DELETE WHICHEVER IS NOT APPLICABLE

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

20/09/23
DATE

SIGNATURE

THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no. J 1135 / 23

In the matter between:

BRENTHURST WEALTH MANAGEMENT (PTY) LTD **Applicant**

and

GUSTAV ADOLPH REINACH **First Respondent**

PSG FINANCIAL SERVICES (PTY) LTD **Second Respondent**

Heard: **6 September 2023**

Delivered: **20 September 2023**

Summary: **Restraint of trade – principles stated – application of principles to matter – issue of protectable interest and infringement of such interest considered**

Restraint of trade – protectable interest in the form of trade connections and confidential information considered – protectable interest shown – employee acting in breach of such interests – enforcement justified

Restraint of trade – breach of restraint – employment with direct competitor *per se* poses no risk to employer – employer sufficiently protected by way of relief relating to protection of confidential information and trade connections

Restraint of trade – weigh off considered – weigh off favouring employer where it comes to confidential information and trade connections – weigh off favouring enforcement of restraint

Interdict – requirements of interdict satisfied – interdict upheld – application granted – essential terms of restraint enforced

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This judgment concerns an urgent application brought by the applicant on 15 August 2023 to enforce a restraint of trade agreement against the first respondent, who is a former employee of the applicant. The first respondent has commenced employment with the second respondent, with the second respondent being a direct competitor of the applicant. In the application, the applicant seeks an interdict against the first respondent, to prevent him from continuing his employment with the second respondent. The applicant also seeks relief in the form of interdicting the first respondent from soliciting the custom of the applicant's clients and from disseminating any of the applicant's confidential information to any third parties, including the second respondent. The second respondent has been joined by the applicant in the application only on the basis of having an interest in the matter, as a result of its employment of the first respondent. Only the first respondent has opposed the application.

[2] The application came before me on 6 September 2023 for determination. After hearing argument by both the parties, and having considered the pleadings filed in this case, I made the following order on 6 September 2023:

> '1. The application is heard as one of urgency in terms of Rule 8.

2. The first respondent is interdicted and restrained from disclosing or permitting to be disclosed to any person, or use or permit to be used in any manner, any of the confidential information / records of the applicant.

3. The first respondent is interdicted and restrained for a period of 24 months calculated from 6 June 2023 whether for himself, as the agent for anyone else or in any other capacity for any other reason, directly or indirectly from persuading, inducing, soliciting or encouraging any client of the applicant to terminate its/his/her contractual relationship and / or engagement with the applicant.

4. The first respondent shall pay the costs of this application.

5. Written reasons for this order will be handed down on 20 September 2023.

[3] This judgment now constitutes the written reasons as contemplated by paragraph 5 of my order, above.

Urgency

[4] Urgency was in reality not challenged by the first respondent. Instead, the first respondent had an issue that the applicant had failed to comply with clause 12.3 of the Practice Manual,[1] and the applicant had made out no case to justify such deviation.

[5] Whilst it is of course true that the Practice Manual is not simply directory and must be complied with as a binding pre-script,[2] I am compelled to point out that where it comes to restraint of trade applications, a practice has developed in

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[1] Clause 12.3 reads: '*The normal time for the bringing of an urgent application, whether during term or in recess, is **10h00 on Tuesdays and Thursdays**. If the urgent application cannot be brought at 10h00 on Tuesday or Thursday of any week, it may be brought on any other day of the week at any time, but the applicant in the founding affidavit must set out facts which justify the bringing of the application at a time other than 10h00 on Tuesdays or Thursdays*'.

[2] In *National Education Health and Allied Workers Union on behalf of Leduka v National Research Foundation* (2017) 38 ILJ 430 (LC) at para 13, the Court said: '*The Practice Manual is binding on litigating parties and must be complied with. It is not just a guideline, but an actual prescript. …*'. See also *Ralo v Transnet Port Terminals and Others* (2015) 36 *ILJ* 2653 (LC) at para 9; *Tadyn Trading CC t/a Tadyn Consulting Services v Steiner and Others* (2014) 35 *ILJ* 1672 (LC) at para 11; *Butana v SA Local Government Bargaining Council and Others* [2016] JOL 36088 (LC) at paras 8-9; *Edcon (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others: In re Thulare and Others v Edcon (Pty) Ltd* (2016) 37 *ILJ* 434 (LC) at para 24.

this Court which is not catered for the Practice Manual. In the case of restraint of trade applications, the practice is that an applicant party first approaches the Registrar for a case number and a hearing date, before actually bringing the application. The Registrar then allocates a hearing date, generally affording a longer lead time to date of set down, than would be the case with ordinary urgent applications, for the want of a better description. In short, the Registrar would allocate a date in the region of three to four weeks hence.

[6] There is an important reason for this practice. Experience in this Court has shown that restraint of trade applications is more often than not hotly contested, and affidavits (with annexures) exchanged can be voluminous and comprehensive. The end result of this reality is that if too short lead time is given for the set down, the application would inevitably not be ripe to be heard as affidavits still need to be exchanged. Also, and with the exchange of affidavits very close to the hearing date, the presiding Judge is often deprived of a proper opportunity to consider all the pleadings and prepare on the same, before the case is heard. This may further delay the matter, for example that it would take longer to give a judgment. Postponements to a later date would be a regular occurrence in such instances. If the set down date is however three to four weeks into the future, that affords the parties a proper opportunity to exchange affidavits, cater for the preparation and indexing of the Court file, and allow a full set of pleadings (duly paginated) to be found in the Court file by the time the file is allocated to a presiding Judge for hearing and determination.

[7] The above practice is exactly what transpired *in casu*. The applicant's attorneys approached the Registrar in the second week of August 2023 for a hearing date, and ultimately received 6 September 2023 as such a date. By the time the matter came before me, all pleadings were exchanged and the Court file was properly indexed and paginated. It would be an untenable proposition to non-suit the applicant, in such circumstances, for not complying with the letter of clause 12.3 of the Practice Manual. In my view, and in the particular circumstances of this matter, the first respondent's objection in this regard has no substance. Nothing that I have said above must however be considered to detract in any way from the binding nature of the Practice Manual.

[8] In any event, and overall considered, I am satisfied that the applicant met all the requirements of urgency in this matter.[3] On the facts, and even though the applicant was aware as early as the beginning of June 2023 that the first respondent had taken up employment with the second respondent, this state of affairs, as I have addressed later in this judgment, was never really a problem for the applicant. I am convinced that if the other restraint violations that later came to pass did not happen, the applicant would never have brought an application to prevent the first respondent from being employed by the second respondent. What the applicant did do in the course of June and July 2023, when faced with the prospect of the first respondent's employment with the second respondent, was to make sure that the first respondent understood that he must not utilize the applicant's confidential information and adhere to his non-solicitation obligations. At this early stage, there was no evidence that the first respondent had actually violated these provisions.

[9] The applicant only obtained actual knowledge that the first respondent had violated the confidentiality undertaking and non-solicitation obligation when the applicant, on 3 August 2023, received a change of mandate form on behalf of two clients that had been serviced by the first respondent in the course of his employment with the applicant. The applicant however did not immediately launch into litigation at that point, and first sought to try and resolve the issue by way of procuring an undertaking by the first respondent that he would comply with his restraint of trade and confidentiality undertaking. In this regard, the applicant, though its legal advisers, demanded from the first respondent in writing on 4 August 2023 to *inter alia* provide undertakings that he would not in future contravene his restraint of trade, providing a deadline of 7 August 2023 to do so. The first respondent answered on 7 August 2023, in essence denying that he acted or was acting in contravention of the restraint of trade. An issue then arose with regard to whether the first respondent was working within a radius of 20 kilometres of the applicant's offices, and further correspondence in this regard was exchanged between the applicant's legal advisers and the first respondent on 10 and 11 August 2023. When this issue also could not be

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[3] For the requirements of urgency see *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another* (2016) 37 ILJ 2840 (LC) at paras 20 – 26, and in particular where it comes to restraint of trade applications *Vumatel (Pty) Ltd v Majra and Others* (2018) 39 ILJ 2771 (LC) at paras 4 – 5; *Ecolab (Pty) Ltd v Thoabala and Another* (2017) 38 ILJ 2741 (LC) at para 20.

resolved, the current application was prepared and served and filed on 15 August 2023.

[10] In my view, the applicant's conduct in first trying to resolve this matter by way of seeking undertakings from the first respondent is appropriate, as it is advisable that parties first try and find an alternative way to secure compliance with the restraint, before resorting to litigation.[4] The applicant then promptly resorted to instituting legal proceedings when this intervention was not successful, taking the necessary action in this regard in less than a week. Also, and considering the nature of the relief sought, and the purpose sought to be achieved by the enforcement of a restraint of trade, there is no other form of substantial redress in due course, other than this application.[5] Restraints of trade also carry with them an inherent quality of urgency.[6] I am therefore satisfied that this application should be dealt with as one of urgency in terms of Rule 8.

[11] Because the applicant seeks final relief, the applicant must satisfy three essential requisites to succeed, being (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.[7] I will commence deciding whether the applicant met these requirements by first setting out the relevant facts.

The relevant facts

[12] Fortunately, and in this case, most of the important facts relied on by the applicant to show the existence of its protectable interests and the first respondent's breach of the restraint of trade were either undisputed or

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[4] In *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes and Another* (2012) 33 ILJ 629 (LC) at para 21 it was said that: *'... In my view, litigants should be encouraged in any attempt to avoid litigation, rather than rushing to court as a first option. Litigation is costly and often unnecessary. ...'.*

[5] See *Maqubela v SA Graduates Development Association and Others* (2014) 35 ILJ 2479 (LC) at para 32; *Transport and Allied Workers Union of SA v Algoa Bus Co (Pty) Ltd and Others* (2015) 36 *ILJ* 2148 (LC) at para 11.

[6] See *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff and Another* (2009) 30 ILJ 1750 (C) at 1761.

[7] *Setlogelo v Setlogelo* 1914 AD 221 at 227; *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) para 20. In particular, and where it comes to restraint applications, see *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronjé and Another* (2011) 32 ILJ 601 (LC) at para 38 – 40; *Continuous Oxygen* (*supra*) at para 26; *Experian SA (Pty) Ltd v Haynes and Another* (2013) 34 ILJ 529 (GSJ) at para 59; *Jonsson Workwear (Pty) Ltd v Williamson and Another* (2014) 35 ILJ 712 (LC) at para 54; *FMW Admin Services CC v Stander and Others* (2015) 36 ILJ 1051 (LC) at para 1.

admitted.[8] Factual disputes that may emerge from a consideration of the first respondent's answering affidavit, will be determined in line with the principles established in *Plascon Evans Paints v Van Riebeeck Paints*[9]. The Court in *Ball v Bambalela Bolts (Pty) Ltd and Another*[10] succinctly summarized the nature of the factual enquiry to be made as follows:

> '... In *Reddy v Siemens Telecommunications (Pty) Ltd*, it was held that the reasonableness of a restraint could be determined without becoming embroiled in the issue of onus. This could be done if the facts regarding reasonableness have been adequately explored in the evidence and if any disputes of fact are resolved in favour of the party sought to be restrained. If the facts, assessed as aforementioned, disclose that the restraint is reasonable then the party, seeking the restraint order, must succeed, but if those facts show that the restraint is unreasonable, then the party, sought to be restrained, must succeed. Resolving the disputes of fact in favour of the party sought to be restrained involves an application of the *Plascon-Evans* rule ....'

[13] The business of the applicant, in a nutshell, and as relevant to this application, is that of wealth management and the provision of investment advisory services and products. The applicant, through individual wealth professionals / specialists / planners employed by it, markets and then administers and maintains investments, for and on behalf of individual clients, as well as providing such clients with financial and investment advice.

[14] The applicant is a long-established business, having been established in 2004. It started in the Western Cape, but has expanded to a national footprint, with three offices in Gauteng. The applicant's professional advisory team consists of 27 professionals. The applicant is ranked as a leading boutique wealth manager

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[8] Admitted facts include facts that, though not formally admitted, simply cannot be denied – see *Gbenga-Oluwatoye v Reckitt Benckiser SA (Pty) Ltd and Another* (2016) 37 ILJ 902 (LAC) at para 16.

[9] 1984 (3) SA 623 (A) at 634E-635C. These principles are, in sum, that the facts as stated by the respondent party together with the admitted or facts that are not denied in the applicant party's founding affidavit constitute the factual basis for making a determination, unless the dispute of fact is not real or genuine or the denials in the respondent's version are bald or not creditworthy, or the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable, that the court is justified in rejecting that version on the basis that it obviously stands to be rejected.

[10] (2013) 34 ILJ 2821 (LAC) at para 14. See also *Reddy v Siemens Telecommunications* (2007) 28 ILJ 317 (SCA) at para 4; *Labournet (Pty) Ltd v Jankielsohn and Another* (2017) 38 ILJ 1302 (LAC) at para 40; *Ball* (*supra*) at para 14; *Vumatel* (*supra*) at para 29; *New Justfun Group (Pty) Ltd v Turner and Others* (2018) 39 ILJ 2721 (LC) at para 10.

in South Africa for the last seven years. A critical component of its business is building long-term relationships with its clients, and at all times maintaining client retention through such close relationships, professional advice and a high standard of service.

[15] The individual services offered by the applicant to clients include investment planning, retirement planning, offshore investments, tax planning, wills and estate planning and risk planning, which it provides though its professional advisers to its own client base.

[16] The business of the second respondent is direct competitor to the business of the applicant. The second respondent, *in casu*, conducts a virtually identical wealth planning business to that of the applicant, providing the same kind of services to the same kind of client base. The second respondent also offers those services by way of professional advisers employed by it. The first respondent has admitted that the applicant and the second respondent are indeed direct competitors.

[17] There can be little doubt that the industry in which the applicant and its competitors operate is specialised, is a very relationship and service intensive industry, and is highly competitive. This is also admitted by the first respondent in the answering affidavit.

[18] Turning next to the first respondent, he started employment with the applicant with effect from 1 May 2019, as a financial adviser, in terms of a written contract of employment signed by the parties on 29 May 2019 (the employment contract). The first respondent occupied this position until the date of ultimate termination of his employment with the applicant on 6 June 2023. In this position, the first respondent was directly responsible for and attended to a substantial client portfolio, encompassing some 129 clients. He was tasked to service and maintain a close working relationship with these clients, providing financial advice and intermediary services to such clients, and managing their portfolios.

[19] The first respondent was required to have a detailed knowledge of, and relationship with, all clients he serviced. He was fully familiar with all the confidential information relating to the clients, and advised the clients on what

investments / policies the clients should pursue to best serve their financial needs and long-term financial objectives. Also, and with the view to expand the business of the applicant, he would have intimate knowledge of the pricing, products and operational activities of the applicant. He was in the position to provide competitive quotes for products and services. He also needed to be able to report to the applicant's directors on his activities and clients.

[20] The applicant has explained that its business procurement model does not require single advisers to cold call or find clients at their own cost. Instead, the applicant's model for growth includes aggressive marketing initiatives on radio shows, digital and print publications, webinars and seminars, social media platforms, and collaboration with multiple industry specialists and experts. The applicant does this at considerable cost, and the leads so generated are then passed on to the advisers, such as the first respondent.

[21] As to the kind of confidential information the first respondent was familiar with, this would obviously include all the confidential client particulars. In addition, the first respondent knew the applicant's pricing strategies and arrangements, the contract particulars between the applicant, its clients and / or suppliers, as well as the applicant's complete client list / database.

[22] Because of the nature of the position occupied by the first respondent, and the specific duties and obligations he was required to fulfil, the employment contract (in clause 21 thereof) provided that the first respondent had to conclude a restraint of trade covenant and confidentiality undertaking, which would be an essential part of the terms and conditions of employment of the first respondent with the applicant. In this regard, the applicant and the first respondent indeed concluded a confidentiality and restraint agreement on 29 May 2019 (the restraint agreement).

[23] In terms of the restraint agreement (clause 3.2), the first respondent agreed and undertook to keep all confidential information of the applicant strictly confidential. Confidential information, as defined in the restraint agreement, included information about the business methodology and strategy of the applicant, as well as information concerning its clients and prospective clients, suppliers and employees.

[24] The restraint agreement also contained specific restraint covenants (clauses 3.3 and 3.4). These covenants would apply for a period of 24 months, calculated from the date of termination of the first respondent's employment with the applicant. In terms of these covenants, the first respondent firstly agreed and undertook not to be employed in a competing business to that of the applicant which conducts business within a radius of 20 kilometres of any office of the applicant. Secondly, the first respondent agreed and undertook not to persuade, induce, solicit or encourage any of the applicant's clients or prospective clients to terminate such client(s)' contractual relationship / engagement with the applicant. Or in other words, the first respondent agreed and undertook not to solicit the custom of the applicant's clients, which restraint covenant / obligation had national application.

[25] The first respondent resigned on 5 June 2023, on 30 days' notice. However, and in order to protect its interests where an employee such as the first respondent resigns, the applicant did not require the first respondent to work out his notice. Consequently, the first respondent left service on 6 June 2023. He earned approximately R85 000.00 per month at the time of leaving the applicant's employment. He indicated at the time of leaving that he would be joining the second respondent, doing the exact same work and fulfilling the exact same duties he had at the applicant.

[26] On 22 June 2023, the applicant sent written notice to the first respondent, reminding him of the terms of the restraint agreement. The notice warned the first respondent not to act in breach of the restraint agreement, and that he had no rights whatsoever to use any of the confidential information he was exposed to and was familiar with. He was also warned that a violation of his restraint of trade could lead to interdictory relief being sought against him. The applicant raised no issue with regard to his employment at the second respondent, *per se*.

[27] The first respondent answered this notice on 26 June 2023. He stated that where clients had called him, he referred them to the applicant. He stated that had no intention of 'pulling' clients over to him. He requested that the applicant contact him so that the parties could discuss what the first respondent should inform any clients that contacted him. It is however clear from this e-mail that

there had been contact between the first respondent and clients. On 28 June 2023, the first respondent sent a further e-mail to the applicant, in which he stated that it was his intention to honour the restraint agreement, and that he had no confidential information concerning the applicant in his possession. He informed the applicant, in this e-mail, that he would now be taking up employment with the second respondent, which, according to him, was situate outside the 20 kilometre radius of the applicant's office in Fourways.

[28] On 4 July 2023, the applicant informed the first respondent by e-mail that he should never be contacting any client of the applicant, and that all clients have been informed by the applicant of the first respondent's departure and already had other adviser(s) at the applicant allocated to them. He was required by the applicant, in this e-mail, to inform any client that contracted him, that he left the applicant and was not allowed to deal with such client by virtue of him honouring his restraint of trade, and then only to refer such clients back to the applicant.

[29] Despite the aforesaid, it would appear that the first respondent was not true to his word, once having taken up actual employment with the second respondent in July 2023. On 3 August 2023, the applicant received what is known as a change of advisor notification. In the industry, this would happen where a client moves its business / assets from one service provider to another. In this instance, there were two such notifications received from Momentum Wealth International (a third party product provider to the applicant). In terms of these notifications, two clients, being a Mr G F Janse Van Rensburg and Mrs Y Janse Van Rensburg, terminated their mandate with the applicant and moved their business to the second respondent.

[30] The new adviser at the applicant to whom these clients had been allocated, being Michelle Burger (Burger) contacted these clients about the mandate termination. Burger was informed by the clients that they had decided to move their business to the first respondent, now working for the second respondent, and that the first respondent had never informed them he was subject to a restraint of trade.

[31] The above mandate terminations were followed by a further two notifications on 4 August 2023, in respect of two other clients, being Mr A J Balt and Mrs J M Balt. These clients also moved their business to the first respondent at the

second respondent. On 11 August 2023, there was a further mandate cancellation by Mr C Bornman, who also moved to the first respondent.

[32] All of these individual clients were clients that had been allocated to the first respondent to service during the course of his employment with the applicant. It is quite clear that the first respondent must have informed these clients that he had moved to the second respondent, whilst making no refence to the fact that he was subject to a restraint of trade. The first respondent also clearly accepted this business, despite the clear terms of his restraint of trade prohibiting him from doing so.

[33] On 4 August 2023, the applicant, through its legal advisors, then sent a formal letter of demand to the first respondent. In this letter of demand, it was demanded that the first respondent provide a written undertaking by close of business on 7 August 2023 that he would immediately cease and desist from pursuing, in any manner whatsoever, the applicant's clients and soliciting their custom, and that he would honour the confidentiality and non-solicitation obligations as contained in the restraint agreement.

[34] The first respondent did not provide a written undertaking by 7 August 2023. Instead, he denied breaching the restraint, stated that he had no confidential information in his possession, and once again baldly said that he would honour the undertakings he gave in the restraint agreement.

[35] As I have touched on above, there was further correspondence between the applicant's legal advisors and the first respondent about whether he was employed with the second respondent within the 20 kilometre restraint area. For the reasons set out later in this judgment, nothing turns on this, and it is not necessary to elaborate any further on this issue. What is however important is that in the course of this correspondence, the first respondent, in a letter sent to the applicant on 11 August 2023, stated that he had provided the undertakings asked for and that he should be given the opportunity to 'fairly' complete with the applicant.

[36] The aforesaid left the applicant no choice but to enforce the restraint of trade, and the urgent application then followed on 15 August 2023.

Restraint principles

[37] As stated above, there can be no doubt that the first respondent bound himself to a restraint of trade covenant and confidentiality undertaking, in favour of the applicant, in the restraint agreement. It is trite that restraints of trade are valid and binding, and as a matter of principle enforceable, unless the enforcement thereof is considered to be unreasonable.[11] A restraint of trade also does not infringe on the constitutional right to free economic activity.[12]

[38] Whether the enforcement of the restraint of trade against the first respondent would be reasonable is dependent upon deciding the following questions set out in *Basson v Chilwan and Others*[13]: (a) Does the one party have an interest that deserves protection?; (b) If so, is that interest threatened by the other party?; (c) does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?; and (d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected. More recently, a further enquiry has been added, which can be called question (e), being whether the restraint goes further than necessary to protect the relevant interest.[14]

[39] This Court and the Labour Appeal Court have been consistently applying these five considerations in determining whether the enforcement of a restraint of trade would be reasonable.[15] Deciding each of these considerations is a determination on the facts of that particular case, applying, as held in *Ball supra*[16], the following approach:

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[11] *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 891B-C; *Reddy v Siemens Telecommunications* (2007) 28 ILJ 317 (SCA) at paras 14; *Labournet (Pty) Ltd v Jankielsohn and Another* (2017) 38 ILJ 1302 (LAC) at para 39; *Ball* (supra) at para 13; *Esquire* (*supra*) at para 26; *SPP Pumps (SA) (Pty) Ltd v Stoop and Another* (2015) 36 ILJ 1134 (LC) at para 26; *Shoprite Checkers (Pty) Ltd v Jordaan and Another* (2013) 34 ILJ 2105 (LC) at para 20.

[12] *Reddy (supra)* at paras 15 – 16. See also *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* 2001 (2) SA 853 (SE) where the Court said: '*The 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] 1993 (3) SA 742 (A) at 767G-H.

[14] *Jonsson* (*supra*) at para 44; *Van Wyk* (*supra*) at para 15; *Esquire* (*supra*) at paras 50 – 51.

[15] *Labournet* (*supra*) at para 42; *Jonsson (supra)* at para 44; *Vox Telecommunications (Pty) Ltd v Steyn and Another* (2016) 37 ILJ 1255 (LC) at paras 28 – 29; *Shoprite Checkers* (*supra*) at paras 23 – 24; *Benchmark Signs Incorporated v Muller and another* [2016] JOL 36587 (LC) at para 15.

[16] Id at para 17. See also *Labournet* (*supra*) at para 40.

> '... the determination of reasonableness is, essentially, a balancing of interests that is to be undertaken at the time of enforcement and includes a consideration of 'the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests ...'

[40] The protectable interest of an applicant in a restraint of trade application can be found in one or both of two considerations, being confidential information (trade secrets), or trade connections.[17] In *Labournet (Pty) Ltd v Jankielsohn and Another*[18] the Court held:

> '... A restraint is only reasonable and enforceable if it serves to protect an interest, which, in terms of the law, requires and deserves protection. The list of such interests is not closed, but confidential information (or trade secrets) and customer (or trade) connections are recognised as being such interests. ...'

[41] Confidential information would be:[19] (a) Information received by an employee about business opportunities available to an employer; (b) information that is useful or potentially useful to a competitor, who would find value in it; (c) Information relating to proposals, marketing or submissions made to procure business; (d) information relating to price and/or pricing arrangements, not generally available to third parties; (e) information that has actual economic value to the person seeking to protect it; (f) customer information, details and particulars; (g) information the employee is contractually, regulatory or statutory required to keep confidential; (h) Information relating to the specifications of a product, or a process of manufacture, either of which has been arrived at by the expenditure of skill and industry which is kept confidential; and (i) information relating to know-how, technology or method that is unique and peculiar to a business. Importantly, the information summarized above must not be public

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[17] *Dickinson Holdings Group (Pty) Ltd and Others v Du Plessis and Another* (2008) 29 *ILJ* 1665 (N) at para 32; *Basson (supra)* at 769 G – H; *Bonnet and Another v Schofield* 1989 (2) SA 156 (D) at 160B-C; *Hirt and Carter (Pty) Ltd v Mansfield and Another* (2008) 29 ILJ 1075 (D) at para 37; *Esquire* (*supra*) at para 27; *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) at 502E-F; *FMW (supra)* at para 36; *Vox* (*supra*) at para 30.

[18] (2017) 38 ILJ 1302 (LAC) at para 41.

[19] See *Dickinson (supra) at* para 33; *Jonsson* (*supra*) at paras 46 – 49; *David Crouch Marketing CC v Du Plessis* (2009) 30 ILJ 1828 (LC) at para 21; *Esquire (supra)* at para 29; *Experian* (*supra*) at para 19.

knowledge or public property or in the public domain. In short, the confidential information must be objectively worthy of protection and have value.

[42] Trade connections as an interest worthy of protection would be where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he or she leaves employment and becomes employed by a competitor, the employee could easily or readily induce the customers to follow the employee to the new business.[20] Whether the employee can be seen to have the ability to exert this kind of influence, is dependent upon: (a) the duties of the employee; (b) the employee's particular personality and skill; (c) the frequency and duration of contact between the employee and the customer(s); (d) the nature of the relationship between the employee and the customer(s) and in particular whether the relationship carried with it a notion of trust and confidence; (e) the knowledge of the employee concerning the particular requirements of the customer and the nature of its business; (f) how competitive the rival businesses are, and (d) the nature of the product or services at stake.[21]

[43] The seniority of the employee concerned is also an important consideration where it comes to evaluating the existence of a protectable interest.[22] The more senior the employee, the more likely it is that the employee would be entrenched with what can legitimately be considered to be a protectable interest based on the above two considerations.[23] Seniority is not just the level of the employee in the organization of the erstwhile employer, but also includes factors such as the influence, knowledge, expertise, nature of duties, relationships and even the particular person of the employee.

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[20] See *Rawlins and another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at 541D-F; *FMW* (*supra*) at paras 46 – 48; *Esquire* (*supra*) at paras 31 – 32; *Experian* (*supra*) at para 18; *LR Plastics (Pty) Ltd v Pelser* [2006] JOL 17855 (D) at para 26.

[21] *Caravantruck* (*supra*) at 541F-I; *FMW (supra)* at para 45; *Aquatan (Pty) Ltd v Jansen van Vuuren and Another* (2017) 38 ILJ 2730 (LC) at para 24.

[22] See *Dickinson* (*supra*) at para 38; *Stewart Wrightson (Pty) Ltd v Minnitt* 1979 (3) SA 399 (C) at 404B-C; *Random Logic (Pty) Ltd t/a Nashua, Cape Town v Dempster* (2009) 30 ILJ 1762 (C) at para 32; *Experian* (*supra*) at para 43; *Jonsson (supra)* at para 51.

[23] See *David Crouch* (*supra*) at para 21; *Plumblink SA (Pty) Ltd v Legodi and Another* (2020) 41 ILJ 1743 (LC) at para 30.

[44] In *A J Charnaud & Co (Pty) Ltd v van der Merwe and Others*[24] the Court summarized the process where it comes to enforcing restraints of trade as follows:

> '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, and 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, and 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.'

The protectable interest

[45] In considering the issue of a protectable interest *in casu*, it is necessary to firstly deal with the issue of the first respondent's employment with the second respondent, and whether this employment infringes on the applicant's protectable interests. I accept that in the restraint agreement, employment of the first respondent with a competitor of the applicant, such the second respondent, within a radius of 20 kilometres of the applicant's offices, is prohibited, and such employment would thus be in violation of the restraint of trade. But the question always has to be whether such employment, despite the terms of the restraint, would actually infringe on the protectable interest of the applicant.

[46] In this case, I do not believe the first respondent's employment with the second respondent, *per se*, would infringe on any protectable interest of the applicant. There are a number of reasons for this. Firstly, and on the facts, the applicant on its own version concedes that the first respondent informed it, when resigning, that he received an offer of employment from the second respondent. It appears that this state of affairs did not concern the applicant much. It took no issue with such possible employment of the first respondent with the second respondent. Instead, what the applicant sought to emphasize to the first respondent, in its subsequent correspondence and demands to the first

[24] (2020) 41 ILJ 1661 (LC) at para 56.

respondent, was that he comply with and adhere to his confidentiality undertaking and non-solicitation obligations. Even when sending the first letter of demand to the first respondent on 4 August 2023, the applicant did not refer to or in any manner take issue with the first respondent's employment with the second respondent.

[47] The applicant only became concerned with the issue of the employment of the first respondent with the second respondent when it briefed its current attorneys, and its attorney then came out with the strategy to measure the actual distance from the applicant's offices to the second respondent's offices, and then found it to be less than 20 kilometres. I am however of the view that this was little more than an afterthought in the whole scheme of things, designed to bolster the restraint application, when that was not really necessary.

[48] But even if the issue of the first respondent's employment with the second respondent is considered, I have difficulty in understanding why the first respondent physically working in the office of the second respondent would place anything at risk. As correctly explained by the first respondent's counsel when the matter was argued, the first respondent could go and place himself at any location, or work from home, or anywhere else, during the course of his employment with the second respondent. The location of an office is just geography. The fact is that is at the very core of the applicant's protectable interest and what would be its most valuable asset, is its client base. These clients are distributed all over and are not area bound. That is why the non-solicitation obligation has no geographical limit attached to it. The clients are insulated by virtue of the restraint, wherever one may find them. That is the true value of the applicant's protectable interest in terms of the restraint agreement, and not where the first respondent may physically work.

[49] Therefore, and insofar as the applicant sought an interdict prohibiting the first respondent from being employed with the second respondent, the applicant is bound to fail. This is because the applicant cannot show a breach of its protectable interest in this respect.

[50] Turning then to the applicant's client base and confidential information, this is where, as I have said, the applicant's real protectable interest lies. It cannot be gainsaid that the most critical asset, for the want of a better description, in a

business such as that of the applicant, is its client base. Also, what would distinguish the business of the applicant from other competitors would in all likelihood be sensitive and confidential, and of interest and value to competitors. In sum, the client base, the services provided to that client base, and the methodology of such service, is the reason for the existence of the business of the applicant. The applicant, from a legitimate business and operational perspective, must be entitled to protect its client base from being effectively eroded from the inside. That is the very purpose of enforcing the restraint of trade *in casu*. The following dictum in *Bonfiglioli SA (Pty) Ltd v Panaino*[25] is apposite:

> '... 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:
> '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."

[51] It is trite that in the industry in which the applicant operates, client relationships, trust and confidence are of critical importance. This business is extremely competitive in the sense that any client can easily move his or her portfolio to another wealth management business. It is only through long term operation in the industry that contacts and relationships are established with clients and potential clients in the industry. In *TWK Agriculture Ltd v Wagner and Another*[26], where the Court specifically dealt with a broking relationship, it was held:

> '... The applicant's interest in those connections is an important aspect of the applicant's incorporeal property in the form of goodwill and it is trite law that it is entitled to protect that interest. When the respondents dealt with those clients, they did so on behalf of the applicant's business and not for their own account. Whether those clients were ones that they had originally brought into the applicant's business through the sale agreement, or whether those with clients they acquired in the course of working for the applicant, the insurance business

[25] (2015) 36 ILJ 947 (LAC) at para 24.
[26] [2015] ZALCCT 50 (12 August 2015) at para 8.

> and relationship developed with those clients and was that of their employer and not theirs to exploit for their own personal gain, even if they had been responsible for obtaining such business or sustaining it through their personal relationship with those clients ...'

[52] As stated above, there can be no doubt that the second respondent is a direct competitor of the applicant, as established by the undisputed facts. In any event, it would not be possible for the five clients above, to move their business to the second respondent, where they will be serviced by the first respondent, if the second respondent was not a directly competing business.

[53] Dealing next with the concept of confidential information as a protectable interest of the applicant, I am satisfied that the applicant has succeeded in establishing its existence. The first respondent, on the undeniable facts as fully set out above, had access to the kind of information that would clearly qualify as confidential and sensitive information concerning the clients and business methodology / strategy of the applicant, which the applicant would not want to be disseminated to competitors, especially not a competitor such as the second respondent. This information would obviously be valuable to competitors. Further, the first respondent has not suggested that any of the information he may have had access to is in the public domain. It is also undisputed that the requirements and arrangements with each individual client is unique, and that the industry is highly competitive, with the services rendered being susceptible to being easily moved from one service provider to another. This kind of confidential information is also inextricably linked to the issue of trade connections.[27] In *SPP Pumps (SA) (Pty) Ltd v Stoop and Another*,[28] the Court said:

> 'In my view, the respondent acquired confidential information of the business of the applicant including personal knowledge of the customers by virtue of his duties and the relationship he had with the suppliers and customers of the applicant. It is for this reason that I am of the view that the applicant has made out a case which has not been seriously challenged. The case is that the applicant has an interest in the confidential information acquired by the respondent during his employment. There is very strong evidence that the

[27] *AJ Charnaud* (*supra*) at para 35.
[28] (2015) 36 ILJ 1134 (LC) at para 37.

> respondent had, during his employ with the applicant, acquired confidential information which requires protection. The information which the respondent acquired, particularly the relationship with the customers, is of such a nature that when he left the applicant's employ, he posed a risk to the applicant's business if he were to join any other competitor. The level of risk rose higher when he established the second respondent and commenced conducting the business in competition with the applicant.'

[54] In sum, it is my view that the applicant has thus shown that it has a protectable interest where it comes to confidential information. The confidential information is not in the public domain, has commercial value in the industry and to competitors, and would be useful to a competitor such as the second respondent. It is information known to the first respondent, which can readily be disseminated to the second respondent, and is worthy of protection.

[55] The second part of the protectable interest which has been clearly established by the applicant to exist is the applicant's trade connections. It is in undisputed that the nature of the relationship between the first respondent and the applicant's clients he was responsible for is such that he developed a close working relationship and relationship of trust with them. It must be emphasised that the first respondent never disputed in his answering affidavit, that he had the ability and the kind of relationship with the clients to readily convince them to move their business to the second respondent. He simply stated that he was not in the habit of conducting himself in such a manner and had no intention of doing so, which cannot be a legitimate answer in the circumstances of this case. This constitutes a proper protectable interest for the purposes of the enforcement of a restraint of trade.[29] In *Rawlins and another v Caravantruck (Pty) Ltd*[30] the Court said:

> 'The need of an employer to protect his trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he leaves the employer's service he could easily induce the customers to follow him to a new business ...

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[29] In *Hirt and Carter* (*supra*) at para 37 it was held: '... *Customer goodwill and trade connections have long been regarded as proprietary interests worthy of protection*'.
[30] 1993 (1) SA 537 (A) at 541D-I. See also *Esquire* (*supra*) at para 27; *Continuous Oxygen* (*supra*) at paras 34 – 36; *FMW* (*supra*) at para 45.

> Much will depend on the duties of the employee; his personality; the frequency and duration of contact between him and the customers; where such contact takes place; what knowledge he gains of their requirements and business; the general nature of their relationship (including whether an attachment is formed between them, the extent to which customers rely on the employee and how personal their association is); how competitive the rival businesses are; in the case of a salesman, the type of product being sold; and whether there is evidence that customers were lost after the employee left …'

[56] In my view, the first respondent ticks most of the boxes identified in the *dictum* in *Rawlins supra* needed for the enforcement of the restraint based on trade connections. He was a financial adviser, which is a senior position in the applicant, specifically tasked to service and establish a close working relationship with a number of the applicant's clients directly allocated to him. On the undisputed facts, his direct client portfolio consisted of 129 clients. He had full and complete access to all client information in this capacity. It is also undisputed that the services are of such a nature that the rendering thereof can with relative ease be moved to a new service provider.[31] What happened in this case clearly illustrates the reality of this eventuality, considering that in a short space of time, five clients moved their portfolios / assets to the second respondent to be serviced by the first respondent. Applicable is the following *dictum* in *Lifeguards Africa (Pty) Ltd v Raubenheimer*[32]:

> '… in competing directly with the plaintiff in the contracts obtained from the above-mentioned institutions, the defendant took advantage of trade connections of the plaintiff which constituted protectable interests. …'

[57] It is not even necessary to show that the first respondent actually exploited trade connections. All that has to be shown is that he could.[33] And *in casu*, he actually clearly did, as evidenced by the move of the five clients from the client corps he was responsible for at the applicant, to the second respondent. Unless the first respondent is insulated from this client base, there is a substantial risk that the applicant will lose more clients to the second respondent (where they will be serviced by the first respondent). The reason for this is that the first respondent

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[31] Compare *Medtronic (Africa) (Pty) Ltd v Kleynhans and Another* (2016) 37 ILJ 1154 (LC) at para 46.
[32] (2006) 27 ILJ 2521 (D) para 41.
[33] See *SPP Pumps* (*supra*) at para 30; *Continuous Oxygen (supra)* at para 42; *Van Wyk* (*supra*) at para 30; *Vox* (*supra*) at para 31.

simply cannot be trusted. He on several occasions said that he was not violating the restraint agreement, when that was undoubtedly not true. He made several promises that he would honour his undertakings, which were all false. The applicant has proper cause for not trusting the first respondent to honour anything he promised.

[58] The first respondent's own answering affidavit compounds the difficulties. In answer to all the contentions made by the applicant in the founding affidavit as to the first respondent failing to honour the promises he had made and that five clients had departed the applicant to join the first respondent at the second respondent, the first respondent does not even deny what the applicant has said. The first respondent acknowledges that he has had contact with clients whilst employed at the second respondent. He states that: '*... the Honourable Court is invited to understand my position. On the one hand, I have my obligations to the Applicant. On the other hand, I have people whose investments I have been handling for a considerable time who no longer want to work with the Applicant ...*'. This statement undoubtedly illustrates the risk to the applicant. The fact that the first respondent is so conflicted is telling. He should not be, and the only consideration he should have, is to honour the undertakings he had agreed to.

[59] But what makes it worse is the following statement made by the first respondent in the answering affidavit:

> '... My proposal was that every time I am contacted by one of the Applicant's clients, I shall duly inform the client of the restraint and inform the Applicant I had been contacted. This is in line with what I have been doing until now. Thereafter the Applicant would be afforded an opportunity to repair the relationship with the client. The only change I proposed is that should a client contact me after the Applicant had been afforded an opportunity to repair the relationship, I would be at liberty to offer services to the client.' (emphasis added)

[60] The position adopted by the first respondent is untenable, and in fact shows how he would attempt to manipulate the situation so as to justify taking over the applicant's clients. It does not take a genius to figure out the problem this so-called proposal causes. First and foremost, why would it be necessary for the

Applicant to repair the relationship? All that changed is that the first respondent is now working somewhere else. This situation in itself shows the influence the first respondent has over the clients, as his departure "damages'. This being so, all the first respondent needs to do, when contacted, is to tell the client to contact the applicant to 'repair' his or her relationship with the applicant, and if not, the client can come to him. The end result, of the client moving to the first respondent, is implied by this very proposal. There is little doubt, in my mind, that the appropriate clandestine influence dispensed by the first respondent when contacted by such client, will direct the client to simply tell the applicant he or she wants nothing to do with the applicant, and that client is then free to come to the first respondent. This cannot be acceptable, and undermines the very purpose of the restraint. Whilst it is true that clients can contract any wealth manager and / or adviser they wish, the fact remains that the first respondent simply cannot accept the custom of such clients, if they come from the applicant. He must be completely insulated from the clients, so as to give the applicant a fair chance to retain such business. I am in any event convinced that of the client knows that the first respondent is not allowed, by Court order, to advise him or her or manage his or her portfolio, that client would not leave the applicant.

[61] The risk to the applicant's business caused by what is summarized above is patently obvious, and is all the applicant has to show to succeed in establish a breach.[34] The Court in *IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Hall (Aka Baghas) and Another*[35] said the following:

> 'Where the ex-employer seeks to enforce against his ex-employee a protectable interest recorded in a restraint, the ex-employer does not have to show that the ex-employee has in fact utilised information confidential to it - merely that the ex-employee could do so. (See International Executive Communications Ltd (Incorporated in the Netherlands) t/a Institute for International Research v Turnley and Another 1996 (3) SA 1043 (W) ([1996] 3 B All SA 648) at 1055D - F (SA).) In short, the ex-employer 'has endeavoured to safeguard itself against the unpoliceable danger of the [ex-employee] communicating its trade secrets

[34] See *Reddy* (*supra*) at para 20; *Den Braven* (*supra*) at para 17; *Point 2 Point Same Day Express CC v Stewart and Another* 2009 (2) SA 414 (W) at para 14; *SPP Pumps (supra)* at paras 30 and 37; *Esquire (supra)* at para 27; *Continuous Oxygen (supra)* at para 34.
[35] 2004 (4) SA 174 (W).

> to a rival concern after entering their employ. The risk that the [ex-employee] will do so is one which the [ex-employer] does not have to run; and neither is it incumbent upon the [ex-employer] to inquire into the bona fides of the [ex-employee] and demonstrate that [he or she] is mala fide before being allowed to enforce its contractually agreed right to restrain the [ex-employee] from entering the employ of a direct competitor."

[62] There is no doubt that *in casu*, the applicant's protectable interest has been breached, as he has taken up employment with the second respondent as direct competitor, and the applicant has already lost five clients to such competitor, to be serviced by the first respondent in the course of his employment there. The first respondent has shown that he cannot be trusted, and clearly has it in mind to pursue the clients he dealt with the course of his employment with the applicant. His position at the applicant and the relationship of trust and confidence he developed with the clients, as a representative of the applicant tasked to service those clients, had the consequence that he carried those clients in his pocket.[36]

[63] In sum, the applicant cannot be expected to trust the *bona fides* of the first respondent to not pass on all his trade connections and knowledge of confidential information of the applicant to the second respondent, especially considering the very competitive nature of the industry, the similarity of services, and the limited availability of suitable clients. In *Medtronic (Africa) (Pty) Ltd v Kleynhans and Another*[37], the Court held as follows:

> '... It is also not incumbent upon Medtronic to enquire into the bona fides of Kleynhans and demonstrate that he is mala fide before being allowed to enforce its contractually agreed right to restrain him. In those circumstances, all that the Medtronic needs to do is to show that there is a trade connection Kleynhans could exploit should he desire to do so. The very purpose of the restraint agreement is that Medtronic did not wish to have to rely on the bona fides or lack thereof on the part of Kleynhans when he left their employ.'

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[36] In *Rawlins* (*supra*) at 541D-I, the Court held: '... *Heydon The Restraint of Trade Doctrine (1971) at 108, quoting an American case, says that the "customer contact' depends on the notion that – "the employee, by contact with the customer, gets the customer so strongly attached to him that when the employee quits and joins a rival he automatically carries the customer with him in his pocket' ...*'.

[37] (2016) 37 ILJ 1154 (LC) at para 40. See also *Van Wyk* (*supra*) at para 34.

[64] Accordingly, I am satisfied that the applicant has succeeded in establishing a protectable interest in relation to both trade connections and confidential information, and in establishing the existence of a breach / infringement of these protectable interests by the first respondent, thereby justifying the enforcement of the restraint of trade.

Other considerations

[65] Where it comes to the quantitative and qualitative weigh off to be conducted, the scope and period of the restraint is relevant. A shorter restraint and properly limited geographical area (if applicable) would mitigate in favour of enforcement, whilst an unduly long and broad restraint would mitigate against it.[38] It must also be considered whether the employee was possessed of the skills, expertise, qualifications and experience before joining the employer, as it could be seen as unfair in the weigh off to prevent the employee from earning a living under such circumstances.[39] In *Vumatel supra,*[40] the Court said:

> '...The nature of the industry is also an important consideration. The more specialized the industry is, the more the weigh off will favour the employer, as it limits the scope of the restraint and leaves much more avenues open to the employee to procure gainful employment in other industries. ...'

[66] In the current matter, and as already been dealt with above, the first respondent's continued employment with the second respondent has been found not to be prohibited. He can thus continue to earn a living in the industry of his choosing, using all the skills, experience and expertise he has accumulated over the years. He must however do this off his own bat, finding his own clients, and not by way of exploiting the confidential information and client base of the applicant. This can be nothing unduly onerous in such a proposition. This in my view weights in favour of the enforcement of the restraint where it comes to trade connections and confidential information. The applicant's client base is its most important asset, and the applicant must be

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[38] *Labournet* (*supra*) at para 43; *Continuous Oxygen* (*supra*) at para 47.
[39] *Automotive Tooling Systems (Pty) Ltd v Wilkens and Others* (2007) 28 ILJ 145 (SCA) at para 8; *Labournet* (*supra*) at paras 43 - 44; *Jonsson (supra)* at para 51.
[40] Id at para 39.

allowed to protect its interests in this regard. Overall considered, the weigh off in this case must favour the applicant.

[67] The issue of a restraint area is not relevant in this instance, because protecting the applicant's confidential information and client base will be sufficient to protect its interests. These interests are ordinarily not area bound. For example, a client is a client, no matter where the client is located. In this context, a restraint area plays no role, because these kinds of protectable interests do not contemplate limiting competing activities and being associated with a competing business, *per se*.

[68] Where it comes to the restraint period, the first respondent had the onus to provide proper information or a factual basis upon which the restraint period would be considered to be unreasonable.[41] The first respondent has made no case in this regard. I am satisfied that a restraint period of 24 months in this industry environment, and considering the seniority, the nature of position of the first respondent, and the nature of his relationship with the applicant's clients, is reasonable.[42]

[69] The applicant has no alternative remedy available to it in this instance. As said in *Plumblink SA (Pty) Ltd v Legodi and Another*[43]: '*... A future damages claim based on breach of contract would be cold comfort for business lost, in a market where as already said products are readily interchangeable. ...*'. It is far more appropriate to simply completely insulate the applicant from the risk associated with the employment of the first respondent with a direct and material competitor such as the second respondent, for the restraint period, and so give the applicant the opportunity to bed down its clients and have the value of confidentiality of its information diminish through the lapse of time.[44] An interdict is the only way this can be achieved, based on the following *dictum* in *Esquire supra*:[45]

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[41] *Plumblink* (*supra*) at para 50.
[42] *Plumblink* (*supra*) at 47. *Waco Africa (Pty) Ltd t/a Form-Scaff v Sack and Others* (2020) 41 ILJ 1771 (LC) at para 44
[43] (2020) 41 ILJ 1743 (LC) at para 49.
[44] Vumatel (*supra*) at para 38.
[45] Id at para 40.

> 'As I have stated above, the alternative remedy of a damages claim is cold comfort to an applicant that seeks to enforce a legitimate restraint of trade covenant. By the time a damages claim is heard, the horse had bolted and the harm is done. That harm is very difficult to repair. I am satisfied that, where a restraint of trade is enforceable, the alternative remedy of a damages claim in due course is more apparent than real ...'

[70] In the end, I believe the following considerations as articulated in *Ball supra*[46] must equally apply *in casu*:

> 'In my view, quantitatively and qualitatively, the interest of the first respondent surpassed that of the appellant. The fact that the appellant stated that she did not intend and did not use any of the information in favour of or for the benefit of the second respondent is irrelevant in determining whether the restraint is reasonable, or in determining whether the restraint had been breached. Furthermore, in my view, there was no other fact or aspect of public policy, at the time when the restraint was to be enforced, which required that the restraint be rejected. In the circumstances, I am satisfied that the court a quo correctly concluded that the restraint was reasonable and enforceable and in granting relief accordingly.'

[71] The applicant has thus satisfied all the other requirements necessary for the final relief it seeks against the first respondent, to be granted. In short, the weigh off favours the applicant, it faces real prejudice if relief is not granted, in the form of the loss of business and the risk created to it by way of the first respondent's continued employment and association with the directly competing business of the second respondent to the applicant's trade connections (client base) and confidential information. The restraint period is reasonable, and there is no suitable alternative remedy available.

Conclusion

[72] In summary, and final interdict wise, the applicant has demonstrated the existence of a clear right, in that it has a legitimate and proper restraint of trade covenant and confidentiality undertaking in place with the first respondent, susceptible to being enforced, where it comes to both confidential information

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[46] Id at para 25.

and trade connections. The applicant has also established that the first respondent is indeed infringing on such protectable interests. The weighing off of interests favours the applicant and there is no intervening issue of public interest. Finally, the applicant demonstrated the existence of an injury reasonably apprehended, and has no proper alternative remedy available to it.

Costs

[73] This then leaves only the issue of costs. This Court has a wide discretion where it comes to the issue of costs, considering the provisions of section 162(1) of the LRA. It must of course be considered that the applicant was ultimately overall successful, and that the current dispute is principally a contract dispute, and not an LRA dispute where ordinarily costs do not follow the result. I also consider, in the context of a costs award, that the first respondent has been less than forthright in his earlier dealings with the applicant, and in essence always had it in mind that he would target, whether directly or indirectly, the applicant's client base. I also consider that the applicant has suffered actual damages in the form of a loss of business. Fairness dictates, in the circumstances, that the applicant should be entitled to its costs.

Order

[74] It is for all the reasons as set out above that that I made the order that I did on 6 September 2023, as set out in paragraph 2 of this judgment, *supra*.

S. Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate A H Van Der Merwe
Instructed by:	Fluxmans Inc Attorneys
For the First Respondent:	Advocate N Mpofu
Instructed by:	James Attorneys