

SOUTH AFRICA / JUDGMENT

Findaload (Pty) Ltd and Others v CMT Transport (Pty) Ltd and Another (584/2019) [2019] ZAFSHC 205 (31 October 2019) [2019] ZAFSHC 205

COURT

Free State High Court, Bloemfontein

BEFORE

C J Musi

CASE / FILE NUMBER

584/2019

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case No.: 584/2019

In the matter between:-

FINDALOAD (PTY) LTD

First Applicant

LOHAN LOGISTICS (PTY) LTD

Second Applicant

SCARLICENTO

Third Applicant

And

CMT TRANSPORT (PTY) LTD

First Respondent

JOHANNES PHILIPPUS KRUGER

Second Respondent

DANIE BLOEM

Third Respondent

JUDGMENT

BY: C. J. MUSI, JP

HEARD ON: 1 AUGUST 2019

DELIVERED ON: 31 OCTOBER 2019

[1] This matter concerns a director's fiduciary duty, and the enforcement of a restraint of trade agreement against an employee.

[2] The applicants sought the following relief:

1. Interdicting and restraining the second respondent from appropriating and diverting business opportunities to the first respondent, falling within the scope and line of business of the first applicant;
2. Interdicting and restraining the second respondent from continuing to breach his fiduciary duties towards the first applicant by managing the first respondent;
3. Interdicting and restraining the second respondent from disclosing the first applicant's information to the first respondent;
4. Interdicting the first, second and third respondents from representing to members of the public that the first respondent is associated with, alternatively related to the first applicant, alternatively that the first respondent has any interest in the first applicant.
5. Interdicting and restraining the first respondent from rendering logistics and transport services whilst the second respondent is a director of the first respondent and of the first applicant;
6. In the event of the second respondent resigning his appointment as director of the first applicant, interdicting and restraining the first respondent from delivering logistics and transport services to any existing clients of the first applicant;
7. Interdicting and restraining the first and second respondents from unlawfully competing with the first applicant by using any information

pertaining to the first applicant's business forthcoming from either the second or third respondents;

8. Interdicting and restraining the first respondent from conducting logistics and transport business with any clients which it obtained from the date that it commenced with business until a period to be determined by the Court after date of the second respondent's resignation as director of the first applicant, in the event that the second respondent resigns as director of the first applicant;

9. Ordering and directing the first respondent to render a full account, supported by documents and vouchers, of all logistics and transport services or services falling within the scope of services recorded in item 4 of the Memorandum of Understanding appended to the founding affidavit as Annexure "H", that it has rendered since the first day it commenced business until date of this order;
10. Ordering and directing the first respondent to keep a full and proper account of all the logistics and transport services and any other services falling in the scope of services that the first applicant recorded in Item 4 of the Memorandum of Understanding, appended to the founding affidavit as Annexure "H", which account must be furnished to the applicant within 7 days of a demand that the account be rendered to the applicant and which obligation will subsist, notwithstanding demand that the account be delivered to the Applicant for as long as the second respondent remains a director of the first respondent and, in the event of the second respondent's resignation as director, for a period of three years thereafter, alternatively such period as the Court deems meet;
11. That the third respondent be interdicted and restrained from being employed by or be in the employ or hold any direct or indirect
interest in the first respondent in any capacity for a period of one
(1) year calculated from 23 January 2019;
12. That the third respondent be interdicted and restrained for a period of one year calculated from 22 January 2019 from being employed or becoming directly or indirectly associated or directly or indirectly carrying on or to be interested or engaged in any capacity whatsoever in any business or enterprise or association of persons, both corporate and incorporated, including the Second Respondent's business, which carries on a competing business with that of the Applicant conducting or carrying on business in South Africa;
13. Restraining and interdicting the first respondent from employing or continuing to employ the third respondent in any capacity or from utilizing the third respondent directly or indirectly or to be engaged with the third respondent in any capacity whatsoever, including to be directly or indirectly associated or directly or indirectly carrying on or to be interested or engaged in any capacity whatsoever, either as principal, agent, partner, representative, shareholder, director, employee, consultant, advisor, financier, or in any other like or similar capacity in the first respondent any time 23 January 2020;
14. Interdicting and restraining the third respondent from providing any service to or lend any aid or advice to any of the customers or client of the first applicant for a period of one year, calculated from 23 January 2019;

15. Interdicting and restraining the third respondent from soliciting or encouraging any person, firm, corporation or any other business entity, or persona or any like thereof, who are customers, clients, suppliers, business associates or referral sources of the first applicant to cease doing business with the first applicant or any of its associated companies or to do business with the first respondent or to do business with any competing business of the first applicant, including the first respondent;
16. That the respondents pay the costs of the application on the scale as between attorney and client, alternatively party and party scale, jointly and severally, the one paying the others to be absolved.
17. Such further and alternative relief as the Court may deem meet."
- [3] Lohan Holdings (Pty) Ltd, a duly registered and incorporated company, holds 100% of the ordinary issued shares in eight companies. The shareholders of Lohan Holdings are Evergreen Trust 40%, the EP Ceronio Trust 40% and the JP Kruger Trust 20%.
- [4] Mr Johannes Philippus Kruger (Kruger), the second respondent, and Mr L Laubscher are the trustees of the JP Kruger Trust.
- [5] Lohan Logistics (Pty} Ltd, the second applicant, a duly registered and incorporated company, is one of the subsidiaries of Lohan Holdings. The directors of Lohan Logistics are Kruger, Mr Evert Ceronio and Mr Johan Ceronio.
- [6] Lohan Logistics, Ruvan Besigheidstrust (Pty) Ltd, Find A Load CC, Scarlicento (Pty) Ltd, the third applicant, a duly registered and incorporated company, joined forces and formed Findaload (Pty) Ltd, the first applicant, a duly registered and incorporated company. Findaload was registered on 31 July 2017. These four entities entered into a Memorandum of Understanding that governed their relationship.
- [7] Lohan Logistics holds 50% of the ordinary issued shares in Findaload and the other 50% is held by Scarlicento. The directors of Findaload are Kruger, Johan Ceronio, Evert Ceronio and five other persons. Mr Daniel Johannes (Danie) Bloem, the third respondent, was an employee of Findaload.
- [8] The first respondent is CMT Transport (Pty) Ltd, a duly registered and incorporated company. Kruger is the sole director of the first respondent.
- [9] Kruger, Johan Ceronio and Evert Ceronio conducted business together. Johan and Evert are brothers. Kruger initially worked for the Ceronio brothers. He turned out to be an astute, loyal and resourceful employee who worked himself up to become a shareholder in Lohan Holdings and some of its subsidiaries. Lohan Logistics was formed as a result of Kruger's suggestion. The Ceronio brothers had no experience in logistics.

- [10] The three got along like a house on fire. The logistics business was doing well. Negotiations started with the entities mentioned in paragraph [6] above which resulted in the registration of the conglomerate called Findaload, on 31 July 2017.
- [11] Lohan Logistics provided 8 trucks to Findaload. The latter provided the former's trucks with transport work and saw to the general management scheduling and day-to-day running of the trucks. All the paperwork related to scheduling, freight notes, delivery notes and invoicing was also done by Findaload. It deducted an 8% handling fee and all expenses from the invoice amount and paid the rest over to Lohan Logistics. The arrangement was the same with regard to the third applicant.
- [12] Findaload experienced management or administrative problems as a result of which Kruger was appointed its CEO with effect from September 2018. He simultaneously held the position of project manager at Lohan Civils which is an affiliate of Lohan Holdings.
- [13] Kruger and the Ceronio brothers could not sustain their good relationship. The cracks widened. Their wives initially received a salary from Lohan Civils. This was stopped during October/November 2017, much to Kruger's dissatisfaction.
- [14] During January 2018, Johan Ceronio accused Kruger of stealing money from Lohan Civils as a result of which Kruger's laptop was confiscated by Johan. He was exonerated and his laptop was returned.
- [15] The first respondent was registered on 24 July 2018 and Kruger became a director thereof on 19 October 2018. Kruger did not disclose this fact to the Ceronio brothers or the other directors of Findaload.
- [16] On 14 November 2018, Kruger was suspended as an employee of Lohan Civils. According to him, he was thus also suspended as the CEO of Findaload. A charge sheet was given to him and he was informed that a disciplinary inquiry, with regard to misconduct committed as an employee of Lohan Civils, would be held on 5 December 2018. He was removed as a director of Lohan Holdings on 30 November 2018. He resigned as an employee of Lohan Civils on 5 December 2018 and instituted constructive dismissal proceedings against Lohan Civils.
- [17] The first respondent hauled its first freight on 29 November 2018. This application was launched on 7 February 2019. According to Kruger he resigned as a director of Lohan Logistics "shortly after this application was served upon me". He also stated that he is no longer a director of Findaload.
- [18] The third respondent entered into an employment contract with Findaload on 11 September 2018. It is not in dispute that his employment contract contains a restraint clause embodied in clause 22 thereof.[1] The restriction was to be applicable for one year after termination of the employment contract and would be enforceable in the entire Republic of South Africa.

[19] When his employer suspected that he is working against its interest by channeling work to the first respondent, it decided to institute disciplinary proceedings against him. He resigned on 22 January 2019.

[20] The third respondent denied that he assisted the first respondent. He stated that he was head hunted by the first applicant due to his expertise and experience in the freight industry. He joined the first applicant on 28 June 2018. He assisted the first applicant by introducing clients to it which he had from his previous employment and business.

[21] He further denied that he was privy to any confidential information and did not have access to any programs and or records of a confidential nature relating to client lists and or any confidential documents of the first applicant. He admitted that he had access to excel programs and mixtelematics tracking systems which are standard systems used in the transport industry by various transport companies. He started in the transport industry during 2012 and has been using these systems since then.

[22] The issues that have to be decided are:

1. Did Kruger owe a fiduciary duty to any of the applicants?
2. If so, does a director's fiduciary duty live on even after the termination of the relationship?
3. If it does, did Kruger breach his fiduciary duty?
4. Should the restraint clause be enforced against the third respondent?

[23] These are motion proceedings for final relief. The Plascon-Evans rule applies. [2]The factual disputes must be decided based on the respondents' version together with the undisputed and common cause facts. Untenable

denials by a respondent should not be countenanced.

[24] When adjudicating the reasonableness of a restraint, I must have due regard to all the facts disclosed in the affidavits. If the facts disclose that the restraint is unreasonable then the respondent must succeed. The converse is also true. If the facts disclose that the restraint is reasonable then the applicants must succeed. I am called upon to make a value judgment.[3] The value judgment must be made after considering two important policy considerations. First, public interest requires that parties

should comply with their contractual obligations. Second, that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or in their professions.[4]

[25] In *Basson v Chilwan*[5] four questions that should be asked in determining whether a restraint clause is reasonable were identified. These are:

"(a) Is daar 'n belang van die een party wat na afloop van die ooreenkoms beskerming verdien?

- (b) Word so 'n belang deur die ander party in gedrang gebring?
- (c) Indien wel, weeg sodanige belang kwalitatief en kwantitatief op teen die belang van die ander party dat hy ekonomies nie onaktief en onproduktief moet wees nie?
- (d) Is daar 'n ander faset van openbare belang wat met die verhouding tussen die partye niks te make het nie maar wat verg dat die beperking gehandhaaf moet word, al dan nie?
(Laasgenoemde vraag kom nie hier ter sprake nie.)

Vir saver die belang in (c) die belang in (a) oortref, is die beperking in die rel onredelik en gevolglik onafdwingbaar. Dit is 'n kwessie van beoordeling wat van geval tot geval kan wissel..."[6]

[26] Section 76 (2) and (3) of the Companies Act[7] (the Act) reads as follows:

"(2) A director of a company must-

- (a) not use the position of director, or any information obtained while acting in the capacity of a director-
 - (i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or
 - (ii) to knowingly cause harm to the company or a subsidiary of the company; and
- (b) communicate to the board at the earliest practicable opportunity any information that comes to the director's attention, unless the director-
 - (i) reasonably believes that the information is-
 - (aa) immaterial to the company; or
 - (bb) generally available to the public, or known to the other directors; or
 - (ii) is bound not to disclose that information by a legal or ethical obligation of confidentiality.
- (3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director-
 - (a) in good faith and for a proper purpose;
 - (b) in the best interests of the company; and
 - (c) with the degree of care, skill and diligence that may reasonably be expected of a person-
 - (i) carrying out the same functions in relation to the company as those carried out by that director; and
 - (ii) having the general knowledge, skill and experience of that director."

[27] A director's fiduciary duty and the remedy for the breach thereof have been succinctly set out in *Cyberscene Ltd v I-Kiosk Internet and Information (Pty) Ltd*[8]. It was summarised as follows:

"A director stands in the fiduciary relationship to the company even if he is a non- executive director... It is a long-established

principle of South African law that such a fiduciary duty exists and that the breach thereof is remediable by means of an interdict... It has also been held that the duty of directors and senior employees is far more extensive than that owed by more junior employees. Thus the duty owed by senior management; into which category the second to sixth respondents fell, is far above that of ordinary employees, whose duty extends only to respect for trade secrets and confidential information...Furthermore, the common-law fiduciary duty of directors owed to the company subsists even after the appointment has ceased... The liability for breach of such a fiduciary duty is not delictual, but sui generis... Clearly a director acts in breach of his fiduciary duty to the company where he sabotages the company's contractual opportunities for his own advantage, or where he uses confidential information to advance the interests of a rival concern or his own business to the prejudice of those of his company... It has also been held that a director has a duty not to misappropriate corporate opportunities...A director has a duty not to compete improperly with the company in the sense of becoming a director of or holding another office in a rival concern, thereby placing himself in a position in which his duties or interests conflict..."[9]

[28] I agree that a director's fiduciary duty continues regardless of the determination of the company-director relationship. Is this duty limitless? I think not. I say this because, first, the duty is created, by the particular relationship, to exact loyalty and it logically follows that the appurtenant obligation should end when the relationship ends.[10] Second, an ex-director has a right to be economically active and to be permitted to engage in trade and commerce. [11] The public policy against restraint applies with equal force to directors.[12]

[29] Directors should, however, not be allowed to escape their fiduciary duties by breaching them and subsequently resigning without consequence. If a link is established between exploitation of information, benefitting by putting self- interest before fiduciary duty or exploiting business opportunities in conflict with the fiduciary duty, by an ex-director prior to resignation then the duty will live after resignation. Regard must be had to the totality of the ex-director's acts prior to resignation in order to establish the link. Resignation should not be used as a means to evade the strict fiduciary duties imposed on a director. It is therefore in the interest of justice that the strict fiduciary duties 'survive' the termination of the company-director relationship.

[30] As stated in Cyberscene, the liability for breach of a fiduciary duty is sui- generis. When it is established that an ex-director has benefitted by exploiting his position as director, he or she may be held liable. Koh puts it thus:

"The no-profit rule, on the other hand, renders a fiduciary liable to account for any gain which he obtained as a result of taking advantage of his fiduciary position, whether there was present a conflict of interest or not. The fiduciary position could have given the director access to valuable information or able to cognizance of some business opportunity. Liability therefore depends on there being a connection or link between gain and office."[13]

[31] This view is consonant with section 218(2) of the Act which provides that:

"Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention."

[32] The third respondent has been in the logistics business for the past 7 years. He was headhunted to work with the first applicant because of his experience and expertise in logistics. He was employed as a freight scheduler. His responsibilities were to schedule freight for and on behalf of his employer. He used to standard operating systems in the execution of his duties.

[33] The applicants do not specify what protectable confidential information the third respondent was privy to because of his employment by the Findaload. The applicants made out a clear case against the third respondent with regard to his collusion with the first and second respondents. It is clear that the third respondent was not a loyal employee. Despite his denials, it is clear from the conversations with some of the first applicant's clients that he knew about the existence of the first respondent and the link between it and Kruger. I am convinced that he was less than candid about his knowledge of and interaction with the first respondent.

[34] The totality of the evidence against the third respondent indicates that he was disloyal to his employer and that he probably committed misconduct. That, however, is not enough to restrain him from having future employment in companies that compete with or conduct the same or similar business as the first applicant.

[35] The third respondent was employed on 28 June 2018. The employment contract containing the restraint clause was signed on 11 September

2018. He resigned on 22 January 2019. He therefore resigned four months after signing the employment contract. When he was employed he already had vast experience in logistics. He also had numerous clients which he introduced to Findaload. There is no proof of specific trade secrets, client lists or confidential information deserving of protection that the third respondent might use post his resignation. I'm not convinced that a case has been made out for the relief sought against the third respondent.

[36] It is common cause that the second respondent became the sole director of first respondent while he was the CEO of the first applicant and a director of the first and second applicants. He states that when he was suspended as the project manager of Lohan Civils he was "thus also suspended as the CEO of the first applicant". There is no indication whatsoever that he was suspended as the CEO of the first applicant. He clearly abandoned his position as the CEO of the first applicant.

- [37] He is currently embroiled in legal proceedings with Lohan Civils claiming that he was constructively dismissed. When it comes to the first applicant the second respondent gives no explanation whatsoever about how he left its employ as the CEO. He did not resign as the CEO. He was not dismissed as the CEO of the first applicant. He absconded. It is clear that the second respondent allowed the toxic relationship between him and the Ceronio brothers to contaminate the relationship between him and the first applicant.
- [38] The second respondent contended that he did not have any access to confidential information of the first applicant. It would be stretching credulity a bit too far to accept that a CEO of a company would be restricted or limited when it comes to information of the company. The second respondent had access to the information of the first applicant when he became a director of the first respondent. The information need not be confidential information. Section 76(2) does not limit the prohibition against a director using information to the use of confidential information.
- [39] He had access to first applicant's information when he became the sole director of the first respondent who was in direct competition with the first applicant. He did not disclose the fact that he was a director of the first respondent to any of his co-directors or the shareholders of the first applicant.
- [40] The second respondent, as director and CEO of the first applicant had a duty to secure business opportunities for the first applicant. He, however, had an interest in a business that was in direct competition with the first applicant. He put himself in a position where his interest in the first respondent conflicted with his duty towards the first applicant.
- [41] The second respondent argued that he had no dealings with the first and second applicants after he resigned from Lohan Civils. It is, however, clear that he embarked on this deceptive route when he became the sole director of the first respondent. He has not yet resigned from Findaload. There is no proof that he resigned from Lohan Logistics. Even if I accept that he resigned from both entities after this application was launched, it is of no moment. The resignation was calculated to avoid being held to his fiduciary duty.
- [42] I agree with Mr. Snellenberg that second respondent also owes a fiduciary duty to the shareholders of the first applicant. The second respondent has, at least, contravened the provisions of section 76 of the Act. The first respondent benefits from the second respondent's unlawful conduct.
- [43] The first and second respondents have already breached the first applicant's clear right and they intend to persist with their conduct. The applicants have no suitable ordinary remedy at their disposal and they are entitled to prevent any further breaches by means of interdictory relief.
- [44] Paragraph 8 of the notice of motion is too wide. I can understand why it is couched in such wide terms. There is no evidence as to who the first respondent's clients are and when it commenced doing business with those clients. It is also difficult to establish whether the

first respondent commenced doing business with those clients as a direct result of the information given to it by the second respondent. In order couched in the terms suggested in paragraph 8 is too wide, unfair and would unduly limit the first respondent's right to conduct business.

[45] In my judgment the orders sought in paragraphs 9 and 10 of the notice of motion are indeed reasonable and necessary for the applicants quantify their damages, if any.

[46] This is a proper case in which no order as to costs should be made in favour of the third respondent, regardless of the fact that he has been successful. There is overwhelming evidence into his collusion with the first and second respondents against the interests of the first applicant. He worked against the interest of the first applicant while he was in its employ. He was not open, frank and candid with this court pertaining to his nefarious activities.

[47] I am not convinced that this is a matter in which I must make a court order on the higher scale.

[48] I therefore issue an order:

1. Interdicting and restraining the second respondent from disclosing the first applicant's information to the first respondent.
2. Interdicting the first and second respondents from representing to members of the public that the first respondent is associated with, alternatively related to the first applicant.
3. In the event of the second respondent resigning his appointment as director of the first applicant, interdicting and restraining the first respondent from delivering logistics and transport services to any existing clients of the first applicant.
4. Interdicting and restraining the first and second respondents from unlawfully competing with the first applicant by using any information pertaining to the first applicant's business forthcoming from either the second or third respondents.
5. Ordering and directing the first respondent to render a full account, supported by documents and vouchers, of all logistics and transport services or services falling within the scope of services recorded in item 4 of the Memorandum of Understanding appended to the founding affidavit as Annexure "H", that it has rendered since the first day it commenced business until the date of this order.
6. Ordering and directing the first respondent to keep a full and proper account of all the logistics and transport services and any other services falling in the scope of services that the first applicant recorded in Item 4 of the Memorandum of Understanding, appended to the founding affidavit as Annexure "H", which account must be furnished to the applicant within 7 days of a demand that the account be rendered to the applicant and which obligation will subsist, notwithstanding demand that the account be delivered to the Applicant for as long as the second respondent remains a director of the first respondent

and, in the event of the second respondent's resignation as director, for a period of one year thereafter.

7. That first and second respondents pay the costs of this application, jointly and severally, the one paying the other to be absolved.

C.J. MUSI, JP

Appearances:

For the Applicant:

Adv N Snellenburg SC

Instructed by Honey Attorneys

Bloemfontein

For the 1st & 2nd Respondent: Adv S Grabler

Instructed by Rossouws Attorneys

For the 3rd Respondent:

Adv AP Berry

Instructed by Taylor Attorneys

- [1] NON-DISCLOSURE UNDERTAKING/RESTRICTION OF TRADE By virtue of your association with the company, you will become possessed and will have access to the company's trade secrets and confidential information including inter alia, but without limiting the generally of the foregoing, the following matters, all of which are hereinafter referred to as the Company's Trade Secrets: 22.1 Knowledge and influence over the company's costumers and business associates. 22.2 Contractual arrangements between the company and its business associates. 22.3 The names of prospective customers and their requirements. 22.4 Details of the company's financial structure and operating results 22.5 Other matters which relate to the business of the company and in respect of which information is not readily available in the course of business to a competitor of the company. If, on termination of your employment for any reason whatsoever, you take up employment or otherwise become associated with or interested in a competitor of the company, the company's propriety interest in its trade secrets will be prejudiced. Having regard to the facts in the paragraphs above you undertake and agree that in order to protect the propriety interests of the company, you will not, during your employment, or at any time thereafter, either use or directly or indirectly divulge or disclose to other (except as required by the terms of your employment hereunder) any of the company's trade secrets, any written instruction, drawing notes, memorandums or records relating to the company's trade secrets which are made by yourself or which come into your possession during the period of your employment with the company. Any of the above-mentioned will be deemed to be the

property of the company and will be surrendered to the company on demand in any event upon the immediate termination of your employment and you will not retain any copies thereof or extract there from. You will not, either for yourself, or as the agent of anyone else persuade, induce, solicit, encourage or procure any employee of the company to become employed by or interested in any manner whatever in any business, firm, undertaking or company (all of which are hereinafter referred to as any concern) directly or indirectly in competition with the business carried on by the company. You will not furnish any information or advice acquired by yourself as a result of your employment with the company to anyone else which results in any employee of the company becoming employed by or directly or indirectly interested in any manner, in any concern. You will (not) solicit, interfere with or entice or endeavour to entice away from the company any person, firm or company who or which during this period of this agreement or at the date of termination was accustomed of or was accustomed to dealing with the company. In the event of breaching the above, the company reserves the right to seek relief from the Industrial, Criminal or Civil Courts and costs pertaining to the undertaking and this restriction of trade will be effective from date of termination for a period of 1 year and will be enforceable in the following areas and kilometre radiuses: SA. Written permission to relieve you from the non-disclosure undertaking/restriction of trade must be obtained from the company."

[1] NON-DISCLOSURE UNDERTAKING/RESTRICTION OF TRADE

By virtue of your association with the company, you will become possessed and will have access to the company's trade secrets and confidential information including inter alia, but without limiting the generality of the foregoing, the following matters, all of which are hereinafter referred to as the Company's Trade Secrets:

22.1 Knowledge and influence over the company's customers and business associates.

22.2 Contractual arrangements between the company and its business associates.

22.3 The names of prospective customers and their requirements.

22.4 Details of the company's financial structure and operating results

22.5 Other matters which relate to the business of the company and in respect of which information is not readily available in the course of business to a competitor of the company.

If, on termination of your employment for any reason whatsoever, you take up employment or otherwise become associated with or interested in a competitor of the company, the company's proprietary interest in its trade secrets will be prejudiced.

Having regard to the facts in the paragraphs above you undertake and agree that

in order to protect the propriety interests of the company, you will not, during your employment, or at any time thereafter, either use or directly or indirectly divulge or disclose to other (except as required by the terms of your employment hereunder) any of the company's trade secrets, any written instruction, drawing notes, memorandums or records relating to the company's trade secrets which are made by yourself or which come into your possession during the period of your employment with the company.

Any of the above-mentioned will be deemed to be the property of the company and will be surrendered to the company on demand in any event upon the immediate termination of your employment and you will not retain any copies thereof or extract there from.

You will not, either for yourself, or as the agent of anyone else persuade, induce, solicit, encourage or procure any employee of the company to become employed by or interested in any manner whatever in any business, firm, undertaking or company (all of which are hereinafter referred to as any concern) directly or indirectly in competition with the business carried on by the company. You will not furnish any information or advice acquired by yourself as a result of your employment with the company to anyone else which results in any employee of the company becoming employed by or directly or indirectly interested in any manner, in any concern.

You will (not) solicit, interfere with or entice or endeavour to entice away from the company any person, firm or company who or which during this period of this agreement or at the date of termination was accustomed of or was accustomed to dealing with the company.

In the event of breaching the above, the company reserves the right to seek relief from the Industrial, Criminal or Civil Courts and costs pertaining to the undertaking and this restriction of trade will be effective from date of termination for a period of 1 year and will be enforceable in the following areas and kilometre radiuses: SA.

Written permission to relieve you from the non-disclosure undertaking/restriction of trade must be obtained from the company."

[2] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E to 635C.

[3] Reddy v Siemens Telecommunications (PTY) LTD 2007 (2) SA 486 (SCA) at para 14.

[4] Ibid para 15.

[5]

[6] Basson v Chilwan [1993] ZASCA 61; 1993 (3) SA 742 (A). (a) Does the one party have an interest that deserves protection after termination of the agreement? (b) If so, is that interest threatened by the other party? (c) In that case, does the interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive or unproductive? (d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected? If

the interest in (c) outweighs the interest in (a) then the restraint is as a rule unreasonable and unenforceable. It is a matter of adjudicating each case on its own merits.⁶(My translation.)

[6] Basson v Chilwan [1993] ZASCA 61; 1993 (3) SA 742 (A).

- (a) Does the one party have an interest that deserves protection after termination of the agreement?
- (b) If so, is that interest threatened by the other party?
- (c) In that case, does the interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive or unproductive?
- (d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected?

If the interest in (c) outweighs the interest in (a) then the restraint is as a rule unreasonable and unenforceable. It is a matter of adjudicating each case on its own merits.⁶(My translation.)

[7] Companies Act 71 of 2008.

[8] Cyberscene Ltd v I-Kiosk Internet and Information (Pty) Ltd 2000 (3) SA 806 (CPD).

[9] Ibid para 31.

[10] Koh, Once a director, always a fiduciary: Cambridge Law Journal 62(2) July 2003 pp 403- 443 at 404.

[11] Reddy supra para 15.

[12] Koh supra 404.

[13] Ibid 406

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CASE PAGE <https://chat.esheria.ai/case-law/south-africa/findaload-pty-ltd-and-others-v-cmt-unknown-topic-afshc-2019>

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