IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number:16806/2018

In the matter between:

Pepkor Speciality (Proprietary) Limited	**First Applicant**
Pepkor Holdings Limited	**Second Applicant**

And

Abraham Johannes Van Huyssteen	**First Respondent**
Bernard Eugene Mostert	**Second Respondent**
Michael Brown	**Third Respondent**
Gert Christoffel Claassens	**Fourth Respondent**
David Van Niekerk	**Fifth Respondent**
AJVN Holdings (Pty) Limited	**Sixth Respondent**

JUDGMENT DELIVERED ON 7 NOVEMBER 2018

BAARTMAN, J

[1] The applicants seek to enforce a modified version of the terms of restraint of trade agreements they allege the respondents are in breach of pending the final determination of the dispute at trial. The applicants seek the following relief:

'1. The non-compliance by Applicants with the Rules relating to form and service is condoned, and this application is heard as one of urgency in terms of Uniform Rule 6(12).

2. The trial of the action to be instituted shall be heard as an expedient trial on dates to be agreed between the parties in consultation with the Judge President.

3. Until the conclusion of the trial, or until any further Order by the trial Court, the First to Fifth Respondents, and each of them, are interdicted and restrained from being interested in, or concerned with, any business which, anywhere within South Africa or Namibia, stocks, or offers for sale, the footwear listed on annexure "A" hereto.

4. The parties are directed to keep annexure "A" confidential as between them.

5. Costs, including the costs of two counsel.'

[2] At the hearing, the applicants committed to issue summons by Monday, 5 November 2018. They have done so. Below, reference to the respondents excludes the sixth respondent as no relief is claimed against it.

Urgency

[3] The application was brought on an urgent basis. The respondents contend that the matter was not urgent. The application was postponed and the parties filed further affidavits. I am persuaded that the application was sufficiently urgent.

Background

[4] It was common cause that Mr Van Huyssteen (**the first respondent**) was the founder member of Tekkie Town (Proprietary) Limited (**Tekkie Town**). At times relevant to this judgment, Tekkie Town was, and still is, a successful 'branded footwear' retailer with 380 stores in South Africa, Namibia and Lesotho. On 29 August 2016, the respondents were the senior executive and managers of Tekkie Town. On that date, Tekkie Town's shareholders, not the respondents, exchanged (sold) their shares and claims (**the exchange agreement**) in Tekkie Town for shares in Steinhoff International NV (**Steinhoff**). Tekkie Town became a wholly-owned subsidiary of Steinhoff.

[5] Steinhoff transferred the Tekkie Town shares to Steinhoff Investment Holdings Limited, which in turn transferred the shares to Steinhoff Africa Holdings (Proprietary) Limited. The latter 'sold and transferred' the Tekkie Town shares to K2017221869 (South Africa). On 1 July 2017, Tekkie Town became a wholly owned subsidiary of the second applicant. On 21 September 2017, the second applicant listed on the Johannesburg Stock Exchange at the time it owned Tekkie Town and the first applicant was a wholly-owned subsidiary of the second applicant. On 1 October 2017, the first applicant bought the business of Tekkie Town. It follows that Steinhoff International as the holding company has an interest in the business of Tekkie Town through its subsidiaries, the first and second applicants and Tekkie Town.

[6] The respondents were employees in senior management capacity of Tekkie Town and remained so employed through the transfers. They were so employed when the first applicant acquired the business of Tekkie Town. They had entered into restraint of trade agreements with Tekkie Town; I deal in more detail with the restraint contracts below. It is in issue whether those restraint agreements survived the transfer to the first applicant.

[7] The respondents left the applicants' employ in May and June 2018. They are now trading under a new retail outlet (**Mr Tekkie**) similar to Tekkie Town. It is in issue whether they are doing so in contravention of the restraint of trade agreements assuming they had survived the transfers.

[8] The applicants seek interim relief; the well-known requirements for it are:

(a) a *prima facie* right though open to some doubt;

(b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted;

(c) that the balance of convenience favours the granting of an interim interdict;

(d) the absence of another adequate remedy.

Employment history

[9] The first respondent founded Tekkie Town. On 25 September 2012, he was employed as Tekkie Town's managing director. On 14 September 2016, the first respondent signed the addendum to his contract of employment with Tekkie Town. The terms of the addendum (**the Addendum**), dealt with below, are similar for all the respondents. On 24 May 2018, the first respondent's employment with the first applicant was terminated. At the time, he was a director of the first applicant. However, the first respondent has alleged, in correspondence and other litigation to which I shall refer to the extent necessary below, that he was in the second applicant's employ. Therefore, 'as an abundance of caution [second applicant] has been joined…in this application'.

[10] Mr Mostert (**the second respondent**) joined the business of Tekkie Town in 2012 and was its chief executive officer with effect from

1 November 2014. On 14 September 2016, he signed the Addendum. In September 2017, he was the first applicant's chief executive officer. The second respondent's employment terminated on 25 June 2018.

[11] Mr Brown (**the third respondent**) joined Tekkie Town as a buyer and moved through the ranks to chief procurement officer in November 2014. On 14 September 2016, he signed the Addendum. The third respondent held the position of chief procurement officer at the first applicant until 25 June 2018 when his employment terminated.

[12] Mr Claassens (**the fourth respondent**) joined Tekkie Town and moved through the ranks to marketing manager in 2005, to project and marketing manager in 2009 and to head of store merchandise and development with effect from 1 November 2014. On 14 September 2016, the fourth respondent signed the Addendum. His employment terminated on 25 June 2018.

[13] Mr van Niekerk (**the fifth respondent**) joined Tekkie Town as store manager of its Somerset West branch. He left Tekkie Town in 2014 but returned in 2015 to the position of chief operating officer. On 14 September 2016, he signed the Addendum. On 25 June 2018, his employment with the first applicant was terminated, at which time, he held the position of chief operating officer.

[14] The relevant terms of the contracts in issue are as follows:

The contract of employment with Tekkie Town

'…22. Non-Solicitation of Tekkie Town Employees

The Employee undertakes that neither he/she nor any company, close corporation, firm undertaking or concern in which he/she is directly or indirectly interested or by which he/she is employed will, during the term of this Agreement and for a period of 12 months after

expiry or termination of this contract (howsoever caused), and whether for reward or not, directly or indirectly encourage or entice or persuade or induce any employee of Tekkie Town to terminate his/her employment with Tekkie Town.'

The sale of shares and claims agreement – 29 August 2016: [the exchange agreement]

'…2.2.8 the Business- the business conducted by the Company at the Premises under the name and style of "Tekkie Town" as retail shoe outlet; …

2.2.11the Company- Tekkie Town Proprietary Limited, Registration …

3.1.6 by not later than 30 September 2016, written service agreements, which agreements shall include a minimum term of 5(five) years, confidential provisions and a restraint which shall subsist during their period of employment and for a period of 3(three) years from the date upon which such employment ceases, between each of Key Management and the Company are concluded, which service agreements shall supersede all other contracts presently subsisting between Key Management and the Company; …

16 Restraint in favour of the purchaser

16.1 In order to protect the proprietary interest of the Purchaser in the Company and the Business, each of the Sellers hereby irrevocably undertakes in favour of the Purchaser, that it shall not, for a period of 5(five) years after the Effective Date [1 October 2016]:

16.1.1 whether as proprietor, principal, member, agent, partner, representative, shareholder, director, manager, employee, consultant, advisor, financier, administrator and/or in any other like capacity, be directly or indirectly associated and/or concerned with,

…any firm…which carries on any restricted business anywhere within South Africa and Namibia ("the Territory");

16.1.2 be interested in or concerned with any business which, in the Territory, is competitive with or similar to the Business;(my emphasis)

16.1.3 draw away, canvass, solicit or entice, or employ, or appoint, or procure the employment or appointment of, in the Territory, in respect of any business which, in the Territory, is competitive with or similar to the Business, any person who is at the Effective Date or was during the 2(two) years prior to the Effective Date, an employee, officer or agent of, or consultant or supplier to the Business;…'

[15] In compliance with the exchange agreement, the first to fifth respondents entered into the following:

Addendum to Contract of Employment [14 September 2016]

'As from 1 September 2016 the following changes to your Contract of Employment with the Company will be effected;

Your contract of employment will be amended to a fixed Term Contract effective 1 September 2016 to 30 September 2021. …

In addition, it is agreed that there will be a 3 (three) year Restraint of Trade from the last day of your employment (be it through dismissal or your contract expiring.) The restraint is as defined in the Steinhoff Sale of Shares and Claims agreement and covers any retail or commercial activities in which Steinhoff may have a direct or indirect interest. …'

Restraint enforcement

[16] The applicants seek to enforce restraint of trade agreements. The issues central to a decision on the enforceability of a restraint of trade agreement are as follows[1]:

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

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

(c) If there is a protectable interest which is threatened, how does that interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?

(d) Is there any aspect or public policy having nothing to do with the relationship between the parties that requires the restraint to be upheld or not?

(e) Does the restraint go further than necessary to protect the interest?[2]

[17] Below, I deal with conduct allegedly in breach of the restraint, the defences raised to the restraint and the requirements set referred to above.

The alleged impermissible conduct

[18] The applicants alleged that the respondents had conspired through the first respondent to harm the first applicant's business and to force a sale of the business. The respondents at the time felt hard done by because the Steinhoff share price had dropped dramatically. In these

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[1] *Henred Freuhauf (Pty) Ltd v Davel & Another* (2011) 32 ILJ 618 (LC) at para 15.
[2] *Reddy v Siemens Telecommunication (Pty) Ltd* 2007 (2) SA 486 (SCA) at para 17.

papers, they have described the price paid for the Tekkie Town shares as ‘fools gold’.

[19] Towards the end of June 2018, there was an alleged attempt to sabotage Tekkie Town’s 380 branches by disabling its sales systems. Werner de Bruin (**De Bruin**) deposed to an affidavit in which he said that he had been employed by Tekkie Town and the first applicant for the past 8 years. He has a BSc in Mathematics. On 18 June 2018, he attended a meeting at which the first respondent said that he intended to evict Tekkie Town from premises leased from an entity in which he had an interest. At the time, a number of Tekkie Town staff had resigned following the first respondent’s resignation in May 2018.

[20] At that meeting, the first respondent guaranteed those ex Tekkie Town employees that they would receive their salaries. It is common cause that the first respondent had established a trust for the Tekkie Town employees and that the salaries would be paid from that trust. On 19 June 201[8], De Bruin and other Tekkie Town specialists, Roetz and Wait, started copying Tekkie Town data onto hard drives supplied by the second respondent. On 21 June, the second respondent addressed Tekkie Town staff and said that plans to buy back the business were in progress. On 24 June, De Bruin resigned as part of a mass resignation that occurred on 26 June. The first respondent had guaranteed his salary. The second respondent resigned on 26 June and others followed. On 29 June, the first respondent’s attempts to reach a settlement to buy back Tekkie Town failed. [First respondent] was angry and there were ‘speculations that he wanted to hurt the business.’

[21] On 30 June, the second respondent provided extra hard drives ‘in order to clone the data’. De Bruin was to ‘get network access/VPV, through a branch login detail. …Luke, who still works at Tekkie Town.’ On 1 July 2018, De Bruin confessed and since has assisted

the applicants in this litigation. Eben Bothma, 'IT Executive in charge of Infrastructure for Steinhoff Africa Retail Limited group', confirmed the interference with the IT system as De Bruin alleged.

[22] Thereafter, the first respondent, with knowledge of the Tekkie Town leases, attempted to evict Tekkie Town from premises owned by entities to which he was affiliated. By 14 August, the plan to roll out Mr Tekkie stores was made public. Mr Tekkie has opened its doors in St George's Mall, Cape Town, in a store that was formerly occupied by Tekkie Town. The first respondent is affiliated to the entity that owns the property. Against that background, the applicants seek to protect their alleged interest as follows:

(a) The first respondent was the founder and managing director of Tekkie Town. His intimate knowledge of the business includes knowledge of:

(i) the pricing structure and Tekkie Town pricing formula;

(ii) profit margins and other financial information;

(iii) supplier and business model detail.

(b) The second respondent, in his position as chief executive officer of the first applicant, has knowledge of the Tekkie Town brands that he oversaw until his resignation.

(c) The third and fourth respondents were responsible for 'distribution of stock, they understand how much of what stock to buy, when to buy, the proper price to buy and sell at, when and which shops should be stocked with what stock, how much stock to send to each shop, and the assortment of products that should be sold in each shop. …'

(d) The fifth respondent 'was responsible for running of the stores, staff and properties…[he knows] how many employees are

required per store, shop discipline…how to display products, the management of stock losses and profitability of stores…'

[23] The applicants alleged that the respondents have and will continue to use that information in Mr Tekkie, contrary to the restraint of trade agreement, and so harm its interest in Tekkie Town.

[24] The respondents have denied that Mr Tekkie competes with Tekkie Town; instead, they alleged that it would complement Tekkie Town. They are optimistic about the chances of success in litigation to have Tekkie Town returned to its former owners. Therefore, so the argument went, they would not harm the business.

Alleged admitted contravention

[25] However, the second respondent has admitted, in the answering affidavit, that Mr Tekkie is a business similar to that of Tekkie Town. The applicants submitted that the respondents operate contrary to their undertaking in clause 16.1.3; it bears repeating:

'draw away, canvass, solicit or entice, or employ, or appoint, or procure the employment or appointment of... in respect of any business which, …is competitive with or similar to the business…'

Were the restraint benefits transferred?

[26] I accept as common cause for purposes of this application that the respondents have entered into employment contracts and an Addendum thereto in identical terms to those referred to above with Tekkie Town. The applicants alleged that those contracts of employment were transferred to them via the provisions of the Labour Relations Act[3]. The section provides as follows:

[3] Section 197 Labour Relations Act, 66 of 1995.

'… (a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;

(b) all the rights and obligations between the old employer and an employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;…'

[27] In litigation, under case numbers 14423/18 and 13507/18, the first and second respondents accept that their respective employment contracts were transferred. In the circumstances of this matter, having regard to the positions the respondents held when their employment terminated, I am persuaded that their contracts of employment survived the various transfers. It follows that the applicants would have *locus standi* if the restraint agreements were also transferred. Mr Dominy SC, the respondents' lead counsel, who appeared with Mr Traverso and Mr Quixley, submitted that the transfer of a restraint is 'not essential to the achievement of any purpose of the LRA'[4]. However, he cautioned that the issue was 'a complex question of law that need not be answered definitively at the interim interdict stage'.

[28] However, the vexed question has already received judicial attention[5] as follow: (the Securicor position)

'[12] The legal position…is thus that, in order to determine whether a restraint agreement survives the transfer of a business under s 197 of the [LRA], it needs to be determined as a matter of fact whether the restraint formed part of the goodwill of the business and whether

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[4] *Laser Junction (Pty) Ltd v Fick* (2017) 38 ILJ 2675 (KZD) and *MacGuire v Commissioner, South African Revenue Service* 2009 (4) 345 (SCA) at para 22.
[5] *Securicor (SA) (Pty) Ltd and Others v Lotter and Others* 2005 (5) SA 540 (E) at para 12.

that goodwill formed part of the business being transferred as a going concern in terms of the section. This is an objective factual enquiry which will depend on the circumstances of each case.

If this factual enquiry establishes that the restraint formed part of the transfer of the business the employee's obligations under the restraint are owed to the new employer and the new employer is entitled to enforce the restraint against the employee. …'

[29] However, the Laser judgment[6] differed. It is important to bear in mind that that court first '…accepted [respondent's] evidence that the restraint fell way.' That was so because the respondent had entered into a new contract with the buyer who became his employer. Nevertheless, the court continued the investigation and said at paragraphs 21–22:

'Only contracts of employment are transferrable under s 197 of the LRA. What is a contract of employment? Section 4 of the Basic Conditions of Employment Act 75 of 1997(BCAE) stipulates that contracts of employment may contain conditions of employment as provided in the BCEA or a sectoral determination, and any law or term in a contract that is more favourable to the employee….In the hands of [the employer] …the real and only purpose of the restraint agreement was to wield it as a weapon to discourage him from leaving…' (the Laser position)

[30] The matter at hand is distinguishable from the Laser matter in that no new contract was entered into. There is no evidence that the restraint serves only to discourage the respondents from leaving. If it did, public policy would militate against it[7]. Enforcement of the modified restraint would also not leave the respondents unemployed.

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[6] *Laser Junction (Pty) Ltd v Fick* (2017) 38 ILJ 2675 (LZD).
[7] Mozart Ice Cream Franchises (Pty) v Davidoff 2009 (3) SA 78 at 82 G-J.

I am persuaded that the Securicor position is a correct statement of the law.

[31] The contract of exchange between Tekkie Town and Steinhoff, as well the contract of sale of the business to the first applicant, refer to the goodwill of Tekkie Town. The applicants alleged that a substantial part of the R3 billion purchase price for the shares of Tekkie Town was allocated to its goodwill. The respondents alleged, in the second respondent's answering affidavit, that only R20 million was apportioned to the 'goodwill of the Tekkie Town business'. However, the respondents alleged that the purchase price represented 'fool's gold' because the Steinhoff shares plunged to a record low in late 2017 due to alleged accounting irregularities/fraud. Mr Kuschke SC, the applicants' lead counsel, who appeared with Mr Smallberger and Mr Fritzgerald, cautioned that the reason for the drastic decline in Steinhoff shares was still under investigation. I need not resolve that dispute in this application. As indicated above, both parties alleged that a value was attributed to Tekkie Town's goodwill in the exchange contract. Therefore, I accept that the goodwill of Tekkie Town formed part of the consideration paid in the exchange agreement and subsequent transfer agreements.

[32] The sellers of Tekkie Town were corporate entities. The second and third respondents were not 'affiliated to the sellers and did not benefit from the value paid in respect of goodwill'. Goodwill attaches to a particular business although it can be separately valued. It has been described as 'the attractive force which brings in custom[8]'. It is sold with the business even when it has not been separately valued. It follows that only those capable of disposing of the business can dispose of its goodwill.

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[8] Agreements in Restraint of trade in South African Law, John Saner SC, Lexis Nexis South Africa, Chapter 7.2.

[33] The ‘force which brings in custom’ consists of a variety of elements, e.g. skill, quality of the product, knowledge of customer profile and location among others. It can be infringed by someone other than the seller. It is therefore not surprising that the respondents entered into the restraint agreements as part of the transfer/sale to Steinhoff seemingly to protect the goodwill of Tekkie Town which it acquired with the business. In the circumstances of this matter, I consider that the respondents are experienced business persons and apparently appreciated the import of the agreements they had entered into. Ordinarily, as a matter of public policy, one must be held to an agreement entered into freely and voluntarily.

[34] The agreements relevant to these proceedings are directed at the protection of information about pricing, customer profile and lease agreements among others. The respondents are able to influence some or all the categories. In the circumstances of this matter, for purposes of the interim relief sought, I am persuaded that the goodwill of Tekkie Town was sold with the business as a going concern.

[35] I have considered the allegations of the fraud-induced sale to Steinhoff and the reality of the dramatic reduction in the Steinhoff share price. Although, these are issues that will be determined at the trial and in the various pending litigation between the parties, it is a factor in determining the balance of convenience. Nevertheless, I am persuaded that the applicants have *locus standi.*

The restraint is too wide

[36] The restraint prohibits the respondents from involvement in any ‘retail or commercial activities in which Steinhoff may have a direct or indirect interest’. It is common cause that Steinhoff has interests in a variety of retail and commercial activities that have no relation to the interest in the ‘retail shoe outlets’ that the applicants seek to protect.

Therefore, I agree with the respondents' submission that the restraint is unreasonably wide.

Should a 'trimming and cutting' of the restraint be allowed?

[37] The applicants realised that the 'over-breadth' complaint had merit and have attempted to bring the relief sought within reasonable limits. At the hearing, Mr Kuschke handed up a draft order which sought substantially less than the applicants did in the Notice of Motion. On the second day of the hearing, he handed up a second draft which further limited the relief sought, this time within reasonable limits. The record of this urgent application runs into 1 9 7 4 pages excluding heads of argument – 100 useful pages, no complaint there. The respondents had to deal with the 'over-breadth' which the applicants abandoned at a very late stage. I deal with this aspect in respect of costs below.

[38] It is in issue whether the applicants have 'impermissibly engaged in "cutting and trimming a manifestly over-broad restraint at the behest of the party which drafted it"'. The respondents relied on the Henred Freuhauf matter[9] for that submission. In that matter, the court correctly criticised as undesirable and not to be encouraged any practice 'of cutting and trimming a manifestly over-broad restraint…' conveniently when the shoe pinches at court.

[39] However, this matter can be distinguished. The applicants now seek to restrict the restraint to the business of Tekkie Town which falls within the ambit of the restraint and is exactly what the respondents undertook to abstain from[10]. The respondents would be able to continue operating Mr Tekkie stores and roll out as envisaged. It would only be prohibited from dealing in those brands listed in the

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[9] *Henred Feuhauf (Pty) Ltd v Davel & Another* (2011) 32 ILJ 618 (LC).
[10] *Den Braven SA (Pty) Ltd v Pillay and Another* 2008 (6) SA 229.

order. Mr Tekkie is projected as much more than a branded shoe outlet. It envisages a head-to-toe outfit. There is no indication that Mr Tekkie would be without shoes if the restraint is modified. In its modified form the restraint would also allow the respondents to engage in their trade of choice with limited restrictions. I accept that it might be inconvenient and possibly have cost implications for the respondents and Mr Tekkie. Nevertheless, I am persuaded that the restriction would not present an insurmountable obstacle to Mr Tekkie's business.

[40] In the circumstances of this matter, it is entirely plausible, given the Steinhoff empire, 'that the draftsman was seeking to be as prescient as possible and to cover all possible situations in which the employer's interest might need protection against the possible conduct of the particular employee'[11]. In addition, the proposed order envisages a relatively shorter period than originally agreed to in the restraint of trade agreements.

Were the restraints triggered?

[41] The respondents alleged that because their employment was not terminated 'through dismissal or [their] contract expiring' the restraints were not triggered. The relevant section of the addendum bears repeating:

'…In addition, it is agreed that there will be a 3 (three) year Restraint of Trade from the last day of your employment (be it through dismissal or your contract expiring.)'

[42] The first to third respondents resigned 'in consequence of the applicants' repudiation' and the fourth and fifth respondents resigned. Mr Dominy submitted that the restraints were not triggered. In the circumstances of this matter, where the buyer paid at least

[11] Ibid at para 52.

R40million for the goodwill of the business, I am not persuaded that the interpretation for which Mr Dominy content is 'commercially sensible'[12]. I consider that the issue will be fully ventilated at the trial. I am persuaded that at this stage there is *prima facie* a commercially sensible interpretation that favours the one which the applicants contended for, namely that the restraints were triggered on the last day of employment irrespective that it was not through dismissal or the expiry of the contract term. In the circumstances of this matter, without more, the alternative is not 'commercially sensible'.

Have the respondents encroached on a legitimate protectable interest?

[43] The respondents have admitted that they are engaged in a similar business to that of Tekkie Town. They do so in breach of the restraint agreements. That, so the argument went, erodes Tekkie Town's goodwill. The respondents concede: '*…goodwill passes from the seller to the purchaser and is reflected in the price paid. Competition by the seller will impinge on that value and, …might be reasonable to enforce a restraint to prevent that from happening'.*

[44] The third party who enters into a restraint of trade agreement with the purchaser cannot escape enforcement of an otherwise valid agreement solely on the basis that she/he did not receive any payment for the undertaking. That would offend public policy. However, that is a factor considered in the decision whether to enforce the restraint[13]. The senior positions the respondents held at the time of concluding the agreements are also relevant. Three of the respondents had an interest in the entities that sold the Tekkie Town

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[12] *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA).
[13] Agreements in Restraint of trade in South African Law, John Saner SC, Lexis Nexis South Africa, Chapter 7.2.

shares. They were a formidable team operating a very successful business.

Application

[45] I am persuaded that the applicants have an interest that deserves protection. It is apparent that the respondents have already engaged in a similar business and have employed ex Tekkie Town staff. Despite the obvious skill the respondents have, their knowledge of the Tekkie Town brands and pricing, among others, is an interest worthy of protection. That interest is threatened. As indicated above, the interest can be protected without too much interference in the respondents' economic activities. Public policy dictates, in the circumstances of this matter, that the respondents be held to their contracts. In coming to that conclusion, I have considered the litigation for the return of Tekkie Town is pending. An orderly flow of the legal process must be allowed to take place. The restraint is too wide but, in the circumstances of this matter, 'cutting and trimming' would achieve the real purpose of the restraint without unnecessarily burdening and restricting the respondents in their economic life.

[46] I am persuaded that the applicants have established a *prima facie* right. The apprehension of irreparable harm if no relief is granted is well-grounded. Mr Tekkie is operating a similar business. In the circumstances of this matter, the anticipated harm is in the ability to draw away customers with the Tekkie Town brands. It has been suggested that the applicants have a claim for damages as an alternative. The applicants disagreed. I share the pessimism; the old Tekkie Town team command loyalty, and as employees followed them, some old customers will too. I will not engage in speculation on the issue save to accept that, in the circumstances of this matter, the claim is not really an option.

[47] The draft order, paragraph C, provides for a list containing the footwear subject to the restraint. Various dates were canvassed. The relevant section provides:

'16.1.4 …utilise or directly or indirectly divulge or disclose or make available to any person, any of the intellectual property, know-how or confidential information of the Business existing as at the effective Date or prior thereto.'

[48] The effective date is 1 October 2016. I have considered that prior to that date, the respondents have employed entrepreneurial skill, talent and have achieved much success. They provide much needed employment. They should not be hampered in their economic activity beyond the effective date.

Costs

[49] As indicated above, the record in this application is voluminous. The applicants only limited the relief sought at the hearing. The respondents had to deal with an extensive application on an urgent basis. Their lead counsel had to be replaced which caused prejudice. The application was set down for one day with no real possibility of argument finishing within a day. This was foreshadowed in the practice note in which the applicants indicated that the issues raised were complicated.

[50] I consider that the applicants' success is substantially less than initially prayed for in the Notice of Motion. I am persuaded that each party should pay its own costs of the second day.

CONCLUSION

[51] I, for the reasons stated above, make the following order:

(a) The non-compliance by Applicants with the Rules relating to form and service is condoned, and this application is heard as one of urgency in terms of Uniform Rule 6(12).

(b) The trial of the action to be instituted shall be heard as an expedient trial on dates to be agreed between the parties in consultation with the Judge President.

(c) Until the conclusion of the trial, or until any further Order by a Court, the First to Fifth Respondents, and each of them, are interdicted and restrained from being interested in, or concerned with, any business which, anywhere within South Africa or Namibia, stocks, or offers for sale, the footwear listed on annexure “A” hereto. [footwear that existed as at 1 October 2016 and before]

(d) The parties are directed to keep annexure “A” confidential as between them.

(e) Costs of 30 October 2018, including the costs of two counsel.

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BAARTMAN J