



REPUBLIC OF SOUTH AFRICA
THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Not reportable

Of interest to other judges

CASE NO: J 786/14

In the matter between:

NEW JUSTFUN GROUP (PTY) LTD

APPLICANT

and

TURNER, C

1ST RESPONDENT

KIDSII SOUTH AFRICA (PTY) LTD

2ND RESPONDENT

SHEBAB, C

3RD RESPONDENT

Heard: 9 May 2014

Judgment delivered: 14 May 2014

JUDGMENT

VAN NIEKERK J

- [1] The first respondent (Turner) was employed by the applicant until 30 April 2014. On 1 May 2014, she commenced employment with the second respondent. In this application, brought on an urgent basis, the applicant seeks by way of a final order to enforce restraint and confidentiality undertakings given by Turner in favour of the applicant.
- [2] On 23 April 2014, Tlhothalemaje AJ postponed the application to 9 May 2014 to enable the filing of further affidavits by Turner and the applicant. Specifically, Turner was granted leave to file a further affidavit and the applicant granted leave to file a 'supplementary reply' to the extent that it deems necessary. On the same date, the second respondent filed an affidavit stating that it would abide by the decision of the court. The filing of further affidavits was occasioned by new matter raised in reply - in particular, an averment relating to emails not previously referred to as to what the applicant contended to be confidential information, and a with prejudice tender by the applicant that dramatically reduced the scope of the relief sought.
- [3] The applicant is the sole distributor in South Africa of the Mattel brand of toys and family products, and has been since November 1999. Turner was employed in 2009 as a key account executive in the applicant's Just Baby division. During 2011, she was transferred to the applicant's toys division, which included the Mattel brand. The Fisher Price products and goods that are material to the present applicant were dealt with by the Just Baby division. In 2012, the applicant's operations were restructured. Mattel became a separate division, and the Just Baby division ceased to exist. The Fisher Price products and goods, which comprise mainly baby toys, continue to be dealt with in the Mattel division.
- [3] In the capacity of a key accounts executive, the applicant was required to manage the applicant's relationship with particular customer accounts. In her capacity as a key accounts executive, it is not disputed that Turner was required to participate in strategic account planning, monthly customer meetings, sales management meetings, showroom presentations, and marketing planning and implementation. These tasks were performed in

collaboration with the buyers of retailers, with whom the applicant does business. It is not disputed that the customers with whom Turner had dealings were Shoprite, Baby Boom, Baby City and Toy Kingdom.

- [4] The restraint agreement that is the subject of these proceedings was signed in June 2009. In terms of the agreement, the first respondent undertook in favour of the applicant not at any time during the restraint period *inter alia* to be employed by any entity in any of the prescribed areas in any competitive activity or any business which sells prescribed goods or competing goods, or which renders prescribed or competing services. The restraint period was defined to mean each of the 24 months immediately following the date of termination of employment, for any reason. The prescribed area was defined to mean each magisterial district in the Republic of South Africa, and a number of neighboring countries. 'Prescribed goods' and 'prescribed services' were respectively defined to include any goods dealt with by Just Baby at the termination date and any services rendered by the company as at that date. "Competitive activity" was defined to mean '*any activity pertaining to, connected with and/or relating to the bicycle industry or any activity similar thereto...*' The reference to the 'bicycle industry' and its relevance to the present proceedings have not been explained but, as I have indicated, 'competing goods' is defined to mean any goods sold in competition with the prescribed goods, the latter defined as '*any goods which are dealt in by the company Just Baby at the termination date in the ordinary course of business and includes but is not limited to Toys and accessories*'.
- [5] In addition to the restraint of trade, Turner agreed to certain confidentiality undertakings. When she resigned and indicated that she intended taking up employment with the second respondent, the first respondent gave an undertaking that she would have no dealings with the customers with whom she had established relationships while in the applicant's employ. On 20 March 2014, Turner signed a written undertaking, without prejudice to the applicant's rights under the restraint agreement, in terms of which she would not, for the remainder of her employment with the applicant, provide any

competitor of the company with information, or make contact with competitors or discuss with them the business or the customers of the applicant.

- [6] On 15 April 2014, Turner's attorney addressed a letter to the applicant's attorney in which Turner undertook for a period of 12 months and in respect of the customers Shoprite, Baby Boom, Baby City and Toy Kingdom, not to solicit orders from the customers, canvass business in respect of goods and services from the customers, render any services to any of the customers, encourage, entice, incite, persuade or induce any of the applicant's employees to terminate his or her employment, furnish any confidential information or advice to any of the applicant's employees calculated to result in the employee terminating his or her employment, or furnish any information or advice to any customer, or take any action designed to result in a customer terminating its association with the applicant or transferring its business away from the applicant. In her answering affidavit, Turner made clear that she understood that her undertaking extended to the utilisation, transfer and sharing of knowledge with the second respondent in so far as the applicant's Mattel division is concerned. Further, the applicant consented to having her undertaking made the subject of an order of court.
- [7] The applicant does not consider that the undertaking is sufficient, rejected it, and in reply made a counter-proposal on a with prejudice basis. In terms of the counter-proposal, the applicant proposed that the restraint period be reduced from 24 to eight months, and that the prescribed goods and services be limited respectively to those goods sold and services rendered under the Mattel and fisher price brands.

Applicable legal principles

- [8] There is no dispute as to the applicable principles. It is well-established that an agreement in restraint of trade is enforceable unless it is unreasonable, and will generally be considered unreasonable, and thus contrary to public policy, if it does not protect some legally recognisable interest of the party in whose favour the restraint is granted, but merely seeks to eliminate

competition (see *Automotive Tooling Systems (Pty) Ltd v Wilkens & others* 2007 (2) SA 271 (SCA), *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 406 (SCA), *Den Braven v Pillay & another* 2008 (6) SA 229 (D)).

- [9] A party seeking to enforce a contract in restraint of trade is required only to invoke the restraint and to prove a breach of its terms. Once a restraint agreement has been invoked and a breach of the agreement proved, the onus is on the respondent to prove on a balance of probabilities that the restraint agreement is unenforceable because it is unreasonable (see *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 (4) SA 874 (A)). In a matter such as the present, where a final order is sought, any disputes of fact stand to be resolved by the application of the *Plascon Evans* rule.
- [10] In *Basson v Chilwan* 1993 (2) SA 742 (A), the court held the determination of the reasonableness or otherwise of a restraint requires, in addition to the existence of an interest deserving of protection, a consideration of the following:
- (a) whether that interest is being prejudiced by the other party;
 - (b) if so, whether the interest weighs up qualitatively and quantitatively against the interest of the latter party that he or she should not be economically inactive and unproductive; and
 - (c) whether there are any considerations founded in public policy which require that the restraint should either be maintained or rejected (at 767 G-H).
- [11] Proprietary interests that are legitimately capable of protection by a restraint agreement extend both to confidential matters which are useful for the carrying on of the business and which could be used by a competitor, if disclosed, to gain a relative competitive advantage, and to relationships with customers, potential customers, suppliers and others that go to make up what is referred to as the 'trade connection' of the business. The second kind of proprietary interest capable of protection is that which comprises confidential matter useful for the carrying on of the business, and which could be used by a competitor, if disclosed, to gain a relative comparative advantage. These

are referred to as 'trade secrets' (see *Sibex Engineering Services (Pty) Ltd v Van Wyk* 1991 (2) SA 482 (T)).

- [12] Not every contact between an employee and the employer's customers constitutes or forms the basis of a protectable interest in the form of customer connection. The need of an employer to protect a trade connection arises where the employee has access to customers and is in a position to build up a particular relationship with the customer. It is sufficient for the applicant to show that the customer contacts exist and that they can be exploited by the former employee. In *Rawlins v Caravan Truck (Pty) Ltd* 1993 (1) SA 537 (A) at 541 C-D it was said that the need of an employer to protect its trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with the customers, and could easily induce the customers to follow him or her to a new business. Once that conclusion has been reached and it is demonstrated that the prospective new employer is a competitor of the applicant, the risk of harm to the applicant if its former employee would take up employment becomes apparent.
- [13] Whether confidential information is properly the subject of protection is a factual question. The respondent must establish that he or she had no access to that information or that he or she had never acquired any significant personal knowledge of, for instance, the applicant's customers while in the applicant's employ. All that an applicant need show is that there is secret information to which the respondent had access and which in theory the respondent could transmit to the new employer should he or she desire to do so. Where the ex-employer seeks to enforce against an ex-employee a protectable interest recorded in a restraint, the ex-employer does not have to show that the ex-employee has in fact utilised information confidential to it; it is sufficient to show that the ex-employee could do so. Indeed, the very purpose of a restraint agreement is that the applicant does not wish to have to rely on the bona fide's or lack of retained knowledge on the part of the respondent, of the confidential information.
- [14] In the present instance, it is not disputed that:

- (a) Turner signed the restraint agreement, incorporating those clauses which correspond with the relief sought in the notice of motion;
- (b) Turner resigned from the applicant's employ to take up employment in a similar position with the second respondent; and
- (c) The applicant and the second respondent are competitors, at least in so far as the applicant's Fisher Price brand and the second respondent's Bright Starts brands are concerned.

[15] It follows that in order for Turner to escape enforcement of the restraint, it is incumbent on her to establish that the restraint agreement is unreasonable. The applicant contends that it has a protectable interest both in relation to the risk to its customer connection and the risk of disclosure of confidential information, and in respect of the applicant's customer connections and its confidential information.

[16] I deal first with an objection to the applicant 'whittling away' of the scope of the restraint during the course of these proceedings. As I understood the submission, the applicant, having elected to enforce the full ambit of the restraint in its founding affidavit, is not entitled to make out a new case in reply for a pared down restraint. As I have indicated, the truncated relief sought (which was reflected in a draft order filed with the reply) seeks to limit the scope of the restraint, broadly speaking, to an eight month restraint in the Republic of South Africa, in respect of any entity selling goods or providing services in respect of the Mattel and fisher price brands in competition with the applicant. There are at least two reasons why the applicant ought not to be bound to its attempt to enforce the full ambit of the restraint. First, it is well-established that the court is entitled to enforce a restraint partially, by restricting the scope of its operation to reflect what is found to be reasonable (see *National Chemsearch (SA) (Pty) Ltd v Borrowman & another* 1979 (3) SA 1092 (T) at 1116D-G; *Den Braven SA (Pty) Ltd v Pillay & another* 2008 (6) SA 229 (D&CLD), at 263 A-C). The nature and extent of any partial restraint is a matter to be determined from the papers; I do not understand the applicable authorities to preclude an applicant from seeking a partial restraint only

because the applicant has sought in its founding affidavit to enforce the full ambit of the agreed restraint. In any event, the extent to which any restraint agreement ought to be pared down is ultimately the decision of the court, having regard to all of the facts and circumstances, to grant more limited relief than that initially sought. Secondly, the tender made by the applicant in its replying affidavit is one made in the spirit of compromise. At no stage did the applicant seek to waive its rights during the course of the engagement on the prospect of a mutually agreeable resolution of the dispute between the parties – the context of the agreement to the partial restraint was the tender made by Turner, and a counter proposal made by the applicant's attorney on 17 April 2014. The court should not be seen to reproach parties who express willingness to compromise, or who act on that willingness by tendering to accept less than what was originally sought.

[17] It is not in dispute that the second respondent is a competitor of the applicant, at least in the sense that the restraint defines 'prescribed goods' to include any goods dealt with by Just Baby, to include toys and accessories. The restraint in essence is against involvement, directly or indirectly, in any business which sells prescribed goods. It may well be, as Turner avers, that the second respondent's Bright Starts products are aimed at a lower end of the market (being cheaper than the fisher price products marketed by the applicant), and that the second respondent's current target market is the 0 to 36 month age group, but she concedes in her answering affidavit that the applicant and the second respondent compete in respect of 'certain products' in that category, which the Turner states to amount to approximately 20% of the Mattel division's business. It is however not disputed that the value of the applicant's fisher price business alone is some R43 million per annum, hardly an amount or interest that might be described as negligible. Once it is established that the second respondent is a competitor of the applicant the risk of harm to the applicant, if Turner were to take up employment, becomes apparent.

[18] In her capacity as a key accounts executive, as I have indicated, it is not disputed that Turner was required to participate in strategic account planning,

monthly customer meetings, sales management meetings, showroom presentations, and marketing planning and implementation. These tasks are performed in collaboration with the buyers of retailers, with whom the applicant does business. It is also not disputed that in the customers with whom Turner had dealings were Shoprite, Baby Boom, Baby City and Toy Kingdom. Much of Turner's time was spent in ensuring that a strong bond and relationship developed and was maintained between her and key persons at retailers of the applicant's products. Indeed, that was the very purpose of her employment. It is not unreasonable to assume that should Turner leave and take up employment with one of the applicant's competitors, she would be in a position to take advantage of these relationships for the benefit of the competitor.

- [19] Turner also became aware, during the course of her employment by the applicant, of confidential information in the form of pricing strategies, marketing strategies and strategic account plans, including customer plans. She is also aware of which products to source to meet the applicant's customer current and future requirements, the price at which products have to be sourced, the applicant's business challenges, product related problems, stock levels, the contact persons and decision maker of the applicant's major customers, the applicant and Mattel's marketing and advertising strategies and the like. Turner was also involved in the preparation and maintenance of a customer plan, is aware of the applicant's practices regarding catalogues, and was part of the applicant's participation in toy fairs at which customer plans and annual trade agreements are negotiated. Even if I were to exclude from consideration the new material introduced in the applicant's supplementary affidavit relating to "pull" or information used to ensure that customers are drawn to the applicant's products (referred to as the Mattel consumer-led strategy), and the applicant's concerns regarding undercutting (on the basis that the second respondent sells products priced below those in the fisher price range), it remains ultimately for Turner to establish that she had no access to confidential information and that she never acquired any significant personal knowledge of, or influence over, the applicant's customers while she was in the applicant's employ. In my view, she has failed to do so.

Implicit in Turner's version is that even though she was privy to confidential information, she has not and does not intend to use it.

- [20] The undertakings given by Turner and underwritten by the second respondent (effectively consenting to an order in terms of prayers 3 and 4 of the notice of motion with some minor modification, and an undertaking not to deal with the applicant's customers with whom Turner had dealt - specifically, Shoprite, Baby Boom, Baby City and Toy Kingdom) would ordinarily address any legitimate concern by the applicant, especially in relation to the confidentiality of information. However, my understanding of the relevant authorities is that once the applicant has shown that there is confidential information to which the applicant had access and which in theory Turner could transmit to the applicant should she desire to do so, then the applicant is entitled to the protection afforded by the restraint. The enforcement of a restraint, the purpose of which is to protect confidential information, cannot be defeated by an undertaking that the employee will not divulge the information if he or she is permitted, contrary to the restraint, to enter into employment with a competitor. *BHT Water Treatment (Pty) Ltd v Leslie* 1993 (1) SA 47 (W), at 57 J – 58B. This approach was recently affirmed in *Experian SA (Pty) Ltd v Haynes & another* (2013) 34 ILJ 529 (GSJ) and by the Labour Appeal Court in *Ball v Bambela Bolts (Pty) Ltd & another* (2013) 34 ILJ 2821 (LAC), where Coppin AJA noted that the fact that an employee had stated that she did not intend and did not use confidential information for the benefit of her new employer is irrelevant in determining whether a restraint is reasonable, or whether it has been breached (at paragraph [25] of the judgment). The purpose of a restraint agreement, as the court observed in *Reddy v Siemens Telecommunications (Pty) Ltd* (2007) 28 ILJ 317 (SCA), is to relieve the applicant of having to rely on Turner's *bona fides*. This is not to cast any aspersions on Turner's *bona fides* or those of the second respondent, but as the authorities make clear, the very purpose of a restraint agreement is to relieve the enforcing party from the obligation to police undertakings such as those given by Turner and the second respondent. In any event, Turner provides no undertaking that she will not be concerned with, or transfer information to, or assist a competitor like the second respondent who pursues

the same clients, once she is employed by it. The threat to the applicant's interests is further patent in the circumstances of the case. The second respondent has up until the present only had one employee, the third respondent, who is an ex-employee of the applicant.

[21] In so far as the respective interests of the applicant and Turner are concerned, Turner may be employed elsewhere for so long as she does not breach provisions of the restraint. (She was previously employed in the cosmetics industry.) As I have indicated, the applicant seeks enforcement only in the Republic of South Africa, the area in which the prescribed goods are sold. Both the applicant and the second respondent operate on a national basis and deal with large retailers who operate in the same area. The duration of the restraint sought is a period of 8 months from the date of the termination of Turner's employment, i.e. 31 December 2014. Finally, public policy requires ultimately that contracts be enforced. There is nothing in the papers before me to suggest that Turner signed the restraint involuntarily, or that she failed to appreciate its significance. In the absence of any considerations related to public policy that dictate otherwise, in my view, the restraint sought is reasonable and stands to be enforced.

[22] Section 162 of the LRA confers a broad discretion on the court to make orders for costs according to the requirements of the law and fairness. The Labour Appeal Court has recently affirmed (in *Ball v Bambela Bolts (Pty) Ltd & another*) that the rule ordinarily applicable in the civil courts to the effect that costs follow the result does not apply in this court. In the exercise of the discretion conferred by s 162, other factors must necessarily be taken into account. This would appear to apply even in a matter such as the present, where this court exercises a jurisdiction it enjoys concurrently with the High Court, and where its jurisdiction is founded in the contract of employment rather than unfair conduct on the part of a party to an employment relationship. In the present instance, Turner is an individual employee, who has not defended these proceedings out of ill-will or malice. Also relevant is the fact that Turner was prepared to provide undertakings which had the effect of narrowing the issues in dispute. There was a suggestion in the

papers that her efforts were being funded by the second respondent, but I cannot make any definitive finding in that regard. On balance, in my view, the requirements of the law and fairness dictate that there should be no order as to costs.

For these reasons, I make the following order:

1. The First Respondent is interdicted and restrained for a period commencing on the date of granting of this order until 31 December 2014 (being the restraint period) whether as proprietor, partner, director, shareholder, member, employee, consultant, contractor, financier, agent, representative, assistant, trustee or beneficiary of a trust or otherwise and whether for reward or not, directly or indirectly, from carrying on or being interested or engaged in or concerned with or employed by any company, closed corporation, firm undertaking or concern including but not limited to, the Second Respondent, within the Republic of South Africa, which directly or indirectly, is or are engaged in any competitive activity or engaged in any business which sells any goods sold by the Applicant under the "Mattel" and "fisher price" brands (being the prescribed goods) or renders any services in respect of the Mattel and fisher price brands (being the prescribed services) or competing services (being any service rendered in competition with the prescribed services or in the course of which prescribed goods or competing goods (being any goods sold in competition with the prescribed goods) are sold or prescribed services or competing services are rendered in the Republic of South Africa in competition with the Applicant.
2. The First Respondent is interdicted and restrained during the restraint period whether directly or indirectly, as herself or as proprietor, partner, director, shareholder, member, employee, consultant, contractor, financier, agent, representative, assistant, trustee or otherwise, in any part of the Republic of South Africa and in competition with the Applicant, whether for reward or not, from:-

- 2.1. soliciting orders from prescribed customers (being any person who was a customer of the Applicant's business in respect of its "Mattel" and "fisher-price" brands at the termination date ; or who was prospective customer of the Applicant's business in respect of its "Mattel" and "fisher-price" brands at the termination date as defined herein whom the First Respondent had approached to do business with the Applicant; or who purchased prescribed goods from the Applicant at any time preceding the termination date; or to whom prescribed services were rendered by the company at any time preceding 30 April 2014 (being the termination date), for prescribed goods or competing goods and/or for prescribed services or competing services;
- 2.2. canvassing business in respect of prescribed goods or competing goods and/ or prescribed services or competing services;
- 2.3. selling or otherwise supplying prescribed goods or competing goods to a prescribed customer;
- 2.4 rendering any prescribed services or competing services to a prescribed customer;
- 2.5. purchasing any prescribed goods or competing goods from any prescribed supplier (being any person who is or was a supplier of prescribed goods and/or prescribed services, or is or was a supplier of prescribed goods and/or services as at the termination date whom the First Respondent approached to do business within a period of 1 (one) year preceding the termination date; or supplied goods and services to the Applicant within a period of 1 (one) year preceding the termination date) in respect of prescribed goods and/or prescribed services;

- 2.6. soliciting appointment as a distributor, licensee, agent or representative of any prescribed supplier in respect of any prescribed goods or services.
3. The First Respondent is interdicted and restrained during the restraint period, whether directly or indirectly, for reward or not, from:-
 - 3.1. encouraging, enticing, inciting, persuading or inducing any other employee of the Applicant, who was in the Applicant employ whilst the first Respondent was in the Applicant's employ, and who was or is engaged or participates in the sale or other marketing by the Applicant of the prescribed goods, or in any material respect in the rendering or in the marketing of the prescribed services, to terminate his or her employment by the Applicant; and/or
 - 3.2. furnishing any information or advice to any employee of Applicant or to any prospective employer of any such employee or use any other means which are directly or indirectly designed, or in the ordinary course of events calculated, to result in any such employee terminating his employment by the Applicant and/or becoming employed by or directly or indirectly in any way interested in any or associated with any other company, close corporation, firm, undertaking or concern;
 - 3.3. furnishing any information or advice (whether oral or written) to any prescribed customer, or using any other means, or taking any other action which is directly or indirectly designed, in the ordinary course of events calculated, to result in any such prescribed customer terminating his association with the Applicant and/or transferring his business to or purchasing any prescribed goods or competing goods or accepting the rendering of prescribed services or competing services from any person other than the Applicant, or attempting to do so.
4. There is no order as to costs.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Appearances

For the applicant: Adv. F Strydom, instructed by Stewart-Garden Attorneys

For the first respondent: Adv. C Whitcutt SC, instructed by Norton Rose Fulbright