



Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: J 1945/15

In the matter between:

MASSMART HOLDINGS LTD

First Applicant

MASSTORES (PTY) LTD

Second Applicant

MASSTORES (PTY) LTD

Third Applicant

and

TYRONE VIEIRA

First respondent

JD GROUP LTD

Second respondent

JDG TRADING (PTY) LTD

Third Respondent

STEINHOFF DOORS AND BUILDING MATERIAL

(PTY)

Fourth Respondent

Heard: 3 November 20

Judgment delivered: 13 November 2015

JUDGMENT

VAN NIEKERK J

- [1] The first respondent (Vieira) has been employed by the first applicant (Massmart) and its predecessors for some 22 years. He is currently Massmart's group general merchandising executive. On 28 June 2002, Vieira signed a restraint of trade and confidentiality agreement which, in essence, precludes him on termination of his employment with Massmart from being employed anywhere within the Republic of South Africa by a competitor of Massmart for a period of 24 months. In consideration for the restraint, Vieira was paid an amount equivalent to 2 years' remuneration, based on his remuneration package at the time. Vieira resigned from Massmart on 15 May 2015 giving six months' notice, as he was contractually obliged to do. Vieira was suspended on 2 September 2015, on full pay, and has had no access to his office or any of the applicants' business affairs since then. Vieira intends to take up employment with the third respondent (JDG Trading) on 16 September 2015. In this application, the applicants seek on an urgent basis to enforce the restraint agreement. The application is opposed by Vieira; the second, third and fourth respondents abide by the decision of the court.
- [2] Although the respondents initially contested that the application was urgent, the parties have agreed that the matter should be dealt with on an urgent basis. In so far as it is necessary to condone the late filing of the applicants' replying affidavit, condonation is granted.

- [3] There is no dispute that Vieira agreed to the restraint undertakings, and that his intended employment by the JDG Trading will constitute a breach of those undertakings. The primary issue in dispute is whether Vieira's employment by the JDG Trading, as Vieira contends, poses no threat to the applicants' business, with the result that the restraint is unreasonable. Put another way, Vieira contends that the information to which he has been exposed while employed by Massmart is not useful to the respondents or of any economic value to them because of the peculiar nature of the market in which they operate. Vieira also contends that even if the court were to hold that restraint is reasonable, the period for which enforcement is sought (24 months) is unreasonably long.
- [4] The applicable legal principles are well-established, and it is not necessary to repeat them here in more than summary form. Restraint agreements are enforceable unless they are unreasonable (see *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A)). In general terms, a restraint will be unreasonable if it does not protect some proprietary interest of the party seeking to enforce a restraint. In other words, a restraint cannot operate only to eliminate competition. The party seeking to enforce a restraint need only invoke the restraint agreement and prove a breach of the agreement, nothing more. The party seeking to avoid the restraint bears the onus to establish, on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable (see 2013 (1) SA 135; *Magna Alloys and Research (SA) (Pty) Ltd* supra; *Den Braven SA (Pty) Ltd v Pillay and another* 2008 (6) SA 229 (D)).
- [5] One of the most influential statements of the law in regard to the determination of the reasonableness or otherwise of a restraint of trade agreement is that in *Basson v Chilwan and others* 1993 SA 742 (A). In that judgment, the court established the following test:
1. Is there an interest of the one party, which is deserving of protection at the termination of the agreement?
 2. Is such interest being prejudiced by the other party?

3. If so, does such interest weigh up qualitatively and quantitatively against the interests of the latter party that the latter should not be economically inactive and unproductive?
4. Is there another facet of public policy having nothing to do with the relationship between the parties but which requires that the restraint should either be maintained or rejected?

- [6] The proprietary interests that can legitimately be protected by a restraint agreement, generally speaking, fall into two categories. The first is confidential information which is useful for the carrying on of the business and which could be used by a competitor, if it were to be disclosed to that competitor, to gain a relative competitive advantage (sometimes referred to as 'trade secrets'). The second is relationships with customers, potential customers, suppliers and others that go to make up what is sometimes referred to as the 'trade connection' of the business, this being an important aspect of its incorporeal property known as goodwill.
- [7] Whether information constitutes a trade secret is a question of fact (see *Moss Gas (Pty) Ltd v Sasol Technology (Pty) Ltd* [1999] 3 B All SA 321 (W) at 333), *Walter McNaughten (Pty) Ltd v Schwartz & others* 2004 (3) SA (C)). For information to be confidential, it must be capable of application in trade or industry, i.e. it must be useful and not public knowledge and property; secondly, it must be known to a restricted number of people or a close circle; and thirdly, it must be of economic value to the person seeking to protect it (see *Townsend Productions (Pty) Ltd v Leech & others* 2001 (4) SA 33 (C) *Walter McNaughten (Pty) Ltd v Schwartz & others* (supra).
- [8] The need by an employer to protect trade connections arises where an employee has access to customers or suppliers and is in a position to build up a particular relationship with them so that when the employee leaves the service of the employer, he or she could easily induce the employer's customers and suppliers to follow him or her to a new business. Again, this is a question of fact, and often one of degree.

- [9] It is incumbent on the employee under restraint to establish that he or she had no access to confidential information and never acquired any significant personal knowledge of confidential information or influence over the applicant's customers while in the applicant's employ (see *Rawlins* supra at 542F-543A). In other words, it is enough for the party seeking to enforce a restraint to show that trade connections through customer or supplier contact exist, and that they can be exploited if the employee was to be employed by a competitor or compete with the business of the applicant. It is not for the applicant to have to run the risk of the employee communicating its trade secrets or utilising its customer connections to the advantage of a competitor. It is also not incumbent on an applicant to enquire into the *bona fides* of the employee or to demonstrate that he or she is *mala fides* before it is entitled to enforce a contractually agreed restraint. The holder of the restraint also does not have to show that the employee in fact utilised information confidential to it – it is enough that the employee could do so. As Marais J stated in *BHT Water treatment (Pty) Ltd v Leslie and another* 1993 (1) SA 47 (W) at 57J-58D:

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 the 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.

- [10] The applicant seeks final relief. To the extent that there are factual disputes between the parties, the court is bound to follow the approach set out in *Plascon Evans Paints (Pty) Ltd v Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A). Where the facts concerning the reasonableness of the enforcement of the restraint or the possible risk of harm to the applicant's business have been fully

canvassed and the evidence, any facts that are in dispute must necessarily be resolved in favour of Vieira, regardless of the fact that he is required to discharge the onus of showing that in relation to the applicants' proprietary interests, the restraint is unreasonable and accordingly unenforceable.

- [11] As I have indicated above, it is not in dispute that the restraint agreement was concluded in favour of Massmart on 28 June 2002, when Vieira was employed as the merchandising manager of Game stores. It is also not in dispute that Vieira has accepted a position with JDG Trading and that he will commence employment as a business development executive on 16 November 2015.
- [12] Massmart is a group holding company listed on the JSE. The second and third applicants are subsidiaries of Massmart. Masstores trades as Makro, Game and Dion Wired. Massbuild trades as Builder's Superstore, Builder's Trade Depot, Builder's Express and Builder's Warehouse.
- [13] Vieira's case is that the only real area of competition that arises between JDG Trading and Massmart is in the electronics market, through JDG Trading's Hi-Fi Corporation stores and its Incredible Connection stores, which compete directly with Game, Dion Wired and Makro. Vieira contends that the business of many of the divisions of JDG Trading sell different products (mostly furniture) to different categories of customers (mainly low-income and credit) in different geographic areas to the customers and areas serviced by Massmart and the second and third applicants. That dispute aside, Vieira contends that irrespective of the extent of the competitive interface between the parties, the information to which he had access while employed by Massmart and its relationships with suppliers is of no use to JDG Trading and is not capable of causing harm to the business of the applicants.
- [14] The relevant part of the restraint agreement reads as follows:
- 4.3 The employee shall not, within 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 with a full reward or not, directly or indirectly, carry on or

be interested or engaged in or concerned with employed by any company, close corporation, firm, undertaking or concern carried on in any of the prescribed areas which is a prescribed competitor or a prescribed supplier ...

- [15] The agreement defines 'prescribed areas' to mean each magisterial district in the Republic of South Africa and 'prescribed competitors' as any entity which:

conducts the prescribed business in more than 20% (twenty per cent) of the magisterial districts comprising the prescribed area in which the group conduct the prescribed business as at the termination date; or

is an entity registered outside of the prescribed area which conducts the prescribed business in the prescribed areas and any subsidiary thereof...

- [16] The 'prescribed business ' means the business of the wholesale and/or retail sale of line items carried by the group as a determination date. The restraint period is defined to mean a period of 24 months calculate it from the termination date, the latter being defined as the date on which the employees employment by the company ceases or is terminated for any reason.

- [17] To the extent that Vieira contends that Massmart has failed to establish the terms of the restraint agreement and a breach of the agreement, his contention is based on the definition of 'prescribed areas' read with 'prescribed competitors' and the failure by Massmart to set out in its founding affidavit that the second, third and fourth respondents conduct business in more than 20% of the magisterial districts within the Republic of South Africa. While it is correct that this analysis was not undertaken in the founding affidavit, it is common cause that the applicants and JDG Trading operate throughout the country. In response to Vieira's challenge, by way of reply, the applicants confirm that competition takes place in more than 20% of the magisterial districts in the country and provide evidence of competition throughout the country. To the extent that this element of the restraint agreement is contested, I find that JDG Trading conducts the prescribed business in more than 20% of the magisterial districts that comprise the Republic of South Africa.

- [18] As I have indicated, Vieira does not dispute that JDG Trading's stores, Incredible Connection and Hi-Fi Corp, compete directly with the second applicant's stores, Game, Dion Wired and Makro in respect of both product range and geographical area. The applicants have sought to cast the net of competition between the applicants and the second, third and fourth respondents wide, but in view of Vieira's concession that there is a not insignificant competitive interface, I need therefore not make any specific findings in relation to its nature and extent.
- [19] The primary basis of Vieira's opposition to the application is not the absence of any substantial competitive interface rather than lack of any usefulness to JDG Trading of any confidential information to which Vieira has had access during the course of his employment by Massmart. Vieira contends that even if he was exposed to the applicants' confidential information or had the opportunity to develop relationships with the applicants' customers and suppliers, he is not in a position to use this confidential information or these relationships to advance the business of the JD Group, JDG Trading or the fourth respondent or cause harm to the business of the applicants. Vieira advances this assertion on three main grounds. First, he contends that his knowledge of rebates granted by suppliers is limited to those negotiated at a group or 'umbrella' rather than chain or store level; secondly, that the businesses of the JDG Trading and the second applicant differ to such an extent in relation to turnover and market share that any confidential information to which he has had access would be of limited if any value to JDG Trading; and thirdly, that the difference in business models (Massmart operates on a decentralised basis, the JDG Group on a centralised basis) will render him incapable of using his knowledge of the applicants trade secrets and confidential information to the benefit of the third respondent.
- [20] The applicants' case, in broad terms, is that a key element in the competitive edge that it seeks to establish and maintain is the effective negotiation of confidential rebates with their suppliers. What the applicants seek to do is to protect their relationships and exclusive contractual arrangements with the suppliers. The present application thus largely turns on the nature and extent of

the information to which Vieira admits that he had access during the course of his employment with Massmart, and the extent of the usefulness of that information to the second, third and fourth respondents.

- [21] I deal first with the issue of supply rebates. It is not disputed that pricing in the retail industry has two broad components. The first is the high-level rebates negotiated with suppliers, referred to as the 'back-end' margin and includes the rebates negotiated by Vieira on behalf of Massmart. The other component is the 'front-end' or retail margin, which applies to the retail price for which the product is sold. The retail margin is the margin and pricing negotiated by each of the chains within the Massmart group on an individual and independent basis with particular suppliers. This may include additional discounts, advertising budgets, promotions, demonstrations and preferential deals all of which are negotiated independently by each of the chains in the Massmart group. Given that front-end margins change rapidly and continuously, it would follow that if this information is confidential at all, it loses its confidentiality and value within a short period of time.
- [22] Vieira contends that he was not involved at chain store level and does not know the relevant front-end margins and is thus unable to influence pricing at JDG Trading to make it more competitive with Massmart. In short, Vieira's case is that even though he was responsible for the negotiation of rebates with Massmart's suppliers and that he had relationships with suppliers, the knowledge that he acquired and the relationships that he forged are of no value to JDG Trading on account of the macro-level at which the information was obtained and its limited use at that level.
- [23] However, the information to which Vieira had access, on his own version, is not limited to supplier rebates. It is not disputed that in his capacity as group general merchandise executive, Vieira was party to what is described as the general merchandise forum, a monthly meeting of senior general merchandising executives across the group. It is not disputed that the purpose of the forum amongst other things is to review the applicant's performance and

competitiveness in the marketplace, to develop strategies and initiatives to outperform the applicants' competitors and to review matters relating to programs for joint advertising, the introduction of new products and new product categories, business plans and the determination of milestones and targets and a review of competitor activity and plans. In this forum, the attendees also discuss mandates to the group's lead negotiator (in the majority of cases Vieira), for negotiation with suppliers. Confidential information, including rebates, growth incentive rebates, advertising contributions distribution allowances and settlement terms are discussed at these meetings.

- [24] Vieira does not seriously dispute the purpose of the forum, nor does he dispute the nature of what was discussed in the forum or that it is strategic information at a high level.
- [25] Turning next to Vieira's assertions concerning the different business models adopted by Massmart and the JD group respectively, it is not disputed that if Vieira takes up his position as business development executive with the JDG group that he will have a seat on the centralised executive committee of the third respondent. It follows that in this capacity, Vieira will be in a position to have a material effect on the businesses of JDG Trading and its subsidiaries. The fact is that the JD group may have a centralised management structure does not detract from the fact that the JDG Trading's stores compete directly and substantially with the second applicant's stores nationwide, that JDG Trading and the second applicant are both retailers of electronic products to the general public, that the third and fourth respondents' stores and the second and third applicants' stores compete in electronic products and building materials and that in regard to the latter, the major suppliers of electronic products and building material in South Africa are the same for the third and fourth respondents in the second and third applicants.
- [26] This must necessarily be viewed against the fact that Vieira negotiated trading terms with the applicants' top 41 suppliers of general merchandise and in conjunction with others, negotiated or oversaw the negotiations with a further 21

suppliers of general merchandise. It also ignores the fact that the volume of purchases of general merchandise from these 62 suppliers constitutes 57.5% of all purchases of general merchandise by Massmart in South Africa and the 12 month period ended June 2015. It is axiomatic that almost all of the 62 suppliers are also the key suppliers of the third and fourth respondents.

- [27] The proposition that key suppliers will not entertain granting the third respondent the same or substantially better trading terms is not sustainable having regard to the fact that on the papers, the applicants are required simply to believe Vieira that he will not ask them for the same or substantially the same or better trading terms than those granted to the applicants, or that the key suppliers will refuse to grant the third respondent the same or better trading terms simply on account of differences in turnover and market share.

- [28] While it is not disputed that the annual turnover of the second applicant is some R10 billion per annum and that of JDG Trading some R3 billion per annum, JDG Trading has the second largest market share in electronic products and as such, constitutes the second largest customer of key suppliers. That being so, the key supplier cannot afford not to have a presence in the third respondent stores or to lose the goodwill and custom of the third respondent. It would accordingly be open to Vieira to pressurise a key supplier to grant JDG Trading the same or better trading terms. At its most basic level, the sales executive of a key supplier, anxious to retain the goodwill of its second largest customer, would be required to negotiate with Vieira on the basis that he or she is fully aware that Vieira knows the terms agreed by the supplier with the applicants.

- [29] In these circumstances, regardless of size and market share, JDG Trading stands to gain a negotiating edge as against key suppliers to improve its trading terms. Given the volume and value of sales, the smallest misuse of the applicants' confidential information could have ramifications measured in tens of millions of Rands. As indicated in *BHT* judgment (*supra*), the purpose of a restraint is precisely that an employer does not have to 'cross its fingers' and

trust a restraint employee not to divulge or use the trade secrets of his or her employer for the benefit of a new employer.

- [30] More fundamental though, in my view, is the confidential information to which Vieira had access by virtue of his responsibility in running the general merchandising forum. As mentioned above, on his own version, the forum reviews mandates and growth hurdles for suppliers (additional incentives offered by suppliers for further rebate), allows chains to share their performance by product category and matters of general interest, provides feedback on current projects and target areas and discusses issues of relevance to Massmart's competitors. This is self-evidently information of a highly confidential nature and of commercial value to a competitor. Objectively viewed, and having regard to the totality of the information which is available to Vieira and which is clearly confidential information of the applicants, it is not unreasonable to enforce the restraint agreement against him.
- [31] For these reasons, in my view, Vieira has failed to establish that the information to which he has had access during the course of his employment with Massmart (including but not limited to back-end margins) would be of no commercial value to JDG Trading.
- [32] The third and fourth elements of the test established in *Basson v Chilwan* (supra) require a balancing of interests and in particular, a determination of whether the interests of the applicants outweigh Vieira's interest not to be economically inactive or unproductive, and considerations of public policy. It is undoubtedly so that the enforcement of a restraint agreement imposes a degree of hardship on the party to whom it applies, but this is not in itself a basis to find that the restraint is unreasonable (see *Branco t/a Mr Cool v Gale* 1996 (1) SA 163 (E) at 179 E-F)). It is not disputed that Vieira left Massmart's employ voluntarily and that he is able to remain economically active and free to utilise his skills and experience in the public domain provided he does not do so in competition with Massmart. In his answering affidavit, Vieira records a discussion that he had with the divisional chief executive officer of Masscash Retail in which he said that employment with

JDG Trading was his 'first prize' but that he was looking at other options including a private equity opportunity and a possible franchise opportunity. Vieira specifically records having said that he would not be without employment and needed to have a 'back stop' option should he be stopped from working for JDG Trading. I am not persuaded therefore that Vieira has demonstrated that he will be economically inactive or unproductive should the restraint be enforced.

- [33] Insofar as the period of the restraint is concerned, Vieira contends that 10 months would be a reasonable period on the assumption that Vieira's knowledge of supply rebates is confined to that period. As recorded above, this has been challenged by the applicants who contend that broadly speaking, most of the trade terms negotiated by Vieira with suppliers directly have not substantially changed over the course of three years and that others have changed only marginally in that time.
- [34] As I have indicated, in my view, the real protectable interest in this matter lies not only in the trade terms negotiated with suppliers but also the confidential information to which Vieira was privy by virtue of the executive position that he held and in particular, his leadership of the general merchandise forum. What is at issue here is whether the restraint that the applicants seek to impose does not go beyond what is reasonably required to protect their interests in information relating to specific agreements reached with suppliers and also information relating to Massmart's performance and competitiveness in the marketplace, its strategies and initiatives to maintain competitive advantage in the marketplace its business plans and determination of milestones and targets, including the introduction of new products and new product categories. The fact that there has been no change in some supply agreements and a marginal change to others does not necessarily imply that the terms of supply agreements will not change in future. But the information to which Vieira has been privy by virtue of his position is self-evidently information that would be of commercial value to the second, third and fourth respondents. This is not information, it would seem to me, that has value for a protracted period and a reasonable restraint in the circumstances

would not extend beyond a period of 12 months. Of some relevance too, in relation to the period of the restraint, is the fact that Vieira's contract concluded with JDG Trading includes a six-month restraint enforceable at the employer's discretion. It is not disputed that the business of JDG Trading competes directly with that of the applicants. This is an indication, and I put it did no more than that, that a two-year restraint, given the nature of the sector, is on the face of it excessive and unreasonable.

- [36] Vieira has been excluded from Massmart's business since 2 September 2015, when he was suspended on full pay, and with effect from that date, has ceased to be involved in the applicants' business and exposed to its confidential information and trade connections. In the circumstances, in my view, a proper weighing up of the interests of the parties dictates that the duration of the restraint ought to be attenuated and that it should operate for a period of 12 months from the date on which Vieira ceased to have access to any business information, i.e. 2 September 2015.
- [37] Finally, in relation to costs, this court has a broad discretion in terms of s 162 of the LRA to make orders for costs according to the requirements of the law and fairness. The applicants have succeeded only in part in securing the relief that they seek. In my view, in these circumstances, the interests of the lawn fairness are best served by each party bearing its own costs.

I make the following order:

1. The First Respondent is interdicted and restrained until 2 September 2016 (being 12 months from date on which the Third Respondent was suspended) anywhere within the Republic of South Africa-
 - 1.1 from directly or indirectly taking up employment with the Third Respondent and the Fourth Respondent;
 - 1.2 and from directly or indirectly and whether or not for reward, being interested in, or engaged in, or concerned with (whether as proprietor, partner, director, shareholder, member, employee, consultant, contractor,

financier, agent, representative, assistant, trustee or beneficiary of a trust or otherwise) the Third Respondent and the Fourth Respondent or any company, close corporation, firm, undertaking or concern which is a prescribed competitor of the Applicants as defined in Annexure “A” hereto.

2. The First Respondent is interdicted and restrained until 2 September 2016 anywhere within the Republic of South Africa –

2.1 from being employed by the Second Respondent and/or any of the Second Respondent's other subsidiaries where such employment would constitute a breach of the Restraint Agreement, which would include, but not be limited to, the First Respondent being a member of, and/or participating in, in any manner or capacity whatsoever, an executive committee or any other forum having a purview of and/or directly or indirectly exercising influence or control over, the Third and Fourth Respondents and the businesses conducted by the Third and Fourth Respondents;

2.2 and from becoming involved in any capacity of whatsoever nature (whether or not for reward, being interested in, or engaged in, or concerned with (whether as proprietor, partner, director, shareholder, member, employee, consultant, contractor, financier, agent, representative, assistant, trustee or beneficiary of a trust or otherwise)), with the Second Respondent and its subsidiaries where such involvement would constitute a breach of the Restraint Agreement, which would include, but not be limited to, the First Respondent being a member of, and/or participating in, in any manner or capacity whatsoever, an executive committee or any other forum having a purview of and/or directly or indirectly exercising influence or control over, the Third and Fourth Respondents and the businesses conducted by the Third and Fourth Respondents.

3. The First Respondent is interdicted and restrained until 2 September 2016 anywhere within the Republic of South Africa, for himself, or for and on behalf of, any company, close corporation, firm, undertakings or concern in which he

is directly or indirectly interested or employed, from encouraging or enticing or inciting or persuading or inducing any other employee of the Applicants who was employed whilst the First Respondent was employed with the Applicants to terminate his/her employment with the Applicants or attempt to do so.

4. The First Respondent is interdicted and restrained until 2 September 2016 anywhere within the Republic of South Africa from furnishing any information or advice (whether oral or written) to any prescribed supplier (as defined in Annexure "A"), or use any other means or take any other action which is directly or indirectly designed, in the ordinary course of events, to result in any such prescribed supplier terminating his association with the Applicants or attempting to do so.
5. The First Respondent is interdicted and restrained until 2 September 2016 from disclosing any confidential information of the First, Second and Third Applicants, such confidential information being any information to which the First Respondent became privy to by virtue of his employment with the Applicants, and which would be of assistance to a competitor to enable such competitor to compete against the Applicants and which would not ordinarily be known to such competitor.

ANNEXURE "A"

DEFINITIONS OF "PRESCRIBED COMPETITOR" AND "PRESCRIBED SUPPLIER"

6. *Ex facie* the Restraint Agreement between the First Applicant and the First Respondent concluded on 28 June 2002 ("the Restraint Agreement") –

6.1 "Prescribed Competitor" means any person or any Entity which –

- 6.1.1 conducts a Prescribed Business in more than 20% (twenty percent) of the magisterial districts in the Republic of South Africa in which the Group conducts a Prescribed Business as at 15 November 2015;

6.1.2 is an Entity registered outside of the Republic of South Africa which conducts a Prescribed Business in the Republic of South Africa and any subsidiary thereof.

6.2 “Prescribed Supplier” means any person or any Entity which supplied to the Group more than 2.5% (two comma five percent) by value of its stock in trade within the period of 1 (one) year preceding 15 November 2015.

7. And where *ex facie* the Restraint Agreement –

7.1 “the Company” means, Massmart Holdings Limited (the First Applicant);

7.2 “Entity” includes any association, business, close corporation, company, concern, enterprise, firm, partnership, person, trust, undertaking or other similar entity whether corporate or incorporate;

7.3 “Group” means collectively the Company, any partnership in which the Company is a partner, any company which is a subsidiary company of the Company and reference to “the Group” shall embrace each member thereof individually;

7.4 “Prescribed Business” means the business of the wholesale and/or retail sale of line items carried by the Group as at 15 November 2015.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

APPEARANCES

For the applicants: Adv. C Whitcutt SC, instructed by Justin Lapin Attorneys

For the first respondent: Adv. A Redding, with him Adv. P Bosman, instructed by Petersen, Hertog & Associates