



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable/Not Reportable

Case No: J 961/18

In the matter between:

WNS GLOBAL SERVICES SA (PTY) LTD

Applicant

and

CHRISTOPHER HAYES

Respondent

Heard on: 25 April 2018

Delivered on: 09 May 2018

JUDGMENT

MAHOSI. J

Introduction:

- [1] This is an urgent application for a final order to enforce a restraint of trade and certain confidentiality provisions embodied in the written Restraint and Confidentiality Agreement (Agreement) concluded between the applicant and the respondent on 16 February 2015.

- [2] This application was prompted by the respondent's resignation from his employment on 30 January 2018. On the same date the respondent had a discussion with Mr. Edward Maughan (Maughan), the applicant's General Manager: Business Development, during which he (the respondent) communicated his intention to take up employment with Accenture South Africa (Accenture) after his employment with the applicant terminates on 30 April 2018.
- [3] It was then agreed that the respondent's employment would terminate on 30 April 2018. The respondent was therefore placed on 'garden leave' by the applicant until 30 April 2018.
- [4] On or about 15 February 2018, the applicant served the respondent with a letter of demand wherein, *inter alia*, various written undertakings were sought from the respondent in relation to him abiding by the terms of the restraint of trade provisions. According to the applicant, Accenture is the applicant's competitor and in taking up employment with Accenture, the respondent is acting in breach of the restraint of trade provisions as contained in the agreement. During the period between 21 February 2018 and 13 March 2018, there was an exchange of correspondences between the parties with a view to negotiate the settlement of this dispute.
- [5] It is common cause that during the negotiations, the respondent made an undertaking that he will comply with the agreement and that the applicant should not fear as he would not be employed in a position where he would compete with it because Accenture does not provide BPM/BPO services.
- [6] Subsequently, it became apparent that the dispute could not be settled. The applicant then launched this application on 23 March 2018. The respondent opposed the application and raised a preliminary point relating to non-joinder of Accenture.

[7] According to the notice of motion, the applicant sought relief in the following terms:

- '1. That the application be heard as a matter of urgency in terms of uniform rule of court 6 (12) and rules ordinarily applicable to form and time periods be dispensed with.
2. That the respondent is interdicted and restrained for a period of 365 (three hundred and sixty-five) days with effect from 30 April 2018 and in the Republic of South Africa, in any capacity whatsoever, directly or indirectly, from:
 - 2.1 carrying on or being interested or engaged in or concerned with or employed by Accenture Africa (Pty) Ltd or Accenture South Africa (Pty) Ltd ("Accenture") in South Africa or any of the Applicant's competitors, either directly or indirectly; and/or
 - 2.2 soliciting any order from any customers or prospective customer of the applicant for any Goods or competing Goods and/or for any services or competing services; and/or
 - 2.3 canvassing business from any customers or prospective customer of the applicant in respect of any Goods and/or for any services or competing services; and/or
 - 2.4 selling or otherwise supplying to any customers or prospective customer of the applicant any Goods or competing Goods; and/or
 - 2.5 rendering to any customers or prospective customer of the applicant for any Goods or competing Goods; and/or
 - 2.6 purchasing from any supplier of the applicant any Goods or accept from any supplier of the applicant the rendering of any services from it; and/or
 - 2.7 soliciting the appointment as a distributor, licensee, agent or representative of any supplier of the applicant in respect of any Goods and/or services.
3. that the respondent is interdicted and restrained from directly and indirectly using or disclosing to Accenture in South Africa or any third party, the confidential information and/or proprietary interests of the applicant, in any manner or for any reason or purpose whatsoever, without the prior written consent of the applicant.

4. that the respondent pays the applicant's costs on a scale as between attorney and client and vat.
5. that the applicant be afforded such further or alternative relief as this Court may deem fit.
6. that, the provisions of paragraphs 2, 2.1 to 2.7 and 3 operate as an interim interdict, pending the final determination of this matter.'

[8] I am of the view that the matter ought to be dealt with as one of urgency.

Non-Joinder

[9] The respondent has raised a preliminary point in that the applicant failed to join Accenture to this application. According to the respondent, Accenture has a direct and substantial interest in the outcome of the matter.

[10] The applicant submitted that Accenture did not consider itself to have a direct and substantial interest which may be affected prejudicially by the judgment of the Court in this dispute in that on or about 19 February 2018, the applicant sent an email to Accenture in terms of which the latter was informed that the respondent is subject to a restraint of trade agreement which prohibits him from taking up employment with it.

[11] The email further stated that in the event that the respondent does take up employment with Accenture, such conduct will be in material breach of his restraint of trade undertakings. The applicant further provided Accenture with a copy of the letter of demand addressed to the respondent that specifically states that if he does not adhere to the applicant's demands, the latter will approach this Court for relief as sought herein.

[12] Accenture acknowledged receipt of the email but did not respond to the contents of the email. The applicant submitted further that if Accenture considered itself to have a direct and substantial interest in this matter,

it would have taken steps to participate in the dispute or intervene in the application. At the hearing, the applicant handed in a letter from Accenture's attorneys addressed to the applicant's attorneys which stated the following:

- '1. We act on behalf of our client Accenture (South Africa) (Pty) Ltd.
2. We have been instructed that your client, WNS Global, seeks to enforce a Restraint and Confidentiality Agreement, by way of instituting legal proceedings, against Mr Hayes who has been offered employment by our client.
3. Our client will not oppose any legal proceedings that your client may institute against Hayes and abide by the court, to the extent that no legal costs are sought against our client.'

[13] In the light of the abovementioned letter from Accenture, I cannot find any merit in the respondent's objection.

Relevant factual background

[14] The applicant has been operating in South Africa since 2003. It operates as *inter alia*, a provider of Business Process Outsourcing (BPO) and Business Process Management (BPM) services that includes consulting services in various industries throughout South Africa. The applicant delivers the entire spectrum of BPO and BPM products and services in, *inter alia*, customer interaction services, finance and accounting, human resources, research and analytics, technology solutions and industry-specific processes.

[15] The respondent's employment with the applicant commenced on or about 4 January 2016 in the capacity as Associate Vice President Sales. On the 11 January 2016, the parties concluded the Restrained and Confidentiality Agreement that is quite extensive. Clause 3 thereof deals with the protectable interests of the applicant which are captured as follows:

'3. Protectable interest of the group

3.1 The Employee acknowledges and accepts that in the course of his employment by the Company (and/or other person in the group) the Employee:

has acquired and/or will acquire considerable know-how in relation to the respective Businesses, interests and affairs of the Group and has learned and/or will learn of and become acquainted with some or all Confidential Information;

3.1.1 has had and/or will have access to the names, requirements and needs of customers, licensors, suppliers and/or other persons who of which have business or trade connections with any of the businesses, whether embodied and written forms or otherwise, all or any of whom are or could be drawn from all or any of the territories;

3.1.2 has had and/or will have opportunity of forging personal relationships with and developing the ability to influence customers, licensors, suppliers, other persons who of which have business on trade connections with any of the businesses and/or other employees and businesses; and

3.1.3 generally has had and/or will have the opportunity of directly or indirectly acquiring and/or learning and becoming acquainted with the trade secrets, trade connections, business secrets, business connections and other confidential information relevant to the respective businesses, all or any of which, if disclosed to or used directly or indirectly by or for the benefit of any competitor of any of businesses, would possibly or is reasonably likely to allow such competitor to gain an unfair advantage over and severely prejudice and cause substantial harm to all or any of the persons in the group.

3.2 the employee, having carefully considered each restraint and confidentiality undertaking imposed on him under this agreement, acknowledges and accepts that:

3.2.1 the only effective and reasonable manner in which the respective rights of any person in the group in respect of its trade secrets, trade connections, business secrets, business connections and other Confidential information can be protected is by way of the restraints and confidentiality undertakings imposed upon the employee in terms of this agreement, and

3.2.2 each such undertaking is reasonable in its duration, area and scope of operation is necessary for the protection of the proprietary interest of the company and each person in the Group, respectively; and

3.2.3 any choice by the employee of any trade, occupation or profession after the termination date will be limited by and will be subject to all or any of the restraints and confidentiality undertakings imposed upon the employee in terms of the agreement.'

[16] The parties agreed that the area to which the restraint applies was "each magisterial district in the Republic of South Africa." The restraint period was defined as the period while the respondent is employed by the applicant and the period of 365 days immediately following the termination period.

[17] It is common cause that during his employment with the applicant, the respondent's duties and functions included *inter alia*: enabling new business opportunities in the Contact Centre, Shared Services, Finance and Accounting, Human Resource Solutions and Procurement Solutions areas across multiple industries; selling large end to end business process outsourcing solutions to prospective clients (this

entails the applicant, on its client's behalf, managing a process contracted for, such as the client's Finance and Accounting function, or the client's Customer Service function); giving critical support and input to the applicant's Solutions Team in developing and presenting tailored deals (products, services and solutions) to clients; owning and driving customer relationships to facilitate retention of existing clients as well as "farming" opportunities, in other words offering and selling to existing clients of the applicant; using management information (such as information from conversations with targeted opportunities) and business analytics (such as information researched on the targeted opportunity such as industry benchmarks and investor analysis) to drive sales opportunities and value in new and existing clients; obtaining customer insight (information discussed with a customer/client which results in an agreement to propose a solution for their 'challenge', or more information which enables the applicant to craft a unique proposal for its clients based on the insight from said client) and reporting to the business (such as in the applicant's weekly sales meeting); prospecting for new sales opportunities through the existing network of the applicant's clients, building a new network of clients; marketing and selling through cold calling, social media, and events as key sales channels; building solid client and prospective relationships, in other words "customer-connections"; preparing, developing, maintaining and updating a sales plan in conjunction with other members of the applicant's sales team; working with other members of the applicant's Business Development team and larger organization to develop client-specific proposals, attending industry functions, associations and events.

- [18] It is the applicant's case that the respondent, by taking up employment with Accenture, a direct competitor of the applicant, is acting in material breach of the restraint of trade undertakings as contained in the Agreement. The applicant is essentially relying on two kinds of protectable interests to justify the enforcement of the restraint, namely, confidential information or trade secrets and the customer connections.

- [19] The respondent argues that Accenture is not a direct competitor of the applicant and he will therefore not be in breach of his restraint of trade undertakings. The basis of the respondent's argument is essentially that Accenture does not provide BPM or BPO services in South Africa. The respondent submitted that the applicant has no protectable interest in the products and services it provides, as they are freely available on the website. Furthermore, the respondent submitted that the solutions and the pricing of the products provided by the applicant are compiled in India and therefore unknown to him.
- [20] The respondent further argued that this application was unnecessary and unwarranted because he provided the applicant with an unconditional undertaking that he would comply with the confidentiality clause by not contacting any of its clients, not using any of the contacts introduced to him by the applicant and not divulging any confidential information to any person or institution. Furthermore, the respondent submitted that he will be employed as a sales capture manager and that his task will not be to sell any form of outsourcing.

The applicable legal principles

- [21] The legal principles applicable to restraint of trade have been set out in detail in a number of decisions of this court and recently by the Labour Appeal Court (LAC) in *Labournet (Pty) Ltd v Jankielsohn and Others* as follows:¹

[39] According to the decision in *Magna Alloys and Research SA (Pty) Ltd v Ellis*, ("*Magna Alloys*") restraints of trade are enforceable unless they are proved to be unreasonable. Because the right of a citizen, to freely choose a trade, occupation, or profession and to practice such, is constitutionally protected, the *onus* to prove "*the reasonableness*" of a restraint might well have been affected.

¹ (2017) 38 ILJ 1302 (LAC).

[40] In *Reddy*, the Supreme Court of Appeal preferred not to become embroiled in the issue of *onus* and adopted a pragmatic approach, which according to it, was consistent with an approach where there was a direct application of the Constitution to restraint agreements. This approach was specifically adopted in respect of motion proceedings for the enforcement of restraints where the issue for determination was the reasonableness of the restraint. In terms of that approach, where the facts, concerning the reasonableness, had been canvassed in the affidavits – genuine disputes of fact are to be resolved in favour of the party sought to be restrained by applying the so-called *Plascon-Evans* rule. If the accepted facts show that the restraint is reasonable, then the applicant must succeed, but if they show that the restraint is unreasonable then the respondent in those proceedings must succeed.

[41] The enquiry into the reasonableness of the restraint is essentially a value judgment that encompasses a consideration of two policies, namely the duty on parties to comply with their contractual obligations and the right to freely choose and practice a trade, occupation or profession. A restraint is only reasonable and enforceable if it serves to protect an interest, which, in terms of the law, requires and deserves protection. The list of such interests is not closed, but confidential information (or trade secrets) and customer (or trade) connections are recognised as being such interests. To seek to enforce a restraint merely in order to prevent an employee from competing with an employer is not reasonable.

[42] According to the Appellate Division in *Basson v Chilwan and Others*, the following questions require investigation, namely, whether the party who seeks to restrain has a protectable interest, and whether it is being prejudiced by the party sought to be restrained. Further, if there is such an interest – to determine how that interest weighs up, qualitatively and quantitatively, against the interest of the other party to be economically active and productive. Fourthly, to ascertain whether there are any other public policy considerations which require that the restraint be enforced. If the interest of the party to be restrained outweighs the interest of the restrainer – the restraint is unreasonable and unenforceable.

[43] It is now clear from, *inter alia*, *Basson* and *Reddy* that the reasonableness and enforceability of a restraint depend on the nature of the activity sought to be restrained, the *rationale* (purpose) for the restraint, the duration of the restraint, the area of the restraint, as well as the parties'

respective bargaining positions. The reasonableness of the restraint is determined with reference to the circumstances at the time the restraint is sought to be enforced. With reference particularly to the facts of this matter, it is an established principle of law that the employee cannot be interdicted or restrained from taking away his or her experience, skills or knowledge, even if those were acquired as a result of the training which the employer provided to the employee.

[44] Even though it is acknowledged that it is difficult to distinguish between the employee's use of his or her own knowledge, skill and experience, and the use of his or her employer's trade secrets, it is accepted that an employee cannot be prevented from using what is in his, or her, head.'

[22] Two categories of proprietary rights that a restraint of trade may protect are recognised in our law. The first one relates to the relationship one might have or have developed with existing or potential customers, a business or its suppliers. This is commonly referred to as "trade connections". The second one relates to confidential information useful for the wellbeing of the business commonly known as "trade secrets"²

[23] In this case, despite his aforementioned undertakings, the respondent denies that the applicant has proprietary interests worthy of protection. The respondent further contends that his new employer is not a competitor of the applicant and thus he will not be in breach of his restraint of trade undertakings by taking up employment with Accenture.

Is Accenture South Africa the applicant's direct competitor?

[24] In support of the aforesaid contention, the respondent throughout his answering affidavit attempts to draw a distinction between the applicant and Accenture. Essentially, the respondent argues that the applicant's

² *Townsend Productions (Pty) Ltd v Leech and Others* 2001 (4) SA 33(C) and *Mossgas (Pty) Ltd v Sasol Technologies (Pty) Ltd* 1999 3 ALL SA 321 (W) at 333f; See *Kwik Kopy (SA) (Pty) Ltd v Van Harlem and Another* 1999 (1) SA 472 (W) at 484E; *Rawlins and Another v Caravan Truck (Pty) Ltd* 1993 (1) SA 537 (A).

business is focused on outsourcing services whilst Accenture is focused on consulting services.

- [25] In its replying affidavit, the applicant placed before this Court, copies of pages taken from Accenture's own website to prove that Accenture and the applicant are direct competitors in that they both provide outsourcing and consulting services in the same industries and compete for the same clients.
- [26] On the one hand, the applicant's webpage states that its portfolio of services comprises industry-specific processes that are tailored to address its client's specific and industry needs. These services include customer interaction services; enterprise analytics; enterprise information technology; finance and accounting; governance, risk and compliance; human resources, legal services; procurement and research. The industries to which the applicant provides services to are: banking and financial services; consulting and professional services; consumer packaged goods; healthcare; insurance; manufacturing; media and entertainment; retail; shipping and logistics; telecommunications; travel and leisure; utilities and energy.
- [27] On the other hand, Accenture's webpage states that: "Accenture is reinventing business operations through industrialised business process expertise, technology, applied intelligence and data to boost the intelligence engine of our client's business." The services it offered under its Business Process Services (BPS) are business and accounting; marketing; procurement; supply chain; talent and human resources; health; insurance; network and utilities. It is apparent that these are similar services provided by the applicant.
- [28] At the hearing, Advocate E Coleman argued that it is Accenture International that is the applicant's competitor but not Accenture South Africa. He further argued that the web page relied on by the applicant was of Accenture International. However, this argument was baseless

and unsubstantiated as the web address revealed that the address was that of South Africa. Besides, his argument was not foreshadowed by submissions in any of the respondent's affidavit.

- [29] The applicant further placed as evidence before this Court e-mails by the respondent where he, on his own version, refers to the consulting services which the applicant offers. In an email dated 10 July 2017 by the respondent to Mr. V van Niekerk of USA BCO (a potential client of the applicant at the time) the respondent refers to and lists various consulting services which the applicant offers. In another e-mail dated 11 October 2017 by the respondent to Mr. Stephanus Burger of Alexander Forbes (a client of the applicant) the respondent in no uncertain terms stated that the applicant is:

'...not just outsourcers, and in fact most cases outsourcing is the last option. We partner with large organisations to assist them with their process alignment and projects whereby we help to reduce the time spent on a process or reengineering the process, reducing costs associated with those processes and a whole lot more.'

- [30] In another e-mail dated 3 November 2017 by the respondent to Mr. Jason Norton of Edcon, a potential client of the applicant at the time, to which the respondent was offering and trying to sell the applicant's products and services, following an exchange of e-mails, the respondent once again and in no uncertain terms stated that:

[the applicant has] ... a very strong and well-established consulting arm within the business. Generally speaking, we assist businesses from the conceptual phase to the implementation and management.'

- [31] In an e-mail dated 7 November 2017 by the respondent to Mr Edward Maughan, the respondent addresses, amongst other aspects, consulting services to be provided by the applicant in respect of Edcon's Operational Overhaul and Transformation Strategy Alignment.

It is apparent from the above that the applicant also provides consulting services. Consequently, I agree with the applicant's submission that there is no merit whatsoever in the respondent's defence that Accenture is not the applicant's direct competitor.

Confidential information

[32] The applicant seeks enforcement of the restraint of trade undertakings that the respondent afforded the applicant on the premise that the respondent had access to the applicant's confidential information. The respondent contends that the information which the applicant seeks to protect is in the public domain.

[33] In *Experian SA (Pty) Ltd v Haynes and Another*³ the Court had the following to say in relation to trade secrets:

'[19] It is trite that the law enjoins confidential information with protection. Whether information constitutes a trade secret is a factual question. For information to be confidential it must be capable of application in the trade or industry, that is, it must be useful and not be public knowledge and property; known only to a restricted number of people or a close circle; and be of economic value to the person seeking to protect it...'

[20] As I have pointed out above, the *onus* is on the respondent to prove the unreasonableness of the restraint. He must establish that he had no access to confidential information and that he never acquired any significant personal knowledge of, or influence over, the applicant's customers whilst in the applicant's employ. It suffices if it is shown that trade connections through customer contact exist and that they can be exploited if the former employee were employed by a competitor. Once that conclusion has been reached and it is demonstrated that the prospective new employer is a competitor of the applicant, the risk of harm to the applicant, if its former employee were to take

³ (2013) 34 ILJ 529 (GSJ)

up employment, becomes apparent. See *Den Braven SA (Pty) Limited v Pillay and Another* [2008] 3 All SA 518 (D) at paragraphs [17] to [18].

[21] Where an applicant as employer, has endeavoured to safeguard itself against the unpoliceable danger of the respondent communicating its trade secrets to, or utilising its customer connection on behalf of a rival concern after entering that rival concern's employ by obtaining a restraint preventing the respondent from being employed by a competitor, the risk that the respondent will do so is one which the applicant does not have to run and neither is it incumbent upon the applicant to enquire into the *bona fides* of the respondent, and demonstrate that he is *mala fides* before being allowed to enforce its contractually agreed right to restrain the respondent from entering the employ of a direct competitor (see *IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Tarita and Others* 2004 (4) SA 156 (W) at 166I to 167C). In such circumstances, all that the applicant needs to do is to show that there is secret information to which the respondent had access, and which, in theory, the respondent could transmit to the new employer should he desire to do so.

[22] The ex-employer seeking to enforce against his ex-employee a protectable interest recorded in a restraint, does not have to show that the ex-employee has in fact utilised information confidential to it: it need merely show that the ex-employee could do so. The very purpose of the restraint agreement is to relieve the applicant from having to show *bona fides* or lack of retained knowledge on the part of the respondent concerning the confidential information. In these circumstances, it is reasonable for the applicant to enforce the bargain it has exacted to protect itself. Indeed, the very *ratio* underlying the bargain is that the applicant should not have to contend itself with crossing his fingers and hoping that the respondent would act honourably or abide by the undertakings that he has given. It does not lie in the mouth of the ex-employee, who has breached a restraint agreement by taking up employment with a competitor to say to the ex-employer "*Trust me: I will not breach the restraint further than I have already been proved to have done*".

[34] Mr Maughan, who deposed to the applicant's founding affidavit, avers that by virtue of his position and through the performance of his

functions and responsibilities, the respondent had access to the applicant's costing and pricing. In this regard, the respondent was allegedly trained to have an in-depth understanding of the unique differentiators, solutions and pricing strategies. Mr Maughan avers that because of the highly competitive nature of BPO/BPM industry, the applicant has invested a significant amount of time, money and effort in developing its unique value proposition to its current and prospective clients.

- [35] The respondent conceded that the industry is highly competitive but denied that he was involved in pricing and that he had access to any proprietary technologies, data analytics or tools unique to the applicant. He submitted that he was a member of the sales team who understood how to sell the product to client.
- [36] Mr Maughan further avers that the respondent had access to the applicant's operational model in building customer solutions in order to obtain new business and maintain existing business. The respondent denied having had access to the applicant's operational model. However, he admitted having being part of a meeting in which key points of the applicant's customer analytics capabilities/solutions and business process re-engineering analytics were discussed, along with some high level business cases, tangible outputs and savings, future sales capabilities and opportunities.
- [37] It is common cause that the respondent had access to and was privy to regular sales update meetings concerning current and future sales capabilities and opportunities; confidential Powerpoint Presentations concerning the applicant's Retail Analytics Capabilities; internal Web meetings during which issues such as the applicant's methodology were discussed; cost and efficiency improvements; as well as solutions specific to various clients. In addition to the aforesaid, the respondent attended regular Bid Committee meetings during which the applicant's entire current client base as well as future and prospective clients were

identified and discussed, in particular their specific needs and requirements, costing and pricing and the relevant decision-makers or contact person at each one of these clients.

[38] However, he submitted that no information in the e-mail is of any proprietary value. In this regard, he argued that he did not compile the power point presentation and had no access to it. Furthermore, he submitted that the said power point presentation is not unique to the applicant and is a common business tool that is used by many companies.

[39] It is not in dispute that during the business development meetings which he attended along with other senior executives and members of the sales team, highly confidential information was shared by each participant during his or her time slot concerning his or her sales performance. The confidential information shared amongst participants included, *inter alia*, feedback on overall sales; international sales and farming performance; sales and marketing strategies; customer relationship management sales; academy sales, prospective sales and sales performance; each members report in respect of his or her clients and potential clients that he or she is busy working on; deal values; sales and marketing strategies; opportunity plans and competitors in the market. It is also common cause that all the information was made available to and was accessed by each participant, including the respondent, on the applicant's Information Server kept in different folders.

[40] Mr Maughan further avers that the respondent had access to the current 'carve-out' deals which were being negotiated with prospective clients where the applicant would take an entire part or portion of a client's business and render services at either cost or purely output based; the unique solution of the customers to use its service called 'process discovery.' This is a process that is allegedly not currently performed by any of the applicant's competitors, including Accenture

South Africa. It is alleged that the respondent has an in-depth knowledge of this unique process and positioning to the applicant's clients. The respondent submitted, in his answering affidavit, that the process is an analysis of the clients' business to determine what can be outsourced to save the costs or improve the process. He further submitted that he was not involved in any carve-out deal.

[41] The applicant submitted that the aforesaid information included regular written reports in the format of a spreadsheet and contained columns and rows of detailed information concerning: the identity/name of each client; the maturity of the deals/opportunities which the respondent was marketing, offering or providing to each specific client; the specific nature of the product or service; the type of deal, the name and surname of the member of the sales team that would be assisting him; the name and surname of the senior operations person of the sales team that would be overseeing the deal, the primary and secondary Line of Business (LOB), the status of each deal, whether the deal has been approved, To Be Understood (TBU), current action and the action to be taken or not, the respondent's note in respect of each deal, the Annual Contract Value (ACV) and Total Contract Value (TCV), value of each deal and the name and surname of each contact person or decision-maker at each one of the clients. According to the applicant, this information is confidential.

[42] It is the applicant's submission that having regard to those duties and functions that the respondent performed while employed by the applicant he was privy to and had access to the applicant's confidential information that includes client lists, costing, pricing, marketing strategies, discount structures, research and development regarding new products. The applicant further submitted that there can be no doubt that the information it seeks to protect is not in the public domain, is of value to the applicant and useful in the industry. For that reason, the applicant argued that such information qualifies as confidential information and is worthy of protection.

- [43] The respondent must establish that he had no access to confidential information of the applicant. The applicant has shown that the respondent, in his capacity as an Associate Vice President Sales, had access to the applicant's client's lists, costing, pricing, marketing strategies, discount structures, research and development regarding new products. However, he has downplayed his role by bluntly denying access to the applicant's confidential information. His submission that the applicant's information was available in the public domain was not substantiated as he has not made an attempt to identify where and how this information may be found, let alone attach any documentary proof to support his statement. There is merit to the applicant's submission that the type of information it seeks to protect does not exclusively fall within the respondent's skills and knowledge. It is indeed proprietary to the applicant.

Customer-connections

- [44] It is trite that the need of an employer to protect its trade connections would arise where the employee has access to its customers, or is in a position to build up a particular relationship with those customers, and could easily induce those customers to follow him or her to a new business.
- [45] It is common cause that by virtue of his position and through the performance of his functions and responsibilities, the respondent did not only have access to the applicant's prospective and current clients, he had established a strong business relationship with some of the applicant's clients.
- [46] As aforementioned, the respondent provided the applicant with an unconditional undertaking that he will not: (a) contact any of the applicant's clients; (b) use any of the contacts introduced to him by the applicant; and (c) divulge any confidential information belonging to any

person or institution. In this regard, the applicant submitted that at the very least, the applicant is entitled to an order in these terms. This is a fair proposition.

- [47] The applicant has, in my view, succeeded in proving that it has an interest, which is deserving of protection. Such an interest is clearly being prejudiced by the respondent through his association with the applicant's direct competitor, Accenture South Africa. The respondent should, therefore, be interdicted from using the information that he obtained in confidential relationship with the applicant.
- [48] The question is whether the applicant's interest weighed up against those of the respondent would leave the latter economically inactive and unproductive. The applicant submitted that the respondent will not be excluded from being economically active and productive and that he will just not be entitled to use the applicant as a "*spring board*" to unlawfully compete with it. It is further submitted that the respondent is equipped to be employed in various other sales and consulting positions as he is well-qualified and experienced.
- [49] The respondent resigned from his employment with the applicant voluntarily and he immediately entered into a new contract of employment with Accenture South Africa. The respondent has not demonstrated that he would be economically inactive should the restraint be enforced. He is entitled to be employed elsewhere for as long as he does not breach the provisions of the restraint agreement. Public policy requires that contracts concluded voluntarily be enforced, and I am satisfied that on the facts and the law, the applicant demonstrated that it is entitled to the relief it seeks.
- [50] The only other issue for consideration is the period of the restraint and geographical area it covers. The respondent submitted that the restraint covenant is too wide and thus unenforceable. As aforementioned, the contract required the respondent to be restrained

for a period of 365 days after the termination of the employment agreement within the whole of the Republic of South Africa. In my view, the period of the restraint as recorded in the employment contract is reasonable. I am equally of the view that with regard to the geographical area, and given the nature of the applicant's client base, it would be reasonable for the restraint to cover the whole of the Republic of South Africa.

[51] I have had regard to the issue of costs and I am of the view that the requirements of law and fairness dictate that there should be no order as to costs.

[52] I accordingly make an order as follows:

Order:

1. The respondent is interdicted and restrained for a period of 365 (three hundred and sixty-five) days with effect from 30 April 2018 and in the Republic of South Africa, in any capacity whatsoever, directly or indirectly, from:
 - 2.1 carrying on or being interested or engaged in or concerned with or employed by Accenture Africa (Pty) Ltd or Accenture South Africa (Pty) Ltd (Accenture) in South Africa or any of the applicant's competitors, either directly or indirectly, and/or
 - 2.2 soliciting any order from any customers or prospective customers of the applicant for any goods or competing goods and/or for any services or competing services and/or
 - 2.3 canvassing business from any customers or prospective customers of the applicant in respect of any goods and/or for any services or competing services and/or

- 2.4 selling or otherwise supplying to any customers or prospective customer of the applicant any goods or competing goods; and/or
 - 2.5 rendering to any customers or prospective customers of the applicant for any goods or competing goods and/or
 - 2.6 purchasing from any supplier of the applicant any goods or accept from any supplier of the applicant the rendering of any services from it, and/or
 - 2.7 soliciting the appointment as a distributor, licensee, agent or representative of any supplier of the applicant in respect of any goods and/or services.
3. The respondent is interdicted and restrained from directly and indirectly using or disclosing to Accenture in South Africa or any third party, the confidential information and/or proprietary interests of the applicant, in any manner or for any reason or purpose whatsoever, without the prior written consent of the applicant.
4. There is no order as to costs.

D Mahosi

Judge of the Labour Court of South Africa

Appearances:

For the Applicant

Advocate L. Malan

Instructed by

Bowman Gilfillan Inc

For Respondent

Advocate Coleman

Instructed by

Strydom M & Associates