



**IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG**

Not Reportable

Not of interest to other judges

Case No: J 2761/17

In the matter between:

SHOPRITE CHECKERS (PTY) LTD

Applicant

and

RUANE JANSEN

First Respondent

DIS-CHEM PHARMACIES LTD

Second Respondent

Heard: 22 November 2017

Order: 4 December 2017

Reasons: 13 December 2017

REASONS

BARNES AJ

[1.] On 4 December 2017 I made the following order:

[1.1.] The application is dismissed with costs.

[1.2.] The undertaking made by the first and second respondents and recorded in the letter from Saltzman Attorneys to Cliffe Dekker Hofmeyr dated 3 November 2017 at paragraph 2.18 thereof is made an Order of Court.

[2.] I set out my reasons below.

Introduction

[3.] This is an urgent application to enforce a restraint of trade agreement.

[4.] The applicant sought a final order in the first instance, and an interim order only in the alternative. The application was effectively argued before me as one for final relief.

[5.] The first respondent, Mr Jansen, was employed by the applicant from 1 February 2011 until his resignation on 14 October 2017. At the time of his resignation, Mr Jansen was a Groceries Buyer responsible for the purchasing of sweets, snacks, biscuits, confectionary and beverages for the applicant's stores in its Great North Division.

[6.] Upon handing in his resignation, Mr Jansen informed the applicant that he would be taking up employment with the second respondent, Dis-Chem Pharmacies (Pty) Ltd ("Dis-Chem") as a buyer.

[7.] The applicant informed Mr Jansen that this would constitute a breach of the restraint of the trade undertaking he had signed in the applicant's favour.

The applicant sought to persuade Mr Jansen to withdraw his resignation and offered to continue to employ him, an offer which it reiterated at the hearing of the application.

- [8.] Mr Jansen was unpersuaded. He accepted that he had signed a restraint of trade undertaking in the applicant's favour. He contended however that it would not be enforceable in precluding him from taking up employment with Dis-Chem.
- [9.] Mr Jansen commenced employment with Dis-Chem on 20 November 2017.
- [10.] The applicant launched this application expeditiously after exhausting attempts to convince Mr Jansen to comply with his restraint of trade undertaking. I am satisfied that it was justifiably brought as one of urgency.

Background Facts

- [11.] Mr Jansen commenced employment with the applicant on 1 February 2011 as an Assistant Manager Designate. The applicant attached Mr Jansen's contract of employment, signed on 28 February 2011, to its founding affidavit. This contract, on the face of it, contains no restraint of trade clause. However, Mr Jansen stated in his answering affidavit that his contract did include a restraint of trade undertaking in substantially similar terms to the undertakings which he signed in subsequent years during his employment with the applicant. Those undertakings are set out below.
- [12.] Mr Jansen moved quickly through the applicant's ranks. Not long after his appointment, in April 2011, the applicant promoted him to Regional Fruit and Veg Specialist.
- [13.] In May 2013, Mr Jansen was appointed as a Trainee Buyer in the applicant's

Food Buying Department. Prior to commencing in this position, on 7 May 2013, Mr Jansen signed a confidentiality and restraint undertaking in favour of the applicant. This formed an addendum to Mr Jansen's contract of employment.

[14.] On 1 December 2014, Mr Jansen was promoted to the position of Groceries Buyer. Pursuant to his appointment in this position, Mr Jansen signed a further confidentiality and restraint undertaking in favour of the applicant. He did so on 11 December 2014. This undertaking too formed an addendum to Mr Jansen's contract of employment.

[15.] The undertakings signed by Mr Jansen on 7 May 2013 and 11 December 2014, respectively, are in identical terms. They provide as follows:

"Confidentiality and Restraint

1. By virtue of your appointment, you will be privy to information which is confidential and/or proprietary to the Company. This includes information concerning the Company's business, its operations, finances, policies, practices, planning, purchases, pricing, sales, suppliers, stocks and other matters. You agree that you will not (save insofar as is necessary and appropriate) disclose to any person, without the written consent of the Company, any confidential or proprietary information as the business, operations, dealings or any other affairs of the Company during your employment or after the termination of your contract of employment.
2. You agree further that, should you become involved in any business or other activity competing with the Company or its associated operating divisions, this would severely prejudice

the business of the Company. You therefore agree and undertake in favour of the Company, that during your employment and for a period of two (2) years from the date of termination of your appointment with the Company, or with any associated or related company, you will not anywhere in the Republic of South Africa, directly or indirectly, alone or with any other person, and whether as an agent, employee, consultant, in partnership or as a company, body corporate, franchisor of franchisee, or in any other capacity, be engaged, retained or employed or have a material interest in any Company, business, firm person, enterprise or undertaking, carrying on a business involving the distribution and/or sale, through chain retail stores, of any food or related products, household products, furniture, beverages or any other product, product category or other items that are distributed by, and/or sold through the retail chain operations of the Company or any associated Company.

3. You will not, either for yourself, or as the agent of anyone else, persuade, induce, solicit, encourage or procure (or endeavour to do any of the foregoing) any of the Company's employees to become employed by or interested in any manner whatsoever in any business, firm, undertaking or company (collectively referred to herein as 'any concern') directly or indirectly in competition with the Company, or to terminate employment with the Company, nor will you furnish any information or advice acquired by you as a result of your employment with the Company, to any person whomsoever, which results or may result in any of the Company's employees becoming employed by or interested in any manner whatsoever, whether directly or indirectly, in any

concern.

4. You acknowledge that the terms of this restraint are fair and reasonable and go no further than is reasonably required to protect the proprietary interests, trade secrets and confidential information of the Company, to which you would have had access or to which you would have been exposed.” (“the restraint”)

[16.] As a Groceries Buyer, Mr Jansen was one of a team of 13 Buyers and 3 Trainee Buyers who reported to the applicant's Head of Buying and Marketing: Great North Division, Mr Charles Ochse. Mr Jansen had initially been responsible for purchasing in the paper and plastics categories. This encompassed items such as sandwich bags, freezer bags, cling wrap, foil, toilet paper, roller towels and serviettes. From the end of 2016 until his resignation Mr Jansen was responsible for purchasing in the categories of sweets, snacks, biscuits, confectionary and beverages.

[17.] The applicant's application is premised on the contention that Dis-Chem is its competitor. The applicant contended that, as a Groceries Buyer, Mr Jansen was privy to trade connections and confidential information, which are its protectable interests, and which stand to be prejudiced by Mr Jansen's employment at Dis-Chem.

[18.] It is evident from the restraint that clause 2 prohibits employment or engagement with the entities defined therein for a period for two years. The applicant however, sought to enforce this clause against Mr Jansen for a period of one year only. It also sought the enforcement of clauses 1 and 3 of the restraint.

[19.] In answer to the applicant's contentions, Mr Jansen submitted in the first

instance that the restraint is, on its terms, contrary to public policy and unenforceable.

[20.] Secondly, and in the alternative, Mr Jansen submitted that it would not be reasonable to enforce the restraint against him. He contended that this was so having regard to the nature of Dis-Chem's business vis-à-vis that of the applicant and the fact that they are not competitors. Mr Jansen submitted that in this context, the applicant does not have a protectable interest, alternatively, even if it does, there could be no question of any prejudice to the applicant.

[21.] Mr Jansen's averments pertaining to the nature of Dis-Chem's business and the fact that it is not in competition with the applicant, were confirmed by Dis-Chem on the papers.¹

[22.] Mr Jansen pleaded further that at Dis-Chem he is designated to be a buyer for baby care, intimate care, foot care, haircare, incontinence and paper products and not beverages, sweets, snacks, biscuits and confectionary.

[23.] Prior to the commencement of the litigation, Mr Jansen and Dis-Chem offered undertakings to the applicant in the following terms:

"..... our clients are willing to provide your client with the following undertakings in an attempt to reassure your client and dissuade it from instituting the aforesaid proceedings:

Mr Jansen shall indefinitely abide by items 1 and 3 of the restraint; and

Dis-Chem shall not employ or in any way involve Mr Jansen as a buyer

¹ In confirmatory affidavits attached to Mr Jansen's answering affidavit deposed to by Saul Lever, Dis-Chem's HR Manager and Mr Ronald Govender, a Senior Dis-Chem Executive.

in respect of confectionary, beverages and related products for a period of 1 (one) year after commencement of his employment with Dis-Chem, i.e., until 6 November 2018.”

[24.] Mr Jansen and Dis-Chem tendered that the aforesaid undertakings be made an Order of Court.

The Applicable Law

[25.] Prior to *Magna Alloys and Research SA (Pty) Ltd v Ellis* (“*Magna Alloys*”),² restraints of trade were only enforceable if they were proved to be reasonable. The effect of *Magna Alloys* was to reverse this position, by placing an *onus* on the party sought to be restrained, to prove on a balance of probabilities, that the restraint was unreasonable. Since then the position has been that restraints of trade are enforceable unless they are proved, by the party sought to be restrained, to be unreasonable.

[26.] However, as the Labour Appeal Court noted in *Ball v Bambalela Bolts (Pty) Ltd*³ and another:

“Because the right of a citizen to freely choose a trade, occupation or profession is protected in terms of section 22 of the Constitution and a restraint constitutes a limitation of that right, the *onus* may well be on the party who seeks to enforce the restraint to prove that it is a reasonable or justifiable limitation of that right of the party sought to be restrained. (see *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* 2001 (2) SA 853 (SE) at 862; *Canon KwaZulu Natal (Pty) Ltd t/s Canon Office Automation v Booth and another* 2005 (3) SA 205 (N). Also compare *Affordable Medicines Trust and others v Minister of*

² 1984 (4) SA 874 (A)

³ [2013] 9 BLR 843 (LAC).

Health of RSA and another 2005 (6) BCLR 529 (CC))”⁴

- [27.] In *Reddy v Siemens Telecommunications (Pty) Ltd*,⁵ the Supreme Court of Appeal held that the question of the reasonableness or unreasonableness of a restraint is always a value judgment which involves the weighing up of two policy considerations: the public interest which requires that parties to a contract comply with their contractual obligations (*pacta servanda sunt*) and the principle that a citizen should be free to follow a trade, occupation or profession of her choice.⁶
- [28.] The value judgment must be based on factual findings, after any disputes have been resolved in the respondent's favour by the application of the *Plascon Evans* rule.⁷ Thus the Supreme Court of Appeal held in *Reddy v Siemens Telecommunications* that if the facts, assessed in this way, disclose that the restraint is reasonable then the party seeking the restraint order must succeed. If on the other hand, those facts show that the restraint is unreasonable, then the party sought to be restrained must succeed. “*What this calls for is a value judgment, rather than a determination of what facts have been proved, and the incidence of the onus accordingly plays no role.*”⁸
- [29.] The test for reasonableness of restraint of trade provisions remains that set out in *Basson v Chilwan and others*⁹ where the court held that the facts are to be assessed with reference to the following questions:
- (a) Is there an interest of the one party which is deserving of protection at the termination of the agreement?

⁴ At para 13.

⁵ 2007 (2) SA 486 (SCA).

⁶ *Reddy v Siemens Telecommunications*, at para 15.

⁷ *Plascon Evans Paints (Pty) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A). The rule is applicable in labour matters; see *Fry's Metals (Pty) Ltd v NUMSA and Others* [2003] 2 BLLR 140 (LAC)

⁸ *Reddy v Siemens Telecommunications*, at para 14.

⁹ 1993 (3) SA 742 (A).

- (b) Is such interest being prejudiced by the other party?
- (c) If so, does such interest so weigh up qualitatively and quantitatively against the interest of the other party that the latter should not be economically inactive and unproductive?
- (d) Is there any other facet of public policy having nothing to do with the relationship between the parties but which requires that the restraint be maintained or rejected?¹⁰

[30.] In *Kwik Kopy (SA) (Pty) Ltd v Van Haarlem and another*¹¹ the court added a further consideration, namely whether the restraint is wider than what is necessary in order to protect the protectable interest.

[31.] As stated above, Mr Jansen submitted, in the first instance, that the restraint falls to be declared unenforceable on the grounds that it is contrary to public policy on its terms.

[32.] This is so, he submitted, because the restraint as it stands may preclude Mr Jansen's employment for two years anywhere in the Republic of South Africa (a) by any entity that carries and sells the same products as those sold by the applicant and its associate companies and (b) by any entity that trades in competition with the applicant and its associated companies.

[33.] Mr Jansen submitted that, as such, the restraint is manifestly overbroad and restricts, for no legitimate purpose, economic freedom and the right of an individual to choose her occupation.

¹⁰ At 767A – D. This test has been regularly applied by this court. See for example *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronje and Another* (2011) 32 ILJ 601 (LC); *Shoprite Checkers (Pty) Ltd v Jordaan and Another* (2013) 32 ILJ2105 (LC) and *Medtronic (Africa) (Pty) Ltd v Van Wyk and Another* (2016) 37 ILJ 1165 (LC).

¹¹ 1999 (1) SA 472 (W).

- [34.] An approach which seeks to have a restraint declared unenforceable, on its terms, without regard to the reasonableness or otherwise of the form in which its enforcement is sought, is against the weight of prevailing authority.
- [35.] In *Den Braven SA (Pty) Limited v Pillay and another*,¹² a case in which the same approach was attempted, the court held as follows:

“As regards the authorities I have dealt with those above. They show in my view that it is inappropriate to have resort to general principles of severability in approaching a restraint of trade agreement that is too widely drawn but which is sought to be enforced only in respect of conduct which manifestly falls within its terms and in respect of which the enforcement would be fair and reasonable in accordance with the norms of public policy derived from the Constitution. In my view it forms no part of the analysis in that situation to ask whether the agreement as a whole is so broad that it will be unenforceable if enforcement is sought of its terms in their entirety. There mere fact that only limited relief is being sought will ordinarily indicate that this is the case. The proper approach in my view is for the court to ask itself whether the conduct that the applicant seeks to restrain by way of an interdict is conduct that falls within the terms of the restraint agreement and from which the former employee agreed to abstain. If the answer to that question is in the affirmative the court then moves to an analysis of whether it should, in accordance with the principles of public policy, enforce the agreement to that extent by granting relief to the applicant. It has no need in those circumstances to have regard to those portions of the agreement that are more extensive than the relief actually being sought.”¹³

¹² [2008] 3 All SA 518 (D)

¹³ At para 50.

[36.] This is the approach I intend to follow. The conduct which the applicant seeks to interdict in this case clearly falls within the ambit of the restraint. I shall therefore proceed to determine, by applying the test set out in *Basson v Chilwan*, whether it would be reasonable to enforce the restraint to the extent sought by the applicant.

[37.] The first question for determination in terms of the *Basson v Chilwan* test is whether the applicant has an interest worthy of protection after the termination of the agreement, that is, a protectable interest. It is by now well established that a protectable interest may be of two broad kinds:

“The first kind consists of the relationships with customers, potential customers, suppliers and others that go to make up what is compendiously referred to as the ‘trade connections’ of the business, being an important part of its incorporeal property known as goodwill.

The second kind consists of 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 relative competitive advantage.”¹⁴

[38.] As far as trade connections are concerned, it is well established that a protectable customer or supplier relationship exists where an employee has personal knowledge of, and influence over, the customers (or suppliers) of her employer so as to enable her, if the competition was allowed, to induce the customer or supplier to follow her to the new employer.¹⁵

[39.] In relation to confidential information, there is no closed list of the type of

¹⁴ *Kwik Kop (SA) (Pty) Ltd v Van Haarlem* supra at paras 14 -17.

¹⁵ *Rawlins & another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at 541E; 543 C-G.

information that may be confidential. However, certain requirements must be satisfied in order for information to properly qualify as confidential in this context. These are the following:

- (a) The information must involve and be capable of application in trade or industry, that is, it must be useful.
- (b) The information must not be public knowledge and public property, that is, objectively determined, it must be known only to a restricted number of people or to a closed circle.
- (c) The information objectively determined must be of economic value to the person seeking to protect it¹⁶ and be objectively useful to a competitor.¹⁷

[40.] There is a dispute in this case as to whether or not the applicant and Dis-Chem are competitors. This has important implications for the confidentiality of the information sought to be relied on by the applicant, for if Dis-Chem is in fact not the applicant's competitor, then the applicant's information would be of no use to Dis-Chem and would accordingly not qualify as confidential.¹⁸

[41.] In *Value Logistics Ltd v Paula Smit and Another*,¹⁹ the court, even presuming that the relevant businesses competed with each other, found that the information in question was of no use to the so-called competitor and therefore could not be classified as confidential for purposes of protection by

¹⁶ *Alum-Phos (Pty) Ltd v Spatz* [1997] 1 All SA 616 (W) at 623f -624a; *Aranda Textile Mills (Pty) Ltd v Hum* [2000] 4 All SA 183 (E) at 190 i – d; *Townsend Productions (Pty) Ltd v Leech* [2001] 2 All SA 255 (C); *Canon KwaZulu Natal (Pty) Ltd v Booth* 2001 (1) BCLR 39 (N); *Advtech Resourcing (Pty) Ltd v Kuhn* [2007] 4 All SA 1386 (C).

¹⁷ *Dickinson Holdings Group v Du Plessis* 2008 4 SA 214 (N) at para 35; *Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg* 1967 1 SA 686 (W) 689 and *Hirt & Carter (Pty) Ltd v Mansfield* 2008 3 SA 512 (D) 523 at para 46.

¹⁸ See *Saner Agreements in Restraint of Trade in South African Law* (Lexis Nexis) at 7-31.

¹⁹ Unreported case no 2013/9906 (GSJ).

a restraint.

[42.] The second question for determination in terms of the *Basson v Chilwan* test is whether, if a protectable interest is found to exist, it would be prejudiced by Mr Jansen's employment at Dis-Chem. Here too, the question of whether the applicant and Dis-Chem are competitors is important.

[43.] As John Saner states in his book *Agreements in Restraint of Trade in South African Law*:

"Even where protectable interests exist, for example in the form of confidential information to which the respondent had been exposed, if the respective companies are not in competition with each other, then the confidential information will effectively be useless in the hands of the respondent's new employer which will in turn lead to a finding of the unreasonableness of the restraint."²⁰

[44.] This is what transpired in *Shoprite Checkers (Pty) Ltd v Coskey* ("Coskey"),²¹ a case in which the applicant sought to enforce a restraint against a former employee who took up employment at Federated Timbers (Pty) Limited trading as Builders Trade Depot ("Federated Timbers"). The restraint sought to be enforced by the applicant in that case was identical to the restraint sought to be enforced in this case.

[45.] In *Coskey*, the applicant contended that because it sold certain limited lines of general hardware and building ware, Federated Timbers was one of its competitors.

[46.] The court in *Coskey* found that the applicant and Federated Timbers were not in competition with one another in any substantial sense and therefore

²⁰ Supra at 7-8.

²¹ Unreported case no 11 626/2008 (D), (2009 JDR 0013 (D)).

that any information which may have been in the knowledge or possession of the applicant's former employee, even if confidential, was completely irrelevant to Federated Timber's operations. For these reasons the court found that it would be unreasonable to enforce the restraint and declined to do so.

Applying the Law to the Facts

The Applicant's Contentions

[47.] In support of its contention that Dis-Chem is its competitor, the applicant pleaded as follows:

"Although the second respondent is primarily a pharmacy group, its retail pharmacies also sell personal care, baby care, confectionary, dry grocery, household and other ancillary products. It is in this specific area in which the second respondent competes with the applicant."

[48.] Insofar as its protectable interest is concerned, the applicant contended that Mr Jansen had been privy to its confidential information. This, according to the applicant, was the following:

"The First Respondent is privy to not only the prices for the various categories which he was required to obtain on behalf of the Applicant, but also the pricing structure, including the discounts and other incentives which form part of competitive pricing."

[49.] The applicant accepted that prices themselves fluctuated on a regular basis but contended that its pricing structures and discount structures were highly confidential:

"Although the specific prices would change from time to time,

depending on each negotiation, the basic structure and the terms within which the negotiations take place, which is confidential to the applicant would provide him and his new employer with the unfair competitive edge.”

- [50.] The applicant also, albeit more faintly, contended that Mr Jansen’s exposure to its trade connections, and its suppliers in particular, constituted a protectable interest:

“... by virtue of his employment with the Applicant, First Respondent was privy to the names and other details of those suppliers he got to know during his employment and was able to build up a special relationship with them, one which (apart from his knowledge of their specific prices, pricing structures and the resultant margins) would allow him to try and convince these suppliers to do business with second respondent in the future to the prejudice of the Applicant.”

The First Respondents’ Contentions

- [51.] Mr Jansen pleaded as follows:

[51.1.] The applicant and Dis-Chem are not competitors. The applicant is the largest retail supermarket in the country. It is not a pharmacy. Dis-Chem is first and foremost a pharmacy. The applicant and Dis-Chem are fundamentally different businesses with different customer focuses. They do not compete for market share.

[51.2.] For from being competitors, the applicant and Dis-Chem are complementary stores and are, for this reason, often placed in close proximity to one other in shopping malls.

- [51.3.] Dis-Chem has been trading for more than 30 years and can fairly be described as well established to the point of being a household name and market leader. There can be no risk of Dis-Chem seeking to “springboard” off the applicant’s trade connections or confidential information in these circumstances.
- [51.4.] Dis-Chem is a sophisticated modern business with an established network of suppliers and established pricing structures tailored to its core business which is the retail of pharmaceutical goods and products. It does not seek to copy the applicant’s business model and does not require the applicant’s information for its operations.
- [51.5.] Where there is limited overlap of the goods sold by the applicant and Dis-Chem, they use some of the same suppliers. There is no risk of Mr Jansen inducing suppliers away from the applicant in these circumstances. But in any event, given the applicant’s market share and buying power, the notion that its suppliers could be persuaded not to do business with it is far-fetched.
- [52.] As noted above, Mr Jansen’s averments pertaining to the nature of Dis-Chem’s business and the fact that it is not in competition with the applicant were confirmed by Dis-Chem on the papers.

Analysis

- [53.] Mr Jansen made much of the fact that at Dis-Chem he will not be responsible for buying sweets, snacks and beverages but will be working in an entirely different department. I agree with Mr Stelzner, who appeared for the applicant, that this does not necessarily eliminate the risk faced by it the

applicant if indeed, it is found, legitimately, to be at risk. The fact that Mr Jansen is employed in baby care, intimate care and so forth would not preclude him from disclosing confidential information and seeking to exploit trade connections in the categories of sweets, snacks and beverages, if he wished to do so. The question is whether the applicant has a protectable interest which would be prejudiced by Mr Jansen's employment at Dis-Chem.

[54.] In argument, Mr Stelzner placed heavy reliance on two judgments of this court which enforced a restraint, in identical terms to the present one, at the instance of the applicant. The judgments are *Shoprite Checkers (Pty) Ltd v Jordaan and Another*²² and *Shoprite Checkers (Pty) Ltd v Jana Alida Thirion*.²³ Mr Stelzner submitted that the facts in those cases are sufficiently similar to the facts of the present case for the judgments to be on point and that I am accordingly, unless I find that those judgments were wrongly decided, bound to follow them. This submission is not correct. The second respondent in both those cases was Pick n Pay Holdings Limited, a direct competitor of the applicant. That alone makes the facts of those cases wholly different from the present one. In my view, the facts of the present case are far more similar to those in *Coskey*, a case to which I was not referred by the parties.

[55.] The dispute as to whether or not the applicant and Dis-Chem are competitors falls to be resolved in accordance with the *Plascon-Evans* rule. Applying that rule to the pleadings, I find that this is case where, like *Coskey*, the businesses are substantially different and do not compete for market share and the fact that there is some limited overlap in goods sold is insufficient to render them competitors.

²² (2013) 34 ILJ 2105 (LC).

²³ Unreported judgment handed down on 19 April 2017 under case number C82/2017.

- [56.] The applicant is best described as a grocery retailer. Its primary business is selling food and related fast moving consumer goods to consumers. Those consumers frequent its supermarkets with the primary purpose of doing their periodic grocery shopping. Dis-Chem, by contrast, is primarily a pharmacy chain. Its stores are established to sell pharmaceuticals, although they do also offer their customers general medical (first aid and self medication), health (vitamins and sport supplements) and beauty and personal care products. To the extent that Dis-Chem sells sweets, snacks and beverages, this is an incidental offering. Put simply, while Dis-Chem customers may reach for a chocolate bar while waiting in the queue to pay for their medicines, they are unlikely to choose Dis-Chem as their destination store to buy their grocery supplies of sweets, snacks and beverages.
- [57.] It is common cause that the applicant and Dis-Chem use some of the same suppliers in respect of overlapping goods. Those suppliers could obviously not be induced to do business with Dis-Chem at the expense of the applicant. They already do business with both. Furthermore, and in any event, the applicant's market share and buying power is fairly described as "gargantuan" in Mr Jansen's answering affidavit. I agree that in these circumstances, the notion that Mr Jansen would be able to induce them not to do business with the applicant (or to somehow do business with Dis-Chem at the expense of the applicant) is far-fetched. I therefore find that Mr Jansen's exposure to the applicant's trade connections does not give the applicant a protectable interest in this case.
- [58.] Turning then to Mr Jansen's exposure to the applicant's confidential information, that is, its pricing and discount structures. Having found that the applicant and Dis-Chem are not competitors, it follows that any information that Mr Jansen may presently have would not be objectively useful to Dis-Chem. In any event, given the applicant's considerable size and buying power, it is most unlikely that Dis-Chem could derive any benefit from

knowing the applicant's current pricing and discount structures. I am therefore of the view that it is not 'confidential' vis-à-vis Dis-Chem, and for this reason does not give the applicant a protectable interest in the context of this case.

[59.] For all these reasons I am of the view that it would not be reasonable to enforce the restraint as sought by the applicant. I therefore dismissed the application.

[60.] I fully accept that an employee cannot escape a reasonable restraint by giving an undertaking. However this does not render the undertakings given by the respondents incapable of enforcement and therefore meaningless, as suggested by Mr Stelzner in argument. Particularly when made an Order of Court, the undertakings provide comfort and assurance that Mr Jansen and Dis-Chem will not act in contravention thereof and are certainly capable of enforcement.

H BARNES

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Adv R Stelzner SC

Instructed by: Cliffe Dekker Hofmeyr

For the Respondent: Adv J Daniels with Adv H Van Zyl

Instructed by: Saltzman