

SOUTH AFRICA / JUDGMENT

TMA Express Road and Another v Scholtz and Another (2025/071413) [2025] ZAGPJHC 636 (25 June 2025) [2025] ZAGPJHC 636

COURT

South Gauteng High Court, Johannesburg

BEFORE

Smit

CASE / FILE NUMBER

2025/071413

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, JOHANNESBURG

Case

Number: 2025-/071413

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

In

the matter between: TMA
EXPRESS ROAD (PTY) LTD
First Applicant
TMA
LOGISTICS (PTY) LTD
Second Applicant
and
HENRICO
JOHN SCHOLTZ
First Respondent
4PL
AFRICA LTD
Second Respondent

JUDGMENT

Smit, AJ

Introduction

[1] This urgent application concerns three

issues:

- a. Did the first respondent, Mr Scholtz, breach a restraint of trade and confidentiality undertaking he gave to the applicants by taking up employment with the second respondent, 4PL Africa, and by contacting the applicants' clients upon taking up his new employment with the apparent purpose of soliciting their business?
- b. How should the restraint of trade be interpreted and is it enforceable?
- c. What relief should the Court award in these circumstances?

[2] The applicants employed Mr Scholtz in various capacities between 1 January 2018 and 30 April 2025.[1] He was first employed by the first applicant, TMA Express Road, as an "Operations Assistant", later promoted to "Operations

Manager" and finally served as the "General Manager" of the second applicant, TMA Logistics.

[3] TMA Express Road is engaged in the business of commercial freight and logistics between South Africa, Zimbabwe and Zambia. The second applicant, TMA Logistics, is also engaged in the business of commercial freight and logistics, domestically between Johannesburg

and Cape Town.

[4] 4PL Africa employed Mr Scholtz from 1 May

2025. 4PL Africa operates in the same industry as TMA Express Road, i.e. between South Africa, Zimbabwe and Zambia. 4PL Cape is a sister company of 4PL Africa and is engaged in the same industry as both TMA Express Road and TMA Logistics (i.e. both the international and domestic routes).

- [5] Although now employed by 4PL Africa, Mr Scholtz is based at 4PL Cape's office in Kempton Park.
- [6] Very shortly after becoming employed by 4PL Africa, Mr Scholtz contacted erstwhile customers of the applicants. The applicants say this was to persuade them to shift their allegations to the 4PL group of companies. After a brief exchange of correspondence, this contact triggered an urgent application, launched on 19 May 2025 and heard on 5 June 2025.
- [7] It is common cause that the application is urgent, and I find that it is.

The restraint of trade and confidentiality undertakings

- [8] Although at different times, Mr Scholtz signed employment agreements with both TMA Express Road and TMA Logistics. Their relevant provisions are identical.
- [9] The restraint of trade reads as follows:

"13. It is clearly stated and understood by the employee that acceptance of this offer of employment shall be subject to a Restraint of Trade that will apply for a period of 24 (twenty four) months after resignation from this Company, inside the geographic borders of the Republic of South Africa. This implies that the employee after termination of his / her service with the Company, for whatever reason, shall not enter into competition with this Company or any of its subsidiaries using or marketing any of its products or similar products that may be available on the market for the said period of 24 months."

- [10] In argument before me, it was common cause that this clause – although clumsily worded – prohibited Mr Scholtz inter alia from being employed during the restraint period and in the restraint area by any competitor of the applicants. The restraint period is 24 months and the restraint area is within South Africa. It was not seriously disputed that 4PL Africa is a direct competitor of TMA Express Road and 4 PL Cape of both applicants.
- [11] Counsel for the applicants contended that the words "using or marketing any of its products or similar products that may be available on the market" specifies (in the context of this case) when a new employer would be regarded as a competitor. In the context of this case, it would be – so it was contended – if the competitor engaged in commercial freight and logistics by operating on the same routes as the applicants.
- [12] Thus, the subsequent employment of Mr Scholtz (for the restraint period and area) by an entity such as 4PL Africa (or 4PL Cape) would be prohibited, but not such employment by a freight and logistics company that, for example, operates routes from Johannesburg to Durban or from Cape Town to Windhoek.

[13] While this position adopted in argument represented a shift from a more absolutist position the applicants articulated in the founding affidavit, counsel for Mr Scholtz did not take issue with the interpretation as such (although, he did with the shift in stance).

[14] It follows that it was essentially common cause that Mr Scholtz breached the restraint of trade undertaking, and that relief could follow if the undertaking is enforceable.

[15] The confidentiality clause reads as follows:

“17.1 The employee is required to keep confidential and not disclose any of the company’s trade secrets, confidential documentation, technical know-how and data, drawings, systems, chemical formulae, methods, software, processes, client lists, programmes, marketing and/or financial information to any person other than to persons employed and/or authorised by the company or associated company (where applicable) who are required to know such secrets or information for the purpose of their employment and/or association

with the company, both during the continuance of his/her employment hereunder or thereafter.

17.2 The company and the employee hereby acknowledge that the confidential and/or information represents a substantial monetary value to the company.

17.3 The employee shall adhere to the above obligation not to disclose any confidential information to any undertaking, firm, company or person with which the company may at any time be in technical and/or competition, co-operation or association.

17.4 The employee acknowledges that the aforesaid obligation shall remain in force indefinitely and notwithstanding termination of his/her contract for any reason whatsoever.”

[16] Counsel for Mr Scholtz fairly conceded during argument that Mr Scholtz had accessed confidential information while in the employ of the applicants. While this did not form part of the ambit of the concession, it seems to me that this confidential information included, at least, the names and contact details of the applicants’ customers with whom Mr Scholtz dealt as well as information regarding the services provided to them, including the pricing of such services.

[17] It also seems incontrovertible, on the strength of the evidence contained in founding and replying affidavits, that Mr Scholtz breached the confidentiality undertakings by using such access to contact certain customers of the applicants and to solicit their business on behalf of 4PL Africa. The only dispute of fact in this regard seems to be whether he did so of his own volition or on the instructions of his new employer – a matter which is irrelevant to whether Mr Scholtz breached his confidentiality undertakings.

[18] I therefore find that Mr Scholtz breached his confidentiality undertakings by, at least, using the customer and contact details to which he had access at the applicants to solicit the business of those same customers (as specified in the founding and replying affidavits) on behalf of his new employer during the first half of May 2025.

The enforceability of the restraint of trade

[19] Counsel for Mr Scholtz did not contend that the confidentiality undertaking was unenforceable. He contended, however, that the restraint of trade was unenforceable on several bases:

- a. First, the restraint of trade clause is too generic and did not specify the protectable interest of the applicants.
- b. Second, the restraint of trade clause is so broad as to be unreasonable.
- c. Third, the restraint period of 24 months was unreasonably long. (Mr Scholtz did not take issue with the geographic reach of the restraint.)

[20] The law to be applied to the question whether a restraint of trade clause is unenforceable, is well-settled.[2] The onus is on the party seeking to avoid the restraint to show that it is unenforceable.

[21] A court must consider the following five questions in reaching a conclusion:

- a. First, is there an interest of the one party which is deserving of protection at the determination of the agreement?
- b. Second, is such interest being prejudiced by the other party?
- c. Third, if so, does such interest so weigh up qualitatively and quantitatively against the interest of the latter party that the latter should not be economically inactive and unproductive?
- d. Fourth, is there another facet of public policy having nothing to do with the relationship between the parties, but which requires that the restraint should either be maintained or rejected?
- e. Fifth, does the restraint go further than is necessary to protect the interest?

[22] In regard to the issue of protectable interest, counsel for Mr Scholtz fairly conceded that there are trade connections between the applicants and their customers. It seems to me that, at the very least, these trade connections represent a protectable interest that was worthy of protection by the restraint of trade clause when the employment of Mr Scholtz with the applicants ended.

[23] Concerning the contention that the restraint of trade clause was required to specify this protectable interest to be enforceable, counsel could not point me to any authority containing such a requirement and I am not aware of any. The contention in seems contrary to principle: no law requires a contractual clause to specify its reason for existing in order to be enforceable. Its enforceability depends on whether there is an acceptable reason for it to exist; not whether it articulates such reason.

- [24] In regard to whether the employment of Mr Scholtz by 4PL Africa prejudices the applicants' protectable interest in their trade connections, that seems self-evidently to be the case. The prejudice is illustrated by his actions in contacting the applicants' customers immediately upon his new employment.
- [25] It is not irrelevant that Mr Scholtz was caught in three untruths regarding his new employment:
- a. First, when asked during his notice period by representatives of the applicants what he would do after his resignation, he stated that he would work as a project manager for a government department or a training facility.
 - b. Second, he stated in his answering affidavit that he has no access to the phone numbers of the applicants' customers' representatives. The replying affidavit illustrated that he had, all times, formed part of a WhatsApp group with certain of these representatives whose numbers he was in a position to retain.
 - c. Third, Mr Scholtz stated in his answering affidavit that he was not involved in invoicing customers in his various capacities at the applicants. The replying affidavit illustrated, with reference to documentary evidence, that this was also untrue.
- [26] Thus, the continued employment of Mr Scholtz by 4PL Africa presents at least the potential for prejudice of the applicants' protectable interests, as illustrated by his disregard for the truth regarding these matters.
- [27] There was no argument before me about the third issue: whether the interest of Mr Scholtz in remaining economically active and productive is outweighed by the applicants' protectable interest. It seems to me that this is not really an issue, given that the proper interpretation of the restraint clause – as described above – does not prohibit Mr Scholtz from working in the commercial freight and logistics sector per se. It only prevents him from working for or in an entity that competes with the applicants on the two particular routes identified above: Cape Town to Johannesburg; and South Africa to Zimbabwe and Zambia. Thus, the restraint on Mr Scholtz is minimal and does not outweigh the applicants' protectable interest.
- [28] As to the fourth issue, it does not seem that there is in the circumstances of this case another facet of public policy which requires that the restraint should either be maintained or rejected.
- [29] In regard to the fifth issue, whether the restraint is broader than is required by the protectable interest, I find that – properly interpreted – it only prevents involvement in or employment by an entity that operates in the same industry and on the same routes as the applicants. Its geographical reach is limited to South Africa which, in the context of the long-distance freight industry, is modest. For example, it was common cause at the hearing that the restraint clause would not prevent Mr Scholtz from being employed by 4PL Africa in Zambia (as opposed to his current base in Kempton Park).

- [30] For these reasons, I do not think that the restraint is too broad or too generic, as contended by Mr Scholtz, save perhaps for its duration of 24 months.
- [31] There was little evidence on affidavit as to the reasonableness of a restraint period of 24 months (or shorter). In argument, counsel for the applicants took the view – with little elaboration – that 12 months would be sufficient, while counsel for Mr Scholtz contended that a period of only one month would be appropriate.
- [32] Counsel for Mr Scholtz motivated for a period of one month with reference to a dictum in *Den Braven*.^[3] In that case, Wallis AJ (as he then was) found that two years is the “outer limit” in a case of this type and that “the period of the restraint should not be any longer than is necessary to enable the applicant to place a new salesperson in the field, enable them to become acquainted with the products and the customers and to make it plain to the latter that they are now the person with whom to deal on behalf of the applicant.”^[4] In *Den Braven*, on the facts of that case, it was found that eight months would be a sufficient period for these purposes.
- [33] In this case, counsel for Mr Scholtz primarily submitted that the Court would not make a contract for the parties and therefore should not enforce the restraint if a period of 24 months is found to be too long. I deal with this submission below when I consider the relief sought. In the alternative, counsel submitted that one month would be sufficient for the applicants to train a replacement for Mr Scholtz. Again, there was little elaboration or evidence for this submission save that the probation period in the industry tends to be three months.
- [34] In this case, Mr Scholtz was the General Manager of TMA Logistics, at the time of his resignation. He also had extensive duties at TMA Express Road, which continued even when he became employed by the former. His combined tenure at these companies was seven years and four months. His duties were far wider than sales. During his employment, he was in a position to cultivate strong customer connections and had access to the applicants’ confidential information. He immediately attempted to capitalise on those connections and that information when he left the applicants’ employ.
- [35] In the circumstances of this case, and in the absence of persuasive evidence on the length of time it would take for a new General Manager to build up sufficient trade connections and for the confidential information to become stale, I find that a period of 12 months from the date of the resignation of Mr Scholtz is reasonable as a restraint period.
- [36] In the circumstances, I find that the restraint is enforceable.
- [37] I am strengthened in that conclusion by the fact that a sister company of 4PL Africa sought to enforce a restraint that was worded identically in litigation in the Labour Court. In that litigation, the 4PL group maintained that the restraint was reasonable and enforceable. The application was dismissed, however, on the basis that the first applicant in that matter, which employed the relevant respondents, had no protectable interest, while the second

applicant, which had the protectable interest, was not the employer and therefore could not enforce the restraint.

[38] It follows that, in my view, the applicants made out a case for a final interdict to restrain Mr Scholtz from working for 4PL Africa in South Africa and from utilising or sharing any of the applicants' confidential information.[5]

The relief to be granted

[39] The applicants sought the following substantive relief in the notice of motion (as paraphrased):

- a. Mr Scholtz is restrained from competing with the applicants and from being employed by 4PL Africa, the 4PL group of companies and any direct competitor of the applicants within South Africa for a restraint period. (First prayer)
- b. Mr Scholtz is restrained from disseminating confidential information of the applicants within the restraint area and for the restraint period. (Second prayer)
- c. Mr Scholtz is restrained from contacting or soliciting customers of the applicants to terminate their business relationships with the applicants or to provide their business to 4PL Africa or any other third party which competes with the applicants within the restraint area and for the restraint period. (Third prayer)
- d. Mr Scholtz is restrained from contacting or soliciting employees of the applicants to terminate their employment relationships with the applicants or to provide their business to 4PL Africa or any other third party which competes with the applicants, within the restraint area and for the restraint period. (Fourth prayer)

[40] It was common cause at the hearing that the fourth prayer should not be granted, given that the contracts of employment in question did not contain an express prohibition on soliciting employees.

[41] Counsel for Mr Scholtz strenuously contended that the other prayers could not be granted either, because they read differently from the provisions of the contract itself. In particular, he contended that the Court could not cut down the restraint period to be reasonable, because that would amount to making a new contract for the parties.[6]

[42] On the facts of this case, these arguments do not have force:

- a. First, I have found above that the ambit of the restraint is reasonable, with the possible exception of the restraint period. To contend in these circumstances that the Court is limited to an order that parrots the words of the restraint clause, is to put substance over form. It is the function of the Court to particularise general provisions of the law (or of a contract) for purposes of a specific case in its order.

- b. Second, courts routinely enforce only such provisions of a restraint clause as are found to be reasonable in the context of a specific case. There is no problem in principle with that, as long as what is enforced is encompassed by what is prohibited and there is no suggestion that the width of the ambit of the restraint was formulated for reasons other than the protection of legitimate interests. This is borne out by the very clear and persuasive exposition of Wallis AJ (as he was then) in *Den Braven* of the non-application of the doctrine of severance in the context of restraint clauses.[7] The following passage is of particular application:

“The proper approach in my view is for the court to ask itself whether the conduct that the applicant seeks to restrain by way of an interdict is conduct that falls within the terms of the restraint agreement and from which the former employee agreed to abstain. If the answer to that question is in the affirmative the court then moves to an analysis of whether it should, in accordance with the principles of public policy, enforce the agreement to that extent by granting relief to the applicant. It has no need in those circumstances to have regard to those portions of the agreement that are more extensive than the relief actually being sought.”[8]

- [43] The contents of prayers 1 to 3 as paraphrased above are in certain respects too wide, in that they do not relate to the facts of this case. For example:
- a. There is no evidence as to what the 4PL group of companies encompasses or what each company in that group does. I will therefore not grant an order in respect of the involvement of Mr Scholtz with the entire group, but only in respect of 4PL Africa and 4PL Cape.
- b. It is unnecessary and undesirable on the facts of this case to extend the order to any competitor of the applicants or to third parties involved in the industry generally. Each case depends on its own facts.
- [44] The parties were agreed that costs should follow the event and that costs on scale C would be appropriate. I agree.
- [45] In regard to the second respondent (the employer of Mr Scholtz), it did not appear at the hearing, but it did enter notice of opposition; and Mr Scholtz recorded in his answering affidavit that he was authorised to depose to it on behalf of the second respondent. Accordingly, the respondents will be ordered to pay the applicants’ costs jointly and severally.
- [46] I thank counsel for their heads of argument and helpful submissions at the hearing.

Order

- [47] I make the following order:
- a. This matter is dealt with as urgent.

- b. Mr Henrico John Scholtz (“Mr Scholtz”) is interdicted and restrained from competing with the applicants and from being employed by 4PL Africa Ltd (“4PL Africa”) or 4PL Cape (Pty) Ltd (“4PL Cape”) within South Africa for a period of 12 months starting on 1 May 2025.
- c. Mr Scholtz is interdicted and restrained from disseminating information confidential to the applicants.
- d. Mr Scholtz is interdicted and restrained from contacting or soliciting customers of the applicants to terminate their business relationships with the applicants or to provide their business to 4PL Africa or to 4PL Cape within South Africa for a period of 12 months starting on 1 May 2025.
- e. Mr Scholtz and 4PL Africa must pay the applicants’ costs on scale C.

DJ SMIT

ACTING JUDGE OF THE HIGH COURT

JOHANNESBURG

Date of hearing: 5 June 2025

Date of judgment: 25 June 2025

For the applicants:

M Lennox instructed by DH Hinrichsen Attorneys Inc.

For the first respondent:

G Elliott SC instructed by Maurice Phillips Wisenberg

[1] For the first part of this period, he was employed by the first applicant (“TMA Express Road”) while for the second

part, he was employed by the second applicant (“TMA Logistics”) while still rendering some services for TMA Express Road. Since they are companies in the same group, and operate in the same industry, nothing turns on this.

[2] E.g. *Basson v Chilwan*

[1993] ZASCA 61; 1993 (3) SA 742 (A); *Kwik Kopy (SA) (Pty) Ltd v Van Haarlem* 1999 (1) SA 472 (W) at 484E; *Experian South Africa (Pty) Ltd v Haynes* 2013

(1) SA 135 paras 13-17.

[3] *Den Braven SA (Pty) Ltd v Pillay* 2008 (6) SA 229 (D) para 55. See also para 24.

[4] *Id.*

[5] See *Experian South Africa (Pty) Ltd v Haynes* 2013

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- (1) SA 135 para 59. It was not contended that there is any other satisfactory remedy for the breach of contract by Mr Scholtz; and it seems to me that the applicants are correct in asserting that a damages claim is speculative and difficult to quantify.
- [6] For this proposition, he relied on *Laws v Rutherford* 1924 AD 261 at 264 and *Henred Freuhauf (Pty) Ltd v Davel* (2011) 32 ILJ 618 (LC) para 22.
- [7] See *Den Braven SA (Pty) Ltd v Pillay* 2008 (6) SA 229 (D) paras 36-54.
- [8] *Id* para 50.
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