IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO: 6970/2017

In the matter between:

LASER JUNCTION (PTY) LTD	**APPLICANT**
v	
KARL LEESON FICK	**RESPONDENT**

Date of Hearing	**:**	**8 August 2017**
Date of Judgment	**:**	**28 September 2017**

ORDER

The following order is granted:

The application is dismissed with costs.

JUDGMENT

D. Pillay J

Introduction

[1] The applicant Laser Junction (Pty) Ltd seeks to enforce a restraint of trade agreement against the respondent, its erstwhile employee Karl Leeson Fick. Does a

restraint of trade agreement exist between the parties? If so, is it a contract of employment transferrable in terms of s 197 of the Labour Relations Act 66 of 1995 (LRA)? Are there public policy considerations that inform how the court should approach a restraint agreement in the context of employment? Are there public policy considerations that inform how any competing interests should be reconciled, taking into account the interests of the parties and the public? Has the applicant established that it has protectable interests? Has the respondent violated or threatened to violate such interests?

The Facts

[2] Laser CNC (Pty) Ltd employed the respondent in November 2010 on three months' probation. On 31 January 2011, at the end of the probation period, he signed a Memorandum of Agreement of Secrecy and Restraint. Three months later on 8 April 2011, the parties concluded a contract of employment a term of which enabled Laser CNC to terminate the respondent's services as an internal sales clerk summarily after the first three months. Laser CNC also prohibited the respondent from using confidential information as stipulated in that contract 'not only for the currency of [that] agreement, but for an indefinite period after its termination as well'.[1]

[3] In December 2012, the applicant, Laser Junction (Pty) Ltd, purchased the business of Laser CNC as a going concern. In terms of s 197 of the LRA, Laser CNC transferred its business and employees, together with their contracts of employment to the applicant. The applicant purported to also take transfer of the restraint agreement.

[4] In November 2015, the applicant promoted the respondent from sales to procurement. After serving three months' probation, the applicant confirmed his appointment as purchasing officer on 1 February 2016. His responsibilities changed from being a salesman to a raw materials buyer.

[1] Page 24 of the pleadings para 34.

[5] With the resignation of the applicant's managing director in August 2016, its difficulty in paying its accounts, and its offer of voluntary retrenchment to its employees, the respondent realised that the applicant was in financial difficulty. His application for voluntary retrenchment was rejected on the basis that his skills were still required.

[6] By the end of 2016 another director and the sales manager resigned to take up employment elsewhere. Furthermore, the applicant was unable to pay its steel suppliers. As a buyer this impacted negatively on the respondent's reputation in the industry. At the end of 2016 the applicant attributed its difficulties to 'market factors … not unique to the respondent'.[2] Whatever the causes, the respondent deduced that his job security was in jeopardy. Consequently he began circulating his curriculum vitae in December 2016 in a bid to find alternative employment.

[7] By the beginning of February 2017 the respondent had not received any job offers from four businesses he had applied to. Nevertheless he decided to resign. On 14 February 2017 he tendered his resignation. In his letter of resignation he stated that his services would end on 28 February 2017 and that he would take 18 days leave. On the same day (14 February 2017), the respondent accepted an offer for the position of technical sales representatives from Pinion and Adams (Pty) Ltd with effect from 1 March 2017.

[8] In April 2017, Pinion and Adams and the applicant engaged each other with a view to establishing a joint venture. To this end they concluded a Confidentiality Non-Disclosure and Non-Circumvention Agreement on 20 April 2017. Nothing however came of this engagement.

[9] On 31 May 2017, Shannon Kannigadu, the Design Centre Manager of the applicant, sent a text cellular phone message via WhatsApp to the respondent enquiring whether the latter would be willing to return to the applicant to take over sales at a very good salary. The respondent expressed his appreciation for being

[2] Page 129 of the replying affidavit para 44.

considered for the position and undertook to discuss the offer with his fiancée. Mr Kannigadu enquired what salary the respondent was earning. The respondent replied that he was earning R22 000 per month plus commission at half a percent on sales after R6.5 million per annum and he had the use of a car. Acknowledging how good the respondent was, Mr Kannigadu offered him R26 000 per month plus a car. The following day Mr Kannigadu indicated that the applicant might discuss paying him a little more. Early on the morning of Monday, 5 June 2017, he called the respondent again. The respondent declined the offer saying that he had more than just money to consider. Mr Kannigadu urged the respondent to reconsider as 'things are good now' at the applicant. The respondent remained unmoved. Agreeing to remain in touch, they terminated their WhatsApp communication amicably. On 20 June 2017 the applicant launched this application urgently without any forewarning.

Order sought

[10] The applicant seeks an order interdicting the respondent from being interested in, taking up employment or offering his services to any person, including Pinion and Adams, that is situated in the Durban Metropolitan area that develops, manufactures, markets and distributes metal products and that is engaged in competition with the applicant in relation to any of the activities in clause 2.1 of the restraint agreement for 15 months from 13 March 2017. Other remedies sought relate to communicating with or soliciting the applicant's customers and suppliers, enticing employees of the applicant, retaining, using or disclosing any confidential information of the applicant and directing the respondent to return all confidential information to the applicant.

Is there a valid restraint between the parties?

[11] The applicant bears the onus to prove the restraint. It relies on the restraint agreement between Laser CNC and the respondent. The applicant pleaded that when it bought the business from Laser CNC, all the contracts of the latter, including the restraint agreement transferred to the former in terms of s 197 of the LRA. Furthermore the attorney for the applicant submitted in her heads of argument that in

addition to an alleged cession of the restraint agreement, the applicant also relies on the agreement's express terms that entitle the applicant to the restraint as successor in title.

[12] As far as the respondent is concerned, the restraint fell away when the applicant employed him. He contends that when the applicant took over the business from Laser CNC, he signed a new contract of employment with the applicant before its director Mr Sphiwe Xulu, in 2013. The applicant did not give him a copy of this agreement. He understood from the new contract of employment that it superseded all previous contracts including the restraint agreement. Mr Xulu denies having concluded any written agreement with the respondent.

[13] The applicant criticises the respondent for not elucidating the full terms of the new contract of employment. It therefore contends that the respondent failed to prove the existence of such a new contract and the waiver or substitution by the applicant of its rights under the restraint agreement concluded with Laser CNC.

[14] Whether the respondent concluded a new contract of employment with the applicant is a material dispute of fact that cannot be resolved on the papers, except in favour of the respondent by applying *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd.*[3] Less still is it possible to draw any adverse inference from the fact that the respondent is not able to provide any better detail of the agreement. Without the new contract to remind himself of its terms, the respondent could hardly be expected to specify any terms other than the most obvious ones that were already being implemented and therefore known to the applicant, i.e. his position and remuneration. Significant however is his evidence that the new contract of employment did not come with a restraint agreement. As the applicant is also silent about whether any of its other serving and departed employees were under a restraint, it fortifies the respondent's case that he was not restrained.

[15] Respondent's counsel submitted that the restraint was also superseded by the April 2011 contract of employment with Laser CNC, which followed three months after the restraint agreement. The contract of employment was subsequent to the restraint agreement; it did not refer to the restraint agreement, and it had a section

[3] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

on confidentiality that would endure 'for an indefinite period after its termination', that was wider than the two years provided in the restraint agreement. However, the restraint agreement had the additional prohibition against his employment in Durban. However, more importantly the respondent's evidence was not that the April 2011 agreement substituted the February 2011 restraint, but that the new contract of employment with the applicant in 2013 displaced the restraint agreement. His evidence rather than his counsel's submissions about the two agreements is more reliable as it was his understanding at the time and not a post hoc construction.

[16] Additionally, there could not have been any restraint agreement in force by February 2016 as the restraint was specifically addressed to the respondent in his capacity as an internal sales clerk. The preamble to the restraint agreement records that Laser CNC employed the respondent in the capacity of an internal sales clerk. The respondent ceased to be a salesman on 1 November 2015. Consequently if the restraint existed at all it fell away when he was promoted to procurement. His contract of employment states that the applicant may require him to perform duties falling outside of his job description but the restraint agreement was specific to his salesman function. As a limitation of several fundamental rights discussed below a restraint agreement must be construed strictly.

[17] As for the applicant's reliance for the cession on the express wording in the restraint, this was not pleaded in its affidavits but emerges in its heads of argument. Unsurprisingly the respondent did not testify whether he saw, read and understood the words 'and being hereinafter together with the successors and assigns referred to as "Laser CNC"' appearing in parenthesis and in significantly smaller font size 8 below the name Laser CNC in the restraint agreement. In this format a reader could easily miss it altogether.

[18] Furthermore the agreement appears to be a cut and paste standard term agreement that switches from addressing the respondent in the second person in paragraph 2 and then in the third person as 'he/she' in paragraph 3. The respondent does not dispute his consent to the restraint agreement or contend that he misunderstood its terms. And, having accepted his evidence that the restraint fell away, no more needs to be said about the quality of its form and content or what, if anything, they meant to the respondent.

[19] Were the agreements transferable by operation of law under s 197 of the LRA? Assuming that the contract of employment was transferred because s 197 expressly provides for it, the same cannot be said for the restraint agreement.

[20] Section 197 of the LRA provides for the transfer of a contract of employment to a new employer. It is designed to ensure that the transfer of a business does not prejudice the employees. That sub-section 9 holds the old and new employer jointly and severally liable in respect of any claim concerning any term or condition of employment that arose prior to the transfer epitomises the breadth of the protection for employees.

[21] Only contracts of employment are transferrable under s 197 of the LRA. What is a contract of employment? Section 4 of the Basic Conditions of Employment Act 75 of 1997 (BCEA) stipulates that contracts of employment may contain basic conditions of employment as provided in the BCEA or a sectoral determination, and any law or term in a contract that is more favourable to the employee. The corollary of this is that a restraint that is less favourable than the BCEA to an employee cannot be a term in a contract of employment. Whether a restraint agreement is less favourable must be determined case by case. If it is less favourable and therefore excluded from a contract of employment as defined then it cannot be transferred by operation of law under s 197.

[22] Is the restraint in this case less favourable to the respondent? Neither the Constitution of the Republic of South Africa, 1996 nor our labour laws recognise a right to work. Similarly conventions of the International Labour Organisation from which the LRA draws sustenance, recognises fundamental rights *at* work but not the right *to* work.[4] By signing the restraint agreement the respondent acquired the right to work. And with that right came all the protections of an employee under s 23 of the Constitution. However, the restraint agreement also constrains the respondent's other rights including rights to freedom of trade, occupation and profession in s 22. The respondent could have acquired the right to work in a contract of employment as workers usually do if that was the only purpose of concluding an agreement. It was not. In the hands of Laser CNC and now the applicant who relies on it the real and

[4] ILO Declaration on Fundamental Principles and Rights at Work http://www.ilo.org/declaration/lang--en/index.htm. (accessed 26 September 2017)

only purpose of the restraint agreement was to wield it as a weapon to discourage him from leaving and when he did to constrain his new employment to its advantage. As such the restraint was not merely less favourable but manifestly unfavourable to the respondent; therefore it did not meet the definition of a contract of employment. Consequently it could not be transferred to the applicant by operation of law.

[23] For these reasons I find on the facts that the restraint agreement fell away in 2013 when the applicant became the employer and concluded a new agreement with the respondent, otherwise it fell away when he was promoted to procurement. As a matter of law s 197 of the LRA does not permit a transfer of agreements that were not contracts of employment, i.e. agreements favourable to an employee, which the restraint agreement was not. Consequently no valid restraint agreement existed between the parties. This finding is dispositive of the application. However, if it transpires that the restraint agreement still exists, the further questions raised in my introduction will be relevant.

Are there public policy considerations that inform how the court should approach the restraint agreement in the context of employment?

[24] In the four-point test for reasonableness of restraints the enquiry into whether there is 'another aspect of public interest that does not affect the parties but does require that the restraint not be invoked' appears last.[5] However if a restraint raises a question of public interest, then the public interest concerns must be addressed first. Ultimately reasonableness will be determined with reference to public policy.[6] In so far as a restraint 'flies in the face of the rights in the Constitution, even if the parties have agreed to it' it will not be enforceable 'because it would be against public policy and therefore unreasonable.' [7]

[25] Reasonableness and public policy in contracts are open-ended norms, never

[5] *Basson v Chilwan* at 743. *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 2 SA 486 (SCA) para 16.
[6] *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 887I-888E and 893C.
[7] John Saner 'Agreements in Restraint of Trade in South African Law' 3-11 citing Magna Alloys at fn 42.

static, ever evolving over time, in tandem with society to gather meaning and certainty.[8] Predictably 'there can be no *numerus clausus* of the circumstances in which a Court would consider a restraint on the freedom to trade as being unreasonable.'[9] Consequently,

> '[w]ith the public interest as the touchstone the Court will be called upon to decide whether in all the circumstances of the case it has been shown that the restraint clause should properly be regarded as unreasonable.'[10] (my emphasis)

[26] When the test for reasonableness of a restraint agreement was reformulated[11] and amplified,[12] two public policy considerations rooted in the common law informed the deliberations to determine interests: the freedom and sanctity of contracts (*pacta sunt servanda*) and the freedom to trade. Today the Constitution informs policy. Labour laws inform labour policy. Together they constitute 'circumstances' that inform the reasonableness of a restraint between an employer and an employee.

[27] The Supreme Court of Appeal interpreted the Bill of Rights in the Constitution to apply to all agreements including agreements in restraint of trade, to all law including private law and to both natural and juristic persons.[13] Subsequently the Constitutional Court was unanimous in concluding that the common law in the field of contract may be developed 'because it is highly desirable and in fact necessary to infuse the law of contract with constitutional values.'[14] Earlier it had interpreted the property rights clause under s 25 of the Constitution to apply horizontally to juristic persons.[15] In the circumstances it is safe to say that contrary to

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[8] *Magna Alloys v Ellis* at 887I-888E and 893C; *South African Police Service v Solidarity obo Barnard (Police and Prisons Civil Rights Union as amicus curiae)* 2014 (10) BCLR 1195 (CC) para 100; I Currie and J de Waal *The Bill of Rights Handbook* 6 ed (2013) at 469-470, para 22.4.
[9] *Magna Alloys v Ellis* at 891H; *Basson v Chilwan & others* 1993 (3) SA 742 (A) at 762.
[10] *Basson v Chilwan* at 762.
[11] *Magna Alloys v Ellis* (Headnote); *Reddy v Siemens Telecommunications* para 10.
[12] *Basson v Chilwan* at 771C-E; *Reddy v Siemens Telecommunications* paras 15-16;
[13] *Reddy v Siemens* para 11.
[14] *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (3) BCLR 219 (CC) para 32 -38, 42, 69-71 However, the majority dismissed the appeal after finding that it would not be the interests of justice to allow Everfresh to raise the issue of the development of the common law in argument for the first time on appeal (para 74).
[15] *First National Bank of SA Ltd t/a Wesbank v Commissioner, South African Revenue Service & another; First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 (4) SA 768 (CC) paras 41-45.

the holding in *Den Braven SA (Pty) Ltd v Pillay & another*,[16] the Bill of Rights has horizontal application to contracts in restraint of trade.[17] Together with labour laws it creates a new dispensation in employment.

[28] Consequently contracts of restraint in employment raise questions about the proprietary interests of both parties under s 25 of the Constitution. Both parties' rights to freedom of trade, occupation and profession in s 22 are also implicated.[18] Labour laws and the policy considerations they embrace extend particular protections to the respondent against unemployment and unfair labour practices under s 23 of the Constitution. Each of these rights ramifies into other values, interests and rights including the rights to equality,[19] dignity,[20] freedom of movement and residence,[21] and to all the rights, goods and services that are accessible only by having decent work to pay for them.[22]

[29] The genesis of the right to fair labour practices is in the Constitution and expatiated in the LRA in order to protect employees because the common law did not do so adequately or at all. A foundation of fundamental constitutional and labour rights elevates the protection of employees and bolsters their bargaining position. Furthermore when interpreting rights or freedoms recognised by the common law and when developing the common law, the obligation is upon every court to promote the spirit, purport and objects of the Bill of Rights.[23] To achieve this objective a restraint agreement enforceable on the principle of *pacta serva sunt* must be scrutinised carefully to ensure that the common law does not creep in to snatch away hard won constitutional and statutory protections. A restraint favouring the applicant with no quid pro quo for the respondent other than the right to work is a typical example of a one-sided restraint that backtracks on these protections.

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[16] *Den Braven SA (Pty) Ltd v Pillay & another* 2008 (6) SA 229 (D) para 30.
[17] *D & E Trading (Pty) Ltd v Hilton Village Centre CC & others* (1342/13) [2013] ZAKZPHC 12 (19 March 2013) paras 15-22.
[18] *Reddy v Siemens* para 15.
[19] S 9 of the Constitution.
[20] S 10 of the Constitution.
[21] S 21(1) and (3) of the Constitution.
[22] The ILO definition of 'decent work' is summarised thus: 'Decent work sums up the aspirations of people in their working lives. It involves opportunities for work that is productive and delivers a fair income, security in the workplace and social protection for families, better prospects for personal development and social integration, freedom for people to express their concerns, organize and participate in the decisions that affect their lives and equality of opportunity and treatment for all women and men.' See http://www.ilo.org/global/topics/decent-work/lang--en/index.htm.
[23] S 39(2) of the Constitution

[30] If the restraint exists, is enforced and the respondent becomes unemployed, it would implicate other rights in the matrix of rights above. The respondent's resulting unemployment would partner with poverty to entrench inequality and indignity. Inflating the pool of unemployed and poor people is antithetical to a developing constitutional democracy and a burden on society. Enforcement of the restraint would also strip the respondent of a plethora of important components of the right to fair labour practices that are available only to employees.[24] These are the potential injustices and inequities that arise for consideration when undertaking an analysis to enforce a one-sided restraint agreement. Consequently ignoring the interests of the respondent would lead to an incomplete, unbalanced and disproportionate result.

[31] Another concern is the onus of proof. By placing the onus of establishing on a balance of probabilities that the restraint was unreasonable on the party seeking to attack the restraint *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*[25] imposed a burden not previously born by an employee who seeks to avoid the restraint.[26] Previously a restraint agreement was invalid and the onus rested on the party seeking to enforce it to prove its validity.[27] Notwithstanding this imposition the court accepted that 'once the agreement is before the court it is open to the scrutiny of the court in all its surrounding circumstances as a question of law.'[28] In answering the question whether a restraint is reasonable the SCA mollified the onus in ***Reddy v Siemens Telecommunications (Pty) Ltd***[29] as one that calls for a 'value judgment rather than a determination of what facts have been proved, and the incidence of the *onus* accordingly plays no role.'[30]

[32] The Constitutional Court's approach 'is not the conventional *onus* of proof as it is understood in civil and criminal trial[s] where disputes of facts have to be resolved.'[31] If argument to justify the limitation of a right is inadequate the court may

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[24] S 23(2) of the Constitution.
[25] *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A).
[26] *Magna Alloys v Ellis* at 891B-C; JT Schoombee 'Agreements in restraint of trade: The appellate division confirms new principles' 1985 (48) *THRHR* 127 at 140, 143.
[27] *Magna Alloys v Ellis* at 890-891C.
[28] *Magna Alloys v Ellis* at 887H.
[29] *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 2 SA 486 (SCA).
[30] *Reddy v Siemens* para 14; Saner 'Agreements in Restraint of Trade in South African Law' 3-13.
[31] *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) & others* 2005 (3) SA 280 (CC) para 34.

nevertheless conduct a justification analysis if the issue is of great public importance. The authors of the *Bill of Rights Compendium* summarise:

> 'Because the task of interpreting the Bill of Rights rests with the courts, evidentiary rules relating to *onus* ought not to play any role with regard to factual issues in the determination of the normative content of provisions of the Bill of Rights. Neither should the incidence of *onus* play a role when there are no factual disputes and only the application of standards such as reasonableness is at issue.'[32]
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> (Footnotes omitted)

This approach ameliorates the burden on the respondent to prove the unreasonableness of the restraint. It fortifies the need for constitutional scrutiny of restraint agreements in employment.

[33] The relative bargaining position of the contracting parties is also a concern. *Magna Alloys* did not consider this question because the employer raised the restraint in its counterclaim in order to resist the employee's claim for unpaid commission.[33] *Basson* acknowledged that contracts between employer and employee may fall in the category of contracts concluded from a position of inferiority,[34] even though in that case the parties contracted on 'a footing of equality'.[35] When there is parity of bargaining power protection from the court will be dispensable. The principle of *pacta sunt servanda* will apply unless 'some other factor of public policy' applies.[36] However, employees with no unique talents, who depend on others for jobs and who are vulnerable to the vicissitudes of the open labour market have little, if any, bargaining power. Consequently the 'other factor of public policy' that applies to them originates in constitutional and labour law protections. Although the respondent has talent and capabilities he depends on industry for employment. He was not head hunted; he searched for two months before he found his current job. He admitted agreeing to the restraint but it is unlikely that he would have done so if he had had a choice or the applicant was prepared to employ him without the restraint. After all why would any employee sign a one-sided restraint agreement if the only benefit for him is a job?

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[32] I M Rautenbach 'Enforcement' in *Bill of Rights Compendium* para 1A97
[33] *Magna Alloys v Ellis* at 882-883.
[34] *Basson v Chilwan* at 763.
[35] *Basson v Chilwan* at 763.
[36] *Basson v Chilwan* at 763.

[34] In these circumstances a one-sided restraint agreement in employment is different from other restraint agreements in which parity of bargaining prevails. Assessing reasonableness of the restraint must be viewed through the lens of constitutional and labour law protections. In so far as a restraint agreement reverses such protections, as the restraint in this case does, it is against public policy and unenforceable. One of the ways to avoid this result would be to ensure that the restraint is not one-sided, that the employee receives some quid pro quo additional to securing a job. This would also support a finding that the employer genuinely has interests to protect, is willing to secure such protection in a meaningful way that avoids the hardships of unemployment and is not simply stamping out lawful competition. An employee who violates such a restraint would risk severe penalties that may be either agreed or imposed by a court. Otherwise as a weapon in the hands of an employer against an unarmed employee a one-sided agreement is unenforceable, as the restraint in this case is. This finding too is dispositive of the application.

Are there public policy considerations that inform how any competing interests should be reconciled taking into account the interests of the parties and the public?

[35] The fundamental rights implicating restraint agreements are substantial, self-standing rights that are more than 'incidents' of one another.[37] The respondent's rights cannot be whittled down or automatically trumped exclusively by the applicant's s 22 rights.[38] Instead, all rights have to be weighed and balanced against each other.[39] If they are to be limited at all then such limitation must be proportional,[40] 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors,' and that no 'less restrictive means to achieve the purpose' exists.[41]

[37] *Advtech Resourcing v Kuhn* [2007] 4 All SA 1368 (C). Contrast with *Den Braven v Pillay* above para 26.
[38] *Affordable Medicines Trust & others v Minister of Health & others* 2006 (3) SA 247 (CC) para 59.
[39] *Reddy v Siemens* para 17.
[40] *Reddy v Siemens* para 17.
[41] S 36 of the Constitution.

[36] To withstand constitutional scrutiny the restraint agreement has to be so vital to the protection of applicant's proprietary interests under s 25 and its rights to trade under s 22 that without it, its performance, commercial wellness and the livelihood of its workforce would be jeopardised; that no less restrictive means exist to protect its rights and interests; and that constraining the respondent from exercising all his first and second generation human rights[42] and all his third generation socio-economic rights[43] accessible only by having decent work to pay for them, for 15 months in the Durban Metropolitan is proportional, reasonable and justifiable. As will emerge from the facts below, the applicant fails to justify any need for the restraint at all.

Did the applicant have protectable interests? If so, what were they?

[37] Generally it is accepted that under s 25 of the Constitution, an employer would have protectable proprietary interests in its confidential information, trade secrets, and customer or trade connections if it proves having such interests.[44] Whether proprietary interests worthy of protection under a restraint agreement exist, depends on whether confidential matter exists, whether the employee has access to it, whether it would be useful to the employer for carrying on business,[45] whether it is private or known to a few people and not in the public domain, and whether if disclosed, it would give a competitor an advantage.[46] Whether information is confidential or amounts to a trade secret is a factual enquiry.

[38] An employer would also have a proprietary interest in its relationship with customers, potential customers, suppliers and others, that is, its trade connection or goodwill.[47] To establish a trade connection an employee would have to have had access to her employer's customers, be able to build relationships with them and

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[42] Equality (s 9), human dignity (s 10), freedom and security of the person (s 12), freedom of association (s 18), freedom of movement and residence (s 21), freedom of trade and, occupation and profession (s 22), labour relations (s 23), and property (s 25).
[43] Housing (s 26), health care, food, water and social security (s 27) and education (s 29).
[44] *Reddy v Siemens* para 20-21.
[45] *Townsend Productions (Pty) Ltd v Leech & others* 2001 (4) SA 33 (C) at 53J-54B; *Mossgas (Pty) Ltd v Sasol Technology (Pty) Ltd* [1999] 3 All SA 321 (W) at 333F; *Walter McNaughtan (Pty) Ltd v Schwartz & others* 2004 (3) SA 381 (C) at 388J-389B.
[46] *Basson v Chilwan* at 751B; *David Crouch Marketing CC v Du Plessis* (2009) 30 ILJ 1828 (LC) para 21.
[47] *Basson v Chilwan* at 751B.

induce them to follow her to her new employment. She would have to acquire such personal knowledge and influence over the customers that if she were allowed to compete she would be able to take advantage of the employer's trade connection.[48]

[39] Care must be taken to distinguish an employer's proprietary interests from those of its employee.[49] An employee's talent, skills and capabilities are her own. These qualities must amount to a proprietary interest which vests in the employee personally, forming part of her identity, and adding to her intrinsic value in the labour market. An employer cannot take such proprietary interests away from an employee by enforcing a restraint of trade. Any restraint of the employee's proprietary interests must be compensated for or else it could amount to violations of the employee's constitutional rights at least under s 25 of the Constitution. In so far as an employer cultivates an employee's capabilities in ways she might not have been able to do on her own, then the employer would have an interest in retaining her services. Employers have a social obligation to provide skills and training for employees.[50] An employer has no proprietary interest in an employee's knowledge, skills and experience even if these were gained during her employment.[51] Tying down an employee to an employer who 'invests' in its employee to acquire or cultivate these qualities as 'a return on its investment' is unreasonable, against public policy,[52] 'pernicious and feudalistic'.[53]

[40] Some understanding of the nature of the applicant's business is needed here to assess whether it has protectable proprietary interests. The business of the applicant was to fabricate sheet metal to meet the design specifications of customers in the engineering industry. The customer would approach the applicant when the need arose for a bespoke product. The design and drawings belonged to the

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[48] *Morris (Herbert) Ltd v Saxelby* [1916] 1 AC 688 at 709); *Rawlins & another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at 541C-I; *Recycling Industries (Pty) Ltd v Mohammed & another* 1981 (3) SA 250 (SE) at 256C-F; *Drewtons (Pty) Ltd v Carlie* 1981 (4) SA 305 (C) at 307G-H and 314C-G.
[49] *Aranda Textile Mills (Pty) Ltd v Hurn & another* [2000] 4 All SA 183 (E) para 33 referred to with approval in *Automotive Tooling Systems (Pty) Ltd v Wilkens & others* 2007 (2) SA 271 (SCA) at 278.
[50] Skills Development Act 97 of 1998, especially s 2.
[51] *Sibex Engineering Services (Pty) Ltd v Van Wyk* at 507D-H; *Basson v Chilwan* at 771C-F and 778D
[52] *Automotive Tooling Systems (Pty) Ltd v Wilkens* at 277G-278A, *Basson v Chilwan* at 748-749; *Reddy v Siemens* paras 9 and 18.
[53] Schoombee 1985 *THRHR* at 142.

customers. In so far as the applicant contends that they belonged to it, this too creates a genuine dispute that must be resolved in favour of the respondent.[54]

[41] The sales function differed in that the customers were from a small community of engineering firms, quite unlike a mass based production of goods and services for sale to the general population for which customer lists, preferential pricing and discounts would be confidential because it would give the holder of such information a competitive edge. The cost of steel constitutes the bulk of the manufacturing costs of sheet metal. As a purchaser of the metal, the applicant and other fabricators of steel worked off price guides of steel merchants. The same discounts were available to all bulk buyers. Pricing and customers' needs are not automatically confidential information. In the course of shopping for the best price and service, nothing stops a customer from disclosing its needs and the prices quoted to multiple steel fabricators. Therefore costing of steel and pricing of fabricated steel would not be confidential information in this instance.

[42] In the order prayed, the applicant does not specify what confidential information or categories it wants the respondent to return to it. Although the restraint agreement defines confidential information broadly to include reports, data, memoranda, manuals, production orders, test results, designs, customer and supplier lists, lists of goods and prices, computer programmes and stored information, and know-how in connection with Laser CNC's business, the applicant has not proven that it had any confidential information or trade secrets. The respondent denies that he had any confidential information to disclose to Pinion and Adams or anyone else. He points instead to the applicant itself providing Pinion and Adams with confidential information during their talks about a joint venture. Therefore if it did have confidential information confidentiality was lost with disclosure to Pinion and Adams.

[43] Pinion and Adams shared customers with the applicant. However, the respondent points out that Pinion and Adams was established over 45 years ago, making it an industry leader. The registration of the applicant and Laser CNC suggests that they were only established in 2012 and 1997. The applicant could not genuinely dispute the respondent's evidence that when he arrived at Pinion and Adams, four large firms were customers of both the applicant and Pinion and Adams.

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[54] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* above.

Furthermore, the respondent did not manage these accounts for the applicant; other employees did. Consequently the respondent could not have established a trade connection with them or acquired any trade secrets in relation to them.

[44] In the circumstances I find that the applicant has failed to prove that it has any protectable proprietary interests either in the form of confidential information or customer connections. Such interests as it might have, Pinion and Adams already has by virtue of its own endeavours and the applicant's disclosures in anticipation of forming the joint venture. This finding on the facts is also dispositive of the application.

Has the respondent violated or threatened to violate such interests?

[45] More than 15 months lapsed between the respondent being a salesman for the applicant and taking up a job as such for Pinion and Adams. If he had any proprietary interests of the applicant this was a sufficient cooling off period for him to have dissociated himself from them. As a buyer for the applicant he did not have to interact with customers of the applicant but with its suppliers, so it was submitted for the respondent.

[46] The applicant countered in reply that the respondent did have contact with its customers. It attached several emails exchanged between him and customers. On this basis the applicant urged the court to hold that the respondent is dishonest or misrepresented his relationship with customers.

[47] These are serious allegations that should not be made lightly in publicly accessible court papers. As they emerge in the replying affidavit in urgent proceedings, the respondent had no opportunity to respond to them. The applicant knew it had to make out its case in its founding affidavit; failing to do so raises questions about its own integrity.

[48] Dishonesty and misrepresentation are not the only inferences to draw from the limited facts presented in motion proceedings. It emerges from some of the emails that the respondent interacted with customers when he was asked to do so by the sales staff to clarify customers' orders or to dispose of excess stock. As a

purchaser he had to know what customers wanted. However, he did not have to deal with customers to know this. Sales people were employed for this purpose. As regards emails SX2 and SX12, a third party seems to have initiated the email exchanges regarding Bell Equipment's spread-sheet and copied it to the respondent. After a lapse of more than three months the respondent requested a copy of the spread-sheet from Bell Equipment. Bell Equipment was a customer of both the applicant and Pinion and Adams. Consequently even if the respondent had not received the spread-sheets while he worked for the applicant he would have had free access to Bell Equipment and its spread-sheets through Pinion and Adams. The restraint if it existed was upon the respondent, not Bell Equipment who was free to disclose whatever information to whomever and whenever it chose. The applicant's example of the spread-sheet fails to prove that the respondent had any information of the applicant that was confidential or established a trade connection.

[49] The applicant contends that the respondent was coy about disclosing in this application when Pinion and Adams offered him a job. It accuses him again of dishonesty when he resigned.

[50] The respondent did not say, as the applicant alleges, that when he handed in his resignation that he did not have a job offer. What he did say was that he had not received any positive responses from the companies he had approached for employment by early February 2017; therefore he decided then to resign and travel to Tanzania to visit his brother and search for employment. He had mentioned this to the applicant's Managing Director Mr Muthusamy Nelson Govender at some stage, not to Mr Xulu as the applicant alleged. The applicant cannot sensibly refute the respondent's intention to travel to Tanzania. As the respondent could not find work in Durban, it cannot be 'nonsensical' as the applicant claims for him to find work elsewhere, even if that meant being away from his fiancée.

[51] The respondent handed in his letter of resignation only on 14 February 2017. The decision to resign and the resignation were separated in time. The offer of employment from Pinion and Adams dated 13 February 2017 also does not contradict the respondent; he did not say that he did not have an offer when he resigned. What he said was when he decided to resign in early February 2017 he did not have a job offer. That he met Pinion and Adams before 13 February 2017 is

speculation on the applicant's part. He might never have met them at all if, as he says, he received an offer electronically from LabourNet, a labour broker; and he might even have received it only on 14 February when he resigned. The applicant has no basis to say that the respondent had the offer from Pinion and Adams in early February 2017.

[52] Certainly the respondent was coy about when he received the job offer. However I cannot find that he had any obligation to disclose the offer at all. In the circumstances, to accuse the respondent of dishonesty is unfair, unjustified and malicious. The unwarranted emphasis on dishonesty in the applicant's affidavits and heads of argument is unfortunate. Left unquestioned it could be potentially damaging to the respondent's career. To my findings above that the applicant has failed to prove that it had any proprietary interest, I add that the respondent had no proprietary interest of the applicant to disclose and any interests he did have were already available to Pinion and Adams. Even if it transpires that the respondent did have access to the applicant's proprietary interests and that he did violate such interests, the applicant delayed more than two months in launching this application. Consequently, this application has become moot, the remedy ineffective.

The Delay

[53] The applicant alleged that it learnt of the respondent's employment at Pinion and Adams during the 'latter half of May 2017' when its driver, Mr Frans Ngidi, saw the respondent in a Pinion and Adams vehicle at Bell Equipment, one of the applicant's biggest customers. In fact Mr Ngidi's affidavit specifies that he saw and took photographs of the respondent on 12 May 2017. The applicant deliberately misrepresents of the evidence of its own witness. This misrepresentation is compounded by the uncontested evidence of the respondent about his conversations with the applicant's staff Mr Govender and Mr Kannigadu..

[54] The respondent disputed that the applicant had not known earlier that Pinion and Adams was his new employer. He recalled meeting Mr Govender at the offices of Pinion and Adams on 13 April 2017. They shook hands. Mr Govender would have noticed that Pinion and Adams employed the respondent because he was wearing its logo on his shirt. He continued to see Mr Govender when follow up meetings took place during the negotiations to form a joint venture.

[55] Then there were the discussions on 31 May 2017 with Mr Kannigadu. The applicant does not mention them in its founding affidavit. It also cannot deny the transcript of the messages the respondent produced. The applicant alleges that Mr Kannigadu did not know initially that the respondent was employed with Pinion and Adams. This is odd because as he had asked the respondent what he was earning he had to know that the respondent was working and where, especially as his Managing Director already knew it was at Pinion and Adams .

[56] On both its versions the applicant knew by mid or latter half of May that the respondent worked for Pinion and Adams. In the discussions with the respondent on 31 May 2017, Mr Kannigadu was cordial to the respondent recognising that he was a valuable employee. Mr Kannigadu gave no indication of the litigation to follow 20 days later.

[57] The misrepresentation about when it knew about the respondent's employment with Pinion and Adams was to bolster its case for urgency and to counter any suggestion that it waived its rights to its proprietary interests in the restraint agreement. It has the opposite effect. The delay in launching this application suggests that the applicant was not concerned about the respondent violating any restraint probably because it did not genuinely believe that it had a valid restraint over him. Its offer of re-employment fortifies this view. Otherwise it would mean that the applicant was prepared to offer employment to someone whom it believed had violated its agreement, behaved dishonourably and was untrustworthy. If there was a valid restraint agreement the offer of re-employment tacitly confirmed the applicant's waiver of its rights under it.

Conclusion

[58] This case is distinguishable from other cases in which employees deliberately set out to use the skills, knowledge, confidential information and trade connections they gathered in violation of a restraint of trade with their old employer to better their prospects with a new employer. In this case the respondent searched for employment only after he deduced that his job security was on the line as the applicant struggled against adverse market conditions. That he was endowed with

his own talent and capabilities is borne out by the applicant expressing its appreciation to him in writing, promoting him, refusing to retrench him voluntarily, and eventually attempting to re-employ him at a significantly higher rate of remuneration.

[69] When the respondent's bargaining position had improved, he was able to reject the significantly improved offer from the applicant. This application is in retaliation against the respondent rejecting that offer. When he tendered his resignation and informed the applicant that he would be taking 18 days leave, the applicant did not object to either the resignation or the leave. In this application the applicant contends churlishly in its replying affidavit that the respondent was not entitled to such leave. It has stooped to misrepresenting the facts in the hope of succeeding in this application. Missing from its evidence is any corroboration that it had similar restraints on its other staff. Accordingly the respondent should not be out of pocket for any loss of income or legal costs. However, the court was not asked to make any special order in these respects.

Order

[60] The application is dismissed with costs.

D. Pillay J

APPEARANCES

Attorney for the applicant	:	C.A Nel
Instructed by	:	MacGregor Erasmus Attorneys Tel: (031) 201 8955 Ref: charmane@meattorneys.co.za
Counsel for the respondent	:	A.Camp
Instructed by	:	Pearce, Du Toit & Moodie Tel: (031) 304 6781 Ref: johan@pdtm.co.za
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