REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

JUDGMENT

Reportable

Case no: D519/13

SOUTH AFRICAN RECYCLING EQUIPMENT (PTY) LTD **Applicant**

and

ARNAUD HENRI LELEUX **First Respondent**

WASTE RECALL (PTY) LTD **Second Respondent**

Heard: **12 September 2013**

Delivered: **13 November 2013**

Summary: **Restraint of trade agreements: - Principles restated. Restraint of trade agreement reasonable and enforceable where an ex-employee found to be in breach before even leaving the employ of the ex-employer. Requirements of final interdict met. Rights enshrined in Section 22 of the Constitution not a license to trample on the rights and obligations contained in restraint clauses**

JUDGMENT – REASONS FOR ORDER

TLHOTLHALEMAJE, AJ

Introduction:

[1] On 13 November 2013, a final order in the following terms was issued;

1.1 The first respondent is interdicted and restrained from carrying on or being interested in, directly or indirectly, the business of waste management, dealing in scrap metal, recycling waste metal and other materials and the supply of waste recycling equipment for a period of 2 years from 25 May 2013 for the whole of the Republic of South Africa.

1.2 The first respondent is interdicted and restrained from divulging any confidential information of the applicant he had obtained during his period of employment with the applicant, which information shall include, but will not be limited to, the identity and contact details of the applicant's customers, suppliers, service providers, pricing and discount structures of the applicant and its suppliers and the identity of the applicant's trade connections, to any trade rival of the applicant and/or any third party that may have an interest in the information or would benefit from the confidential and proprietary information of the applicant;

1.3 The first respondent is interdicted and restrained from using any confidential information as set out in paragraph 1.2 hereinabove either directly or indirectly for the purposes of canvassing the applicant's customers and/or trade connections or soliciting the business of the applicant's customers or trade connections;

1.4 The first respondent is interdicted and restrained from soliciting or seeking any business whatsoever from any person, firm or company who was a customer of the applicant during his term of employment.

1.5 There is no order as to costs

[2] What follows are the full reasons for the above order.

This application was initially brought to court on the basis of urgency. It was set-down for 14 June 2013 and was postponed to 24 July 2013. It was again postponed to 12 September 2013 when it was finally heard. Since then, the applicant only seeks a final order against the first respondent (the employee). By bringing this application, the applicant aimed to enforce a written covenant in restraint of trade, concluded with the employee on 21 November 2011, that is embodied in the contract of employment of the employee and secondly, an undertaking by the employee as recorded in the contract of employment that he will preserve the integrity of the confidential information obtained by him from the applicant in the course of his employment.

Background:

[3] The applicant operates in scrap recycling and processing market in the Republic of South Africa and parts of Africa. It specialises in the import, distribution and sales of general and sophisticated scrap recycling equipment. It has interests in the general waste recycling market, and operates a waste recycling yard in Cape Town and a cable granulation plant in Kwazulu-Natal. Significantly, the applicant recycles waste on behalf of the South African National Defence Force and BHP Billiton.

[4] According to the applicant's Director and Acting Chief Executive Officer, Robert McClelland, the company was registered in 2007 and within a year, became one of the leading suppliers of recycling equipment and plant to South Africa's recycling market. It has preferred supplier agreements with international recycling equipment brand leaders such as Guidetti and Sierra. McClelland further stated that the applicant was set to pioneer a process in South Africa to separate plastic and foil used in food packaging. He lamented the fact that the employee, with whom he has been friends since 2007 had hijacked this idea, and was pursuing it under the applicant's competitor, the second respondent (Waste Recall).

[5] The employee had joined the applicant in 2008 in a sales capacity. On the employee's own version, his further knowledge and experience in the recycling industry was gained largely whilst performing his duties and

responsibilities at the applicant, and to some extent, directly from McClelland. McClelland's contention was that when the employee joined the applicant, he had no knowledge or experience of the recycling industry or of a business like the applicant's as he was a professional diver at the time. McClelland had taught the employee the trade, introduced him to the market leaders and suppliers and trade connections of the applicant, the major role players in the South African and African scrap recycling industry, and had developed him into a proficient sales person.

[6] The employee had worked at the applicant for two distinct periods. The first was between 2008 to November 2012, and the second between February 2013 to May 2013. During the currency of the first period employment, the parties had signed a contract of employment in November 2011 which *inter alia* confirmed the employee's position as sales director. His responsibilities entailed developing a business plan and sales strategy, preparing an action plan for effective research of new prospects and sales leads, import of equipment, initiate action plan to penetrate markets, maintain regular contact with the client base via e-mail, phone and personal visits, development and implementation of marketing plan, control expenses and stay within budget guidelines, maintain records of quotes and record sales and activities of the sales team. The employee had resigned in November 2012 in order to go back into the diving industry but his sojourn into that area was short- lived. He came back and continued to work for the applicant in December 2012 as head of its sales staff, until his final resignation in May 2013.

The Restraint of Trade Clause:

[7] Clause 19 of the contract of employment entered into between the applicant and the employee provides that;

"19.1 The employee, or his agent, shall not at any time during his employment with the employer nor within three (3) years after he shall cease to be employed by the employer;

19.1.1 directly or indirectly use know-how, products, which belong to the employer, its associates or its clients, or have been developed by the

employer, its associates or its clients for any purpose whatsoever other than normal company business.

19.2 The employee shall not, without the express written consent of the directors of the employer, at any time during his employment with the employer, nor within three (3) years after he shall cease to be employed by the employer;

19.2.1 be interested or engaged whether as a proprietor, partner, director, shareholder, employee, member of a syndicate or otherwise howsoever, and whether directly or indirectly in any business, form or undertaking which conducts the business of waste management as dealers in scrap metals and recycling waste metal and materials within the Republic of South Africa; and;

19.2.2 be employed by a firm or company who was a customer of the employer during the term of his employment and with whom he was directly involved whether in the course and scope of this employer with the employer or otherwise; and

19.2.3 solicit or seek to obtain orders in respect of products or services similar to those marketed by the employer from any person, firm or company who was a customer of the employer during the terms of his appointment

19.2.4 the employee acknowledges and agrees that the terms of this clause 19 are reasonable in all respects and in particular as to the extent duration and area."

The employee's salient arguments:

[8] The employee's contention was that the restraint clause was not enforceable on four grounds. These were that;

8.1 There was an agreement between the parties for him to pursue his intended business venture, which agreement was struck with the directors of the applicant.

8.2 the applicant did not have a protectable interest.

8.3 the first respondent's venture does not breach the restraint (if it is found to be enforceable)

8.4 the right to be economically active and to compete in a free market (with no unfair advantage at the expense of the applicant, or anybody else)

"The agreement to be released from the restraint clause":

[9] The question whether the employee's resignation in November 2012, and his second stint between December 2012 and May 2013 put an end to the first contract of employment was mentioned almost in passing by both Mr. Brassey and Mr. Seery. It does not however appear to have been made an issue by the employee, and to the extent that he relied on the second "agreement" in this regard, the issue will be determined in the context of answering the question whether this second "agreement" existed.

[10] The employee's reliance on an agreement releasing him from his restraint followed upon an AGM meeting held on 2 November 2012 at Salt Rock Hotel. He contended that during a lunch break, he had met with the applicant's McClelland, A Fabing (Director), D Simpson (Managing Director), S Bloem (Sales), D Appleby (Director) and M du Plessis (Secretary), and the following issues were orally agreed upon;

10.1 That he would purchase specialised plant (designed to separate laminated plastic and aluminium waste), and sell the separated product (this would be on his own account, and unrelated in any way with the applicant).

10.2 That he would continue to work for the applicant (although he would not draw a salary) and market and sell recycling equipment for it.

10.3 Due to the fact that he would no longer be earning a salary, he had suggested a new commission structure for himself.

[11] The employee's further contention was at that meeting, no issues were raised over the restraint of trade that formed part of his employment contract and McClelland never advised him that the restraint would be enforced. In January 2013, he had met with Fabing on a number of issues, and he had reminded

him of the November 2012 meeting. Fabing had requested that he reduce the agreement in writing. He had done so and sent the agreement to both McClelland and Fabing on 10 January 2013. Only Fabing had acknowledged receipt of the e-mail.

[12] In support of the contention that there was an oral agreement that released him from the restraint, the employee had also relied on the confirmatory affidavits deposed to by the applicant's directors, Susan Bloem and Delia Appleby, who were present at those meetings. This agreement according to the employee was also confirmed telephonically and in meetings. He further contended that it was only when the parties' relationship broke down that the applicant denied the existence of the consent to waive the restraint clause. The employee further contended that what the applicant had done in response was merely to deny the existence of the agreement, and relied on an unsigned affidavit deposed to by Fabing.

[13] McClelland had acknowledged that the employee had sent an e-mail on 10 January 2013 and had made the proposals. Fabing in response had advised the employee on the same date that the matter was to be discussed and that they would revert to him. McClelland denied that he had granted the employee permission, and that any permission in that regard would have required the endorsement of the applicant's other directors. His further contention instead was that it was decided to refuse the request since its grant would essentially mean that the employee was entering in direct competition with the applicant.

[14] McClelland's contention was that the idea that the employee sought to pursue was developed by him and was also shared with other employees and directors of the applicant long before the employee's departure towards the end of 2012. He denied that the employee was at any stage given permission to pursue those interests, and what he had told him was that the matter was to be discussed further.

Evaluation:

[15] Where there are disputes of facts in motion proceedings, it is trite that such disputes should be resolved in accordance with the test set out in *Plascon-Evans Ltd v Van Riebeeck Paints (Pty) Ltd*[1]. The test found further elucidation in *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another*[2] where the Court held that;

> "….. where an applicant in motion proceedings seeks final relief, and there is no referral to oral evidence, it is the facts as stated by the respondent together with the admitted or undenied facts in the applicants' founding affidavit which provide the factual basis for the determination, unless the dispute is not real or genuine or the denials in the respondent's version are bald or uncreditworthy, or the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable that the court is justified in rejecting that version on the basis that it obviously stands to be rejected".

[16] It is further trite that a party that relies on an agreement bears the onus of not only proving its existence, but also the parties' common intention to enter into that agreement, and its specific terms[3]. Mr. Brassey in his written heads of argument had submitted that where there is a dispute surrounding the alleged oral agreement, this should be resolved by the terms of the restraint clauses themselves and the employee's contract. In this regard, it was contended that clause 19.2 of the agreement precluded the employee from competing with the company in the absence of *"express written consent of the directors of the employer"*. In addition, it was contended that the agreement contained a number of non-variation clauses that deny validity to modifications of the agreement or waivers of the right it embodied that are not reduced to writing and signed.

[17] I am in agreement with the submissions made by Mr. Brassey. To the extent that the employee based his case on correspondence, e-mails, meetings and telephonic conversations which do not in any manner or form qualify as a written variation or written consent of the applicant's directors as contemplated in clauses 19.2 and 28.2 of the agreement, he is indeed

[1] [1984] (3) SA 623 (A)
[2] [2009] (3) SA 187 (W) at para 19
[3] See Cotler v Variety Travel Goods (Pty) Ltd and Others 1974 (3) SA 621 (A)

precluded from relying on the alleged oral agreement. Furthermore, insofar as the oral agreement could be said to constitute a relaxation of the employee's obligations, that again does not assist him as clause 28.3 of the agreement expressly states that the relaxation *"shall not be deemed a waiver or in any way prejudice the employer's rights in terms hereof".*

[18] In the light of the above conclusions, it follows that the employee's second stint with the applicant after his first resignation cannot be seen to have terminated the first agreement, and more pertinently, to have released him from the restraint clause and the concomitant obligations in that regard. To that end, any dispute which the employee raised in respect of the existence of any other agreement, or that the restraint clause was no longer enforceable is obviously fictitious, and his version in that regard stands to be rejected.

The legal framework in respect of restraint of trade clauses:

[19] In *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*[4], it was held that restraint of trade agreements are enforceable unless, and to the extent that they are contrary to public policy because they impose an unreasonable restriction on the former employee's freedom to trade or to work. As the Labour Appeal Court in *Trevlyn Ball v Bambalela Bolts (Pty) Ltd and Another*[5] recently held:

> '…. The effect of the Magna Alloys' decision was to place an onus on the party, sought to be restrained, to prove, on a balance of probabilities, that the restraint was unreasonable (See *Magna Alloys: Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at para 14 at 498E-499). However, because the right of a citizen to freely chose a trade, occupation, or profession, is protected in terms of section 22 of the Constitution and a restraint of trade constitutes a limitation of that right, the onus may well be on the party who seeks to enforce the restraint to prove that it is a reasonable, or justifiable limitation of that right of the party sought to be restrained. (See *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearman* 2001 (2) SA 853 (SE) at 862; *Canon KwaZulu-Natal (Pty) t/a Canon Office Automation v Booth* 2005 (3) SA 205 (N).'

[4] [1984] (4) SA 874 (A) at 891 B-C
[5] [2013] (9) BLLR 843 (LAC) at para 13

[20] The test for determining the reasonableness or otherwise of the restraint of trade provision was set out in *Basson v Chilwan & Others*[6] in the following terms:

> (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 such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and 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?

In *Reddy v Siemens Telecommunications (Pty) Ltd*[7] , a fifth factor was considered, viz whether the restraint goes further than is necessary to protect the interest[8].

[21] Since the applicant seeks a final order, it has to show a clear right; the absence of an alternative remedy; and that, if the interdict should not be granted, that it will suffer irreparable harm. In order to establish a clear right, the court has to consider whether there is an interest deserving of protection. Once that has been established, the next enquiry would be whether the employee is in a position to threaten those interests. These interests must then be weighed up against the interest of the employee to be economically active and productive.

Protectable interest:

[22] Coppin AJA in *Trevlyn Ball*[9] held that a restraint would not be regarded as reasonable and enforceable in the absence of a proprietary interest deserving protection. This principle was also expressed by Steenkamp J in *Continuous*

[6] [1993] (3) SA 742 (A) at 767 G-H
[7] [2007] (2) SA 486 SCA
[8] See also Kwik Kopy (SA) (Pty) Ltd v Van Haarlem & another 1999 (1) SA 472 (W) at 484E
[9] Supra. At para 16

Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes and Another[10] when held that;

> "As I pointed out in Esquire Technologies (citation omitted) a restraint is valid if there is a proprietary interest which justifies protection. Those interests are usually in the nature of trade secrets, know-how, pricing or customer connections. Therefore, a restraint would be an enforceable restriction on the activities of an employee who (for example) had access to the company's customers and could use his/her relations with the company's customers to the advantage of a competitor and to the detriment of the company."

[23] In regards to the kinds of interests that can be protected by a restraint covenant, Mr. Brassey on behalf of the applicant had referred to *Experian South Africa (Pty) Ltd v Haynes & another*[11] where Mbha J had stated the following;

> "[17] It is well established that the proprietary interests that can be protected by a restraint agreement, are essentially of two kinds, namely:
>
> > '17.1 The first kind consists of the relationships with customers, potential customers, suppliers and others that go to make up what is compendiously referred to as the "trade connection" of the business, being an important aspect of its incorporeal property known as goodwill;
> >
> > 17.2 The second kind consists of all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him, to gain a relative competitive advantage. Such confidential material is sometimes compendiously referred to as "trade secrets".'
>
> See Sibex Engineering Services (Pty) Ltd v Van Wyk and Another 1991 (2) SA 482 (T) at 502D-F."

[24] From the pleadings and the main submissions made, the crux of what the applicant seeks to protect, other than the protection contained in the restraint clause is its interests in the "NAMPAK project". McClelland's contention was that the employee had actively developed and pursued a project with NAMPAK, which was identical to the one that the applicant had initiated, and

[10] (J 2073/11) [2011] ZALCJHB 150
[11] [2013] (1) SA 135 (GSJ)

for that purpose, opened up a line of communication for the acquisition of the same Italian machine that the applicant intended to use. McClelland had further averred that he had negotiated with NAMPAK to recycle their tinned products since 2011. He had made first contact with NAMPAK and the company was on the verge of concluding a deal where the applicant would recycle NAMPAK waste of hundreds of tons per month.

[25] In pursuance of this NAMPAK project and its interest therein, the applicant had also send NAMPAK's foil and plastic laminated samples overseas to the company supplier, Guidetti, to test on their recycling machinery. The applicant was also in the process of setting up a recycling plant for this purpose. Since then, the employee and Waste Recall were in the process of purchasing machinery from Guidetti, which according to McClelland, was the very same that he had discussed with the employee. It was this conduct which McClelland contended was in direct competition with the applicant, and that the applicant deserved protection against in the light of the restraint clause.

[26] Mbha J in *Experian South Africa*[12] had dealt with the question of onus in the following terms;

> "The position in our law is, therefore, that a party seeking to enforce a contract in restraint of trade is required only to invoke the restraint agreement and prove a breach thereof. Thereupon, a party who seeks to avoid the restraint bears the onus to demonstrate on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable".

[27] The employee in an endeavour to show that the restraint clause was unenforceable had contended that the applicant is not involved directly in recycling and mainly trades in recycling machinery. He further contended that the applicant had no plans to be involved in recycling any product.

[28] In regards to the "NAMPAK project", Mr. Seery on behalf of the employee had submitted that the latter had come out clean on his aspirations in that regard, and to his knowledge, the applicant had either not done much in pursuing that project or alternatively, had abandoned it in view of protracted ongoing

[12] at para 14

negotiations. It was conceded on behalf of the employee that the idea surrounding that project might have been that of the applicant, but that the latter had done nothing about it.

[29] From the facts, it is my view that the applicant has not only demonstrated that the employee is in breach of the restraint agreement, but also that it has a proprietary interest, which is worthy of protection. My conclusions are based on the following;

When the employee rejoined the applicant in November 2012, he had set up his mind to ultimately set up a competition in the form of Waste Recall. This is evident from his request to be released from his covenant of restraint, which request he had formalised by way of his e-mail of 10 January 2013 to McClelland and Fabing. Despite not having the go-ahead, he had whilst still employed by the applicant, actively pursued the interests of the Waste Recall by firstly registering the latter as a limited liability company, and in due course, had secured his appointment as one of its two directors. The other director is Alfred Hany. This was despite the fact that he was also the applicant's minority shareholder at the time. Secondly he had set up a second e-mail address on the applicant's website that diverted customer enquiries to him. When this conduct was discovered after investigations, the employee had referred a dispute to the Commission for Conciliation, Mediation and Arbitration and alleged that he was unfairly dismissed. In pursuit of the interests of Waste Recall, the employee had also made contact with the suppliers of Guidetti, Sierra and Savino. He had also communicated with a number of prospective customers including JMC recycling, Kytopresse, UB Tech and Mushwana. A pursuit of these activities can hardly be construed as being in the interests of the applicant, and it was clearly in breach of his restraint clause even then. It is apparent that the employee had set his eyes on his new venture with Waste Recall, which he was fully aware was in direct competition with the applicant, and in this regard, the applicant was clearly within its rights to invoke the provisions of the restraint.

[30] The applicant had rejected the employee's contention that it had at any stage abandoned the NAMPAK project. Its contention was that there was no reason

it having embarked upon such a lucrative initiative, it would elect to abandon it. It has every intention of pursuing this project, and that any delays in this regard was not evidence of its abandonment. On the other hand, the employee had conceded that the "NAMPAK project" was the initiative of the applicant. It was not in dispute that whilst still employed, the employee also attended to this project in various ways. It is not known on what basis the employee had concluded that the applicant had abandoned that project, in view of the fact that the applicant had been pursuing it since 2011. In effect, it should be concluded that the employee had contrary to his obligations in terms of the restraint agreement, and shamelessly so, used the know-how of the applicant's business and its relationships with its Guidetti and NAMPAK, to set up and pursue the interests of Waste Recall in direct competition with the applicant. In the process, he had usurped the applicant's ideas and initiatives, and abused its goodwill in direct conflict with the provisions of his covenant of restraint.

[31] It was not in dispute that the employee in his capacity as sales director and an employee knew the interests, aspirations and workings of the applicant, its strength and weaknesses. His responsibilities as already mentioned elsewhere in the judgment entailed *inter alia*, developing a business plan and sales strategy, preparing an action plan for effective research of new prospects and sales leads, import of equipment, initiating action plans to penetrate markets, and maintaining regular contact with the client base. His responsibilities and insight of the applicant gave him an advantage in setting up Waste Recall in direct competition with the applicant. By all accounts, the applicant is clearly entitled to protection against abuse of its trade connections, as it had become clear during the employee's employment and after he had resigned that he had come into a position where he already had, build his own relationship with the applicant's trade connections[13].

[32] To conclude on the issue of the first kind of proprietary interests as identified by Mbha J in *Experian South Africa*[14], it follows that the employee's role in the applicant over the years in various capacities, has given him access to

[13] See also Den Braven S.A. (Pty) Limited v Pillay and Another 2008 (6) SA 229 (D) at para 6
[14] At para 17.1

intricate knowledge of the applicant's proprietary information. On his own version, he had over time, developed good relationships with representatives of suppliers and customers. His contention that he has no influence over these suppliers and customers, and that he would not be able to persuade them to work with him to gain any unfair advantage over the applicant deserves to be treated with scepticism in the light of his conduct thus far. He had used this access to information and trade connections built by the applicant to forge a particular relationship with NAMPAK and suppliers of the applicant, including Guidetti so that when he left, he could easily induce these business contacts to follow him to Waste Recall. The applicant is indeed entitled to a protection of its interest in this regard.

Confidential information:

[33] The employee had submitted that the information or documents that the applicant claimed are confidential were in the public domain. Examples of such information include the applicant's customer list, its supplier agreements with Sierra and Guidetti, (the international recycling equipment brand leaders) and minutes of its directors' meetings. Furthermore, much of the information about companies (both international and local) in the recycling industry that is also claimed to be confidential was readily available over the internet and other publications. McClelland's contention on the other hand was that the list of the applicant's client base which might be in the public domain did not refer to contact persons, service level agreements, terms of contract and information pertaining to customer requirements

[34] A perusal of the customer listing[15] merely shows account numbers and names of customers. Even if this list is in the public domain, it would not be useful to anyone unless that person understood what those account numbers and other codes meant. The employee by virtue of his insight, connections, relationship with those customers and knowledge of the applicant's workings is in a position to utilise that list to the disadvantage of the applicant in pursuance of his interests in Waste Recall or any other competitor. A further point that needs to be made is that the fact that part of this information which the

[15] Annexure "X" to pleadings bundle

applicant regards as confidential and seeks to protect is in the public domain, does not imply that the employee is absolved from his obligations in accordance with his restraint clause. This much was captured by Mbha J in *Experian South Africa*, when he stated the following;

> "…..It follows that first respondent's contention that this information to which he had access whilst employed by the applicant is not confidential cannot be sustained. In any event, the contention is legally untenable in that it is clear from several reported judgments on this issue, that irrespective of whether or not information is in the public domain, the fact that the first respondent has obtained such information within the context of a confidential relationship means that it in fact is protectable"[16]

[35] It further needs to be pointed out that the information pertaining to customers which the employee alleges to be in the public domain is not the only information that the applicant seeks to protect. For example, the employee was involved in the NAMPAK project, including its specifics involving the foil and plastic laminated samples which the applicant had sent to Guidetti to test on their recycling machinery. The employee had also conceded[17] that the applicant's pricing was not common knowledge, and was largely something in his control whilst employed by the applicant. That information cannot be in the public domain and the applicant is entitled to its protection. In view of the fact that the employee had already utilised the information he gained whilst employed by the applicant to his own advantage in pursuing the interests of Waste Recall, it cannot be left to chance that he would act honourably and not use the confidential information to the further detriment of the applicant. All that the applicant needed to show in this regard, and which it had succeeded in doing, was that the employee was indeed in possession of confidential information, and not that he had used it, but only that he could potentially use it to its disadvantage.

Is the employee's intended venture with NAMPAK or in selling recycling equipment in breach of the restraint?

[16] At para 44
[17] At para 16 of answering affidavit

[36] This question becomes moot in the light of the conclusions reached insofar as the employee's involvement in the NAMPAK project is concerned. The project was the initiative of the applicant, and McClelland had been pursuing it since 2011. As indicated earlier, the employee took advantage of his involvement in the project whilst employed by the applicant. On his own version, his co-director, Hany, has already travelled to Italy to meet with Guidetti, and Waste Recall has already sent 1.5 ton test sample to Guidetti[18]. The employee and Waste Recall intend to set up a pilot recycling project in KwaZulu-Natal (using plant supplied by Guidetti) and raw material supplied largely by NAMPAK. The employee and Waste Recall have clearly not wasted any time in usurping the applicant's initiative and making it their own. This conduct in my view goes against the grain of any form of good faith. It is gross abuse of the applicant's goodwill and shows flagrant disregard and disrespect of binding agreements.

[37] The fact that the NAMPAK project has not been patented nor signed and sealed by the applicant does not imply that it is up for the taking. To the extent that this project might have been merely an idea, it deserves protection. It was borne out of the knowledge, expertise and efforts of the applicant. I fail to appreciate how this project in its current form cannot be construed as a proprietary interest which the applicant is entitled to protect. Any venture into that project as evident from the conduct of the employee and Waste Recall as things stand, clearly falls foul of the restraint clause, and there can never be justification for the employee's conduct either from a legal or business ethics point of view.

The right to be economically active:

[38] The employee's contention was that he had a right to earn a living; that the sale of recycling equipment is the only industry he knows and which he has been part since 2001 with a break in 2007. He contended that the restraint could not prevent him from competing with the applicant and from trading with suppliers of recycling machinery that also supply the applicant, and that he needed to make a living even if competing with the applicant like other companies in the same business. The employee had submitted that the

[18] At para 98-99 of answering affidavit

industry was competitive with very few reputable dealers in equipment in the world to compete, and he must be free to deal with these suppliers.

[39] The applicant's contention on the other hand was that the employee's submissions in regard to his right to be economically active amount to saying that the restraint was too broad to warrant enforcement. To this end, it was submitted that the validity and enforceability of the restraint was not seriously contested. In the light of the employee's contentions, it was submitted on behalf of the applicant that the market for waste refining and the attendant machinery was manifestly nation-wide, and that opportunities outside of KwaZulu-Natal where the applicant operated principally would not go begging.

[40] In enforcing restraint of trade agreements, the Court has to strike a balance between the interests of both the employer and the employee. Other than constitutional considerations, the balancing act which the Court has to undertake in considering the enforceability or otherwise of the restraint of trade is that of having to weigh between avoidance of restricting or even preventing healthy competition and the sanctity of contracts. Bearing these considerations in mind, it needs to be stated that inasmuch as the employee like any other citizen has a right in terms of section 22 of the Constitution to freely choose a trade, occupation, or profession, at the same time, he has concomitant obligations in terms of the covenant of restraint which he had willingly entered into. It cannot be correct that his constitutional right gives him the right to go on with his life and to completely ignore his obligations in terms of the restraint agreement. If every employee were to enter into a restraint of trade agreement, and cried "constitution!" every time they moved on in competition against their ex-employers, such clauses would ultimately be rendered redundant.

[41] In this case, in balancing the employee's constitutional rights and the rights of the applicant to enforce the restraint, a number of factors have been taken into account. These include the employee's conduct of breaching the restraint clauses at the time when he was still employed and even after he had left the applicant's employ. Secondly, there was no undertaking that the employee would desist from his conduct and show some good faith. On the contrary, he

is bent on pursuing an idea initiated by the applicant to the latter's disadvantage, including using the applicant's trade connections. He has made his intentions clear that he would disregard the rights and interests of the applicant relating to the NAMPAK project. To put it bluntly, he stole the idea from the applicant, and is unapologetic about his conduct. His attitude appears to be that that even if he was not released from his restraint clause he would dare the applicant in any event. To that end, it would be a travesty if the employee in these circumstances would be allowed to be freed from the restraint clause. To the extent that he may have alleged that the industry in question is the only one he knows, it is in line with consideration of this factor that the period of restraint is reduced by a year as evident from the order already granted. There is however no justification in the light of his conduct as to why the area of the restraint should be interfered with.

Does the order sought by the applicant go beyond the scope of the restraint clause?

[42] Mr. Seery on behalf of the employee had submitted that the order sought by the applicant went beyond the scope of the restraint clause. Firstly, he indicated that contrary to what was being sought, there was no clause in the restraint outlawing the employee in dealing in recycling equipment, and selling it on to persons/institutions who were not customers of employee. The applicant's business entails the import, distribution and sales of general and sophisticated scrap recycling equipment, and has interests in the general waste recycling market and operates a recycling yard in Cape Town and granulation plant in KwaZulu-Natal. It follows from clause 19.1.1 of the restraint that the employee is prohibited from directly or indirectly using the know-how, products, which belong to the employer, its associates or its clients, or have been developed by the employer or its associates or its clients. In my view, reference to *"products*" is sufficient to cover "recycling equipment", whilst any reference to "associates" is sufficient to cover *"customer*". It is not a requirement that the applicant must have mentioned who its customers are, more specifically since the employee knew who they are in any event.

[43] Secondly, it was submitted on behalf of the employee that customers are not suppliers and that the employee cannot be restrained from dealing with suppliers such as Guidetti and Sierra, and selling on equipment sourced from these suppliers. Again the employee fails to appreciate that it is this very interests, i.e., the applicant's relationship with its suppliers that the applicant seeks to protect as envisaged in the restraint clauses. These clauses are broad enough to cover the loopholes he sought to exploit. Guidetti and Sierra are some of the main trade connections which the applicant seeks to protect, and it would be illogical for the employee to choose amongst these connections, which ones the restraint clause should not be applicable to.

Conclusion:

[44] In the light of all of the above, I am satisfied that the applicant has discharged its onus of proving the existence of the contract in restraint of trade. This contract is valid, enforceable and reasonable. Any disputes surrounding the reasonableness of the restraint agreement is resolved further by its clause 19.2.4, which provides thatthe employee acknowledges and agrees that the terms of this clause 19 are reasonable in all respects and in particular as to the extent duration and area.

[45] It is apparent that the employee, even on his own version is in breach of the contract in restraint of trade in that he has not only been instrumental in the setting up of Waste Recall which he knew to be in direct competition with the applicant, but has also taken up directorship with that entity. He used the applicant's trade connections to pursue the interests of that entity even whilst still employed by the applicant, and for all intents and purposes, he will continue to pursue that course with that entity unless the provisions of the restraint are strictly invoked. In addition, the applicant has shown that the employee has contacted its suppliers in the form of Guidetti and others and has accordingly demonstrated the need for the relief that it seeks. I am further satisfied that the applicant is entitled to final relief as sought. It has demonstrated a clear right which is being infringed by the employee in having set up and taking directorship position with Waste Recall in breach of the agreement. An injury therefore has been committed, and continues to be

committed through the employee's blatant disregard of his obligations in terms of the restraint agreement, and the applicant has no other satisfactory remedy available to it.

Costs:

[46] An order of costs is generally at the discretion of this Court, having taken into account considerations of law and fairness. The Labour Appeal Court in *Trevlyn Ball*[19] had cautioned against making cost orders in matters pertaining to enforcement of a restraint in the light of constitutional issues involved in such matters. The rationale behind this approach is that any cost orders may dissuade employees who genuinely challenge the enforceability or reasonableness of their restraint agreements. In the light of the conclusions as above, I am not convinced that the employee's challenge to the restraint agreement was *bona fide*. Notwithstanding, I am inclined to follow the approach in *Trevlyn Ball* and thus make no order as to costs.

Tlhotlhalemaje, AJ

Acting Judge of the Labour Court of South Africa

[19] At para 30

Appearances:

For the Applicants:	Adv. MSM Brassey SC with Adv. Hein Groenewald
Instructed by:	CW Prinsloo Attorneys
For the Respondent:	Adv. T Seery
Instructed by:	De Wet Leitch Hands INC