



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J1149/15

VOX TELECOMMUNICATIONS (PTY) LTD

Applicant

and

MURRAY STEYN

First Respondent

INTERNET SOLUTIONS (PTY) LTD

Second Respondent

Heard: 5 August 2015

Delivered: 4 September 2015

Summary: Application to enforce restraint of trade – application dismissed

JUDGMENT

MYBURGH, AJ

Introduction

[1] This is an application to enforce restraint of trade and confidentiality undertakings contained in a contract of employment.

- [2] The applicant (Vox) is a telecommunications operator providing voice, data and collaboration services both in the wholesale and retail market. The second respondent (IS) is also a telecommunications operator, and is both a direct competitor of Vox and one of its key suppliers. IS supplies Vox with, *inter alia*, wholesale Internet bandwidth and uncapped ADSL services. The NTT group of companies owns IS and its parent company, Dimension Data.
- [3] Before his resignation (addressed below), the first respondent (Steyn) had worked for the Vox group for some 14 years and had risen through the ranks, finally occupying the position of executive head: communication solutions, but simultaneously performed the role of executive: commercial and regulatory (a position he had previously held for some time). Steyn held a senior strategic executive position and was a member of Vox's executive management committee.
- [4] With effect from 30 June 2015, Steyn resigned from Vox and then took up employment (with effect from 1 July 2015) with IS as executive: wholesale business. This precipitated the present application, which is opposed by Steyn, with IS having undertaken to abide the decision of the court.
- [5] Although the relief sought by Vox is wide-ranging, it essentially seeks an order that Steyn be interdicted and restrained from being employed by IS (or its holding company or a subsidiary company) for a period of 12 months commencing on 1 July 2015 throughout the RSA. Vox seeks such relief against a tender to pay Steyn his monthly remuneration as at the time of his resignation for a period of 12 months, or for such shorter period that he is unemployed.
- [6] The papers in this matter are voluminous, and include a confidential affidavit delivered by Vox and a fourth set of affidavits delivered by Steyn. Both parties also filed comprehensive heads of argument. In what follows, in determining the various preliminary points and issues on the merits, I endeavour to focus on what I consider to be the essence thereof.

The issue of urgency

- [7] Steyn contests urgency and contends that insofar as the matter is urgent, it was self-created by Vox. Essentially, Steyn relies on the fact that whereas he tendered his resignation on 29 May 2015 (on a month's notice) and advised Vox on that day that he intended joining IS, this application was only launched on 23 June 2015, and that he was only afforded (in terms of the notice of motion) some two days to deliver an answering affidavit. Steyn also contends that by the time the matter was heard on 5 August 2015, the proverbial horse had bolted, in that he had already been in the employ of IS for a month.
- [8] In assessing the issue of urgency, the following aspects of the chronology of events warrant highlighting.
- a) During the period 29 May 2015 to 8 June 2015, Vox's CEO and then the chairman of its remuneration committee engaged in talks with Steyn with a view to securing the retention of his services.
 - b) On 9 June 2015, and when the talks proved unsuccessful, Vox's attorneys addressed a letter to Steyn in which a series of undertakings were sought. Steyn's attorneys replied on 17 June 2015, and provided only limited undertakings.
 - c) This application was then launched on 23 June 2015 (the papers having been emailed to Steyn's attorneys the previous day) and set down for 30 June 2015 (this being the last day of Steyn's notice period).
 - d) On the morning of 30 June 2015, Steyn delivered his answering affidavit, with the result that the matter could not proceed. At the hearing of the matter that day, an order was granted, *inter alia*, postponing the matter to 9 July 2015, and directing Vox to deliver its replying affidavit by 6 July 2015. Costs were costs in the cause.

- e) The replying affidavit was, however, only filed on 8 July 2015.
- f) On 9 July 2015, at the hearing of the matter, Vox sought a postponement in order to finalise a confidential affidavit (that was to accompany the replying affidavit), which it undertook to deliver by 09h00 on 13 July 2015. An order was granted to this effect, with the matter being postponed to 30 July 2015, and Steyn being awarded his costs of the postponement.
- g) On 13 July 2015, Vox's confidential affidavit was delivered two hours late.
- h) On 29 and 30 July 2015, respectively, Steyn delivered a supplementary affidavit and a reply to Vox's confidential affidavit.
- i) On 30 July 2015, the matter was postponed to 5 August 2015, with costs being reserved.
- j) The matter was then finally heard on 5 August 2015, by which time Steyn had been in the employ of IS for more than a month (having taken up such employment on 1 July 2015).

[9] With reference to the above, I am of the view that Vox was not dilatory in launching the application, and that it was reasonable to only do so after receipt of the letter from Steyn's attorneys of 17 June 2015. Although Steyn was given a short period of time within which to deliver his answering affidavit (two days), he ultimately took a week to do so, and was thereupon afforded a significant period of time within which to deliver his supplementary affidavit and reply to Vox's confidential affidavit, which is indicative of him not having been prejudiced by the truncated time-periods.

[10] Regarding the 'horse has bolted' contention, the fact that the hearing was delayed after 30 June 2015 was as a consequence of the fact that it was necessary to exchange further affidavits in order for the matter to be fully

ventilated. It is also not unusual in labour law litigation for matters to be heard on the urgent roll despite the effective date having come and gone (for example, this often occurs in section 197 applications). Consistent with this, this court has entertained urgent restraint of trade applications brought at a time when a significant portion of the restraint period had already elapsed.¹

- [11] As has previously been found by this court, an alleged breach of a restraint of trade is by its very nature urgent.² Quite clearly, this is not a matter that is suited to being heard on the opposed motion roll in the ordinary course, with the earliest available date apparently being in April 2016. By then the restraint of trade sought by Vox will all but have run its course. In all the circumstances, I am satisfied that Vox has made out a case for urgency.

Other preliminary issues

Steyn's points in limine

- [12] Steyn raises two points *in limine*: firstly, that the founding affidavit had not been commissioned; and, secondly, that Vox does not have *locus standi* to bring this application.
- [13] Regarding the first point, a very unusual situation arose in this matter. Instead of commissioning the founding affidavit in the ordinary course, the commissioner of oaths used the incorrect stamp, certifying that each page was "a true reproduction / copy of the original". While it is so that the founding affidavit was thus not commissioned, the deponent attested to the truth of the contents under oath in the replying affidavit. The issue was also subsequently rectified, with the founding affidavit having been properly commissioned and tendered for inspection at the hearing on 5 August 2015. As I understand it,

¹ See, for example, *ARB Electrical Wholesalers (Pty) Ltd v Grove and Others* (C335/14) [2014] ZALCCT 31 (3 June 2014) at para 20.

² *ARB Electrical (supra)* at para 20; *Pinnacle Technology Shared Management Services (Pty) Ltd and Another v Venter and Another* (J1095/15) [2015] ZALCJHB 199 (14 July 2015) at para 6.

Ms Wood (who together with Ms Bosman appeared for Steyn) persisted with the point only insofar as it has a bearing on costs.

- [14] Regarding the second point, it arises from the fact that the contract of employment (containing the restraint of trade and confidentiality undertakings in question) relied upon by Vox was concluded between Steyn and Vox Telekom Ltd, a different entity to the applicant herein. To my mind, there is no merit in the point because it is common cause that, in 2013, Vox Telekom Ltd sold its business to the applicant as a going concern, which attracted the operation of section 197 of the LRA. Steyn's contract of employment thus transferred from Vox Telekom Ltd to the applicant (referred to herein as Vox), with it being entitled to enforce the provisions of the contract and thus having *locus standi*. Insofar as Steyn's complaint is that this ought to have been dealt with in the founding affidavit and not in reply (in response to the point *in limine*), no prejudice was suffered as a result.

Steyn's opposition to the confidential affidavit (and replying affidavit)

- [15] As appears from the chronology of events set out in para 8 above, the confidential affidavit delivered by Vox was, in effect, the confidential part of its replying affidavit. It was provided to Steyn upon him furnishing various undertakings relating to maintaining the confidentiality of the information contained therein.
- [16] Steyn objects to the introduction of the confidential affidavit on two grounds: firstly, that no application had been made for it to be admitted into evidence; and, secondly, that it (and the replying affidavit) contains new matter that ought to have been contained in the founding affidavit, with the result that the offending portions ought to be struck out.
- [17] Regarding the first point, it is without merit because leave to deliver a confidential affidavit was sought from this court in Vox's replying affidavit. A prayer for the admission of the confidential affidavit is also contained in Vox's

application for condonation for the late filing of its replying affidavit and confidential affidavit.

[18] Regarding the second point, although it is so that the confidential affidavit (and the replying affidavit) contains new matter, the issue must be placed in context. As dealt with in the section below on the legal principles applicable to restraints of trade, while Vox has the onus to invoke the restraint and prove a breach thereof, the onus then shifts to Steyn to establish that the restraint is unenforceable because it is unreasonable. In these circumstances, as submitted by Mr Whitcutt SC (who appeared for Vox together with Mr Makka), Vox's replying affidavit (and confidential affidavit) constitute, in effect, an answer to Steyn's case that the restraint is unenforceable (as opposed to a new case in reply). In *Townsend Productions (Pty) Ltd v Leech and others* 2001 (4) SA 33 (C) at 41A-D, the High Court sanctioned the very approach adopted by Vox. While Spilg J adopted a different approach in the unreported judgment³ relied upon by Ms Wood, I prefer the approach adopted in *Townsend Productions*.

[19] There is an additional reason why Vox may be entitled to some latitude when it comes to the scope of its replying / confidential affidavit. This is because its founding papers were premised on Steyn taking up employment with IS as the head of wholesale voice services only, whereas it appears from Steyn's answering affidavit that he has been appointed to head up the entire wholesale operation at IS, and not merely voice services. According to Vox, this required it to recalibrate its case in reply.

[20] Furthermore, Steyn has not suffered any demonstrable prejudice by the introduction of the confidential affidavit – this in circumstances where he has delivered a comprehensive reply thereto.

[21] In the premises, the confidential affidavit is admitted into evidence, and the application to strike out is dismissed.

³ *Interpark (South Africa) Ltd v Andre Joubert & Really Useful Parking Company (Pty) Ltd t/a Easipark* (unreported SGHC judgment, case no. 09/29946, dated 29/3/2010) at para 59.

The applications for condonation

[22] This then leaves for determination a number of applications for condonation. As appears from the chronology of events set out in para 8 above, Vox delivered its replying affidavit late (by two days) and its confidential affidavit late (by two hours). Having perused Vox's applications for condonation, I am of the view that a proper case for the grant of condonation has been made out, with the result that condonation is granted.

[23] The unopposed application by Steyn for the late delivery of his answering affidavit is also granted.

Restraints of trade: legal principles

[24] Before dealing with the merits of the application, this is a convenient point at which to deal with the legal principles applicable to restraints of trade. They have been set out in some detail in a number of decisions of this court,⁴ and are summarised below with reference thereto.

[25] An agreement in restraint of trade is enforceable, unless it is unreasonable (and thus contrary to public policy). A restraint of trade will generally be considered unreasonable if it does not protect some legally recognisable interest of the party in whose favour it is granted, but merely seeks to eliminate competition.⁵

[26] A party seeking to enforce a restraint agreement is required only to invoke the restraint and to prove a breach of its terms (this being Vox's onus). Once this has been done, the onus is on the respondent to prove on a balance of

⁴ See, for example, *New Justfun Group (Pty) Ltd v Turner and Others* (J786/14) [2014] ZALCJHB 177 (14 May 2014); *ARB Electrical (supra)*; *Shoprite Checkers (Pty) Ltd v Jordaan & another* (2013) 34 ILJ 2105 (LC).

⁵ *New Justfun Group (supra)* at para 8; *ARB Electrical (supra)* at para 25.

probabilities that the restraint agreement is unenforceable because it is unreasonable (this being Steyn's onus).⁶

[27] The enquiry into the reasonableness of a restraint is a value judgment that involves a consideration of two policy considerations, namely the public interest, which requires that parties to a contract must comply with their contractual obligations, and the principle that a citizen should be free to engage or follow a trade, occupation or profession of his or her choice.⁷

[28] In *Basson v Chilwan* 1993 (3) SA 742 (A) at 767C-H, the court set the following test for determining the reasonableness or otherwise of a restraint agreement:

- a) Is there an interest of the one party (in this case Vox), which is deserving of protection at the termination of the agreement?
- b) Is such an interest being prejudiced by the other party (in this case Steyn)?
- c) If so, does such an interest so weigh up qualitatively and quantitatively against the interest of the latter party that the latter (Steyn) should not be economically inactive and unproductive?
- d) Is there another facet of public policy having nothing to do with the relationship between the parties which requires that the restraint should either be maintained or rejected?

Insofar as the interest in (c) exceeds the interest in (a), the restraint would be unreasonable and accordingly unenforceable.⁸

⁶ *New Justfun Group (supra)* at para 9; *ARB Electrical (supra)* at para 26.

⁷ *Ball v Bambalela Bolts (Pty) Ltd and another* [2013] 9 BLLR 843 (LAC) at para 15.

⁸ *New Justfun Group (supra)* at para 10; *ARB Electrical (supra)* at para 27; *Shoprite (supra)* at para 23; *Ball (supra)* at para 16.

- [29] A further consideration should be added, namely whether the restraint is wider than what is necessary to protect the protectable interest.⁹
- [30] The proprietary interests (see the first consideration in *Basson (supra)*) that can be protected by a restraint agreement are essentially of two kinds. The first is all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to it, to gain a relative advantage. This is sometimes referred to as “trade secrets”. The second is the relationships with customers, potential customers, suppliers and others that go to make up what is referred to as the “trade connection” of the business.¹⁰
- [31] Whether information constitutes a trade secret is a factual question. For information to be confidential, it must be: capable of application in the trade or industry (i.e. it must be useful and not be public knowledge); known only to a restricted number of people or a closed circle; and of economic value to the person seeking to protect it.¹¹ It is for the respondent to 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 example, the applicant’s customer basis while in its employ. All that the 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 if he or she was inclined to do so. In order to enforce the restraint, the applicant does not have to show that the respondent has in fact utilised information confidential to it; it is sufficient to show that the respondent could do so.¹²
- [32] 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 of confidential knowledge on the part of the respondent.¹³ Put differently, the

⁹ *Shoprite (supra)* at para 24.

¹⁰ *New Justfun Group (supra)* at para 11; *ARB Electrical (supra)* at para 28.

¹¹ *Townsend Productions (supra)* at 53J-54B.

¹² *New Justfun Group (supra)* at para 13.

¹³ *New Justfun Group (supra)* at para 13.

applicant should not have to content itself with crossing its fingers and hoping that the former employee will not breach the restraint.¹⁴ It is for this reason that an application to enforce a restraint of trade is not necessarily defeated by the respondent giving an undertaking that he or she will not disseminate or utilise confidential information.¹⁵

- [33] Regarding customer connections, the need of the 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 a customer so that when he or she leaves the employer's service he or she could easily induce the customer to follow him or her to a new business. Once that conclusion is 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.¹⁶
- [34] Although restraints of trade typically afford protection against employees joining competitors, as Mr Whitcutt submitted, there exists no reason why a supplier restraint should not be recognised. The rationale for enforcing restraints depends first and foremost on the protection to the business afforded by the restraint, rather than focussing necessarily on whom the protection operates against. Thus, there can be restraints against poaching employees rather than only against soliciting customers, and either of those two can be enforced against someone who is nonetheless permitted to take up employment with a competitor. Similarly, a restraint against disclosure of confidential information is not confined to disclosure to a competitor, but must operate to protect against disclosure to any party which can utilise that knowledge to the prejudice of the goodwill of the business in favour of which the restraint has been obtained.

¹⁴ *ARB Electrical (supra)* at para 30.

¹⁵ *New Justfun Group (supra)* at para 20.

¹⁶ *New Justfun Group (supra)* at para 12; *ARB Electrical (supra)* at para 29.

- [35] The purpose of a restraint of trade undertaking is to protect the goodwill of a business, with goodwill including connections with suppliers. In this regard, Neethling says this about goodwill:¹⁷

“Similarly, goodwill is a unit in its emanations to potential customers, suppliers, credit granters and employees. This is proven by the continuous interaction of these emanations. The stronger the attracting power of the goodwill towards suppliers, the more favourable the conditions of the supply of stock.” (Emphasis added.)

- [36] As Mr Whitcutt went on to submit, if a company’s goodwill requires protection by way of a supplier restraint, then in principle there is nothing less enforceable about such a restraint as compared to an employee restraint against soliciting customers or employees or joining a competitor. The rationale for the restraint remains the same: the protection of the company’s proprietary interests.

- [37] While I am in agreement with these submissions, it seems to me that a supplier restraint would typically be motivated by the ex-employer’s desire to ensure that the employee joining the supplier did not share with it confidential information that might cause the supplier to change the terms of supply or otherwise treat it differently. By comparison, the motivation is much narrower than that which applies to a competitor restraint.

The merits of the application

The contractual provisions and their interpretation

- [38] Vox relies particularly on clauses 17 and 18 of Steyn’s contract of employment concluded on 12 December 2007 (“the contract”). Clause 17 (headed “trade secrets”) essentially provides that the employee will during the course of his employment acquire knowledge of the company’s trade secrets

¹⁷ Van Heerden & Neethling *Unlawful Competition* (2nd ed) at 102.

(which are listed¹⁸) and records an undertaking by the employee not to disclose any trade secrets (so as to protect the proprietary interests of the company therein) during or after his employment with the company.

[39] This then brings one to the critical clause 18 (headed “restraint”). It reads in full as follows (the quotation is verbatim):

- “a. In order to protect the proprietary interests of the Company as stated in clause 17 of this Agreement, the Employee undertakes to the Company that he shall not during this agreement and for a period of 2 (two) years after the termination of this Agreement for any reason whatever, be directly or indirectly
- i. approach any customer of the group (which is defined as any customer indicated on the debtors list which has been active during the six months prior to your termination) for the purposes of conducting a similar or competitive business to the group’s business with such customers;
 - ii. approach any prospective customer or leads which are being contacted by the group at the time of termination of your employment or have been contacted during the 6 months prior to the termination of your employment, for the purposes of conducting competitive business with such customer or lead;
 - iii. take up employment with any customer of the group, whether such employment is in the capacity of employee, director, consultant, agent or any other capacity whatsoever;
 - iv. take up employment with any supplier of the group (defined as any business with whom the group has business dealings for the supply of the items outlined herein during the six months prior to your

¹⁸ They include all internal controls, financial details of the company's relationship with its suppliers and customers, knowledge of and influence over the company's customers, details of the company's financial structure and operating results, buying policies and strategies, salary and wage policy, recruitment and employment policy, details of the company policy relating to expansion and marketing, and other matters relating to the business of the company, in respect of which information is not readily available in the ordinary course of business to a competitor of the company.

termination), unless you are given specific written agreement to same by the Managing Director or other senior authorised manager;

- v. either for yourself or as an agent for anyone else persuade or procure any employee of the group who has been or is employed at any time during the restraint period in the sale, installation and service of the products in the Republic by the group, to end his employment and be employed, or be directly or indirectly interested or concerned (whether financially or otherwise) in any way in such a competitive business;
- vi. carried on within the Republic of South Africa; and
- vii. which competes with any business conducted by the Company at the termination date of this Agreement ('the competitive business').

- b. The Employee acknowledges –
- c. the restraint imposed upon him in terms of 17.a is reasonable as to subject matter, area and duration, and is reasonably required by the Company to protect and maintain the goodwill of the Company's business;
- d. the provisions of 17.a shall be construed as imposing a separate and independent restraint in respect of –
- e. each of the years falling within the period referred to in 17.a, and
- f. every locality falling within the area; and
- g. every activity falling within the ambit of a competitive business; and
- h. every capacity, in relation to a competitive business, in which the Employee is prohibited from acting in terms of 17.a;
- i. The provisions of clause 17.a shall not be construed as prohibiting the Employee from
 - i. acting as a director, officer or employee of, or consultant to the Company, whether in terms of a written Service Agreement or not;

- ii. acquiring or holding not more than 5% (five percent) of the issued ordinary shares in any Company which is for the time being listed on any recognised stock exchange, even if such Company carries on any competitive business, provided that nothing herein shall permit the Employee to be directly or indirectly involved or engaged or concerned or interested in the affairs and management of such Company;
- iii. if any of these provisions is wholly or partly invalid or unenforceable, the remaining provisions will continue to be enforceable.” (Emphasis added.)

[40] As a reading of clause 18 reveals, several parts of it are literally incomprehensible. While sub-clause (a)(iv) provides that Steyn is restrained from taking up employment with a supplier of the group (see further below), sub-clauses (a)(vi) and (vii) make no sense whatsoever, and do not provide for Steyn being restrained from taking up employment with a competitor (which I refer to as “a competitor restraint”).

[41] In its founding affidavit, Vox sought to address this problem by pleading that it is an implied term of the contract that the words “Steyn is restrained from taking up employment with a company (like the second respondent)” appear before the word “competes” in clause 18(a)(vii). There is no merit in this, and it was not a line pursued by Mr Whitcutt in argument. An implied term is imported into a written contract as a matter of law, and is part of the *naturalia* of the contract. An implied term arises out of the common law, statute or so called “trade usage” and is “used to describe an unexpressed provision of the contract which the law imports therein, generally as a matter of course, without reference to the actual intention of the parties”.¹⁹ The term that Vox seeks to imply into the contract simply does not constitute an implied term.

[42] Not pursued by Vox was the option of pleading that a competitor restraint was a tacit term of the contract, or the option of pursuing the rectification of the contract. Mr Whitcutt did, however, submit in argument that the words

¹⁹ *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531.

mentioned above should, in effect, be read into clause 18(a)(vii) so as to give the clause business efficacy. But to my mind, this would involve the court effectively creating a contract for the parties (i.e. a competitor restraint) which it is not empowered to do. In the result, I conclude that while clause 18 of the contract serves to restrain Steyn from joining a supplier of Vox, it does not restrain him from joining a competitor.

- [43] There is another issue of interpretation that can conveniently be dealt with at this point. It relates to the scope of the term “supplier of the group” in clause 18(a)(iv). Does it mean that in order for employment with the supplier to be prohibited, the supplier must supply the entire group or would a supply contract with a company within the group suffice? To my mind, the use of the word “group” was intended to cast the net wider (in the sense of covering any and all suppliers to group companies) and not narrower (in the sense of limiting the restraint to only those suppliers who happen to supply all companies throughout the group). In the context of a restraint of trade and having regard to the purpose thereof, the narrower interpretation (which was contended for by Steyn) is neither sensible nor business like.²⁰

Vox's onus: restraint and breach

- [44] As set out above, Vox bears the onus of proving the restraint agreement and a breach of its terms. With reference to the analysis undertaken above, I am satisfied that Vox has established that Steyn is restrained from taking up employment with a supplier to a group company. (But, as dealt with above, Vox has not established that the contract includes a competitor restraint.)
- [45] Turning to the issue of breach, in circumstances where it is common cause that Steyn took up employment with IS on 1 July 2015 and remains in its employ, and that IS is a supplier of Vox, I am also satisfied that Vox has established a breach of the restraint agreement. (Indeed, Steyn himself

²⁰ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18.

concedes in his supplementary affidavit that his employment by IS “may constitute a technical breach of the terms of clause 18(a)(iv).”) The onus is now on Steyn to establish that the restraint is unreasonable and thus unenforceable.

The first and second considerations in Basson (supra): an interest worthy of protection, and, if so, is the interest threatened?

[46] Turning now to the considerations set out in *Basson (supra)*, it is convenient for present purposes to deal with the first and second considerations (paraphrased above) together.

[47] As mentioned above, it is common cause that Vox and IS are both telecommunications operators, that Vox and IS are competitors, and that IS is a supplier of Vox. But in the light of my finding about the contract not containing a competitor restraint, it is Vox’s relationship with IS *qua* supplier that is of particular relevance to this application, and not Vox’s relationship with IS *qua* competitor.

[48] In argument, Mr Whitcutt submitted that in circumstances where IS is both a competitor and supplier of Vox, it is artificial to maintain a distinction between the two roles (insofar as this can be done) for the purposes of this application. I do not agree with this submission. The distinction must be maintained throughout, and particularly when considering whether Vox has a protectable proprietary interest. Here the question is not whether Steyn is possessed of trade secrets and customer connections that may be of use to IS in its capacity as a competitor of Vox, but rather in its capacity as a supplier to Vox. This cuts down and limits the information that is relevant. Not to do so would potentially result in a competitor restraint (which is not included in the contract) being enforced against Steyn under the guise of a supplier restraint.

[49] Put differently, as submitted by Ms Wood, the competitive interface between Vox and IS is not relevant to this application – this because the restraint only prohibits Steyn from taking up employment with a supplier of Vox. Vox’s case

must thus be viewed through the prism of its relationship with IS *qua* supplier, with it being in this context that any possible harm which Steyn may be able to cause Vox must be viewed.

[50] Turning then to the supplier relationship between Vox and IS and Steyn's role therein, during his employment with Vox, Steyn was responsible for negotiating and concluding commercial contracts with suppliers, such as IS. There are three facets of the supplier relationship between Vox and IS.

- a) The first facet involves the wholesale of Internet bandwidth by IS to Vox. In circumstances where the current agreement between the parties has expired, there is a month-to-month arrangement in place, with it being Steyn's contention that he cannot influence the pricing for various reasons, including that a deflationary pricing model is in place.
- b) The second facet involves the reseller relationship between Vox and IS involving ADSL, and the so-called "25 legacy services". IS currently supplies Vox with ADSL, but Vox has given notice of its intention to cancel this arrangement and to migrate to its own platform. Regarding the legacy services, their contribution to Vox's revenue is said (by Steyn) to be miniscule (0.5% or less in respect of a particular category of revenue).
- c) The third facet involves the bilateral peering relationship between Vox and IS, which relates to the interconnection between the networks of Vox and IS. This takes place on a "settlement fee" basis, with no consideration being paid by Vox to IS, with the result that it is not open to manipulation.

[51] Based on this analysis, Steyn contends that he cannot influence the business of IS in its capacity as a supplier of Vox such that it could harm the business of Vox. Market trends, as Ms Wood put it, simply do not allow for this. On the papers before me, I am in agreement with this.

[52] In argument, in response to the “supplier analysis” advanced by Ms Wood, Mr Whitcutt did not seek to challenge it head on, but instead placed heavy reliance on the Telkom reseller agreement, which Steyn had been involved in negotiating with Telkom on behalf of Vox before his resignation (the agreement has yet to be concluded) (“the Telkom venture”).

a) Vox says this about the Telkom venture:

“This innovation is highly strategically valuable and is not known to any supplier rivals. It represents a commercial opportunity that IS can capitalise upon as a supplier.” (Emphasis added.)

And further:

“Steyn has been responsible for the negotiations and can use this information to assist in the IS supplier strategy.” (Emphasis added.)

b) In his reply on this issue, Steyn, *inter alia*, denies that the services would be provided on a wholesale basis, and contends that they are provided on a retail basis – it thus being his contention that he will not be in a position to make use of any of this information to the benefit of IS because he is employed in its wholesale, and not retail, division. However, Steyn goes on to record as follows:

“Be that as it may, I undertake that I will not deal with Telkom in respect of any retail business for the 12 month period of my restraint. I also undertake that I will continue not to disclose to [IS] any information in relation to the discussions that were underway between Telkom and [Vox] in terms of which [Vox] may have been granted the right to resell and bill Telkom services.”

c) With reference to this undertaking, Mr Whitcutt went on to submit that Vox is under no obligation to accept it, and that it is entitled to enforce the restraint in order to ensure that its proprietary interest in the confidentiality of the information in question is protected. He submitted

further that the Telkom venture is in itself a sufficient basis upon which to enforce the restraint. (See further below.)

- [53] The balance of Vox's case in argument on a protectable proprietary interest was advanced by Mr Whitcutt undertaking a finely grained analysis of, in particular, the contents of the confidential affidavit, and Steyn's reply thereto. Under the head of confidential information possessed by Steyn, Mr Whitcutt placed emphasis on Steyn's knowledge of: Vox's five year growth strategy; Vox's online growth strategy; the Frogfoot acquisition by Vox; presentations made at the senior managers' conference; churn rates; marketing strategies; the Free State Development Corporation contract; and the Alcatel OTEC. As the confidential affidavit reflects, it is Vox's case that all of this information would be of value and assistance to IS if Steyn made disclosure thereof. Mr Whitcutt then addressed the various customer connections held by Steyn.
- [54] On the basis of the analysis summarised in para 53 above, if Steyn was party to a competitor restraint, I would probably have been persuaded that Vox has a protectable proprietary interest in restraining him from being employed by IS *qua* competitor. But as Ms Wood correctly submitted, Vox cannot base its case on confidential information relative to IS *qua* competitor. To my mind, all of the information relied on by Vox summarised in para 53 above falls into that category. The same applies to the customer connections.
- [55] The question that remains for consideration is whether the confidential information held by Steyn in relation to the Telkom venture is relevant to Vox's relationship with IS *qua* competitor or *qua* supplier. As mentioned above, Mr Whitcutt submitted that it relates to the supplier relationship, and this appears to be borne out by the use of the word "supplier" in the extracts from the confidential affidavit quoted above. However, upon careful evaluation, it seems to me that the information is rather relevant to the competitor relationship. This for the following reasons. In terms of the Telkom venture (and on the assumption that it comes to fruition), Vox will enhance the supply of services into the market (on either a wholesale or retail basis). It wishes to protect the relevant confidential information, for fear that IS may seek to do

likewise in a similar manner. This goes to the relationship between Vox and IS *qua* competitor, and not *qua* supplier.

[56] In the result, to my mind, in respect of the relationship between Vox and IS *qua* supplier, no protectable proprietary interest has been established in this matter that is under threat or being prejudiced. The application thus fails on this basis alone, with there being no need to consider the remainder of the considerations in *Basson (supra)*. (It is also not necessary to address Steyn's attack on the whittling down of the restraint, and his attack on the duration of the restraint.)

[57] Before turning to make my order on the merits of the application, I should mention that I do not intend repeating the orders and rulings that I have made above on the various preliminary issues. It also warrants mention that the parties are in agreement that any order that is made may include the undertakings given by Steyn in relation to the Telkom venture.

Order

[58] In the result, the following order is made:

- a) The application is dismissed.
- b) The first respondent shall not deal with Telkom in respect of any retail business for a period of 12 months commencing 1 July 2015, and shall not disclose to the second respondent any information in relation to the discussions that were underway between Telkom and the applicant in terms of which the applicant may have been granted the right to resell and bill Telkom services.
- c) The first respondent is ordered to return all copies of the applicant's confidential affidavit and annexures (hard and / or soft copies) immediately after the handing down of this judgment.

- d) The applicant shall pay the costs of the application, including the costs occasioned by the postponements on 30 June 2015 and 30 July 2015. Costs shall include the costs of two counsel.

Myburgh, AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the applicant: C Whitcutt SC and A Makka (instructed by Webber Wentzel)

On behalf of the first respondent: D Wood and P Bosman (instructed by Hogan Lovells)