THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case No: J 1335/2015

Not reportable

Not of interest to other judges

In the matter between:

MPACT OPERATIONS (PTY) LTD **Applicant**

t/a MPACT PLASTICS WADEVILLE

and

KIRSTY WHITEHEAD **First Respondent**

POLYOAK PACAGING (PTY) LTD **Second Respondent**

Heard: **20 July 2015 2015**

Delivered: **25 September 2015**

Summary: **Restraint of trade. Application granted with costs.**

JUDGMENT

AC BASSON J.

Introduction

[1] This is an application for final relief to enforce a restraint of trade and certain confidentiality undertakings incorporated in a written restraint of trade agreement concluded between the applicant (Mpact Operations (Pty) Ltd t/a Mpact Plastics Wadeville) and the first respondent ("Ms Whitehead") on 1 November 2011 ("the agreement"). This application was prompted by the resignation of the first respondent from her employment with the applicant and her subsequent employment by the second respondent (Polyoak Packaging (Pty) Ltd ("Polyoak").

[2] The first respondent was employed by the applicant as a National Sales Manager and later as the National Business Development Manager in its plastics operation in Wadeville. Shortly after her appointment, she was requested to sign - and did in fact sign - the restraint of trade agreement with the applicant. Mr Bachelor - the General Manager at the time - signed the agreement on behalf of the applicant. In terms of the agreement the first respondent undertook not to disclose or use applicant's confidential information to third parties after the termination of her employment. She also undertook that she would not become employed in any capacity whatsoever with any business which carries on business directly or indirectly in competition with any business carried on by the applicant. The period of the restraint sought to be enforced is 12 months and is set to terminate on 30 June 2016. Enforcement is sought within Gauteng (the greater Johannesburg area) which includes Ekurhuleni (East Rand), City of Johannesburg Metropolitan Municipality.

Urgency

[3] The first respondent took issue with the urgency of the application. I have considered the founding affidavit and the reasons set out therein as to why this application is urgent. The deponent (Mr Albertse – General Manager of the Wadeville operations) to the founding affidavit states that following the resignation of the first respondent, but during her notice period and on or

about to June 2015, he (Albertse) and the applicant had a discussion concerning her resignation. During the discussion she informed Albertse that she would be joining the second respondent but that her employment did not constitute competition with the applicant as she was joining Polyoak's so-called BlowPack division.

[4] On two later occasions following her resignation, the first respondent approached Albertse regarding her agreement. At that stage Albertse had no knowledge of the restraint of trade agreement as he only joined the applicant in December 2014. According to him, the first respondent requested him to obtain written confirmation from the Managing Director of the applicant's plastic division (Mr Naidoo) that she would be released from the agreement. He explained with reference to the written formal delegation of authority in place at the applicant that only Naidoo had the authority to waive or vary the restraint. He further explained that the first respondent (by requesting him to obtain the written authority) was alive to the fact that she had to obtain a written release from the contract as the restraint of trade agreement contains a non-variation clause and contains a provision that any waiver of or release from the agreement would have to be in writing.

[5] On 19 June 2015 Albertse sent an e-mail to the first respondent in which he stated that she had failed to disclose the full extent of the restraint of trade agreement to him during their previous discussions and that his acceptance of her resignation should in no way be construed as a release or a waiver of the obligations under the restraint of trade agreement.

[6] On 25 June 2015 the attorneys of the applicant addressed a letter to Polyoak in which it was recorded that the first respondent had concluded the restraint of trade agreement with the applicant and that an undertaking was sought from Polyoak that it would not employ the first respondent in breach of her restraint of trade undertakings. An extension was sought by Polyoak to obtain legal advice. An extension was granted until 1 July 2015 on the basis that Polyoak would not employ the first respondent until 6 July 2015. It became

clear to the applicant on 3 July 2015 that no undertaking was forthcoming. The first respondent further took up employment with Polyoak on 6 July 2015.

[7] It was submitted on behalf of the applicant that it had therefore endeavoured to resolve the dispute without having to approach this Court and that it has acted without delay once it became clear on 3 July 2015 that no undertakings would be given on behalf of first respondent.

[8] I am satisfied that in light of the aforegoing, the application is urgent. Furthermore it must also be pointed out that it is generally accepted that applications of this nature are inherently urgent and there is no alternative way of obtaining adequate redress by placing this matter on the normal court roll.

<u>Brief background facts</u>

[9] The applicant operates three separate businesses through three separate divisions namely: (i) Plastics (which forms the subject matter of this application); Paper and (iii) Corrugated. The Plastics division manufactures a range of plastic packaging products, beverage, personal care, home care, pharmaceutical and other related markets. The two major operations within the Plastic division are the Wadeville operation and the so-called fast moving consumer goods business ("FMCG") which is situated in Pinetown and Atlantis.

[10] The Wadeville operation consists of two sites. This site specialises in the manufacture of plastic packaging using polyethylene terephthalate ("PET") and closures using high-density polyethylene ("HDPE") and polypropylene ("PP"). The applicant's FMCG serves a customer base in the FMCG market.

[11] The first respondent's main contention is that she will be employed in the BlowPack division (which is not directly competitive with the Wadeville operations where she was employed). The applicant took issue with this contention. Firstly, the second respondent is a competitor across the range of the plastics divisions of the applicant's operations and consequently the first

respondent will be in a position to disclose confidential information to Polyoak. Secondly, the applicant's Wadeville operations and its FMCG operations were not kept hermetically separate.

[12] The first respondent attended a joint sales collaboration day with the Wadeville and FMCG operations during which confidential information across a spectrum of both operations was openly shared. Furthermore, on 30 May 2015 an e-mail was circulated to the sales teams from both Wadeville and the FMCG department to which two versions of the generics catalogue comprising of products marketed by both Wadeville and FMCG were attached. This internal version was embargoed from disclosure to clients or suppliers because it contained confidential information. Furthermore, the first respondent was involved with a number of new projects together with the FMCG division which related to new products and all new customers.

[13] It is common cause that the second respondent is a direct competitor of the applicant's Wadeville operations through its PET products. The second respondent's BlowPack division in Johannesburg competes directly in respect of certain products with the applicant's FMCG division. The applicant submitted that the first respondent is in possession of confidential information that could directly benefit Polyoak's HDPE and PET divisions. Furthermore although Polyoak consists of various divisions at a regional level, the divisions are managed through one regional manager and that this structure exacerbates the potential for proprietary information to be disclosed between the different divisions. Therefore, the mere fact that the first respondent will be rendering his services in the BlowPack division does not bar her from sharing information to benefit the other divisions.

[14] The applicant also refers to the fact that first respondent in her role as National Sales Manager was responsible for managing and developing the sales team as well as delivering results, preparing budgets and interfacing with and managing all existing and prospective customers and managing new business development. In her role as Business Development Manager she was responsible for product development and in the course of such duties

interface directly with new and existing customers. She was also responsible for preparing proposals and pricing for existing and new customers. All pricing proposals are determined based on an application of the applicant's costing model. A detailed description of the costing model is contained in a confidential affidavit that was placed before the Court. I do not intend for purposes of this judgement to explain how the costing model operates. Suffice to point out that the first respondent knows the details of at least three of the costing models and it was submitted on behalf of the applicant that the information pertaining to the costing models would enable a competitor to undercut on pricing given the fact that products are price sensitive.

[15] The applicant also submitted that as part of the management team, the applicant was privy to and played an integral role in the implementation of the applicant's strategic objectives in the plastic industry. To this end the first respondent attended a strategy session on 22 January 2015 during which the applicant's strategic actions to be taken in relation to new markets - such as the so-called "hotfill" market - was discussed. Following the strategic session, a detailed action plan was drafted and specific functions were allocated to the first respondent in respect of some of these products. More in particular, she was specifically tasked to investigate the "hotfill food" market. These projects and the manner in which the applicant intended to implement these products, are not yet in the public domain and are intended to give the applicant a competitive advantage in the market. It was submitted that a disclosure of these products in a public document will destroy the confidentially thereof. The applicant further submitted that these products constitute an opportunity which, if disclosed to any competitor including Polyoak, would enable them to build on the applicants strategic innovations in order to short-circuit the process.

[16] In respect of the first respondent's customer connections, it was submitted that she has been working closely with a number of clients in order to meet the specific needs that they may have in the market. To the end the first respondent formed close relationships with various customers. She had also visited customers at their premises to gain an understanding of their

processes; their existing business requirements and their requirements for innovative and new products.

[17] On 8 June 2015 the first respondent sent an e-mail to an existing customer in which she made the following statement:

> "I resigned from Mpact and will be moving to another plastic Company…. I am uncertain if I will be replaced any time soon and if anyone else will be picking up the project. Although my new position is not in PET, I would so like to meet with you in my personal capacity, if possible, and this was/is something which I'm passionate about and wanted to follow through with it. Please let me know your view."

[18] It was submitted on behalf of the applicant that the contents of this e-mail - at least on the face of it – convey a willingness on the part of the first respondent to secure the business of a customer for herself or for her new employer and that she is thus willing to misappropriate a maturing corporate opportunity from the applicant to Polyoak or to herself. I am in agreement with this submission: This e-mail clearly confirms, firstly, that the first respondent would be in a position to continue customer relationship and projects developed still in a developing phase the applicant with her new employer notwithstanding the fact that she will be employed in a different division and secondly, her willingness to divulge information to her new employer. I am further in agreement with the submission that the first respondent's contention that her employment constitutes no threat to the applicant because she will be employed in a different division is without merit. (I will return to this issue herein below.)

<u>Preliminary issues</u>

[19] The first respondent claimed the following: (i) Firstly there is no valid restraint of trade agreement which binds her. In this regard she claimed that when the restraint of trade agreement was concluded in November 2011, the General Manager - the signatory to the agreement - did not have the necessary authority to complete the agreement. She also contended that at the time of the agreement the Human Resources Manager either deliberately or

negligently misrepresented to her that agreement would not be enforced and that the applicant had a policy of not enforcing restraint of trade agreements. (ii) Secondly, the first respondent contended that she was released from the agreement by the current manager (Albertse). In this regard she contended that in so far as the applicant disputes this allegation, the applicant should nonetheless be bound by the principal of ostensible authority. (iii) Thirdly, the first respondent contends that even if the Court finds that the agreement is binding, the applicant has no proprietary interest worthy of protection either in the form of customer goodwill or in the form of confidential information. (iv) Fourthly, the agreement should not be enforced because of the conduct of the applicant when it constructively dismissed the first respondent.

[20] I intend to deal with the first two points raised on behalf of the first respondent very briefly: At the time when the agreement was entered into (November 2011), the signatory to the agreement on behalf of the applicant did in fact have the necessary authority to sign the agreement. In respect of the second point it appears from the applicant's written policy of delegation of authority that any release of the restraint would have to be authorised by the Divisional Managing Director (Mr Naidoo). In this case this was not done. Furthermore the contention by the first respondent that she was misled by the Human Resources Manager is not borne out by the facts. If this was so the first respondent would not have gone to the lengths she did to obtain written confirmation from Naidoo that she was released from restraint of trade agreement. She also would not have sought to ensure that such release was recorded in writing as is required in terms of her contract of employment.

[21] I am therefore satisfied that a valid restraint of trade agreement existed at the time the first respondent left the employment of the applicant.

<u>Brief exposition of the law</u>

[22] A party seeking to enforce a contract in restraint of trade is required to invoke the restraint agreement and proof a breach thereof. Thereafter a respondent who seeks to avoid the restraint of trade agreement bears the onus to

demonstrate on a balance of probabilities that the restraint agreement is unenforceable because it is unreasonable[1].

[23] An applicant does not have to show that the first respondent is *mala fide* before being allowed to enforce its contractually agreed right to restrain a first respondent.[2] The applicant also does not have to show that the first respondent has in fact used the information only that he could do so.[3] An undertaking by an employee that he or she will not breach the agreement is not relevant to the exercising of the court's discretion.[4]

[24] The Court in *Basson v Chilwan and Others*[5] set out the test to determine the reasonableness or otherwise of a restraint of trade as follows:

> "Vier vrae moet in dié verband gestel word:
>
> (a) Is daar 'n belang van die een party wat na afloop van die ooreenkoms beskerming verdien?
>
> (b) Word so 'n belang deur die ander party in gedrang gebring?

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[1] *Experian South Africa (Pty) Ltd v Haynes and Another* (2013 (1) SA 135 (GSD).

[2] *BHT Water Treatment (Pty) Ltd v Leslie and Another* 1993 (1) SA 47 (W)**: "**

[3] *Ibid* at 57H – 58D*:* "It is quite impossible for the applicant to police the undertakings given by the first respondent or to know or prove what information the first respondent can make available to the second , or has made available.

In my view, all that the applicant can do is to show that there is secret information to which the respondent had access, and which in theory the first respondent could transmit to the second respondent should he desire to do so. The very purpose of the restraint agreement was that the applicant did not wish to have to rely on the bona fides or lack of retained knowledge on the part of the first respondent, of the secret formulae. In my view, it cannot be unreasonable for the applicant in these circumstances to enforce the bargain it has exacted to protect itself. Indeed, the very ratio underlying the bargain was that the applicant should not have to content itself with crossing its fingers and hoping that the first respondent would act honourably or abide by the undertakings that he has given.

In my view, an ex-employee bound by a restraint, the purpose of which is to protect the existing confidential information of his former employer, cannot defeat an application to enforce such a restraint by giving an undertaking that he will not divulge the information if he is allowed, contrary to the restraint, to enter the employment of a competitor of the applicant. Nor, in my view, can the ex-employee defeat the restraint by saying that he does not remember the confidential information to which it is common cause that he has had access. This would be the more so where the ex-employee, as is the case here, has already breached the terms of the restraint by entering the service of a competitor.

[4] *International Executive Communications Ltd t/a Institute for International Research v Turnley and Another* 1996 (3) SA 1043 (W) 1056H – 1057A: *"I*n each case, the Court must look to the facts: even a very limited recollection of a vast amount of confidential information might be useful to a competitor; whereas, conversely, an incomplete recollection of all the information might (conceivably) be of no value at all, even as a pointer in the right direction. I would stress, however, that once it is established that an ex-employee has been exposed to trade secrets, and entered the employ of a competitor, an objective assessment is required of whether the danger exists that he could disclose such trade secrets to his new employer; and in making this assessment, the Court will not be influenced by undertakings by the ex-employee not to do so, much less embark on an investigation of the *bona fides* of the ex-employee in tendering such undertakings."

[5] 1993 (3) SA 742 (A).

(c) Indien wel, weeg sodanige belang kwalitatief en kwantitatief op teen die belang van die ander party dat hy ekonomies nie onaktief en onproduktief moet wees nie?

(d) Is daar 'n ander faset van openbare belang wat met die verhouding tussen die partye niks te make het nie maar wat verg dat die beperking gehandhaaf moet word, al dan nie? (Laasgenoemde vraag kom nie hier ter sprake nie.)

Vir sover die belang in (c) die belang in (a) oortref, is die beperking in die reël onredelik en gevolglik onafdwingbaar. Dit is 'n kwessie van beoordeling wat van geval tot geval kan wissel (Sibex Engineering Services (Pty) Ltd v Van Wyk and Another 1991 (2) SA 482 (T) te 486H).

Die partye se eie beskouing, soos in die ooreenkoms verwoord, oor wat redelik is, kan nooit deurslaggewend wees nie. (Die Magna-saak supra te 488E-F.) Ten eerste word die redelikheid van die verbod eers by nabetragting deur 'n hof beoordeel aan die hand van faktore en maatstawwe wat nie noodwendig deur die partye in oënskou geneem was nie. Ten tweede kan die inhoud van die ooreenkoms nie self die uitsluitlike maatstaf wees van wat redelik is nie, want dan word die behoorlikheid van die ooreenkoms aan homself getoets."

[25] The Court in *Kwik Kopy (SA) (Pty) Ltd v Van Haarlem and Another*[6] added a further consideration namely whether the restraint goes further than is necessary to protect the interests of an applicant.

[26] In terms of *Basson*[7] two kinds of proprietary interests can be protected by a restraint of trade agreement: Firstly, 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 him, to gain a relatively competitive advantage. Such confidential material is generally referred to as "trade secrets". Secondly, the relationships with customers, potential customers suppliers and others. This proprietary interest is sometimes referred to as the "trade

[6] 1999 (1) SA 472 (W) at 484E.
[7] *Supra*.

connections" of the business and is an important aspect of its incorporeal property known as "goodwill".[8]

[27] It is a factual question whether information constitutes a "trade secret" (confidential). For information to be confidential it must be (i) capable of application in trade and industry. In other words the information must be useful and not be public knowledge and property. (ii) The information is known to a restricted number of people, and (iii) is of economic value to the person seeking to protect it.

[28] In respect of customer connections it is accepted that there is a need for an employer to protect his trade connection with customers in circumstances where an employee was in a position to build up a particular relationship with the customer to such an extent that when the employee leaves the employer's service, he could easily use the customers to follow him to a new business. See in this regard *Rawlins and Another v Caravantruck Ltd*:[9]

> "In *Morris (Herbert) Ltd v Saxelby* [1916] 1 AC 688 (HL) at 709 it was said that the relationship must be such that the employee acquires 'such personal knowledge of and influence over the customers of his employer . . . as would enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer's trade connection . . .'.
>
> This statement has been applied in our Courts (for example, by Eksteen J in *Recycling Industries (Pty) Ltd v Mohammed and Another* 1981 (3) SA 250 (E) at 256C-F). Whether the criteria referred to are satisfied is essentially a question of fact in each case, and in many, one of degree. Much will depend on the duties of the employee; his personality; the frequency and duration of contact between him and the customers; where such contact takes place; what knowledge he gains of their requirements and business; the general nature of their relationship (including whether an attachment is formed between them, the extent to which customers rely on the employee and how personal their association is); how competitive the rival businesses are; in the case of a salesman, the type of product being sold; and whether there is

[8] See in this regard *Sibex Engineering Pty Ltd Van Wyk and Another* 1991(2) SA 482 (T) at 502D, E-F.

[9] 1993 (1) SA 537 (A) at 541C and D – I.

evidence that customers were lost after the employee left *(Heydon (op cit* at 108-120); and see also *Drewtons (Pty) Ltd v Carlie*1981 (4) SA 305 (C) at 307G-H and 314C and G)."

[29] I have already pointed out that a respondent must establish that he had no access to confidential information or that he does not have influence over the applicant's customers.[10]

[30] The applicant in this matter is seeking final relief. As such it must show a clear right; an injury actually committed or reasonably apprehended; and the absence of any other satisfactory remedy that may have been available to the party seeking interdict. This remedy is discretionary and the Court has a wide discretion.[11] Where a dispute exists on the papers, the Court must decide whether these disputes are capable of satisfactory determination without recourse to oral evidence. A bare denial by a respondent of the averments contained in the founding affidavit does not create a real dispute of fact.

Does a valid restraint of trade agreement exist and did the first respondent breach the agreement?

[31] I have already referred to the fact that the applicant bears the onus to show the existence of restraint of trade undertakings and that the first respondent is in breach thereof. I have already concluded that the applicant has discharged the onus of showing that a restraint of trade agreement existed.

[10] Rawlins at 543E - H: "In summary then, what Rawlins says is that during his employment with the respondent he largely dealt, not with its existing customers, but with his own pre-existing following or buyers whom he later found. Does this establish that the respondent did not have a proprietary interest of the kind under consideration? It is, of course, a factor in his favour; but not conclusively so (see Cansa (Pty) Ltd v Van der Nest 1974 (2) SA 64 (C) at 69E-H and M & S Drapers (a firm) v Reynolds [1956] 3 All ER 814 (CA) at 820E; compare, however, the views of Denning LJ at 821A-E). Even though the persons to whom an employee sells and whom he canvasses were previously known to him and in this sense 'his customers', he may nevertheless during his employment, and because of it, form an attachment to and acquire an influence over them which he never had before. Where this occurs, what I call the customer goodwill which is created or enhanced, is at least in part an asset of the employer. As such it becomes a trade connection of the employer which is capable of protection by means of a restraint of trade clause."

[11] *Hix Networking Technologies v System Publishers Pty Ltd and Another* 1997 (1) SA 391 (A) at 399A and 401G – 40. See *also Nestor and others v Minister of Belize and others* 1984 (4) (4) SA 230 (SWA) at 244.

[31] The high watermark of the first respondent's defence is that the applicant does not have a proprietary interest that is worthy of protection in either customer connections or confidential information. Furthermore, she was not involved in the applicant's FMCG operations (which is akin to Polyoak's BlowPack Division). The first respondent therefore contended that her restraint only pertains to the PET operations and not to the so-called FMCG operations. Furthermore she contended that she has taken up employment with Polyoak but only in its BlowPack (FMCG) division - which manufactures its products using HDPE as opposed to PET – and that she consequently did not breach the terms of her restraint of trade agreement.

[32] This submission on behalf of the first respondent loses sight of the fact that the first respondent had concluded the restraint of trade in November 2011 and up until very recently the applicant had both a PET and a FMCG division in Johannesburg. It is therefore clear from the restraint of trade agreement that it prohibits the first respondent from taking up employment with a direct competitor within the greater Johannesburg area which, on the common cause facts, she did. The applicant has accordingly proved that a restraint of trade agreement was concluded and that the first respondent had breached the agreement.

<u>The applicant's proprietary interests</u>

[33] On behalf of the first respondent it was submitted that the first respondent did not have a connection with customers to the extent that would allow the first respondent to easily introduce customers to follow her to another business. It was further submitted that the first respondent also did not have access nor was she exposed to confidential information or trade secrets which would require the protection sought by the applicant.

[34] In respect of confidential information I have already referred to the fact that the Financial Manager of the applicant (Mr Meyer) had sent an email to the first respondent as late as June 2015 to which documents were attached relating to the costing models for a client. The costings are recorded in an

Excel spreadsheet (the first attachment) which contains up-to-date information of the Wadeville operations as a whole. The second sheet calculates the up-to-date overheads for the Wadeville operation and the last sheet takes these costs and applies them towards a particular project. This shows that, contrary to the assertions by the first respondent that she was not fully apprised of the raw material costs and overhead costs as of April 2015 that she was in fact fully apprised of not only the raw material costs and overheads of the Wadeville operations but also the percentage allocation to a particular project. The first respondent was therefore privy to the applicant's sales budget for the 2015 financial year. This information regarding costing undoubtedly is confidential and is of use to a competitor.

[35] Furthermore, as early as 7 April 2015, the first respondent was aware of the customer complaints that troubled the applicant. In this regard I am in agreement with the submission that this information is undoubtedly of value to a competitor in light of the fact that customers are the lifeblood of any business and if a competitor is aware of a customer that is dissatisfied, a competitor will be able to target that customer and may be able to capitalise on that dissatisfaction.

[36] The first respondent was also privy to future strategies developed by the applicant by virtue of the fact that she held the position of New Business Development Manager. In this regard it is common cause that the first respondent attended a strategy session early in 2015 where the market was analysed and during which new business opportunities were identified. In fact the first respondent was tasked with investigating certain sectors of the market. In this regard it is important to refer to the confidential affidavit that was filed on behalf of the applicant and to which spreadsheets are attached setting out the projects in respect of which of the first respondent presented a review at a meeting in May 2015. A total of 38 projects are listed. The first respondent was directly involved in 20 of these products. Although not directly involved in the remaining 18 projects, she was nonetheless privy to sufficient information on each project to be able to present thereon at the monthly meetings.

[37] The applicant also emphasised the fact that the first respondent had access to the machine costings in respect of the machines used by the applicant. Although the first respondent attempted to downplay her access to machine costings by differentiating between the machines used by the applicant and those used by Polyoak, I am in agreement with the submission that the first respondent, by being privy to the costing of the machines used by the applicant will well be able to provide Polyoak with direct comparisons with regard to these machines in respect of the efficiencies and costs involved in using each machine. This in turn will enable the second first respondent to daily business to be more competitive.

[38] Regarding customer connections, it is trite that these connections constitute a protectable proprietary interest. It is clear from the papers that the first respondent had a close connection with customers of the applicant and that that placed her at an unfair advantage over the applicant by virtue of her influence over the applicant's customers. A clear example of her influence over customers is borne out by the fact that the first respondent addressed an email to SAB Miller on 8 June 2015 in which she indicated that she had resigned from the applicant's employment and in which she expressly stated that she would like to meet with SAB Miller in "her personal capacity" and that she wanted to "follow through with the project". I have already pointed out that this e-mail confirms that, not only does the applicant have a protectable proprietary interest in customer connections but that the first respondent by virtue of employment with the applicant had direct access thereto. This e-mail also gainsays her allegation that she was marginalised and that she was not involved in any projects of significance and that her interaction with customers was diminished. Importantly this e-mail clearly conveys an intention to continue with a project to the exclusion of the applicant and to the potential benefit of Polyoak.

[39] I have already referred to the fact that the applicant's PET division and that of Polyoak's PolyPet division compete directly with each other. Both these divisions are situated in Johannesburg. This is relevant because the first

respondent, whilst still in employment with the applicant was involved in the applicant's activities in respect of the so-called "hotfill market". In this regard the first respondent was tasked to advance the applicant's interests in this market from as far back as January 2014. The first respondent submitted that notwithstanding the fact that there is a direct competitive interface between the two PET divisions of the applicant and Polyoak she will not be employed in the PET division but will only be employed in the BlowPack division Polyoak. I am in agreement with the submission that this defence is neither good in law nor in fact. In this regard the comments made by the Court in *Reddy v Siemens Telecommunications (Pty) Ltd* [12] is relevant to this matter:

> "[19] Reddy will during the period of the restraint have no contact with Vodacom, nor will he be able to solicit Vodacom to move its business to Ericsson. He will, however, provide services to MTN in South Africa and to Celtel and Safricom in Kenya where Siemens does not operate. The restraint against being employed by a competitor, in addition, applies to Gauteng only despite Siemens being active throughout South Africa. It was submitted on behalf of the appellant that in these circumstances the restraint is unreasonable.
>
> [20] However, all the facts must be considered. Siemens and Ericsson are competitors providing services to telecommunication network operators. Although Vodacom and Cell C are customers of Siemens, Ericsson does some business with them. Siemens still has to acquire any of MTN's business. Reddy is in possession of trade secrets E and confidential information of Siemens. Moreover, shortly before his resignation from Siemens, he attended a training course updating his knowledge of the processes, methodologies and systems architecture developed by Siemens. Information of this kind, if disclosed, could be used to the disadvantage of Siemens. This is not a case such as *Basson v Chilwan* where an employer's application to assert a protectable interest in respect of customer connections against an ex-employee who had no such connections was dismissed. Reddy is in possession of confidential information in respect of which the risk of disclosure by his employment with a competitor, assessed objectively, is obvious. *It is not that the mere possession of knowledge is sufficient, and this*

[12] 2007 (2) SA 486 (SCA).

is not what was suggested by Marais J in BHT Water: Reddy will be employed by Ericsson, a 'concern which carries on the same business as [Siemens]' in a position similar to the one he occupied with Siemens. His loyalty will be to his new employers and the opportunity to disclose confidential information at his disposal, whether deliberately or not, will exist. The restraint was intended to relieve Siemens precisely of this risk of disclosure. In these circumstances the restraint is neither unreasonable nor contrary to public policy.[13] I agree with the remarks of Marais J in *BHT* Water:

> 'In my view, all that the applicant can do is to show that there is secret information to which the respondent had access, and which in theory the first respondent could transmit to the second respondent should he desire to do so. The very purpose of the restraint agreement was that the applicant did not wish to have to rely on the *bona fides* or lack of retained knowledge on the part of the first respondent, of the secret formulae. In my view, it cannot be unreasonable for the applicant in these circumstances to enforce the bargain it has exacted to protect itself. Indeed, the very *ratio* underlying the bargain was that the applicant should not have to content itself with crossing its fingers and hoping that the first respondent would act honourably or abide by the undertakings he has given. . . . In my view, an ex-employee bound by a restraint, the purpose of which is to protect the existing confidential information of his former employer, cannot defeat an application to enforce such a restraint by giving an undertaking that he will not divulge the information if he is allowed, contrary to the restraint, to enter the employment of a competitor of the applicant. Nor, in my view, can the ex-employee defeat the restraint by saying that he does not remember the confidential information to which it is common cause that he has had access. This would be the more so where the ex-employee, as is the case here, has already breached the terms of the restraint by entering the services of a competitor.'

[40] From the *Reddy* judgement it is clear that firstly, an employee cannot escape the effects of the restraint of trade agreement by an undertaking that he will not divulge confidential information obtained during the course of his

[13] My emphasis.

employment. In this regard the Court in *Reddy* clearly pointed out that: *"The loyalty which the employee owes his or her employer is sufficient to create the real probability that he or she will, consciously or unconsciously, do so*."[14] The claim by the first respondent that she will be employed in the BlowPack division and consequently she will be isolated from the other divisions consequently holds no water. Furthermore, on the facts it is common cause that a single person manages the various divisions in a particular region. The argument that Polyoak is divisionalised is therefore of no consolation to the applicant.

[41] It is therefore concluded that the first respondent undoubtedly had access to the applicant's confidential information and that she is infringing upon the restraint of trade agreement by virtue of her employment with the first respondent.

[42] I am further unable to find on the papers that the enforcement of the restraint is disproportionate having regard to any countervailing interest that the first respondent may have. The first respondent left the applicant's employment of her own accord and is able to remain economically active outside of the applicant's business as long as she does not do so in competition with the applicant. Furthermore, the restraint sought is for a period of 12 months which is not, in my view, unduly burdensome given the circumstances of this case. The restraint is also only in respect of the greater Johannesburg area.

[43] I am therefore of the view that the application must be granted with costs including the costs of two counsel,

<u>Order</u>

[44] In the event the following order is made:

44.1 The first respondent is interdicted and restrained until 30 June 2016 from being employed by the second respondent.

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[14] *Ibid*.

44.2 The first respondent is interdicted and restrained until 30 June 2016 within Gauteng (particularly the greater Johannesburg area) from -

44.2.1 Directly or indirectly rendering any prescribed services (being any services rendered by the applicant as at 30 June 2015, or within 12 (twelve) months prior thereto, or which the applicant has planned and programme to render and does in fact take steps to render within 12 (twelve) months from 30 June 2015) to or for the benefit of any prescribed customer (being any customer of the applicant as at 30 June 2015 or to whom or to which prescribed services were rendered by the applicant during the 12 (twelve) months preceding 30 June 2015 or who or which is a potential customer of the applicant and in negotiation with the applicant as 30 June 2015) or attempting to do so;

44.2.2 Soliciting, interfering with, enticing attempting to entice away from the applicant any prescribed customer;

44.2.3 directly or indirectly being interested, engaged, concerned, associated with or employed whether as proprietor, partner, director, shareholder, employee, consultant, contractor, financier, principal, agent, representative, assistant, adviser, administrator or otherwise and whether reward or not in any company, firm, business undertaking, concern or other association of any nature which furnishes or renders, directly or indirectly, any form of prescribed services.

44.3 The first respondent is interdicted and restrained from using or directly or indirectly divulging or disclosing any of the applicant's confidential information and/or trade secrets to any person.

44.4 The first respondent is ordered to pay the costs of this application together with costs of two counsel.

AC BASSON

Judge of the Labour Court

Appearances:

For the applicant	: Christopher Whitcutt SC
	with Advocate Claire de Witt
Instructed by	: Thomson Wilks Inc.
For the respondent	: Andrew Redding SC
Instructed by	: Tabacks Attorneys