

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 091828/2024

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

9 September 2024

DATE

SIGNATURE

In the matter between:

**BIDVEST SERVICES (PTY) LTD T/A BIDVEST
STEINER**

Applicant

and

ROXANNE PROCTOR URWIN

First Respondent

WACO AFRICA (PTY) LTD

Second Respondent

This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 9 September 2024.

Key words: Contract — Covenants in restraint of trade and competition. — Enforceability — Protectable interest — Confidential information and trade connections — Sufficient if shown that there was confidential information or trade connections to which respondent had access and which could be exploited by new employer-In such circumstances ex-employer entitled to interdict.

JUDGMENT

Mudau, J:

- [1] This is an application pursuant to Rule 6 (12) (c) of the Uniform Rules in terms of which Bidvest Services (Proprietary) Limited t/a Bidvest Steiner ("Bidvest") seeks to enforce certain contractual restraint of trade, non-solicitation and confidentiality undertakings provided by Ms Roxanne Proctor-Urwin ("Ms Urwin") in favour of the applicant, on an urgent basis. The relief sought is final in effect. The applicant seeks to justify the enforcement of a restraint against Ms Urwin in terms of what is described as the Werksmans Agreement, alternatively, the Steiner Agreement on the grounds of the need to protect its trade connections which it alleges the first respondent is able to target for the benefit of the second respondent, Waco Africa (Proprietary) Limited ("Waco") in the Republic.
- [2] The application is opposed by Ms Urwin. The second respondent, Waco, filed a notice to oppose. Waco, however, failed to file an answering affidavit in support of its opposition and in essence abide to the decision of the court.
- [3] Ms Urwin disputes the urgency of the application contended for by the applicant, having regard thereto that the first respondent resigned from the employment with the applicant on 12 July 2024. The present application was launched more than a month later, on 15 August 2024, affording the first respondent seven Court days within which to answer. However, given the 12 months period of the restraint, I am satisfied that there is a clear case for urgency, which is commonly the approach in matters of this nature. In any event, it is not seriously challenged that the short duration of the restraint necessitates the application being one for final relief and attracting the evidentiary test set out in *Plascon Evans*. Accordingly, I can hardly find any discernible prejudice against Ms Urwin occasioned by the launch of this application.

- [4] The trite legal principles in matters of this nature are that an employer seeking to enforce a restraint agreement is required only to invoke it and call breach; whereas the employee seeking to avoid it must show unreasonableness by establishing, for example, that he had no access to confidential information, or never acquired any significant personal knowledge of or influence over the employer's customers'.¹ In order to succeed, an applicant does not need to demonstrate that the respondent is mala fides or will seek to solicit customers or impart confidential information in favour of a new employer. It is sufficient that the employment itself is in breach of the restraint, and falls to be interdicted.²
- [5] In determining whether a restraint is enforceable or not our Courts have regard to the fact that first, the interests of the public require that parties should comply with their contractual obligations even if they are unreasonable or unfair; second, it is generally accepted that it is in the interests of society that its members should be permitted to engage in commerce or their preferred professions.³ Courts have furthermore held that it would be contrary to public policy to fetter unreasonably or restrict a person's freedom to trade or to pursue a profession or trade.⁴
- [6] In issue regarding the merit in this this matter is first, the enforceability of the restraint undertakings provided by Ms Urwin in favour of the applicant. Second, the applicant asserts that it has protectable interest in the form of both confidential information and customer relationships. In this regard, Ms Urwin signed two restraint of trade undertakings in favour of the applicant. Ms Urwin denies that either restraint is valid, binding or enforceable.

Background facts

- [7] The background facts are largely common cause. Bidvest conducts business and pride itself as a leading corporate service-orientated business providing;

¹ See *Experian SA (Pty) Ltd v Haynes and Another* 2013 (1) SA 135 (GSJ) at [17] - [20].

² See also *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at [20] and *Dickinson Holdings (Group) (Pty) Ltd and Others v Du Plessis and Another* 2008 (4) SA 214 (N).

³ See *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 877I-898E; *Sunshine Records (Pty) Ltd v Frohling and Others* 1990 (4) SA 782 (A) at 794B-E.

⁴ See the *Magna Alloys* case *id* at 894C; the *Sunshine Records* case *id* at 794E.

inter alia, hygiene services, cleaning service, washroom and hygiene rental equipment, office consumables, deep cleaning and pest control services to a wide spectrum of businesses throughout South Africa and across all industries including government, mining, medical, recreational, hospitality and corporate facilities. Bidvest services over 35,600 customers across 37,250 sites monthly with 39 branches throughout South Africa in each of the nine Provinces. It has arranged its various businesses under separate but interrelated divisions, which are run autonomously by separate Chief Executive Officers. However, the divisions collaborate extensively and share information on an on-going basis, as they generally share customers.

- [8] Waco is a direct competitor of the applicant, also conducting business as a service provider of professional washroom hygiene services. Waco offers a comprehensive range of effective, durable and reliable hygiene products and services. These products include sanitisers, wipes, toilet tissue dispensers, sanitary bins, hand washing and hand drying components. The integrated solution provides daily cleaning, deep cleaning, pest control services, laundry services, specialised high-rise cleaning as well as washroom equipment, available on a monthly contract basis.

- [9] During or about February 2015, the applicant's predecessor-in-title (Steiner Hygiene (Proprietary) Limited) ("Steiner Hygiene") appointed Ms Urwin as an Area Consultant within the Sandton branch of Steiner Hygiene's sales department. During or about 2016, the transfer of the entire business of Steiner Hygiene to the applicant took place, including all employees. Accordingly, Ms Urwin's employment transferred to the applicant, and the terms of her employment continued to be governed by the 2015 letter of appointment together with the 2015 restraint and 2015 confidentiality agreement that Ms Urwin signed, in accordance with section 197 of the Labour Relations Act.⁵

- [10] In 2019, Ms Urwin was promoted to the role of New Business Consultant. On 13 January 2022, Ms Proctor-Urwin was promoted to the position of Regional

⁵ Act 66 Of 1995.

Sales Manager. Her final promotion was that of a National Business Development Manager at the applicant's Head Office; in terms of a written letter of appointment dated 6 October 2023. This was to be her last position with the applicant.

- [11] As part of her promotion to a new position, Ms Urwin was required to by the applicant to conclude a new letter of appointment ("annexure FA14") and furnish new restraint undertakings to the applicant, intended to supersede and replace the 2015 restraint. First, was a Restraint, Confidentiality and Non-Solicitation Agreement ("the Werksmans Agreement") marked FA5 dated 6 October 2023. Second, was restraint undertakings on a Steiner letterhead ("the Steiner Agreement") marked "FA4" signed by the applicant on 6 October 2023 that contains covenants in restraints of trade, confidentiality and non-solicitation provided in favour of the applicant.
- [12] Ms Urwin adopted the view, correctly, that the Werksmans Agreement relied upon by the applicant, is inchoate and invalid, and of no force or effect. The inchoate state of the Werksmans Agreement is glaring, more so because of the express recordal in bold type on the cover page thereof of the words "DRAFT-NOT FOR SIGNATURE". The inchoate state of the Werksmans Agreement as Ms Urwin points out, is evident from the incomplete state and the drafting notes appearing in the definitions of "Effective Date", "Employee" and "Employment Agreement" in clauses 1.2.6, 1.2.7 and 1.2.8 respectively, all of which are material terms of the proposed agreement.
- [13] Significantly, it is titled PERSONNEL ONLY RESTRAINT, CONFIDENTIALITY AN SOLICITATION AGREEMENT", which as Ms Urwin points out in her answering affidavit, does not accord with the description in the letter of appointment of the agreement which she was required to agree to, namely, a "Restraint of Trade Agreement", nor with the position of Business Development Manager in which she was employed for, as opposed to "sales personnel". It is common cause that, following her resignation from her position with the applicant and her request to the applicant to be provided with a copy of the

restraint agreement which the applicant contended she was bound by, the applicant provided her with a copy of the Steiner Agreement.

[14] As regards the Werksmans Agreement, Ms Urwin alleges that she is not bound thereby because she did not intend to sign any restraint over and above the Steiner Agreement. Although the applicant disputes this version, for purposes of the *Plascon Evans* test, the applicant urges this court, correctly, to accept that the Werksmans Agreement does not bind Ms Urwin. I deal with Steiner Agreement below.

[15] In relevant parts at paragraph 3, the Steiner Agreement reads as follows:

“ I shall not, during the course of my employment with the Company, and for a period (12) months after the termination of my employment with the Company for any reason whatsoever, be directly or indirectly engaged or employed in, or associated in any way whatsoever, with any business which is similar to any of the businesses of the Company in which I was engaged, either at the time of termination of my employment with the Company, or at any time during the twelve (12) month period preceding the termination of my employment”.

[16] During her employment with the applicant, she dealt with existing and prospective customers, and personally concluded or procured the conclusion of contracts for the applicant's hygiene business. In the founding affidavit, Bidvest stressed the type of information to which Ms Urwin was exposed, which include the terms of full access to all of the applicant's records and files; the applicant's entire database of customers for all of the applicant's divisions, including the pricing and discount terms for each customer, their location and cleaning requirements; and the applicant's records as regards the business that it lost over the past five years. This also includes, inter alia, details of the contents of the applicant's tender proposals; the applicant's confidential and proprietary information that Ms Urwin gained by participating in the preparation of tenders will be invaluable to a competitor, not to mention the specific products, and the margins at which they were supplied, which according to Bidvest is not public knowledge.

- [17] Bidvest contends that, Ms Urwin is in a position whether in a training position or otherwise, to use the applicant's confidential and proprietary information in both its Hygiene and Prestige divisions, as well as the strong connections with the applicant's customers she forged, preserved and maintained, to the benefit of Waco, thereby placing Waco in a position to unlawfully compete with the applicant.
- [18] There is no dispute that during her employment with the applicant, Ms Urwin was exposed to or came to know of a whole host of information which the applicant classifies as confidential. She resigned from her employment with Bidvest with effect from 12 August 2024 as previously indicated and has taken up employment as a "Training Sales Manager" with Waco. She also knew by virtue of her senior position at Head Office, which of those contracts were the most lucrative, and how they were priced.
- [19] Ms Urwin makes the point that she was not poached the second respondent, but decided to resign from her employment with the applicant and to seek alternative employment due to her employment with the applicant having become intolerable due to what she described as a hostile and toxic environment in which she found herself attributable to a range of factors, including hostility and animosity towards her by sales representatives with whom she was required to work.
- [20] According to Ms Urwin, she also experienced her immediate superior, Ms van Niekerk to be intimidating and increasingly confrontational. Consequently, she actively sought alternative employment, and was offered employment as a sales manager by Sanitech, whereafter she then submitted her letter of resignation. It is common cause that, following legal advice that the Waco could employ Ms Urwin provided it was not in a sales position, the first respondent was then offered the position as a Training Sales Manager in the Waco Training Academy.
- [21] Subsequently, what followed was the letter of demand addressed by the applicant's attorneys of record, Werksmans to Ms Urwin, and thereafter the

exchange of correspondence between Werksmans and her attorneys of record, Fluxmans, and ultimately, the issue of the present application.

- [22] Ms Urwin states that, as a Training Sales Manager for the Waco Training Academy, she will have no engagement or involvement with any customers or potential customers of the applicant and will not in any way compete with the applicant. On her version, she cannot utilise her customer connections because she is employed by the second respondent in a different capacity that does not require her to solicit customers. She also undertakes not to solicit the applicant's customers. She contends that, she poses no threat to any protectible proprietary interest of the applicant, the effect whereof is that even if there is a valid restraint undertaking, it is not in the circumstances enforceable against her.
- [23] In this matter, what the applicant must prove is a valid agreement containing the restraint clause and the fact that the respondents acted in conflict therewith. Clearly, the parties in this matter contractually determined the nature of the interests they intended to protect by the imposition of the restraints referred to above. There is no doubt that, to the extent that the issue of onus rested upon the applicant, I am satisfied that, Bidvest discharged such onus flowing from the Steiner Agreement and Ms Urwin thereupon attracted an onus to show that the enforcement of the restraint in question would be against the public interest and that it is unreasonable. I must point out that the first respondent does not seriously assail the enforceability of the restraint in issue on the basis that it is too widely framed. Neither as to area nor period of operation. The question whether an agreement in restraint of trade is against the interests of the public is a factual issue.⁶
- [24] Ms Urwin points out in her defence that, the contracts entered into by the applicant with its customers with whom the first respondent dealt are for a fixed 3-year period, with an automatic 12-month renewal period in the absence of notice not to renew. Additionally, she points out that the applicant states the

⁶ See *Sibex Engineering (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) at 485H.

position as follows in para 81 of the founding affidavit: "considering the close relationship between service provider their clients, it has proven to be very difficult for service providers to make inroads into already existing service relationships in order to acquire new customers".

- [25] Ms Urwin further contends and records that she cannot recall detail of specific pricing, discounts, margins, markups, details of tender proposals, details of contractual terms and other price sensitive information, given the vast number of customers of the applicant. In this regard the applicant itself concedes, significantly, that it is not possible for the first respondent to "have committed all that granular detail to memory" at paragraph 107 of the founding affidavit. The applicant submits importantly however, that Ms Urwin obtained detailed enough confidential information regarding the applicants' customers' requirements to be able to prepare competitive proposals for the benefit of Waco in any of its businesses that compete with the applicant.
- [26] It is well established as Ms Urwin contends, that a protectible interest in the form of customer connections does not come into being simply because the former employee had contact with the employer's customers in the course of their work. The connection between the former employee and the customer must be such that it will probably enable the former employee to induce the customer to follow him or her to a new business.⁷
- [27] Public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim *pacta servanda sunt*. Equally crucial is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or their preferred professions. This court is accordingly required to make a value judgment with these two primary considerations in mind in answer as to the reasonableness or otherwise of the restraint⁸. The principle that *pacta sunt servanda*, in particular where parties contract on a basis of equality, is generally accepted as an important part of our

⁷ See *Den Braven SA (Pty) Ltd v Pillay and Another* 2008 (6) SA 229 (D) at 236D-E; *Walter MacNaughtan (Pty) Ltd v Schwartz and Others* 2004 (3) SA 381 (C) at 390C-D.

⁸ *Reddy V Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at para 15.

law. The paramount importance of upholding the sanctity of contracts, without which all trade would be impossible, was again stressed by the then Appellate Division in *Sasfin (Pty) Ltd v Beukes*,⁹ in which Smalberger JA remarked that-

“the power to declare contracts contrary to public policy should be . . . exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power.”

[28] In *Basson v Chilwan and Others*,¹⁰ the Appellate Division remind us that, the parties' own views, as reflected in the agreement, as to what is reasonable can never be decisive because, the reasonableness of the restraint is judged only after consideration by a court based on factors which might not necessarily have been present to the minds of the parties. Also, because the content of the agreement cannot itself be the exclusive measure of what is reasonable because that would result in the propriety of the agreement being tested against itself. That the parties in concluding the agreement seriously considered such a restraint to be necessary, that they identified and evaluated the disputed interests and described the restraint itself as most reasonable cannot therefore be decisive but at most, a factor to be considered.

[29] In my judgment, the applicant is perfectly entitled to rely on the Steiner Agreement as it does in the alternative basis. It is trite that the law enjoins confidential information with protection¹¹. Ms Urwin's argument that her new position with the second respondent would not afford her access to customer connections and confidential information is unsustainable. As already pointed out, the first respondent was employed by the applicant at a senior level as a National Manager, a senior position within the applicant's overall business. In matters concerning restraint agreements, the seniority of the employee is an important consideration as pointed out in *Experian*¹² and the authorities referred therein.

⁹ 1989 (1) SA 1 (A) at p9B-C.

¹⁰ 1993 (3) SA 742 (A).

¹¹ See *Experian* above at para 19.

¹² At para 53.

- [30] The protectable interest of the applicant, the subject of this application from the Steiner Agreement in my view weigh up qualitatively or quantitatively against the interest of the first respondent being gainfully employed by the applicant's direct competitor. Knowledge of the applicant's customers' requirements is not in the public domain and would be extremely valuable to a competitor. Ms Urwin can use the information at her disposal to target or train her trainees to target those customers for the benefit of Waco, using the applicant's confidential and proprietary information and the personal customer connections that she has established, thereby competing unfairly and unlawfully with the applicant for Waco's benefit. The applicant has shown that it is entitled to final relief as sought as it has established a clear right consistent with the well-established principle that a court granting a final interdict, must be satisfied on three essential requisites: firstly, a clear right; secondly, an injury actually committed or reasonably apprehended, and, thirdly, the absence of any other satisfactory remedy ¹³. In this case, not only has Bidvest's clear right been demonstrated but also its breach. An undertaking to the contrary is insufficient.
- [31] In these circumstances, I am satisfied that the applicant has discharged its onus of proving the existence of the contract in restraint of trade, and that the first respondent is in breach of the contract in that she has taken up employment with a direct competitor of the applicant, in this case the second respondent. Bidvest has a real right not to be faced with unfair competition. The fear that the first respondent is likely to make use of confidential trade information to its disadvantage in her new role in trade competition with the second respondent is reasonably comprehended. the applicant is not obliged to accept Ms Urwin say-so that her position at Waco, which was undoubtedly designed to circumvent her restraint that it poses no risk to the applicant. In the circumstances, this court holds, accordingly, that the restraint is not unreasonable and therefore enforceable and not against public interest given the facts of this matter. The question of costs follows the result as against the first respondent only. The second respondent who did not participate in these proceedings, did not increase the costs in any substantial way.

¹³ see *Setlogelo v Setlogelo* 1914 AD 221.

[32] *Order*

- 32.1 The applicant's non-compliance with the ordinarily applicable provisions of the Uniform Rules of Court as regards service, filing and prescribed time periods is condoned in terms of Rule 6 (12) (c) of the Uniform Rules and that this matter is to be adjudicated as an urgent application as contemplated in the said rule;
- 32.2 The first respondent is interdicted and restrained until 12 August 2025, from-
- 32.2.1 being or becoming directly or indirectly employed by, engaged and/or associated with any business which is similar to and/or competes with the applicant in the area applicable to the aforesaid restraint, being each of the Provinces of the Republic of South Africa;
- 32.2.2 soliciting orders from, or doing any business with any employees, customers or suppliers of the applicant where such orders are in direct competition with any of the applicant's activities;
- 32.2.3 encouraging, inducing, or attempt to encourage and induce any employee of the applicant to terminate their employment with the applicant for any reason whatsoever; and
- 32.2.4 utilising or disclosing any information, intellectual property or trade secrets relating to the business of the applicant; and
- 32.2.5 that the first respondent, pay the applicant's costs of this application, together with the costs of senior counsel on the C Scale.


TP MUDAU
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, JOHANNESBURG

Date of Hearing:

3 September 2024

Date of Judgment:

9 September 2024

APPEARANCES

Counsel for the Applicant:
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