonable and contrary to public policy to do so.

[16] He said that his restraint must not be enforced because of the following: (a) because he is of a young age; (b) he has worked for the applicant for a relatively short space of time: (c) he was not a senior employee of the applicant and, (e) he was dissatisfied with his work and the conditions about it. The applicant says that the first respondent must be held to his agreement. The applicant promoted and trusted him with confidential information, and the first respondent's undertaking must be honoured. Significantly, the applicant informed the first respondent that he could work with an alternative indirect competitor. Further, the applicant was prepared to engage with the first respondent regarding his remuneration and further opportunities within the applicant group going forward.

[17] Also, the first respondent would be welcome to withdraw his resignation until he found alternative employment that would not breach his restraint covenant. In considering granting the order for interim relief, the balance of convenience issue weighed heavily on me. This is because the first respondent was offered the opportunity to withdraw his resignation from the applicant when he expressed frustration about not progressing in his career. The applicant wanted to engage with the first respondent in this connection.

[18] Further, the applicant remained prepared to accept a withdrawal of the first respondent's resignation and keep him on in its employment. Thus, I found that the enforcement of the restraint, both qualitatively and quantitively, on the grounds of public policy was necessary. I considered the balance between the constitutional values being upheld regarding the restraint agreement and the freedom to trade. I believed the rule of law and the principles of legality needed to be observed.

[19] Further, it was in the public interest that the applicant be encouraged to promote the first respondent into a position of trust. The first respondent's claims of lack of possession of the information did not render the applicant's motivation behind the terms of the restraint included in the first respondent's employment

contract against public policy. I say this because the applicant required the first respondent to bind to the restraint covenant when promoted.

[20] The relevant public policy consideration issues that bore scrutiny were most eloquently described in *Nyandeni*[1] in the following terms:

'…The judgment in Shifren convincingly deals with policy considerations such as the need to avoid disputes, evidential difficulties often associated with oral agreements, the need for certainty and clarity in the commercial environment, and the infringement of the right to contractual freedom to allow a departure from the elementary principle of "pacta sunt servanda"….'

[21] The contract between the applicant and the first respondent undoubtedly served an acceptable employment purpose to the benefit of both parties when it was concluded at the time that the applicant promoted the first respondent. The enforceability of contracts is essential both for commerce and fair employment practices.

[22] The public policy argument is based on the premise that the first respondent would not have constitutionally waived his rights to freedom of employment and that, accordingly, public policy factors weigh against enforcing the restraint covenant in these particular circumstances. I was not persuaded that the restraint covenant was inconsistent with public policy in these circumstances. I say this because it seems common cause on the facts that the first respondent, having been fully informed, elected voluntarily to consent to the terms of the restraint covenant. In this case, the first respondent agreed and accepted expressly that he understood what he agreed to in his employment contract and restraint covenant.

[23] I understand the correct position in our jurisprudence on this score has been recently clearly re-stated in *Beadica*.[2] In short, establishing whether a

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[1] *Nyandeni Local Municipality v Hlazo* 2010 (4) SA 261 (ECM) at 43-44.
[2] *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC).

clause should be enforced includes considering whether the parties negotiated with equal bargaining power and understood what they agreed to. In this matter, it is clear that the parties possessed equal bargaining power, and they must have understood what they were agreeing to.

[24] The facts demonstrate that the first respondent voluntarily consented to the terms of the subject restraint covenant. This brings me to the issue of the public policy arguments and debates. Public policy, in this context, falls to be constitutionally infused. This means that a court may refuse to enforce specific contractual terms of an agreement where that term itself, alternatively, the enforcement thereof, would be contrary to public policy.[3]

[25] In *Barkhuizen*[4], this was categorized as a measured balancing exercise. For obvious reasons, this refusal by a court must be used sparingly. Generally, public policy dictates that parties should be bound by their contractual obligations embodied in a contract. This is primarily where the contract was entered into freely and voluntarily. In this case, the first respondent attracted the onus of exhibiting that the subject restraint was and is against public policy.[5] The subject restraint covenant is also very limited and specific.

[26] The first respondent argued that if the terms of the subject restraint were enforced, then in this event, it would, in effect, amount to a violation of his constitutionally enshrined rights.[6] To counter this argument, the applicant contended that their argument is for enforcing the restraint covenant, not its validity. The argument is that the first respondent voluntarily relinquished his rights which were very limited in scope. Thus, the first respondent himself, at the time, considered the terms of the subject restraint to be fair and reasonable in the circumstances. Under these particular circumstances, the public policy argument was diluted.

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[3] *Beadica* para 80.

[4] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) para 70.

[5] *Barkhuizen* para 58.

[6] In terms of section 34 of the Constitution of the Republic of South Africa, 1996.

[27] By contrast, if the court did not grant the interim relief contended for, it could be argued that this result would be unjust, against public policy and unduly harsh. I say this because when the first respondent entered the restraint covenant, this was with the full awareness of his rights. I say this further because it is now settled law that contractual interpretation is an objective process of attributing meaning to the words used in a document recited in the context of the document as a whole and having regard to the apparent purpose of those words.[7] By way of the interim order, all the parties were given leave to file further papers on whether (or not) final relief should be granted on the return day. Further, the second respondent (as a cited party to the proceedings) was given leave to file further papers (if any) on the issue of costs.

[28] Neither of the respondents accepted this invitation and did not file any other papers or additional heads of argument. The applicant did, however, file a short affidavit confirming service of the *rule nisi* on the second respondent and confirmed that the applicant would pay the first respondent his salary and benefits until 15 June 2023. After that, on 5 June 2023, the first respondent filed a notice abiding by the court's decision concerning the above application.

[29] Further, attached to this notice to abide was a letter which contained some curious features indicated as follows:

'….Mr Kgatle's [the first respondent's] legal team have offered to continue representing Mr Kgatle on a pro bono basis, but Mr Kgatle is concerned about the possible risk of a cost order award being made against him, which he might not be able to honour….'

[30] This approach by the first respondent is challenging to understand as he was invited to file further papers, including, but not limited to, cost issues. No such papers were filed, and all that was done was a letter was written. Further, the notice of intention to abide contained no order concerning the costs of and incidental to the proceedings thus far.

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[7] *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

[31] Having rejected the tender of re-employment, the result is that the applicant will no longer be remunerating the first respondent with effect from 15 June 2023. This notwithstanding, the first respondent derived the benefit of his total remuneration without working for it for two and a half months. The first respondent informed the applicant of his intentions ten calendar days before the return date and that he would abide by the outcome of the application. Still, the first respondent did not consent to any order in any terms. Thus, the applicant was compelled to persist with the application for final relief and costs. As alluded to earlier, the second respondent should have taken the opportunity to file an affidavit, among other things, stating why it should not be ordered to pay the costs of this application either separately or jointly and severally with the first respondent. The applicant seeks an order that the application costs be paid by both the first and second respondents jointly and severally, including the costs of senior counsel, the costs of the urgent application, and the costs of the return day.

[32] The applicant seeks these costs orders because the second respondent made common cause with the first respondent and has supported him in his breach of the restraint to the extent of filing a confirmatory affidavit in support of him. In addition, the applicant seeks costs on the scale between attorney and own client on the strength of the principle enunciated in *Alluvial Creek*.[8] It is contended that because in the circumstances of this matter, it would be unreasonable to expect the applicant to have to bear all its costs, in addition to those which it would be able to recover from the first and second respondents on the scale as between party and party.

[33] Some of the further policy considerations which may justify such a costs order in the present circumstances are that our courts are loath to encourage wasteful use of judicial resources and to permit parties to cause the other to run up legal costs, only to withdraw their opposition towards the end.[9] The restraint

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[8] *In re Alluvial Creek Ltd* 1929 CPD 532-535.

prohibited the first respondent from being employed by a business that sells and distributes the same products as the applicant through retail chain stores.

[34] There could have been no *bona fide* dispute that the applicant and the second respondent both sell and distribute the same products and that the first respondent's employment with the second respondent was in direct breach of the first respondent's undertaking not to do so. This was a commercial dispute, with the first respondent, in all probability, enjoying the financial backing of the second respondent, who must, in the circumstances, be seen to be making common cause with the first respondent. After further limited argument on 15 June 2023, a final order was made regarding paragraphs 2.1 and 2.2 of the interim order, and these orders were confirmed. There seems no reason for me (and none was advanced) to deviate from the standard provision that costs should follow the result as far as the first respondent is concerned, save that it is averred by way of a letter that he may not be able to pay such costs.

[35] However, in the peculiar circumstances of this matter, it is prudent to make an order to pay the costs jointly and equally, rather than jointly and severally, with the one paying the other the be absolved. I say this because this would be a fairer result for both respondents. Further, the first respondent received the benefit of his salary for another two and a half months despite not working for the applicant. Thus, it is ordered that the first respondent will be responsible for half of the costs, and the second respondent will be liable for the remaining half of the costs of and incidental to the hearing of this application

[36] The applicant contends for costs on a punitive scale for the entire application. I don't see it this way. However, some costs should be paid on an attorney and client scale. One of the fundamental cost principles is indemnifying a successful litigant for the expense put through in unjustly having to initiate or defend litigation. The successful party should be awarded costs.[10] The last thing

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[9] *RTS Industries and Others v Technical Systems (Pty) Ltd and Another* (145/2021) [2022] ZASCA 64 (5 May 2022).

[10] *Union Government v Gass* 1959 (4) SA 401 (A) 413.

that already congested court rolls require is further congestion by an unwarranted proliferation of litigation.[11]

[37] It is so that when awarding costs, a court has a discretion, which it must exercise judiciously and after due consideration of the salient facts of each case at that moment. The decision a court takes is a matter of fairness to both sides.[12] The court is expected to take into consideration the peculiar circumstances of each case, carefully weighing the issues in each case, the conduct of the parties as well as any other circumstance which may have a bearing on the issue of costs and then make such order as to costs as would be fair in the discretion of the court. No hard and fast rules have been set for compliance and conformity by the court unless there are exceptional circumstances.[13] Costs follow the event in that the successful party should be awarded costs.[14] This rule should be departed from only where reasonable grounds for doing so exist.[15]

[38] In all the circumstances, a punitive costs order is warranted for some of the reasons set out in these reasons for my order. Whilst I harbour some deep suspicions about the respondents' alleged conduct during this litigation, I cannot visit upon the respondents the requested attorney and client cost order sought by the applicant since the inception of this litigation, absent further evidence.

[39] That being said, it must have dawned on the respondents shortly after the filing of the replying papers by the applicant that the shields they had raised in defences to the application were doomed to failure. For this reason, a portion of the costs awarded in this matter will be on the scale between attorney and client. Thus, the first and second respondents shall be liable for the costs of and incidental to the application, in equal shares jointly, on a party and party scale (including the fees of senior counsel where so employed), as taxed or agreed, from the inception of this matter until 11 April 2023.

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[11] *Socratous v Grindstone Investments* (149/10) [2011] ZASCA 8 (10 March 2011) at [16].
[12] *Intercontinental Exports (Pty) Ltd v Fowles* 1999 (2) SA 1045 (SCA) at 1055 F- G.
[13] *Fripp v Gibbon & Co* 1913 AD 354 at 364.
[14] *Union Government v Gass* 1959 (4) SA 401 (A) 413.
[15] *Gamlan Investments (Pty) Ltd v Trilion Cape (Pty) Ltd* 1996 (3) SA 692 (C).

[40] In addition, the first and second defendants shall be liable for the costs of and incidental to the application, in equal shares jointly, on an attorney and client scale as taxed or agreed (including the fees of senior counsel where so employed), from 12 April 2023 and after that. Further, all the wasted costs incurred in connection with all the appearances and postponements in this matter shall be on the scale between party and party. These costs shall be paid in equal shares jointly by the first and second respondents (including the fees of senior counsel where so employed), as taxed or agreed.

[41] These are my reasons for granting the interim relief and the final relief contended for by the applicant against the first respondent and the costs in addition to it.

E. D. WILLE
(Cape Town)