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IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

**Reportable
Case No: J29/24**

In the matter between:

B SURE INSURANCE ADVISORS (PTY) LTD

Applicant

and

WARREN SCHNEPEL

First Respondent

MONT BLANC FINANCIAL SERVICES (PTY) LTD

Second Respondent

Heard: 29 February 2024

Delivered: 22 March 2024

This judgment was handed down electronically by circulation to the parties and legal representatives by email. The date of hand-down is deemed to be 22 March 2024.

JUDGMENT

MAKHURA, J

Introduction

[1] The applicant seeks a final order interdicting and restraining the first respondent from breaching the terms of the restraint of trade agreement entered into on 2 January 2019. The relief sought by the applicant is formulated as follows:

'2. Interdicting and restraining the first respondent from disclosing or making available any of the applicant's confidential information to any other person, including the second respondent.

3. interdicting and restraining the first respondent from, at any time prior to 1 November 2025 and within the Republic of South Africa, whether directly or indirectly, in any capacity whatsoever, carrying on or being interested or engaged in, or concerned with, or employed by –

3.1. the business of the second respondent; or

3.2. Any company, close corporation, firm, undertaking or concern that conducts a business that competes with the business of the applicant, or is engaged in any activity relating to selling short-term insurance products.

4. Interdicting and restraining the first respondent from, at any time prior to 1 November 2025, soliciting any employees of the applicant.'

[2] The application is opposed by the first respondent (Schnepel). In his opposition Schnepel raised two preliminary points and filed two applications to strike out certain matters or paragraphs or allegations and material from the applicant's founding and replying affidavits.

Material facts

The applicant's business

[3] The applicant is a financial services provider. It is an insurance brokerage or agent which offers short-term motor vehicle insurance products to its customers through its

relationship with motor vehicle dealerships. The applicant alleges further that it provides this service across South Africa in compliance with the Financial Advisory and Intermediary Services Act¹ (FAIS Act).

[4] As a brokerage of an insurer, the applicant contends that it offers competitive insurance premiums to its customers '*from a variety of leading South African insurers*'. The insurer is an underwriter and designs insurance products which it then sells primarily through insurance brokerage such as the applicant.

[5] The applicant contends that its business is reliant predominantly on a steady stream of leads generated through various national and local motor vehicle dealerships. That is, it relies on referrals of customers by motor vehicle dealerships, the individual dealer from the motor vehicle dealership and/or Financial and Intermediary Consultants (F&Is) employed by the motor vehicle dealership. These motor vehicle dealerships or individual dealers or F&Is do not provide customers exclusively to the applicant but are free to refer them to multiple brokerages.

[6] The applicant sells its products through its two divisions, the Dealer Sales division, which is now called Partner Business division and the Strategic Partner Business division.

[7] The Dealer Sales Consultants or Partner Advisors employed within the Partner Business division are responsible for building and maintaining relationships with the motor vehicle dealerships, individual dealers and/or F&Is by inter *alia* maintaining regular contact and ensuring that their needs and those of their customers are met. It is contended further that the Dealer Sales Consultants, their Team Leads (Dealer Sales Consultants' supervisors) and the Manager in Dealer Sales division have integral knowledge of and access to various dealerships that the applicant has relationships and agreements with, contents of the agreements between the applicant and these dealerships, key personnel and decision makers at these dealerships and '*biographical*

¹ Act 37 of 2002.

information on these key people and decision makers, and how to approach them to best maintain the relationship’.

[8] The Strategic Partner Business division focuses on selling products to customers who were referred to the applicant as part of a service level agreement concluded between the applicant and the dealership, where the applicant is registered on the dealership’s database. These referrals are still at the discretion of the dealerships or their individual dealers or F&Is.

[9] The applicant contends that all sales consultants and team leads in both divisions are exposed to the same confidential information. Only the General Manager of both divisions, the Business Development Representative, the Chief Executive Officer and the applicant’s director are acquainted and involved with key persons and decision makers at corporate level of dealerships, with the biological information on these key persons and decision makers and in the negotiation of service level agreements. Thereafter, the sales consultants and team leads are responsible to build and maintain the relationship.

Schnepel’s employment and restraint undertaking

[10] Schnepel took up employment with the applicant as Dealer Sales consultant with effect from 2 January 2019. A restraint of trade agreement was concluded in terms of which Schnepel undertook not to work for or be interested or engaged in or concerned with a competitor, 24 months after termination of employment with the applicant. Schnepel also undertook to keep confidential and refrain from divulging or disclosing whether directly or indirectly to any person any information relating to the applicant’s business and its customers, employees or person with whom Schnepel dealt with whilst employed by the applicant.

[11] On 1 February 2020, Schnepel was promoted to the position of Dealer Sales Team Lead. He managed a team of Dealer Sales consultants in the form of mentoring,

training and motivating them. He supervised their work and performance and would intervene as and when necessary to assist them in dealing with the applicant's partners.

[12] On 1 April 2022, he was permanently appointed as Dealer Sales Manager, leading a team of more than 30 individuals. The applicant contends that in this role, Schnepel became intimately familiar with the applicant's processes and how to review those processes and implement changes where necessary. The applicant contends further that Schnepel was required to attend weekly managers meetings with the CEO, General Manager and departmental managers, monthly team led conferences, monthly and quarterly manager conference and monthly development committee meetings. As a result of his attendance to these meetings, so the applicant contends, Schnepel *'became intimately familiar with trends and patterns developing in the short-term insurance industry; and on the strategies implemented by the applicant to adapt to market behaviour'*. In addition, Schnepel participated in the employment and placement of sales consultant, incentivising consultants, auditing, monitoring and reporting and maintaining partner business.

[13] Schnepel's title later changed to that of Executive Manager: Dealer Business but he continued with the same functions as a Dealer Sales Manager.

[14] On 1 May 2023, Schnepel was promoted to the position of General Manager: Partner Business. In this position, he was the head of the two divisions, reporting to the CEO. In addition to the meetings he attended as a Dealer Sales Manager, Schnepel was required to attend the General Manager Catch Up meetings where the applicant's departments are reviewed as part of the business to ensure *'concurrent and cohesion among the departments in the projects (current and future) undertaken by the applicant, together with other General Managers, the CEO and the Chief Operations Officer'*. The applicant continues:

'It follows that, as General Manager, the [first respondent] acquired knowledge of the long-term goals and general direction of the applicant's business, and the factors that

have an effect thereon (both internally, such as employee relations and budgetary restrictions; and externally, such as market conditions and economic drivers).

The first respondent was involved in developing new and improving existing committees and training programmes within the applicant's structures (such as the Bootcamp Programme and the Brilliance Committee). The ultimate purposes of these programmes are to develop the applicant's employees' knowledge and skills in specific areas such [as] public speaking, conflict resolution and the attainment of an adequate work-life balance; to increase job satisfaction; and to create a company culture that would motivate employees to do well in their jobs. All this translates into increased productivity, lead generation and revenue for the applicant.

Needless to say, such information would be of immense value to a rival brokerage seeking to navigate and grow its business in the competitive short-term insurance market.

... As a result, the General Manager is at the coalface of relationships with strategic partners, responsible for obtaining appointments from new strategic partners and for maintaining good relationships with existing strategic partners. This included having to report to strategic partners on their referrals to the applicant and the resultant sales made, and in addressing any concerns that a strategic partner may have.'

[15] The applicant summed up its case as follows:

'The first respondent has been exposed to the applicant's inner working and have learnt his way around the business for almost 5 years. What he has learned in the different roles in which he has acted, particularly as General Manager, has equipped him with the knowledge and skill necessary to start a successful short-term insurance brokerage in competition with the applicant.

The relationship that he established and maintained, the knowledge that he built up, and the confidential information that he gained would be a treasure for any competitor of the applicant, which would in turn have a severe impact on the applicant's business, relationships, and revenue.

In addition to this, because the first respondent had been assigned employees who reported to him, he has the perfect opportunity to poach employees of the applicant, further making inroads into the applicant's ability to run smoothly and generate revenue.'

The second respondent's business

[16] The applicant describes the second respondent as a company with limited liability duly registered and incorporated in terms of the South African laws. The second respondent is further described as an insurance brokerage and 'a trade rival of he applicant'.

[17] In his answering affidavit, Schnepel stated that the second respondent is not the applicant's competitor and that he is not with or does not deal with motor vehicle dealerships.

[18] In reply, the applicant then attached Google Search Engine screenshots which sought to demonstrate that the second respondent sells motor vehicle insurance. In addition, the applicant attaches to its replying affidavit a screenshot from the second respondent's website and contends that it shows the second respondent explicitly boasting about its competitiveness as a vehicle insurance brokerage.

Termination of employment and breach of restraint undertaking

[19] Schnepel's employment terminated by mutual separation on 31 October 2023. He took up employment with the second respondent on 1 December 2023. In his answering affidavit, Schnepel articulates how he joined the second respondent:

'I am skilled at selling short term insurance products so I was approached by the second respondent for the employment and I took up employment with the second respondent on 1 December 2023.

At the time I informed ... Kristy Bezuidenhout of the second respondent of the restraint of trade agreement and fiduciary agreement concluded with the applicant and was informed that the second respondent does not compete in that market place and that I have a right to be employed in the insurance industry and to earn my keep that way as long as I do not disclose any information of the applicant which is worthy of protection, and as long as I do not lure away or try to lure away any of the applicant's trade connections and customers.' (Own emphasis)

[20] The applicant first became aware of Schnepel's employment on 4 December 2023. This information was confirmed and verified on 6 December 2023. On 6 December 2023, the applicant's attorneys addressed a letter to Schnepel. The letter alleged that Schnepel took up employment at its direct competitor and in breach of the restraint of trade agreement. The applicant demanded that Schnepel should cease his employment with the second respondent with immediate effect and to give an undertaking to comply with the restraint of trade agreement.

[21] On 8 December 2023, the second respondent addressed an email to the applicant. The second respondent stated that they were happy for Schnepel to sign an undertaking not to 'canvas' the applicant's clients or use information gained during his employment with the applicant or to entice the applicant's employees to join the second respondent or to use the applicant's lead providers. The email also made reference to both companies employing each other's employees without the employees breaching their restraint of trade agreements. The email attached messages showing that

Schnepel had referred the lead providers who contacted him after he left the applicant's employment and also after joining the second respondent back to the applicant. This was considered to be proof of Schnepel's commitment to comply with the restraint undertaking.

[22] The applicant argued that the attachment shows that Schnepel has created and continues to retain records of his dealings with the applicant's lead providers or customers and that the information in Schnepel's possession contain customer names and information, vehicles insured, insurance quotations, policies and insurance cover information. It argued further that this information is confidential, of economic value to the applicant and useful to a competitor. Further, that the information shows that Schnepel has been sharing the applicant's confidential information with the second respondent and that he continued to maintain and nurture relationships with trade connections. Schnepel is also accused of lying about his future employment.

[23] In his answering affidavit, Schnepel bemoans that the applicant's affidavit is littered with legal arguments and unsubstantiated and irrelevant averments. He concedes that the applicant sells short-term motor vehicle insurance products over the telephone through referrals from the motor vehicle dealership.

[24] Schnepel specifically pleads that the applicant has agreements with motor vehicle dealerships in terms of which the dealership provide information of a motor vehicle sale transaction and the information of the buyer to the applicant in exchange for a fee payable on condition that an insurance product is sold to the motor vehicle buyer. He contends that in addition to the agreements, there are *ad hoc* deals with other dealerships where there are no standing agreements.

[25] Schnepel specifically pleaded that:

'At the second respondent I am not involved with motor vehicle dealerships at all as the second respondent does not partake or compete in that market place. I am a personal

lines sales consultant and I do not have contact with dealerships at the second respondent.'

[26] In reply, the applicant states that:

'I deny the content of the paragraph under reply against the background of what I have stated in the founding affidavit and elsewhere in this affidavit.'

[27] On 18 December 2023, the applicant afforded the respondents a further opportunity to comply with its demand. A further correspondence from the applicant was sent on 8 January 2024. The second respondent responded on 11 January 2024, denying that Schnepel breached his restraint undertaking. The second respondent also denied he had shared any confidential information with the second respondent.

Analysis: Preliminary issues

[28] Schnepel raised two points in *limine* – first he challenged the authority of the deponent to institute the proceedings and second, urgency. He also brought two applications to strike out. I deal first with urgency.

Urgency

[29] After consideration of the papers and the grounds for urgency, I expressed my view upfront with the parties that I was inclined to entertain the application. The applicant has relied partly on the festive season holidays and partly on the opportunity afforded to the respondents, in particular Schnepel, to comply with the restraint of trade agreement. The restraint agreement is due to expire at the end of October 2025 and Schnepel is alleged to have been in breach from December 2023. Considering the matter and issues, I was satisfied that the matter should be entertained on an urgent basis.

Authority to institute proceedings

[30] Schnepel raised this issue in two parts – the authority of the applicant to institute the proceedings and the legal practitioner's authority to represent the applicant. I deal with both points below.

[31] With regard to the first part, the contention is that the applicant failed to furnish any material to show that the deponent to the affidavit is authorised to institute the proceedings in terms of section 66(1) of the Companies Act². This section provides that: 'The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.'

[32] Schnepel contends that no averment is made in the founding affidavit that the applicant's board of directors authorised the institution of these proceedings or that the institution is authorised by any provision of the Companies Act or its Memorandum of Incorporation. On this basis, so he argues, the application falls to be dismissed with costs.

[33] Regarding the second part, Schnepel contends that the applicant has failed to allege and prove in its founding affidavit that it is duly represented by a legal practitioner in these proceedings.

[34] For his contentions, Schnepel relied on the judgment of *Cullinan Holdings Ltd v Lezmin* 2768 CC³, where the Court held as follows:

² Act 71 of 2008.

³ [2016] ZAGPPHC 758 (26 August 2016).

'8. Henochsberg on the Companies Act 71 of 2008, vol 1 [issue 5] 253-257 deals with the topic of directors and legal proceedings involving companies. The learned author says:

The directors' powers under s 66 enable them to cause the company to participate in legal proceedings. For this purpose they must authorise the institution of the proceedings and the prosecution thereof ... They must also authorise one of their number or someone else (eg a manager or the secretary) to represent the company in such proceedings ... There must be evidence before the Court that the person purporting to represent the company has been authorised accordingly with regard to the particular proceedings ... While in motion proceedings the best evidence would be an affidavit by an officer of the company annexing a copy of the relevant resolution of the board, such evidence is not necessary in every case. Each case must be considered on its own merits and the Court must decide whether enough has been placed before it to warrant the conclusion that it is [the company] which is litigating and not some unauthorised person on its behalf (*Mall (Cape) (Pty) Ltd v Merino Kooperasie Bpk* 1957 (2) SA 347 (C) at 351 – 352).

9. In Ganes case supra at 624F-J the Supreme Court of Appeal held that it is irrelevant whether the deponent to an affidavit filed in support of an application on behalf of a company is authorised to depose to the affidavit. What is relevant is that it is 'the institution of the proceedings and the prosecution thereof that must be authorised.'⁴ (Own emphasis)

[35] In response, the applicant contends that Schnepel's point has been improperly raised. The applicant contends that Rule 7 of the Uniform Rules of Court is applicable in these proceedings and that Schnepel failed to invoke and follow the process therein. Rule 7(1) provides:

'7 Power of Attorney

Subject to the provisions of subrules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it

⁴ Ibid paras 8 – 9.

has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, where after such person may no longer act unless he satisfied the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.'

[36] Mr Nel, for the applicant, relied on the judgment of *Ganes and another v Telecom Namibia Ltd*⁵. There, the Supreme Court of Appeal held that:

'[19] There is no merit in the contention that Oosthuizen AJ erred in finding that the proceedings were duly authorised. In the founding affidavit filed on behalf of the respondent Hanke said that he was duly authorised to depose to the affidavit. In his answering affidavit the first appellant stated that he had no knowledge as to whether Hanke was duly authorised to depose to the founding affidavit on behalf of the respondent, that he did not admit that Hanke was so authorised and that he put the respondent to the proof thereof. In my view it is irrelevant whether Hanke had been authorised to depose to the founding affidavit. The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurz stated that he was a director of the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged by the appellants. It must, therefore, be accepted that the institution of the proceedings were duly authorised. In any event, rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided. (See *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705C-J.)'

⁵ 2004 (3) SA 615 (SCA) at para 9.

[37] Mr Myburgh, acting for Schnepel, relied on the decision of *Lancaster 101 (RF) (Pty) Ltd v Steinhoff International Holding N.V and others*⁶ (Lancaster) to advance the point that the applicant was required to provide proof of authorisation of the institution of the proceedings, in the form of a resolution.

[38] The question is whether the applicant has placed sufficient evidence and/or material to warrant a conclusion that it is indeed the applicant who is before Court and not some unauthorised person purporting to act on its behalf. The deponent to the founding affidavit, Stephen Williams (Williams) is the sole director of the applicant. He has attached a copy of the Companies and Intellectual Property Commission reports, which supports this allegation. He averred that he is duly authorised to depose to the affidavit. Having considered these averments, I am satisfied that Williams has placed sufficient material before this court to prove that the institution of the proceedings was authorised by the applicant. Schnepel's denial that Williams is the sole director is an overly technical point which does not deserve any further attention by this Court.

[39] The second point is whether the applicant's legal representatives, Jansen & Jansen Incorporated, are authorised to represent the applicant. This point should have been raised in terms of Rule 7 of the Uniform Rules of Court. It was not. On this basis alone, it falls to be dismissed. Even if I am wrong, Schnepel has not put facts to suggest that Jansen & Jansen Inc are not authorised to represent the applicant in these proceedings. Jansen & Jansen Inc have been on record from the inception of this matter when the applicant issued a letter of demand. The notice of motion states that the applicant appointed Jansen & Jansen Inc. in these proceedings. Williams has also averred that the legal contentions made in his affidavit are based on the advice from the applicant's legal representatives. Therefore, the point stands to be dismissed.

[40] The point in *limine* raised by Schnepel is a complete and unnecessary nuisance to the application. It is also a waste of the court's limited resources. Overly-technical

⁶ [2021] 4 All 810 (WCC).

and unnecessary points in *limine* must be punishable with a costs order. Accordingly, the first respondent's point in *limine* stands to be dismissed with costs, including the costs of counsel.

Applications to strike out

[41] Schnepel brought two applications to strike out. One against certain averments or matters in the founding affidavit and another against paragraph 39, its sub-paragraphs and annexures. These applications are opposed by the applicant.

[42] In his first application, Schnepel seeks to strike out paragraphs 15 to 38, 85, 86, 88, 99, 100, 114, 117 to 120, annexures M1 to the notice of motion and FA11 to the founding affidavit, the word 'hushed' at paragraph 100 and the heading '*the second respondent and its history of poaching the staff of the applicant*'. Lastly, Schnepel seeks to strike out paragraph 31 of the replying affidavit together with annexure SA1.

[43] Paragraphs 15 to 38 deal with the applicant's business and activities. Paragraphs 85, 86 and 99 deal with Schnepel's post termination of employment plan, paragraphs 88, 114, 117, 118, 119, 120, the word '*hushed*' in paragraph 100 and the heading '*the second respondent and its history of poaching the staff or the applicant*' deal with second respondent's history of 'poaching' the applicant's employees) and annexure FA11 is the mutual separation agreement. Paragraph 39 of the replying affidavit seeks to reply to Schnepel allegation that the applicant failed to prove that the second respondent is a competitor. Annexure SA1 is attached to seek to demonstrate that the second respondent is a competitor.

[44] Regarding the applicant's business and activities, Schnepel's complaint is that the applicant did not make out a case that it has a protectable interest. He contends that based on the averments in these paragraphs, '*a court will never grant any relief to protect the trade connections*'. He contends further that the allegations are vague and ambiguous and that if allowed, he stands to suffer prejudice in his opposition of the

application because he would '*not know if the POPI Act applies to the applicant's activity and method or not*'.

[45] Schnepel also complains about paragraphs 85, 86 and 99. These paragraphs deal with the facts around the time of the parties reaching a mutual separation agreement on 31 October 2023. The applicant alleged that Schnepel informed its attorney about his future employment plans and that he wanted a change. He was going to work in a different industry where he would be selling tyres. Further, the applicant pleads the facts relating to how it became aware that Schnepel was employed by the second respondent. Based on what Schnepel informed the applicant's attorney and the fact that Schnepel went to work for the second respondent, the applicant argued that Schnepel was untruthful about his future employment plans and that it cannot therefore rely on him to act honourably to not disclose the applicant's 'confidential information'.

[46] The next category is the 'poaching' history. Schnepel seeks the striking out of these paragraphs, words and phrases because *inter alia* the applicant omitted material to support the averments of poaching, that they are inadmissible, unsubstantiated and irrelevant and if allowed to stand, he would suffer prejudice because he would not know what material he had to answer to, that the court will understand the content of this material to mean that he participated in poaching and diminish his chances of success in the main application.

[47] Regarding the striking out of annexure FA11, which is the mutual separation agreement, Schnepel contends that this should be struck out to the extent that it shows that disciplinary action was going to be instituted against him. The applicant relied on this agreement to show that on his last day of work on 31 October 2023, Schnepel basically recommitted to the restraint of trade undertaking that was signed in January 2019.

[48] Schnepel contends that annexure SA1 and paragraph 39 of the replying affidavit constitute new material and this is against the trite legal principles. He therefore seeks that this be struck out.

[49] Applications for strike out are regulated by Rule 6(15) of the Uniform Rules of Court. This rule provides that:

‘The Court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The Court shall not grant the application unless it is satisfied that the applicant will be prejudiced in his case if it be not granted.’

[50] This is a two-stage enquiry.⁷ First, an applicant to strike out must show that the matters sought to be struck out are scandalous, vexatious or irrelevant. If the applicant fails to show that the matters are scandalous, vexatious or irrelevant, that is the end of the enquiry and the application fails. If, however, the applicant is able to show that the matters sought to be struck out are scandalous, vexatious or irrelevant, the court must be satisfied that the applicant would suffer prejudice if the matters are not struck out.

[51] I have great difficulties comprehending the motive for Schnepel’s applications. He seeks to strike out matters that relate to the business activities of the applicant, matters where he is able to plead and argue that the applicant failed to make out a case and matters that he is not contending that are irrelevant. He brought an application to strike out matters that he alleges are pleaded for the first time in the replying affidavit when he knows very well what the legal principles applicable are and the onus of proof.

[52] That the facts are pleaded vaguely or that the application is half-baked is not the test for strike out applications. If the applicant failed to make out a case in its founding papers, the respondent should plead accordingly and argue the point. The failure to make out a case is not a ground to apply to strike out the matters. Inexplicably,

⁷ See: *Beinash v Wixley* 1997 (3) SA 721 (SCA) at p733.

Schnepel brought a strike out application against annexure SA1 and paragraph 39 of the replying affidavit. He makes no allegation that the matters raised in the annexure and affidavit are irrelevant or scandalous or vexatious. He simply complains about the fact that he has no opportunity to respond to the allegations, which according to him are new. However, importantly, Schnepel, of course represented by a legal practitioner, fully appreciate the onus of proof, the legal principle relating to introduction of new evidence and how new matters or facts should be introduced. Regardless, he brought the application to strike out.

[53] The matters contained in the affidavits and the annexures are relevant to the application and to the relief sought by applicant. If they are relevant, the respondent cannot claim to be prejudiced by pleading thereto. Indeed, no prejudice can exist. Having considered the two applications, I am not persuaded that Schnepel made out a case.

[54] The applications are ill-advised and misdirected. They are an unnecessary nuisance, meritless and intended to avoid dealing with the substantive issues raised in the founding affidavit. Schnepel was in fact able to plead to and respond to the case set out in the applicant's founding affidavit. He was not prejudiced in any form.

[55] Schnepel cannot escape punishment for this conduct. This is not how litigations, particularly in this court, are conducted. The applicant incurred costs in opposition of these meritless and unnecessary applications. A costs order in these applications is in my view appropriate. In the premises, the applications to strike out fall to be dismissed with costs, including the costs of counsel.

Analysis: Main Application

[56] The legal principle on enforcement of restraint of trade agreements is trite. A party who seeks to enforce a restraint of trade agreement need only establish the existence of the agreement and prove that its terms have been breached. It is upon

proof of the restraint agreement and the breach thereof that the evidentiary burden shifts to the person resisting the enforcement of the restraint agreement to prove that the restraint agreement is unenforceable because it is unreasonable.⁸

[57] The judgment of *Basson v Chilwan*⁹ sets out the test to determine the reasonableness of a restraint agreement. First, is there an interest that is worthy of protection, second, is such interest being prejudiced by the other party, third, whether the interest weigh up qualitatively and quantitatively against the interest of the other party not to be economically inactive or unproductive and fourth, whether there is another facet of public policy that requires that the restraint agreement be maintained or rejected.

[58] In *casu*, the existence of the restraint of trade agreement is not in dispute. What is in dispute is the breach. Therefore, before this Court can consider the reasonableness test set out above in *Basson*, the first question is whether there has been a breach. To establish breach, the applicant has to show, *inter alia*, that Schnepel is engaged by a competitor. Schnepel contends that the applicant failed to establish that the second respondent is its competitor. If the second respondent is not the applicant's competitor, then that should be the end of the enquiry. If, however I find that the second respondent competes with the applicant, the next issue, is to consider whether there is any trade secret worthy of protection.

[59] The applicant describes its business and activities in some detail. It is established that it sells its products through the agreements with motor vehicle dealerships in terms of which information of a motor vehicle sale transaction and the buyer is provided to the applicant by the dealership in exchange for a fee paid on condition that the product is sold to the buyer. Once the product is sold, the applicant would then pay a fee to the

⁸ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A); *Basson v Chilwan* 1993 (3) SA 742 (A); *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at paras 10 and 16; *Experian South Africa (Pty) Ltd v Haynes* 2013 (1) SA 135 (GSJ), at para 14; *New Just Fun Group (Pty) Ltd v Turner and others* (2018) 39 ILJ 2721 (LC) at paras 9 and 10.

⁹ 1993 (3) SA 742 (A).

dealership in terms of the agreement. In addition, there are *ad hoc* referrals of motor vehicle sale transactions and buyer from other dealerships to the applicant.

[60] Who is the second respondent? This Court is informed that the second respondent is:

‘a private company with limited liability duly registered and incorporated in terms of the Laws of the Republic of South Africa with registration number 2002/001890/07 and with principal place of business at 1[...] B[...] Road, B[...], Gauteng.’

[61] The applicant contends that the second respondent is an insurance brokerage and its trade rival. It states that Schnepel became engaged by a competitor. Mr Nel, for the applicant, submitted that the second respondent sells short term motor vehicle insurance and is therefore a competitor.

[62] The applicant argued that second respondent’s email in December 2023 to the effect that Schnepel may sign another undertaking that he would not entice or engage or solicit the applicant’s clients or use information obtained whilst employed by the applicant to entice the applicant’s employees to take up employment with the second respondent, constitutes an admission that the second respondent is a competitor.

[63] Mr Myburgh referred to the subsequent email from the second respondent which disputed that Schnepel was in breach of the restraint agreement. He submitted that the applicant has not made out a case to establish that the second respondent is a competitor.

[64] Schnepel pleaded that in his current position as personal lines sales consultant with the second respondent, he is not involved with motor vehicle dealerships at all and had no contact with the motor vehicle dealerships. He also contended that the second respondent does not partake or compete in that market place.

[65] In its replying affidavit, the applicant attached the screenshots of the second respondent's websites to attempt to show that it is a competitor. The applicant makes an astounding allegation that Schnepel failed to prove that the second respondent is not a competitor. In my view, the onus is on the applicant that Schnepel breached the restraint agreement. That onus extends to proving that the new employer is a competitor. Therefore, the applicant misconceived the onus, and this is fatal to its case.

[66] The details of the second respondent are non-existent. This Court is therefore not in the know as to who the second respondent really is, except that it is an insurance brokerage and the applicant's rival. It was the applicant's duty to show that the second respondent is indeed a competitor, not to make an unsubstantiated allegation. There are no details before this Court *inter alia* to demonstrate how and where the second respondent competes with the applicant, the products they sell, the method used by the second respondent to sell these products and the list of motor vehicle dealerships they are both competing to get referrals, are not contained in the affidavits.

[67] Even if the material provided in reply was contained in the founding papers, it falls short of establishing that the second respondent is a competitor. There is no evidence that the second respondent works with dealerships, the names of the dealerships that the second respondent has relationships and/or agreements with. What is worse, the applicant has not even provided the list of dealerships that it has agreements with and those that it works with on an *ad hoc* basis. This Court does not know where the second respondent operates, the products it sells, how it sells them, and its clients.

[68] I am not persuaded that the applicant has established that the second respondent is a competitor. Consequently, the applicant failed to establish that Schnepel has breached the restraint of trade agreement. In light of this finding, the issue of reasonableness of enforcing the restraint of trade agreement does not arise. I do not need to address any further contentions in Schnepel's affidavit. The application stands to be dismissed.

Costs

[69] I have already awarded costs against the first respondent for raising what I consider to be overly-technical, meritless and unnecessary point and strike out applications.

[70] Both parties did not pursue costs of the application. Although this is a contractual claim where costs ordinarily follow the result, it is ultimately for this Court to decide whether or not to award costs. The applicant did not bring a frivolous claim before this Court. Inasmuch as the first respondent is a successful litigant in the main application and that he was mulcted with costs on the failed preliminary and interlocutory issues, it is my view, consistent with the parties' wishes, that there should be no costs order awarded.

[71] In the premises, the following order is made:

Order

1. The matter is heard as one of urgency.
2. The first respondent's point in *limine* is dismissed with costs, including the costs of counsel.
3. The first respondent's applications to strike out are dismissed with costs, including the costs of counsel.
4. The applicant's application is dismissed with no order as to costs.

M. Makhura

Judge of the Labour Court of South Africa

Appearances:

For the Applicant : Adv. E.J.J. Nel

Instructed by : Jansen & Jansen Inc.

For the First Respondent : Mr. A.S. Myburgh of Engelbrecht Attorneys

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