



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 2025-176724

In the matter between:

TRUWORTHS LIMITED

Applicant

And

MELUSI NXASANA, MR PRICE GROUP LIMITED

First Respondent

MR PRICE GROUP LIMITED

Second Respondent

Heard : 11 November 2025

Delivered : 10 December 2025

Summary : Contract- restraint of trade.- The mere presence of a restraint of trade agreement is insufficient proof of a protectable interest; the applicant bears the burden of actively demonstrating that such an interest genuinely exists. - General industry skills and experience are not confidential or protectable by law. However, a senior employee's access to high-level proprietary information, corporate secrets, and key client relationships creates a heightened risk of competitive harm to the former employer. For this information to be legally protected, it must be objectively shown to warrant confidential status. - Differentiation strategies change how companies compete (through targeting specific markets or unique designs) but do not remove the underlying competition within the industry landscape. - There is no single, fixed standard or universal formula for evaluating

reasonableness of restraint; instead, each individual case must be assessed and decided based purely on its own unique facts and merits.- An employer is not responsible for losses in value of employee share options that result from general market fluctuations, as this liability is dependent on the specific facts and circumstances of each individual case.

ORDER

Application granted with costs.

JUDGMENT DELIVERED ELECTRONICALLY

Introduction

Nziweni, J

[1] In this application the applicant (“Truworths”) seeks to enforce a six-month restraint of trade against the respondent (“the first respondent”). On 05 September 2012, the first respondent accepted an offer of employment with Truworths as a ‘Store Planner’ (The job title for a Store Planner was later updated to ‘Store Designer’).

[2] Truworths positions itself as a retailer of fashion, clothing, footwear, homeware and related merchandise in the ladies’, men’s and children’s markets. According to Truworths, part of its competitive edge is the manner in which they execute; and the importance they attach to the concept of store development (which encompasses both store design and store build). Truworths holds the view that it is no secret that their competitors look to emulate them, in order to gain market share at their expense.

[3] No relief is sought against the second respondent, for sake of brevity, I will refer to the second respondent as (“Mr Price”). According to Truworths, they cited Mr

Price only out of abundance of caution. However, the application against Mr Price was withdrawn by the applicant.

[4] The offer of employment between Truworhts and Mr Nxasana contained a restraint of trade clause [headed 'Restraint of Trade']. The restraint of trade clause stated the following:

"This offer is dependent on your signing the attached Restraint of Trade of 6 (six) months, for which you will acquire R120, 000 (One Hundred and Twenty Thousand Rand) share appreciation rights, or share options or High-Performance Shares (HPSS) options or a combination thereof. We anticipate that the new share appreciation right scheme will be approved by shareholders in November 2012, failing which we will invest the amount in our existing share scheme or in High Performance Share Scheme (HPSS) or a combination thereof under the same conditions as above."

[5] It is Truworhts' assertion that the restraint of trade and the employment agreement, inter alia, record that the first respondent would be exposed to confidential and commercially sensitive information regarding Truworhts' business and that to this end, he would be required to sign the restraint.

[6] On 17 October 2012, the parties concluded the restraint of trade agreement. The restraint of trade, inter alia, stipulates the following:

"2.5 The Restraintee has been employed by and is in the service of Truworhts and by reason thereof and by virtue of his/her aforementioned capacity and period of service, been brought into contact with the operations of Truworhts. Its philosophy, development, general policy and approach to business as well as Truworhts' trade secrets and know-how. This has placed, and for as long as he/she remains associated with Truworhts will continue to place, the Restraintee in the position of being able to assimilate and acquire a key fundamental and in-depth knowledge and understanding of aforementioned aspects of Truworhts.

2.6 By virtue of his/her position of employment, it is sine qua non that the Restraintee will remain and will operate in close contact with most, if not all, of the the customers, suppliers and business associates of Truworhts.

2.7 Pursuant to the foregoing and particularly by virtue of the position(s) which the Restrainee has held/filled and will continue to hold during his/her period of service with Truworths, the Restrainee has acquired and will continue to acquire certain unique skills, experience, expertise and knowledge, as more fully defined hereunder and which, had he/she not been employed by and in the service of Truworths would not otherwise have been available to or have been able to have been acquired by him/her.

2.8 . . .

2.9 In order to protect its interest with a view to ensuring its continued profitability, growth, development and the expansion of its market share, with particular reference to the interests of all its members/shareholders and the commitment which it has towards all its employees, Truworths has decided to implement a policy aimed at protecting its trade secrets and know-how, its goodwill and propriety interests by concluding an agreement with the Restrainee, pursuant to which the latter will be:

2.9.1 restrained for a reasonable period from being associated, directly or indirectly with any competitor of Truworths;

2.9.2 obliged to respect and maintain absolute confidentiality in respect of all trade secrets and know-how acquired by him/her in the course of his or her employment and association with Truworths.

2.9.3 generously compensated as a further quid pro quo in respect of this agreement.

2.10 . . .

3. INTERPRETATION

3.1 . . .

3.1.3 “Trade Secrets and Kow How” means all financial and marketing policies, strategic plans including, inter alia, mergers, acquisitions, and/or investments; strategic and business plans in connection with or relating to all functions of the business; the business philosophy; sources of supply ; expansion programme(s); quality control of merchandise; discounts obtained from suppliers; control of stock losses (“shrinkages”); methods of distribution; specialised knowledge of training programmes and staff welfare; business connections both in the Republic of South Africa and internationally; all export activities and overseas /international markets; internal control systems buying policies and strategies; salary and wages policies; security methods; methods of warehousing and systems of control therefore; Information technology information systems technology; employment, staff and personnel policies and practices; general and specific internal systems, policies and procedures; all credit control and debt collecting processes and systems of Truworths; and any further “assets” appearing from the recordal above and any other matters which relate directly or indirectly to the business of Truworths and in respect of which information is not readily available in the ordinary course of business to a competitor of Truworths . . .

3.1.6 “Restrained Business” means any business which is the same or materially similar to or competitive with any business conducted by Truworths (“Competitive Business”) or the business of any supplier who supplies goods and services to a competitor or competitors of Truworths. Without limiting the generality of the afore going, the Competitive Business shall be deemed to include any organisation undertaking business which is a retailer of clothing and footwear and related accessories and/or jewellery and/or homewares. Furthermore, and again without limiting the generality of the description of “Restrained Business” above, the Competitive Business shall be deemed to include any organisation, undertaking or business which is the same as, or materially similar to or competitive with any specialist business unit or department of Truworths . . .

4. THE CONSIDERATION

4.1 . . . The Restrainee hereby undertakes to and in favour of Truworths that:

4.1.1 he/she shall not, throughout the period of his/her employment with Truworths and for a period of 6 six months with effect from Termination Date; and anywhere within the Territory, directly or indirectly;

4.1.1.1 carry on; or

4.1.1.2 be engaged or concerned or interested in or employed by or . . .

Any business, company, close corporation, partnership, trust, person, body corporate, juristic person, association or other legal or business entity . . . which in any manner whatsoever. . . carries on Restrained Business . . .

4.3 The Restrainee hereby records and acknowledges that:

4.3.1 he/she has given careful consideration to the restraints undertaken by him/her and made by virtue of this Agreement (Including taking into consideration his/her personal knowledge of the Trade secrets and Know-how of Truworths) and the said restraints are fair and reasonable and go no further than reasonably necessary to protect the proprietary rights and interests of Truworths;

4.3.2 the compensation offered to and accepted by him/her (as provided in clauses 4.1 above) constitutes a more than fair and reasonable compensation and quid pro quo for the undertakings given by him/her and the obligations imposed upon him /her in terms of this Agreement; . . .”

[7] The first respondent received an employment offer from Mr Price. On 29 July 2025 the first respondent then tendered his resignation to Truworths. On 8 August 2025, Truworths addressed a letter of demand to the first respondent, reminding him of the restraint. Truworths also wrote to Mr Price notifying them that the first respondent is subject to a restraint of trade contract. Upon learning of the restraint, Mr Price wrote to the first respondent, amongst others, stating that Mr Price competes with Truworths.

Evaluation

[8] This Court is aware of the delicate balance required when enforcing restraint of trade provisions. Enforcement requires careful consideration, as such contracts frequently clash with public policy principles that prioritise an individual's right to participate freely in the commercial labour market.

[9] Notwithstanding the general caution applied, these agreements will be enforced provided they are not determined to be contrary to public policy, are necessary to protect the legitimate interests of the employer, and do not unduly restrict the employee's rights. These determinations require careful consideration of specific contractual details, and operational context.

[10] The first respondent is opposing Truworths' application for an interdict which is aimed at preventing him from commencing employment with Mr Price; by launching an integrated, three-pronged challenge. The initial argument contests the scope and enforceability of the restraint of trade agreement; the second focuses on defining the nature of his new role at Mr Price; and the third maintains that Truworths faces no demonstrable risk to its protectable interests.

[11] To justify the restraint of trade agreement's scope, Truworths must demonstrate that its protectable interest possesses a level of uniqueness adequate to warrant such specific legal protection. The restraint must be reasonably related to that protectable interest. There is no universal formula for assessing reasonableness; each case must be determined on its own merits.

The nature of the new role

[12] The first respondent argues that if he finds employment with Mr Price, his new position would be in project management and not in store design as was the case with Truworths. According to him, the project management role would involve co-ordination and execution rather than creative or strategic design. As such, the role does not require access to or use of any confidential information obtained by him at Truworths.

[13] It is not in dispute that Truworths and Mr Price are in the retail industry. Truworths contends that the confidential know-how and proprietary information accessed by the first respondent during his employment tenure [particularly as a senior] constitutes interests deserving of protection; the disclosure of which to Mr Price could confer an unfair competitive advantage upon the latter.

[14] Further, the first respondent contends that his new role at Mr Price is solely focused on project management, with distinct responsibilities that do not necessitate the utilisation or transfer of Truworths' confidential or proprietary information, systems, or internal methodologies. The first respondent asserts that the project management role at Mr Price, focusses on co-ordination, execution and delivery of store projects, rather than creative or conceptual aspects of design.

[15] In these circumstances, he [the first respondent] asserts that he will not continue in a store design function.

[16] The restraint is sought due to the highly competitive commercial environment in which Truworths operates. Surely, a non-disclosure provision alone is insufficient to protect legitimate business interests, as adherence would be difficult to monitor without the restraint. The core concern is the potential difficulty in proving whether the first respondent is improperly utilising confidential goodwill and proprietary knowledge gained during employment for the benefit of competitors.

[17] The stipulations contained within clause 2.6 and 2.7 of the Restraint of Trade and Confidentiality Agreement are unequivocal, transparent, and do not necessitate further elucidation. The contents of clause 2.6 and 2.7 are cited in paragraph 5 of this judgment.

[18] Clearly clause 2.6 states that, because of the nature of the job the first respondent held at Truworths, it is inherent and inevitable that the first respondent would work very closely with all of Truworths' key clients, vendors, and partners. As such, this close contact with Truworths' customers and suppliers is a fundamental, essential part of the first respondent's job.

[19] Clause 2.7 posits that, due to the inherent specifics of the first respondent's position at Truworths, he has inevitably amassed specialised and proprietary knowledge, skills, and expertise that are distinct to the company and could not have been accessed or obtained within an alternative professional environment. Truworths contends that the expertise and skills the first respondent developed during his tenure of employment are precisely what confer a competitive advantage upon the company.

[20] The defining factor is the first respondent's acquisition of vital experience and expertise at Truworths, not the particulars of his new role. As previously mentioned Truworths' objective is to safeguard that specific information from being used elsewhere. This then implies that Truworths believes the skills and insider knowledge the first respondent gained are inherently valuable and sensitive enough to pose a risk, regardless of how different his new job title might sound. I pause only to note one further point: this is that, given the inherent nature of a project manager's role in directing projects, it is reasonable to infer that the knowledge, expertise, and confidential information accrued during the individual's prior engagement with Truworths would be directly applicable and beneficial to their performance and the outcome of the projects currently under their new employer.

[21] This Court notes Truworths' contention that their business interests are threatened by the first respondent's new role. This judgment will subsequently provide the rationale and evidence demonstrating why this view is justified.

Does the restraint agreement protect a legitimate and a protectable interest?

[22] It is also the first respondent's assertion that not all knowledge gained during his employment at Truworths qualifies as protectable trade secrets. The first respondent contends that much of the expertise developed are transferable skills and not proprietary assets.

[23] The mere existence of the restraint of trade agreement does not necessarily mean there is a protectable interest. The applicant [Truworths] must prove that the interest exists. The court will only enforce the contract if interest is proven. A key challenge is distinguishing between an employer's confidential business information (protectable interest) and an employee's general professional knowledge (not protectable), as the two often overlap, making precise definitions difficult and risking inadvertent curbing of legitimate skills use.

[24] The central issue is whether Truworths' interests are substantial enough to warrant legal protection. The employer's subjective opinion about what is protectable

is legally irrelevant to the formal determination; the interest must be objectively worthy of protection.

[25] General industry skills and experience are not protectable information. However, a senior employee's access to high-level strategies, company secrets or information, and key client relationships creates a heightened risk of using proprietary knowledge elsewhere, which can harm the former employer. However, the information itself must objectively warrant protection.

(a) Truworths' Assertions of Protectable Interests

[26] Truworths argues that the training provided to the Store Design team is specific, focusing on brand concepts, design standards, merchandising principles, and operational requirements. New recruits work on single-brand projects to internalise these specific standards before moving to complex projects.

[27] By training and employing specialised store design staff, Truworths claims these employees are exposed to core, confidential business information.

[28] The first respondent, a former senior employee in the Store Design department, was reportedly privy to sensitive, confidential information during his tenure, including proprietary details on future store locations, formats, timelines, confidential design principles, branding strategies, and supplier lists.

[29] Truworths asserts that the expertise and skills acquired by the respondent are not widely known or easily discoverable by competitors. According to Truworths, the goal is to shield information that gives the company a competitive advantage over rivals.

[30] Truworths asserts their non-public databases contain proprietary business strategies and commercially sensitive data, which constitute a valuable protectable interest and a source of competitive advantage. This Court agrees that the evidence

presented by Truworths, explicitly evidences a quantifiable financial valuation to this information.

[31] The evidence before this Court also demonstrates that Truworths took measures through the restraint agreement to safeguard this specialised knowledge from competitors. Amongst others, the measures taken by Truworths are aimed at preventing their employees from utilising the information and knowledge acquired during employment with a competitor.

(b) The first Respondent's Position and the Court's Assessment

[32] The first respondent concedes signing the restraint in anticipation of exposure to confidential information. This is not to say, however, that the first respondent concedes that all the information he had access to is protectable information. As mentioned previously, the first respondent argues that much of the knowledge gained is industry standard and widely used across the sector.

[33] According to the Competition Act, Act 89 of 1998, "Confidential information" means trade, business or industrial information that belongs to a firm, has a particular economic value, and is not generally available to or known by others.

[34] Of special importance in this case is the fact that the first respondent's use of "much of the information" indicates a challenge to the scope of the protectable information, rather than a total denial of exposure. That being so it seems to me that the first respondent does not contest access to Truworths' protectable information but maintains that much of it constitutes common industry knowledge, not proprietary secrets.

[35] In *Basson v Chilwan & Others* [1993] ZASCA 61; 1993 (3) SA 742 (A) at 767A-D, the court held that to determine the reasonableness or otherwise of a restraint of trade, the following questions should be asked:

1. Is there an interest of the one party, which is deserving of protection at the termination of the agreement?
2. Is such interest being prejudiced by the other party?
3. If so, does such interest so weigh up qualitatively and quantitatively against the interest of the latter party, that the latter should not be economically inactive and unproductive?
4. Is there another facet of public policy having nothing to do with the relationship between the parties but which requires that the restraint should either be maintained or rejected?

[36] The argument before us, as in the *Chilwan* judgment supra, proceeded on the footing that the question to be asked was whether there is an interest of the one party, which needs to be protected.

[37] It is the applicant's contention that given the first respondent's central role in the store design process positioned between the conceptual and implementation teams, the first respondent has a comprehensive understanding of Truworths' store design approach and strategies, as well as its store development strategy and planning.

[38] Truworths asserts that the first respondent played an integral role in Truworths' Store Design department. So the argument continues, that the first respondent's intimate knowledge of Truworths's store design approach and strategies, as well as its store development strategy and planning, would give a competitor an unfair springboard.

Standard of Proof and Conclusion on Harm/Risk of harm

[39] Truworths aims to prevent a breach of confidentiality. It was argued that the first respondent's employment with a direct competitor (Mr Price) poses a significant risk of inadvertent disclosure. This access would confer an invaluable competitive advantage upon Mr Price, risking Truworths' market position. The evidence in this matter demonstrates that Truworths is highly motivated to protect its significant competitive edge.

[40] I do not find it difficult to accept that it is reasonable for Truworths to assert the first respondent, due to his senior position, had access or the potential for access confidential information. Truworths is not required to furnish proof that the first respondent obtained actual exposure to or use of the confidential information (this is an interdict application requiring only reasonable apprehension of harm).

[41] For an employer to maximise the value of an employment contract and of employing, they must be able to confidently share the sensitive information necessary for the employee's optimal job performance.

[42] As stated above, by virtue of his position, the first respondent acquired inside knowledge about Truworths' strengths and weaknesses, which he would inevitably carry over to Mr Price, allowing Mr Price to appropriate that knowledge.

[43] Hence, the specific nature of the role the first respondent intends to assume at Mr Price is immaterial if Mr Price is a competitor; prior knowledge could still facilitate disclosure.

[44] The first respondent's commitment not to disclose information offers minimal reassurance to Truworths, nor does the argument that the information is obsolete. This overlooks Truworths' central assertion that, by virtue of his employment position, the first respondent inherently gained access to proprietary and confidential information.

[45] In light of the prevailing evidence, the conclusion is inescapable that Truworths possesses a demonstrable and superior protectable interest, both in nature and extent, which takes precedence over that of the first respondent.

[46] Having established that a protectable interest is present and threatened, I turn now to weigh the employer's interest against the employee's interest in being economically active and productive.

Reasonableness of the restraint

[47] The first respondent further argues that Mr Price operates within a separate market segment, characterised by a different customer base, pricing strategy, and brand identity, thereby suggesting that the general industry overlap does not equate to direct competition sufficient to warrant the enforcement of the restraint of trade. The first respondent's position is that he is unable to disclose any of Truworths' trade secrets. As such, the respondent asserts that the restraint of trade would be unreasonable. The question as to whether the restraint of trade is reasonable is a vital issue in the case.

[48] The apt question that then arises here is whether the restraint in question prevents the employee from working in his field of expertise for six months, thereby imposing a hardship that far outweighs any potential harm to employer?

[49] It is an established legal principle that a court will only enforce a restraint of trade agreement against a former employee to the degree that the restraint is both reasonable and essential means of safeguarding a legitimate business interest of the employer.

[50] In *Bidfood (Pty) Ltd t/a Bidfood Western Cape v Govender and Others* (2264/2017) [2017] ZAWCHC 91 (28 March 2017) at paragraphs 11 and 13, the following was stated:

"[11] It is now well accepted in our law that the reasonableness or otherwise of a restraint of trade agreement is a matter for the Court to determine. The fact that parties may accept and choose to describe it as reasonable is no longer the decisive factor. In this regard see *Advtech Resourcing t/a Communicate Personnel Group v Kuhn* 2008 (2) SA 375 (CPD) at 382 G and the cases cited therein. . .

"[13] The reasonableness of a restraint also entails a value judgment. This is factually driven and premised upon the facts of each case. In *Reddy* supra, the following was held at para [15]-[16]:

"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.”

[51] Plainly, reasonableness of restraint is not a one size fits all exercise. The important principle at play in this matter is that an employee’s mobility is essential for an individual to earn a living and pursue career opportunities. A restraint of trade agreement can hinder an employee's capacity to change jobs or pursue new career opportunities. Nonetheless, courts will safeguard an employer from the unauthorised disclosure or use of its confidential or strategic information by a former employee, provided that the employee formally agreed to an enforceable and reasonable restraint of trade contract.

[52] Once an employer and an employee enter into a restraint of trade agreement, a confidential relationship and a duty of confidence is established between them. As mentioned in *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 488 SCA, the principles of freedom of contract come into play.

[53] The first respondent voluntarily entered a clear, six-month restraint of trade agreement as a condition of his employment with Truworths. The restraint of trade agreement restrained the first respondent for a reasonable period from being associated, directly or indirectly with any competitor of Truworths. His subsequent assertion of hardship is currently based on a bare assertion of inability to secure work for the duration of the restraint. Surely, the restraint involved in this case cannot be described as one that is excessively broad in its duration. It can also not be said that the restraint conflicts with public interest. The restriction of the restrained

to the competitors of Truworths cannot be viewed as being unreasonable. It does not unjustly prevent the respondent from getting employment with companies that are not in competition with Truworths.

Is Truworths a competitor of Mr Price

[54] The first respondent asserts that “Mr Price is one of Truworths’ direct competitors” is broadly correct, but it lacks nuance and oversimplifies the nature of the competition in retail. It is the first respondent’s assertion that Truworths and Mr Price operate in different segments. The first respondent asserts that Truworths is positioned to high end fashion retailer, while Mr Price is value driven brand, catering to a broader, more price sensitive demographics. The first respondent further argues that Truworths’ and Mr Price’s operational models, customer bases, and brand philosophies are distinct and the overlap in industry does not equate to direct competition in a way that would justify enforcement of such a sweeping restraint.

[55] According to Truworths, there is no much distinguishing features between Truworths and Mr Price, both are clothing retailers, both are mass market and both have an element of substitutability between their offerors. Both are retailers in an overlapping market which means they are competitors. It was argued on behalf of Truworths that the distinctions that the first respondent seeks to draw between Truworths and Mr Price are not distinctions that are relevant in evaluating the competition element. It is further asserted on behalf of Truworths that the concession made by the first respondent in the answering affidavit that Mr Price is one of Truworths’ direct competitors is correct and is telling.

[56] In *Pepkor Retail (Proprietary) Limited v Truworths Limited* (900/2015) [2016] ZASCA 146; 2016 BIP 286 (SCA) (30 September 2016), the Supreme Court of Appeal remarked as follows:

“Truworths and Ackermans are competitors in the fashion retail industry. Both predominantly sell clothing, footwear, headgear and other fashion-related goods. Ackermans is, however, regarded as a ‘value’ retailer aimed at selling at affordable prices.”

[57] Mr Price's acknowledgment of Truworths as a competitor is significant, making it challenging to argue otherwise when both companies mutually recognise the competitive relationship. It is evident that Truworths and Mr Price are direct competitors. They do have the same target audience in the same market.

[58] Truworths and Mr Price have maintained operations within the retail industry for a significant period. Both companies are well-established entities in the merchandising sector, demonstrating long-standing engagement in the business of selling goods directly to consumers. The argument presented by the first respondent is unsustainable. It depends on an unduly narrow interpretation of "competitors" that is completely unsupportable when considering the core business activities of both companies. Both operate in the same market, offering wearing apparel, household equipment, and accessories and competing for consumers.

[59] I do not understand the averment made by the first respondent, when he says that the differentiation in target market, product offering and store design philosophy, means that the two companies are not direct competitors. Surely, this averment is incorrect. Differentiation strategies (target market, product, design) do not eliminate competition; they are simply different ways of competing within the same general market landscape. These are simply strategies to gain competitive edge.

[60] Companies employ various strategies, such as focusing on specific customer groups or creating unique products, as methods to compete within the same market and achieve a leading position. These approaches are not ways to avoid competition; rather, they are the very tactics used to actively fight against direct competitors. Surely, companies will always use different approaches, like targeting unique demographics or developing specialised products, to strive for dominance.

[61] This makes sense, particularly given the fact that both companies are powerful, rapidly expanding retail companies that have enjoyed significant success, making them aggressive competitors. Although Truworths and Mr Price may target slightly different customer segments, this does not mean they are not competitors. In fact, for the majority of their products, they compete directly for the same customers. Which means the two companies operate within the same competitive space. This is

why this case is totally distinguishable for the case of *Truworths Limited v De Bruyn and Another* (2020) 41 ILJ1617 (WCC)

[62] Thus, it is not correct to contend in the context of Truworths and Mr Price, that differences in target demographics, design philosophy, and brand strategy mean that the two companies are not direct competitors in the strict sense.

[63] Furthermore, the fact that one company may be larger or pricier than the other does not negate their competitive relationship. A consumer might be deciding whether to spend R1000 on a high-end item from a pricey retailer (Truworths) or buy several essential items for the same total price at a value retailer (Mr Price). However, both companies are competing for that consumer's discretionary income. Businesses compete for a customer's discretionary income regardless of their vastly different price points or market segments. As long as they are targeting the same pool of optional spending money, they are direct rivals.

[64] In fact, pricing is a crucial and powerful source of the competition between rivalries. Identical pricing prevents or lessens competition. Uniform pricing among competitors tends to diminish market rivalry.

[65] Competition isn't just about customers; it's also about resources. Firms compete for favourable store locations, the appearance of their stores, manufacturing capacity, talented employees, and management staff. Mr Price's attempt to recruit a Truworths employee serves as proof that they operate in the same competitive space. Thus, hiring a rival's staff provides quick access to valuable industry insights, strategic intelligence (like trade secrets), and knowledge of the competitor's operations and vulnerabilities, which consequently leads to proliferation of restraint of trade agreements.

The consideration (Share Appreciation Rights)

[66] According to Truworths, the first respondent was awarded 102, 700 shares on 14 December 2012. Truworths asserts, the consideration gave the first respondent a

share appreciation rights. It is further the Truworths' contention that the value in the share appreciation rights was linked to the performance of Truworths' share price.

[67] It was argued on Truworths' behalf that Truworths wants its senior employees to have a stake in the business to feel some sense of ownership in relation to it. Truworths gives employees the opportunity to purchase shares in Truworths. It is further argued on Truworths's behalf that the way the share appreciation rights work is that Truworths gives a relatively senior a stake in the business to feel some of ownership in relation to it. Like so many other public companies Truworths has a share option scheme. According to Truworths, in a way the employee becomes an investor in the business. According to Truworths' counsel, Truworths has a share option scheme, to acquire the shares in the company after having worked for a particular period of time.

[68] Whether they want to keep the shares or not; there is an outer limit within which an employee has to chose to acquire those shares. Truworths avers that there were vesting dates in respect of the first respondent opportunity to accept the offer that Truworths makes to acquire share in Truworths. The first vesting date for the first respondent's opportunity to exercise the acceptance of the offer of shares in Truworths was the 14 of December 2015. At that stage the first respondent could have acquired the right to accept an offer in respect of 116 shares, this offer expired on 14 December 2020. A year after the first vesting, on 14 December 2016, the first respondent received an opportunity to accept an offer made to him to purchase 350 of his shares and the expiry date of the offer was 14 December 2020. The third vesting date was 14 December 2017; the respondent received an opportunity to acquire 350 shares made to him and the expiry date was 14 December 2020. Finally, the fourth vesting, respondent had a last chance to acquire 350 shares from 13 December 2018, subject to an expiry date of 14 December 2020 [the outer limit date for the exercise of the share appreciation right] [the share appreciation rights offer lapsed].

[69] According to Truworths, the Truworths shares performed badly, particularly in 2020.

[70] It is Truworths' submission that the ghastliness of the pandemic led to the first respondent not receiving those benefits the parties thought he would receive due to the pandemic. Nobody contemplated in 2012, that the share price would be lower come 2020. It was argued that embedded in the consideration that Truworths gave was the risk that it could happen that the share's value could become lower.

[71] According to the Truworths, had the shares performed well in the period 2012 to December 2020, the first respondent could have exercised his shares appreciation rights for a substantial profit.

[72] The question here is whether Truworths gave effective consideration to the first respondent that, amongst others makes the restraint reasonable.

[73] Mr Patrick SC, on behalf of Truworths, submitted that the lack of consideration does not mean that the restraint fails. According to him, English law states that there cannot be a valid contract unless consideration is received. Thus, in terms of the English law a contract can fail for want of consideration.

[74] It was further submitted on behalf of Truworths by Mr Patrick SC that South African law, does not have a doctrine of consideration, and there is no requirement that consideration must be given and received. According to Mr Patrick SC, what courts in South Africa enquire is whether the contract is concluded with earnest contractual intents. The approach of Truworths was authoratively stated in *Conradie v Rossouw* 1919 AD 279 at 289 and *specifically endorsed by the Constitutional Court in KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal and Others* (CCT 60/12) [2013] ZACC 10; 2013 (6) BCLR 615 (CC); 2013 (4) SA 262 (CC) (25 April 2013) when it expressly stated at para 94 that :

“[94] Our law of contract, unlike English law, enforces promises seriously made, not bargains. Not all promises are enforced, only those made “seriously and deliberately and with the intention that a lawful obligation should be established”, in the words of Wessels AJA in *Conradie v Rossouw*. There have been different formulations of this “redelike oorsaak” or underlying cause for a contract, but what Conradie settled more than 90 years ago was that consideration is not a requirement for a valid contract in

our law. And although the underlying rationale for rejecting consideration as a separate requirement for the validity of a contract is that mere serious agreement between parties is sufficient to constitute a contract, our law is also practical enough to recognise that it must, as a general rule, concern itself with the external manifestations, and not the workings of the minds of parties to a contract. When a person thus expresses his or her intention in relation to the formation of a contract the decisive question is often not what he or she subjectively intended, but what it leads the other party, as a reasonable person, to believe was his or her intention. Once again, this has been formulated in many ways by our courts. Perhaps the most famous and enduring is that of Innes J in *Pieters & Co v Salomon*:

“When a man makes an offer in plain and unambiguous language, which is understood in its ordinary sense by the person to whom it is addressed, and accepted by him *bona fide* in that sense, then there is a concluded contract. Any unexpressed reservations hidden in the mind of the promisor are in such circumstances irrelevant. He cannot be heard to say that he meant his promise to be subject to a condition which he omitted to mention, and of which the other party was unaware.”

[75] Truworths acknowledges that a restraint of trade carries some sort of measure of an impairment of an employee’s ability to find just any job. However, it is the Truworths’ contention that the harshness of the restraint of trade is mitigated by the consideration. The consideration is made by Truworths in order to protect its proprietary interest.

[76] It is asserted on behalf of Truworths that this is not the sort of matter in which an employee is left in the cold, on the contrary, in this matter the first respondent is given the opportunity to continue to be employed by Truworths. According to Truworths, this offer ameliorates the harm which is resulting in the consequence of granting the interdict.

[77] On the other hand, it is the first respondent’s assertion that the restraint agreement was expressly conditional upon the award of the Share Appreciation rights. The respondent asserts that he did not receive the consideration. The first

respondent further asserts that, although Truworths offered R120 000.00 in Share Appreciation Rights as a consideration, the consideration failed and proved to be commercially worthless. According to the first respondent, the Share Appreciation Rights were contingent on two conditions: that the right would vest and that the share price would exceed the award price.

[78] The first respondent contends that neither condition was met and the share price remained consistently below the grant price, rendering the Share Appreciation Rights “under water” and incapable of yielding any financial value.

[79] The first respondent further asserts that the historical share data confirms that that the Share Appreciation Rights never reached a value that could confer any meaningful benefit.

[80] The first respondent argues that Truworths’ failure to deliver the promised benefit due to non-performance and undisclosed terms, means the consideration has failed entirely. As such, it is argued that a party who did not get the value can withhold their performance because they did not receive a reciprocal performance which is due to them by their contractual counter parts.

[81] A signatory to a contract continues to be legally bound by that agreement, even if circumstances change. Put differently, it is a standard tenet of contract law that original signatories cannot easily escape their contractual liabilities. For instance, if the value of the promised consideration drops unexpectedly or becomes worthless, this is not grounds for a contract breach. In any event, the first respondent did not seriously claim a breach occurred.

[82] It is, as I understand it, not disputed at present that the value of the first respondent’s Share Appreciation Rights decreased. I should also mention, that this is a risk inherent to shares, which can fluctuate wildly and even evaporate in value.

[83] The long and the short of it is that Truworths contends that the first respondent could have exercised the options earlier to prevent the loss. It follows from all these considerations that the vesting dates were meant to mitigate the risks

associated with normal share volatility, the opportunity for the first respondent to acquire shares in Truworths was structured with specific vesting dates.

[84] The contract offered no guarantee against these normal share price swings or volatility, a situation exacerbated by COVID-19's effect on Truworths' shares. As such, there were no guarantees against value loss.

[85] These vesting dates served as defined periods when the respondent could "cash out" or exercise their options to acquire shares, allowing them to capture value at specific points in time.

[86] In the course of Truworths' counsel submissions, I inquired whether the lapsing of the share appreciation rights rendered the consideration clause null because the applicant could not generate income from it. Truworth's counsel responded and the heart of Mr Patrick's submission is that, although the consideration unexpectedly became worthless, Truworths did, in fact, provide valid consideration.

[87] All these consideration underlines the fact that the first respondent had the opportunity to accept the shares earlier. It was further submitted that it was unfortunate that the value evaporated due to the pandemic. It was vehemently argued on behalf of Truworths that the value was present at a prior time point when the right could have been exercised, but the first respondent's failure to act resulted in the shares becoming valueless.

[88] It is well known that the core principle of investing is that timing is everything when dealing with shares; their value can evaporate overnight, meaning the decision of when to execute an option is as important as the option itself. Consequently, inaction or a deferred decision may lead to significant financial detriment. The direct consequences of passive conduct versus affirmative action are borne by the decision-maker [in this instance, the first respondent]. In the matter of the first respondent's options, the failure to exercise the rights by the optimal vesting date resulted in a foregone opportunity for a higher share value. It therefore follows that, Truworths cannot be held liable for the first respondent's losses.

[89] On that basis, of course, depending on the facts of each case, I am of the view that, an employer is not liable for market fluctuations that diminish the value of employee shares options.

[90] It was argued by Truworths' counsel that before 14 December 2020, Truworths notified the first respondent and told him that the outer limit date for the share appreciation right is approaching [the date upon which he needs to accept his offer to acquire the shares]. It appears the first respondent does not deny prior knowledge of the Share Appreciation Rights' terms. His own answering affidavit confirms he received automated notifications about the conditions shortly before the December 2020 expiration date. That being said it does not, of course, follow that the notification about the outer limit date, did not reach the first respondent. Consequently, I am satisfied that the first respondent received formal notification regarding the specified deadline [outer limit date].

Conclusion

[91] Truworths has fulfilled the requisite legal criteria necessary to be granted a final interdict enforcing a restraint of trade. The complexity and circumstances of this matter warranted the instruction of two counsels; therefore, the general principle applies that costs ought to follow the event. One might express a wish that the involved parties could set aside their dispute and return to negotiation to restore their working relationship, as the first respondent demonstrated himself to be a highly intelligent, effective and resourceful employee. Moreover, Truworths has indicated its interest in reemploying him.

[92] I thus make the following order:

92.1 The first respondent is interdicted and restrained from:

- (a) assuming employment with the second respondent as envisaged in the restraint of trade agreement concluded by the first respondent on 17 October 2012 ("the restraint") (annexure "TM1" to the founding affidavit, for the period of the restraint, namely six (6) months commencing from the date of

termination of first respondent's employment with the applicant, in the Republic of South Africa.

- (b) The first respondent is directed to pay the costs of the application, including the costs of two counsel where so employed, on scale C.

CN NZIWENI
JUDGE OF THE HIGH COURT

Appearance:

Counsel for the Applicant : Advocate R Patrick SC
Advocate J Ord

Instructed by : Ward Brink Attorneys
F Strydom

Counsel for First Respondent : Advocate A Lawrence
Advocate U Mlamleni

Instructed by : Gqencu Attorneys
U Gqencu