**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable

Case no: J 629/17

In the matter between:

**NOVOZYMES SOUTH AFRICA (PTY) LIMITED** **First Applicant**

and

**THOMAS GIULIANO SCHENCKENBERG** **First Respondent**

**DANISCO SOUTH AFRICA (PTY) LTD** **Second Respondent**

**Heard:** **11 April 2017**

**Delivered:** **31 May 2017**

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**JUDGMENT**

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TLHOTLHALEMAJE, J

*Introduction:*

[1] The Applicant seeks interdictory relief to enforce certain restraint of trade and confidentiality undertakings contained in the First Respondent's (Schenckenberg) contract of employment. The specific orders sought by the Applicant are as follows;

"1. …

2. Interdicting and restraining the First Respondent until 31 March 2018 and in the Republic of South Africa, from taking up employment with the Second Respondent, or directly or indirectly working or otherwise engaging in the production, manufacture, sale or distribution in South Africa of any products similar to or competitive with those manufactured or sold by the Applicant or its subsidiaries either for his own benefit or for the benefit of any other person, firm or corporation whatsoever.

3. Interdicting and restraining the First Respondent from disclosing the confidential information of the Applicant to any third party including the Second Respondent.

4. Directing the First Respondent to return to the Applicant alternatively to destroy and to provide the Applicant with proof of affidavit that it has been destroyed, the information uploaded by the First Respondent onto his Google Drive on 21 December 2016 or on any other date."

*Background:*

[2] The Applicant carries out business in the enzyme and microbial solutions industry. It is subsidiary of a Danish company that conducts business internationally in the production of *inter alia* biological solutions including industrial enzymes which it supplies to various industries including the household care, food and nutrition, brewing, bio-energy and baking.

[3] The Applicant supplies its enzymes to the baking industry globally and in South Africa. Its customers, including AB Mauri, RCL, Bake Tech, Pepsico and Grants Baking, use these enzymes for a variety of purposes, including improvements in the quality of their end products or in a wide variety of applications, *i.e.* to increase colour and volumes of loaves of bread, improve crumb texture, appearance, dough handling etc.

[4] Schenckenberg had entered into a contract of employment with the Applicant on 3 February 2015, and commenced his duties on 16 February 2016. He was the Applicant's Account Manager-Baking, Africa Region, and was based in Johannesburg. He also was required to visit the Applicant's offices and branches locally and abroad. He had resigned from his position on 3 January 2017 having given three months' notice. His employment was to terminate on 31 March 2017, but he was informed on 21 February 2017 that he

was ‘suspended’ from duty and that his services were no longer required pending the termination date.

[5] It is common cause that Schenckenberg has taken up employment with the Second Respondent (Danisco), as Bakery Technical Sales Manager in its Cape Town branch. Danisco, is a company carrying on the business in the food and beverage sector. It was joined to this proceedings since it has a material interest in the outcome, as Schenckenberg had taken up employment with it, and also since the Applicant views it as a competitor. No relief is however sought against Danisco.

[6] The basis upon which the Applicant seeks to enforce the restraint and confidentiality clauses is that Schenckenberg will be employed by Danisco in a position which will make him responsible for selling enzymes of DuPont/Danisco in the South African baking industry in direct competition with it.

[7] A further factor necessitating the enforcement of the restrain according to the Applicant was that during his employment, Schenckenberg was the only employee dealing with baking enzymes in the Middle East, Africa and the SADC countries. By virtue of his position, Schenckenberg was required to generate sales of its enzymes products in the baking industry, and was privy to and therefore granted access to confidential information and trade secrets including all the Applicant’s customer portfolios, product details, strategy for growth, strategy to deal with competitors, sales figures, and process.

[8] Schenckenberg according to the Applicant was viewed as the most critical employee within its baking enzyme division and had reported directly to Esra Özcömlecki, the Head of Sales for baking, food and nutrition for the Middle East and Africa.

[9] It was contended that Schenckenberg had also developed significant relationships with clients, which relationship were proprietary and protectable, as he was required as part of his role, to visit and meet with clients and to try and persuade them to purchase its enzymes, and that through his regular access to and contact with the customers, he had developed and maintained significant customer connections. Other than these factors, it was also

submitted on behalf of the Applicant that prior to his resignation, Schenckenberg was exposed to customer specific projects on its behalf. In this regard, it was submitted that he was involved in two important projects for large customers of the Applicant, *viz*, Tiger Brands and RCL.

[10] When Schenckenberg resigned on 3 January 2017, he had informed the Applicant through his attorneys of record that he intended to take up employment with an entity known as DuPont, or that he would be working for a 'baking company'. It nevertheless transpired that he had instead taken up employment with Danisco, which is a subsidiary of DuPont, and which according to the Applicant, competes directly with it in the supply of enzymes in the baking industry in South Africa and globally. The taking up of employment with Danisco therefore according to the Applicant constitutes a breach of the restraint agreement.

[11] It was further submitted on behalf of the Applicant that by taking up employment with Danisco, Schenckenberg will cause harm to its business as he will be able to disclose its confidential information and trade secrets to which he was made privy while employed. Danisco will then be able to use the information and trade secrets to compete unlawfully with it. Schenckenberg, it was also submitted, would be able to use customer connections which he established whilst employed by the Applicant, and which were proprietary to the Applicant to the benefit of Danisco.

[12] The nub of Schenckenberg's opposition to the application is that the Applicant and Danisco are not competitors because the Applicant manufactures and sells 'single enzyme' products whilst Danisco only sells 'pre-mix' products. He further contended that the Applicant does not have a protectable interest worthy of protection and/or that it cannot harm the Applicant by taking up employment with Danisco.

[13] Schenckenberg had denied that he was exposed to the Applicant's confidential information or customer connections which could substantiate the existence of a protectable interest; that the enforcement of the restraint would cause him to suffer prejudice, and further that the considerations of weighing of interest and public interest favoured him.

[14] Prior to dealing with the merits of the applicant, it is important to highlight that Schenckenberg placed too much emphasis on the contention that the application should not be accorded urgency. It is my view that the issue of urgency should be disposed of within the context of the following events upon his resignation;

[15] The Applicant had initially approached the court having cited DuPont as the second respondent. This was on the basis that Scheckenberg had created an impression after his resignation that he was going to be employed by that entity. This impression was further created by Schenckenberg's attorneys of record in their letter of 30 January 2017. It was only after the initial application was launched that Scheckenberg's attorneys and those of DuPont had pointed out that it was in fact Danisco that had employed him. This had resulted in the Applicant having to remove its initial application from the roll as set down on 31 March 2017, amend its papers and re-issue the application against Schenckenberg and Danisco.

[16] In the founding affidavit, the Applicant had averred that Schenckenberg's attorneys of record had specifically indicated that they would not take issue with the urgency of the application occasioned by the further postponement of the hearing and the need for the Applicant to amend its papers[1]. Schenckenberg in his answering papers merely admitted to the Applicant's averments in this regard[2].

[17] An area of concern needs to be highlighted regarding Schenckenberg and his attorneys of record not being candid in respect of who the former's new employer was. It was not disputed that Schenckenberg had received his letter of appointment from Danisco on or about 12 December 2016. In an undated letter confirming receipt of his resignation[3], the Applicant's Anne Agergaard Pøhls had reminded Schenckenberg of his restraint obligations as shall be dealt with below, and was asked to disclose the identity of his new employer by 31 January 2017. In a response dated 30 January 2017 through his attorneys of record, Schenckenberg indicated that he would be employed by DuPont

[1] At para 90 of the Founding Affidavit
[2] At para 67 of the Answering Affidavit.
[3] Annexure 'TGS2' of the Answering Affidavit

which was not a competitor. In a separate e-mail by Schenckenberg dated 4 January 2017, Schenckenberg in a response to Özcömleckci nevertheless refused to disclose the identity of his new employer, contending that he was not legally obliged to do so. He merely indicated that the new employer was a 'baking company'. As at 23 February 2017, and following further correspondence between the respective attorneys of record, the Applicant laboured under the impression that Schenckenberg was to be employed by DuPont, to which the Applicant had nonetheless raised its reservations.

[18] The point being made with the above background is that to the extent that Schenckenberg was in possession of a letter of appointment from Danisco, at the very least, good faith required of him and his attorneys of record to disclose that fact. As a result of having the wrong impression as to who the real employer was to be, the Applicant had ended up citing the wrong second respondent, and this in my view was utterly unnecessary in view of the subsequent need for it to amend its papers.

[19] In the light of the above, it is indeed disingenuous for Schenckenberg to strenuously argue that the application is not urgent when he had in my view deliberately, failed to disclose who his new employer was immediately after he had resigned and was asked about it. To the extent that further emphasis was placed on other delays in bringing this application, I am satisfied that these are not substantial to render the matter not urgent. In any event, it has also been held on numerous occasions in this Court that applications to enforce restraint of trade are by their nature urgent[4], and to this end, there is no merit in the contrary contention as advanced on behalf of Schenckenberg.

*The relevant restraint clauses and breach:*

[20] It is trite that a party that seeks to enforce restraint provisions must invoke the agreement and demonstrate a breach thereof. The existence of the agreement as I understood Schenckenberg's case is not in dispute. The following clauses as contained in the contract of employment are relied upon;

[4] *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another* 2009 (3) SA 78 (C) 89A.

"21 **NON-COMPETITION CLAUSE**

*20.1 After termination of the Employee's employment with the Company for any reason, he agrees for a period of twelve (12) months after leaving the employment of the Company, that he will not directly or indirectly work or otherwise engage in the production, manufacture, sale or distribution in South Africa of any products similar to or competitive with, those manufactured or sold by the Company or its subsidiaries either for the Employee's own benefit or for the benefit of any other person, firm or corporation whatsoever.*

*20.2 The Employee acknowledges and agrees that the stipulated remuneration on this contract includes compensation on this respect and no compensation can be claimed on this regard after termination.*

*20.3 The period of 12 months referred to above commence on the day upon which the Employee leaves the Company, even if this date is prior to the expiry date of any given notice or of termination. The Company's board of directors may at its discretion by express written consent release the Employee from the above restriction."*

"21. **CONFIDENTIALITY AGREEMENT**

*21.1 The Employee acknowledges that by virtue of his position in the Company that he will be placed in possession of confidential information and/or documentation relating to both the Company and its clients;*

*21.2 The Employee shall not, save in as far as it is necessary and appropriate in the ordinary course of his employment, disclose to any person, Company or institution any information regarding the business, operations; clients, finances, dealings or any other affairs of the Company, associated companies or any other customer or business associated Company, either during or after his employment. Nor shall the Employee disclose any information or documentation, other than in the ordinary course of employment, to which he has come into possession by virtue of his employment.*

*21.3 The confidentiality requirement shall apply during the Employee's employment with the Company and at all times after the termination of his employment with the Company for any reason"*

[21] Schenckenberg's contention was that the restraint was not enforceable and should not endure for any period of time. He nevertheless contended that to the extent that it did, the period of restraint commenced on 21 February 2017 based on the application of clause 20.3 of the contract, which was the day on which he was 'suspended'.

[22] As to whether there is a breach of the above restraint provisions needs to be examined within the context and circumstances under which Schenckenberg will take up employment with Danisco, and whether the latter is the Applicant's competitor.

[23] The starting point is that upon receipt of Schenckenberg's letter of resignation, the Applicant on 3 January 2017 wrote a letter to him to confirm that he was bound by the terms of the restraint agreement and that he would be held to them. In his response *via* his attorneys of record, Schenckenberg had confirmed that he was to take up employment with *DuPont* as its Technical Sales Manager in Cape Town, and that this entity was not a competitor of the Applicant but rather a customer in that it purchased certain enzymes from the Applicant.

[24] Schenckenberg had further in his response alleged that the restraint provisions relied upon were unenforceable as they *inter alia*, 'nonsensical'; were aimed at stifling competition, and that the Applicant had no protectable interests because he was not in a position to solicit business away from it. He further alleged that clause 20 was too wide in its geographical reach, and stated that he had no intention of divulging the confidential information of the Applicant or harming it.

[25] The Applicant through its attorneys of record then responded on 20 February 2017 and *inter alia* reiterated that the restraint provisions remained binding on Schenckenberg, and that by taking up employment with DuPont he would be in breach of those provisions. The Applicant sought an undertaking from Schenckenberg that he would comply with the terms of the restraint provisions failing which this application would be launched. In his response through his attorneys of record, Schenckenberg confirmed that he stood by his allegations and that he would oppose any action.

[26] The Applicant's main contention was that Danisco is a direct competitor since its parent company, DuPont is a diversified company which is involved in various industries globally, and in particular, in the enzymes industry as it produced, manufactured, sold and distributed enzymes for the baking industry in South Africa. According to the Applicant, both entities were involved in the manufacture and supply of industrial enzymes globally and in South Africa. DuPont in particular was a major competitor in the manufacture and supply of industrial enzymes to the various industries. It was conceded that the Applicant holds the dominant market position globally, but that DuPont was the second biggest manufacturer and seller of enzymes globally, and distributed its enzymes to the baking industry via Danisco.

[27] The Applicant's further contention was that the area of competitive interface between it and Danisco in the baking industry was in respect of five enzymes which were used in the improvement of flour. Only the Applicant and DuPont/Danisco competed in the production of these five enzymes, whilst other competitors only produced certain enzymes.

[28] As Schenckenberg was to take up the role of Bakery Technical Sales Manager with Danisco, the Applicant's contention was that he would be involved in the sale of enzyme products for Danisco into the baking industry in South Africa, and in direct competition with it. The capacity in which Schenckenberg was to be employed in at Danisco was according to the Applicant, similar to that which he previously held at it.

[29] Schenckenberg denied that Danisco is a competitor on the basis that;

29.1 In the wholesale baking industry, where products are manufactured and sold in high quantities, baking companies incorporate various types of single enzymes (different types of proteins) in their recipes to achieve different goals. Baking companies purchase different kinds of single enzymes and then incorporate these into their own recipes using their own formulae. Other companies however chose to purchase 'pre-mixes' that consist of a number of ingredients which have been pre-mixed by the manufacturer according to their proprietary formulae and

then sold in this form to the baking companies that prefer to purchase pre-mixes.

29.2 Customers who purchased single enzymes and incorporated it into their own mixes are referred to as ‘Enzyme customers’, whilst those who prefer to purchase pre-mixes are the ‘Pre-mix customers’. Enzyme customers have different infrastructure, technical know-how and different operational and business models than pre-mix customers, and one cannot become the other without consequences in respect of capital expenditure and/or changes in their operational structure and business model.

29.3 Within South Africa, a number of companies manufacture and sell pre-mixes (the pre-mix sellers) to pre-mix customers. Others sell single enzymes to customers (Enzyme sellers and enzyme buyers). Pre-mix sellers and enzyme sellers are not competitors because their customers purchase different products from them. The Applicant is an enzyme manufacturer seller, whilst Danisco is a pre-mix seller. Danisco merely through DuPont, purchases single enzymes from a number of companies including the Applicant in order to manufacture its pre-mixes. Thus, since the Applicant does not sell pre-mixes in South Africa, and since Danisco does not sell single enzymes in SA, they were not competitors.

29.4 DuPont and Danisco did not sell single enzymes in the SADC region, nor were they in competition with the Applicant in that region. DuPont and Danisco did not have manufacturing plants for enzymes in South Africa other than blending plants in Midrand and Cape Town. The Applicant’s competitor in this regard were entities known as DSM and MuhlenChemie

[30] In its replying affidavit as deposed to by its Head of Business Operations, Umut Köroğlu the Applicant refuted the allegations that Danisco was not a competitor, and averred that;

30.1 Danisco manufactured single enzymes which it sold globally, and that those products competed directly with the single enzymes manufactured by the Applicant;

30.2 Danisco and the Applicant competed directly in the manufacture and sale of five enzyme segments which were used in the baking industry;

30.3 The distinction sought to be drawn by Schenckenberg that the two entities were not in competition to support his contention was merely artificial, and also pertained to the manner and form in which these enzymes were sold to customers. All baking products were accordingly made up of five ingredients referred to as 'improvers', and these in turn consisted of various ingredients, the most important of which was the enzymes;

30.4 The enzymes, whether single or part pre-mixes as sold by both entities to customers clearly competed in respect of the end product sought by a customer. The two entities sold similar and competitive enzymes either on a single basis or in combination with other ingredients as a pre-mix as they target the same requirements of customers, and the fact that they position themselves as a seller of single enzyme or blended products did not imply that they did not compete because ultimately, they compete for the custom of baking companies who want to achieve specific product results.

30.5 Danisco was not a customer of the Applicant as suggested by Schenckenberg, as not a single enzyme was sold to it for inclusion in its pre-mixes, and furthermore, Danisco/DuPont manufactured their own enzymes which were sold globally. There was therefore no reason for Danisco to purchase the enzymes of a competitor for use in its pre-mixes when it manufactured its own enzymes and sold these globally.

[31] As expected with applications to enforce restraint provisions, disputes of fact are bound to rise from the parties' pleadings. These disputes, to the extent that they are real or genuine, are however to be resolved by the application of

principles as set out in *Plascon Evans Paint Ltd v Van Riebeeck Paints (Pty) Ltd*[5].

[32] As correctly pointed out on behalf of the Applicant, the issue insofar as determining whether Danisco is in competition with it pertains to the nature of the two entities' business, and whether in fact there are differences in the enzymes as manufactured and sold within the baking industry. I did not understand it to be Schenckenberg's case that the primary purpose of enzymes is not to obtain certain attributes in the finished product. Thus, as pointed out on behalf of the Applicant, whether enzymes are sold as single enzymes or pre-mixes is not material, as the end result sought by customers is to achieve a particular attribute in its final product.

[33] As I further understood Schenckenberg's case, the main issue is the manner and form in which these enzymes are either produced or sold by either entity. Based on the pleadings and submissions in this regard, I am satisfied that it should be concluded that the Applicant and Danisco/DuPont manufacture and sell enzymes to the baking industries locally and globally, and thus compete directly in that regard, with particular reference to the five enzyme segments which are used in the baking industry.

[34] I am further of the view that as correctly pointed out on behalf of the Applicant, the distinction which Schenckenberg sought to draw in regard to the nature and form of enzymes which the two entities manufactured or sold is indeed artificial, and accordingly, the alleged disputed facts raised by Schenckenberg cannot be real or genuine, and his allegations on the papers therefore ought

[5] 1984(3) SA 623 (A) at 634H-635C, where it was held that:

> *'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact … . If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court … and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks … . Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers.*'

to be rejected as they are untenable. The enzymes, whether single or part pre-mixes as sold by both entities to customers clearly compete in respect of the end product sought by a customer. The two entities sell similar and competitive enzymes either on a single basis or in combination with other ingredients as a pre-mix as they target the same requirements of customers.

[35] There is further no merit in Schenckenberg's contentions that Danisco is the Applicant's customer, and I am persuaded that indeed Danisco was not a customer of the Applicant. This in my view makes sense in that if Danisco manufactured and sold its own enzymes, there would not be any reason for it to purchase the enzymes of a competitor to use in its pre-mixes. On the whole therefore, I am satisfied that on the facts, the Applicant has discharged the onus of demonstrating a competitive interface between it and Danisco, particularly in respect of the five enzymes. By joining Danisco therefore, Schenckenberg would be in breach of his restraint of trade obligations.

*The legal framework and evaluation:*

[36] Once a restraint agreement has been invoked and a breach of the agreement proved, the onus is on Schenckenberg to prove on a balance of probabilities that the agreement is unreasonable or contrary to public policy and thus unenforceable[6]. Considerations of public policy normally involves an examination of whether the restraint agreement imposes an unreasonable restriction on the former employee's freedom to trade or to work[7].



[6] *See Experian South Africa (Pty) Ltd v Heyns and Another* ([2013] (1) SA 135 (GSJ), where Mbha J (As he then was) held as follows:

> *"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".*

[7] As to what constitutes public policy was summarised in Venter v Khan and Others (14185/2011) [2014] ZAKZDHC 48 (3 November 2014) at para [63] as follows;

> *"In summary, clauses that public policy cannot tolerate include those that are 'draconian', 'so gratuitously harsh and oppressive', that are 'clearly inimical to the interests of the community', that are 'contrary to law or morality', that 'run counter to social or economic expedience' or are 'unconscionable and incompatible with public interest'.* (Authorities Omitted)

[37] The principles set out in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*[8] remain authoritative in determining whether a restraint of trade agreement is enforceable or not. Thus, it is accepted that a contract in restraint of trade is not necessarily wholly enforceable or wholly unreasonable, and that a court may in the public interest, order that the whole, or only a part, or no part at all, of a restriction on trade be enforced[9]. This principle is in sync with the acknowledgement that it is in the public interest that parties should honour their own agreements[10].

[38] In *Basson v Chilwan and others*[11], the Court identified four questions which should be asked when considering the reasonableness of the restraint. These are;

1. Does the one party have an interest that deserves protection at the termination of the employment?
2. If so, is that interest threatened/prejudiced by the other party?
3. Does such interest weight qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?
4. Is there an aspect of public policy having nothing to do with the relationship between the parties, which requires that the restraint be maintained or rejected? Thus, where the interest of the party sought to be restrained outweighs the interest to be protected, the restraint is unreasonable and consequently unenforceable.

[39] Other considerations entail whether the enforcement of restraint undertakings is merely intended to stifle competition. Any enforcement for that purpose would be deemed to be unreasonable[12]. It further needs to be determined whether the restraint goes further than is necessary to protect the interests

[8] [1984] (4) SA 874 (A) at 891 B-C)
[9] at 896 A-E
[10] See S*unshine Records (Pty) Ltd v Frohling and Others* 1990 4 SA 782 (A) at 794C-E, where it was held that;

> *'In determining whether a restriction on the freedom to trade and to practise a profession is enforceable, a court should have regard to two main considerations. The first is that the public interest requires, in general, that parties should comply with their contractual obligations even if these are unreasonable or unfair. The second consideration is that all persons in the interests of society, be permitted as far as possible to engage in commerce or professions or, expressing this differently, that it is detrimental to society if an unreasonable fetter is placed on a person's freedom of trade or to pursue a profession. In applying these two main considerations, a court will obviously have regard to the circumstances of the case before it.'*

[11] [1993] (3) SA 742 (A) at 767 G-H
[12] See *Ball v Bambalela Bolts (Pty) Ltd and Another* (2013) 34 ILJ 2821 (LAC)

alleged[13]. In this regard issues such as the duration of the restraint and the geographical area covered by the restraint are important[14]. In this regard, and as repeatedly stated by Schenckenberg in his replying affidavit despite his other contentions, the reasonableness of the duration and the area of the restraint is not challenged.

*Protectable proprietary interests:*

[40] Protectable interests worthy of protection are of two kinds. The first relates to the 'trade connections' of the business, which essentially entails the goodwill of the business encompassing relationships with customers, potential customers, suppliers and others. The second relates to 'trade secrets' of the company, which involves all confidential matters which are useful for the carrying on of the business and which could be useful to a competitor[15]. Crucial also is that once it is demonstrated that the prospective new employer is a competitor of the applicant as in this case, the risk of harm to the applicant, if its former employee were to take up employment, becomes apparent[16].

*Trade Connections:*

[41] In this case, the onus is on Schenckenberg to demonstrate that he has never acquired any significant personal knowledge of, or influence over, the Applicant's customers, potential customers, suppliers and others. It is trite



[13] *Kwik Kopy (SA) (Pty) Ltd v Van Haarlem and Another* (1999) (1) SA 472 (W) at 484E

[14] *See also Den Braven SA (Pty) Ltd v Pillay and Another* 2008(6) SA 229 (D) at paragraph [50], where it was held that:

> *"The proper approach in my view is for the court to ask itself whether the conduct that the applicant seeks to restrain by way of an interdict is conduct that falls within the terms of the restraint agreement and from which the former employee agreed to abstain. If the answer to that question s in the affirmative the court then moves to an analysis of whether it should, in accordance with the principles of public policy, enforce the agreement to that extent by granting relief to the applicant. It has no need in those circumstances to have regard to those portions of the agreement that are more extensive than the relief actually being sought."*

[15] Experian at paras 17, 17.1 and 17.2

[16] Experian, at para [20]. See also Den Braven SA (Pty) Ltd v Pillay & Another at para [6], where the Court held that;

> *"In considering the facts of a particular case it must always be borne in mind that a protectable interest in the form of customer connections does not come into being simply because the former employee had contact with the employer's customers in the course of their work. The connection between the former employee and the customer must be such that it will probably enable the former employee to induce the customer to follow him or her to a new business"*

however that not every contact between an employee and the ex-employer's customers constitutes or forms the basis of a protectable interest in the form of trade connections. It however suffices if it is shown that trade connections through customer contact exists, and that they can be exploited if the former employee was to be employed by a competitor. This is particularly so where on the facts, it can be established that there was indeed an attachment between the ex-employee sought to be restrained and those customers, and that the attachment was of such a nature that the ex-employee would be able to induce those customers to follow him or her[17].

[42] As to whether there was or is an attachment between the ex-employee and the customers or potential customers is obviously a question of fact to be determined taking into account the ex-employee's duties, his personality, the frequency of his contact with clients and the duration of such contact, what knowledge he gained of their requirements and business, the general nature of the relationship he has with clients, whether the ex-employee was involved in the canvassing of customers and whether any customers were lost after the ex-employee left his or her employment[18].

[43] The Applicant's contention was that in his position, Schenckenberg had access to its customer portfolios, and was required to visit and meet clients in an endeavour to persuade them to purchase its enzymes. Schenckenberg was the primary and critical liaison between the Applicant and its baking customers; was responsible for driving sales; kept in constant contact with clients regarding its products; was essentially its face with the clients and was required to manage those relationships.

[44] Schenckenberg denied any attachment to the Applicant's customers or clients, and contended that he did not have the kind of relationships with them that was of such a degree of closeness that they would follow him to his new employer, especially after having been employed by the Applicant for a period of 24 months.

[45] There are however a number of concessions made by Schenckenberg in this regard which belie his contentions. He had conceded that he was a liaison

[17] See Reddy v Siemens Telecommunications (Pty) Ltd (above) at para 20.
[18] *Den Braven SA (Pty) Ltd v Pillay & Another* at para [6]

between customers and the Applicant and some of its baking customers in the SADC region, even though he was not the only liaison as baking customers liaised with several other people within the Applicant. Despite his contentions that his responsibilities as Account Manager did not include building personal relationships with customers, as the product sold by the Applicant was unique and not readily available, he nevertheless conceded that he did generate new business even though this was not his primary or only function.

[46] Schenckenberg further conceded that he did proactive courtesy calls at least once a month to customers, but that this did not involve constant contact. He also rarely did reactive courtesy calls if customers had experienced problems with the Applicant's products. He further conceded that he was indeed an important role player or 'face' in managing the relationship with customers, but that he was not the only role player or 'face' of the Applicant. In any event, according to Schenckenberg, the nature and type of the Applicant's business did not require of him to maintain close relationships with customers.

[47] In the light of the above concessions, I am satisfied that the Applicant is entitled to protection in respect of its trade connections. This is further so in that as Accounts Manager whilst employed by the Applicant, Schenckenberg also dealt with clients/customers both in South Africa and within the SADC region. His role and responsibilities in view of that position clearly placed him in contact with clients and customers, and that role cannot by any accounts be insignificant. I am therefore of the view that his attempts at downplaying his role and responsibilities and the nature of his contact with clients were indeed feeble, particularly in view of his own concessions, including that he knew who those customers were and what products they bought from the Applicant. The fact that he was not the only person responsible for liaising with customers or that he was not the only 'face' of the Applicant is irrelevant, in that on his own and in his individual capacity within the course of his duties, he had liaised with those customers, and was also responsible for generating new business. He had further conceded that he did proactive and reactive courtesy calls to customers, and the fact he was not in constant contact with these customers is neither here nor there as on his further version, he was an important role player or 'face' in managing relationships with those customers.

[48] Significant also with Schenckenberg's concessions was that he would be performing exactly the same functions at Danisco as he had performed whilst employed by the Applicant, *albeit* he will have a different job title. To the extent that he had conceded that he knew who the Applicant's customers were and what they had bought from it, and further to the extent that he had conceded that he would be performing exactly the same functions as he had done whilst employed by the Applicant, I am satisfied that the trade connections alleged by the Applicant exists, and that they can be exploited for the benefit of Danisco.

[49] Schenckenberg was therefore unable to demonstrate that he never acquired any significant personal knowledge of, or influence over, the Applicant's customers, potential customers, suppliers and others. The contact that he had with these customers and clients is in my view, sufficient to constitute the basis of a protectable interest in the form of trade connections.

*Confidential Information:*

[50] The next issue to be determined is whether the Applicant has a protectable interest in preventing the risk of Schenckenberg divulging confidential information about its business. The essence and purpose of any restraint of trade agreement is to prevent the use of confidential information by a former employee to the detriment of the ex-employer. It is therefore not necessary to find that the ex-employee did or would actually use trade secrets and confidential information in his new employment, but that is was sufficient if *he could do so*[19].

[51] For information to be regarded as confidential, it must be objectively established that it could reasonably be useful to, and enable a competitor to gain an advantage over the ex-employer[20]. More specifically, such information must (a) be capable of application in trade or industry, must be useful; not be public knowledge or property; (b) it must be known only to a restricted number

[19] In *Reddy v. Siemens Telecommunications (Pty) Ltd supra*
[20] See *Coolair Ventilator Co SA (Pty) Ltd v Liebenberg and Another* 1967 (1) SA 686 (W)

of people or a closed circle and (c) be of economic value to the person seeking to protect it.[21]

[52] The Applicant submitted that Schenckenberg was privy to a variety of confidential information in the form of its customer list, including the names and contact details of key customer representatives and the requirements of particular customers; sales and marketing strategies for the Applicant in respect of the baking industry; pipeline business and prospective clients targeted by the Applicant; the pricing of products sold to clients including discounts offered to clients to incentivise them to purchase products; the terms of contractual relationships with suppliers and the terms of the supply; financial information in relation to the Applicant's business including its generated revenue; business strategy; and confidential details about the Applicant's products including their uses, benefits and disadvantages.

[53] Schenckenberg conceded that he had developed technical knowledge in respect of the Applicant's enzyme products, knew its elements, their uses, advantages and disadvantages. He further conceded that he had knowledge of the prices of products and sales figures. He however contended that pricing was not confidential to the Applicant, and that he was not familiar with any confidential information or purported trade secrets that were useful to a competitor. He also contended that information in respect of sales figures was in any event in the public domain, and that the Applicant's pricing of products is not confidential as it could be established by simply phoning the Applicant.

[54] As to whether Schenckenberg was privy to the Applicant's confidential information ought to be disposed of on two significant grounds. The first is in regard to concessions made in respect of Tiger Brands and RCL, which the Applicant viewed as its big projects. On 4 January 2017 and after his resignation, Schenckenberg assured Özcomlecki of the Applicant that despite his concerns with confidentiality in regard to Tiger Brand, he *'will go with these secrets to his grave'*[22].

[21] See *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff and Another; Waste Products Utilisation (Pty) Ltd v Wilkes and another* 2003 (2) SA 515 (W) at 577B C.
[22] Annexure 'TAF9' to the Founding Affidavit

[55] From the above concession alone, it can be extrapolated that Schenckenberg was aware of the confidential information he had in his possession, and I am not convinced that these only pertained to Tiger Brand. At the time that he gave Özcomlecki assurances, he was less than forthright in disclosing who his next employer was despite being in possession of a letter of appointment at that time. In circumstances where an ex-employee particularly as in this case has been exposed to confidential information, and is on the verge of joining a competitor and was reluctant to disclose that fact, and further where such an employee gives half-hearted assurances in respect of that confidential information, it cannot be for the ex-employer to rely on the ex-employee's *bona fides*.[23]

[56] A second significant factor and even more worrisome in this case is the conduct of Schenckenberg prior to leaving the Applicant's employ. It was not disputed that on 31 December 2016, and before his resignation, Schenckenberg whilst on leave had uploaded a variety of confidential information[24] onto his google drive, including information related to the Applicant's clients/customers' and the projects embarked upon in respect of those clients. The information uploaded is according to the Applicant, proprietary in nature as it also contains its price list. At the time that Schenckenberg uploaded the information, he was as already indicated, in possession of a letter dated 12 December 2016 which confirmed his appointment by Danisco.

[57] In his answering affidavit, Schenckenberg merely denied having uploaded information in respect of RCL, but conceded that he had uploaded information containing pricelists and about meetings and communication dates with Tiger

[23] See Experian at para [22] where it was held that;
*"The ex-employer seeking to enforce against his ex-employee a protectable interest recorded in a restraint, does not have to show that the ex-employee has in fact utilised information confidential to it: it need merely show that the ex-employee could do so. The very purpose of the restraint agreement is to relieve the applicant from having to show bona fides or lack of retained knowledge on the part of the respondent concerning the confidential information. In these circumstances, it is reasonable for the applicant to enforce the bargain it has exacted to protect itself. Indeed, the very ratio underlying the bargain is that the applicant should not have to contend itself with crossing his fingers and hoping that the respondent would act honourably or abide by the undertakings that he has given. It does not lie in the mouth of the ex-employee, who has breached a restraint agreement by taking up employment with a competitor to say to the ex-employer "Trust me: I will not breach the restraint further than I have already been proved to have done"."*

[24] Annexure 'TAF10' to the Founding Affidavit

Brands. He however contended that the information uploaded was not proprietary in nature, and that he had uploaded hundreds of files and documents onto google drive during the same period which had nothing to do with the information related to Tiger Brands and RCL. He nevertheless contended he had uploaded the information as it was practice he had had been following over the years before he even joined the Applicant, and that he did so purely as backup in case information was lost.

[58] Schenckenberg further defended his conduct on the basis that there was no internal policy or procedure at the Applicant that prohibited him from uploading information onto his google drive, and that by uploading, he merely meant to update information and to store it, and that in any event, the google drive was not password protected, hence it was easy for the Applicant to access it.

[59] It is my view that Schenckenberg's glib responses to the allegations made against him insofar as the uploading of information onto his google drive signifies his lack of appreciation of the consequences of his actions, and the reason the Applicant is justified in being concerned with his employment by Danisco. In the founding and replying affidavit, the Applicant had in detail, shown why it should be found that the information that Schenckenberg had access to or was exposed to was of value to it, and I have no reason to hold otherwise.

[60] At the time that Schenckenberg uploaded the said information, he knew that he was leaving the Applicant's services, as he was already in possession of a letter of appointment. The fact that the google drive was not password protected or that the Applicant did not have a policy in that regard did not entitle him to upload that information at the time that he did. It therefore did not make sense for him to attempt to update the Applicant's information on his own google drive for the purposes of creating back-ups, as the Applicant, which was part of an international group of companies had a sophisticated network back-up system. There was no reason therefore as correctly pointed out on behalf of the Applicant, for Schenckenberg to create his own back-up on his google drive. In the light of these factors, the only inference to be drawn is that Schenckenberg knew that the information he had uploaded was

confidential and of value to the Applicant. He also knew that the information could prove useful to Danisco and had uploaded it onto his google drive for use in the future.

[61] Having had regard to the above, and further based on Schenckenberg's own concessions in regards to the information he was exposed to or had access to, I am satisfied that the Applicant has demonstrated that it is entitled to protection of that information as it remains confidential and capable of application in the trade or industry that Danisco operates in. I am satisfied that such information would be useful to Danisco, and it is apparent that Schenckenberg's employment with Danisco would infringe on the Applicants' protectable interest in that regard.

*Weighing of interests:*

[62] The next question to be determined is how does the Applicant's interests weigh up qualitatively and quantitatively against Schenckenberg's interests to be economically active and productive. It was common cause that Schenckenberg resigned on 3 January 2017, and it is apparent from the facts that he had done so after he was offered a position by Danisco.

[63] Primary amongst Schenckenberg's concerns if the restraint was to be enforced was that in terms of his offer of employment from Danisco, he was to be based in Cape Town, and had already relocated thereto with his family. The starting point is that Schenckenberg did not deny knowledge of the terms of his contract with the Applicant. His approach however as evident from his earlier correspondence with the Applicant was that the restraint was not enforceable[25], or that '*no restraint of trade will hold in SA court if there is a chance of me not being able to provide for my family'*[26]*.* He even went to the extent of describing the restraint provisions as 'nonsensical'.

[64] It has already been stated that flowing from the principles set out in S*unshine Records (Pty) Ltd v Frohling and Others*[27]*,* parties are generally bound by restraint provisions even if they might appear to be unreasonable.

[25] Annexure 'TAF8' to the Founding Affidavit
[26] Annexure 'TAF9' to the Founding Affidavit
[27] ibid

Schenckenberg's approach to the binding nature of the restraint provisions, and his failure to take the Applicant's warnings that it would seek to invoke those provisions appeared to be cavalier. As correctly pointed out on behalf of the Applicant, any prejudice to him if the restraint provisions are found to be enforceable was clearly foreseeable and his own doing. In this regard, despite the full knowledge of these restraint provisions, Schenckenberg accepted a position from a competitor, decided to relocate his family to Cape Town, and essentially dared the Applicant in a reckless manner to enforce the restraint. He should have foreseen the consequences of his reckless conduct.

[65] It has also been pointed out that Schenckenberg does not challenge the reasonableness of the duration and area of the restraint and there is therefore no basis upon which the Court can interfere in this regard. The Applicant only seeks to prevent Schenckenberg from working for a business which competes with it in the sale of enzymes, and he is thus not prevented from working for any baking customer. There is therefore no substance to the allegation that the enforcement of the restraint would prevent Schenckenberg from earning a living in an industry he is familiar with.

*Requirements of final relief:*

[66] Where a final order is sought, three essential requisites must be met. Thus there must be a clear or alternatively a *prima facie* right, secondly an injury actually committed or reasonably apprehended, and lastly, the absence of any other satisfactory remedy.[28]

[67] For a clear right to be established, the court must consider whether there is an interest deserving of protection. If this question is answered in the affirmative, the next question is whether the ex-employee can threaten those interests. If the answer is still in the affirmative, those interests must be weighed up against the interest of the ex-employee not to be economically inactive and unproductive[29].

[68] In this case, and upon a consideration of all the factors, I am satisfied that the Applicant has established a clear contractual right to a protection of its

[28] See *Pilane and Another v Pilane and Another* 2013 (4) BCLR 431 (CC) at para 39.
[29] See *OH Mthombo (Pty) Ltd v Bheekie-Odhav* (LC C 177/12) (22 March 2012.)

proprietary interest in the form of confidential information and customer connections. By taking up employment with Danisco, which is the Applicant's direct competitor, Schenckenberg will be in breach of his restraint undertakings. I am also satisfied that the enforcement of the restraint provisions is not meant to stifle competition but to protect the Applicant's proprietary interest against any harm posed by Schenckenberg's association with Danisco. The Applicant's alternative remedies in the circumstances are limited if not non-existent if the restraint is not enforced, and I am satisfied that on the facts, the Applicant's interests in regard to the protection it seeks far outweighs those of Schenckenberg, as he is not completely prevented from being economically active.

*Costs:*

[69] The provisions of section 162 (1) of the LRA, requires of this court to take into account the requirements of law and fairness when considering an order of costs. In so doing also I am mindful of the fact that issues surrounding restraint of trade invariably impacts on the provisions of section 22 of the Constitution of the Republic[30], and litigants should not be deterred from defending or prosecuting bona fide actions for fear of adverse costs orders. Having considered these factors, I am not persuaded that a cost order is warranted in this case.

*Order:*

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

1. The First Respondent is interdicted and restrained until 31 March 2018 and in the Republic of South Africa, from;
   a) taking up employment with the Second Respondent, or
   b) directly or indirectly working or otherwise engaging in the production, manufacture, sale or distribution in South Africa, of any products similar to or competitive with those manufactured or sold by the Applicant or its subsidiaries either for his own benefit

[30] See *Trevlyn Ball v Bambalela Bolts* (Pty) Ltd at para 29 - 30

or for the benefit of any other person, firm or corporation whatsoever;

c) from disclosing the confidential information of the Applicant to any third party including the Second Respondent.

2. The First Respondent is directed to return to the Applicant, alternatively to destroy and to provide the Applicant with proof on affidavit that it has destroyed, the information uploaded by him onto his Google Drive on 21 December 2016 or on any other date.

3. Each party is to pay its own costs.

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E. Tlhotlhalemaje

Judge of the Labour Court of South Africa

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**Appearances:**

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| For the Applicant: | Adv. Penny Bosman |
| Instructed by: | Mervyn Taback Inc. |
| For the First Respondent: | Mr. RD Orton of Snyman Attorneys |