



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

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

SIGNATURE

DATE: 18 March 2024

Case No. 2024-024081

In the matter between:

EPIC OUTDOOR MEDIA SALES (PTY) LTD

Applicant

and

TERRANCE PATERSON

First Respondent

NETWORK X PTY LTD

Second Respondent

JUDGMENT

WILSON J:

- 1 The applicant, Epic Outdoor, applies urgently to enforce two provisions of its contract with the first respondent, Mr. Paterson. Mr. Paterson is a former employee of Epic Outdoor. He undertook, in his contract with Epic Outdoor, not to divulge any of Epic Outdoor's confidential information, imparted to him during his employment, to anyone else. Mr. Paterson's contract makes clear that this obligation extends beyond the termination of his employment with

Epic Outdoor. Mr. Paterson also undertook not to accept employment with any of Epic Outdoor's partners or competitors for a year after he leaves Epic Outdoor.

- 2 Epic Outdoor says that, contrary to these undertakings, Mr. Paterson has now accepted employment with the second respondent, Network X, which is one of its competitors, and has divulged, or is shortly to divulge, confidential information conveyed to him during his employment with Epic Outdoor to Network X. It is not necessary for me to deal with the nature of that information in any detail, and Epic Outdoor would not thank me for doing so. It is commercially sensitive, and was outlined to me in a confidential affidavit which has been excluded from the public record of this case on this court's electronic registry. It is enough for me to say (and this was not seriously disputed) that the information is such that would allow any of Epic Outdoor's direct competitors to undercut Epic Outdoor on price, and to extinguish competitive advantages Epic Outdoor has built up by developing a range of analytic tools and technologies in the course of maturing its business.
- 3 It is clear from the papers that Mr. Paterson had access to a wide range of confidential information, and that his access to that information was the result of Epic Outdoor's decision to build him up as a technological expert in the outdoor advertising industry. The strategy seems to have been to present Mr. Paterson as a particularly skilled asset that only Epic Outdoor could offer to its clients. The pitfall implicit in this approach is, of course, that an employee whose status is so elevated may one day leave and take his special skills and enhanced reputation to a competitor.

- 4 To insure itself against this eventuality, Epic Outdoor had Mr. Paterson agree to the contractual provisions it now seeks to enforce. The question at the centre of this case is whether, and to what extent, those provisions are enforceable.
- 5 Before turning to that question, it is necessary to deal briefly with two preliminary issues raised on Mr. Paterson's and Network X's behalf at the hearing. These two issues were plucked from a range of other points taken *in limine* on the affidavits, but which were not persisted with in argument.

Urgency

- 6 The first issue is that of urgency. Mr. Bester, who appeared for Mr. Paterson, contended, at some length, that Epic Outdoor's application was not urgent and ought to be struck from the roll. The argument on this score consisted, in the main, of formalistic criticisms of Epic Outdoor's non-compliance with this court's practice directives on the institution and enrolment of urgent matters, and Epic Outdoor's apparent disregard for the strictures of Coetzee J in *Luna Meubel Vervaardigers (Edms) Bpk v Makin* (1977 (4) SA 135 (W) at 137A-F), in which the procedure to be followed in determining the extent of a departure from the ordinary rules in cases of urgency is set out.
- 7 However, Mr. Bester's argument did not engage the overriding consideration in any urgent application: whether the applicant will achieve substantial redress at a hearing in due course. That question must be answered on the facts as the Epic Outdoor alleges them. In this case, those facts plainly sustain a claim of urgency. Epic Outdoor built Mr. Paterson up as an industry expert, and in doing so gave him access to confidential information he would

not otherwise have had. In return, Mr. Paterson signed a contract containing a restraint of trade and an undertaking that he would not share Epic Outdoor's confidential information if and when he left employment with it. The restraint of trade endures for a year. If the restraint is valid and enforceable, then time is of the essence. A hearing in the ordinary course, and any time that may be necessary to consider judgment after that hearing, may well take up the whole of the period during which the restraint would otherwise be enforced. Plainly, that will deny Epic Outdoor substantial redress.

- 8 The question of whether Epic Outdoor has complied with urgent court practice directions, and the principles set out in case law dealing the enrolment of urgent applications, is secondary to this consideration. It may have been different had any non-compliance been shown to have so prejudiced Mr. Paterson and Network X as to have deprived them of a reasonable opportunity to present their case. But that was not shown. The matter is clearly urgent.

Standing

- 9 The second preliminary issue Mr. Bester raised was Epic Outdoor's standing. The applicant in this case is Epic Outdoor Media Sales (Pty) Ltd. There is another company, to which the applicant is related. It is called Epic Outdoor Media (Pty) Ltd. The founding affidavit in this case is deposed to by Mr. Darren McKinon. Mr. McKinon is not a director of the "Media Sales" company. He is a director of the "Outdoor Media" company. The header on the applicant's founding papers refers to the "Outdoor Media" company, not the "Media Sales" company. In the founding affidavit itself, however, Mr.

McKinon confirms that the applicant is in fact the “Media Sales” company. But he does not claim to be a director of the “Media Sales” company. He says that he is a director of the “Outdoor Media” company.

10 In a Rule 7 notice, Mr. Paterson took the point that Mr. McKinon was not authorised to bring the application on behalf of the “Media Sales” company, no doubt because he is not a director of it. This was met with a resolution of the “Media Sales” company authorising Mr. McKinon to act on behalf of the “Media Sales” company, notwithstanding the fact that he is not a director of it.

11 Mr. Bester argued that this did not resolve the issue, because the entity cited in the founding papers was not the “Media Sales” company, but the “Outdoor Media” company. But that is plainly not so. Even though the header on the founding papers appears to refer to the “Outdoor Media” company, the founding affidavit makes crystal clear that the applicant is in fact the “Media Sales” company. Epic Outdoor says that the incorrect reference to the “Outdoor Media” company in the headers was a typing error. That is plainly what it was.

12 What Mr. Bester sought to make of all of this took some probing at the hearing. In the end, the point seemed to be that the wrong company was in fact before me, and that no relief could be granted for that reason. As should be abundantly clear by now, that contention is far-fetched. This application was always brought by and on behalf of the “Media Sales” company.

The confidential information

- 13 There is no real dispute between the parties that the confidentiality clauses in Mr. Paterson's contract are valid and binding. Mr. Paterson has in fact given written undertakings to abide by them. For its part, Network X has undertaken not to ask Mr. Paterson to break them.
- 14 Ms. Bosman, who appeared for Epic Outdoor, argued that these undertakings are insufficient. I agree. Network X is now Mr. Paterson's employer. Whether or not Network X asks him to feed it confidential information, Mr. Paterson has a clear incentive to do so, and there are no apparent consequences for Network X if it allows him to do so without making an explicit request.
- 15 At the hearing of the matter, Network X agreed to be bound by a stronger set of undertakings. These are that Network X will not keep or use any confidential information Mr. Paterson may offer to it, and that, if Mr. Paterson does seek to divulge any of the confidential information referred to in the confidential affidavit, Network X will inform Epic Outdoor of this. At that point, Epic Outdoor will have its remedies. This arrangement provides Epic Outdoor with more protection than it seeks in its notice of motion, and I intend to make an order that strengthens the relief sought in that respect.

The restraint of trade

- 16 However, the nub of this case is not whether Mr. Paterson should be restrained from divulging Epic Outdoor's confidential information to Network X. It is whether he should be permitted to stay in Network X's employment at all. Clause 2.1.4 of Mr. Paterson's contract contains the restraint of trade upon which Epic Outdoor relies. It states that Mr. Paterson will not "seek

employment from, or become employed by, or associated with or contracted to” a “Business Partner” or a “Competitor” of Epic Outdoor for a year after his employment comes to an end. Under the contract, a “Business Partner” is any “natural [or] juristic perso[n]” that Epic Outdoor “may collaborate with in order to conduct its Business and to render . . . services to Clients”. A “Competitor” is “any company, closed corporation [sic], firm or entity which engages in the same or similar Business as” Epic Outdoor. The restraint operates throughout South Africa.

17 It was ultimately accepted that Network X is a competitor of Epic Outdoor. Given the startlingly broad definition given to that term in the contract, it is hard to see how Network X could be defined otherwise. Indeed, the effect of the restraint clause is to make Mr. Paterson unemployable in the outdoor advertising industry, and in at least some of its related industries, for a year after he leaves Epic Outdoor. Mr. Paterson has been employed in that industry for 10 years. The effect of enforcing the restraint, at its widest, is prevent him from using the untransferable skills and know-how he would have acquired during that period.

18 Every restraint of trade embodies a tension between two principles of public policy. The first is that, where it has been freely agreed, a restraint of trade is, just like any other contract, enforceable even if it results in some unfairness. The second is that individuals should generally be free to choose their trade or occupation. Both these principles enjoy at least some constitutional recognition. Freedom of contract – and accordingly the importance of enforcing contracts freely entered into – is an incident of the

right to dignity (see *Brisley v Drotsky* 2002 (4) SA 1 (SCA), paragraph 94). The right to choose a trade or profession is entrenched in section 22 of the Constitution, 1996.

19 The enforcement of every restraint of trade requires the reconciliation of these two principles in the context of a particular case (*Sunshine Records (Pty) Ltd v Frohling* (“*Sunshine Records*”) 1990 (4) SA 782 (A) 794C-E). The starting point is to identify any inequality of bargaining power between the parties to the restraint, before moving on to consider the consequences of enforcing the restraint for the party seeking to escape it, together with the consequences of declining to enforce the restraint for the party that seeks to rely on it. The central question is the extent to which a restraint is reasonable in the context in which it is to be enforced. A court is entitled to enforce the restraint only to the extent that it is reasonable to do so, and to ameliorate the restraint to the extent necessary to render it consistent with public policy (*Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A)). Where it is alleged that a restraint will operate too harshly on the party to whom it applies, that party bears the onus of demonstrating this on the facts (*Sunshine Records*, 795G-H).

20 In this case, the inequality of bargaining power is obvious: Mr. Paterson was an ordinary employee, and Epic Outdoor is a company of some substance that contracted him to work for it. It decided to promote him as an industry expert on terms that he could hardly refuse. In that context, I cannot accept that it is reasonable to shut Mr. Paterson out of the industry that he has worked in for the last 10 years solely in order to protect Epic Outdoor’s

confidentiality interests, especially if those interests are separately protected by the interdict I intend to grant.

21 Ms. Bosman urged me not to look at things this way, since all that is asked of me in this case is to prevent Mr. Paterson from working with Network X, not to exclude him from the whole of the industry in which Epic Outdoor is embedded. But I do not think I can take such a narrow view. Epic Outdoor's case is that its confidential information is effectively hardwired into Mr. Paterson. Notwithstanding the fact that Mr. Paterson will be interdicted from sharing facts, documents and other specific information about Epic Outdoor's sales strategies, pricing and analytic technologies with Network X, Ms. Bosman argued that the fact that Mr. Paterson has seen and worked with this information is enough to make its disclosure to Network X inevitable.

22 In these circumstances, Ms. Bosman submitted, the only way to protect Epic Outdoor's confidentially interests is to prevent Mr. Paterson from working with Network X. But if that is true of Mr. Paterson's employment with Network X, then it must also be true of Mr. Paterson's employment with any of Epic Outdoor's competitors. In other words, if I enforce the restraint in this case, there is no reason why it should not be enforced at its widest. It seems to me that I cannot blind myself to the broader effect of the restraint of trade in considering whether it should be enforced in this case.

23 In any event, I think that Ms. Bosman's submission elides the distinction between Epic Outdoor's confidential information and the skills and know-how Mr. Paterson has acquired while working with Epic Outdoor. It is reasonable

to restrain Mr. Paterson from using or disseminating the confidential information to which he had access in the course of his employment with Network X. It is not reasonable, in my view, to prevent Mr. Paterson from working with any of Epic Outdoor's competitors simply because he acquired special skills and know-how during his employment with Epic Outdoor. I have held elsewhere that a restraint of that nature is enforceable where an individual's particular skills and know-how are inseparable from the assets being sold as part of that individual's business. In that case, special skills and knowledge of the techniques of a business form part of the capital transaction. It is part of what is bought and sold. The purchaser may, in those circumstances, enforce a restraint against the seller of a business that prevents the seller from competing with the business sold or from being employed by any of its competitors, for a specific, reasonable period (see *ASI Capital (Pty) Ltd v Mann* (2022/059634) [2023] ZAGPJHC 26 (23 January 2023)).

24 But this case is not of that nature. Mr. Paterson sold his labour, and nothing more. If Epic Outdoor has any protectable interest in the special skills and know-how, or even the enhanced reputation as an expert with which it equipped Mr. Paterson during the course of his employment, the protection of that interest does not justify excluding Mr. Paterson from employment in an industry in which he has worked for 10 years. Mr. Paterson says that he is unemployable in a similar position outside that industry. He says that his efforts to find work outside the industry in October 2023 failed. Epic Outdoor cannot really gainsay this. During argument, Ms. Bosman suggested that Mr. Paterson could find employment with companies of a similar nature to those

which employed him before he entered the industry. But Mr. Paterson's entry to the industry having taken place so long ago, I do not think that is realistic.

25 Finally, it weighs with me that, upon learning of Mr. Paterson's intention to take up work with Network X, Epic Outdoor did not immediately object in principle to Mr. Paterson moving there. This initial flexibility appears to me to be consistent with clause 2.4 of Mr. Paterson's contract with Epic Outdoor, which empowers Epic Outdoor to relax the restraint of trade if Mr. Paterson's employment with one of its competitors or partners is deemed to be "of low risk" to its interests. It follows that the contract itself envisages that the interests underpinning the restraint may be protected by something short of a total ban on Mr. Paterson being employed with any of Epic Outdoor's competitors or partners. If that is so, then enforcing the restraint is not intrinsically necessary. It is only necessary insofar as it protects another of Epic Outdoor's specific and identified interests. It seems clear to me that the interest at stake in this application is the protection of Epic Outdoor's confidential information. Once that is adequately protected by the interdict I intend to grant, the terms of the contract themselves, taken together with Epic Outdoor's initial failure to object to Mr. Paterson's move to Network X, suggest that there is little underlying need to discontinue Mr. Paterson's employment there.

26 Epic Outdoor has accordingly identified no basis on which to restrain his employment with Network X *per se*.

Costs

27 Mr. Paterson and Network X made common cause in opposing this application. The undertakings they gave in relation to Epic Outdoor's confidential information were objectively insufficient, and a hearing before me was necessary to delineate the relief to which Epic Outdoor is entitled. At that hearing, Mr. Paterson and Network X belaboured two preliminary contentions that were transparently without merit, wasting a great deal of time in a busy urgent court. They must bear the costs of this application jointly and severally.

Order

28 For all these reasons –

28.1 The first respondent is interdicted and restrained from divulging the applicant's confidential information to the second respondent or any third party.

28.2 The second respondent is interdicted and restrained from seeking, possessing, using or disseminating any of the applicant's confidential information that may be conveyed to it by the first respondent.

28.3 If the first respondent offers to disclose, or in fact discloses, any of the applicant's confidential information to the second respondent, the second respondent will forthwith inform the applicant, setting out -

28.3.1 the date and time of the disclosure or the offer to disclose;

28.3.2 the nature of the information offered or disclosed; and

28.3.3 the steps the second respondent took thereafter in dealing with that information or the offer to disclose it.

28.4 The first and second respondents are directed, jointly and severally, the one paying the other to be absolved, to pay the costs of this application.

S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading to Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 18 March 2024.

HEARD ON: 12 March 2024

DECIDED ON: 18 March 2024

For the Applicant: P Bosman
Instructed by Christelis Artemides Attorneys

For the Respondents: B C Bester
Instructed by Warrener De Agrela and Associates Inc