

SOUTH AFRICA / JUDGMENT

Defy Appliances (Pty) Ltd v Nyamunda and Another (D207/2024) [2024] ZALCD 20 (9 July 2024)

[2024] ZALCD 20

COURT

Labour Court Durban

BEFORE

K Allen-Yaman

CASE / FILE NUMBER

D207/2024

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FLYNOTES:

LABOUR – Restraint – Confidential
information –
Former
employee resigning to join competitor in sale of household
appliances – Applicant and competitor following similar
business models – Nothing unique in manner applicant
conducts its business – Former employee not privy to any
information which could legitimately be classified as confidential
and to which applicant can claim to have proprietary interest
–
Application dismissed.
IN
THE LABOUR COURT OF SOUTH AFRICA, DURBAN
Case
No: D207/2024
Not
Reportable
In

the matter between: DEFY
APPLIANCES (PTY) LTD
Applicant
and
TINOTENDA
NYAMUNDA
First Respondent
SAMSUNG
ELECTONICS SOUTH AFRICA
(PTY)
LTD
Second Respondent

Heard: 11 June 2024

Delivered: This judgment was handed down electronically by circulation to
the parties and / or their legal representatives by email. The date
and time for handing-down is deemed 16h00 on 28 June 2024.

JUDGMENT

ALLEN-YAMAN J

Introduction

- [1] This application concerns the enforcement of a restraint of trade agreement entered into between the applicant ('Defy') and the first respondent ('Mr Nyamunda') on 5 June 2023 during the course of his employment with the applicant, and upon his having then been promoted to the position of Senior Specialist – Retail and Product.
- [2] When the application first came before this court on 9 May 2024, by way of what was termed a counter application, Mr Nyamunda sought, inter alia, an adjournment of the application, that he be given leave to deliver a supplementary answering affidavit, and that an interim interdict be granted only in relation to a limited portion of the relief sought by Defy concerning the dissemination by him of any of Defy's confidential information. The second respondent delivered a Notice of Intention to Abide.
- [3] Albeit that Defy had then sought final relief, so as to afford Mr Nyamunda an opportunity to deliver a comprehensive answering

affidavit (in circumstances in which the affidavit which had then been delivered by him in support of his 'counter-application'

had dealt with the substance of Defy's allegations on no more than a superficial level), Defy indicated that it would then seek interim relief only, albeit on wider terms than had been suggested by Mr Nyamunda.

- [4] Upon the conclusion of the argument an interim interdict was issued, which included prohibiting Mr Nyamunda from tendering or providing his services to the second respondent in the capacity of an employee, consultant or service provider, with the application adjourned to 11 June 2024 with directions for the delivery of further affidavits, on which date Defy sought final relief.

Background

- [5] Defy is a manufacturer and supplier of household appliances within both South Africa and the broader African market. Mr Nyamunda was initially employed by it on 3 March 2021 in the position of Junior Products Manager, working from Defy's Durban offices. On 5 June 2023 he was promoted to the position of Senior Specialist – Retail and Product, which position he retained until 31 March 2024.
- [6] Mr Nyamunda tendered his resignation by way of a letter on 1 March 2024 in which he indicated that he had taken a decision 'to pursue new opportunities and challenges that align[ed] with [his] professional and personal goals'. In response, Defy's Director: Human Resources and Industrial Relations, Mr Ian Delpont, reminded him of the existence of the restraint of trade and confidentiality agreements which he had entered into with Defy, and requested that he address the concern that had arisen within Defy that it was his intention to take up employment with a competitor. Mr Nyamunda did not respond to this request at any time prior to the termination of his employment.
- [7] Not having received a response from Mr Nyamunda which might have allayed its concerns, Defy instructed its attorney to address further correspondence to him in this regard. On 5 April 2024 such a letter was transmitted, albeit with specific reference to the possibility of Mr Nyamunda having taken up employment with the second respondent ('Samsung'), an entity which Defy regards as its direct competitor. He was requested either to confirm or to deny that he had done so and, if Defy's belief was correct, to provide his undertaking that he would resign forthwith and comply with the terms of the restraint of trade agreement for the remainder of the duration thereof.
- [8] Mr Nyamunda's response three days later was in the following terms,
- 'I am overwhelmed as this is a loaded letter. I am not a lawyer so I would need some time to seek legal advice before I can respond. Thank you for your understanding.'
- In its response of 9 April 2024, Defy afforded him until close of business the following day to do so, failing which it indicated that it intended to apply to court to enforce the restraint.
- [9] Mr Nyamunda responded to Defy's attorney the following day in which letter he confirmed that he had indeed taken up employment with Samsung, but gave no indication that he intended to resign from his position.

[10] Upon the launching of this application, as Defy had indicated that it intended to do, Mr Nyamunda instructed attorneys to address correspondence to Defy's attorneys in an attempt to resolve the matter. These efforts did not, however, achieve the desired effect.

Analysis

[11] Embodied in Mr Nyamunda's letter by which he was promoted, and in terms of which his employment details were changed, were the clauses upon which Defy relied which encapsulated his agreement to both the restraint of trade and the prohibition of the dissemination of Defy's confidential information,

'15. Confidentiality

15.1 By signing hereunder, the Employee irrevocably and unconditionally agrees and undertakes:

15.1.1 not to use the Confidential Information, whether directly or indirectly, for his/her benefit;

15.1.2 not to use the Confidential Information, whether directly or indirectly, for the benefit of any person other than the Company and / or any Arçelik Group;

15.1.3 to treat and safeguard the Confidential Information as strictly private and confidential;

15.1.4 not to use, disclose or divulge, directly or indirectly, the Confidential Information in any manner to any third party for any reason or purpose whatsoever without the prior written consent of the Company, which consent may be granted or withheld in the sole and unfettered discretion of the Company;

15.1.5 not to decompile, disassemble or reverse engineer or otherwise modify, adapt, alter or vary the whole or any part of the Confidential Information; and

15.1.6 to take all such steps as may be reasonably necessary to prevent Confidential Information from falling into the hands of unauthorised third parties.

19. Restraint of Trade

By signing hereunder, the Employee agrees and undertakes that, in order to protect the Confidential Information, goodwill and the stable trained workforce of the Company and / or the Arçelik Group and for a period of 12 (twelve) months after the Termination Date, either directly or indirectly, be interested, engaged or concerned as an employee, consultant or services provider in any concern which carries on the same business as the Company's Arçelik Group's business, or a business allied or similar to the Company's and / or Arçelik Group's business.'

[12] Defy sought to enforce the aforementioned restraint of trade and confidentiality agreements in the following terms,

‘2. That the First Respondent be interdicted and restrained for a period of 12 months from the date on which the matter is heard; alternatively from 31 March 2023 and in the Republic, the Southern and Sub-Saharan Africa territory incorporating Angola, Cameroon, Democratic Republic of Congo, Ethiopia, Gabon, Ghana, Kenya, Madagascar, Malawi, Mauritius, Mozambique, Nigeria, Rwanda, Seychelles, Somalia, St Helena, Sudan, Tanzania, Uganda, Zambia and Zimbabwe from:

2.1 Directly or indirectly being interested, engaged or concerned as an employee, consultant or service provider in any concern which carries on the same business as the Applicant’s or Arçelik Group’s business, or a business allied or similar to the Applicant and / or Arçelik Group’s business, whether with the Second Respondent or any other competitor.

3. Interdicting and restraining the First Respondent from:

3.1 using the confidential information whether directly or indirectly for his own benefit;

3.2 using the confidential information, whether directly or indirectly for the benefit of any person other than the Applicant and / or the Arçelik Group;

3.3 using, disclosing or divulging, directly or indirectly, the Confidential Information in any manner to any third party for any reason or purpose whatsoever without the prior written consent of the Applicant, which consent may be granted or withheld in the sole and unfettered discretion of the Applicant;

3.4 decompiling, disassembling or reverse engineering or otherwise modifying, adapting, altering or varying the whole or any part of the Confidential Information; and

3.5 disclosing to any third party any information acquired by him by virtue of his employment with the Applicant which would be of assistance to such third party to enable it to compete against the Applicant and which would not otherwise be known by such third party.’

[13] Defy’s application was initially premised on its need to protect both its trade connections as well as its trade secrets, however in the course of argument Mr Whitcutt SC who appeared for Defy expressly abandoned reliance placed by it on the issue of its trade connections.

[14] Mr Nyamunda, in his initial affidavit, indicated that his opposition to the application was premised on the unreasonableness of the restraint, having alleged that any enforcement thereof would be against public policy. In amplification, he alleged that Defy had vastly overstated the duties performed by him in the course of his employment with it. In his supplementary answering affidavit Mr Nyamunda articulated additional reasons regarding why Defy’s application ought not to succeed: Defy lacked an interest worthy of protection; the restraint agreement was too wide; and public policy required that no employee in his position should be restrained from working elsewhere.

[15] Before considering the factual position and the legal conclusions to be drawn from the parties' respective versions, certain propositions contained in the parties' affidavits concerning that which each party was required to establish in applications such as the present will be considered.

[16] Defy asserted,

'I am advised that the applicant bears the onus to prove the contract and the breach. The applicant has proven the contract and the first respondent has admitted the breach. That is all that is required from the applicant to make out a case for enforcement.

The first respondent bears the onus to prove that the restraint is unreasonable. The first respondent has failed to do so.'

[17] Mr Nyamandu, on the other hand, articulated the position to be as follows,

'The reason both the Founding and Replying Affidavits are devoid of specificity and filled with generalities is that the Applicant is of the view that all it needs to do is show that I signed the Restraint and took up employment with a competitor whereupon I attract a reverse onus to prove that the restraint is unreasonable and against public policy.

This may be correct if the Applicant proceeded by way of action. It did not. The Applicant proceeded on motion seeking a final interdict. To be successful it must demonstrate to the Court that it has a clear right to the relief sought. A clear right is demonstrated if the Applicant shows it has a protectable interest deserving of protection which outweighs my right to be employed. This is a factual enquiry and requires specificity. Bland allegations as made by the Applicant do not meet this requirement. In contrast my version relating to the extent of my duties both with the Applicant and the Second Respondent show why there is no threat to the Applicant.'

[18] The Appellate Division in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* [1984] ZASCA 116; 1984 (4) SA 874 (A) stated,

'(1) There is nothing in our common law which states that a restraint of trade agreement is invalid or unenforceable.

(2) It is a principle of our law that agreements which are contrary to the public interest are unenforceable. Accordingly, an agreement in restraint of trade is unenforceable if the circumstances of the particular case are such, in the court's view, as to render enforcement of the restraint prejudicial to the public interest.

(3) It is in the public interest that agreements entered into freely should be honoured and that everyone should, as far as possible, be able to operate freely in the commercial and professional world.

(4) In our law the enforceability of a restraint should be determined by asking whether enforcement will prejudice the public interest.

(5) When someone alleges that he is not bound by a restraint to which he had assented in a contract, he bears the onus of proving that the enforcement of the restraint is contrary to the public interest.’[1]

[19] It was this judgment which disposed of the position previously adopted from English law, that restraints were unenforceable unless they were shown to be reasonable.

[20] *Magna* was re-affirmed by the Appellate Division in *Basson v Chilwan and Others* [1993] ZASCA 61; 1993 (3) SA 742 (AD),

‘In *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* [1984] ZASCA 116; 1984

(4) SA 874 (A) this Court held that the approach of the English law that agreements in restraint of trade were *prima facie* void and that the onus rested on the person seeking to enforce them to prove their reasonableness *inter partes* and in the public interest, was not part of our law. It was held that in our law such agreements were *prima facie* enforceable and that an onus rested on the party seeking to avoid the restraint clause to prove that its enforcement would be contrary to the public interest. The public interest must be the touchstone for deciding whether the Courts will enforce the restraint clause or not. The party seeking to avoid the contractual obligation to which he had solemnly agreed, should therefore be required to prove that the public interest would be detrimentally affected by the enforcement of the clause,’[2]

‘The incidence of the onus in a case concerning the enforceability of a contractual provision in restraint of trade does not appear to me in principle to entail any greater or more significant consequences than in any other civil case in general. The effect of it in practical terms is this: the covenantee seeking to enforce the restraint need do no more than to invoke the provisions of the contract and prove the breach; the covenantor seeking to avert enforcement is required to prove on a preponderance of probability that in all the circumstances of the particular case it will be unreasonable to enforce the restraint; if the court is unable to make up its mind on the point the restraint will be enforced. The covenantor is burdened with the onus because public policy requires that people should be bound by their contractual undertakings. The covenantor is not so bound, however, if the restraint is unreasonable, because public policy discountenances unreasonable restrictions on people’s freedom to trade. In regard to these opposing considerations of public policy, it seems to me that the operation of the former is exhausted by the placing of the onus on the covenantor; it has no further role to play thereafter, when the reasonable or otherwise of the restraint is being enquired into. “The paramount importance of upholding the sanctity of contracts”, which is emphasized by EKSTEEN JA, finds its complete expression in the rule of the law that the onus is on the covenantor; it has no bearing on the issue of whether the particular restraint in question is unreasonable.’[3]

[21] When the Supreme Court of Appeal was called upon to determine a constitutional challenge to where the onus in applications relating to the enforcement of restraints of trade in *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA), it expressed the position in the following terms,

‘In the present case we are not called upon to decide that issue. Where the onus lies in a particular case is a consequence of the substantive law on the issue. I have pointed out that the substantive law as laid down in *Magna Alloys* is that a restraint is enforceable unless it is shown to be unreasonable, which necessarily casts an onus on the person who seeks to escape it. But if the rule were to be reversed – to provide that a restraint is not enforceable unless it is shown that it is reasonable – which would necessarily cast an onus on the person seeking to enforce it to allege and prove that the restraint is reasonable the result in the present case would be the same. For in the present case the facts concerning the reasonableness or otherwise of the restraint have been fully explored in the evidence, and to the extent that any of those facts are in dispute that must be resolved in favour of Reddy (these being motion proceedings for final relief). If the facts disclosed in the affidavits, assessed in the manner that I have described, disclose that the restraint is reasonable, then Siemens must succeed: if, on the other hand, those facts disclose that the restraint is unreasonable then Reddy must succeed. What that calls for is a value judgment, rather than a

determination

of what facts have been proved, and the incidence of the onus accordingly plays no role.’[4]

[22] The Labour Appeal Court explained the reasoning and conclusions in *Reddy in Labournet (Pty) Ltd v Jankielsohn and Another* [2017] 5 BLLR 466 (LAC),

‘In *Reddy*, the Supreme Court of Appeal preferred not to become embroiled in the issue of onus and adopted a pragmatic approach, which according to it, was consistent with an approach where there was a direct application of the Constitution to restraint agreements. This approach was specifically adopted in respect of motion proceedings for the enforcement of restraints where the issue for determination

was the reasonableness of the restraint. In terms of that approach, where the facts, concerning the reasonableness, had been canvassed in the affidavits – genuine disputes of fact are to be resolved in favour of the party sought to be restrained by applying the so-called *Plascon-Evans* rule. If the accepted facts show that the restraint is reasonable, then the applicant must succeed, but if they show that the restraint is unreasonable then the respondent in those proceedings must succeed.

The enquiry into the reasonableness of the restraint is essentially a value judgment that encompasses a consideration of two policies, namely the duty on parties to comply with their contractual obligations and the right to freely choose and practice a trade, occupation or profession. A restraint is only reasonable and enforceable if it serves to protect an interest, which, in terms of the law, requires and deserves protection. The list of such interests is not

closed, but confidential information (or trade secrets) and customer (or trade) connections are recognised as being such interests. To seek to enforce a restraint merely in order to prevent an employee from competing with an employer is not reasonable.’[5]

[23] From the aforementioned decisions, it is evident that in circumstances in which an applicant seeks to enforce a restraint by way of motion proceedings, a court is not required to determine the reasonableness or otherwise thereof by way of an application of any onus: a court must firstly determine the disputed facts in favour of the respondent and thereafter consider whether it is reasonable to enforce the restraint in the circumstances of the facts which have been found to have been proven. Reasonableness is assessed by application of the questions posed in *Basson* and expanded upon in *Reddy*,

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

It is now clear from, *inter alia*, *Basson* and *Reddy*, that the reasonableness and enforceability of a restraint depend on the nature of the activity sought to be restrained, the rationale (purpose) for the restraint, the duration of the restraint, the area of the restraint, as well as the parties’ respective bargaining positions. The reasonableness of the restraint is determined with reference to the circumstances at the time the restraint is sought to be enforced. With reference to the particularity of the facts of this matter, it is an established principle of law that the employee cannot be interdicted or restrained from taking away his or her experience, skills or knowledge, even if those were acquired as a result of the training which the employer provided to the employee.’[6]

[24] This court is accordingly in agreement with Mr Nyamunda’s proposition that *Defy* was required to demonstrate the existence of a clear right by establishing not only the restraint agreement and its breach, but also the existence of a protectable interest. Without a protectable interest, the law considers the enforcement of a restraint to be unreasonable, and a party seeking to enforce an unreasonable restraint has no right to do so.

[25] Moreover, the issue of a protectable interest is fundamental to the remaining issues which are required to be established when seeking an interdict. Distinct from the requirement that an applicant seeking an interdict must establish a clear right (which must encompass the establishment of a protectable interest), such applicant is also required to establish the existence or reasonable apprehension of irreparable harm (or such potential), an issue which is inextricably bound to the existence of a protectable interest.

- [26] The mere fact that an applicant is armed with a contract which has been shown to have been breached by a respondent is not in and of itself justification for the granting of an interdict: more is required. Such applicant is required to demonstrate that the non-enforcement thereof will result in harm being occasioned to its business. In an application for the enforcement of a restraint of trade agreement, such harm can conceivably only ensue through the infringement of its protectable interests by the former employee.
- [27] Accordingly, and distinct from the immateriality of the issue of onus in circumstances in which parties seek to enforce restraint of trade agreements by way of motion proceedings, nothing stated in the judgments referred to herein detract from the obligations cast upon an applicant who seeks to enforce a restraint of trade agreement by way of an application for an interdict to make out a case for such relief by establishing the requirements therefor.
- [28] Mr Nyamunda did not dispute the existence or validity of the restraint. He did, however, challenge the proposition that he was in breach of the agreement by seeking to distinguish the markets served by Defy and Samsung, thereby negating the notion that the two entities are, in fact, competitors. Additionally, it was argued on his behalf that until and unless Defy established that he had, in fact, disclosed confidential information, he could not be found to have breached the restraint.
- [29] In having asserted that Samsung is a competitor in the industry in which it operates, Defy correlated the products which are produced and distributed by both companies, which included refrigerators, laundry appliances, vacuum cleaners, cooking appliances, dishwashers and air-conditioners. On the basis that Samsung offers for sale products which are sold by it, in the same markets served by it, Defy concluded that Samsung is a direct competitor.
- [30] The basis upon which Mr Nyamunda denied that Samsung and Defy were competitors was for the reason that he alleged that, although they both manufacture and distribute household appliances of the type described by Defy, the focus of each is different, each serving consumers at opposite financial ends of the market. He asserted that the products produced by Defy are targeted at entry level consumers, with a price index of 80, whilst Samsung's products are intended for more affluent consumers, with a price index of approximately 120.
- [31] Defy, in response, explained that the price point to which Mr Nyamunda had referred ranged from 0 to 200, with the median price point being 100. Whilst Defy accepted that Samsung's products are intended primarily for more affluent consumers, categorised as LSM8 and above as defined by the Living Standard Measure, it asserted that its own products were not limited to consumer groups attributed with a lower LSM score, but ranged across the entire spectrum, including LSM8 and above.

[32] In his fourth affidavit, Mr Nyamunda reiterated that the majority of Defy's business is focused on the sale of appliances in the market of LSM8 and lower, whilst the converse is true for Samsung and that,

'Any overlap is very minimal and poses no major risk to the Applicant's core business.'

[33] In consideration of the aforementioned, this court must find that Samsung is, if only in respect of a limited portion of the relevant market, a competitor of Defy.

[34] Relying on *Dot Activ (Pty) Ltd v Daubinet and Another* (2023) 44 ILJ 785 (LC), it was argued on Mr Nyamunda's behalf that,

'The mere taking up employment with a competitor does not constitute a breach of the Restraint of Trade. Particularity is required from the Applicant to demonstrate infringement of its protectable interest.'

[35] In that case this court, in considering the suitability of an undertaking which had been given by Dot Activ's former employee not to disclose confidential information made the following observation,

'There may be instances where the providing of an undertaking would serve to establish that there is no breach of a restraint.'[7]

[36] Taken at face value, this statement suggests that the provision of an undertaking not to disclose confidential information to a new employer, notwithstanding that the new employer is a competitor of the old employer, in and of itself suffices to negate the assertion by the old employer that its former employee has breached his or her restraint. Had this indeed been the meaning intended by this court, such meaning would be wholly incompatible with the law. A breach of a restraint occurs by the commission of one or more of the prohibited acts set out therein, such as taking up employment with a competitor. The provision of an undertaking in the face of a breach does not and cannot extinguish the existence of such a breach; at best the provision of an undertaking not to disclose confidential information may be a factor to be taken into account in the subsequent determination of the reasonableness or otherwise of the enforcement of the restraint.

[37] Whilst the statement appears to conflate the questions of (1) whether a restraint of trade has been breached by a former employee by having taken up employment with a competitor, and (2) the reasonableness of the enforcement of the restraint of trade in circumstances in which an undertaking has been given, in the context in which the statement was made it is apparent that this court was, in fact, then assessing the reasonableness of enforcement of the restraint in circumstances in which an undertaking had been given.

- [38] Accordingly, in view of the fact that Defy established that Samsung is a competitor in the market in which it operates, this court must conclude that Mr Nyamunda's breached the restraint when he took up employment with that entity, notwithstanding that he gave Defy an undertaking that he would disclose no confidential information (without any admission that he was in possession of any such confidential information) to Samsung.
- [39] The interest sought to be protected by Defy constitutes the unauthorised utilisation of its confidential information to which it alleged that Mr Nyamunda had been privy during the course of his employment and which, if utilised by Samsung, would afford it a competitive advantage,

'Given the above:

- The Applicant has a well-founded apprehension that the First Respondent will make use of his knowledge of the Applicant's confidential information (which took years to develop and which has given the Applicant a clear competitive advantage over, for example, its competitors such as the Second Respondent) in order to assist the business of the Second Respondent.
- The Second Respondent, in those circumstances, would plainly obtain an unfair competitive advantage over the Applicant which it would have obtained solely as a result of the First Respondent having breached the restraint agreement.
- The First Respondent, currently employed by the Second Respondent, is in a position to utilise his knowledge of the Applicant's

technology, costing, conceptualizations and strategic plans in order to approach the Applicant's present distributors (based on the information he had access to in relation to the Applicant's ongoing product management strategies) with a view to undercutting the Applicant's pricing and securing that business for this new employer, the Second Respondent.'

- [40] Mr Nyamunda disputed that Defy had any interest which was worthy of protection by way of the enforcement of the restraint. Although he disputed that he had been exposed to any of Defy's confidential information, he asserted that if he had been, his exposure to such information in the performance of his duties as the Senior Specialist – Product Manager was of such a limited basis as to render it worthless in the hands of a competitor.
- [41] The key responsibilities identified in the advertisement for the position published by Defy on 20 March 2023, relevant to the potential acquisition of confidential information by an incumbent in that position, included:
- The creation of long-term and short-term product range plans with Global category Product Managers;
 - Managing and leading Defy's product development process in alignment with Global Product Manager teams and maintaining the key product development files and systems;

- Working with the cooling, cooking, laundry, dishwasher and air-conditioning production plants by providing product briefs and guidance relating to market size, product design, innovation, technology trends and by providing updates regarding market related costs and performance issues;
- Communicating with and providing support to Defy's Sales, Customer Support, Supply Chain, Finance and Service teams regarding product related issues, including performance, market positioning, technical and commercial issues;
- Managing and providing reports regarding the stock keeping unit count as well as the commercial performance of product ranges;
- Taking action to improve performance or to discontinue models to maintain a competitive range of products;
- Contributing to marketing communication plans regarding product technologies, innovations and design;
- Running idea generation sessions with consumers to identify current and future trends and needs, and to integrate these into Defy's long term plans;
- Creating business presentations to update internal stakeholders concerning product performance;
- Evaluating the continuity or improvement of products;
- Supporting Defy's marketing team at a global, regional and country level to ensure the alignment of both Marketing Plans and product launches;
- Managing the phase in and phase out of products across the region; and
- Engaging with various stakeholders to plan assembly lines in various markets.

[42] Mr Delport, in the founding affidavit deposed to on behalf of Defy described the activities which had been undertaken by Mr Nyamunda in the course of his employment in terms which mirrored the job description itself. He asserted that by having undertaken all the aforementioned activities Mr Nyamunda had become intimately acquainted with Defy's confidential information. Notwithstanding such unequivocal assertions, in response to Mr Nyamunda's subsequent denial that he had undertaken all the functions described, Mr Delport admitted that, 'the first respondent may not have performed all the duties in his job description.'

[43] Mr Nyamunda further alleged that Defy had overstated his duties with it:

- He denied that he had been involved in the creation of pricing structures, which were managed by the sales director, and that profitability was conveyed to any of the Product Managers;

- His involvement with the products introduced to different markets was premised on information provided to him by the Key Account Managers, his involvement having been limited to the conveyance of that information to the Global Product Managers who in turn would advise him of suitable products which were then available;
- Products sold in the sub-Saharan region are, in the main, Defy products, the creation of which was the responsibility of the domestic team, with very few changes being effected to those same products then exported into the regional market;
- Beside the information provided by the Key Account Managers, no data regarding the sub-Saharan market was provided for the purpose of enabling him to better understand those markets;
- Defy's local and global research team managed the creation of products, an activity with which he had very limited involvement;
- He had no involvement with aftersales support, mark ups, discounts, rebates, marketing support or pricing support, these discussions having been between his own manager, the sales director and the Key Account Manager; and
- His knowledge of the technologies utilised in the appliances was limited in extent to the information provided to him as to what had been created, when it would be available and for which models, such technological knowledge as in his possession being common to the industry and available to the public.

[44] In addition, Mr Nyamunda expressly denied that Mr Delport had, or could have had any personal knowledge of the work undertaken by him in the course of his employment by Defy, by virtue of the position held by Mr Delport,

'I deny that the Deponent to the Founding Affidavit ('Mr Delport') has personal knowledge of the allegations contained in the Founding Affidavit pertaining to the practical execution of my employment with the Applicant.

Mr Delport is the Director: Human Resources and Industrial Relations. His direct knowledge is limited to employment matters and not to the products or distribution thereof.'

[45] In Defy's replying affidavit, Mr Delport did not respond to Mr Nyamunda's assertion that he lacked any personal knowledge concerning the actual functions which he had performed during the course of his employment with Defy, and Mr Nyamunda's assertion must accordingly be accepted as correct. Seemingly having accepted that the disputes of fact in motion proceedings cannot be decided in favour of Defy,[8] Mr Delport nonetheless asserted that, on the basis of Mr Nyamunda's admissions alone, this court should find that he had been exposed to and aware of Defy's confidential information,

'... It is equally absurd to suggest that the first respondent does not possess any proprietary insight into the applicant's business in the face of his admissions that he:

- 111.1 Was the point of contact for KAM's;
- 111.2 Was the conduit of all information for three KAM's throughout most of Africa;
- 111.3 Was aware of volume orders and distributor requested specifications;
- 111.4 Worked with product data;
- 111.5 Was aware of duty benefits;
- 111.6 Dealt with distributor enquiries and liaised with the R&D team; and
- 111.7 Has a fundamental understanding of the business structure and workings of the applicant.'

[46] In disputing the extent to which he had acquired knowledge of any of Defy's confidential information, Mr Nyamunda made a number of admissions:

- He denied that he had any direct involvement with Defy's customers, the relationship between Defy and its customers having been facilitated by its Key Account Managers. He was, however, exposed to requests for documentation and information by those customers, conveyed to him through the relevant Key Account Manager.
- He was involved in product launches in different countries, which launches were premised upon the conveyance of client requirements by Key Account Managers to him, where he would, in turn convey that information to the Global Product Manager who in turn would offer suggestions from the array of products then available.
- Unlike the position locally, where data can be sourced from a subscription service known as GFK, the only information available to him from the regional market was through Key Account Managers for each area.
- He had very little, if any, involvement in the technical creation of products or the creation of new technologies which was managed by Defy's Research and Development team, and no involvement in the manufacturing process itself.
- He had no involvement with aftersales support, mark ups, negotiated discounts, rebates, marketing support or pricing support, such discussions having taken place between the Key Account Manager, the Sales Director and his own manager, and nor was he privy to the contracts in place between Defy and its customers.
- His direct contact with distributors in the course of his employment was minimal.

[47] It is accordingly correct that Mr Nyamunda made the admissions upon which Defy seeks to rely. Those admissions did not, however, establish that in the execution of his duties whilst employed by Defy he became appraised of any information which can be regarded as confidential and in respect of which Defy can legitimately claim a proprietary interest.

- [48] Having a ‘fundamental understanding’ of Defy’s business structure and its workings is an eventuality which would arise in the course of most employees’ employment in any entity over time. Nothing stated by Defy or admitted by Mr Nyamunda suggested that there is anything unique concerning the manner in which Defy conducts its business, which would render its business model itself one which is confidential to it and accordingly a concept in relation to which Defy has a proprietary interest. Moreover, on Defy’s own assessment of matters, it articulated a belief that both it and Samsung, ‘appear to follow very similar business models.’
- [49] Knowledge of the manner in which the South African Revenue Service levies duties and taxes in relation to exports is information capable of acquisition by anyone with an interest in such issue. This type of information is a matter of public knowledge and therefore cannot be confidential to Defy.
- [50] Whilst initially having described Mr Nyamunda as the ‘face of Africa’ for Defy, with relationships with the distributors in the various African countries into which Defy supplies its products, the facts demonstrate that Mr Nyamunda was something less than this. In reality he had very little, if any, direct involvement with the distributors themselves.
- [51] The distributors of Defy’s products for whom Mr Nyamunda was responsible dealt directly with Defy’s Key Account Managers for the regions West Africa, East Africa and Southern Africa. Distributors directed all their requirements to the relevant Key Account Manager who, in turn, conveyed that enquiry to Mr Nyamunda who, in turn, directed such enquiry to Defy’s Research and Development department. In this context, Mr Nyamunda was nothing more than the conduit of information.
- [52] Defy argued that such information was critical to its sales and, by virtue of his exposure thereto Mr Nyamunda had acquired knowledge of the needs of the distributors, as well as knowledge of how to transform those needs into products desired by the distributors, as well as any deficiencies in Defy’s Research and Development department. Defy’s concerns were expressed as follows,

‘In a hypothetical scenario, the distributor has a preference for a specific type of product. This information is known to the first

respondent by virtue of the communications between the distributor and the first respondent / KAM. The applicant will attempt to meet the requirements of the distributor, alternatively the R&D team will attempt to produce the requested item. There is nothing to stop the first respondent from disclosing that kind of information to the second respondent so that it can obtain an inside track to which it (the second respondent) is not lawfully entitled.’

- [53] The confidential information sought to be relied on accordingly pertained to the needs of the distributor’s customers, as conveyed to Mr Nyamunda through the relevant Key Account Manager. The difficulty with this proposition were Defy’s admissions that the distributors in question are both publicly known and, in the main, common to both Defy and Samsung.

This being the case, any information conveyed to the Key Account Manager by the distributor could, with neither the assistance nor the intervention of Mr Nyamunda, be conveyed to Samsung directly by the dealers in question, Samsung being one of the dealers' existing suppliers. The information concerning any of the dealer's requirements cannot be considered to be confidential to Defy as Samsung, with veritable ease, could obtain any information it required pertaining to those distributors' market and product requirements and preferences directly from the distributors themselves, with whom it has existing relationships.

- [54] To the extent that Defy may be understood to have persisted in its intimations that its technological developments required protection, and that Mr Nyamunda's admission that he had some involvement in its Research and Development department bore this out, the limited nature of his admissions in this regard must be read in the context of his unequivocal denials and explanations given in relation thereto,

'I have minimal to low technical involvement in the creation of products. This is handled by the Research and Development ('R&D') team locally and globally. In terms of the months in which I was in this role, I had only worked on the creation of a few products from our local factory but once again had no direct involvement in the technical creation as this is handled by R&D who has in-depth knowledge of the requirements for the different regions,'

'In terms of technologies coming from the global team, I was not involved in the creation. The local Product Managers would only be informed of what has been created and when it will be available for what models. All the technologies of which I am aware are already available in the market thus that knowledge is available to the public as well as all technologies in the appliances industry having the same working operation.'

- [55] In reply Defy denied that there are no new technological advancements peculiar to Defy in the industry. It did not, however, take this court into its confidence to divulge what, even in general terms, such technological advancements may comprise, let alone did it identify a specific technological development, yet to be released into the market, of which Mr Nyamunda is aware. It referred only to hybrid solar technology which has already been made publicly available. In addition it addressed the issue of Mr Nyamunda's

involvement in both the dimensions and the finish of products. In the absence of any explanation as to how either of these issues could constitute innovation of some kind, neither appear to be anything more than issues relating to the preferences of customers as expressed by distributors, which has already been dealt with. The fact the Mr Nyamunda had an overview of Defy's product line does not take the issue of technological advancements any further, the products already produced by Defy being in the public arena.

- [56] Mr Nyamunda's denials that he had any personal involvement in the development of new technologies, and that he is aware of the existence of any technological innovation created by Defy which has yet to reach the market and has thereby become public knowledge must accordingly be accepted as correct.
- [57] Given the particularity of Mr Nyamunda's denials, assessed in relation to the generality of the applicant's assertions, this court is unable to conclude that in the execution of his duties, Mr Nyamunda was privy to any information which could legitimately be classified as confidential, and to which Defy can now claim to have a proprietary interest. In light of the finding of this court that Mr Nyamunda is not in possession of any of Defy's confidential information, it cannot be found that Defy has any interest warranting protection by the enforcement of the restraint, and the grounds upon which it contends that it will suffer irreparable harm in the event that the interdict is not granted are found absent.
- [58] As the answer to the first question posited in Basson is in the negative, the other factors raised by Mr Nyamunda which he asserted rendered the enforceability of the restraint unreasonable

(being that the restraint agreement was drafted in terms so broad that it was incapable of being enforced without this court impermissibly

redrafting the agreement for the parties, and that his personal circumstances required that he be permitted to be economically

active) need not be considered.

- [59] The application will be dismissed.

Costs

- [60] Both parties sought an order of costs and this court can conceive of no reason, as a matter of either law or fairness, why Mr Nyamunda should not be awarded these for the main application. In light of the fact that Defy regarded the matter as sufficiently complex to have warranted briefing two counsel, the costs of counsel employed by Mr Nyamunda shall not be limited to the tariff established in terms of R67A of the High Court Rules,[9] but shall include counsel's reasonable fee on brief.
- [61] Insofar as those costs which were reserved on 9 May 2024 are concerned, notwithstanding that this matter could not then be finalised as a consequence of Mr Nyamunda then not having delivered a comprehensive answering affidavit, this court does not intend to mulct him with those costs for the reason that he has, in the interim, been subjected to an interdict which effectively prohibited him from earning an income in circumstances in which Defy's application, in the final analysis, has been found to have been devoid of merit. In the circumstances, this court will exercise its discretion and require that each party bear its own costs in relation to 9 May 2024.

Order

1. The application is dismissed
2. There is no order as to costs in relation to the proceedings of 9 May 2024.
3. The applicant is to pay the first respondent's costs, such costs to include counsel's reasonable fee on brief.

K Allen-Yaman

Judge of the Labour Court of South Africa

Appearances

Applicant:

Mr C Whitcutt SC, with Ms S Saunders

Briefed by Mcaciso Stansfield Inc

First Respondent:

Mr R Ungerer

Briefed by CH Attorneys Inc

[1] At 897E – 898D

[2] At 762B-D

[3] At 776H – 777B

[4] At paragraph 14

[5] At paragraphs 39 and 40

[6] Labournet, at paragraphs 41 and 42

[7] At paragraph 61

[8] Plascon-Evans Paints (TVL) Ltd v Van Riebeck Paints (Pty) Ltd 1984

(3) SA 623.

[9] Incorporated in terms of Rule 24(3)

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