THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: J1328/23

In the matter between

G4S SECURE SOLUTIONS (SA) (PTY) LTD **Applicant**

and

JUSTIN CORNELIUS CHETTY **First Respondent**

BIDVEST PROTEA COIN (PTY) LTD **Second Respondent**

Heard: **27 October 2023**

Delivered: **22 March 2024**

Summary: **Urgent application – The Applicant amongst others, seeks a final order (interdict) enforcing the terms of a restraint of trade and confidentiality clauses contained in an employment agreement against a former employee.**

This judgment was handed down electronically and was circulated to the legal representatives of the parties. The date and time for hand down is deemed to be 22 March 2024, 10:00 am.

JUDGMENT

MORGAN, AJ

Introduction

[1] This matter came as an urgent application, wherein the Applicant (G4S Secure) *inter alia*, seeks a final order (interdict) enforcing the terms of a restraint of trade and confidentiality clauses contained in the employment agreement between G4S Secure and the First Respondent (Mr Chetty). The contractual undertakings sought to be enforced by G4S Secure against Mr Chetty were given in favour of G4S Secure upon the conclusion of the employment agreement.

[2] Upon the termination of the employment agreement with G4S Secure, Mr Chetty joined the employ of the Second Respondent (Bidvest Coin) as a Regional General Manager. G4S Secure learnt of his new employment with Bidvest Coin and brought this urgent application.

[3] The second respondent, Bidvest Coin, delivered its notice to abide by the decision of this Court and thus did not participate in the proceedings of this case.

Relevant background facts

[4] The common cause facts are set out *infra*.

4.1. On 11 March 2019, Mr Chetty entered into an employment agreement with G4S Secure in the position of Regional Technology Manager, which contained a restraint of trade and confidentiality clauses.

4.2. Mr Chetty formally resigned from the position of Regional Technology Manager on 30 November 2021 and transferred to Durban in the position of Business Development Manager on 6 December 2021.

4.3. Mr Chetty resigned from his employment with G4S Secure on 31 July 2023, effective 31 August 2023.

4.4. The separation or termination of the contractual employment relationship between Mr Chetty and G4S Secure was mutually agreed to and amicable.

4.5. Mr Chetty had not performed any adverse act or conducted himself in bad faith against G4S Secure to give G4S Secure the impression or suspicion that he was to breach the restraint of trade and confidentiality clauses of the agreement sought to be enforced by either approaching or soliciting G4S Secure's clients. In other words, he had not been in breach of the terms nor had G4S Secure suffered any actual or perceived harm in their operations or profitability after he joined Bidvest Coin nor have they proven to have lost the clients with whom Mr Chetty was working with since he left G4S Secure's employ to the Bidvest Coin.

4.6. Bidvest Coin is a competitor of G4S Secure and both are arguably the biggest role players in their specialised and high-risk industry. Both entities specialise in the provision of security products, services, and integrated cash management solutions.

[5] In the main, what G4S Secure simply seeks in these proceedings is to prevent the possibility of losing the clients that Mr Chetty worked with and seeks to enforce the restraint of trade during the year which Mr Chetty would have been restrained from working with any of its competitors within the Republic of South Africa.

[6] Mr Chetty argues that he was not privy to any of G4S Secure's confidential information nor was he in a position to poach or take away G4S Secure's customers. Further that G4S Secure has failed to demonstrate in its papers that it has any proprietary interests worthy of protection in the context, role and occupation Mr Chetty held. He further contends that his predecessor who held the exact position at G4S prior to joining Bidvest Coin was able to join Bidvest Coin without G4S enforcing the same contractual terms of restraint of trade sought to be enforced in this application notwithstanding that they

occupied the same position. This argument seems to me as if Mr Chetty contends that G4S unfairly discriminated against him and did not exercise its discretion consistently.

Urgency

[7] The parties came to this Court on an urgent basis. I heard the Applicant's case on urgency and found that they had satisfied the test of urgency. However, the complexity of the substantive issues in this matter warranted proper consideration, hence judgment was reserved.

The relevant legal principles

[8] In the broadest terms, South African contract law recognises restraints of trade clauses within contracts that limit a party's ability to compete with another after the contract terminates. While generally upheld under the principle of *pacta sunt servanda* (agreements must be kept), enforceability hinges on reasonableness. Courts apply a proportionality test, balancing the employer's legitimate protectable interests, such as confidential information or client relationships, against the employee's right to earn a livelihood. The restraint's geographical scope and duration must be narrowly tailored to the specific interest protected, ensuring it is no wider than necessary.

[9] The Labour Appeal Court in *Bonfiglioli SA (Pty) Ltd v Panaino*[1] stated:

> 'The restraint agreement is therefore geared at protecting the employer's proprietary interest after the employee has left the employer's employment. In *Reeves & another v Marfield Insurance Brokers CC & another*, the object of a restraint of trade term was described as follows:

[1] [2014] ZALAC 59; (2015) 36 ILJ 947 (LAC) at para 24.

> "The legitimate object of a restraint is to protect the employer's goodwill and customer connections (or trade secrets) and the restraint accordingly remains effective for a specified period (which must be reasonable) after the employment relationship has come to an end..."'

[10] The aim of a restraint of trade clause is to protect the economic interests of an employer after an employment contract has been terminated. These economic interests can range from trade secrets, confidential information, client lists and strategic business plans.[2]

[11] The Appellate Division in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*[3] held that a restraint of trade provision is valid in principle and will be enforceable, provided that it is not contrary or offensive to public policy and thus unreasonable.[4] If such a clause is found to be contrary to public policy, it would be unenforceable (not void).

[12] Thus, at the heart of restraint of trade are two pivotal considerations: freedom of trade and the sanctity of contract. The former, freedom of trade, is constitutionally protected under section 22 of the Constitution of the Republic of South Africa, 1996 (Constitution).[5] The sanctity of contract, flowing from the principle of *pacta sunt servanda* (agreements, freely and voluntarily concluded, must be honoured), is a "*profoundly moral principle, on which the coherence of any society relies*".[6]

[13] The majority of the Constitutional Court in *Barkhuizen v Napier*[7] recognised that the principle of *pacta sunt servanda* gives effect to the "*central constitutional values of freedom and dignity*".[8] This is because the principle —

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[2] See: *Reeves and another v Marfield Insurance Brokers CC and another* 1996 (3) SA 766 (A) and *Reddy v Siemens Telecommunications (Pty) Ltd* [2006] ZASCA 135; 2007 (2) SA 486 (SCA) (*Reddy*).
[3] 1984 (4) SA 874 (A).
[4] Ibid at 895D.
[5] Section 22 of the Constitution reads:
'Freedom of trade, occupation and profession
Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.'
[6] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at para 87.
[7] Ibid.
[8] Ibid at para 57.

> 'gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.'

[14] Recently, in *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*[9], the majority of the Constitutional Court held that *"[p]acta sunt servanda is thus not a relic of our pre-constitutional common law. It continues to play a crucial role in the judicial control of contracts through the instrument of public policy, as it gives expression to central constitutional values*".[10] It further held:

> 'The fulfilment of many of the rights [and] promises made by our Constitution depends on sound and continued economic development of our country. Certainty in contractual relations fosters a fertile environment for the advancement of constitutional rights. The protection of the sanctity of contracts is thus essential to the achievement of the constitutional vision of our society. Indeed, our constitutional project will be imperilled if courts denude the principle of *pacta sunt servanda*.'[11]

[15] Thus, restraint of trade requires a delicate balance between several constitutionally protected interests. Without more, a restraint of trade does not infringe on the constitutional right to freedom of trade.[12] This is because "[*t]he Constitution does not take such a meddlesome interest in the private affairs of individuals that it would seek, as a matter of policy, to protect them against their own foolhardy or rash decisions*".[13]

[16] While individuals generally enjoy the right to freely engage in business, the principle of upholding agreements (that is, freedom of contract) takes precedence as a core societal value. Public policy, as defined by the Constitution and its fundamental principles, prioritises the sanctity of

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[9] [2020] ZACC 13; 2020 (5) SA 247 (CC).
[10] Ibid at para 83.
[11] Ibid at para 85.
[12] *Reddy* at paras 15-16.
[13] *Knox D'Arcy Ltd and another v Shaw and another* 1996 (2) SA 651 (W) at 660C.

contracts.[14] However, this is not absolute. If enforcing a specific restraint of trade clause from a contract would be deemed unfair or unreasonably restrictive, it might not be upheld despite initial agreement. The burden of demonstrating that enforcing the restraint is against public policy lies with the party challenging the clause, typically the employee.[15]

[17] Determining the reasonableness of a restraint of trade often involves a three-pronged analysis: the nature of the activity being restricted, the geographic scope of the restriction and the duration of the restriction. All three factors are considered together to assess whether the clause is reasonable.[16]

[18] This Court in *A J Charnaud & Co (Pty) Ltd v van der Merwe and Others*[17] set out the approach to be taken in restraint of trade cases:

> 'In short, the logical sequence that applies in the case of an employer (the applicant) seeking to enforce a restraint against an employee, is firstly to prove the existence of a restraint obligation that applies to the employee. Secondly, if a restraint obligation is shown to exist, the employer must prove that the employee acted in breach of the restraint obligation imposed by the restraint. Finally, 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.'

[19] Determining the enforceability of a restraint of trade in South Africa hinges on a multi-faceted analysis established in the landmark case of *Basson v Chilwan and Others*[18] (*Basson*). This analysis comprises the following questions: (a) Does the employer have a legitimate interest needing protection, like confidential information? (b) Does the employee's post-employment activity pose a potential threat to this interest? (c) When weighing these interests, does the employer's need for protection outweigh the

[14] *Brisley v Drotsky* [2002] ZASCA 35; 2002 (4) SA 1 (SCA) at paras 91 - 95 and *Price Waterhouse Coopers Inc and others v National Potato Co-operative Ltd* 2004 6 SA 66 (SCA) at para 24.
[15] *Sunshine Records (Pty) Ltd v Frohling and others* 1990 (4) SA 782 (A) at 795G-H. See also: *New Reclamation Group (Pty) Ltd v Davies and another* 2014 ZAGPJHC 63 at para 4.
[16] See: R. H. Christie, G. Bradfield, '*Christie's Law of Contract*', 8th ed LexisNexis at p 459.
[17] [2020] ZALCJHB 1; (2020) 41 ILJ 1661 (LC) at para 56.
[18] [1993] ZASCA 61; 1993 (3) SA 742 (A) at 767G-H.

employee's right to work freely in their chosen field, considering their potential economic hardship? (d) Beyond the specific employer-employee relationship, are there broader public policy concerns that influence the decision? (e) Lastly, as set out in *Kwik Kopy (SA) (Pty) Ltd v van Haarlem and Another*[19], does the restraint extend beyond what is strictly necessary to safeguard the employer's interest?

[20] In the context of restraints of trade, a concept known as "dual onus" applies. This means the burden of proof shifts between parties during the legal process. Initially, the applicant (usually seeking enforcement) must demonstrate three things: the existence of a restraint clause in the contract, that the clause applies to the respondent (typically challenged by the restraint), and that the respondent has breached the terms of the clause. Once these elements are established, the burden shifts to the respondent to prove why enforcing the restraint would be unreasonable. This can involve arguments based on the restraint being excessively restrictive, geographically or temporally broader than necessary, or lacking a legitimate reason for enforcement (e.g. no protectable interest on the employer's side). This two-stage approach ensures a balanced evaluation, allowing both parties to present their arguments within the legal framework.[20]

[21] When an employer seeks to enforce a restraint of trade, they generally only need to present the agreement and demonstrate a breach of its terms, as seen in the case of *New Justfun Group (Pty) Limited v Turner and others*[21] (*New Justfun*). Regarding customer connections, the court held that the employer only needs to show that such connections exist and have the potential to be exploited by the former employee.[22]

[22] Similarly, for confidential information, the burden shifts to the employee to prove they lacked access to such information or never acquired significant knowledge of the employer's customers during their employment. The

[19] 1999 (1) SA 472 (W) at 484E.
[20] See: *Dickinson Holdings Group (Pty) Ltd and Others v Du Plessis and Another* (2008) 29 ILJ 1665 (N) at para 89 and *Bridgestone Firestone Maxiprest Ltd v Taylor* [2003] 1 All SA 299 (N) at 302J-303B.
[21] [2014] ZALCJHB 177; (2018) 39 ILJ 2721 (LC).
[22] Ibid at paras 13 - 14.

employer only needs to establish the existence of secret information accessible to the employee, theoretically allowing them to share it with a new employer. Ultimately, the responsibility falls on the employee to demonstrate they did not possess this information or substantial customer knowledge, balancing the burden of proof in such cases.[23]

[23] I will now apply the five elements identified above in turn below.

Application of the law

Protectable Interest

[24] In the first stage of the *Basson* test, which determines the enforceability of a restraint of trade, two key types of proprietary interests qualify for protection:

24.1. Trade Secrets: This encompasses any confidential information that benefits the business and, if disclosed to a competitor, could grant them an unfair advantage. These secrets may include formulas, customer lists, or sensitive marketing strategies.

24.2. Client/Consumer Connections: This refers to the established relationships with customers, potential customers, suppliers, and other parties that contribute to the overall goodwill of the business. These connections are considered intangible assets and deserve protection from unfair exploitation by former employees.

[25] Whether information constitutes a trade secret is a factual question. For information to be confidential it must be –

25.1. capable of application in trade or industry, that is useful and not be public knowledge and property;

[23] Ibid at para 20.

25.2. known only to a restricted number of people or a closed circle; and of economic value to the person seeking to protect it.

[26] The Labour Court in *Massmart Holdings v Vieira and another*[24] asseverated that a restraint of trade will be unreasonable where there is no proprietary interest of the party seeking to enforce this restraint. As highlighted in *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjies and another*[25], a restraint of trade is valid and enforceable where there is a proprietary interest that justifies protection.[26] A restraint would be an enforceable restriction and limitation on the trade of an employee who had access to the company's customers and clients and could use such relations with the customers to advantage a competitor to the detriment of the company.[27]

[27] G4S Secure, argues the protectable interest is both, its confidential and proprietary information and consumer connections. In the first instance, G4S Secure alleges that Mr Chetty had access to the protectable interest in its confidential and proprietary information that has economic value to it. Further that Mr Chetty was exposed to confidential and proprietary information during his employment with G4S Secure. In its founding affidavit, the information is listed as follows:

'47.1. Information in relation to the technology solutions offered by G4S to its customers including the components of such solutions, the way in which its solutions are structured, the costing of its solutions including the individual cost elements such as labour costs, technology costs and the gross margin charged by G4S and the customer base.

47.2. Information in relation to the existing customers of G4S including their requirements, the solutions provided to them and the cost of such solutions both on the technology side and the manned guarding and access control side.

[24] [2015] ZALCJHB 451 (3 November 2015) at para 4.
[25] [2011] ZALCJHB 150; (2012) 33 ILJ 629 (LC) (*Continuous Oxygen*).
[26] See: *Globeflight Worldwide Express SA (Pty) Ltd v Grace and Another* (J1178/21) [2021] ZALCJHB 437.
[27] *Continuous Oxygen supra* at para 11.

47.3. The workforce management system offered by G4S to its customers including the components of such solutions, the way in which its solutions are structured, the costing of its solutions including the individual cos elements such as labour costs, technology costs and the gross margin charged by G4S and the customer base.

47.4. Information in relation to new and potential business opportunities being pursued by G4S.

47.5. Information of the strengths and weaknesses of the G4S product solution and offering, including pricing and discounts.

47.6. Information in relation to G4S's staff complement as well as their remuneration.

47.7. The sales and business development strategies of G4S in respect of all of its complete product and service offering.

47.8. Information relating to G4S suppliers, the on-boarding process, criteria to be a supplier of G4S, costing and the commercial terms that find application to suppliers.'

[28] G4S Secure further asserts that this information would be useful in the hands of a competitor of G4S Secure, such as Bidvest Coin. This is because the information is not public knowledge as it is not in the public domain and is instead industry specific. It also submits that the security services market in which G4S Secure and Bidvest Coin operate is highly competitive. It is alleged that this information would assist Bidvest Coin in competing with G4S Secure and allow it to lure and win over customers, thus financially harming G4S Secure and its business.

[29] In the second instance, G4S Secure contends that Mr Chetty had developed a relationship with various clients and customers of G4S Secure. To this end, it is alleged that these customers felt comfortable enough to share confidential

information with Mr Chetty pertaining to their security needs. He was the customers' first point of contact. In G4S Secure's words:

> 'Armed with these customer relationships. Mr Chetty would be in a position to approach the existing and potential customers of G4S to persuade them to place their business with Bidvest Coin instead of G4S. He is also able to target existing and maturing opportunities for G4S and to divert them away from G4S to Bidvest Coin.'

[30] Mr Chetty argues that G4S Secure has failed to prove that he was exposed to any confidential information. He alleges that he was not placed in possession of any formulae or designs or any special knowledge that would amount to an interest worthy of protection. Thus, Mr Chetty avers that G4S Secure does not satisfy the requirements of confidentiality. He argues that while he knows the workforce management system, called *XTime*, he does not have any knowledge of how to reproduce it and does not sell it. He acknowledges that while Bidvest Coin has a similar system, his position does not expose him to it and he does not work on it and does not sell it either.

[31] Mr Chetty also alleges that due to G4S Secure's business largely being based on a formal tender process, it has not been proven that he automatically carries the customers with him in his pocket, as set out in *Rawlins v Caravantruck (Pty) Ltd*.[28] He argues that G4S Secure's argument in this regard is a fiddle and that G4S Secure's argument turns on the view that Mr Chetty "would be" in a position to persuade these customers to place their business with Bidvest Coin.

[32] Arguing that there is no argument made out in relation to the customer list, Mr Chetty asserts that G4S Secure has not made a case that his personality, the frequency and duration of his contact with its customers, the place of such contact, the nature of his relationship with buyers and his knowledge of its customer's businesses was such that he could probably induce them to leave the applicant.

[28] 1993 (1) SA 537 (A) at 541D-H.

[33] There is merit to Mr Chetty's argument. G4S Secure has not proven that it has a protectable interest, worthy of protection against Mr Chetty. The factual concession made by G4S Secure that the information that Mr Chetty was exposed on its own, without Mr Chetty poaching actively approaching the clients would not lead to a competitive gain for Bidvest.

[34] In *New Justfun*, this Court perspicuously held:

> 'Proprietary interests that are legitimately capable of protection by a restraint agreement extend both to confidential matters which are useful for the carrying on of the business and which could be used by a competitor, if disclosed, to gain a relative competitive advantage, and to relationships with customers, potential customers, suppliers and others that go to make up what is referred to as the 'trade connection' of the business. The second kind of proprietary interest capable of protection is that which comprises confidential matter useful for the carrying on of the business, and which could be used by a competitor, if disclosed, to gain a relative comparative advantage. These are referred to as 'trade secrets…'[29]

[35] Thus, if there is no protectable interest that "*could be used by a competitor, if disclosed, to gain a relative competitive advantage*", then the restraint of trade is not enforceable, and it is unreasonable. G4S Secure has shown no competitive advantage that would directly arise from the knowledge that Mr Chetty allegedly has, outside of broad, unsubstantiated claims that the security industry is highly competitive. This is unhelpful.

[36] As Davis, J in *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff and Another*[30] held, citing Olivier, AJ in *Viamedia (Pty) Ltd v Sessa*,[31] a subjective view that information is confidential will simply not suffice. The Court stated:

> 'Information does not become confidential, and a process or practice does not become secret merely because Viamedia contends that they

[29] *New Justfun* at para 12. See: *Sibex Engineering Services (Pty) Ltd v Van Wyk and another* 1991 (2) SA 482 (T).
[30] (2009) 30 ILJ 1750 (C) at 1759E – G.
[31] *Viamedia (Pty) Ltd v Sessa* (unreported judgment of CPD case no: 8679/2008).

do – or, perhaps, even if Mr Sessa subjectively believed them to be so. It does not suffice for Viamedia to say that it has confidential information or trade secrets. **It must set out what they are and when and how Mr Sessa was exposed to them. It must set up the facts from which the conclusion could be drawn that something is indeed confidential or secret.**'

[37] The Court in *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronjé and Another*[32] held that the question of whether there is a protected interest must be evinced by the facts and applying the well-known principles for final relief in motion proceedings as set out in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*.[33]

[38] Having carefully considered the evidence presented by both parties in their respective affidavits, I find that even though G4S Secure could have been believed to possesses protectable interests (which I find doesn't), Mr Chetty has established that he does not currently possess any trade secrets or hold exclusive customer connections that could potentially prejudice these interests.

[39] Therefore, in light of Mr Chetty's lack of access to confidential information and demonstrably non-exclusive customer relationships, I conclude that enforcing a restraint of trade in this instance would not be warranted, as it would not serve the legitimate purpose of safeguarding G4S Secure's proprietary interests.

[40] The Supreme Court of Appeal in *Reddy v Siemens Telecommunications (Pty) Ltd*[34] (*Reddy*) the Court held that:

'A court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint. The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the

[32] [2010] ZALC 198; (2011) 32 ILJ 601 (LC) at para 43.
[33] 1984 (3) SA 623 (A).
[34] *Reddy* supra at para 15.

maxim *pacta servanda sunt*. The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions. Both considerations reflect not only common-law but also constitutional values. Contractual autonomy is part of freedom informing the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life. In this sense freedom to contract is an integral part of the fundamental right referred to in s[ection] 22 [of the Constitution]. Section 22 of the Constitution guarantees '[e]very citizen ... the right to choose their trade, occupation or profession freely' reflecting the closeness of the relationship between the freedom to choose a vocation and the nature of a society based on human dignity as contemplated by the Constitution. It is also an incident of the right to property to the extent that s 25 protects the acquisition, use, enjoyment and exploitation of property, and of the fundamental rights in respect of freedom of association (s 18), labour relations (s 23) and cultural, religious and linguistic communities (s 31).'

[41] The principles of contractual freedom and the right to freely engage in trade are enshrined in South African law, as recognised by the Supreme Court of Appeal in *Reddy*. Balancing these principles with the need to protect legitimate proprietary interests necessitates a careful assessment. In this case, the absence of protectable interests renders enforcement of the restraint of trade clause, with its duration of 12 months and nationwide scope, unreasonable and incompatible with public policy.

[42] In the circumstances, I make the following order:

Order

1. The application is dismissed with costs.

L.M Morgan

Acting Judge of the Labour Court of South Africa

Appearances

For the Applicant:	Advocate P. Bosman
Instructed by:	Eversheds Sutherland (SA) INC
For the First Respondent:	Advocate K. Naidoo
Instructed by:	Mikhail Mayet Attorneys
For the Second Respondent:	No appearance, notice to abide delivered.