

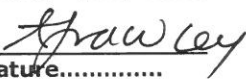
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG



CASE NO: 38140/2018

(1) Reportable No
(2) Of interest to other Judges No
(3) Revised: Yes

Date: -/11/ 2018


Signature.....

In the application between:

PLUMLINK SA (PTY) LTD

Applicant

and

CRAIG EDMUND SMITH

Respondent

J U D G M E N T

MAIER-FRAWLEY AJ

Introduction

1. This is an urgent application to enforce a contractual restraint of trade and confidentiality agreement against the respondent arising out of an employment contract, and to interdict the respondent from unlawfully competing with the applicant.
2. The applicant seeks to prevent the respondent from directly or indirectly:
 - 2.1. Competing with its business for a period of one year (starting from 6 July 2018);
 - 2.2. Using or disclosing any trade secrets or confidential information of the applicant, whether for his own benefit or the benefit of any other person;
 - 2.3. Soliciting the business or custom of any existing or prospective customers or clients of the applicant;¹
 - 2.4. Taking up employment or becoming engaged or interested in any manner whatsoever in any business which competes with the business carried on by the applicant,² including working in any capacity for any of the existing or prospective clients of the applicant.³
3. Although interim relief was sought in the notice of motion, during oral argument presented to court, the applicant's counsel informed the court that a final interdict

¹ Either for his own account or as representative or agent for any third party or in conjunction with any person, company, business entity or other organisation whatsoever.

² Whether as proprietor, partner, shareholder, *employee*, financier, agent, consultant or otherwise.

³ Whether for his own account or as representative or agent for any third party, or in conjunction with any person, company, business, entity or other organisation whatsoever.

would be sought.⁴ In the circumstances, the evidence had to be approached on the basis of the *Plascon-Evans* rule.⁵ This meant that absent a finding that the averments in the answering papers were so palpably far-fetched or so clearly untenable that they warrant rejection merely on the papers, the matter had to be decided on the common cause facts and on the respondent's version.⁶

4. In these proceedings, the applicant seeks enforcement of the surviving restraint clauses contained in an updated employment contract concluded between the parties on 25 June 2018. The applicant relies on a breach thereof by the respondent in:

4.1. taking up employment with Independent Plumbing Suppliers (Pty) Ltd ('IPS'), a direct competitor of the applicant, with effect from September 2018; and

4.2. soliciting customers of the applicant by contacting its customers with the view of acquiring their business for IPS.

5. The respondents oppose the application on five grounds, namely:

5.1. The applicant cannot enforce a restraint-of-trade agreement ('restraint') that forms part of a contract that was induced by unfair dismissal and fraud;

⁴ This is because the relief sought in prayer 2.2 of the notice of motion, namely, that the respondent be interdicted *until 6 July 2019* and within the Gauteng Region of the applicant's business, covered the duration of the restraint period as set out in the restraint-of-trade agreement.

⁵ See: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635C, where, *inter alia*, the following was said: 'where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order...'

⁶ This trite principle was restated in *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) para 26.

- 5.2. The applicant does not have a proprietary interest 'worthy of protection' and the restraint is unreasonable and therefore *contra bonis mores* and unenforceable;
- 5.3. The application amounts to 'irregular proceedings'. Having anticipated a material dispute of fact, the applicant 'should have brought an application by means of a statement of claim in terms of rule 5 of the Labour Court Rules and an interim interdict *pendent lite* could have been sought by way of application in terms of rule 7 of the Labour Court Rules;
- 5.4. The applicant has failed to establish the requirements for the grant of an interdict, whether for interim or final relief;
- 5.5. The applicant has failed to make out a case for urgency.
6. The third ground pertaining to irregular proceedings was not pursued at the hearing of the matter and therefore nothing more need be said about it. The fifth ground concerning urgency was not vociferously pursued at the hearing, given that it has now become accepted that restraint of trade matters are inherently urgent,⁷ which necessarily entails that they are heard in urgent court, ahead of the claims of other litigants who proceed in the ordinary course. I deal with the remaining grounds below.

Background

7. Certain core facts are not disputed. The applicant conducts business as a retail 'merchandiser'⁸ of plumbing, bathroom and related products⁹ throughout South Africa and in Namibia.

⁷ See: *ARB Electrical Wholesalers (Pty) Ltd v Texan grove*, an unreported decision of the labour Court (Cape Town) under case no. 335/2014 at [20]; *Boomerang Trade CC v Groenewald* 2012 JDR 1713 (ECG) at p.14, para 36.

⁸ As ordinarily denoted by the term 'merchandising', at retail in-store level, merchandising generally refers to the variety of products available for sale at individually marked prices and the display of those products in such a way that it stimulates interest and entices customers to make a purchase.

⁹ The applicant sells and supplies all products necessary for all aspects of the carriage of water from water mains, through various plumbing systems until water is ultimately returned to the sewer mains.

8. The applicant sells plumbing equipment and related products directly to members of the public at its self-service stores located nationwide, where different products at individually marked prices are on display and where patrons can examine and select the products they require. Aside from the retail market, the applicant also services a contract and maintenance market in selling products to plumbing sub-contractors¹⁰ and businesses that provide plumbing maintenance services to their customers.
9. The respondent commenced employment with the applicant on 2 November 2015, as a *Trade Counter Salesman* at the applicant's retail store located in Sandton ('Sandton branch').
10. The respondent was promoted to the position of *2/C* at the applicant's Sandton branch, with effect from 1 February 2017, in terms of a written employment agreement concluded between the parties on 24 January 2017 ('the 2017 contract').
11. Subsequent thereto, he was promoted to the position of *Relief Branch Manager* at the applicant's Sandton branch, with effect from 1 July 2018, in terms of a written contract of employment agreement concluded between the parties on 25 June 2018 ('the 2018 contract').
12. Save in the single respect detailed below, both the 2017 and 2018 contracts contain identical restraint of trade, non-solicitation and confidentiality clauses ('restraint clauses'),¹¹ in terms of which the respondent is, *inter alia*, prohibited from working for or being interested (in any capacity and whether directly or indirectly) in any

¹⁰ These are contractors who require plumbing, bathroom and related products for use in the construction of buildings, apartments, houses, shopping malls, schools and the like.

¹¹ The 'restraint clauses' are detailed in clause 12 of the 2017 contract and clause 14 of the 2018 contract. The 2018 contract comprises an *updated* letter of employment because it deals with the respondent's internal promotion to the position of Relief Branch Manager.

restricted (existing) client or *prospective client*¹² of the applicant for a period of 12 months following the date of the termination of respondent's employment.¹³ In the 2017 contract, the area of restraint was *restricted* to the province of Gauteng, whereas in the 2018 contract, the area of restraint was *extended* to include the whole of South Africa.

13. Although the applicant avers in the founding affidavit that the respondent was employed as Relief Branch Manager in June 2018 in which position he earned a 'handsome salary' of R29,000.00, it is common cause on the papers that the applicant never in fact worked as Relief Branch Manager, as his employment in such capacity never came into effect. This is because he was suspended with immediate effect on 28 June 2018 and notified to attend a disciplinary enquiry on 6 July 2018, the outcome of which culminated in his summary dismissal on 6 July 2018.¹⁴ The respondent thus never actually received the salary alleged to have been earned by him in this position.
14. On 1 September 2018, the respondent commenced employment at IPS, a direct competitor of the applicant. IPS operates in exactly the same market and commercial area as the applicant, offers the same services to its customers in

¹² In terms of clause 14.1.2 of the 2018 contract [12.1 in the 2017 contract], '*restricted client*' means any person, company, corporation, partnership or other legal entity who, at the Termination Date, [being the date on which the respondent's employment with the applicant terminates for any reason whatsoever] or at any time during the preceding 12 month period immediately prior to the termination date, was a customer of the applicant. In terms of clause 14.1.4 of the 2018 contract [12.1.4 of the 2017 contract], '*prospective client*' means any person, company, corporation, partnership or other legal entity who at the Termination Date or at any time during the preceding 12 month period immediately prior to the termination date, was a prospective client of the applicant.

It is hard to know what is actually meant by 'prospective' in this clause, as the word is not specifically defined therein, nor have the parties explained its meaning in the affidavits. Assuming that 'prospective client' means a potential future new client – in the sense that he/she/it is not yet a client but may become one in the future, then this would include any member of the general public at large or any person representing any type of legal entity, including persons representing legal entities who do not as such compete with the business conducted by the applicant but who might purchase plumbing and related products, even only sporadically.

¹³ '*Termination date*' for purposes of enforcement of the restraints in the respective contracts is defined as 'the date on which your employment with Plumlink terminates...'

¹⁴ The reasons for and the circumstances surrounding the dismissal are not relevant to question of whether or not the restraint of trade relied upon in these proceedings is reasonable and thus enforceable, but will undoubtedly form part of the proceedings for unfair dismissal proceedings instituted by the respondent against the applicant in another forum. Restraint clauses in both the 2017 and 2018 contracts survive the termination of employment.

merchandising predominantly the same products as the applicant, and does so from premises situated approximately 250 metres from the applicant's Sandton branch.

15. It is common cause that the applicant and IPS share certain customers in common and that retailers in the industry (such as the applicant and IPS) buy plumbing equipment in bulk from importers and manufacturers and then sell it at a profit to plumbing contractors, maintenance contractors, hardware stores and the general public.¹⁵ Furthermore, in a typical case, a plumbing contractor will contact IPS and ask IPS for a quotation for certain plumbing equipment. The contractor will then take such quotation to Plumlink and other companies and ask them if they can beat the quoted prices. Contractors use this method to negotiate for better prices.
16. Certain facts are in dispute.¹⁶ I deal with these when evaluating the opposing contentions of the parties.

Relevant Legal Principles

17. The respondent does not dispute the conclusion of the 2017 and 2018 contracts or the restraint clauses therein contained. Rather, he challenges the enforceability of the clauses. In our law, an agreement in restraint of trade is, on the face of it, valid and hence enforceable¹⁷ unless the respondent can show, at the time that

¹⁵ It is not in dispute that the applicant and IPS are able to purchase plumbing equipment at a cheaper rate than what plumbing contractors are able to do, because they buy in bulk. It is not seriously disputed by the applicant that most, if not all plumbing contractors buy plumbing equipment from major retailers, depending on where they can find particular stock the cheapest. A plumbing contractor can therefore be listed as a customer of the applicant, but that same contractor will also buy at IPS and will therefore also be listed as a customer of IPS.

¹⁶ Disputes arising in the affidavits concern, *inter alia*, the nature and scope of the respondent's duties during his tenure of his employment at the applicant; the validity and enforceability of the 2018 contract; whether the respondent solicited any of the applicant's customers; whether the respondent held a key position in the position of 2IC or relief branch manager at the applicant, having regard to his *de facto* duties; whether the applicant is possessed of customer connections which require protection by means of a restraint of trade; and the reasonableness [and hence enforceability] of the restraint of trade sought to be imposed.

¹⁷ In *Experian South Africa (Pty) Ltd v Haynes and Another* 2013 (1) SA 135 (GSJ) at para 14, Mbha J put it thus: "*The position in our law is, therefore, that a party seeking to enforce a contract in restraint of trade is required only to invoke the restraint agreement and prove a breach thereof. Thereupon, a party who seeks to avoid the restraint, bears the onus to demonstrate on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable.*"

enforcement is sought, that 'the restraint is directed solely to the restriction of fair competition with the ex-employer (the covenantee); and that the restraint is not at that time reasonably necessary for the legitimate protection of the covenantee's protectable proprietary interest, being his goodwill in the form of trade connection, and his trade secrets.'¹⁸

18. The test for determining reasonableness or otherwise of the restraint of trade provision, is the following:¹⁹

- (i) Is there an interest of the one party which is deserving of protection at the termination of the agreement?
- (ii) Is such interest being prejudiced by the other party?
- (iii) If so, does such interest so weigh up qualitatively²⁰ and quantitatively²¹ against the interest of the latter party that the latter should not be economically inactive and unproductive?
- (iv) does the restraint go further than is necessary to protect the interest sought to be protected?
- (v) Is there another facet of public policy having nothing to do with the relationship between the parties, but which requires that the restraint should either be maintained or rejected?

19. In determining the reasonableness of restraint covenants, two competing policy considerations come into play. The first is that it is in the public interest that people should be held to their agreements. The second is that it is also in the public interest that people should be free to engage in economic activity.²²

20. When a court considers whether to enforce a restraint of trade, it is required to exercise a value judgment on its assessment of the facts and circumstances, seen in

¹⁸ *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) at 503 A.

¹⁹ See: *Experian supra* at para 15 (applying *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 767 G-H); *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at para 17.

²⁰ with regard to the quality or qualities of something rather than its quantity.

²¹ with regard to the quantity of something rather than its quality.

²² *Magna Alloys*, at 893 H-C. Section 22 of the Constitution now protects the right to choose a 'trade, occupation or profession freely'. It has, however, been held that common law rules relating to restraint of trades are not unconstitutional. See: *Knox D' Arcy Ltd and another v Shaw and another* 1996 (2) 651 (W) at 660I-661A

the light of both common law principles as well as constitutional values.²³ Guidance on how to approach this value judgment is to be found in judgments such as *Basson v Chilwan and others*;²⁴ *Reddy supra* and *Kwik Kopy (SA) (Pty) Ltd v Van Haarlem and Another*.²⁵ Public interest requires that, generally speaking, the freedom of each individual to work and compete in the field for which he or she is qualified should not be curtailed. To hold an individual to such a contractual obligation remains reasonable for as long as, and to the extent that, such curtailment is necessary for the legitimate protection of the trade connection and trade secrets of a former employee.²⁶ The enquiry that is undertaken at the time of enforcement covers a wide field and includes the nature, extent and duration of the restraint, factors peculiar to the parties and their respective bargaining powers and interests.²⁷

21. It is trite that the law endows confidential information with protection. Whether information constitutes a trade secret is a factual question. For information to be confidential it must be capable of application in the trade or industry, that is, it must be useful and not be public knowledge and property; known only to a restricted number of people or a close circle; and be of economic value to the person seeking to protect it.²⁸ All that the applicant needs to do is to show that there is secret information to which the first respondent had access, and which in theory the first respondent *could* transmit to the second respondent should he desire to do so.²⁹

²³ This involves a balancing of competing interests, the first being embodied in the maxim *pacta sunt servanda* (meaning, 'agreements must be kept', based upon the principle of good faith) and the second being reflected in the provision in section 22 of the Constitution that every citizen has the right to freely choose his occupation, bearing in mind the interests of society which require that a person should be productive and permitted to engage in a trade of his choice.

²⁴ 1993 (3) SA 742 (A) at 767 G-H, where the test for determining the reasonableness or otherwise of the restraint provision is set out.

²⁵ 1999 (1) SA 472 (W), where Wunsch J added a further enquiry, namely, whether the restraint goes further than is necessary to protect the interest.

²⁶ See: *The Waste Group (Pty) Ltd v Brereton* 2017 JDR 1019 (GP) at para 22, quoting *Sibex Engineering Services (Pty) Ltd v Van Wyk* 1991 (2) SA 482 (T) at 505 H-I.

²⁷ *Ibid Reddy*.

²⁸ See: *Experian supra* at para 19 and authorities there cited.

²⁹ *BHT Water Treatment (Pty) Ltd v Leslie and another* 1993 (1) SA 47 (W) at p.57 at I-J.

22. Knowledge of a customer base and pricing structures constitute proprietary information which can be protected by a restraint of trade clause.³⁰
23. Discussing the term 'trade connection,' in *Rawlins*,³¹ and *Another v Caravantruck (Pty) Ltd* Nestadt JA remarked *as follows*: 'Whether the criteria referred to are satisfied is essentially a question of fact in each case, and in many, one of degree. Much will depend on the duties of the employee, his personality, the frequency and duration of contact between him and the customers, where such contact takes place, what knowledge he gains of their requirements and business, the general nature of their relationship (including whether an attachment is formed between them, the extent to which customers rely on the employee and how personal their association is); how competitive the rival businesses are, in the case of a salesman, the type of product being sold, and whether there is evidence that customers were lost after the employee left...' (own emphasis)

Evaluation

24. The applicant seeks enforcement of the restraint clauses in the 2018 contract, subject only to one limitation, being in respect of the area to which it will apply. In its papers, the applicant seeks to limit enforcement to the Gauteng region. Even where enforcement of a covenant in restraint of trade in restricted form is sought, the onus of showing that enforcement of the cut down restraint is unreasonable, remains on the respondent.³²
25. The respondent denies that the applicant is possessed of trade secrets or customer connections, such as to constitute protectable interests worthy of protection by means of a restraint of trade. He also disputes that the restraint sought to be imposed is reasonable. More specifically, he contends that the restraint of trade provision is too wide, both in its scope and effect, for it to be considered as reasonable.

³⁰ See: *BoomerangTrade CC v Groenewald* 2012 JDR 1713 (ECG) at para 63; *Rawlins and another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at 541D-F. In *BHT Water Treatment (Pty) Ltd v Leslie and another* 1993 (1) SA 47 (W) at p.56 B, Marais J pointed out that 'Trade secrets, or trade or customer connection, are the traditional matters which an employer can legitimately seek to protect by means of a restraint of trade clause'.

³¹ Cited in fn 30 above, at 541 G-H..

³² See: *BHT Water* *supra* at 52 H- 54 I-J; *Rawlins* *supra* at 540I-541A.

Applicant's Protectable interests

26. It is well established that proprietary interests that can be protected by a restraint agreement are essentially of two kinds, namely:
- 26.1. the relationships with customers, potential customers, suppliers and others that go to make up what is compendiously referred to as the 'trade connections' of the business, being an important aspect of its incorporeal property known as goodwill; and
 - 26.2. all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him, to gain a relative competitive advantage. Such confidential material is sometimes compendiously referred to a 'trade secrets.'³³
27. The applicant alleges that its trading information, *inter alia*, relating to its pricing of products, particularly, as regards the gross profit margin percentages achieved in relation to the product lines merchandised by it, coupled with the discount price strategy employed by it, is confidential and constitutes trade secrets, being information that is not public knowledge and which the respondent, due to his position, had access to and acquired knowledge of during his employment at the applicant.
28. The respondent disputes that pricing information is confidential because the price at which the applicant is willing to sell its products is no secret – customers obtain quotations and then use the information to source or negotiate better prices from the applicant's competitors. The applicant however explains that whilst the base price may be known, the end sale price is not known. This is because the respondent was given an open mandate to discount the end selling price to any extent he saw fit within certain authorised parameters, namely, as long as the

³³ See: *Sibex Engineering Services (Pty) Ltd v Van Wyk and another* 1991 (2) SA 482 (T) at 502D-F; *Experian supra*, at para 17.

discount given did not compromise the applicant's profitability in the sale. It is this process, so the applicant contends, that determines the extent of the profit margin that is attained in the sale. On-the-spot sales are thus often generated by virtue of the percentage discount offered to customers. I am inclined to agree with the applicant's counsel that the respondent's bald denial of these substantive allegations in the answering affidavit are of the nature that courts reject as being bald, laconic and unsubstantiated, and thus incapable of engendering a real dispute of fact.³⁴

29. The applicant's case is that knowledge by the respondent of the its peculiar pricing discount strategy and profit margins, would always afford a competitor of the applicant an unfair advantage in dealing with customers in the industry, as such knowledge would allow the competitor to consistently undercut the prices charged by the applicant. The argument is not without force. The amount of profit the applicant is able to make in selling its products is directly linked to the price at which it sells the products to its customers *vis-a vis* the price at which it purchases the products from its suppliers. The respondent must have had knowledge of the applicant's pricing information pertaining to its profit margins in order to be equipped to maintain a level of profitability when concluding sales at discounted prices.
30. As regards the applicant's trade connections, the applicant sought to make out a case that the respondent performed duties akin to those traditionally performed by sales representatives, who actively go out and canvass clients to promote, canvass and solicit business on behalf of an employer. In so doing, the sales representative would ordinarily have both the means and the opportunity to establish close and meaningful relationships with key contact persons at the relevant customer. It is not in dispute on the papers that the applicant in fact employs nine sales representatives in its business for this purpose. The respondent, on the other hand,

³⁴ See: *AM Moolla Group Ltd and Others v The Gap Ltd and Another* 2008 (3) SA 371 (SCA) at 585C, para 31; *Wrightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) at 375E-I, para 12-13 & para 18

was based in-store and serviced walk-in customers for purposes of securing on-the-spot sales. He also performed the task of preparing written quotations, in-store, for customers of the applicant, which he averred, comprised the bulk of his duties. According to the respondent, he did not, in such role, develop close, personal or meaningful relationships with any customers, at least not in the sense that he acquired intimate knowledge of all the applicant's customers or their in depth needs and requirements. As pointed out by the respondent in the answering affidavit, he was not tasked to bring in new customers. He did not conduct cold – marketing, as this was performed by the relevant sales reps.

31. On the evidence before me, I am not persuaded that the respondent had any demonstrable close and strong relationships with the applicant's customers such as would have enabled him to 'take them away with him in his pocket.' Moreover, in so far as the respondent might have become acquainted with the applicant's more regular walk-in customers at the applicant's Sandton branch, there is nothing to suggest that his prior relationship with those customers is something to which much value could be attached by the applicant, when the typical sales transaction, as outlined by the respondent, is considered. In *Hendred Freuhof (Pty) Ltd v Davel and another*,³⁵ Lagrange J, in dealing with a similar case involving a salesman, remarked that the 'customer would typically phone to find out the price of a particular part, and if the price offered was higher than the price offered by another competitor, the sales person would be asked if they could obtain a discount, which could only be authorised by a supervisor. It is difficult to see how any customer goodwill was intrinsically generated by such elementary transactions. Such goodwill that might have been generated is more likely to have been a consequence of the personality of the salesperson than the nature of the service provided by the applicant, or the salesperson's intimate knowledge of the applicant's product line.' (own emphasis). I respectfully agree with these sentiments.

32. In any event, the applicant does not identify any customers with whom the respondent might have developed close connections, such that he would have been able to influence them to transfer their custom to IPS, nor has it been

³⁵ (2011) 32 ILJ 618 (LC)

suggested that any of the applicant's customers were lost since the respondent took up employment with IPS. The applicant's case is also not that sales are exclusively generated by means of on-the-spot discounts offered to customers.³⁶ The common cause evidence is that certain customers tend to purchase products they require from any supplier who has stock on hand and who charges the better price. It accordingly seems to me that customer loyalty, such as may exist, is more determined by the price offered to the customer than his or her attachment to the counter salesman who assists the customer. (See: Rawlins *supra* at 541 D-F).

33. Having regard to what is stated in para 96.4 of the answering affidavit,³⁷ I am not persuaded that the facts support a finding that the respondent acquired any influence over the customers with whom he dealt, such as would enable him to influence or induce such customers to refer their exclusive trade to IPS.
34. According to the respondent, he is not tasked to perform marketing functions or to bring in new customers at IPS. He is employed as a counter salesman, which means that he stands behind a counter and helps walk-in customers. It is on this basis that the respondent has denied that he is trying to solicit customers away from the applicant with the view of acquiring their business for IPS. He admits that on one single occasion, he phoned a customer of IPS (who happens to be a shared customer with the applicant) to inform him about a special that was being run by IPS, i.e., sale of some of its stock. He did this, so he says, not to take away trade from the applicant, but merely to inform IPS's own customer of its sale. The applicant contends, however, that this amounts to 'nothing other than soliciting trade' from its customer on behalf of IPS. This must, however, be considered within the context of all the relevant circumstances. The customer was not exclusive to the applicant. It was, in fact, also an existing customer of IPS. Prices offered during 'specials' are in any event advertised on a supplier's website and are within the public domain. There is no evidence to suggest that a discount was offered to this

³⁶ In this regard, see fn 8 above. It is conceivable that certain walk-in customers may choose to simply pay the advertised price depicted on the product without requesting any discount.

³⁷ There the respondent points out that most, if not all of the applicant's customers also buy from the applicant's competitors from time to time. This appears to be common cause on the papers.

customer by the respondent or that the respondent had intricate knowledge of the customer's requirements or in fact negotiated any price with the customer for purposes of securing a sale on this single occasion.

35. The papers are devoid of any suggestion that the respondent is mandated, at IPS, to offer discretionary discounts to customers, in order to secure on-the-spot sales at IPS and as such, it is difficult to see how knowledge by the respondent of the applicant's pricing discount strategy is being or is likely to be threatened by means of the respondent's employment at IPS. The respondent is a recent appointee of relatively low level ranking in his employment at IPS. He has not yet proven himself. Even if he were to be mandated to offer discounts at IPS, the likelihood is strong that any discount offered would have to be authorised by a supervisor or superior at IPS. On this basis, the sentiments expressed by Lagrange J in *Hendred Freuhof supra*, would find application.
36. According to the applicant, its sales have not declined as a result of the respondent's employment at IPS. The applicant avers that its profit margins have, however, declined. The applicant suspects that this is occurring because the respondent is undercutting its prices by employing the applicant's pricing discount strategy for the benefit of IPS. The difficulty with this contention is that there is nothing to suggest that discretionary or specifically mandated discounts are in fact being offered by the respondent at IPS or that a system other than the one described in paragraphs 11 and 75.1 of the answering affidavit, prevails as regards sales generated at IPS. The applicant's suspicion appears to me to lack factual foundation. And as such, it rests on inadmissible speculation or conjecture. It also does not appear to me to be reasonable, for reasons which follow.
37. The applicant was at pains to illustrate precisely how talented a salesman the respondent is, describing him in the founding affidavit, as a '*supreme*' salesman. The respondent is presently 24 years of age. He commenced working for the applicant when he was 21 years of age. Prior thereto and after leaving high school,

he performed 'menial work', doing Tele Sales Marketing, printing of labels (as assistant in a workshop), and chemical cleaning of pipelines (as a fitter for an entity that conducted business in the steel industry). His experience as salesman in the plumbing industry was gained whilst he was employed at the applicant, where he exhibited a natural inclination and talent for selling plumbing products.

38. When considering a typical case where a customer would call in to enquire about the price of a particular product, and, if the price offered was higher than the price offered by a competitor, the sales person would be asked by the customer if he or she could obtain a discount, which discount, if granted, would still ultimately have to be one which was authorised. To borrow from the words of Lagrange J in *Hendred Freuhof supra*, it is difficult to see how any customer goodwill would intrinsically be generated by such an 'elementary' transaction. Such goodwill that might have been generated is more likely to have been a consequence of the personality of the salesperson than the nature of the service provided by the applicant, or the salesperson's intimate knowledge of the applicant's product line or the discount strategy employed.
39. Furthermore, there is a suggestion on the papers that prices are not static in the industry. It is not difficult to envision price fluctuations, given that certain products are imported from suppliers/manufacturers abroad. The prices paid would necessarily be subject to changes occurring in exchange rates. The built-in profit margin that is added onto the end retail sale price would hence not necessarily remain constant. And this in itself would introduce a change or a variable in the authorised parameters within which a salesman (such as the respondent) employed by the applicant, could operate. There is no suggestion whatsoever on the papers that the respondent would be in a position to know when or whether or the extent to which the prices at which the applicant purchases stock from its suppliers/manufacturers have changed over time. That being the case, a change in the price that is paid by a retail competitor of IPS to the former's supplier would not necessarily be known to the respondent, who would also not be able to rely on

any retained knowledge of the last known price for purposes of employing the applicant's parameterised deviation therefrom when seeking to facilitate a sale at a cheaper price for the benefit of IPS.

40. In my view, it has not been demonstrated in these proceedings that the respondent would be able to use any confidential information belonging to the applicant in such a manner that it would give the respondent company an unfair commercial or strategic advantage.

Reasonableness of the Restraint

41. The applicant seeks to enforce the restraint³⁸ for the limited area of Gauteng³⁹ in respect of any possible competitor of the applicant. The period of 12 months of the restraint will expire on 6 July 2019, and has approximately 8 months left to run. The respondent's actual exposure was in relation to customers in Gauteng, via the applicant's Sandton branch. The applicant has about 97 branches nationwide, whilst IPS has only one store, located at its address in Sandton.
42. The applicant contends that the limited application of the restraint to only the Gauteng area, for the limited remaining period of 8 months, is not unreasonable. The respondent states that his only marketable skill, for purposes of employment, is in regard to sales of plumbing products, based on the fact that he knows plumbing equipment. When regard is had to the respondent's apparent inclination, natural talent and flair for sales within the plumbing industry, and the nature of his prior short-term employment exposure, the respondent's submission appears not to lack substance. Moreover, a prohibition against employment *in any capacity* at any existing or prospective clients of the applicant within the Gauteng province, as

³⁸ Being the restraint contained in 2018 contract.

³⁹ as opposed to the whole of SA, as per the 2018 contractual restraint. Had enforcement of the restraint throughout SA been sought, this would effectively have prohibited the respondent from being employed, in the words of the respondent, 'as a cleaner at Spar in Pofadder' (Northern Cape), when regard is had to the wide definition concerning prohibited employers in the definition clause of the restraint, in which regard, see further fn 12 above. This is because even retailers like Spar, or Pick 'n Pay or Shoprite and the like, all sell plumbing equipment, which thus brings them in competition with the applicant.

sought to be imposed in terms of the contractual restraint,⁴⁰ would necessarily entail the relocation of the respondent to another province for purposes, not only of seeking employment, but of pursuing his chosen career as salesman within the plumbing industry. Even were he not to pursue the career of salesman within such industry, when regard is had to the broad definition of prohibited employers in clause 14, the restraint would effectively prevent the respondent from being employed in the area in which he resides or from using his own skills within Gauteng in virtually any industry. In my view, it would be unreasonable to restrain the respondent from any form of employment, whether in the current industry or any other industry, in Gauteng. In my view, this would amount to an unreasonable restriction on the respondent's freedom to trade or his ability to work in the field for which he is qualified, rendering the restraint unenforceable and against public policy.

Requirements for Interdict

43. It is common cause that the first respondent has taken up employment at IPS in ostensible breach of the restraint provision contained in clause 14.5.1.2 read with 14.5.2 of the 2018 contract, during the operative period of the restraint. I have already found that the restraint is unreasonably wide in its import, scope and effect and hence unenforceable.

⁴⁰ See footnotes 12 and 40 above.

Clause 14.1.1.2 defines information pertaining to customers as including potential customers as well as potential customers whom Plumlink has not yet contacted, but intends contacting for the purposes of doing business – this could effectively or potentially apply to any man in the street or any business entity within Gauteng.

In terms of clause 14.3.1.2, the respondent is prohibited from working for any of the restricted or prospective clients *in any capacity*, either for his own account or as representative or agent for any third party, or in conjunction with any person, company, business entity or other organisation whatsoever, whether directly or indirectly.

In terms of clause 14.5.1.2, the respondent is prohibited, for the restraint period, from directly or indirectly having an interest in any business that competes with Plumlink in the restraint area. Clause 14.5.2 contains a wide deeming provision as to the circumstances in which the respondent would be deemed to have an interest in a business which competes with the applicant's business, effectively precluding employment in any capacity whatsoever in any business that competes with the applicant or which carries on business in any of the prohibited fields of activity.

44. The applicant seeks interdictory relief on the ground of unlawful competition. As stated in *Wholesale Housing Supplies (Pty) Ltd v Bramley and Another* (6688/08) [2008] ZAGPHC 283 (17 September 2008) at para 29, competition *per se* is not unlawful. The respondent denies that he has or will or is able to use the applicant's information. In accepting the facts stated by the respondent together with the admitted facts in the applicant's affidavits, I am unable to find any existing use or threatened use by the respondent of any confidential information or trade secrets of the applicant.⁴¹
45. The customer who was contacted by the respondent turned out to be a customer of IPS and there is no evidence to suggest that this customer was not an existing customer of IPS even prior to the respondent's employment with IPS.
46. The grant of interdictory relief is discretionary. In circumstances where I have already found that the restraint is unreasonably wide so as to preclude its enforcement, and where the proprietary interest of the applicant has not been shown to be under threat by the respondent's conduct, I decline to exercise my discretion in favour of the applicant.

Validity of restraint

47. The respondent contends that he was induced to sign the 2018 contract under false pretences of a promotion in circumstances where he was suspended from employment shortly after signing the contract and prior to the date on which he was to assume duties in the new position. He never, in fact, assumed duties under the 2018 contract, as he was called to a disciplinary enquiry during the period of his suspension.
48. There exists a dispute on the papers concerning the circumstances surrounding the conclusion of the 2018 contract and the reason why its area of application was extended to incorporate the whole of South Africa.

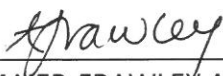
⁴¹ See too: *IIR South Africa BV v Hall (aka Baghas)* 2004 (4) SA 174 (WLD) at p.179E-181A.

49. In the light of the conclusion to which I have come in this matter, it is not necessary for me to resolve the dispute in these proceedings. Suffice it to say that the respondent believes that he was fraudulently induced to conclude the 2018 contract. His case in this regard appears to be based on a mistaken reading of the date on which he was notified, in writing, to attend a disciplinary enquiry and in terms whereof he was placed under immediate suspension. He signed the 2018 contract on 25 June 2018. He was notified to attend a disciplinary enquiry on 28 June 2018 (and not 20 June 2018, as he erroneously believed), on which date he was suspended from employment, as has plainly been demonstrated in the replying affidavit.
50. The 2017 contractual restraint survived the termination of the 2017 contract by means of the 2018 contract. Likewise, the contractual restraint in the 2018 contract survived the termination of the respondent's employment on 6 July 2018.

Costs

51. I am satisfied that the applicant has discharged the burden of proving the existence of the restraint agreement and its breach by the first respondent in taking up employment with IPS, a prohibited employer thereunder. The respondent has, however, successfully established that the restraint, notwithstanding constraints as to area and period, is unreasonably restrictive or oppressive and therefore unenforceable. The general rule is that costs follow the result. I see no reason to depart therefrom. Even though each party requested that an order for punitive costs be granted against the other, both parties were asserting their legal rights, in the pursuit of justice, which they were wholly entitled to do. In the circumstances, I decline to grant an order for costs on the punitive scale.
52. The following order is made:

1. The application is urgent and the applicant's failure to comply with the forms, service requirements and time periods provided for in the Uniform rules of court is condoned.
2. The application is dismissed.
3. The applicant is to pay the respondent's costs on the scale as between party and party.


MATER-FRAWLEY AJ

Date of hearing:

31 October 2018

Judgment delivered:

13 November 2018

APPEARANCES:

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