IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J4405/2018

In the matter between:

MASTERBATCH SOUTH AFRICA (PTY) LTD **Applicant**

and

ALBERT GIDENHUYS **First Respondent**

XUBA POLYMER (PTY) LTD **Second Respondent**

Heard: **20 December 2018**

Delivered: **29 January 2019**

JUDGMENT

TLHOTLHALEMAJE, J:

Introduction and background:

[1] With this application, the applicant (Masterbatch), seeks an order interdicting and restraining the first respondent (Gildenhuys) until 28 June 2020 and in the Republic of South Africa, from being directly or indirectly associated or concerned with or interested or engaged in the second respondent (Xuba) or any entity or business which manufactures or sells, in any manner or form, masterbatch, additives, compounds, pigments or products equivalent to or in opposition to its products. A further order is sought interdicting and restraining Gildenhuys from using or disclosing its confidential information. Gildenhuys opposed the application.

[2] In the founding affidavit deposed to by Anthony van Niekerk, its managing director, he averred that Masterbatch manufactures and supplies masterbatch, pigments and additives to the plastic industry. The product masterbatch, is highly concentrated, and used to that add mechanical and aesthetic properties to plastics (polymers) during the manufacturing process of plastic products. It is encapsulated in polymer granules for ease of handling and dosing, and allows the plastic processor to colour raw polymer in an economical manner during the plastic manufacturing process. It is used *inter alia*, to enhance the performance of products by providing resistance against fire, degradation due to ultraviolet rays and microbial growth (referred to as additive masterbatch). It adds aesthetic properties that allows a product to exhibit a particular colour, brightness, vibrancy, tint and reflective compound under specified lighting conditions.

[3] Van Niekerk went at length in explaining the masterbatch product, what it does, what it is used for, who makes it, what is contained in it, how the

business of masterbatch works, and the steps in its production process. These issues will be dealt with in the course of this judgment to the extent necessary.

[4] Gildenhuys in his answering affidavit raised a number of issues and contend that these ought to dispose of the matter. It is common cause that he commenced his employment with Masterbatch on 1 March 2012 as a Technical Manager. A contract of employment signed on 16 February 2012[1] contains confidentiality and restraint of trade undertakings in favour of Masterbatch. A further 'Confidentiality Agreement and Restraint of Trade'[2] was signed on 13 February 2012.

[5] Gildenhuys in opposing the application contends that;

a) The application is not urgent.

b) He had not signed or agreed to the restraint of trade undertakings contained in 'Confidentiality Agreement and Restraint of Trade' that was purportedly signed on 13 February 2012.

c) Masterbatch and Xuba are not competitors, and he is employed by the latter as an independent contractor to work on the development of compounds for the automotive industry;

d) Masterbatch has no proprietary interests in its confidential information and customer connections, which are worthy of protection by means of enforcement of the restraint.

[1] Annexure 'O' to the Founding Affidavit.
[2] Annexure 'R' to the Founding Affidavit

Urgency:

[6] Gildenhuys resigned from Masterbatch's employ on 24 May 2018, and his last working day was 29 June 2018. According to Masterbatch, Gildenhuys advised that he was going to join an entity called Faurecia, which is an automotive parts manufacturer and not its competitor. Masterbatch however contends that it came to its attention on 25 October 2018 that Gildenhuys had in fact joined Xuba, its competitor. Masterbatch only got to know of Gildenhuys' new employer by chance, after a copy of e-mail meant for Gildenhuys was erroneously sent by one of Xuba's employees named 'Francois' to an old email address at Masterbatch that was previously used by Gildenhuys. Attached to the email were minutes of an OPS meeting of Xuba, that took place on 22 October 2018, which Gildenhuys had attended.

[7] Masterbatch's sales director had acted on that information by making telephonic enquiries at Xuba, and it was confirmed that Gildenhuys was indeed its employee. Masterbatch had subsequently instructed its attorneys of record to send Gildenhuys a letter of demand. This was done on 5 November 2018, with undertakings sought by 7 November 2018.

[8] Gildenhuys' response on 7 November 2018 was to request an extension of one week as he needed to consult with his attorneys, which Masterbatch's attorneys of record had consented to. In a further response by Gildenhuys through his attorneys of record, he had denied the allegations made in the correspondence of 5 November 2018 without substantiating those denials. Further correspondence from Masterbatch's attorneys of record followed on 19 November 2018 to Gildenhuys' attorneys pointing out that he had not confirmed whether he worked for Xuba or not. His attorneys of record undertook to revert after consultations with him. When no response was forthcoming, his attorneys were given until 28 November to issue a response failing which an urgent application would be instituted. His response on

29 November 2018 was essentially that he would defend any action against him. Masterbatch's attorneys then advised him on the same that an urgent application would be brought in the light of his bare denials and his refusal to answer the allegations made against him.

[9] The urgent application was launched on 7 December 2018, setting the matter down for 20 December 2018. The principles pertinent to urgent applications are well-established. An applicant seeking urgent relief as contemplated in Rule 8 of the Rules of this Court must adequately and in detail, set out in the founding affidavit, the reasons for the urgency, the circumstances which render the matter urgent, and the reasons why substantial redress cannot be obtained at a hearing in due cause. It therefore follows that where the Court is not satisfied that sufficient reasons exists for the matter to be treated as urgent, the application ought to be struck off from the roll on that ground alone[3]

[10] Furthermore, where it is found that the urgency claimed is ultimately self-created, the Court should refuse to grant relief[4]. It has also been held that disputes pertaining to enforcement of restraint undertakings are by their very

[3] See *Commissioner for South African Revenue Service v Hawker Air Services (Pty) Ltd; Commissioner for South African Revenue Service v Hawker Aviation Services Partnership and Others* 2006 (4) SA 292 (SCA) ; [2006] 2 All SA 565 (SCA) at para 9, where it was held that;

> "…Urgency is a reason that may justify deviation from the times and forms the rules prescribe. It relates to form, not substance, and is not a prerequisite to a claim for substantive relief. Where an application is brought on the basis of urgency, the rules of court permit a court (or a judge in chambers) to dispense with the forms and service usually required, and to dispose of it 'as to it seems meet' (Rule 6(12)(a)). This in effect permits an urgent applicant, subject to the court's control, to forge its own rules (which must 'as far as practicable be in accordance with' the rules). Where the application lacks the requisite element or degree of urgency, the court can for that reason decline to exercise its powers under Rule 6(12)(a). The matter is then not properly on the court's roll, and it declines to hear it. The appropriate order is generally to strike the application from the roll. This enables the applicant to set the matter down again, on proper notice and compliance." (Citations omitted)

[4] See *Jiba v Minister: Department of Justice and Constitutional Development and Others* (2010) 31 ILJ 112 at para 18, where it was held that;

> "Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and the degree to which the ordinary applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self-created when seeking deviation from the rules"

nature urgent[5]. Even if this might be the case, the Court must be satisfied that the requirements set out in Rule 8 have been complied with.

[11] One of the factors to be considered in determining whether a matter should be accorded any urgent attention is the haste with which a party approached the Court. In this case, it was submitted on behalf of Gildenhuys that the explanation proffered by Masterbatch in approaching the Court some six months since the resignation was not adequate, and that it was not clear from the papers as to when Masterbatch became aware of the breach. It was further submitted that time had passed by within which it could be argued that there were any proprietary interests of use, and there was no evidence to suggest that Masterbatch's clients were approached or its confidential information was disclosed.

[12] The timeline as summarised above indicates that Masterbatch became aware on 25 October 2018 of the fact that Gildenhuys had joined Xuba. Several correspondence exchanged between the parties' attorneys of record indicates that Gildenhuys was less than forthcoming about his employment with Xuba, had not responded appropriately to the allegations made against him, and had requested an extension to respond, or had refused to make any undertakings. In the circumstances, it cannot be said that Masterbatch did nothing until 7 December 2018 when it launched these proceedings, and it is apparent that it was only compelled to do so when Gildenhuys refused to shed some light on his association with Xuba. In the circumstances, I am satisfied that Masterbatch acted within a reasonable period upon being made aware of the fact that Gildenhuys had joined Xuba, and further that in accordance with Rule 8 of the Rules of this Court, it has adequately set out the reasons for the urgency, the circumstances which render the matter urgent, and the reasons why substantial redress cannot be obtained at a hearing in due cause. There is no basis for any conclusion to be reached that the urgency claimed in this case is self-created.

[5] See *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff and Another* 2009 (3) SA 78 (C) at 88J

<u>The merits:</u>

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

[13] 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[6]. A restraint of trade agreement is enforceable if it protects legally recognised interests of the party seeking to enforce it. The agreement will however be unenforceable if it is unreasonable and contrary to public policy[7]. 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[8].

[14] 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

[6] 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 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."

[7] See *Advtech Resourcing (Pty) Ltd t/a Communicative Personnel Group v Kuhn & Another 2008 (2) SA 375 (C)* at para 25

[8] 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)*

has been discharged, it would then be for the party resisting the enforcement, to demonstrate that the restraint is unreasonable and therefore unenforceable[9].

[15] The factors to be taken into account when determining whether a restraint of trade is reasonable or otherwise were set out in *Basson v Chilwan and Others*[10] as follows;

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

b) Is such interest 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

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?

[16] A fifth consideration is whether the restraint provisions go further than is necessary to protect the particular interest. It is further trite that the mere fact that parties to an agreement choose to describe a restraint as being

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[9] *Reddy* at para 10
[10] *Basson v Chilwan* 1993 3 SA 742 at 767 G-H .

reasonable, is not itself decisive, as the reasonableness or otherwise thereof is a matter for the Court to determine[11].

[17] 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 gain a relative competitive advantage. Such confidential material is sometimes compendiously referred to as "trade secrets"[12]. 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[13].

[18] In regards to the question of onus, Masterbatch's right to the relief it seeks is grounded on the existence of what it considers to be a valid confidentiality and restraint of trade agreement. It is trite that a party that seeks to enforce a contract in restraint of trade is required to invoke the restraint agreement and prove a breach thereof.

[19] In his answering affidavit, Gildenhuys appears to dispute that he signed the 'Confidentiality Agreement and Restraint of Trade'. He nonetheless recalled that he had signed the letter of appointment containing the confidentiality and restraint of trade undertakings. He could not however recall that he signed the separate 'Confidentiality Agreement and Restraint of Trade' on or about 13 February 2012 prior to his employment.

[11] *Kwik Kopy v Van Haarlem 1999 (1) SA 472 (W)* at 484B-E
[12] *Sibex Engineering Services (Pty) Ltd v Van Wyk 1991 (2) SA 482 (T)) at 502D-F*
[13] *Bapedi Marota Mamone v Commission of Traditional Leadership Disputes and Claims and Others [2014] 3 All SA 1 (SCA)* at para [16].

[20] It must be stated that Gildenhuys' attempts at denying that he had signed the confidentiality and restraint of trade agreement are extraordinary. He does not dispute having signed the letter of appointment which contains similar provisions. As it was correctly pointed out on behalf of Masterbatch, Gildenhuys despite his attempts, raises no real disputes in this regard, as the letter of appointment was signed and initialled by him, which letter in any event contains similar provisions as contained in the 'Confidentiality Agreement and Restraint of Trade'. The Court ought therefore to take a dim view of Gildenhuys' feeble attempts at denying the obvious. I am satisfied that valid confidentiality and restraint of trade undertakings were made by Gildenhuys in favour of Masterbatch.

[21] The next issue to be determined is whether there is a breach of the restraint of trade agreement. Gildenhuys' last day at Masterbatch was on 29 June 2018. He joined Xuba as an independent consultant with effect from 1 July 2018. He however denies that Xuba is a competitor of Masterbatch. The Restraint of Trade as contained in the letter of appointment read as follows:

> *"The employee agrees not to join a Masterbatch manufacturer, supplier or distributor in the area known as the Republic of South Africa (RSA) for a period of 2 (two) years after termination of this agreement. You are restrained from the involvement, manufacture and sale, in any manner or form of masterbatch, additives, compounds, pigments or product that is equivalent to or in opposition to an MBSA product. For a more detailed explanation of the 'Restraint of Trade' clause in your contract, please refer to the MBSA Employee handbook."*

[22] The above provisions are similarly contained in clause 8 of the 'Confidentiality Agreement and Restraint of Trade', and clause 27.9 of the

Employee Handbook to which the letter of appointment letter made reference. In regards to the competitive interface between the two entities, Masterbatch, as already indicated, contended that it conducts business in the manufacture and supply of masterbatch, pigments and additives for the plastic industry. Masterbatch as a product is either sold in granulated form or already diluted and encapsulated in a polymer in which case it is referred to as a 'compound'.

[23] Xuba according to Masterbatch is a direct competitor as it provides *inter alia* the same masterbatch services such as manufacturing and supply of masterbatch additives and compounds. It relied on an extract from Xuba's website[14], which indicated that it (Xuba), is a direct competitor, because it also manufactured and supplied masterbatch and compounds.

[24] In his answering affidavit, Gildenhuys confirmed that Xuba is one of Masterbatch's clients, which purchases masterbatch, additives and pigments from it to mix with the raw polymer to produce a product that is a modified polymer (the compound), with a specific colour and characteristic. He denied that Xuba is a competitor and alleged that Masterbatch's core business is not the production of mixing the masterbatch pigments with raw polymers to produce polymer compound, or a supplier of masterbatching, but that its main business is the production of the masterbatch and pigments, whereas Xuba's core business was in the compounding of automotive materials and mixing of masterbatch products with raw polymers, to produce the final 'compound' which Xuba then supplied to the manufacturers.

[25] According to Gildenhuys, Masterbatch only had one client to whom it provided a service such as where it provided the masterbatch and pigments and then also mixes that masterbatch and pigments with the raw polymers to provide a final product (compound). Those products were supplied by another client, (Cochrane Steel)

[14] Annexure 'M' to the Founding Affidavit

[26] Masterbatch however points out that the distinction sought to be drawn by Gildenhuys was one without a difference in that masterbatch products can be sold in granulated form or already mixed with a polymer in the form of a compound, and that it manufactured both.

[27] Gildenhuys on the other hand conceded that the website of Xuba referred to masterbatching for the manufacture of plumbing fittings, but that the website was outdated as Xuba is not involved in masterbatching. In this regard, he alleged that he had spoken to one Gerhard Pretorius of Xuba to remove any reference to masterbatching in Xuba's website, as it was not something that it performed.

[28] Gildenhuys however conceded that Masterbatch did in fact supply compounds to at least one known client, Cochrane Steel. Masterbatch's contention was that Cochrane Steel was in fact its largest customer, and that the supply of compound to it made 11% of its total product volume and 9% of its total business. It had added in its replying affidavit that other clients that were supplied with compounds included Flex-0-Thene Plastics (Pty) Ltd; Amcor, Usabo (Pty) Ltd and Marley Pipe Systems SA (Pty) Ltd.

[29] With reference to the Restraint of Trade provisions, they provide that; "…*You are restrained from the involvement, manufacture and sale, in any manner or form of masterbatch, additives, compounds, pigments or product that is equivalent to or in opposition to an MBSA product* …". In the light of the limited concessions made by Gildenhuys, the invariable conclusion to be reached is that indeed Xuba is involved in the business of masterbatch and compounding in opposition to Masterbatch's products, and a clear competitive interface between the products of the two entities has been established, which places Gildenhuys in conflict with his undertakings made in favour of Masterbatch.

[30] In summary, I am satisfied that valid confidentiality and restraint of trade undertakings were made in favour of Masterbatch. The competitive interface referred to above is sufficient in my view for a conclusion to be reached that Xuba and Masterbatch are competitors. To the extent that it is common cause that Gildenhuys has joined Xuba, a further conclusion to be reached is that there is indeed a breach of those undertakings.

Proprietary interests deserving protection?

[31] The mere fact that Gildenhuys has taken up employment with Xuba, and that the latter is in competition with Masterbatch, does not in itself entitle Masterbatch to any relief, if all that Gildenhuys will be doing is to apply his skills and knowledge acquired whilst in the employ of Masterbatch. It is only if the restriction on his activities serves to protect a proprietary interest relied on by Masterbatch that he would be in breach of his contractual obligations[15].

[32] As to whether Masterbatch's proprietary interests are threatened by Gildenhuys' employment with Xuba has to be determined within the context of his role and responsibilities whilst employed at Masterbatch. Masterbatch alleged that as Technical Manager, Gildenhuys (as per his "Job Effectiveness Description', was required to understand key business drives in the plastics industry and how these could be satisfied by it. Furthermore, his daily activities entailed being custodian of sales relationships with customers; visiting existing and prospective customers to address their needs, obtaining and delivering orders; generating product quotations for customers; developing masterbatch formulations or adjusting existing formulations in order to meet customer needs; and negotiating and discussing price adjustments with customers;

[15] *Automotive Tooling Systems (Pty) Ltd v Wilkens and Others* [2007] 4 All SA 1073 (SCA); 2007 (2) SA 271 (SCA)
At para 9

[33] Gildenhuys according to Masterbatch was the custodian of product specification and contact for all customers; had logged all customer complaints and implemented corrective measures; accessed customers, their manufacturing processes, capabilities and opportunities for growth; managed customer relations through constant contacts; had access to sensitive commercial information of customers including *inter alia*, volumes of products purchased, price lists, products sold, costs, margins and profitability per customer per product; involved in new product development projects; attended meetings were commercially sensitive and strategic business information was discussed; performed extensive work in Masterbatch's laboratory thus gaining access to all sensitive software, systems, data and processes; gained access to all production facilities and production equipment; performed procurement and supply chain functions; imported new equipment; and engaged in improvements of operational efficiencies.

[34] Gildenhuys' response in his answering affidavit to the allegations in regards to his daily activities as summarised above was to merely note them. In regards to customer connections, Masterbatch alleged that Gildenhuys was required to act as a contact for customer problem and support; liaise with existing and prospective customers by managing relationships with them, generating business from existing and prospective customers; providing them with technical advice; was placed in a position to develop strong and ongoing relationships with customers and was essentially the face of Masterbatch. It was further alleged that he was in a position to use those connections and technical know-how gained from Masterbatch for the benefit of Xuba and to assist the latter in competing with it, and further that he was in a position to divert existing and potential business to Xuba.

[35] Gildenhuys' response to the allegations in regards to customer connections was to merely note or deny them, other than to add that he had not contacted any of Masterbatch's clients, nor did he have any hard or soft copy of any of Masterbatch's client list or technical information. In submissions made on his

behalf, he had conceded that he knew who those clients were, but contended that he was not the face of Masterbatch. It was further submitted on his behalf that Masterbatch had no clients that Xuba wanted as the two were in different markets.

[36] It is accepted that the need for an employer to protect trade connections arises where an employee had access to customers or suppliers and is in a position to build up a particular relationship with them so that when the employee leaves the service of the employer, he could easily induce the employer's customers and suppliers to follow him to a new business. Again, this is a question of fact, and often one of degree[16].

[37] In *Profibre*, it was again emphasized that it is incumbent on the employee under restraint to establish that he/she acquired any significant influence over the applicant's customers while in the applicant's employ. In other words, it is enough for the party seeking to enforce a restraint to show that trade connections through customer or supplier contact exist, and that they can be exploited if the employee was to be employed by a competitor or compete with the business of the applicant.

[38] It is not for the applicant to have to run the risk of the employee utilizing its customer connections to the advantage of a competitor. It is also not incumbent on an applicant to enquire into the *bona fides* of the employee or to demonstrate that he/she is *mala fides* before it is entitled to enforce a contractually agreed restraint. The holder of the restraint also does not have to show that the employee in fact utilised information confidential to it, it is enough that the employee could do so[17].

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[16] See *Profibre Products (Pty) Ltd v Govindsami* (J1448/18) [2018] ZALCJHB 240 (5 June 2018) at para 14

[17] At para 15

[39] Gildenhuys' contention was that Masterbatch had no proprietary interests in the form of customer connections that were worthy of protection. I have difficulties in comprehending how that should be the case where he merely noted the extensive allegations made in regards to him being closely associated with Masterbatch's clients. He had conceded having knowledge of those customers, and the need for protection consequently arise to the extent that he had merely denied having built a particular relationship with those customers, without adding anything substantial to his denials.

[40] It has also been held that the onus is on the respondent to demonstrate that he/she never acquired any significant personal knowledge of, or influence over, the applicant's customers whilst in the applicant's employ, and that it suffices if it is shown that trade connections through customer contact exists, and that they could be exploited if the former employee were employed by a competitor. Thus once a 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 up employment, becomes apparent[18].

[41] In this case, I am satisfied that Masterbatch has demonstrated that the trade connections through customer or supplier contact exists, and that they could be exploited for the benefit of Xuba if Gildenhuys continued his employment with it. It is therefore not sufficient for Gildenhuys to merely allege that he had no soft or hard copies of the details of these customers, or that Xuba had no need for those customers. The mere fact that he knows those customers, and had dealt with them before in a manner as described and detailed by Masterbatch in the founding affidavit, is sufficient for the latter to be entitled to

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[18] See *Experian South Africa (Pty) Ltd v Heyns and Another ([2013] (1) SA 135 (GSJ)* at para [20]; *Den Braven SA (Pty) Ltd v Pillay & Another* 2008 (6) SA 229 (D)
at para [6], where the Court held that;

> "In considering the facts of a particular case it must always be borne in mind that a protectable interest in the form of customer connections does not come into being simply because the former employee had contact with the employer's customers in the course of their work. The connection between the former employee and the customer must be such that it will probably enable the former employee to induce the customer to follow him or her to a new business"

protection, and it is not even required of it to demonstrate that those connections had been utilized.

[42] In regards to confidential information, it is accepted that this entails information which is not in the public domain or public knowledge[19]. What constitutes information of a confidential nature will depend on the circumstances of each case, with the primary consideration being the potential or actual usefulness of that information to a competitor to the prejudice of the ex-employer[20]. For information to be confidential, it must other than being known to a select few, be also capable of application in trade or industry, and be of economic value to the person seeking to protect it[21].

[43] Paragraphs 94.1 – 94.7 of the founding affidavit outlines detailed confidential information that Masterbatch alleges Gildenhuys was privy to. It further alleged that the information and trade secrets such as manufacturing and production processes, pricing laboratory systems, product designs and the like is information which remains confidential for years.

[44] In the answering affidavit, Gildenhuys either noted or denied the allegations. He alleged that he did not possess any confidential information that was relevant for Xuba, as the latter purchased masterbatch products from Masterbatch in its manufacturing process. He further expressly gave an undertaking not to disclose any confidential information to Xuba or any other third party, or to utilise any such information to benefit or for the benefit of any third party, including Xuba.

[45] As I understood Gildenhuys' response, the nub of it is that that the information that he was privy to is of no value to Xuba. In the same vein however, he made undertakings not to disclose or utilise that information for the benefit of

[19] See *Saltman Engineering Co Ltd v Campbell Engineering Co Ltd* [1963] 3 All ER 413 at 415
[20] *Coolair Ventilator Co (SA) (Pty) Ltd v Liebenberg and Another* 1967 (1) SA 686 (W) at 691B:
[21] *Townsend Productions (Pty) Ltd v Leech & others* 2001 (4) SA 33 (C)

Xuba or any other third party in competition with Masterbatch. The contradictions in his contentions are glaring.

[46] It is trite that the essence and purpose of any restraint of trade agreement is to prevent the use of confidential information by a former employee to the detriment of the employer. It has further been held that it was not necessary to find that the ex-employee did or would actually use trade secrets and confidential information in his new employment, but that is was sufficient if *he could do so*[22]*.* In this case, and to the extent that Gildenhuys had either noted or made bare denials in regards to allegations of the confidential information he has in his possession or that he was privy to, I am further satisfied that Masterbatch has demonstrated that indeed Gildenhuys was privy to its confidential information, which he or Xuba could use to its detriment. In the circumstances, Masterbatch is entitled to the protection of that information.

[47] The undertakings made by Gildenhuys are clearly half-hearted, and belated in the light of his initial refusal to do so prior to this application being launched. Such undertakings are of little comfort in the light of his continued employment with Xuba and the likely damage to Masterbatch that this may cause. His contention that he had not made such undertakings earlier as he was of the view that the restraint was unenforceable or that he was not in breach thereof is equally a lame excuse, particularly since he had not responded to Masterbatch earlier when it made enquiries about his involvement with Xuba. The submission made on his behalf that he was under no obligation to provide details surrounding his denials of the allegations

[22]*See Experian* at para [22], where the Court held that;

> "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".

made in correspondence prior to this application being launched is equally not of assistance to his case.

The weighing of interests:

[48] I accept that whilst the sanctity of contracts is something the courts should not hesitate to enforce, a sense of proportion in the light of the provisions of section 22 of the Constitution of the Republic ought to be maintained. Thus, there is a need to strike a balance between Gildenhuys' rights to freedom of trade, occupation and profession, and the protectable interests of Masterbatch, which in essence appears to be the real issue between the parties in this matter.

[49] Gildenhuys' complaint was that the restraint imposed restrictive conditions on him and was contrary to public policy in that it was too wide, and effectively meant that he would be unable to be economically active and productive in the marketplace for a period of two years within the whole of the Republic. He contended that the restraint was directed solely at the restriction of competition, and that even if there were interests threatened as a result of his employment with Xuba, the interests of Masterbatch qualitatively and quantitatively did not outweigh his own to be economically active and productive. He further alleged that as a consultant with Xuba, he utilised his own skills, knowledge and experience for the purposes of developing the compound products in the automotive industry and not to utilise any trade secrets or confidential information of Masterbatch. It was further submitted on his behalf that he was a qualified engineer specialising in compound plastics, and that the restraint was restrictive as he could not earn a living as a result of reference to 'compound' in the agreement

[50] Masterbatch's contention was that it conducted its business nationally and throughout the Republic, with over 100 customers in the plastic industry, hence its interests should be protected throughout the Republic. It further contended that the period of two years was reasonable as pricing in the industry did not change regularly, as were the technical specifications of its products. It was pointed out that six months of that period had already lapsed. Masterbatch denied that Gildenhuys was prevented from being economically active for the period of the restraint, as he was simply limited in his choice of employment for the restraint period as he had provided the undertakings in its favour. It was submitted that Gildenhuys was not rendered economically inactive as he was able to work in various industries in the plastic industry where opportunities were extensive including in plastic conversion, suppliers, traders and polymer companies, that were not in competition with Masterbatch.

[51] It has been concluded in this case that the proprietary interests demonstrated by Masterbatch deserves protection. The only issue is whether the restraint is reasonable in terms of area and duration. It is trite that a restraint of trade will be unreasonable if the duration and scope of area sought to be enforced, falls outside of the agreement itself, and/or the restraint is broader than necessary.

[52] Given the provision of the restraint of trade and the conclusions reached in regards to Masterbatch's protectable interests, it cannot be said that these provisions are merely meant to stifle competition, nor are they intended to render Gildenhuys economically inactive and unproductive, especially given his qualifications, skills and experience, which he was at liberty to utilise outside of the areas covered by the restraint of trade. The mere fact that he had experience in masterbatching which area he sought to leave for compounding cannot by all accounts be justification to limit enforcement of his restraint undertakings.

[53] Inasmuch as reasons have been proffered by Masterbatch to justify the duration and scope of area sought to be enforced, it is my view however that the reasons in regard to the duration are not convincing. Pricing and technical specifications cannot be static for prolonged periods as they are influenced by market forces and constant innovations in a particular industry. To simply rely on unknown factors or to contend that pricing remains constant for prolonged periods, or that changes to technical specifications only take place in unknown exceptional circumstances cannot in my view justify unreasonable duration of restraints. To this end, I am of the view that the duration of the restraint is longer than necessary given these considerations, and thus unreasonable. I have further taken into account that six months had passed since Gildenhuys had resigned from Masterbatch and joined Xuba. In the circumstances, the period up until 28 December 2019 is a reasonable period for the operation of the restraint.

Costs

[54] An order of costs is generally at the discretion of this Court, having taken into account considerations of law and fairness. The Labour Appeal Court in *Trevlyn Ball*[23] has cautioned against making cost orders in matters pertaining to enforcement of a restraint in the light of constitutional issues involved in such matters. The rationale behind this approach is that any cost orders may dissuade employees who genuinely challenge the enforceability or reasonableness of their restraint agreements. In the light of the conclusions as above, I am not convinced that Gildenhuys' opposition to this application was vexatious or *mala fide*, and thus it would be appropriate that each party bears its own costs.

[55] Accordingly, the following order is made;

[23] *Trevlyn Ball v Bambalela Bolts (Pty) Ltd and Another* [2013] (9) BLLR 843 (LAC) at para [30]

<u>Order:</u>

1. The requirements of Rule 7 of the Rules of this Court are dispensed with and this matter is heard as one of urgency in terms of Rule 8.

2. The First Respondent is interdicted and restrained until 28 December 2019, and within the Republic of South Africa from being directly or indirectly associated or concerned with or interested on engaged in;

   2.1 The Second Respondent;

   2.2 Any entity or business which manufactures or sells, in any manner or form, masterbatch, additives, compounds, pigments or products equivalen

   2.3 t to or in opposition to the Applicant's products.

3. The First Respondent is interdicted from disclosing the confidential information of the Applicant to any third party including the Second Respondent.

4. The First Respondent is interdicted from using the confidential information of the applicant for his own benefit or for the benefit of any third party including the Second Respondent.

5. Each party is to pay its own costs.

Edwin Tlhotlhalemaje

Judge of the Labour Court of South Africa

APPEARANCES:

For the applicant: P. Bosman

Instructed by: Cliffe Dekker Hofmeyer Incorporated

For the First Respondent: A. R van der Merwe

Instructed by: Eduard Fourie Attorneys