

SOUTH AFRICA / JUDGMENT

Bosman Adama (Pty) Ltd v Le Roux and Another (C306/2021)

[2021] ZALCCT 58 (6 August 2021)

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COURT

Labour Court Cape Town

BEFORE

Lagrange

CASE / FILE NUMBER

C306/2021

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THE

LABOUR COURT OF SOUTH AFRICA,

HELD

AT CAPE TOWN

Of

interest to other judges

Case:

C306/2021

In

the matter between:

BOSMAN

ADAMA (PTY)

LTD Applicant

and

ANDRE

MALAN LE

ROUX First

Respondent

MISCHA

PREMIER VINES PTY LTD Second

Respondent

Date

of Hearing: 19 July 2021

Date

of Judgment: 6 August 2021

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and

release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 6 August 2021

Summary: (Restraint of trade – Final relief - partial enforcement of anti-solicitation and confidential information provisions – Undertakings made but not sufficient – Novation - Urgency - Costs)

JUDGMENT

LAGRANGE J

Introduction

[1] This is an application to partially enforce provisions of a restraint of trade agreement. The application was launched on 14 June 2021 following unsuccessful efforts between the parties to negotiate a resolution of the disputes between them. The applicant ('Adama') seeks the following relief against the first respondent ('Le Roux') and second respondent ('Mischa'), in summary:

1.1 restraining Le Roux, for a period of two years from the date of the termination of his employment on 31 March 2021, from:

1.1.1 negotiating with or soliciting business of any party that was a client of Adama up to and including the date of his termination of employment, and

1.1.2 providing any service or product of the kind he was engaged with, while working for Adama, to such client;

1.2 restraining Le Roux from:

1.2.1 making any use of Adama's client lists, details and particulars ['client proprietary information'];

1.2.2 making known any such client proprietary information to any third party;

1.3 directing Le Roux to:

1.3.1 return any proprietary information including correspondence and communications of any kind to Adama;

1.3.2 comply with undertakings given by him in his attorney's letter of 4 June 2021;

1.4 interdicting Mischa from making any use of Adama's proprietary information received from Le Roux, or supplying it to any other party;

1.5 restraining Mischa from enabling Le Roux to breach any of the obligations set out in paragraphs 1.1 to 1.4 above, inclusive, and that the

1.6 an order of costs against any respondent opposing the application.

[2] On 18 June 2021, by agreement of the parties, an interim order was granted in the following terms:

‘1. The application is postponed to a date to be confirmed with the court either to be enrolled during the week of 13 July or on 29 July 2021.

2. The Respondents are granted until close of business on 24 June 2021 to deliver their answering affidavit/s.

3. The Applicant is granted until close of business on 30 June 2021 to deliver its replying affidavit, if any.

4. All parties shall file heads of argument by close of business on 5 July 2021.

5. Pending the hearing of the application, the following interim order is made by consent:

5.1 The First Respondent is restrained from communicating, negotiating with or attempting to solicit the business of any person, firm or company on the lists annexed hereto, marked “A”.

5.2 The Second Respondent is restrained from communicating, negotiating with or attempting to solicit the business of any person, firm or company on the list annexed hereto (“clients”), marked “A”, unless, in the case of clients denoted as “past/present client” or “nursery” the Second Respondent provides proof to the Applicant in the form of an invoice or confirmed order that it has sold goods to the client or, in the case of nurseries, bought or sold goods from or to the client.

5.3 The order is without prejudice to the parties’ rights to argue the merits of the case or any point in limine, including urgency.

6. Costs are reserved.’

[3] The application for final relief was heard on 18 July 2021, after the applicant (‘Adama’) agreed that the application could be decided on this basis. In his answering affidavit, Le Roux states that he has no objection to the relief sought, as summarised in paragraphs 1.2 and 1.3 above, for reasons discussed below. Mischa opposes all the relief sought against it.

Narrative outline

[4] In February 2012, Le Roux sold his vine marketing business to Adama and became an employee of Adama. For many years prior to that, he had provided his marketing service to Adama. Part of the sale agreement entailed a five-year restraint on Le Roux, in exchange for which he received R 400,000.

[5] Quite apart from that on 12 May 2012, he was employed under a permanent employment contract as a vine marketer of Adama. The contract required him to retire at age 63, unless otherwise agreed with Adama.

- [6] Clause 18 of the contract set out the terms of a restraint of trade agreement [‘the restraint’]. In summary, pertinent provisions of the restraint provided that for two years after the termination of his services, in any place in the southern hemisphere, and particularly in South Africa, where vine plantings are done, in respect of the clients and employees of Adama and in any capacity whatsoever, he was prohibited from:
- 6.1 negotiating with or soliciting business from any party which was, to the best of his knowledge, a client supplier or agent of Adama at any time prior to the termination of his service [clause 18.1.1.1];
- 6.2 competing with Adama by providing any service or product similar to the kind he was engaged with during his employment by Adama to any party which was a client or supplier of Adama prior to the termination of his service [clause 18.1.1.2], and
- 6.3 in respect of any person, whom to the best of his knowledge, was a member or employee of Adama prior to the termination of his service, enticing or attempting to entice such persons from Adama, and interfering with the relationship between such person and Adama [clause 18.1.1.3].
- [7] Similar prohibitions relating to suppliers of Adama were set out in clause 18.1.2.
- [8] During the two-year period of the restraint, Clause 18.1.3 prohibited Le Roux from being involved or interested, in any capacity whatsoever, in any form of enterprise engaged in any aspect of Adama’s core business or activities, or future material or strategic initiatives undertaken by Adama.
- [9] Clause 18.4 recorded that Le Roux accepted the restraint as reasonable and necessary to protect Adama and that it was fair to enforce the restraint against him. The clause also made allowance for the severability of the various restrictive provisions to preserve the enforceability of what remains of any provision in the event that part of it is found to be invalid or unenforceable for any reason.
- [10] Le Roux was due to retire in December 2019 but his employment was extended by an incentive agreement until February 2020 and thereafter it was extended for a further fixed term until 28 February 2021. In terms of clause 3.1 of the “Final Agreement on Incentive Structure” (‘the incentive agreement’), concluded between Adama and Le Roux, it was “agreed that the new remuneration and incentive structure replaces all previous agreements related to commission, incentives and remuneration.”
- [11] When this arrangement ended, by which stage the Covid-19 coronavirus was impacting on the country, the parties attempted to renegotiate Le Roux’s employment relationship, but were unable to come to an agreement. Le Roux then gave notice of his resignation effective at the end of March 2021 and informed Adama he intended to take up an offer of employment with Mischa. There was no express extension of Le Roux’s fixed term employment contract after the end of February, though he continued to work for Adama during March.

- [12] Up to this point, the narrative is largely common cause, but points of disagreement arise about what followed.
- [13] Mr P W Bosman [‘Bosman’], the managing director of Adama, alleges that Le Roux, acknowledged the restraint and undertook not to interfere with or solicit business from Adama’s clients but rather to seek out new business opportunities for Mischa. Le Roux had a target to sell between 200,000 and 300,000 vines for Mischa. To achieve this he advised Bosman he would target clients and customers of another vine nursery known as “Voorgroenberg”. Adama claims that for this reason it did not seek to enforce the prohibition against Le Roux’s involvement in the business of Mischa, which clause 18.1.3 of the restraint prohibited.
- [14] During early May 2021, Adama claims it received reports from clients that Le Roux had visited them or received emails from him or Mischa. Bosman claimed that Le Roux had visited a number of its “top clients” and told them of his change of employment with the object of inducing them to give their business to Mischa, all of which Le Roux denies having done, and rejects the claims as hearsay. The applicant asked the evidence be admitted despite being hearsay in view of the urgency, but did not provide any detail of the alleged conversations between Le Roux and the clients mentioned.
- [15] However, Le Roux did concede that had used the list of companies and contact details that he had updated while he was working for Adama, to advise those parties that he had taken up employment with Mischa and invited them to contact him regarding information of cultivars, clones and vines. Le Roux maintains that the individuals on the list are not exclusive clients of Adama and their details could be obtained by going through the Wine Industry Directory, Google and LinkedIn. Accordingly, he argues that the information about them was not confidential, but concedes that he had started compiling this list before he even started working for Adama. He denies that when he sent out these emails he was using Adama’s database as a springboard to unlawfully compete and try to entice away its clients.
- [16] On 11 May 2021, Adama’s attorneys wrote to Le Roux concerning his alleged unlawful solicitation of their clients using the alleged proprietary information from Adama’s database. They also mentioned that when he left he had disclosed that he was taking up a three-year contract with Mischa, but that his function would be to seek out and acquire new clients and target those of other competitors, and in doing so would not prejudice Adama’s interests protected by the restraint, though no specific mention was made of Voorgroenberg, as such. The letter demanded an undertaking be given by him the following day to the effect that he:

16.1 would stop corresponding with Adama’s customers;

16.2 cease making use of Adama’s proprietary information, particularly that relating to customers, or disclosing it to any third party;

16.3 identifying all Adama's property in his possession and returning it immediately irrespective of the form in which it was stored;

16.4 identifying all Adama's customers whom he or Le Roux had approached to engage in any business in competition with Adama, and

16.5 he would not approach any of Adama's clients to obtain business from them for himself or any third party, nor provide any services, advice or products to any of its customers in breach of the restraint provisions.

[17] Le Roux only responded formally through his lawyers a week later on 18 May 2021. The tone of that response was defensive and combative. He disputed the exclusive client status of Adama's customers contacted by Mischa as well as the proprietary nature of knowledge about them. The enforceability of the restraint was also questioned. Nonetheless, undertakings were made by Le Roux, which may be summarised as:

17.1 not interfering with existing orders of Adama;

17.2 without admitting being in possession of a customer list of Adama, undertaking not to make use of it if he did have it;

17.3 undertaking not to make known any confidential information to third parties, whom Adama specifically identified, and

17.4 offering to hand over any property documents or material, which Adama claimed he had, provided Adama specified what those items were.

Unsurprisingly, this undertaking was unacceptable to Adama. Subsequent engagements took place between the parties culminating in a meeting without prejudice on 28 May 2021. That meeting did not bear any fruit, but after another complaint by Adama on 29 May about further approaches made by Le Roux to its clients, Adama issued a further ultimatum on 31 May to Le Roux to give the undertakings previously sought by it on 11 May 2021.

[18] The ultimatum was still not enough to elicit an unqualified undertaking to give the undertakings sought. On 31 May, Le Roux responded with revised undertakings, namely not to:

18.1 contact any of Adama's clients, who bought exclusively from them and "will, as agreed, focus on the Voorgroenberg clients" [emphasis added], and

18.2 make use of Adama's proprietary information;

Le Roux also claimed to have deleted an "email list", containing alleged proprietary information, and denied being in

possession of any other property of Adama, apart from a laptop given to him. Le Roux also offered to "cooperate" if there were further undertakings required. These modified undertakings were also rejected by Adama as insufficient, and it reiterated its insistence that the undertakings

it he should provide the undertakings it sought on 11 May. It was only on 4 June, that Le Roux's attorneys emailed Adama's attorneys, stating that they had been attempting to settle the matter amicably but because Adama seemed "hell-bent" on going to court, they recorded that "our client herewith provides you with all the undertaking [sic] mentioned in your letter of 11 May 2021" (emphasis added).

- [19] Adama welcomed Le Roux's decision noting that it had come after he had changed his version and willingness to cooperate on a number of occasions, which made his undertaking dubious. Adama further sought that Mischa should also give similar undertakings and proposed that, as a "proper conclusion" to "the matters at hand", all parties should conclude a written agreement recording the specific terms of the undertaking which bound Le Roux and Mischa, and that the agreement be made an order of court. Adama emphasised that it was important for Mischa to be a party to the agreement because Adama's confidential information had been disclosed to it and it could continue to use it irrespective of Le Roux's undertakings.
- [20] On 8 June 2021, Mischa's attorneys suggested that Adama provide a draft of the proposed agreement to try and resolve the matter without going to court. It also gave an undertaking that the list of names and email addresses used by Le Roux had been removed from its database and claimed it had no proprietary information of Adama in its possession. It further invited Adama, subject to various conditions to have an independent expert search its database to satisfy itself that the material had been removed. A draft agreement was subsequently produced by Adama, in terms of which the respondents would be prevented, for a period of 24 months, from engaging with any clients of Adama to whom it had supplied products or services in the five years prior to Le Roux's termination. The agreement also barred the respondents from using any proprietary information of Adama or disclosing any of it to third parties and returning it to Adama. It also required the respondents to provide a list of all such customers, which they had contacted or tried to contact, and not to provide any service advice or products to them. The draft provided that any party could have the agreement made an order of court.
- [21] The respondents' attitude to the proposal was that they had never been in possession of any proprietary information of Adama and that the list which had been removed from Mischa's database did not constitute Adama's proprietary information. In any event, their undertakings regarding the removal of "the list" from Mischa's database ought to have been more than sufficient to allay Adama's concerns. They continued to assert the invalidity and unenforceability of the restraint and to the extent that the proposed agreement sought to enforce obligations contained in the restraint, it was unacceptable to them. They also raised difficulties with the extent of the proposed bar on dealing with Adama's customers. They argued that Mischa had been in the business for over 50 years and it was inevitable there would be some commonality amongst customers between it and Adama, added to which customers were seldom the exclusive client of one nursery or another. Lastly, the

response sought to qualify Le Roux's agreement of 4 June to give the undertakings set out in Adama's letter of 11 May, as being undertakings given in the context of allegations of unfair competition and not in the context of obligations arising from the restraint agreement.

[22] In a further letter from Le Roux's attorney on 10 June each one of the undertakings contained in the 11 May letter, which he had previously agreed to, were subjected to various qualifications and partial retractions. A couple of days later this application was launched.

Urgency

[23] As mentioned, this matter was held over for determination at the time the interim order was made. On the papers, I am satisfied that Adama was not opposed to Le Roux working for Mischa, on the basis that he would not target former customers of Adama. Adama became aware of some of its clients been approached by Le Roux early in May and by 11 May called on him to make undertakings and reminded him of the previous commitment he had made regarding potential customers he would target in his new job. Le Roux responded negatively a week later. There appear to have been some fairly serious engagements between Le Roux and Adama in the following ten days, which did result in Le Roux modifying his stance by the end of the month. After further pressure from Adama on 4 June, he gave the undertakings which it had been seeking. An attempt to finalize a settlement agreement, which included Mischa, appears to have been undertaken with good intentions by Adama, and it was only when it became apparent that Le Roux and Mischa were digging in their heels about acknowledging the restraint agreement's validity and Le Roux started to try and clawback the undertakings he made on 4 June that Adama proceeded to launch the application.

[24] There is often a fine line between not satisfying the requirement of urgency by acting too early or acting too late in approaching the court. It is not unusual in applications of this sort, for an applicant party to effectively 'buy time' to settle an application by revising ultimatums to respondents, on the pretext of being engaged in attempts to resolve the matter.

[25] In this instance, there is nothing to suggest that Adama did not promptly raise the alleged breaches with Le Roux, soon after it became aware of them in early May. After Le Roux's response on 18 May, progress was made in obtaining some concessions from Adama. Moreover, by 4 June there was good reason to believe that the dispute could be settled, provided Mischa became a party to a settlement. When it became apparent that this was not going to materialize, Adama acted reasonably promptly. I believe that Adama did not delay in bad faith and acted promptly when promising negotiations failed. Accordingly, the applicant established that it brought the application with sufficient urgency.

[26] Since the matter was ultimately argued as an application for final relief after all parties had ample time to file answering and replying papers, the respondents were also not prejudiced in relation to the final proceedings by any curtailment of time periods.

[27] That said, there was no reason to enrol the interim application on such short notice, even if Adama did not expect the respondents to file answering papers until the day of the hearing. It put them under considerable pressure to file comprehensive affidavits on a matter where there was quite a lot of factual ground to cover by the time the application was launched. Adama's rush to apply for interim relief on barely more than four court days' notice was at odds with the way it had dealt with the matter up to then. This is a matter, I will return to when dealing with costs.

Validity of the restraint agreement

[28] Three defences were raised by Le Roux to the current validity of the restraint agreement concluded on 12 May

2012. Firstly, he argues that this agreement was terminated in February 2020 and replaced by a new employment contract which did not contain a restraint ('the first novation'). Alternatively, Le Roux argued that he and Bosman had agreed that he could work for Mischa, a competitor of Adama, and this agreement replaced any obligations in the restraint agreement which might have survived after February 2020 ['the second novation']. Alternatively, Le Roux argues that the understanding reached was that Adama would not try to enforce the restraint even though he had gone to work for Mischa ['the pactum de non petendo']. Le Roux had pleaded that even if there was no agreement to amend the provisions of the restraint agreement, it was not applicable because his services had terminated as a result of restructuring, and the restraint agreement specifically provided that it would not apply in such event. However, this claim was not pursued in argument.

The first novation

[29] It is common cause that in terms of clause 12 of the permanent employment contract signed by the parties in 2012, which contained the restraint, that Le Roux was due to retire when he reached the age of 63 in December 2019. It is also common cause that the parties agreed in March 2020 to the incentive agreement in terms of which a new fixed term remuneration structure applicable from 1 March 2020 until 29 February 2021 would be effective. There is no dispute about the terms of the agreement, even though the document in which it is embodied was only signed by Bosman. Clause 1.2 of the agreement stated:

"It was agreed that your permanent contract employment dates will move from 31 December 2019 to 29 February 2020 in respect of your retirement."

(emphasis added)

[30] On any plain reading of that clause, the parties had agreed that Le Roux retired from permanent employment at the end of February 2020. In his answering affidavit, Le Roux refers to another unsigned version of the incentive agreement, headed "[DRAFT PROPOSAL 2]". It should be noted that he does not expressly state that the terms of this version of the agreement, rather than the one relied on by Adama, reflect the agreed terms. [?] That document does not contain a provision like clause 1.2, but contains a heading "ENTER INTO

A FIXED TERM CONTRACT EFFECTIVE FROM 1 MARCH 2020-28 FEBRUARY 2021 BASED ON THE NEW INCENTIVE STRUCTURE". It also sets out more precise calculations of the basic remuneration and the bonus, but in

all material respects does not differ significantly from the incentive agreement produced by Adama. On either version, it is difficult to avoid the conclusion that Le Roux's permanent employment ended on 29 February 2020 and he entered into a fixed term contract of one year with a new remuneration package. It is true that Le Roux does not state what other terms may have been applicable to

the last year of his employment, but if the permanent contract expired, Adama ought to have made out a clear case that it was a

tacit term that all other conditions in his permanent employment contract, aside from the remuneration continued, if it wished to argue that the restraint agreement formed part of his terms of employment under the fixed term contract.

[31] Consequently, Le Roux's permanent employment contract terminated on 29 February 2020. Accordingly, at best for Adama, the length of time for which the restraint agreement can run, aside from provisions relating to protection of confidential information, will end on 28 February 2022.

The second novation

[32] It is common cause that on the expiry of the fixed term contract, in February 2021, the parties could not come to an agreement about the terms of any continued employment relationship, and Le Roux gave notice to terminate his employment at the end of March 2021, which Adama accepted, albeit that strictly speaking such notice was probably not necessary.

[33] The question which arises is whether the discussions held between Bosman and Le Roux led to a binding agreement in terms of which Adama abandoned its rights under the restraint agreement and agreed that Le Roux could work for its competitor, subject to certain conditions. It is common cause that during March 2021, Bosman and Le Roux held discussions on revised conditions of continued employment, but could not agree and Le Roux advised Adama of Mischa's offer of a three year marketing contract linked to certain sales targets. It was stated by Le Roux that he would be targeting the customers of Voorgroenberg, and it was on this basis that Adama was agreeable to him working for Mischa, despite the latter being a competitor, for whom Le Roux could not work for unless Adama agreed to condone him breaching clause 18.1.3 of the restraint agreement.

[34] On Le Roux's version, there were no objections raised when he advised Bosman at the end of March that he was going to work for Mischa. He claims that it was only at his second farewell function on 2 April that he indicated to Bosman that he foresaw lots of opportunities in the market especially in relation to Voorgroenberg because two of its marketing consultants had left it to start their own business and Voorgroenberg would not

been able to service all its clients. He insists that he never acknowledged the restraint provisions nor undertook to refrain from interfering with Adama's existing clients or business. In support of this, he contends he could never have done so because most of the customers to whom Adama sold vines not only purchase from it, but also from other nurseries like Voorgroenberg and Mischa. Moreover, he claimed 70% of vine customers bought from Adama. Therefore, on Le Roux's version, prior to starting work with Mischa with Adama's permission, there was no undertaking given by him that he would be focusing on targeting clients of Voorgroenberg in his new job. Accordingly, Adama gave him carte blanche to work for a direct competitor without any restrictions on the customers he could target. However, Le Roux fails to address or explain the apparent admission made in the first letter, in which he tendered to make certain undertakings. In his attorney's letter of 31 May 2021, it is stated:

"1. It [is] are instructions that our client is willing to make the following undertakings:

1.1 The identity of your client's customers is unclear, as the nursery industries produces are not limited to having exclusive clients and that customers often place orders with different producers. Our client however undertakes not to contact any of Bosman Adama's clients that certainly buy from them and will, as agreed, focused on the V1 clients; ..."

Le Roux does not explain why there is this reference to him having agreed with Adama to focus on Voorgroenberg's clients.

[35] It should be mentioned at this juncture that clause 18.4.1 of the restraint provided that all restrictions in the restraint agreement were independent of each other and enforceable even if others were found to be invalid or unenforceable for one or other reason. Thus, agreeing not to enforce the prohibition against Le Roux working for a competitor in clause 18.1.3, did not necessarily entail abandoning the restriction on Le Roux soliciting business with former clients or suppliers of A.1

[36] When it became apparent to Adama that Le Roux was approaching its clients, it immediately raised the issue in the first letter it sent to him:

"Your employment concluded in March 2021. At that time you disclosed and represented to my client that you would be taking up a three year employment contract with Mischa Premier Vines ("Mischa") but, having regard to the restraint provisions, that your function would be to seek out and acquire new clients and in particular those of other competitors. In that manner you would abide by the restraint and not prejudice my clients legitimate proprietary interests."

[Emphasis added]

It is noteworthy that in Le Roux's first response on 18 May no attempt was made to dispute this claim. The first time that any reference was made to this discussion by Le Roux is when he records the concession in the letter of 31 May, mentioned above. On Le Roux's version, there would have been no need for him to make any undertaking in this regard, and it is irreconcilable with his pleaded version.

[37] As such, his version stands to be rejected as inherently implausible. It must also be accepted that the basis on which Adama did not object to him working for Mischa, is that he would not be targeting its customers. Consequently, to the extent that any understanding or agreement was reached relieving Le Roux of any obligations he had under the provisions of the restraint, it only extended to a partial relaxation to permit him to work for a competitor and only on the basis of his representation that he would not be targeting Adama's clients. On the most favourable interpretation to Le Roux, any novation which might have taken place was subject to him complying with the restriction on the scope of his marketing activities for Mischa. When he did not adhere to that, any novation of the restraint fell away. Although Adama might have then sought to enforce clause 18.1.3 as well, it is merely sought to enforce those provisions of the restraint which would give effect to the understanding reached.

The upshot is that there was no novation of the restraint agreement. Similarly, the enforceability of any purported agreement not to enforce the restraint was similarly subject to Le Roux making good on his undertaking.

Waiver and *volenti non fit iniuria*

[38] Related to the argument that Adama had agreed that Le Roux could work for a competitor, without reservation were claims that Adama had waived its rights to enforce the restraint. Alternatively, it was argued Adama had assumed the risk that followed from Le Roux going to work for Mischa when it agreed that he could. Therefore it could not subsequently complain about the impact it might have on its client base. Both these defences rely on the assumption that Adama had agreed not to require Le Roux limited his marketing activities on behalf of Mischa in any way. In view of the findings above, there is no basis for making that assumption, and consequently no need to consider these contentions further.

Breach

[39] The pertinent alleged breaches by Le Roux in question are those relating to solicitation and servicing of Adama's clients in breach of the restraint agreement, and the retention and use of confidential proprietary information belonging to Adama, contrary to his common-law obligations regarding such information.

[40] Le Roux concedes that between 1 and 6 April 2021 he sent emails to individuals and companies on the list he had maintained during the course of his employment with Adama. Apart from advising the recipients that he was now working for Adama, he invited them to contact him "regarding information surrounding cultivars, clones and vines". Plainly this

was an invitation to the recipients to do business with him as a representative of Mischa. Further, insofar as the list contained details of customers or clients of Adama, which Le Roux admitted it did, it was a breach of clause 18.1.1.1 of the restraint agreement.

- [41] Le Roux's admission also amounted to him conceding that he had made use of Adama's list, and its initial incorporation in Mischa's database means he had effectively provided the information to a third party.
- [42] As mentioned earlier in the judgment, Le Roux does not object to the relief sought in respect of preserving the confidentiality of Adama's proprietary information and prohibiting Le Roux or Mischa from possessing or using it. In part, the reason for not opposing the relief is that Le Roux and Mischa claimed that the list of details of customers, role players and companies in the industry which had been provided by Le Roux to Mischa, had been removed from the database of Mischa by 31 May. Initially, Le Roux had admitted having contact information of customers which Adama had given to him in the course of his employment, which was derived from various public sources. At the same time, he undertook not to use Adama's customer list

details and customer particulars if he possessed the same. In his answering affidavit, Le Roux described how he had compiled a database containing names, telephone numbers and email addresses of customers, role players and companies in the industry, before he was employed by Adama. He maintained and supplemented this database whilst working for Adama. He further denied that it was confidential information because it could be easily obtained from sources such as the Wine Industry Directory, Google and LinkedIn. In short, while admitting that the database was shared with Mischa and was used for sending out emails to contacts in early April 2021, the respondents maintain that they no longer have that information after it was deleted from the database and, importantly, maintain that it was not confidential in any event. However, the authorities are clear that the mere fact that the same information could theoretically be compiled by diligent trawling other publicly available resources, but was compiled for the benefit of an employer and utilized by the employee in the course of their work, does not entitle the employee to take a copy of such information with them when they leave. For example, in *SPP Pumps (SA) (Pty) Ltd v Stoop & another* (2015) 36 ILJ 1134 (LC) at 1141, this court reaffirmed the principle, viz:

"[31] The other issue to consider in this matter is the point raised by the respondent that the restraint of trade covenant is unenforceable because the confidential information upon which the applicant relies in asserting its right is already in the public domain through the Internet. This issue received attention in Experian SA (Pty) Ltd v Haynes & another, [] where the court held as follows:

'[T]he contention is legally untenable in that it is clear from several reported judgments on this issue that irrespective of whether or not information is in the public domain, the fact that the first respondent has obtained such information within the context of a confidential relationship means that it in fact is protectable.' "

It is also established law that one of the naturalia of a contract of employment is that an employee may not use confidential information for the benefit of a competitor even after the employment relationship has terminated (See: Coolair Ventilator Co (SA) (Pty), Ltd v Liebenberg and Another 1967 (1) SA 686 (W) at 689I-690H and Meter Systems Holdings Ltd v Venter and Another 1993 (1) SA 409 (W) at 426F-G and 428I-429B).

[43] Le Roux claimed that he had started compiling the list in question before he was employed by Adama. That may be so, but the list was compiled in the course of running the vine marketing and sale business which he sold to Adama. The sale of business agreement

included sale of the 'client base' as part of the goodwill as designated by a list of customers. He augmented the client list he had drawn up during his employment with Adama. The document compiled over the years, was not his private property to remove. Still less was he entitled to provide it to Mischa in breach of his duty to preserve the confidentiality of that list. There can be little doubt it would have been of value to Mischa even if it duplicated some of its own details and constituted proprietary

information belonging to Adama. It is well recognised the customer lists are proprietary information.[1]

[44] In light of the above, I am satisfied that Le Roux acted in breach of clause 18.1.1.1 of the restraint provisions and in breach of his contractual duty to preserve the confidentiality of Adama list of customer details.

[45] Adama's rights to preserve the confidentiality of the customer details contained in the list, which the respondents deny they still have access to, does not require further consideration as it is an obligation which arises independently from the employment relationship between Le Roux and Adama, and is not subject to a further test to determine whether it would be unreasonable to enforce the right. I agree with Adama that the incorporation of the list in Mischa's database and issuing emails to individuals and companies in the list, meant that Mischa assisted Le Roux in breaching his contractual obligation of confidentiality. I have also agreed that the fact that it took a while for the respondents to concede that indeed they had been in possession of the list and their equivocation about whether it contained proprietary information of Adama does not inspire confidence that their assurances about the destruction of that information or that the information will not be utilized, can be relied upon. In the circumstances a court order confirming their obligations would not be pointless.

[46] It is true, that Le Roux's own knowledge of Adama's customers acquired over 21 years on the job of marketing Adama's products cannot be erased from his memory, but Adama is able to limit the impact of Le Roux putting his knowledge and experience at Mischa's disposal, by the provisions of the restraint agreement it seeks to enforce.

- [47] It was initially argued by the respondents that the labour court has no jurisdiction to make an order relating to the protection of Adama's confidential information on the basis that the remedy was a delictual one arising in the law of unfair competition. Ultimately they did not pursue the argument in view of the judgement in the Constitutional Court in *Amalungelo Workers Union & others v Philip Morris SA (Pty) Ltd & another* (2020) 41 ILJ 863 (CC).
- [48] In any event, given the wide interpretation by the LAC in *Rand Water v Stoop & another* (2013) 34 ILJ 576 (LAC), of "any matter concerning a contract of employment" in section 77 [3] of the Basic Conditions of Employment Act, 75 of 1997 ('the BCEA')[2], it would be at odds with this approach to preclude the court granting relief against a Mischa because it was not a party to the employment relationship between Adama and Le Roux. It would mean that the labour court could interdict a former employee for breach of contractual obligations relating to a duty to protect the confidentiality of an employer's proprietary information or relating to the enforcement of restraint obligations, but could not order relief against a third party, whose own collaborative conduct is needed to enable the employee to commit those breaches. Whether a party like Mischa might also be delictually liable to Adama under the law of unfair competition, cannot detract from the fact that the court's ability to prohibit Adama from being a party to conduct entailing a breach Le Roux contractual obligations is a logical corollary to the court's jurisdiction and power to make an order enforcing his contractual obligations.

The reasonableness of enforcing the restraint

- [49] It remains to be decided whether there is any reason why it would be unreasonable to enforce the provisions of clause 18.1.1.1 and 18.1.1.2 relating to the solicitation of clients of Adama and the provision of services to them by Le Roux in the course of his work for Mischa.
- [50] The respondents concede that Adama has a protectable interest in the form of its customer goodwill and trade connections. Le Rous was instrumental in preserving and promoting the same. They argue further that the application of the restraint would prevent him from working altogether. It is true that the geographical scope of the restraint is extremely wide, being the southern hemisphere, which entirely encapsulates the area where he has cultivated his expertise and knowledge of the industry. If Adama was seeking to enforce all the provisions of the restraint including preventing Le Roux from working for a competitor like Adama anywhere in the southern hemisphere, in all probability the court would be unwilling to enforce this because it would effectively preclude taking account of Le Roux's reasonable prospects of alternative employment.
- [51] However, Adama is only seeking to enforce the restraint in so far as it affects its customer base. The courts have recognised that a party does not have to seek the enforcement of a restraint in its entirety.[3] If the relief it seeks is granted, Le Roux will only be restrained for a limited period from marketing and providing Mischa's products to those clients of Adama up to the time he left Adama. He can still market and provide products and services of

Mischa to any party that was not Adama's client. He claims that he will have to retire at the end of the fixed term contract and therefore only has the prospect of limited full-time work. As things stand, his employment with Mischa will terminate only in March 2024, whereas the remaining period of the two-year restraint will expire at the end of February 2022, so the restriction on marketing and doing business with former clients of Adama only applied to one third of the period of his anticipated employment with Mischa. None of these considerations, in my view suggests that the limited restrictions the restraint will impose on him being able to use his expertise in the service of Mischa, would outweigh the limited period of protection Adama will obtain of its client base. The interests of Adama in partially enforcing the restraint agreement are not outweighed by the impositions it will place on Le Roux.

- [52] Another objection raised by the respondents is that Le Roux does not know who Adama's clients were at the time he left and accordingly the provisions it seeks to enforce are lacking in specificity necessary for him to know whether he is complying with them or not. The first answer to this problem is that, as Adama rightly points out, Le Roux had no difficulty agreeing to the undertakings in respect of Adama's clients without demanding any specificity in that regard. He also has 21 years' experience of marketing Adama's products it is more likely than not that he has considerable personal knowledge of the identity of most of Adama's clients. I also note that as part of the agreed interim order the parties were able to agree which individuals or entities on a list of 645 names would be considered past or present clients of Adama whom Le Roux and Mischa could not approach. In the circumstances, I am not persuaded that the order would be difficult for Le Roux to comply with.

Costs

- [53] I accept that Le Roux eventually gave the undertaking sought by Adama without qualification and that there were bona fide efforts to resolve the issues in dispute, but in the end the respondents were not prepared to acknowledge the proprietary and confidential status of the information in the list Mischa loaded on its database. Le Roux also started to backtrack on his unqualified undertaking. In the circumstances, it cannot be said that it was not necessary for it to obtain relief in the form of a court order. Consequently, I am satisfied that Adama is entitled to its costs in the final application.
- [54] When the matter was originally enrolled for the interim relief on 17 June 2021 the respondents had not filed answering papers and were planning to argue the matter on urgency. However, after discussions, the parties agreed that in order to for a complete set of pleadings to be before the court it made more sense to postpone the proceedings. This resulted in the agreed order, which was handed down on 18 June 2021. I have already mentioned above that the interim application was brought with unnecessary haste in the circumstances and it was unfair for it to have expected the respondents or the court to have dealt with it on 17 June 2021. Consequently, Adama should pay the costs of those proceedings.

Order

[1] The application for final relief is dealt with as a matter of urgency and any non-compliance with time periods and rules of service as provided for in the Labour Court Rules is condoned.

[2] The First Respondent is interdicted and restrained for a period of two years from 29 February 2020:

2.1 from negotiating with or attempting to solicit the business of any person, firm or company that was a client of the Applicant at the time of or before the termination of his employment on 31 March 2021 ("client"), and

2.2 from providing any service or product with which he was engaged in the course of his employment with the Applicant, to any client.

[3] The First Respondent is restrained from:

3.1 making use of, whether directly or indirectly, any of the Applicant's client lists, details and client particulars ("client proprietary information") in any manner whatsoever, and

3.2 from providing or making known to any person(s) or entity whether in his own interest or that of any other person or entity, any of the client proprietary information which he has in his possession or control, had access to or have knowledge of as a result of his employment with the Applicant.

[4] Insofar as he has not already done so, the First Respondent must immediately return and deliver to the Applicant any/all client proprietary information, including any correspondence, emails, documents, client lists, materials or communications which the First Respondent has in his possession or under his control or stored electronically or in any format in any machines or device.

[5] The First Respondent must comply with the undertakings given in the letter of his attorney of record dated 4 June 2021 as referred to in paragraph [132] (annexure "BA12(b)") of the founding affidavit.

[6] The Second Respondent is interdicted and restrained from:

6.1 making use of any client proprietary information received from the First Respondent;

6.2 enabling the First Respondent in any way to breach any of his obligations set out in paragraphs [2] to [5] above, whether by instructing or requiring him to deal with, negotiate with, solicit the custom of or provide products or services to any client, or otherwise, and

6.3 from providing or making known to any person(s) or entity whether in his own interest or that of any other person or entity, any of the client proprietary information which it has obtained from the First Respondent.

- [7] The Applicant must pay the Respondents' costs of opposing the application for interim relief including representation and attendance at the hearing of the interim application and including costs of counsel's preparation of heads of argument for that hearing;
- [8] The Respondents are jointly and severally liable for the Applicant's costs of the application for final relief, the one paying the other to be absolved.

Lagrange J

Judge of the Labour Court of South Africa

Appearances/Representatives

For the Applicant F

Rautenbach instructed by Grant Marinus Attorneys

For the First Respondent R Acton instructed by Steyn Coetzee Inc.

For the Second Respondent R Acton Instructed by Mosdell, Pama & Cox

[1] See *Dun & Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968

(1) SA 209 (C) and *Meter Systems Holdings Ltd v Venter* 1993

(1) SA 409 (W).

[2] S 77 Jurisdiction of the Labour court. ... (3) The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract. 77A Powers of Labour Court Subject to the provisions of this Act, the Labour Court may make any appropriate order, including an order- ... (e) making a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77 (3), which determination may include an order for specific performance, an award of damages or an award of compensation; ...

[2] S 77 Jurisdiction of the Labour court.

...

(3) The Labour Court has concurrent jurisdiction with the civil courts to hear and determine any matter concerning a contract of employment, irrespective of whether any basic condition of employment constitutes a term of that contract.

77A Powers of Labour Court

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- (e) making a determination that it considers reasonable on any matter concerning a contract of employment in terms of section 77 (3), which determination may include an order for specific performance, an award of damages or an award of compensation; ...

[3] E.g in New Justfun Group (Pty) Ltd v Turner & others

(2018) 39 ILJ 2721 (LC), at 2728, this court held: “[17]... First, it is well established that the court is entitled to enforce a restraint partially, by restricting the scope of its operation to reflect what is found to be reasonable (see National Chemsearch (SA) (Pty) Ltd D v Borrowman & another 1979

(3) SAdama092 (T) at 1116D-G; Den Braven SA (Pty) Ltd v Pillay & another 2008

(6) SA 229 (D) at 263A-C). The nature and extent of any partial restraint is a matter to be determined from the papers; I do not understand the applicable authorities to preclude an applicant from seeking a partial restraint only because the E applicant has sought in its founding affidavit to enforce the full ambit of the agreed restraint. In any event, the extent to which any restraint agreement ought to be pared down is ultimately the decision of the court, having regard to all of the facts and circumstances, to grant more limited relief than that initially sought.”

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