IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case no: D 1223/17

In the matter between

FIDELITY CASH SOLUTIONS (PTY) LTD	**First Applicant**
FIDELITY SECURITY GROUP (PTY) LTD	**Second Applicant**
FIDELITY SECURITY SERVICES (PTY) LTD	**Third Applicant**
and	
DANIE PETER HERBT	**First Respondent**
SBV SERVICES (PTY) LTD	**Second Respondent**

Heard: **20 October 2017**

Delivered: **28 November 2017**

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction:

[1] The applicants seek to enforce certain restraint of trade and confidentiality undertakings against its former employee, the first respondent (Herbst). The relief sought by the applicants is framed as follows:

"…

2. To the extent necessary, that the written employment offer and employment agreement, annexures […] to the founding affidavit, be rectified by deleting the name Fidelity Security Services (Pty) Ltd and its company number, 1997/013274/07, wherever they appear in both documents, and substituting therefor the name Fidelity Cash Solutions (Pty) Ltd and its company number, 2000/025082/07.

3. Interdicting Danie Peter Herbst (the first respondent) until 30 July 2018 (being a period of 12 months from the date of the first respondent's termination of employment with the applicant), within the area of the Republic of South Africa from:

3.1 being engaged, interested or concerned, either directly or indirectly and whether as a director, partner, member, employee, financer, adviser, proprietor, shareholder, agent, consultant, representative, administrator or in any way whatsoever, in the second respondent, or any other business similar to that being or be conducted by the applicants and/ or any other Group Company, or in any business which competes, or is likely to compete, with the business being or to be conducted by the applicants and/ or any other Group Company.

3.2 canvassing for or soliciting any business from existing customers of Fidelity Security Group (Pty) Ltd (FSG), its subsidiaries and associated companies (collectively referred to as "Group Company" or the "Group Companies"), including in particular the applicants.

3.3 persuading, inducing, encouraging, or enticing any employees of any Group Company to become employed by or interested in any manner whatsoever in any business similar to that being conducted by any of the applicants, or in any business which competes, or likely to compete, with the business being conducted by the Group Company or terminate his or her employment with the applicants' Company; and

3.4 becoming employed by, in any way whatsoever, directly or indirectly, any customer of the Group Company, which/whom has a customer of the Group Company at the time of the first respondent's termination of employment with the first applicant, or which/ whom has been a customer of the Group Company during 12 months prior to the termination of the first respondent's employment.

4. The first respondents is interdicted for an indefinite period after the termination of his employment with the first applicant within the area of the Republic of South Africa to:

4.1 make every reasonable effect to hold in trust and confidence all the first applicant's confidential information received or coming to his knowledge and not to disclose in any manner or make available confidential information to anyone without prior written consent of the applicants ("Confidential information" shall include, but shall not be limited to the applicants' trade secrets, business methods and techniques, and the identity of the first applicant's customers and suppliers);

4.2 disclose Confidential information only to those employees, contractors, sub-contractors, agents or sub-agents all whether permanent or temporary who require knowledge of such Confidential information to enable them to carry out any work directly or indirectly connected with [the] Group Company; and

4.3 refrain from using commercially or otherwise Confidential Information except with the prior consent of the Chief Executive Officer of the second applicant.

5. In the alternative to paragraph 3 and/ or 4 above, granting the relief in paragraph 3 and/or 4 above as interim relief pending finalisation of an action be instituted within 30 days of the grant[ing] of this order.

…"

[2] The second respondent, SBV Security Services (Pty) Ltd (SBV) does not oppose this application. Herbst sought condonation for the late filing of the answering affidavit. An agreement between the parties in terms of which the

late filing of the answering affidavit was condoned was made an order of court by Cele J on 15 September 2017 when the matter was also postponed.

Background:

[3] The second respondent, Fidelity Security Group (herein referred to as FSG/The Group) is an integrated security solutions enterprise comprising of a large group of companies with numerous subsidiaries and associated companies which render various security related services including guarding, cash solutions and cash processing services, Cash-in-Transit and retail solutions, electronic solutions which includes smart technology solutions, and integrated technology services. FSG as a group of companies also offers parking management and specialised services such as events and VIP services, mining security, tactical air and ground support. The restraint of trade agreement sought to be enforced was entered into between FSG and Herbst.

[4] The first applicant, Fidelity Cash Solutions (Pty) Ltd (FCS) is a subsidiary of FSG. It sells and manages cash in transit services (CIT Services), and cash processing services (Cash Pro Services) for the financial sector, casinos, retail and property institutions.

[5] Herbst entered into a contract of employment with the third applicant, Fidelity Security Services (Pty) Ltd (FSS), which is also a subsidiary of FSG. The applicants nonetheless contend that Herbst was in effect employed by FCS. It was further contended that the standard terms in the employment contracts of FCS and for FSS were identical, but for the name of the employer, hence the application for rectification.

[6] SBV is according to the applicants, FCS's competitor, as it also provides security cash services and solutions with the Republic, which include Cash-in-Transit to the banking and retail institutions. SBV also has its footprint in other African counties such as Nigeria, Namibia and Lesotho, and provides a range of tailored cash services and solutions to central and commercial banks, the commercial and retail environment.

Jurisdiction:

[7] Herbst, in disputing that the applicants are entitled to the relief they seek contended that he only had a contractual employment relationship with FSS. In this regard, he relied on the offer of employment, the contract itself, the salary advices, and written warnings issued to him by FSS. It was submitted on his behalf that the Court's jurisdiction was limited to determining matters concerning 'contracts of employment'[1], and that restraint of trade disputes were justiciable when they were 'seated in a contract'.

[8] It was submitted on behalf of Herbst that there was no restraint provision seated in the employment contract between him and FSS, and that the applicants therefore sought to enforce a restraint of trade agreement concluded separately from his contract of employment. Herbst further contended that to the extent that the Court may find that it had jurisdiction, such jurisdiction would be limited only to a claim by FSS, as neither FCS nor FSG were his employers.

[9] The founding affidavit is deposed to by Mr Johan Andre van Rooyen (van Rooyen), the New Business Development Manager for FCS, on behalf of the applicants. The background to the employment and resignation of Herbst from Van Rooyen's averments is briefly that;

9.1. On 25 May 2015, FCS through its Group Executive New Business Development, Mr. Stephens, presented a written offer of employment to Herbst, which he had accepted on 1 June 2015.

9.2. Herbst's employment with FCS commenced on 1 June 2015, and he was designated as a Sales Representative for cash solutions, New Business Development Kwa-Zulu Natal and surrounding areas.

9.3. It was a standard requirement of the Fidelity Group of Companies to require their sales personnel to enter into restraint of trade undertakings that formed part of their employment contract. In

[1] In reference to section 77 (3) of the Basic Conditions of Employment Act 75 of 1997

compliance, thereto Herbst concluded a restraint of trade agreement with Fidelity Group of Companies on 1 June 2015.

9.4. On 26 June 2017, Herbst tendered his resignation with effect from 31 July 2017. He however did not disclose to the applicants the reasons for the termination nor did he disclose his plans for future employment. On 27 June 2017, Herbst informed Van Rooyen, Michelle Angela Hawthorne, and Stephens in a teleconference that he had secured employment with G4S Deposita.

9.5. On 30 June 2017, Van Rooyen conducted an exit interview with Herbst. In that interview, Herbst was informed in writing that he was bound by the restraint of trade agreement and an acknowledgment of receipt of the letter was sought from him. However, Herbst refused to sign the letter on basis that he considered the restraint of trade a violation of his right to earn a living. He however proceeded to read the content of the letter. Further to that, Herbst refused to make available his personal laptop with an IP address on basis that the FCS's IT department has the ability to access all the FCS folders from the FSS server. It was also pointed out to Herbst that G4S Deposita was a competitor of the Fidelity Group of Companies.

[10] In determining the jurisdiction of the court to adjudicate upon the matter at hand, section 77(3) of the BCEA, provides that:

> "The Labour Court has concurrent jurisdiction with the Civil Courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract."

[11] The Labour Appeal Court in in *University of the North v Franks*[2] interpreted the above provisions so as to grant exclusive jurisdiction to the Labour Court in certain matters, and further stated that;

> "There is no indication that section 77(3) of the BCEA was enacted solely to solve the so-called dual claims problem. Section 77(1), with certain

[2] *[2002] 8 BLLR 701 (LAC)*

> exceptions, grants exclusive jurisdiction to the Labour Court "in respect of all matters in terms of this act". The act seeks "to give effect to the right to fair labour practices referred to in section 23(1) of the Constitution by establishing and making provision for the regulation of basic conditions of employment..." In those matters exclusive jurisdiction is conferred. Section 77(3) goes much wider. It expressly also deals with employment contracts which have no statutory basic conditions and thus fall outside the scope of the act. Consequently, the legislature had in mind that the Labour Court should also have jurisdiction in such matters. Even if there is no dual claims problem. In short, the Labour Court is to have jurisdiction in respect of all employment contracts and exclusive jurisdiction in respect of some. But the jurisdiction is even wider. It is in respect of any matter concerning a contract of employment."[3].

[12] Flowing from the above principles, it can be accepted that the Court would assume jurisdiction in a dispute where there is a relationship between the matter to be adjudicated and the employment contract. The relationship need not be direct[4], and all that needs to be established is whether the issue in dispute relates to, or is linked to, or connected with a contract of employment.

[13] In considering whether the restraint agreement in this case can be enforced against Herbst in circumstances where it was concluded with FSG on behalf of its subsidiaries, one needs to make such a determination by reference to the wording of the agreement itself, particularly since it was Herbst's contention that the Court lacked jurisdiction on the basis that the restraint of trade agreement was not 'seated' in the contract of employment[5]. In this regard, the court is required to ascribe a sensible meaning to the agreement,

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[3] At para 29

[4] *Randwater* at para 21

[5] In reference to *Singh v Adams (2006) 27 ILJ 385 (LC)* at para 18 and *David Crouch Marketing CC v Du Plessis (2009) 30 ILJ 1828 (LC)* at para 14 where it was held that;

> "It is trite that this Court does have the jurisdiction to hear the present application. In terms of section 77(3) of the Basic Conditions of Employment Act 75 of 1997 the Labour Court has jurisdiction to determine any matter "*concerning a contract of employment*". In *Labournet Holdings (Pty) Ltd v McDermott & Another* (2003) 24 *ILJ* 185 (LC) the Court held as follows:
>
> > "In my opinion, a restraint of trade clause, when it is seated in a contract of employment, is a matter concerning the contract of employment as envisaged by s 77 of the BCEA. Prima facie this Court has jurisdiction to grant the relief which LNH seeks.""

which is consistent with the apparent purpose of the document as signed between the parties[6].

[14] To reiterate, the offer of employment dated 25 May 2015 was made by FSS, and the contract in that regard as signed on 1 June 2015 was similarly entered into with FSS. The restraint of trade agreement was entered into on the same date that the contract of employment was signed. It was however entered into between Herbst and FSG.

[15] From the relevant provisions of the agreement as identified and discussed below, the only conclusion to be reached is that the restraint provisions are in respect of matters concerning or linked to, or connected to Herbst's contract of employment. A further reading of the restraint of trade agreement and Herbst's contract of employment further point to the restraint provisions being incorporated into Herbst's contract of employment. My conclusions in this regard are fortified by the following observations;

15.1 Under clause 1 of the restraint of agreement, it is stated that it (the agreement) is concluded between FSG and the employee (Herbst), as well as between each of the Group Companies and Herbst. The Group Companies are listed in clause 4.1 to 4.27 of the agreement, and include *inter alia*, FSS and FCS.

15.2 Under clause 1.2, it is stated that these entities have authorised FSG to bind them to the restraint of trade agreements with their existing and any future employees including Herbst. This therefore implies that the submission made on behalf of Herbst that the agreement was concluded on behalf of FSS without its authority is misplaced.

[6] See *Sign and Seal Trading 154 (Pty) Ltd t/a Davidson's Discount Boards v Sebastian and Another (C649/2015) [2015] ZALCCT 74 (30 September 2015)* at para 12 where it was held that;

> "…The starting point is the language of the document itself, but this should be construed in the light of its context, the apparent purpose to which it is directed and the material known to those responsible for its production. In other words, the purpose of the document and the background to its production are fundamental to the process of interpretation. (see *Natal Joint Municipal Pension Fund v Ndumeni Municipality* 2012 (2) SA 593(SCA) and *Dex Group v Trust Group Co Group International* 2013 (6) SA 520 (SCA))"

15.3 Under clause 1.3, it is stated that the agreement shall operate as between the employee (Herbst) and FSG, as well as between Herbst and any of the Group Companies in which he is employed, seconded or otherwise engaged in any capacity during the 36 (thirty-six) months prior to the termination of the employee's employment with FSG or a Group Company.

15.4 Clause 1.5 further provides that any reference in the agreement to the 'company' shall be in reference to the company/ies at which the employee is so employed, seconded or otherwise engaged.

15.5 Under clause 3.6, it is provided that the restraint of trade agreement forms an integral part of Herbst's employment contract with FSG or any of the Group companies. This therefore implies that the agreement is incorporated into Herbst's contract of employment in line with Clause 20 of his contract of employment, which stipulates that Herbst is required to sign a restraint of trade agreement, which will form an *addendum* to that contract of employment.

[16] In the light of these and other provisions, the most sensible construction of the restraint of agreement is that FSS, with whom Herbst had entered into a contract of employment, is indeed a subsidiary of FSG, making FSS a beneficiary of a separate restraint established by the terms of the agreement entered into with FSG. The uniform restraint agreement as entered into with FSG is applicable and binding upon all of its subsidiaries, associated companies and their employees. It therefore follows that the Court has the requisite jurisdiction to determine this application, and Herbst's contention that FSS is not a subsidiary of FSG or that he could not be bound by the restraint agreement signed with FSG ought to be rejected.

Rectification:

[17] As per paragraph 2 of the notice of motion, the applicants seek an order that the written employment offer made to Herbst and the employment agreement entered with him be rectified by deleting the name Fidelity Security Services

(Pty) Ltd (FSS) and substituting the name with Fidelity Cash Solutions (Pty) Ltd (FCS). The basis of seeking rectification is that;

a) The employment offer to Herbst and the subsequent employment contract were erroneously concluded with FSS. This was due to an administrative oversight and the wrong documentation being utilised. Herbst was nevertheless *de facto* employed by FCS on the basis that;

   i. He reported to the New Business Development Manager of FCS;

   ii. He marketed and sold CIT services to FCS' clients, and was required to upsell the services of other entities in the Fidelity Group, which included the services of FSS;

   iii. FSG has a centralised payroll department which is housed within FSS, and accordingly undertakes the payroll activities on behalf of all the entities in the Group. Despite this, each entity in the Group has its own specific company and cost centre to which the costs are allocated, and Herbst formed part of the FCS's pay roll system;

   iv. The costs in respect of Herbst's employment were allocated to FCS, which FSG considered to be the correct employer;

   v. Herbst in the course of his duties concluded contracts on behalf of FCS for cash management services, such as CIT services, engaged with clients on its behalf, and was paid a salary and commission from its account.

b) Even if Herbst's contention was that FCS did not employ him, and the dispute of fact persisted in that regard, this according to the applicants was of no consequence, as he would have been seconded by FSS to FCS, and the restraint of trade undertaking in his employment contract was in favour of the Group, including FSS and FCS.

[18] Herbst denied that the applicants were entitled to a rectification order. His starting point is that the claim for rectification should have been brought

through action proceedings, and that to the extent that they chose motion proceedings, the applicants have not demonstrated the facts entitling them to such an order.

[19] Herbst denied that he was employed by FCS and contended that all the objective evidence supported his version including the offer of employment, the contract of employment, the salary advices he had received, the written warnings issued to him and any other forms he was required to deal with during his employ by FSS. Herbst further pointed out that the applicants' contention that FCS paid his salary was demonstrated to be false, and that there was no *bona fide* mutual error or common mistake when the offer was made or when the contract was concluded.

The legal framework and evaluation:

[20] The principles applicable to rectification are fairly trite. It is acknowledged that there are circumstances where the written agreement, which is clear and unambiguous may not necessarily record and reflect the true agreement between the parties. In such cases, the parties are entitled to rectification of the agreement, so that it records and reflects the true and proper agreement that was concluded between the parties. This is particularly so in instances where it is apparent that terms that were agreed upon were omitted or, the terms not agreed to were erroneously added to the written agreement[7].

[21] This court in *Cape Clothing Association v de Kock NO and Others*[8] (per Steenkamp J) approached an application for rectification as follows;

> "Where parties concluded a written agreement which incorrectly reflects a prior common intention which came into existence between them, the court may on application grant rectification of that contract. The court must be satisfied that the agreement recorded is not the same as the actual agreement arrived at. The mistake relied upon may be the result of a bona fide mutual error, an intentional act by one of the parties, or a mistaken acceptance by the parties that the written agreement did not exclude an

[7] See *SAMWU obo TE Chaane & others v City of Johannesburg Metropolitan Municipality. Case no: JA 48/10* at paras 20 - 21

[8] *(2014) 35 ILJ 465 (LC)* at para 41

earlier agreement from operating together with the written agreement. It is not necessary to prove that the written agreement does not correctly reflect the oral agreement because of a mutual error or mistake. What is necessary is to prove that there was a prior common continuing intention which is not reflected in the agreement. It is not a prerequisite that there should be any ambiguity. The mistake may even be caused intentionally by one of the parties" (Authorities omitted)

[22] In *SAMWU obo TE Chaane,* the Labour Appeal Court further held that;

> "The duty falls upon the appellants to satisfy this Court by presenting evidence that can demonstrate in clear and satisfactory manner the contentions made by them to support their entitlement to rectification. In *Bardopoulos and Macrides v Miltiadous*, it was said:
>
> > "A party seeking to obtain rectification must show the facts entitling him to obtain that relief "in the clearest and most satisfactory manner"…and as it is pointed out in Taylor v Cape Importers 1938 CPD 362 at p368, where the common intention is to be shown not by any writing but by verbal evidence, the Courts may have great difficulty in determining whether there was a mistake in the written contract. These cases do not, I consider, require more than a balance of probability in favour of the party seeking rectification but indicate that such a claim is in fact difficult to prove""[9]

[23] In motion proceedings, as in the present case, and where the applicants seek final relief, it is now trite that where disputes of fact exist, these are to be decided in favour of the respondent taking into account the principles as set out in *Plascon-Evans Ltd v Van Riebeeck Paints (Pty) Ltd*[10]. The applicants as correctly pointed out on behalf of Herbst face insurmountable difficulties in demonstrating in clear and satisfactory manner that they are entitled to rectification. These difficulties are that;

i. the application for rectification was brought by way of notice of motion, in which final relief is also sought;

[9] At para 23
[10] *1984 (3) SA 623 (A) at 634H – 635B.*

ii. Herbst had denied that there was any common intention between the parties that he would be employed by FCS, and there could therefore be no *bona fide* mutual error or common mistake when the offer was made or the contract concluded.

iii. On the applicants' own version, the contract of employment presented to Herbst was a standard contract across the Group. On the objective facts, it is apparent that the contract was presented to Herbst in its form, and was hardly a product of negotiations or discussions.

iv. There is further no evidence pointing to any negotiations between the parties in the form of minutes setting out the discussions, agreements and disagreements that took place between the parties, to lead to the conclusion that indeed there may be mutual or common understanding that Herbst would be employed by FCS rather than FSS.

v. There is nothing in the founding affidavit to indicate on what basis it is alleged that the employment agreement was erroneously concluded with FSS. An explanation that there was a mere 'administrative oversight' leading to wrong documents being used hardly qualifies as a clearest and satisfactory explanation, nor can that mere innocent oversight lead to a conclusion that there was a common continuing intention that Herbst would be employed by FCS.

vi. In the absence of any other evidence therefore, I am satisfied that purely on the objective facts as pleaded and denied, there is no basis for this court to conclude that the contract of employment between FSS and Herbst was concluded as a result of *bona fide* mutual error or common mistake.

vii. Even if there was any reason to believe that there was any such mistake, there is still no explanation as to the reason it took the applicants more than one year, and only after Herbst's resignation to realise the alleged 'administrative oversight' in respect of the offer, the contract itself, and the manner of salary payments.

viii. It further remains unexplained as to how FSS, which allegedly was not the employer, had issued Herbst with disciplinary written and final written warnings on account of his alleged failure to reach sales targets. It is trite that only an employer can discipline its own employees.

[24] The applicants' further contention that even if Herbst were to argue that he was employed by FSS was of no moment since he would in effect have been seconded by FSS to FCS is equally flawed. The circumstances surrounding the alleged secondment are unknown, and for FCS to have seconded Herbst, this would have implied a contract of employment between it and Herbst, which was however not the case. To conclude on this issue then, the applicants have not demonstrated the facts entitling them to rectification, and there is further no basis to conclude that Herbst was seconded to FCS by FSS.

[25] It has already been concluded that the Court has the requisite jurisdiction in respect of the restraint of trade agreement as a result of it being valid and binding between the Group, its subsidiaries and Herbst as a consequence of his employment with FSS. I am therefore in agreement with Herbst's contentions that whether the restraint of trade agreement is enforceable can only be in relation to his employment relationship with FSS, on whose behalf FSG had entered into that agreement with.

The legal position in regard to restraint of trade agreement and evaluation:

[26] The principles applicable to disputes surrounding the enforcement of restraint of trade agreement are trite as rehashed over time by this and other courts. The starting point is that considerations of public policy dictates that agreements entered into voluntarily are binding and enforceable as between parties[11]. A restraint of trade agreement is enforceable if it protects legally

[11] See *Reddy v Siemens Telecommunications (Pty) Ltd 2007 (2) SA 488 SCA*, at para [16], where it was held that;

> "A court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint. The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim pacta servanda sunt. The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions. Both considerations reflect not only common law but also constitutional values. Contractual

recognized interests of the party seeking to enforce it. The agreement will however be unenforceable if it is unreasonable and contrary to public policy[12]. Furthermore, the courts will not enforce a restraint of trade if the purpose is merely to seek to stifle competition or to unreasonably restrict an individual's freedom to work or trade[13].

[27] The onus to establish the existence of the restraint of trade agreement and its breach rests on the party seeking the enforcement thereof. Once that onus has been discharged, it would then be for the party resisting the enforcement, to demonstrate that the restraint is unreasonable and therefore unenforceable[14].

[28] The factors to be considered in determining whether a restraint of trade is reasonable or otherwise were set out in *Basson v Chilwan and Others*[15] as follows;

a) Is there interest of the one-party which is deserving of protection at the termination of the agreement?

b) Is such interesting prejudiced by the other party?

c) If so, does such interest so weigh up quantitatively and qualitatively against the interests of the latter party that the latter should not be economically inactive and unproductive?

> autonomy is part of freedom informing the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life. In this sense, freedom of contract is an integral part of the fundamental right referred to in s 22 …. In applying these two principal considerations, the particular interest must be examined. A restraint would be unenforceable if it prevents a party after termination of his or her employment from partaking in trade or commerce without a corresponding interest of the other party deserving of protection. Such a restraint is not in the public interest. Moreover, a restraint which is reasonable as between parties may for some other reason be contrary to the public interest."

[12] See *Advtech Resourcing (Pty) Ltd t/a Communicative Personnel Group v Kuhn & Another 2008 (2) SA 375 (C)* at para 25 where the Court held that;

> "What public policy is and whether a term in a contract is contrary to public policy must now be determined by a reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus, a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is therefore unenforceable."

[13] See *Reddy v Siemens Telecommunications (ibid); Den Braven v Pillay & another* 2008 (6) SA 229 (D) and *Automotive Tooling Systems (Pty) Ltd 2007 [2] SA 271 (SCA)*

[14] *Reddy* at para 10

[15] *1993 (SA 742 (A)* (at 767 G-H).

d) Is that another facet of public policy having nothing to do with the relationship between the parties but requires that the restraint should either be maintained or rejected?

[29] A fifth consideration is whether the restraint provisions go further than is necessary to protect the particular interest[16], and it is further trite that the mere fact that parties to an agreement choose to describe a restraint as being reasonable, is not itself decisive, as the reasonableness or otherwise thereof is a matter for the court to determine[17]

[30] The two kinds of proprietary interests worthy of protection through the enforcement of a restraint agreement are first, confidential matters which are 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. Such confidential material is sometimes compendiously referred to as "trade secrets"[18]. The second kind of interests involves the relationship an employee had with customers, potential customers, suppliers and others that go to made what is compendiously referred to as the "trade connection" of the business, being an important aspect of incorporeal property known as goodwill[19].

[31] It is trite that in motion proceedings, the affidavits constitute both the pleadings and the evidence, and the issues and averments in support of the parties' respective cases should appear clearly therefrom. Thus, it is required of the applicant in application proceedings to make out a case in the founding affidavit, which must contain sufficient facts upon which a court may find in its favour[20]. An applicant must therefore stand or fall by its founding affidavit, as it is trite that a case cannot be made out in replying papers[21].

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[16] *Kwik Kopy v Van Haarlem 1999 (1) SA 472 (W)* at 484B-E
[17] *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn2008 (2) SA 375 (C)*
[18] *Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T)) at 502D-F*
[19] See *Basson* (supra); *Experian South Africa (Pty) Ltd v Haynes & another [2013] (1) SA 135 (GSJ)*
[20] *Bapedi Marota Mamone v Commission of Traditional Leadership Disputes and Claims and Others [2014] 3 All SA 1 (SCA)* at para [16].
[21] See *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H-636B; *SA Railways Recreation Club and Another v Gordonia Liquor Licensing Board* 1953 (3) SA 256 (C) at 260).

[32] Whether the applicants in this case are entitled to the enforcement of the restraint of trade agreement needs to be determined on the basis of their case as pleaded. In the light of the conclusions reached that Herbst's contract of employment with FSS incorporates the restraint of trade provisions, and further that the applicants are not entitled to a rectification order, the issue is whether a case has been made out for the enforcement of the restraint provisions against Herbst.

[33] The obvious difficulty with the applicants' approach insofar as it sought to enforce the restraint against Herbst *vis-à-vis* FSC, is that it pleaded its case in anticipation that rectification would be granted. Thus, any averments made in justifying the enforcement of the restraint of trade were in reference to Herbst being employed by FCS, which it has been found is not the case.

[34] Significant with the applicants' replying affidavit is that it was acknowledged that Herbst in his answering affidavit had consistently made reference to FSS as his employer. It further came out in the replying affidavit that FSS was merely cited in these proceedings as an interested party, and for the purposes of the rectification application. However, once that application failed, the implications thereof are that FSS, even if it has been concluded that it has a binding restraint of trade agreement with Herbst, is not before the Court, whilst FCS, in which the case for the applicants was advanced, is not recognised as Herbst's employer.

[35] The applicants' case was nonetheless that the restraint was in favour of all the group of companies. Part of the reasoning in this regard was that there was an overlap between activities of various subsidiaries of the Group and its clients. In this regard, it was submitted *inter alia* that even though for instance, Herbst sold CIT services but was required to upsell the services of other entities in the Group including FSS, there was no record that Herbst actually did upsell services in respect of FSS. A supplementary affidavit as promised to verify this information was not however forthcoming from the applicants.

[36] A further difficulty with the applicants' case, to the extent that it was contended that the restraint provisions covers all companies/subsidiaries or

associated companies of the Group, is that they seek to bind Herbst to these provisions in a generalised sense, even in circumstances where Herbst's tasks and responsibilities did not transcend beyond his employment with FSS.

[37] Herbst's contention that the restraint of trade agreement can only be enforced as *vis-à-vis* his employment with FSS cannot be faulted. Even if clause 1.5 of the restraint indicates that the agreement covers all the companies/associated companies, or subsidiaries of the Group, this can only imply that it can only be enforceable against Herbst within the context of his employment with FSS. To hold otherwise would create unfairness. As I understood the business of the Group, it is a large and complex group of companies with various subsidiaries and connected companies all rendering various security related services ranging from gardening, to other specialised security services. To have Herbst bound by these blanket restraint provisions even in areas where he had no role, knowledge or experience in, or where there was no link or connection between his areas of responsibilities and other subsidiaries, would be wholly unreasonable.

[38] It therefore does not assist the applicants to insist on general enforcement of the restrain on the basis that employees move from one area of the business to the other or in between companies/subsidiaries or associated companies. This can only be permissible where a person was moved, and a new area specific restraint of trade agreement is entered into. Even then, a case ought to be made out for enforcement.

[39] The applicants in an attempt to extricate themselves from the conundrum created by the far-reaching restraint provisions and their unreasonable nature then sought to sugar coat the relief sought in paragraph 3.1 of the notice of motion, by contending that to the extent that it was framed to make reference to '*or any other business similar to that being or to be conducted by the applicants and/or any other Group Company*', this was unintentional, and should be deleted from the prayer in respect of the relief sought. This unfortunately cannot be permissible, as a proper application in that regard needed to be made.

[40] Contrary to the applicants' contentions, there is everything unfair and unreasonable in its approach in the light of the failure of the application for rectification. It is apparent from the above that FSS is only cited as an interested party, and once the application for rectification failed, that was the end of the applicants' case. There is therefore in the absence of a case having been made out in particular on behalf of FSS, no basis to conclude that there is every reason to deem the restraint provisions enforceable in favour of FCS.

[41] If ever there is any doubt in respect of my conclusions above, one need not go further than the applicants' founding affidavit and Herbst's answer thereto. In this regard;

a) any allegations made in regards to SBV being a competitor in the founding affidavit is clearly in reference to FCS, which is not the employer for the purposes of enforcement.

b) To the extent that SBV is viewed as a competitor to the Group as a whole, no case has been made out in the founding affidavit to establish in what respects this is the case. The applicants sought to rely on a letter from ABSA[22] for its contention that SBV was nonetheless a competitor of the Group. This letter is however in my view not of assistance. It is not sufficient for a general statement to be made by a bank that SBV, G4S and FSG all provide services to ABSA and tender to supply services when requested to do so. It was common cause that FSG offers a wide variety of services, and ABSA's statement is therefore meaningless insofar as it is lacking in particularity.

c) Herbst's contention was that he had not breached the restraint of trade agreement by joining SBV as the latter was not a competitor of FSS. He contended that SBV marketed itself differently to FSG. He had conceded that whilst FSS and SBV both provided services in the same overall industry, there were significant differences including the disparity in pricing. FSS according to Herbst operates in a different

[22] Annexure 'RA2' to the Replying Affidavit

sector of the market and offered different services, being guarding of premises (not cash in transit or cash management services).

d) Herbst in his answering affidavit distinguished SVB and FSS on the basis that the former provided a premium security product to its customers, provided customers with additional security protocols; charged between 20% and 40% more, and accordingly did not compete against each other. He conceded that whilst SVB was in the same overall industry, it has pitched itself in a different sector of the market.

[42] It has already been stated that in matters related to enforcement of restraint agreements, it is for the applicants to establish the breach of the restraint provisions. If as a starting point a case has not been made out for FSS, there is no basis for any conclusion to be reached that Herbst by joining SBV is in breach of the restraint provisions. As concluded elsewhere in this judgment, it did not assist the applicants' case to allege that SBV is the Group's competitor on a general level, and without contextualising that competitive interface within Herbst's employment with FSS[23]. To the extent that the applicants have not surmounted this first hurdle that should be the end of the matter, and the applicants' application ought to be dismissed.

[43] I have further had regard to the requirements of law and fairness in regards to the issue of costs, and I am mindful of the caution issued out by the Labour Appeal Court when considering costs in such matters[24]. I am therefore satisfied that given the circumstances of this case, *albeit* unique as they are, a costs order is nonetheless not warranted.

Order:

[44] Accordingly, the following order is made;

1. The applicants' application is dismissed.

2. There is no order as to costs.

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[23] See paragraphs 60 – 69 of the Founding Affidavit

[24] See *Trevlyn Ball v Bambalela Bolts (Pty) Ltd (2013) 34 ILJ 2821 (LAC)* at para 29 - 30

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Judge of the Labour Court of South Africa

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