IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 1794/17

In the matter between:

WORLD NET EXPRESS (A DIVISION OF WORLD NET LOGISTICS (PTY) LTD)	**Applicant**
and	
MICHELLE AUCAMP	**First Respondent**
ARAMEX SOUTH AFRICA (PTY) LIMITED	**Second Respondent**

Heard: **23 August 2017**

Delivered: **12 September 2017**

JUDGMENT

TLHOTLHALEMAJE, J:

Background:

[1] The applicant seeks interdictory relief to enforce certain restraint of trade and confidentiality understandings as contained in the first respondent's contract of employment. The relief sought by the applicant is framed as follows:

"…

2. It is ordered that the restraint of trade and confidentiality agreement concluded between the applicant and the first respondent on 7 April 2017, annexure **"WN1"** to the founding affidavit, is rectified, by replacing any reference to "W*orld Net Express (Pty) Ltd",* with "*World Net Express, a division of World Net Logistics (Pty) Ltd".*

3. An interdict is granted in the following terms:

3.1 The first respondent shall not for a period of six months within the Republic of South Africa, whether directly or indirectly; whether alone or jointly; whether as a principal, agent, partner, representative, shareholder, consultant, director, employer, employee or in any other capacity or association:

3.1.1 be employed, engaged in, interested, involved in association with or contracted to any company, business, entity, firm, association or person (whether financially or otherwise) that directly or indirectly competes against the applicant or is engaged in a similar business to that of the applicant as at the first respondent's termination date; and

3.1.2 be employed by the second respondent or render services to the second respondent in any capacity; and

3.1.3 be employed by, engaged in, interested or involved in, associated with or contracted to any company, business, entity, firm, association or person that is an existing client, potential client or a legal entity accustomed to dealing with the applicant (whether financially or otherwise) within the 12 (twelve) month period preceding the date of the first respondent's termination.

3.2 The first respondent shall not for a period of 12 (twelve) months after termination date, either for herself or as the agent of anyone or any entity; persuade, induce, solicit, consult, meet with, encourage, employ or procure (or endeavour to do any of the aforegoing), any of the applicant's employees within the Republic of South Africa to be employed by, associated with, interested in any competitor or client of the applicant or to terminate his/her employment with the applicant and shall not furnish any information or advice (including trade secretes) acquired by the first respondent to any third party that results in an employee of the applicant becoming directly employed by, associated with, interested in, any competitor or client.

3.3 The first respondent shall not for a period of 12 (twelve) months after the date termination of employment with the applicant divert any business away from the applicant or attempt to divert business away from the applicant nor will she approach, do business with, solicit, interfere with, entice or endeavour to approach, do business with, solicit, interfere with or entice away from the applicant any person, client, entity, undertaking or association who or which was, during the period of 12 (twelve) months immediately prior to the date of the termination, a client, customer or supplier of the applicant or was accustomed to dealing with the applicant and its business.

4. The interdict contained in prayer 3.1 above shall operate for a period of six months from the date of this order, throughout the Republic of South Africa and the interdict contained in prayer 3.2 - 3.3 above shall operate for a period of twelve months from the date of this order, throughout the Republic of South Africa"

…"

[2] The applicant did not file a replying affidavit. Despite the issue of urgency being raised in the answering affidavit by the first applicant, I am satisfied that other than the inherent urgent nature of such applications, the applicant has also acted with the appropriate haste in bringing this application. This is evident from the fact that the first respondent commenced her employment with the second respondent (competitor) on 1 August 2017, and this application was launched on 8 August 2017. In the circumstances, the matter will be treated as urgent.

The parties and the nature of the industry:

[3] According to Grant Gietl, the applicant's General Manager and National Operations Manager, and the deponent to its founding affidavit, the applicant, trades as a courier and logistics company, and provides its services to a broad spectrum of customers. It operates throughout South Africa and in certain parts of Europe and South-East Asia. It has about 600 customers on

its books varying from individuals and small companies who may place small orders, to large corporate account holders.

[4] The applicant's business falls within the broader logistics industry, which also includes warehousing and related services. It provides its corporate customers with a credit facility of about 30 days to place orders for courier services on an ongoing basis. There is however no retention security of customers or fixed agreements with them. Thus, customers are free to shop around for the most competitive rates, and to use any courier company of their choice.

[5] Large customers often use multiple couriers in order to obtain the best possible price and service. There is essentially little or no customer loyalty in the industry. The applicant utilises various means which are standard in the industry, to secure business. These include cold calling, door to door sales pitches and advertising. The competitiveness in the industry is further exacerbated by the fact that competing companies often recruit each other's staff.

[6] The nature of the courier industry according Gietl generally involves the collection and delivery of small parcels of goods to a large and constantly changing group of customers, using smaller delivery vehicles. Services provided include courier and transport, which falls within the broader logistics industry, encompassing also warehousing and related services. Both the applicant and the second respondent (Aramex) operate in the courier and logistics industry, providing warehousing and distribution services to customers. The industry is highly competitive, with courier companies ranging from sole proprietors to large multinationals with a global network of distribution centres and couriers. There are currently about 2000 courier companies operating and competing in South Africa.

[7] Gietl further averred that the applicant's largest customer is Samsung Corporation, to whom it provides warehousing and logistics services in respect of cell phones and related products. These products are sent and delivered to the applicant's warehouses from where stock is received, counted

and securely stored. Samsung would then issue instructions to dispatch the goods to various cell phone stores and other retail stores that sell Samsung products. Samsung however also makes use of other competitors to provide courier services such as RAM Hand to Hand Couriers and the second respondent (Aramex).

[8] The first respondent, Michelle Aucamp (Aucamp) initially joined the applicant's service as a receptionist in January 2016. Her potential was recognised and she was promoted to the position of Key Account Administrator responsible for the Samsung account. She was part of a team of three people dedicated to servicing that account. During February 2017, Aucamp was promoted to the position of Key Account Manager, and she was tasked with servicing about 60 customers. The Samsung account was excluded from her responsibilities. On 7 April 2017, Aucamp had signed the restraint of trade agreement.

[9] According to Gietl, Aucamp approached him on 28 June 2017 and advised him that she was contacted by Aramex to take up its position of Key Accounts Manager. Gietl reminded Aucamp of her restraint obligations and informed her that the applicant would enforce the terms of the restraint if she took up employment with Aramex, which was the applicant's direct competitor. Gietl had also contacted Jacques Cilliers of Aramex and advised him that Aucamp was subjected to a restraint of trade agreement, which the applicant intended to enforce.

[10] On 30 June 2017, Aucamp resigned from the applicant's employ. In her resignation letter, she advised the applicant that she had received a lucrative offer from a competitor which was *'too exciting to decline'*. On 3 July 2017, Aucamp further advised Gietl that she was to take up a position with Postnet. Aucamp was again informed that she would still be in breach of her restraint undertakings, as Postnet Head Office was not only owned by Aramex Head Office, but that the applicant also provided courier services to certain Postnet franchises which therefore made it a client for the purposes of the restraint of trade agreement.

[11] On 12 July 2017, the applicant instructed its attorneys of record, Howes Inc Attorneys (Howes) to address a letter to Aucamp recording that in the event that she commenced her employment with a competitor, the restraint would be enforced. Aucamp was issued with a demand to provide written undertaking to the effect that she would comply with the restraint provisions. She had responded on 19 July 2017, and indicated that she was willing to sign an undertaking which the applicant could draft.

[12] Following further correspondence between Aucamp, Howes, and Aramex's attorneys of record [Cliffe Dekker Hofmeyr ('CDH')], (which also acts on behalf of Aucamp), the latter on 2 August 2017, sent correspondence to Howes, providing certain undertakings relating to Aucamp's employment with Aramex. The applicant in its response *via* Howes however held the view that these undertakings fell short of the protection of its proprietary interests that the terms of the restraint agreement provided.

[13] On 1 August 2017, Aucamp commenced employed with Aramex as a Customer Relations Manager responsible for Postnet Holdings (Pty) Ltd. Aramex is wholly owned by its parent company Aramex UK, which also owns Postnet Holdings (Pty) Limited. Aramex has seventeen branches throughout the Republic and offers services in domestic and express international distribution and freight services. It also provides business-to-business courier services, business-to-customer courier services and E-commerce services, *i.e.* online purchases and delivery thereof.

[14] Like the applicant, Aramex focuses primarily on securing business from corporates who either call into its call centres to arrange courier services, or who book courier services online. The distinction between the two entities according to Aucamp is that Aramex offers a drop-to-drop service, where customers looking to have something delivered can simply drop the item into a drop-box at appointed retailer shops and then to be picked up by Aramex. The item will then be delivered to the address provided on a flyer for a standard fee.

The submissions:

[15] The applicant seeks to enforce the restraint of agreement on the following summarised grounds:

15.1 The agreement prevents Aucamp from taking up employment with a competitor or a client for a period of six months following termination of her employment. Aramex is its direct competitor.

15.2 During her employment by the applicant, Aucamp was trained in the administration of its contract with Samsung, including expertise in the day to day servicing of this customer, its people and operations of the dedicated call centre.

15.3 In the course of these duties, Aucamp developed excellent working relationships with key Samsung personnel. She also gained valuable knowledge and insight into the applicant's business model, pricing structures, customer base and sales strategies. Her knowledge of the administration and customer service function of the Samsung account could easily be used by Aramex in its efforts to secure work from Samsung.

15.4 In her role as Key Account Manager, Aucamp developed good working relationships with over 50 of the applicant's customers while servicing these accounts. She therefore developed good customer connections in her portfolio, particularly with larger customers such as Evetech.

15.5 In her new role at Aramex, there was a real risk that Aucamp would be able to use her customer connections with the applicant's clients, to secure business for Aramex. This could happen merely as a result of her taking up employment with Aramex and her old customers coming to learn of the fact that she had now moved to a rival courier company.

15.6 Even if it were to be accepted that Aucamp was employed by Aramex to service the Postnet business, this did not provide adequate protection of the applicant's protectable interests in that nothing prevented her from calling on other clients, including her old client base, or securing work from other sources.

[16] Aucamp does not dispute the existence of the restraint of trade in favour of the applicant, and she further does not take no issue with prayer 2 of the applicant's Notice of Motion. She further accepted that on the face of it, she would be in breach of the restraint of agreement as she had taken up employment with Aramex who is a direct competitor of the applicant. She however does not accept that there is merit in the contention that the enforcement of the restraint of trade agreement against her will serve to protect the applicant's protectable proprietary interests on the basis that;

16.1 In her new role in Aramex as Customer Relations Manager, her role will be focused on Postnet, and to maintain and develop the relationship with its franchises in order to achieve growth between it and Aramex.

16.2 Her role was isolated to maintaining and developing Aramex's relationship with Postnet, and that she will not be assisting Aramex with its business generally or in respect of any of its other services which it offers to its customers directly. She contended that she would not in any way involved in the part of business of Aramex that competes with the business of the applicant;

16.3 Aramex is a direct competitor of the applicant, but Postnet was not, in that Postnet Holdings (Pty) Ltd was is in the business of selling franchises and offering those franchises administrative and associated support. There are about 360 privately owned Postnet franchises across South Africa, who in turn offered their customers a variety of services including courier, external office support, identity and passport photographs and post boxes. Other than courier services, the applicant did not offer any of the other services offered by Postnet.

16.4 Postnet and the applicant, even though they offer courier services, had a vastly different business focus. Whilst the applicant's business primarily serviced large corporate customers, Postnet's business on the other hand was geared towards walk-ins, and individual customers with often once off business.

16.5 Other than two franchises the applicant had done business with, there was no record of the applicant being a customer of Postnet, and/or having secured such repeat business from Postnet franchises so as to justify it asserting any proprietary interests. Postnet on the other hand had two preferred suppliers being Aramex and DHL.

16.6 Whilst employed by the applicant, she did not deal with any of the Postnet franchises, and she therefore had not built up any customer connections with any of the franchises which could be said to be vulnerable to exploitation, nor was she privy to any confidential information pertaining to the applicant's alleged dealings with Postnet. She had no knowledge of any information that she could use to the detriment of the applicant.

16.7 Her interaction with the Samsung account on the other hand was limited and related to promotional products. Her last interaction with Samsung as the applicant's client was effectively prior to March 2017.

16.8 Aramex has had a pre-existing relationship with Samsung since 2011, and has always assisted with its express/international and domestic distribution of spare parts and peripheral items. These services were secured through a tender process, for which the applicant and RAM had competed for. Other companies including the applicant, have also been awarded tenders by Samsung in respect of certain services.

16.9 Aramex was given and had declined an opportunity to assist Samsung with its warehousing, and Aucamp had undertaken not to perform any warehouse activities for the duration of the restraint. Currently, Aramex's contract was no longer with Samsung itself but with Samsung SDS Global (Pty) Ltd, which was a fourth party logistic provider for Samsung, and which Aucamp had not dealt with.

16.10 Regarding the customers listed on annexure 'WN3' of the founding affidavit, Aucamp conceded that she was responsible for servicing them, and was further privy to the different rates agreed with the applicant. She could however not recall the rates of particular customers, and had averred that she had not taken any information with her when she left the applicant's employ.

16.11 Furthermore, in her new employment at Aramex, she will not be dealing with those customers, as she would be solely responsible for the relationships with Postnet. Aramex has also undertaken not to do any business at all with any of those customers, save for four out of 56 of those it has a pre-existing relationship with;

16.12 Enforcing the restraint of trade against her would not serve any legitimate purpose in view of the fact that several of the applicant's employees have joined Aramex, whilst employees from Aramex had gone to the applicant. Examples in this regard included; (a) Van der Merwe, who was previously employed by the applicant as General Manager of the international division without a restraint of trade agreement, and who had subsequently joined Aramex in June 2016 as its Divisional Chief Executive; (b) Rubert Wolff, who was previously the applicant's National Sales and Operations Manager, who despite his restraint of trade agreement, was allowed to join Aramex; (c) Grant Gietl, Charles Dornan and Stead were previously employed by Aramex and were allowed to join the applicant despite their restraint of trade agreements.

Evaluation:

[17] The central issue to be determined in this case is whether the applicant is entitled to insist on enforcing the restraint of trade agreement in circumstances where Aucamp and Aramex have made certain undertakings, and where Aucamp's contention was that she will have no contact with the

applicant's customers she used to deal with, more specifically since her focus at Aramex will be on Postnet.

[18] It needs to be stated from the onset that there are disturbing features with this this application in the light of (i) the alleged the proprietary interests the applicant seeks to protect; (ii) the nature of the industry it operates in; (iii) the manner with which it had dealt with senior employees who had left its employ to join the competition and Aramex in particular; (iv) Aucamp's uncontested versions in regards to her role and responsibilities whilst employed by the applicant *vis-à-vis* her new role at Aramex; and (v) the 'with prejudice' undertakings made by both Aucamp and Aramex.

[19] A brief exposition and restatement of the relevant applicable legal principles in such matters is necessary. It is trite that a party that seeks to enforce a contract in restraint of trade is required to invoke the restraint agreement and prove a breach thereof. In this case, and as already stated, the agreement is not in dispute, and Aucamp has conceded that her employment with Aramex in view of it being a competitor is *prima facie*, a breach of her restraint undertakings, *albeit* her contention was that Postnet was not effectively a competitor of the applicant.

[20] Aucamp's contention was that the Postnet franchises were not direct competitors of the applicant, and that whilst employed by the applicant, she did not deal with any of these franchises, nor did she possess any information concerning them. These averments remain undisputed, as well her contention that there are 360 Postnet franchises of which only two had utilised the services of the applicant. In my view, and in the light of the applicant's minimal involvement with these franchises, there is therefore no basis to deem Postnet a customer of the applicant, and any proprietary interest in respect of Postnet or risk of infringement to that interest is indeed negligible in the extreme.

[21] To the extent that Aucamp seeks to avoid the restraint of trade agreement, she bears the onus to demonstrate on a balance of probabilities that the

restraint agreement is unenforceable because it is unreasonable[1]. In *Basson v Chilwan and others[2],* the Court identified four questions which should be asked when considering the reasonableness or otherwise of the restraint provisions. These are;

a) Does the one party have an interest that deserves protection at the termination of the employment?

b) If so, is that interest threatened/prejudiced by the other party?

c) Does such interest weight qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?

d) Is there an aspect of public policy having nothing to do with the relationship between the parties, which requires that the restraint be maintained or rejected? Thus, where the interest of the party sought to be restrained outweighs the interest to be protected, the restraint is unreasonable and consequently unenforceable.

[22] Other considerations the Court is obliged to take into account include whether the enforcement of restraint undertakings is merely intended to stifle competition. Any attempts at seeking enforcement for that sole purpose would clearly be unreasonable[3]. It further needs to be determined whether the restraint goes further than is necessary to protect the interests alleged in terms of area and duration[4].

[23] Regarding the reasonableness of the restraint in terms of area and duration, Aucamp's contention was that the duration of the restraint was not unreasonable. She however submitted that the restraint could not be reasonable in circumstances where the applicant seeks an order interdicting and restraining her from joining the employ of Aramex for six months from the date of the order of this court, and not from the date of the termination of her

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[1] See *Experian South Africa (Pty) Ltd v Haynes and Another (2013) (1) SA 135 (GSD)*; *Basson v Chilwan and Others at 767A-D*

[2] [1993] (3) SA 742 (A) at 767 G-H

[3] See *Ball v Bambalela Bolts (Pty) Ltd and Another* (2013) 34 ILJ 2821 (LAC)

[4] *Kwik Kopy (SA) (Pty) Ltd v Van Haarlem and Another (1999) (1) SA 472 (W) at 484E*

employment as provided for in the signed agreement. I agree with her submissions in this regard. The applicant cannot be granted relief which it is not entitled to in terms of the restraint of trade agreement. It is not for this Court to extent the terms and conditions of agreements entered between parties.

[24] Protectable interests worthy of protection are of two kinds. The first relates to the 'trade connections' of the business, which essentially entails the goodwill of the business encompassing relationships with customers, potential customers, suppliers and others[5]. The second relates to 'trade secrets' of the company, which involves all confidential matters which are useful for the carrying on of the business and which could be useful to a competitor[6].

[25] Once it is demonstrated that the prospective new employer is a competitor of the applicant as in this case, the risk of harm, if its former employee were to take up employment, becomes apparent. This principle can however not be deemed to be immutable, in the sense that an ex-employee can join a competitor, and yet not have anything to do with the business of the old employer in his or her new role when employed by the competitor. The undisputed facts in this case illustrates this point. In this regard, it was Aucamp's contention that one Charles Dornan was initially employed by Aramex as its Business Analyst, and was permitted to join the applicant as the position offered to him was that of the applicant's Operations Division, which was unrelated to sales.

[26] I have already on a general level, alluded to features of this application which I had deemed to be disturbing, and I intent to deal with them within the context of 'customer connections'. In this case, the onus would be on Aucamp to demonstrate that she has never acquired any significant personal knowledge of, or influence over, the applicant's customers, potential customers, suppliers and others. It is trite however that not every contact between an employee and the ex-employer's customers constitutes or forms the basis of a protectable interest in the form of trade connections. It however suffices if it is

[5] See *Basson supra*
[6] *Experian* at paras 17, 17.1 and 17.2

shown that trade connections through customer contact exists, and that they can be exploited if the former employee was to be employed by a competitor. This is particularly so where on the facts, it can be established that there was indeed an attachment between the ex-employee sought to be restrained and those customers.

[27] In view of Aucamp's uncontested averments, I have difficulty in appreciating how it can be said that Aucamp's employment by Aramex would severely prejudice any such interests in circumstances where on the applicant's own version, the industry it operates in is highly competitive. Gietl described the industry as 'cutthroat', with the primary reasons for this being that;

a) There are many entities (about 2000) in the industry vying for the same piece of the pie.

b) There is no customer loyalty to any brand, nor is there retention security of customers or fixed agreements concluded with them.

c) Customers are generally at liberty to shop around for the most competitive rates, and to use any courier company of their choice.

d) Large customers are equally at liberty to use multiple couriers in order to obtain the best possible price and service.

e) Competitors utilise standard methods of securing business, and worst still, competitors liberally poach each other's employees.

[28] It was correctly submitted on behalf of the applicant that the risk of a good salesperson with strong customer connections taking up employment with a competitor is recognised as a factor strongly in favour of enforcing a restraint of trade. In this case, on Aucamp's version, she never forged any strong bonds or relationships with customers, and there is no reason to doubt that in view of the common cause facts highlighted above. The mere fact that an ex-employee had contact or dealings with clients or customers does not lead to an invariable conclusion that those contacts automatically create protectable interests that can be exploited for nefarious reasons.

[29] The applicant’s concerns in this regard are primarily in respect of Samsung, Evetech and the other customers listed in annexure ‘WN3’ to the founding affidavit. In respect of Samsung, Aucamp averred that she had limited and project specific interaction with the Samsung account, and her last interaction with that account was prior to March 2017 when she was promoted to the position of Key Account Manager for customers listed in annexure “WN3’.

[30] It was further not disputed that Aramex has had a pre-existing relationship with Samsung since 2011, and has always assisted with its express/international and domestic distribution of spare parts and peripheral items. This cannot in my view point to an exclusive relationship between Samsung and the applicant. Crucial however with the concerns of the applicant regarding the Samsung’s account is that Aramex has little or no interest in Samsung’s business. Even if it could be said that Aucamp was privy to information peculiar to Samsung, in her new role, she will not deal with that entity moreso since currently, Aramex’s contract was no longer with Samsung itself but with Samsung SDS Global (Pty) Ltd. As to whether the distinction drawn by Aucamp between Samsung Corporation and Samsung SDS Global (Pty) Ltd is artificial or real is a matter that the applicant failed to respond to.

[31] In regard to the customers listed on annexure ‘WN3’ of the founding affidavit, including Evetech, there is further no reason to doubt Aucamp’s version that even though she was responsible for servicing them whilst employed by the applicant, she would not have any contacts with these customers, and to the extent that Aramex had made an undertaking that these customers would be out of bounds save for the four it had always serviced, again, I fail to appreciate how it can be said that these customer connection would be exploited to the detriment of the applicant, or that Aucamp was in a position to lure them to Aramex.

[32] My conclusions above are further fortified by factors surrounding Aucamp’s employment at the applicant, which reveals that upon her promotion during February 2017 to the position of Key Account Manager, she was to service 60 customers excluding Samsung. As to whether it can be concluded that she

was able to form such strong bonds with these client from February to July 2017 is clearly doubted. In any event, to the extent that it can be said that there was a possibility of Aucamp exploiting these customers' connections, the undertakings as shall be dealt with in the course of this judgment in my view went far in protecting any interests the applicant may have.

[33] Whilst on the topic of customer connections, it needs to be stated that it remains uncontested that some of the applicant's ex-senior employees had joined Aramex, whilst some of the latter entity had joined the applicant. It is my view that Aucamp was correct in her assessment that the applicant was selective in enforcing the restraint agreements which it had with its employees, and that the sole purpose of the application was to dissuade Aramex from poaching its employees.

[34] The issue however goes further than that in the sense that if indeed the applicant was concerned about infringement of its perceived proprietary interests, it is inexplicable how it would have waived the restraint undertakings in respect of Wolff, who used to be its National Sales and Operations Manager. It was correctly pointed out on behalf of Aucamp that if indeed the applicant's proprietary interests were ever at risk of being infringed, it would have been when these ex-senior employees joined Aramex. The question that remains unanswered as correctly submitted on behalf of Aucamp is what information regarding proprietary interests could she possibly pass on to Aramex which the other two senior employees had not already done?

[35] Regarding confidential information which Aucamp may have acquired whilst employed by the applicant, it is trite that the essence of any restraint of trade agreement is to prevent the use of such information by a former employee to the detriment of the employer. It has been held that it was not necessary to find that the ex-employee did or would actually use trade secrets and confidential information in his new employment, but that is was sufficient if *she could do so*[7]. For information to be regarded as confidential, it must (a) be capable of application in trade or industry, must be useful; must not be public knowledge or property; (b) it must be known only to a restricted number of

[7] In *Reddy v. Siemens Telecommunications (Pty) Ltd* [2006] ZASCA; 2007 SA 486 (SCA)

people or a closed circle and (c) be of economic value to the person seeking to protect it.[8]

[36] In this case, the applicant's contention was that Aucamp was also privy to all the information of the clients she serviced, that she had in-depth knowledge of the applicant's services, its business model, pricing structures, sales strategies and customer requirements. It was further contended that Aucamp had detailed and up to date knowledge of the pricing structure applicable to each customer in her old portfolio whilst at the applicant, and that it would be easy for her to undercut the applicant by offering slightly lower prices from Aramex by joining Aramex.

[37] Aucamp had conceded that having serviced the customers in question, she would have been privy to information peculiar to those customers, but contended that there was no risk of her utilising the information for the benefit of Aramex in that her focus in her new position would be on Postnet, with the intention of maintaining and developing Aramex's relationship with it. To this end, it was argued on her behalf there was no evident risk to the applicant in that she did not, whilst employed by the applicant, deal with Postnet business.

[38] To the extent that it is not disputed that Aucamp had not whilst employed by the applicant dealt with Postnet, there can be no basis to conclude that she has in her possession, any confidential information concerning Postnet, or any other clients or customers linked to Postnet. I have already dealt with the issue of whether Postnet was a crucial customer of the applicant in view of Aucamp's undisputed version that only two out of 360 franchises of Postnet had utilised the services of the applicant. In these circumstances, and in view of the issue of the undertaking made in regard to the other customers, there is further no basis for a conclusion to be reached that whatever information may be in Aucamp's possession ran the risks of being utilised to the applicant's detriment.

The 'with prejudice' tender:

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[8] See *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff and Another* [2008] ZAWCHC 118; 2009 (3) SA 78 (C)

[39] Subsequent to an exchange of correspondence between the parties' attorneys of record, on 15 August 2017, CDH addressed a letter to Howes, wherein *inter alia* they took issue with the time afforded for the respondents to file their answering papers. Central to that correspondence was the proposal that the matter be removed from the roll and to be enrolled on a different date, and the intention to make 'with prejudice' offer, with a view to resolving the dispute.

[40] In a response dated 16 August 2017, the applicant through Howes refused to accede to the request for a postponement of the matter. Notwithstanding the refusal accede to a postponement, Aucamp and Aramex then on the same day made a with prejudice offer. The relevant portions of the letter read as follows;

> "…
>
> 2 We confirm that in the interest of settling this matter amicably, the first and second respondents (without in any way conceding that the restraint of trade agreement is enforceable in these circumstances), intends to make a with prejudice tender.
>
> 3. Having considered the matter, it appears that your client's primary concern is that our client will be able to persuade the customers with whom she dealt whilst in your client's employ, to do business with the second respondent. In order to address that concern, the first and second respondents tender on a with prejudice basis and in settlement of this application, that the following order be made:
>
> 3.1 *"The restraint of trade and confidentiality agreement concluded between the applicant and the first respondent on 7 April 2017, annexure "WN1" to the founding affidavit, is rectified, by replacing any reference to "World Net Express (Pty) Ltd, with "World Net Express, a division of World Net Logistics (Pty) Ltd;*
>
> *3.2 The first respondent shall not for a period of 12 months commencing on 1 August 2017 and within the Republic of South Africa, either for herself or as the agent of anyone or entity, persuade, induce, solicit, consult, meet with, encourage, employ or procure (or endeavour to do any aforegoing), any of the applicant's employees within the Republic of South Africa to*

be employed by, associated with, interested in any competitor or client of the applicant or to terminate his/her employment with the applicant and shall not furnish any information or advice (including trade secrets) acquired by the first respondent to any third party that results in an employee of the applicant becoming directly or indirectly employed by, associated with, interested in, any competitor;

3.3 The first respondent shall not for a period of 12 months commencing on 1 August 2017 and within the Republic of South Africa, divert any business away from the applicant or attempt to divert business away from the applicant nor will she approach, do business with, solicit, interfere with, entice or endeavour to approach, do business with, solicit, solicit, interfere with or entice away from the applicant any person, client, entity, undertaking or association who or which was, during the period of 12 months immediately prior to 1 August 2017, a client, customer or supplier of the applicant or was accustomed to dealing with the applicant and its business;

3.4 The first respondent will not use or disclose any of the applicant's confidential information to which she may have been privy to whilst employed by the applicant to the second respondent or any other third party;

3.5 The second respondent shall not for a period of 6 months commencing 1 August 2017 and within the Republic of South Africa do business:

3.5.1 any of the customers listed on annexure "WN3" to the founding affidavit save for the following clients with which it already does business:

3.5.1.1 Rymco (Pty) Ltd t/a Anchor Yeast;

3.5.1.2 Deltamune (Pty) Ltd;

3.5.1.3 Boehringer-Ingelheim (Pty) ltd; and

*3.5.1.4 Samsung Corporation ("**Samsung**") save for the courier services which the second respondent has always provided to Samsung from time to time in respect of the*

> *distribution of the "peripheral items" as contemplated in paragraph 23 of the founding affidavit and the logistics of fault and/ or damaged items to be repaired. Simply put, the second respondent will not offer Samsung warehousing or logistic services in respect of new cell phones and related products as contemplated in paragraph 22 of the founding affidavit;*
>
> *3.6 The first respondent is permitted to be employed by the second respondent; and*
>
> *3.7 Each party pay their own costs of the application"*

[41] It is common cause that the applicant had rejected the tender, contending that it was not credible or policeable, and further lamenting the fact that Aramex had a long history of poaching its staff. Aucamp's contention was that the with prejudice tender completely addressed any legitimate concerns that the applicant may have had, and that it was entirely policeable as Aramex itself had undertaken not to deal with any of the applicant's customers listed in annexure 'WN3' safe for the four entities it had always serviced.

[42] It was submitted on Aucamp's behalf that the fact that Aramex has bound itself to the undertakings was significant for a number of reasons, including that;

a) Aramex was not a party to the restraint of trade agreement and therefore dishonesty or distrust of the undertakings it provided in its own right are not to be lightly inferred;

b) the tender was also policeable since it precluded Aramex from doing any business with customers as envisaged in the tender

c) the tender was to be made an order of court

d) case law which stated that an applicant need not cross its fingers and hope that Aucamp will abide by the undertakings she gave are distinguishable in that the tender was made by Aramex, and there was no longer any risk to the applicant and it was no longer a question of the applicant having to cross its fingers

[43] The applicant however holds the view that it was not for it to enquire into the *bona fides* of the undertakings, as what was important was whether its proprietary interests were under threat. The applicant contended that it could not run the risk of Aucamp being employed by Aramex.

[44] In considering whether the enforcement of restraint provisions is reasonable or not, it is trite that the fact that the respondent made certain undertakings that they will not breach the agreement is not relevant for the purposes of this court in exercising its discretion when considering the matter[9]. The circumstances of this case in the light of the conclusions made in respect of the allegations of risk or threats to the applicant's proprietary interests however compel me to conclude that indeed there was no basis for the applicant to reject the tender, and further that its grounds for doing were unreasonable in the extreme when the following factors are taken into account;

a) The applicant had in the past, relaxed or failed to enforce restraint provisions in respect of other senior managers who had jumped ship and joined the competition, and more specifically, Aramex.

b) There is merit in Aucamp's contention that the applicant merely sought to enforce the restraint provisions against her simply to stop Aramex from poaching its staff. This is evident from the response of its attorneys of record to the tender[10], wherein they had outlined Aramex's long history of poaching its staff, and lamenting the fact

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[9] See *International Executive Communications Ltd t/a Institute for International Research v Turnley and Another 1996 (3) SA 1043 (W) 1056H – 1057A*, where it was held that;

> "In 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."

[10] Annexure 'AA4' to the answering affidavit

that Aramex *'clearly had no respect for our client's legal rights and contractual arrangements with its employees or clients'*.

c) The applicant however cannot make an example of Aucamp despite the acknowledgement of the principle that it is in the public interest that persons should honour their own agreements. The submission made by Mr. Fourie on behalf of the applicant that the history of not enforcing restraint provisions was not relevant cannot be sustainable. This is particularly so in instances where the applicant portrays a view that it takes these types of agreements seriously given the nature of the industry it operates in. It is my view that the seriousness contended makes the court obliged to take notice of the consistency with which the applicant has enforced restraint provisions against its employees in the past, and where exceptions were made, to determine whether there was justification.

d) To the extent that the applicant sought to enforce the restraint provisions against Aucamp, it needed to do so for the right reasons, including demonstrating that it was entitled to the protection of its proprietary interests, and not for any other extraneous factor, which had nothing to do with the enforcement of the restraint.

e) A further consideration in this matter is that based on Gietl's own version, the competitiveness in the industry was exacerbated by the fact that competing companies in the industry often recruited each other's staff. In this case, there was nothing to gainsay Aucamp's version that she was not recruited but had responded to an advertisement of the post in question. Even if it can be said that she was poached, that unfortunately was in the inherent nature of the business the applicant operates in, a factor it had acknowledged and appreciated.

f) In the light of the above, there is cause to conclude that the applicant merely sought to enforce the restraint provisions against Aucamp to not only draw the line in the sand and prove a point to Aramex as submitted by Ms. de Witt on her behalf, but also to stifle competition. It appears that the the purpose of enforcing the restraint in this case was merely to punish Aucamp for the sins of former employees of the applicant who had joined Aramex. It has been emphasised over time that the purpose of enforcement of restraint provisions is not to punish employees[11]. To the extent that it is evidently so in this case, and further to the extent that it is apparent that the enforcement is also intended to stifle competition, such enforcement cannot by all accounts be reasonable.

g) The applicant's contention that the undertakings are unpoliceable is equally without merit, given the nature of the industry it operates in, the undertakings made by Aramex even when it was not a party to these proceedings, and the fact that both Aramex and Aucamp sought to make those undertakings an order of court. The issue which the applicant failed to address is why would Aramex risk contempt proceedings unless it was genuine in its intent?

h) Inasmuch as it is accepted that the applicant should not content itself with crossing its fingers and hoping that Aucamp and Aramex would act honourably and abide by the undertakings given, there was no basis for the applicant in this case to be suspicious of these undertakings or for any conclusion to be made that they are not credible in view of the undertakings made by Aramex;

i) In my view, having regard to the conclusions made in respect of the potential risks to the applicant's proprietary interests, the undertakings made by both Aucamp and Aramex went far beyond than merely protecting those interests, to the extent that they may exist.

Summary and Conclusions:

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[11] *Labournet (Pty) Ltd v Jankielsohn and Another (JA48/2016)* [2017] ZALAC 7; [2017] BLLR 466 (LAC); (2017) 38 ILJ 1302 (LAC) at para 65

[45] The requirements of a final interdict are well-established. Thus, there must be a clear right; an injury actually committed or reasonably apprehended, and lastly, the absence of any other satisfactory remedy.[12] In instances involving the enforcement of restraint of trade provisions, the availability of an alternative remedy is a factor that may be taken into account in considering whether and to what extent the restraint should be enforced[13].

[46] For a clear right to be established, the court has to consider whether there is an interest deserving of protection. My conclusions elsewhere in this judgment in regard to the proprietary interests that the applicant seeks to protect are that it has not demonstrated that it has any of these interests, and even if there is a semblance of any, that they are worthy of protection. I was further unable to find on the papers, that Aucamp and Aramex are in a position to pose any discernible risk or harm to the applicant's interests (if any), to the extent that there is an overlap in the customer base of these two entities. In any event, I am not convinced that Aucamp's employment by Aramex with her focus being on Postnet Holdings poses any threat to the applicant's interests in any of Postnet's franchises it might be linked with.

[47] Furthermore, I am of the view that the enforcement of the restraint given the circumstances of this case will not be proportionate having regard to any interests that the applicant may have. The restraint in this case is unenforceable as it not only seeks to prevent Aucamp from being economically active in circumstances where the applicant has not established a corresponding interest deserving of protection, but it is meant also to punish her and to stifle competition. To the extent that the applicant has not demonstrated a clear right, that in my view should be the end of the enquiry.

[48] In further coming to my conclusions, I have also taken account of the fact that Aucamp was amenable to a Court order encapsulating the provisions of the tender, and a draft order was handed in Court in that regard. However, in view of my other conclusions in this judgment in regard to the enforceability of the restraint agreement, and more particularly the fact that Aucamp's *bona fides*

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[12] See *Pilane and Another v Pilane and Another* 2013 (4) BCLR 431 (CC) at para 39.
[13] *Mozart Ice Cream Franchises (Pty) Ltd supra*

through her undertakings were unreasonably rejected, I can find no reason in law or fairness that why the applicant should be entitled to any relief other than in terms of its paragraph 2 of its Notice of Motion.

Costs:

[49] In terms of section 162 (1) of the LRA, this Court may make an order of costs after taking account of the requirements of law and fairness. In considering the issue of costs in this Court, and in particular, within the context of restraint of trade applications, the Labour Appeal Court in *Trevlyn Ball v Bambalela Bolts (Pty) Ltd* held that;

> "The normal rule that costs follow the result is not automatically applicable in Labour Court proceedings. The court is required to consider factors like the financial state of the parties, their *bona fides* and their continuing relationship, in coming to a decision whether to order the unsuccessful party to pay costs. Litigants are not to be deterred from defending or prosecuting bona fide actions for fear of adverse costs orders."[14]

[50] In the light of the conclusions reached in this case in regard to the enforceability of the restraint provisions, ordinarily a cost order would not have been appropriate in line with what is stated in *Trevlyn Ball* as above. It is however my view that taking into account the unreasonable nature of the refusal to accept the tender, and the basis upon which the enforcement was pursued, the prosecution of this application was clearly *mala fide*. To this end, there is no reason why Aucamp should be burdened with the costs of this application in circumstances where they could have been avoided.

Order:

[51] In the circumstances, the following order is made;

1. The matter is heard as one of urgency, with the forms and service provided for in the Rules being dispensed with to the extent necessary.

[14] At para [29]

2. The restraint of trade and confidentiality agreement concluded between the applicant and the first respondent on 7 April 2017 as contained in annexure 'WN1' to the founding affidavit, is rectified by replacing any reference to 'World Net Express (Pty) Ltd', with 'World Net Express, a division of World Net Logistics (Pty) Ltd'.

3. The applicant's application is dismissed with costs.

E Tlhotlhalemaje

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv. G. Fourie
Instructed by:	Howes Incorporated Attorneys
For the Respondent:	Adv. C. de Witt
Instructed by:	Cliff Dekker Hofmeyr Attorneys