REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case NO: 2022/12218

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

[ ] MAY 2022 .....
DATE SIGNATURE

In the matter between:

WHITE RIVER MARKETING (PTY) LTD
T/A WIZARD POLYTHELENE
MANUFACTURERS (in business rescue) FIRST APPLICANT

JULIAN EMPEDOCLES
(in his capacity as the duly appointed Business
Rescue Practitioner of the First Applicant) SECOND APPLICANT

and

KIM ROTHWELL FIRST RESPONDENT

MULTISTRETCH (PTY) LTD SECOND RESPONDENT

JUDGMENT

MUDAU, J:

[1] This matter came before me as an urgent application. The first applicant, White River Marketing (Pty) Ltd ("White River Marketing") manufactures and has delivered stretch wrap, also known as cling wrap, pallet wrap, or plastic wrap for over 20 years. The second applicant, Julian Empedocles has been appointed as the business rescue practitioner for the first applicant. The applicants seek to enforce a restraint of trade agreement against the respondents. The first applicant, White River Marketing (Pty) Ltd however does not seek the first respondent, Kim Rothwell ("Ms Rothwell") to terminate her employment with the second respondent, Multistretch.

[2] It is trite that a litigant cannot be granted that which he or she has not prayed for in the *lis*. The applicant failed to move for an appropriate amendment of the notice of motion.[1] The second respondent has filed a Rule 7 to challenge the authority of the deponent to the founding affidavit to act on behalf of the first applicant. The second applicant's alleged appointment as the business rescue practitioner of the first respondent was also challenged. When the matter was argued, these preliminary issues were abandoned. Accordingly, these aspects require no further consideration.

[3] The urgency of the application is in dispute. The applicants must thus satisfy the requirements for urgency so as to convince this Court to entertain the matter outside the ordinary course. The applicants seeks final relief and must satisfy three essential requisites to succeed, being (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory.[2]

[4] The requirements that have to be met to satisfy the Court that the matter may be entertained as one of urgency have been summarised in numerous cases[3] These are: (a) the applicant has to set out explicitly the circumstances which render the matter urgent with full and proper particularity; (b) the applicant must set out the reasons why the applicant cannot be afforded substantial redress at a hearing in due course; (c) where an applicant seeks final relief,

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[1] *Mgoqi v City of Cape Town & another* 2006 (4) SA 355 (CPD) at paras [10]- [13].
[2] *Setlogelo v Setlogelo* 1914 AD 221 at 227.
[3] AMCU v Northam Platinum Ltd & another (2016) 37 ILJ 2840 (LC).

the court must be even more circumspect when deciding whether or not urgency has been established; (d) urgency must not be self-created by an applicant, as a consequence of the applicant not having brought the application at the first available opportunity; (e) the possible prejudice, the respondent might suffer as a result of the abridgement of the prescribed time periods and an early hearing must be considered; and (f) the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency.

[5] On its own version the first applicant became aware of Ms Rothwell's employment with the second respondent in January 2022. The first applicant's last correspondence with Ms Rothwell was 8 March 2022, yet the application was only launched on 28 March 2022 for which it is criticised. The second respondent contends that the first applicant created its own urgency. Why it took until 28 March 2022 for the launch of these proceedings is not satisfactorily explained.

[6] Restraint of trade agreements by their nature have an inherent quality of urgency since they have a limited lifespan. With the unquestionable realities of litigating in the ordinary course, by the time a hearing date is available, the restraint may well have long since expired. The fact that one is dealing with a restraint of trade is however not a license in itself that establishes urgency, to the exclusion of all other considerations. In *Ecolab (Pty) Ltd v Thoabala and Another*[4] the court reiterated, with which I agree: "… Like all other urgent matters, more than a mere allegation that a matter is urgent is required. This therefore implies inter alia that the court must be placed in a position where it must appreciate that indeed a matter is urgent, and also that any applicant in the face of a threat to it or its interests had acted with the necessary haste to mitigate the effects of that threat".[5] On the facts, this matter has all the hallmarks of self-created urgency.

[7] As for the merits, in the case of a former employer seeking to enforce a restraint against a former employee, the onus is first proving the existence of a restraint obligation that applies to the former employee. Second, and if a restraint obligation is shown to exist, the employer must prove that the former

[4] (2017) 38 ILJ 2741 (LC).
[5] At para [20].

employee acted in breach of the restraint obligation imposed by the restraint. Once the breach is shown to exist, the determination then turns to whether the facts, considered as a whole, show that the enforcement of the restraint would be reasonable in the circumstances.

[8] The enquiry into reasonableness, once applicable, involves answering five key questions, these being: whether a party has an interest that deserves protection after termination of the agreement; is that interest threatened by the other party; does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive; 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; and whether the restraint goes further than necessary to protect the relevant interest.[6]

Background facts

[9] On 1 May 2019, Ms Rothwell was employed by the first applicant as a sales representative. On her appointment, she signed her employment agreement ("employment agreement"), annexure W1 as well as a separate restraint of trade agreement ("the restraint"), annexure W2. Paragraph 13 of the employment agreement states that her employment is subject to the acceptance and signing of a non-disclosure and non-compete agreement, the restraint agreement.

[10] She acknowledges that she has acquired in-depth knowledge of the trade secrets, connections and confidential information as well as considerable know-how on all aspects of White River Marketing. Paragraphs 2.5 up to 2.11 define the ambit of the restraint. It restrains her from using information regarding suppliers, customers and any other confidential information of White River Marketing to the detriment of the latter. Paragraph 2.12 restrains Ms Rothwell from becoming employed by a competitor or contacting suppliers and customers in the territory defined as Gauteng for a time period of no less than 12 months after termination for whatever reason.

[6] *Basson v Chilwan and Others* 1993 (3) SA 742 (A) at 767G-H.

[11] During October 2021 Ms Rothwell was charged with gross insubordination. Her employment with the first applicant was terminated with immediate effect on 22 November 2021. The dispute regarding her termination with the first applicant is still unresolved as she disputes the lawfulness of her dismissal with the CCMA. In January 2022, the first applicant became aware that Ms Rothwell was directly contacting the its clients from the client contact lists she had access to during her employment. This was allegedly after a number of the first applicant's clients contacted the deponent to the founding affidavit directly to inform her of that fact. In this regard, Veloudos Packaging deposed to a confirmatory affidavit, annexure W12.

[12] On 4 March 2022, a letter was dispatched to Ms Rothwell, annexure W4, informing her that she is in breach of the restraint after taking up employment with a direct competitor, Multistretch. Ms Rothwell's response in letters dated 4, 5 and 6 March 2022 did not address the issue. Subsequently, on 8 March 2022 letters were issued by attorneys advising the respondents of the breach and that should Multistretch continue to employ Ms Rothwell as their sales representative, they would be joined as a respondent in this application.

[13] The applicants contend that the respondents were thus aware that White River Marketing's confidential information could be used to its detriment. The first applicant alleges that as a consequence of Ms Rothwell's breach of her employment agreement and restraint, and misappropriating its confidential information, as well as the unlawful competition of Multistretch, it has lost sales which it would ordinarily have received estimated at R2,300,000.00 and increasing. The applicants submit that a case has been made out for final relief.

[14] As to what qualifies as confidential information Snyman AJ in *Vumatel (Pty) Ltd v Majra and others*[7] said as follows:

> "Confidential information would be: (a) Information received by an employee about business opportunities available to an employer; (b) the information is useful or potentially useful to a competitor, who would find value in it; (c) information relating to proposals, marketing to submissions made to procure business; (d) information relating to price and/or pricing arrangements, not generally available to third parties; (e) the information has actual economic

[7] (2018) 39 ILJ 2771 (LC).

value to the person seeking to protect it; (f) customer information, details and particulars; (g) information the employee is contractually, regulatorily [sic] or statutorily [sic] required to keep confidential; (h) information relating to the specifications of a product, or a process of manufacture, either of which has been arrived at by the expenditure of skill and industry which is kept confidential; and (i) information relating to know-how, technology or method that is unique and peculiar to a business. Importantly, the information summarised above must not be public knowledge or public property or in the public domain. In short, the confidential information must be objectively worthy of protection and have value".[8]

[15] In opposing the application on the merits, Ms Rothwell contends that she has not shared any information from the applicant with Multistretch. She disputes that she has the client list. She did not contact any customers instead, they contacted her. The customer names relied upon by the applicant have been clients of all manufacturers in the field. As she puts it, it is all about the availability of stock and pricing. The first applicant has always been the cheapest in its pricing. Prices keep on changing and for that reason, she does not have access to the first applicant's current prices since her dismissal.

[16] On her version, all plastic manufacturers have the same raw materials, which are acquired from the same agents. The deponent to the first applicant's founding affidavit, Ms Werner had disclosed to her long before the latter's promotion to the position of general Manager, even before the demise of the company directors, that the company was in financial trouble as they were indebted to Standard Bank for approximately R9 million, which amount continues to escalate. Multistretch has been contacted by customers, due to lack of proper service and lack of stock by the first applicant.

[17] The second respondent, Multistretch contends that it has its own customer base and has been in the industry for over 7 years. On its version, the first applicant has not made any demand from Multistretch as the alleged correspondence of 4 March 2022 was not sent to Multistretch. It avers that it has never instructed Ms Rothwell to contact the first applicant's customers as alleged.

[8] At para [33].

[18] On the contrary, the first applicant's customers contacted Multistretch due to the former's inability to service its clients. The industry is very price sensitive, and clients shop around for the best prices at any given time. It submits that Superb Packaging had already opened an account with Multistretch in October 2021, prior to Ms Rothwell taking employment with it. As for Veldous Packaging, it was already contacted in February 2021 for potential business before Ms Rothwell's employment. Multistretch further points out that the first applicant does not state who its longest standing client is or how long they have had the business relationship.

[19] Restraints of trade are valid and binding and as a matter of principle enforceable, unless the enforcement thereof is considered to be unreasonable.[9] A restraint of trade does not infringe on the constitutional right to free economic activity.[10] In order for the applicant to obtain the relief it seeks, it needs to illustrate the existence of a clear right. As indicated above, White River Marketing does not call for the termination of the employment relationship between the respondents. The only issue in dispute is the allegation relating to contact between certain customers and the first respondent, an alleged violation of the restraint agreement. There exists no contract between the applicant and the second respondent. A claim, if any, against the second respondent can only be based on delict, which has however not been pleaded.

[20] The *Plascon-Evans* rule[11] holds that an application for final relief must be decided on the facts stated by the respondent, together with those which the applicant states and which the respondent cannot deny, or of which its denials plainly lack credence and can be rejected outright on the papers. I am not persuaded to believe in *casu* that the applicants have made out a proper case of trade connections worthy of protection. There is no proper evidence of the first respondent having any kind of close or influential relationship with the customers of the first applicant.

[21] It has not been established that, in the absence of a client list, those customers that were referred to by the first applicant, deal exclusively with it

[9] *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 891B-C. See also *Reddy v Siemens Telecommunications* 2007 (2) SA 486 (SCA) at para [14].
[10] *Reddy* (*supra*) at paras [15]-[16].
[11] *Plascon-Evans Paints v Van Riebeeck Paints* 1984 (3) SA 623 (A) at 634E-635C.

and have no existing relationships with various other industry service providers. I accept Ms Rothwell's assertions that competition in the plastic manufacturing business is rife and that service providers compete. Furthermore, that the business will go the provider with whom the best deal can be negotiated. In any event, there is a dispute of fact in this regard. The applicants have failed to establish the existence of a clear right to the relief sought, and as such, are not entitled to the interdict sought. Accordingly, I find no merit in the application. The application falls to be dismissed.

[22] In the premises, I make the following order:

1. The application is dismissed with costs.

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T P MUDAU

[Judge of the High Court]

APPEARANCES

For the Applicant:	Adv. Advocate M D Kohn
Instructed by:	Wilkins Attorneys
For the First Respondent:	In Person
For the Second Respondent:	Adv. S Swiegers
Instructed by:	Strydom & Associates
Date of Hearing:	14 April 2022
Date of Judgment:	29 April 2022