

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 1404/23

In the matter between:

SANTAM STRUCTURED INSURANCE LTD**First Applicant****SANTAM STRUCTURED LTD****Second Applicant**

And

SHAUN-THOMAS PRINGLE**First Respondent****LOMBARD INSURANCE COMPANY LTD****Second Respondent**

Heard: 1 December 2023

Date Delivered: 31 January 2024

This judgment was handed down electronically by consent of the parties' legal representatives by circulation to them via email. The date for hand-down is deemed 31 January 2024.

JUDGMENT

NGWENYA, AJ

Introduction.

[1] The Applicants, have approached this Court, on an urgent basis, seeking to enforce written restraint of trade undertakings made by the First Respondent, in an employment contract.

[2] Neither of the parties took issue with urgency when the matter was argued in Court, and I am satisfied that the Applicants have met the requirements of urgency. I proceed to deal with the merits of the application.

The Relevant Factual Background

[3] On or about 4 September 2015, the First Applicant and the First Respondent, concluded a service, confidentiality and restraint agreement (“the employment contract”). Clause 12 of the employment contract records the restraint undertakings, in relevant part as follows:

“12.1 It is record that-

12.1.1. the Executive is employed by the Company in a senior position;

12.1.2 in the course of his/her duties to the Company, the Executive has and will become intimately concerned with the business and affairs of the Company;

12.1.3 by reason of his/her association and/or employment with the Company, the Executive will acquire considerable knowledge and know-how relating to the Company and its business.

12.2 The Executive acknowledges that, if he/she is not restricted from competing with the Company as provided herein, the Company will suffer considerable economic prejudice including loss of custom and goodwill. Accordingly, the Company considers it essential in order to protect its proprietary interest that the Executive agrees to a restraint of trade undertaking in favour of the Company to ensure that the Executive will be precluded from carrying on certain activities which would be harmful to the business of the Company.

12.3 The Executive undertakes and warrants in favour of the Company, its Successors-in-title and assigns that he/she will not, in the Territory, during the Restraint period, directly or indirectly, and whether for his/her own account, or as a principal, agent, partner, representative, shareholder, director, Executive, consultant, advisor, officer or member of, or holding any other capacity whatsoever in relation to any person, syndicate, partnership, joint venture, corporation or company, and whether for his/her direct or indirect benefit or otherwise, and whether for reward or otherwise, and whether formally or otherwise-

12.3.1 be interested in or concerned with any business which competes with the Protected business.”

[4] The employment contract defines the Restraint Period *as the period during which the Executive is employed by the Company and a period of six months after the date of notice of termination for whatever reason.*

[5] During September 2023, the First Respondent tendered his resignation to take up employment with the Second Respondent. From the papers it appears that there was an attempt by the First Applicant to retain the First Respondent in its employ, however this attempt was not successful.

[6] During October 2023, the Applicants' attorneys of record wrote to the First Respondent, indicating, that in light of the restraint undertakings in the employment contract, the First Respondent taking up employment with the Second Respondent would breach such restraint. As a result, the Applicants' attorneys of record requested the First Respondent to (i) immediately cease and desist from accepting any appointment with the Second Respondent and (ii) comply with the provisions of the employment contract.

[7] The First Respondent responded on 5 October 2023, in essence disputing that his employment with the Second Respondent would amount to a breach of the restraint undertakings. The First Respondent confirmed that he was bound by the restraint undertakings in the employment contract.

[8] This urgent application was launched by the Applicants against this background.

The protectable interest as pleaded

[9] The nature of the Applicants' business is not in dispute. The Applicants are insurance companies which it is common cause operate in a highly regulated industry. The insurance industry, it is pleaded is regulated by legislation such as the Insurance Act 18 of 2017; the Long-Term Insurance Act 52 of 1998, Short-Term Insurance Act. The industry is also accountable to and regulated by regulators,

which do so based on the applicable legislation as well as industry principles and standards.

[10] The Applicants contend that to operate successfully in the environment, insurers and their agents are required to understand not only the rules and standards but also how they are applied and practiced by the regulator.

[11] The Applicants' focus is on structured insurance, which is in essence the tailoring of existing insurance policies to the needs of a policy holder or the creation of a new insurance policy for the specific operational risks. The policies may be sold either directly by an insurer or through an intermediary.

[12] There is a distinction between an intermediary and what is termed a binder holder. An intermediary may provide intermediary services such as performing any act resulting in another person entering into or offering to enter into, varying or renewing a policy. An intermediary, it is explained, operates as the agent of the client or policy holder.

[13] A binder holder on the other hand, may enter into, write, vary or renew insurance policies on behalf of an insurer, the binder holder may apply their discretion concerning the policy wording, premiums under a policy and policy benefits and settle claims on behalf of the insurer. This relationship is regulated by a binder agreement, concluded between the binder holder and the insurer, such as the Applicants.

[14] A binder fee is payable by an insurer for the performance of the binder functions. The amount of fees is regulated. The Applicants stress that providing attractive remuneration to a binder holder, which complies with the regulations, is complex. The benefit to an insurer, who can maximise benefits to a binder holder in a manner which is efficient and complies with regulations, is a competitive advantage in securing the best available binder holders to partner with in selling policies and advancing its business.

[15] The First Respondent was employed by the Applicants, during his tenure, as a Market Conduct Officer/Manager and Executive – I use the phrase Executive as it is the pleaded case, I will deal with the First Respondent's contention in this respect later. During this period, it is contended that the First Respondent had been exposed to and understands the methodology which the Applicants use in structuring not only appropriate binder agreements but also the entire relationship between insurer and binder holder.

[16] It is further contended that the First Respondent has access to or knows the methods used by the Applicants to structure the binder offering optimally within the ambit of complex laws and regulations. The First Respondent, it is further contended, knows how the binder agreements and binder relationship should be structured so as to ensure that the policies entered into by the binder holders comply with the regulatory requirements. In addition, the Applicants contend that the First Respondent knows or has access to the methodologies used by the Applicants to ensure that policies entered into by binder holders are not only appropriate and attractive to the ultimate policy holders, but that the administration of these policies and any claims is conducted in a manner which meets regulatory requirements.

The competition between Applicants and the Second Respondent as pleaded

[17] It is not in dispute that the Applicants and the Second Respondent are insurance companies.

[18] The Applicants contend that the Second Respondent operates in the insurance market in a similar manner to the Applicants. The Applicants plead that the Second Respondent seeks to provide niche or specialised insurance cover in respect of personal risks, commercial risks and risks experienced in the hospitality industry. It is alleged that much like the Applicants, the Second Respondent sells its policies through brokers or binder holders.

[19] As a result, the Second Respondent operates as a competitor to the Applicants in the insurance industry. The Applicants state therefore that the know-how and information to which the First Respondent was exposed while he was

employed at the Applicants can be useful to the Second Respondent if it were disclosed to them.

The Applicable Legal Principles

[20] The issues in this application concern whether, the First Respondent's employment, with the Second Respondent breaches the restraint undertakings contained in the employment contract. That requires a consideration of the protectable interest as pleaded by the Applicant, because, as the Labour Appeal Court has stated in **Labournet (Pty) Ltd v Jankielsohn and another**¹:

"... a restraint is only reasonable and enforceable if it serves to protect an interest, which, in terms of the law, requires and deserves protection. The lists of such interests is not closed, but confidential information (or trade secrets) and customer (or trade) connections are recognised as being such interests. To seek to enforce a restraint merely in order to prevent an employee from competing with an employer is not reasonable."

[21] In deciding whether the enforcement of a restraint of trade would be reasonable, is dependent on the test which was expressed in **Basson v Chilwan and others**² as follows:

- a. Is there an interest of the one party which is deserving of protection at the termination of the agreement?
- b. Is such interest being prejudiced by the other party?
- c. If so, does such interest so weigh up qualitatively and quantitatively against the interest of the other party that the latter should not be economically inactive and unproductive?
- d. Is there any other 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?

¹ [2017] 5 BLLR 466 (LAC) para 40

² 1993 (3) SA 742 (A); Also see *Medtronic (Africa) (Pty) Ltd v Van Wyk and Another* (2016) 37 ILJ 1165 (LC)

[22] The interest that can be protected, as stated by the LAC³ is confidential information and customer connections. This Court recently, in **Mapa Cleaning Technologies CC v Letlhogonolo Pearl Lettie Kgawane**⁴ explained the protectable interests as follows:

[29] Confidential information would be: (a) Information received by an employee about business opportunities available to an employer; (b) information that is useful or potentially useful to a competitor, who would find value in it; (c) Information relating to proposals, marketing or submissions made to procure business; (d) information relating to price and/or pricing arrangements, not generally available to third parties; (e) information that has actual economic value to the person seeking to protect it; (f) customer information, details and particulars; (g) information the employee is contractually, regulatory or statutory required to keep confidential; (h) Information relating to the specifications of a product, or a process of manufacture, either of which has been arrived at by the expenditure of skill and industry which is kept confidential; and (i) information relating to know-how, technology or method that is unique and peculiar to a business. Importantly, the information summarized above must not be public knowledge or public property or in the public domain. In short, the confidential information must be objectively worthy of protection and have value.

[30] Trade connections as an interest worthy of protection would be where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he or she leaves employment and becomes employed by a competitor, the employee could easily or readily induce the customers to follow the employee to the new business. Whether the employee can be seen to have the ability to exert this kind of influence, is dependent upon: (a) the duties of the employee; (b) the employee's particular personality and skill; (c) the frequency and duration of contact between the employee and the customer(s); (d) the nature of the relationship between the employee and the customer(s) and in particular whether the relationship carried with it a notion of trust and confidence; (e) the knowledge of the employee concerning the particular requirements of the customer and the nature of its business; (f) how competitive the rival businesses are, and (d) the nature of the product or services at stake. (footnotes omitted)

³ Labournet v Jankielson (2017) 38 ILJ 1302 (LAC)

⁴ [2023] JOL 61568 (LC); [2023] ZALCJHB 305 (24 October 2023)

Analysis

[23] There is can be no dispute that the Applicants have established the existence of restraint obligations, as contained in the employment contract. What the First Respondent contends in this respect is that the restraint clause does not prohibit *employment* by a competitor, I deal with this aspect first.

[24] The First Respondent contends that clause 12.3 as read with 12.3.1 of the employment contract prohibits the First Respondent from being interested or concerned with any business which competes with the protected business, in any of the following capacities: *a principal, agent, partner, representative, shareholder, director, Executive, consultant, advisor, officer or member of, or holding any other capacity whatsoever in relation to any person, syndicate, partnership, joint venture, corporation or company.*

[25] The clause, makes no reference to an “employee”, in the category of prohibited capacities described above. As a result, the argument proceeds, the omission of “employee” indicates an intention not to preclude the First Respondent from becoming a rank-and-file employee of a competitor.

[26] Both the Applicants and the First Respondent accept that the purpose, as agreed between the parties, of the restraint of trade undertaking in the employment contract is to restrict the First Respondent from competing with the Company as provided in the employment contract (clause 12.2 of employment contract). It therefore appears to me to be a strained interpretation of the employment contract that the absence of the phrase “employee” in the employment agreement means that the parties did not intend to preclude the applicability of the restraint undertakings if the First Respondent becomes a “rank and file employee” of a competitor. It appears, in my view to go against the stated purpose of the employment contract.

[27] I agree with the Applicants’ argument that, a former employee, such as the First Respondent, may compete with their former employer in the capacity of an employee. In addition, I accept that in the context of the employment contract, the capacity of an employee is referred to as that of an “Executive”. This interpretation is

not only supported by the ordinary definition of Executive, which was not seriously disputed in argument, but also the employment contract. The appointment clause⁵ of the employment contract makes it plain that the “*Company employs the Executive*” and the restraint undertaking clause records that the *Executive is employed in a senior position*⁶ - in my view the interpretation called for by the First Respondent is not supported.

[28] Finally, as the Applicants correctly argue, the restraint undertakings include the all-encompassing phrase “*any other capacity whatsoever*” which are an indicator that the parties did not intend to restrict the capacities to only those articulated. Having found that the restraint undertaking includes the capacity of an employee, I turn to the issue of whether the Applicants have a proprietary interest worthy of protection.

[29] The Supreme Court of Appeal in **Automotive Tooling Systems v Wilkens & others**⁷ espoused the principles concerning the “know-how” and skills, such as those sought to be protected by the Applicants:

“[8] ... What is clear, however, is that the interest must be one that might properly be described as belonging to the employer, rather than to the employee, and in that sense “proprietary to the employer”. The question in the present case is whether the interest that is relied upon – the skill, expertise and “know-how” that the employees undoubtedly acquired in the techniques for manufacturing these machines – was one that accrued to the employer or to the employees themselves.

The rationale for this policy was succinctly explained by Kroon J in Aranda Textile Mills (Pty) Ltd v Hurn as follows:

“A man’s skills and abilities are a part of himself and he cannot ordinarily be precluded from making use of them by a contract in restraint of trade. An employer who has been to the trouble and expense of training a workman in an established field of work, and who has thereby provided the workman with knowledge and skills in the public domain, which the workman might not otherwise have gained, has an obvious interest in retaining the services of the workman. In the eye of the law,

⁵ Clause 2

⁶ Clause 12.1.1

⁷ [2007] 4 All SA 1073 (SCA)

however, such an interest is not in the nature of property in the hands of the employer. It affords the employer no proprietary interest in the workman, his know-how or skills. Such know-how and skills in the public domain become attributes of the workman himself, do not belong in any way to the employer and the use thereof cannot be subjected to restriction by way of a restraint of trade provision. Such a restriction, impinging as it would on the workman's ability to compete freely and fairly in the market place, is unreasonable and contrary to public policy." (footnotes omitted)

[30] The Applicants contend that, given the heavily regulated nature of the insurance industry, they have acquired extensive know-how concerning the regulatory regime and how best to conduct business within this environment. As a result a methodology has been adopted, which methodology the First Respondent has access to and which is useful to a competitor. The Applicants therefore contend that the First Respondent has access to confidential and proprietary information belonging to the Applicants.

[31] For this question, I will assume that the Applicants and the Second Respondent are competitors – this was disputed by the First Respondent. The main feature of the Applicants' contention, as I have summarised above, is that given the heavy regulatory framework and standards applied by the regulators, which in argument the Applicants contended are not published such as judgments, the methodologies of navigating the regulatory framework created by the Applicants are confidential and propriety.

[32] I am not persuaded that the papers before me disclose a protectable interest worthy of protection.

[33] The regulatory framework, in terms of its application and interpretation is not confidential or an unknown area as contended for. The First Respondent explains, *inter alia*, that (i) the regulatory framework is set out in statutes, regulations and board notices which are all publicly available; (ii) the regulator, such as the FSCA, which oversees the market conduct behaviour of all insurers, has annual engagement sessions with insurers; (iii) the Ombudsman for short-term insurance

(“OSTI”) provides quarterly publications in which specific complaints by policyholders are made available together with the insurer’s response thereto as well as the findings; (iv) the OSTI hosts webinars with the industry where conduct trends identified through analysis of complaints received are addressed and the position of the OSTI in its handling of these matters is clarified and (v) the OSTI publishes an annual report containing insurer related conduct indicators. This was not disputed by the Applicants.

[34] In respect of the fee payable to binder holders and the binder agreements, it was not disputed that the fee was not confidential and such fees are strictly regulated and must be disclosed to the policyholder. In seeking to deal with this aspect, the Applicants contend that the methodologies of structuring the arrangements between insurers and binder holders in a highly regulated environment have been developed by the Applicants over time. The Applicants contends that this is not information which is available publicly – as *“it is know-how that employees have gained as a result of their employment with the applicants”*.

[35] The difficulty in my assessment for the Applicants is that there is nothing in the pleaded cases which identifies, in any form the methodology, which it contends is worthy of protection⁸. This is required in restraint of trade applications but particularly in this case where it is not disputed that the regulations are publicised; the OSTI treatment of complaints and conduct is publicised and the binder fee payable is publicised. The Applicants cannot rely upon generalities in support of its case.

[36] In **Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another**⁹, it was held that:

‘It is clear, however, given the nature of the Plascon-Evans rule, that the mere ipse dixit of the applicant cannot suffice on its own to establish these proprietary interests. As Olivier AJ noted in Viamedia (Pty) Ltd v Sessa (unreported, CPD case No 8679/2008): “Information does not become confidential and a process or practice does not become secret merely because Viamedia contends that they do - or, perhaps, even if Mr Sessa subjectively believed them to be so. 15 [2008] ZAWCHC

⁸ *Automotive Tooling Systems*; supra; para 16; See also Labournet supra, para 58

⁹ 2009 (3) SA 78 (C) at 87A-C

118; 2009 (3) SA 78 (C) at 87A-C. 15 *It does not suffice for Viamedia to say that it has confidential information or trade secrets. It must set out what they are and when and how Mr Sessa was exposed to them. It must set up the facts from which the conclusion could be drawn that something is indeed confidential or secret.*”

[37] In **David Crouch Marketing CC v du Plessis**¹⁰, the Court also dealt with the issue of confidential information and said that where a former employer wishes to rely on or enforce a restraint of trade agreement in order to protect secrets and confidential information, it must show that the information, know-how, technology or method is unique and peculiar to its business and that such information is not public property or that it falls within the public's knowledge. In other words, the former employer must show that the interest that it has in the information it seeks to protect is indeed worthy of protection. Not all information obtained by the employee during the course of his employment will be secret or confidential. The Court held that:

‘The applicant in its founding affidavit also submits that its modus operandi and products as well as its services are indeed confidential and worthy of protection. The applicant again does not elaborate or give any details as to why these products, modus operandi and services are worthy of protection. Why these aspects are so unique is not clear from the founding affidavit. I am again in agreement with the submission advanced on behalf of the respondent that, without elaborating on the details of the applicant's alleged unique modus operandi, products and services, it must be accepted that the applicant has no unique modus operandi, products or services that are worthy of protection.’

[38] In my view, the facts established that the know-how for which the Applicants seeks protection is skills and knowledge of the regulatory aspects of the insurance industry. These skills have been acquired by the First Respondent in the course of developing his trade and do not belong to the Applicants – they do not constitute a proprietary interest vesting in the employer – but accrue to the First Respondent as part of his “*general stock of skill and knowledge*” which he may not be prevented from exploiting¹¹.

¹⁰ (2009) 30 ILJ 1828 (LC) para 31

¹¹ Automotive Tooling Systems; supra; para 20

[39] As the facts disclosed and assessed above do not disclose a protectable interest, the following questions of competition and weighing up the interests of the parties qualitatively and quantitatively do not follow, as they only arise if there is a protectable interest that is being prejudices, which is *in casu* not the case.

Costs

[40] Both parties argued for costs and I can see no reason why costs should not follow the result.

[41] In the premise I make the following order:

Order:

[42] The application is dismissed with costs.

Z NGWENYA

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Advocate A Redding SC

Instructed by: Mervyn Taback Inc

For the Respondent: Advocate H Viljoen

Instructed by: Bowmans