REPUBLIC OF SOUTH AFRICA

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IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2023-024313

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: NO

Date: 11 April 2023 E van der Schyff

In the matter between:

ARTEFLEX (PTY) LTD APPLICANT

and

FRANS PIETERS FIRST RESPONDENT

IKONIC INTERIORS CC SECOND RESPONDENT

JUDGMENT

Van der Schyff J

**Introduction**

[1] The applicant (‘Arteflex’) launched an urgent application for final relief primarily seeking to enforce a restraint of trade clause contained in the employment contract concluded between itself and the first respondent, Mr. Pieters. Arteflex, in addition, relies on what it described as ‘the implied term of every contract of employment that an employee will not use or divulge confidential information acquired during her contract of employment for his benefit or to the detriment of his employers and that such terms bind the employee even after he has left the services of the employer.’

[2] I regard the application as sufficiently urgent to deal with in the urgent court.

[3] Arteflex seeks an order in the following terms:

i. That the first respondent be interdicted and restrained for a period of eighteen months from engaging directly or indirectly, in any capacity whatsoever, including in the capacity of shareholder, partner, member of a closed corporation, including the second respondent or director of a company, in any business trading in competition with the applicant’s business specifically relating to the Dischem Pharmacies Group, Medforum Mediclinic, and Baby City;

ii. That the first respondent be ordered to terminate any and all involvement with the applicant’s customers Dischem Pharmacies Group, Medforum Mediclinic, and Baby City and the applicant’s suppliers known as Clean Cut Glass, KK Shelving (Pty) Ltd, and Heinmor Wire Products, whether directly or indirectly, until 9 June 2024;

iii. That the first respondent be interdicted and restrained from using, disclosing or divulging to any entity or person any confidential information of the applicant, which information shall include but not be limited to customer database, purchasing strategies and sales strategies, *modus operandi*, marketing strategies, pricing structures, discount structures, profit margins, the identity of potential customers and target markets, priority structures, preferential pricing, credit worthiness of customers, credit terms and action plans;

iv. That the first respondent be ordered to return all forms of confidential information belonging to the applicant, and remove and destroy any of the applicant’s confidential information in hard or electronic form;

v. That the second respondent be interdicted and restrained from unlawfully competing with the applicant by utilising or benefitting from any confidential information of the applicant provided by the first respondent to the second respondent; and

vi. That the second respondent be interdicted and restrained from interfering in the applicant’s existing customer relations through the unlawful utilization of the applicant’s confidential information.

**The facts**

[4] Mr. Pieters was employed by Arteflex as a project manager since 2017. He was employed as a general manager and concluded a written contract of employment in this regard, in 19 August 2021. Mr. Pieters terminated his employment relationship with Arteflex, and his last working day was on 9 December 2022.

[5] Arteflex is mainly a shopfitting, construction, general building, and maintenance service-providing company. Prior to his employment with Arteflex, Mr. Pieters was employed as a project manager by one of Arteflex’s competitors. Mr. Pieters has been involved in shopfitting, general construction, and project management for most of his ‘adult life’. He was a skilled and experienced craftsman who had knowledge of the industry before being employed by Arteflex. He had established relationships with suppliers and other stakeholders in the industry before being employed by Arteflex. He developed business connections with employees of the Dischem Group as a result of his employment with Arteflex.

[6] Arteflex’s main client is the Dischem Group, comprising of Dischem Pharmacies, Medforum Mediclinic, and Baby City. Dischem Pharmacies became a customer of Arteflex in 2019, Medforum Mediclinic in 2021, and Baby City in 2022. During his employment with Arteflex, Mr. Pieters had access to the Arteflex’s supplier’s contact details and pricing structures. He was involved in the tender process pertaining to projects issued by the Dischem Group, and was aware of profit margins and payments made in relation to projects.

[7] It is relevant to take note of the fact that although the Dischem Group is Arteflex’s main, and often sole, client, the Dischem Group contracts with a number of service providers and considers tenders for numerous projects annually. The Group uses multiple suppliers.

[8] During January 2023, Mr. Kobus Swart, a project manager of the Dischem Group, was informed by Arteflex’s managing director that Mr. Pieters resigned from his employment with Arteflex and that he is bound to a restraint of trade and confidentiality agreement in favour of the Arteflex.

[9] In February 2023, Arteflex discovered email correspondence between Mr. Pieters and a supplier indicating that Mr. Pieters is involved in a project at Medforum Mediclinic. Material was ordered through the second respondent for delivery at Medforum Mediclinic. In March 2023, Arteflex was informed that the respondents are busy building a hair salon inside a Dischem Pharmacy in Centurion, thus directly competing within its business sphere.

[10] The respondents do not deny dealing with the Dischem Group after Mr. Pieters resigned, although they deny being involved in a project at the Dischem Pharmacy in Centurion. They confirm that they were involved in a project at Mediclinic Medforum after being approached by the Group to conduct certain interior construction at one of its stores.

[11] Disputes of fact exist regarding –(i) whether Mr. Pieters refused to attend an exit interview or hand-over meeting during December 2022 and whether he was, in fact, requested to attend such meeting. Arteflex is not clear on whether Mr. Pieters failed to attend a meeting, or whether he failed to answer the calls made in order to arrange such a meeting; (ii) whether the respondents have any confidential information of the applicant in their possession or under their control; and (iii) whether the respondents are involved in shopfitting a hair salon at a Dischem Pharmacy in Centurion.

**The parties’ main contentions**

[12] Arteflex’s primary contention is that Mr. Pieters is bound to, and is contravening the confidentiality and restraint of trade clauses in the employment agreement. In addition, Arteflex submits that Mr. Pieters is bound to a common law fiduciary duty not to compete unlawfully with it. Arteflex regards the respondents’ involvement with the Dischem Group as proof that Mr. Pieters is in breach of the said clauses of the employment agreement, and his fiduciary common law duty towards Arteflex.

[13] Arteflex focused its submissions on the relief it sought and on the extent to which it wants to enforce the restraint, and submitted that the respondents are not correct when they submit that the restraint will effectively prevent them from engaging in any shopfitting and constructing business in the country.

[14] The respondents submit that the interpretation afforded to the restraint of trade clause by Arteflex that underpins the relief sought, exceeds what was contractually agreed to by the parties. The respondents contend that clause 6 of the employment agreement does not prohibit them from rendering services in competition with Arteflex. The respondents interpret the clause to constitute a non-solicitation clause, and nothing more. Counsel for the respondents submitted that since the respondents were contacted by Mr. Swart of the Dischem Group to do work for the Group, they did not solicit the Dischem Group, and as a result, Mr. Pieters did not contravene the agreement. The respondents, in addition, submit that the restraint of trade clause is unreasonable and unfair considering the duration and geographical area of its applicability. These issues will be dealt with in the discussion below.

[15] The respondents’ contention that the employment contract lapsed, is without merit. Clause three of the agreement providing that ‘This appointment is subject to the employer being provided with the following documents or affidavit (if applicable) by the employee…’ is not a suspensive condition. It is common cause that the first respondent was appointed, and employed as the applicant’s general manager from 19 August 2021 until 9 December 2022, after initially being employed by the applicant as project manager from 1 April 2017.

[16] Mr. Pieters’s general claim that he did not understand the implications of the employment agreement because it was not explained to him and that he merely signed the agreement as a formality does not constitute a defence in the absence of any allegation regarding mistake, duress, or misrepresentation.

**The restraint of trade clause**

[17] Clause 6 of the employment contract concluded between the parties provides as follows:

‘Employees shall not solicit any current customer or potential customers of the Employer identified during the course of employment with Employer, or otherwise divert or attempt to divert any existing business of the Employer. Employee will not, either during employment with Employer or for a period of two years thereafter, either directly or indirectly, for Employee or any third party, solicit, induce, recruit, or cause another person in the employ of Employer to terminate his/her employment for the purpose of joining, associating or becoming employed with any business or activity which is in competition with any products and/or services sold, marketed or provided by Employer. The geographical area to which this non-competition agreement applies is any area in which Employer currently solicits or conducts business, and/or any area in which Employer plans to solicit or conduct business for a period of two years after Employee leaves employment with Employer. Both parties agree that the time and scope of this restraint of trade agreement is reasonable.’

[18] Since the applicant based this application on both the restraint of trade clause and the confidentiality clause, and because a single clause in a contract cannot be interpreted in isolation but needs to be interpreted in the context of the contract as a whole, it is necessary also to have specific regard to the following relevant excerpt of the confidentiality clause:

‘5.1 The Employee acknowledge[s] that during the course of his employment the Employee will have access to and will be entrusted with important details and aspects of the Company’s business, including the manner in which it operates as well as other confidential information. Employees shall not-

5.1.1 either during the continuance of his employment by the company or at any time thereafter disclose any important details, confidential information or trade secret to any person nor will he use it for any purpose other than those of the Company;

5.1.2 at any time utilize, communicate or publicize any confidential information concerning the Company’s business in such manner as to prejudice the Company;

5.1.3 after the termination of his employment with the Company, take any advantage to the prejudice of the Company, of any personal relationship of confidence with a customer or an employee of the Company, established during his employment with the company.’

**Discussion**

[19] The incorporation of restrictive covenants in employment contracts is not novel. Govindjee and Bhat[[1]](#footnote-1) explain that employers always want to retain efficient employees, a desire much more pronounced in competitive industries where key employees are not only valuable to their employer, but where a potential threat arises if they leave the business and begin to work for a rival, or as a rival. An employer is, however, entitled to approach the court for interdictory relief irrespective of the existence of a restrictive covenant where a former employee misuses trade secrets, knowledge of secret processes, or business connections to unlawfully compete with its former employer. [[2]](#footnote-2)

[20] In interpreting clause 6 of the employment agreement, the starting point is that parties are presumed to intend what they have, in fact, written down. The court, in interpreting the clause in the context of the employment agreement as a whole, is attempting to give effect to the intention of the parties to the contract. The well-known and often quoted exposition of the law relating to the interpretation of documents by Wallis JA in *Natal Joint Municipal Pension Fund v Endumeni Municipality,[[3]](#footnote-3)* finds application:

‘Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.’

[21] There are various types of post-employment restraints and restrictions. Restraint of trade clauses are not generic, and, parties sculpt restraint of trade clauses, like any other contractual clauses, to their specific needs. Hence, the specific manner in which a clause is phrased determines the extent and scope thereof. Restraint of trade clauses generally have two aspects, a non-compete clause prohibiting an employee from having an interest in being employed by, or as, a competitor, and a non-solicitation clause, preventing an employee from taking clients away from the employer.

[22] I agree with the respondents that clause 6 of the employment contract, although titled ‘restraint of trade’ and referred to in clause 6 as a ‘non-competition agreement’, factually constitutes a non-solicitation clause.

[23] The essence of non-solicitation clauses is aptly explained in an insightful article by Wyborn *et al*.[[4]](#footnote-4) The discussion equally applies to the South African context, with the *proviso* that in South Africa, we must incorporate the impact of the Constitution into the discussion*.* A non-solicitation clause is concerned with protecting a business’ proprietary interests in the event of a former employee setting up or joining a competing business. Non-solicitation clauses recognise that relationships with clients and suppliers often take significant time and investment to build, and as a result, are assets for a business. Employees often develop strong relationships with clients and suppliers during the course of their employment, particularly where they have regular contact.

[24] As with any other restraint in the employment context, the prohibition on solicitation must not go further than what is reasonably necessary to protect the business interest.[[5]](#footnote-5) *In casu,* the clause, as it stands in the agreement, is extremely broad. It prohibits the solicitation of any current or potential customers identified during the course of employment with the employer, for a period of two years, and it extends to the geographical area in which Arteflex currently solicits or conducts business and any area in which Arteflex plans to solicit or conduct business for a period of two years after Mr. Pieters’s resignation. By including not only current but potential customers and extending the geographical area of the restraint not only to the areas wherein the Arteflex currently solicits or conducts business but also any area where Arteflex plans to conduct or solicit business for the period of two years after Mr. Pieters left his employment with Arteflex, the restraint goes beyond what is reasonably necessary to protect Arteflex’s legitimate business interest. It unduly curtails Mr. Pieters’ right to earn an income and infringes on his constitutionally protected right to choose his trade. By extending beyond what is reasonably necessary to protect Arteflex’s legitimate business interest, the contractually agreed limitation on Mr. Pieters constitutional right to choose his trade is not reasonable and justified in our open and democratic society based on human dignity, equality, and freedom. As a result, the restraint is contra public policy and unenforceable.

[25] Counsel for the applicant submitted that the applicant only wants to enforce the restraint partially. The restrain clause must, however, first withstand constitutional muster, before it will be enforceable, either as it stands or partially. The scope of the relief sought cannot render an otherwise unenforceable restraint clause, partially enforceable.

[26] Arteflex, however, also relied on the common law fiduciary duty of employees, and the confidentiality clause of the employment agreement in approaching the court. I am of the view that Mr. Pieters’ previous experience in the industry provided him with a broad general knowledge and skills enabling him to compete in the industry. His employment with Arteflex would merely have honed already existing general skills and deepened existing general knowledge. Mr. Pieters had established relationships with suppliers in the industry before he left his previous employer to join Arteflex. Pricing structures are impacted by prevailing economic circumstances and need to be adapted continually. Having said that, the current focused niche area of Arteflex is the construction and shopfitting of hair salons within Dischem Pharmacies and Baby City. Mr. Pieters’s connection with Mr. Swart, the project manager from the Dischem Group, is a direct result of his employment with Arteflex, as is his knowledge and insight regarding the construction and shopfitting of hair salons within Dischem Pharmacies and Baby City. He obtained specialised knowledge through his employment with Arteflex in addition to his existing general knowledge. Mr. Pieter’s knowledge regarding the construction and shopfitting of hair salons for the Dischem Group is indeed confidential and it would be unjust to allow him to utilise this knowledge in competing with Arteflex.

[27] Arteflex has established that it has a clear right that Mr. Pieters be prohibited from using the knowledge he obtained in his employment with Arteflex to construct and shopfit hair salons for the Dischem Group in competition with Arteflex. This right is underpinned by Mr. Pieter’s common law fiduciary duty as former employee and clause 5.1.3 of the employment agreement. If the respondents were to construct and shopfit hair salons for the Dischem Group, they would utilise business connections, and information obtained because Mr. Pieters was employed by Arteflex and conducted the business he conducted whilst in their employment.

[28] Due to the relationship between Mr. Pieters and employers of the Dischem Group, which already resulted in the respondents being contracted to do work for the Dischem Group, Arteflex succeeded in making out a case that it is reasonable to apprehend that the respondents may be awarded contracts for the construction and shopfitting of hair salons to the exclusion of Arteflex. The respondents admitted their dealings with Dischem Group without explaining the nature of the projects they are involved in.

[29] There is no alternative remedy to protect Arteflex’s business interests. A damages claim is not to be regarded as an alternative remedy in these circumstances because it applies only after the fact, and cannot prevent the injury from occurring.

[30] As for costs, the applicant is the successful party and there is no reason to deviate from the principle that costs follow the event. Seen, however, that the relief granted is a far cry from the extent of the relief sought, I am of the view that it is just to curtail the costs that the respondents are liable for.

**ORDER**

**In the result, the following order is granted:**

**1. The application is considered as an urgent application in terms of Rule 6(12) of the Uniform Rules of Court and any non-compliance with the Rules of Court is condoned;**

**2. The respondents are interdicted and restrained for a period of 6 months from the date of this order, from engaging in any capacity whatsoever with the Dischem Group (Dischem Pharmacies, Medforum Mediclinic or Baby City) regarding the construction and/or shopfitting and/or maintenance of any hair salon;**

**3. The respondents shall, jointly and severally, the one paying the other to be absolved, pay 75% of the applicant’s taxed or agreed costs of the application, on the scale as between party and party.**

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E van der Schyff

Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

For the applicant: Adv. ASL Van Wyk

Instructed by: Hendrik Haasbroek Attorney

For the respondent: Adv FJ Labuschagne

Instructed by: EW Serfontein Attorneys

Date of the hearing: 5 April 2023

Date of judgment: 11 April 2023

1. Govindjee A, and Bhat S. ‘Restrictive Covenants in Employment Contracts: A Comparison between the Legal Positions in India and South Africa’ 2008 National Law School of India Review Vol 20, Issue 1, 46-61, 46. [↑](#footnote-ref-1)
2. *Phillips v Fieldstone Africa (Pty) Ltd and another* 2004 (3) SA 465 (SCA), *Sibex Construction (SA) (Pty) Ltd and another v Injectaseal CC and others* 1988 (2) SA 54 (T). [↑](#footnote-ref-2)
3. 2012 (4) SA 593 (SCA) at para [18]. [↑](#footnote-ref-3)
4. Wyborn J, Wet-Froy N and Pain S. ‘Restraints of trade in the employment context 03: Understanding non-solicit clauses’ https://www.lexology.com/library/detail.aspx?g=5fc33a1f-5c68-401c-9bf1-9401f9830625 accessed on 8 April 2023. [↑](#footnote-ref-4)
5. *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA). [↑](#footnote-ref-5)