REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Case no: JA 23/11

In the matter between:

TREVLYN BALL **Appellant**

and

BAMBALELA BOLTS (PTY) LTD **First Respondent**

ACTION BOLT (PTY) LTD **Second Respondent**

Heard: **26 March 2013**

Delivered: **30 May 2013**

REPORTABLE

Summary: -Restraint of trade-Mootness- restraint period lapsed - issue of restraint moot, however, issue of costs vital – accordingly the appeal cannot be dismissed for being moot. Enquiry into the reasonableness of a restraint- the question of *onus* avoided in suitable cases by resolving genuine disputes of fact in favour of the party sought to be restrained. Reasonableness is determined in light of the facts. If the facts 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- A restraint is enforceable if it protects a legitimate interest– the determination of reasonableness involves a balancing of competing interests-Labour Court correctly concluded that the restraint was

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enforceable and reasonable. Order that the competitor dismiss the appellant not appropriate relief-Costs- appellant ordered to pay costs in the court *a quo*- presumably on the basis that the costs follow the result- this general rule does not apply in the Labour court – costs orders in Labour court dependant on law and fairness- enforcement of a restraint also constitutes a limitation on a citizen's right, in terms of section 22 of the Constitution – costs not generally granted in constitutional rights disputes- generally litigants not to be deterred to litigate the violation of their labour and constitutional rights for fear of adverse cost orders-Labour Court ruling on costs set aside-Urgency- ruling on urgency generally, *per se*, not appealable. Appeal partially upheld – no costs ordered on appeal.

JUDGMENT

COPPIN AJA

[1] This is an appeal against the order of Lallie J in the Labour Court, in terms of which, amongst other things, a restraint agreement was enforced in favour of the first respondent against the appellant. Leave to appeal was granted by that court.

[2] The appellant was employed by the first respondent from about September 2009 as an internal sales consultant, initially on a temporary fixed term basis and from 1 February 2010 on a permanent basis. Her employment with the first respondent terminated on 28 October 2011 after she had resigned having given a month's written notice to that effect. She was then employed by the second respondent, a competitor of the first respondent.

[3] It is common cause that in the course of her employment with the first respondent and on or about 19 January 2010, the appellant concluded an employment contract with the first respondent in terms of which she, amongst

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other things, agreed to the following confidentiality and restraint of trade provisions:

'16. **CONFIDENTIALITY**

16.1 During your period of employment and subsequent thereto, you will not disclose to others (including other employees of the Company) or make use of directly or indirectly, any confidential information of the Company or of others who have disclosed it to the Company under conditions of confidentiality, unless for a purpose authorised by the management of the Company. If there is any doubt about whether any disclosure or use is for an unauthorised purpose, you will obtain a ruling in writing from the management of the Company and abide by it.

16.2 You will also be obliged to report in writing, to the management of the Company, any unauthorised disclosure or use of the above-mentioned confidential information and assist the Company to suppress or remedy any such unauthorised disclosure or use.

16.3 For the purpose of this clause, confidential information will be deemed to extend to all confidential technical and commercial information (including but not limited to the contents of reports, specifications, quotations, drawings, computer records – whether programmes or output or otherwise – customer lists, supplier lists, stock lists, price schedules and the like).

Information will be deemed to be confidential unless it has entered the public domain as a result of the legal activities of others or of an intentional disclosure by the Company.

17. **RESTRAINT OF TRADE**

In order to protect the proprietary interests of the Company a restraint of trade is a requirement. It is agreed that upon termination of your employment for whatever reason, you shall be restrained from being employed by, conducting business with, or associating yourself directly or indirectly whether as partner, proprietor, shareholder, director, member, consultant or otherwise with any supplier, manufacturer, wholesaler or retailer of any products stocked, supplied or sold by this company during the six months immediately prior to the termination of your employment.

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It is agreed that this restraint shall endure for a period of one year from the date of such termination and will apply within the following Provinces of South Africa, Gauteng, Mpumalanga, Free State, Limpopo and North West.

It is further agreed that this restraint, in its entirety, is both necessary to protect the company's business interests and is reasonable.'

[4] It is further common cause that on 28 October 2011, at the time of her resignation, the appellant signed a letter dealing with her resignation, in which she, amongst other things, confirmed to be bound by the aforesaid provisions.

[5] According to the first respondent, it became aware on 7 November 2011 that the appellant was working for the second respondent, its competitor, and it took steps to obtain an undertaking from the appellant that she would comply with the restraint and also made the second respondent aware of the restraint. Neither the appellant, nor the second respondent gave any undertaking in response to the request of the first respondent, as a result of which the first respondent brought an urgent application in the Labour Court seeking to enforce the restraint.

[6] On 13 January 2012, the court *a quo* granted the order, being appealed against and subsequently, on 1 March 2012, furnished reasons for the order. The order reads:

'IT IS ORDERED THAT:

1. The rules of the above Honourable Court relating to the forms and manner of service are hereby dispensed with and this matter is dealt with as one of urgency.

2. Ball is restrained from being employed by, conducting business with, or associating herself directly or indirectly, whether as partner, proprietor, shareholder, director, member consultant or otherwise with any supplier, manufacturer or retailer of any products stocked, supplied or sold by Bambalela during the six months prior to the 28th October 2011.

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3. The restraint endures for a period of one year from the 28th October 2011 and applies within the provinces of Gauteng, Mpumalanga, Free State, Limpopo and North West.

4. Action Bolts is ordered to terminate the services of Ball with immediate effect.

5. The First Respondent is to pay the costs of this application.'

[7] In its reasons for the order, the court *a quo,* amongst other things, found that special supplier deals, put in place by the first respondent with its local and international counterparts, as well as the first respondent's pricing structure and profit margins were not in the public domain and that the appellant would not have acquired that information had she not been employed by the first respondent. It was also found that as a sales consultant, the appellant developed goodwill with customers and got to know which client ordered which product and the quantities ordered; that such information was not in the public domain and that the first respondent stood to be prejudiced if the appellant was allowed to pass it on to the second respondent. The court *a quo* also held that it had considered the appellant's right, in terms of section 22 of the Constitution, to choose a trade, occupation, or profession freely; that the industry in which the appellant was employed was not her field of expertise since she had previously worked as a conveyancing secretary for nine years and in internal sales, at another concern, for seven years. The court *a quo* concluded that the appellant has knowledge of the first respondent's confidential information and that her continued employment by the second respondent exposes the first respondent to the prejudice which it sought to protect itself from by concluding a restraint of trade agreement with the appellant.

[8] The appellant in her application for leave to appeal relied on several grounds. She submitted that the court *a quo* erred in law and in fact in determining that the application was urgent and accordingly erred in not striking the matter from the roll. Further, she submitted that the court *a quo* erred and failed to

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properly and fairly apply the test enunciated in *Basson v Chilwan and Others*[1] since it had not been shown that she had breached a protectable interest of the first respondent and further that it had not been shown that the appellant transacted in competition with the first respondent, or that the appellant solicited any of the first respondent's customers. Another ground was that the learned judge erred in the application of the test stipulated in *Basson*. In this regard, it was submitted that, on the evidence it was not shown that the appellant would serve any customers other than the existing customer base of the second respondent and would only deal with the second respondent's existing suppliers. Furthermore, the appellant submitted that the evidence had neither shown that she had detailed knowledge of the prices and products of the first respondent, nor was there proof that she had carried any customers of the first respondent 'in her pocket', or that she had any 'secret or confidential information she could and would use'. It was further submitted by the appellant that the court *a quo* ought to have accepted her version of the facts having regard to the test enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*[2] (commonly referred to as 'the Plascon-Evans rule'). It was also submitted that the court *a quo* failed in finding that all that the first respondent was attempting to do was to stifle competition. It was also submitted that the court *a quo* did not consider reducing the scope of the restraint and erred in that regard. Further, that an order which prevented the appellant from transacting with, or soliciting the first respondent's customers and protecting its confidential information would have sufficed, without having to render the appellant unemployed. It was lastly submitted that the court *a quo* erred in awarding costs against the appellant in the circumstances.

MOOTNESS

[9] The first respondent argued at the outset that the appeal has become moot. It is common cause that the period of the restraint, namely one year from the date of the termination of the appellant's employment with the first respondent (i.e. from 28 October 2011) expired on or about 28 October 2012. The first respondent accordingly submitted, at the hearing before us on 26 March

1 *Basson v Chilwan and Others* 1993 (3) SA 742 (A).
2 *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634H-635B.

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2013, that in those circumstances the issue of the restraint was moot as contemplated in terms of section 21A of the Supreme Court Act.[3] This Court in *City of Cape Town v S A Municipal Workers' Union on behalf of Abrahams and Others,*[4] held that even though the Labour Relations Act 66 of 1995 (as amended) ("*the Act*") has no similar provision to section 21A of the Supreme Court Act, the principles contained in that provision could be applied to appeals heard in this Court. The appellant's legal representative conceded that since the restraint period has lapsed, the issue of the restraint, *per se,* was moot, because it no longer has any practical effect or result, but submitted, with reference to section 21A(3) of the Supreme Court Act, that the issue of costs, given the circumstances of this case, was still a vital issue.

[10] Section 21A(3) of the Supreme Court Act provides:

> 'Save under exceptional circumstances, the question whether the judgment or order would have no practical effect or result, is to be determined without reference to consideration of costs.'

Accordingly, in terms of this subsection, the question whether the judgment, or order, appealed against would have a practical effect, or result, could be determined with reference to a consideration of costs where there are exceptional circumstances, for example, where considerable costs have been incurred in the case. It has been held that in such an instance the judgment of the court of appeal would indeed have a practical effect, or result and the appeal should not be dismissed in terms of section 21A(1).[5]

[11] It was submitted on behalf of the appellant that here there are indeed exceptional circumstances present in this case. The appellant was represented before us on a *pro bono* basis and had been unable to afford to pay for legal fees at the hearing before the Labour Court. She appeared there on her own and was not legally represented. If the costs order, that was granted against her, should be confirmed it would hold serious, if not devastating, financial consequences for her. In her answering affidavit before

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3 Act No. 59 of 1959.

4 *City of Cape Town v S A Municipal Workers' Union on behalf of Abrahams and Others* 2012 33 ILJ 1393 (LAC).

5 See *Oudebaaskraal (Edms) Bpk v Jansen van Vuuren* 2001 (2) SA 806 (SCA) at 812C-F.

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the court *a quo*, the appellant sketched her precarious financial situation. The first respondent did not dispute those averments. Similarly, before us counsel for the first respondent did not dispute that the costs order, if confirmed and executed, would have a detrimental impact on the appellant's, already depressed, financial situation.

[12] In my view, the implications that the costs order may hold for the appellant, constitutes exceptional circumstances. In those circumstances, the judgment and order of this Court in respect of the issues would have a practical effect, or result and the appeal cannot, therefore, be dismissed for being moot, or on the basis of the principles stated in section 21A(1) of the Supreme Court Act.

THE MERITS

[13] The thrust of the appellant's arguments was directed at the reasonableness of the restraint. Prior to the decision in *Magna Alloys and Research SA (Pty) Ltd v Ellis,*[6] restraints of trade were only enforceable if they were proved to be reasonable. Since then they have been regarded as enforceable, unless they are proved to be unreasonable. The effect of the *Magna Alloys*' decision was to place an *onus* on the party, sought to be restrained, to prove, on a balance of probabilities, that the restraint was unreasonable.[7] However, because the right of a citizen to freely choose a trade, occupation, or profession, is protected in terms of section 22 of the Constitution and a restraint of trade constitutes a limitation of that right, the *onus* may well be on the party who seeks to enforce the restraint to prove that it is a reasonable, or justifiable limitation of that right of the party sought to be restrained.[8]

[14] In *Reddy v Siemens Telecommunications (Pty) Ltd,*[9] 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

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6 *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1994 (4) SA 874 (A).

7 See *Magna Alloys* (above); *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA)para 14 at 498E-499.

8 See *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* 2001 (2) SA 853 (SE) at 862; *Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth* 2005 (3) SA 205 (N). Also compare *Affordable Medicines Trust and Others v Minister of Health and Another* 2005 (6) BCLR 529 (CC).

9 *Reddy v Siemens Telecommunications (Pty) Ltd* (above).

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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.[10] Resolving the disputes of fact in favour of the party sought to be restrained involves an application of the *Plascon-Evans* rule.[11]

[15] The enquiry into the reasonableness of a restraint is a value judgment that involves a consideration of two policy considerations namely, the public interest, which requires that parties to a contract must comply with their contractual obligations (i.e. *pacta servanda sunt*) and the principle, that a citizen should be free to engage or follow a trade, occupation or profession of her choice.[12]

[16] A restraint would not be regarded as reasonable and enforceable in the absence of an interest-deserving protection i.e. a legitimate protectable interest. A restraint which is purposed to merely prevent competition is not reasonable.[13] In *Basson v Chilwan,*[14] four questions have been held to require investigation namely:

(a) Whether there an interest of the one party which is deserving of protection at the termination of the agreement?

(b) Whether such an interest is being prejudiced by the other party?

(c) If so, does such interest so weigh up qualitatively and quantitatively against the interest of the other party that the latter should not be economically inactive and unproductive?

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10 Compare *Reddy v Siemens Telecommunications (Pty) Ltd* (above) at 496B-D.

11 This rule is applicable in labour matters: *Fry's Metals (Pty) Ltd v Numsa and Others* [2003] 2 BLLR 140 (LAC).

12 This principle is captured in section 22 of the Constitution. See: *Reddy v Siemens Telecommunications (Pty) Ltd* (above) para 15 at 496.

13 See *inter alia Basson v Chilwan* (above) at 771D.

14 *Basson v Chilwan* (above) at 767E-I.

(d) Whether there is another facet of public policy having nothing to do with the relationship between the parties, but which requires that the restraint should be maintained or rejected?

Insofar as the interest in (c) exceeds the interest in (a), the restraint would be unreasonable and accordingly unenforceable.[15] Examples of protectable interests would include trade secrets or confidential information.[16]

[17] The enquiry into reasonableness has been refined and elaborated on in cases such as *Reddy* and *Basson*. The enforceability of a restraint essentially hinges on the nature of the activity that is prevented, the duration of the restraint, and the area of operation of the restraint. In particular, 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'.[17]

[18] Regarding the process of determining reasonableness, in *Reddy,* it was held that the common law of balancing and reconciling the different interests involved, gives effect to the precepts of section 36(1) of the Constitution.[18] The restraint agreement is regarded as having been concluded pursuant to *'a* law of general application' referred to in section 36 of the Constitution. The four questions posed in *Basson,* for determining the reasonableness of the restraint, comprehend the considerations referred to in section 36(1) of the Constitution. The fifth question which was identified and which is really covered by the relationship between questions (c) and (a) posed in *Basson*, relates to proportionality and will cover the consideration referred to in section 36(1)(e) of the Constitution.[19] It was held in *Reddy* that, accordingly, the process of weighing up the different interests in common law does not differ

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15 See *Basson v Chilwan* (above) at 767.

16 See *Sibex Engineering Services (Pty) Ltd v Van Wyk* 1991 (2) SA 482 (T) at 486-488; *Basson v Chilwan* (above) at 769; *Aranda Textiles Mills (Pty) Ltd v Hurn* [2000] 4 All SA 183 (E) at 192 and *Walter McNaughtan (Pty) Ltd v Schwartz* 2004 (3) SA 381 (C).

17 See *Reddy v Siemens Telecommunications (Pty) Ltd* (above) para 16 at page 497F.

18 See *Reddy v Siemens Telecommunications (Pty) Ltd* (above) at 767G-H.

19 See *Reddy v Siemens Telecommunications (Pty) Ltd* (above) paras 16-17.

materially from a justification analysis in terms of section 36 of the Constitution.

[19] It is perhaps so that the court *a quo* did not in its judgment illustrate a detailed analysis and balancing of the different interests of the contesting parties, but, in my view, the conclusion that the restraint was reasonable and enforceable cannot be faulted. There was a breach of the restraint simply by the fact that despite her agreement not to go and work for a competitor of the first respondent (i.e. based on the area covered by the restraint) for a year after the termination of her employment with the first respondent, the appellant nevertheless did so. The appellant averred in her founding papers that the restraint agreement was entered into under duress. The court *a quo* made no specific finding on this point, but it seems to have fallen by the wayside because it was not raised as one of the grounds of appeal and was not argued before us. In any event duress is a technical defence and has to be properly made out. The impression one gets is that the appellant, a layperson, in drafting her own papers, used the term loosely, but intended to convey that she signed the agreement, because she needed the employment. It was not a case of her not having had any choice at all in the matter. She could have refused to sign the agreement which included the restraint but this would have meant possibly that she would not have got the employment. To require an employee to agree to a restraint as part of her contract of employment cannot, by itself, constitute duress as contemplated in the law of contract.

[20] The appellant's own economic and financial circumstances made it imperative for her to find employment. The first respondent was not shown to be responsible for creating those circumstances and to have compelled, as it were, the appellant to enter into the agreement. It is quite common for employers to require employees to sign confidentiality and restraint undertakings as part of their employment contracts.

[21] The first respondent relied on trade secrets, or confidentiality, or more particularly, on customer lists and pricing information, including profit margins, as its protectable interest. More specifically, the first respondent averred that in the course of the appellant's employment with it and as part of her duties as

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internal sales consultant the appellant acquired confidential pricing information from the first respondent. It was also averred that the appellant in that capacity was privy to the terms of specialised supplier deals which its Managing Director, Tania Williamson ("*Williamson*"), who deposed to the founding affidavit of the first respondent, had put together with the first respondent's local and overseas counterparts. Further, that the appellant also knew the names and contact details of persons, both locally and overseas, with whom orders were placed and that all this information was not in the public domain, i.e. was confidential. It was also averred by the first respondent that the appellant was responsible for internal sales and customer care and was, as a result, in constant contact with the first respondent's customers and knew which customer ordered which product and the quantities. The first respondent also averred that the appellant had been contacting its suppliers and customers and was using the aforesaid confidential information to negotiate deals for her new employer, the second respondent.

[22] The appellant denied being privy to specialist deals made with suppliers of the first respondent and denied knowledge of international suppliers. She averred that she did not deal with exports at all and mentioned the names of persons who did deal with exports. She further denied having had any contact information of relevant persons, both locally and overseas, with whom to place orders, but did not deny that the contact information and terms of the specialised deals, which the first respondent had with its local and overseas suppliers, was confidential. The appellant also denied knowing the kind of product ordered and the quantities ordered by customers, but she did not deny that this information was confidential. According to the appellant, she did not take any information, or documentation of the first respondent and has not informed her new employer, the second respondent, of any of the first respondent's customers. However, the appellant admitted to contacting two suppliers of the first respondent, but averred that she only contacted them because they had also been suppliers of her new employer long before her employment with the second respondent. According to the appellant, the suppliers have different discount structures for their customers and she does not know what discount structures the suppliers offer to the first and second

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respondents. She also averred that she could not compare the pricing. According to her, she was in no way jeopardising the first respondent's relationship with its suppliers and customers and 'was not using any information to the advantage' of the second respondent. She further denies having 'taken any information or documentation relating to pricing' and avers that although she had been employed by the second respondent to service its existing customer base, she has not approached any of the first respondent's customers for business. But the appellant does not deny that she knows who the first respondent's customers and suppliers are. A customer list is generally confidential. Implicit in her version is that even though she was privy toconfidential information she has not and does not intend using it. An undertaking not to use the confidential information, in the circumstances, is no defence. An employer does not have to show that the former employee has in fact utilised its confidential information, but merely that she could do so.[20]

[23] The appellant did not deny at all the first respondent's averment in its founding affidavit deposed to by Williamson, that locally she developed customer goodwill and trade connections and that her duties, which included internal sales and customer care, entailed that she was in constant contact with customers. She also did not deny submitting a weekly report of the kind attached to the first respondent's answering papers. Neither did she deny the truth of its contents. The report gives details of quotes to customers, contact persons' details, amounts and comments. Williamson's averment that this kind of report indicates that the appellant knew which local customer ordered what product and in what quantities, is a fair inference. The appellant's denial of that fact cannot be regarded as creating a *bona fide* dispute of fact and can be rejected out of hand.

[24] The restraint was only for one year and was limited to certain provinces. It did not apply at all to the Eastern Cape, Western Cape, Northern Cape and

[20] *IIR South Africa BV (Inc in the Netherlands)t/a Institute for International Research v Tarita and others* [2003] 3 All SA 188 (2004 (4) SA 156 (W)); *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* (above); *Reddy v Siemens Telecommunications(Pty) Ltd* (above).

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KwaZulu-Natal Provinces. Furthermore, it was common cause that the appellant had other skills and competencies. Before being employed by the first respondent she worked for nine years as a conveyancing secretary and for seven years in internal sales dealing with other products. The restraint was not such that it nullified the appellant's right to choice of a trade, or profession, or occupation. There is no suggestion that the appellant was unable to secure employment within the fields of her expertise either as conveyancing secretary or in internal sales dealing with a different product or dealing with the same product as the first respondent, but in a province other than the provinces covered by the restraint.

[25] 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.

[26] However, I do have a difficulty with the relief granted in paragraph 4 of the order, namely ordering the second respondent to terminate the services of the appellant with immediate effect. In my view such relief was not competent. If that order was allowed to stand it would mean that the second respondent would have to dismiss the appellant even though the restraint has already expired, because that order is not limited to the period of the restraint. At best, the court *a quo* could have interdicted the second respondent for the period of the restraint if a proper case had been made out for such relief.[21] In this case, it was not shown that any of the first respondent's confidential information had been disclosed to the second respondent, or had been used by the appellant to the advantage of the second respondent, or that it was reasonable, or

[21] Compare *IIR South Africa BV(Incorporated in the Netherlands) t/a Institute for International Research v Tarita and others* (above).

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within the power of the Labour Court, to order the second respondent to dismiss the appellant. The first respondent would have been adequately protected by an interdict as set out in the order which is to substitute the order of the court *a quo*.

[27] I also have difficulty with the fact that the court *a quo* ordered the appellant to pay the costs of the application. No reasons were furnished by the court *a quo* for its costs order and it appears as if the court *a quo* granted costs purely on the basis of the principle that applies generally in courts of law, namely, that costs follow the result.[22]

[28] It is so that the awarding of costs was a matter within the discretion of the court *a quo* and that the appeal court will not easily interfere with the exercise of that discretion. In *Pretorius v Herbert,*[23] Trollip J summarised the position on appeal as follows:

> 'The mere fact that that is not the order that I would have made does not mean that this Court is justified in interfering with the exercise of the magistrate's discretion. *Penny v Walker*, 1936 AD 241 at p 260, states specifically that the mere fact that a court of appeal would have made a different order as to costs is no ground for interfering with a lower court's order. The limits to which this Court on appeal can interfere with an order made by the magistrate as to costs is, I think, clear from *Merber v Merber*, 1949 (1) SA 446 (AD) at pp 452 and 453. The effect of the passages there is that the discretion as to costs must be judicially exercised by the trial court, that is, there must be some grounds on which a court, acting reasonably, could have come to the particular conclusion; if there are such grounds then their sufficiency to warrant that conclusion is a matter entirely for the trial court's discretion, and the court on appeal cannot interfere, even if it would itself have made a different order.'

[29] In my view, the only ground upon which the court *a quo,* seemingly and in the absence of any reasons indicating the contrary, ordered the appellant to pay the costs is because of the fundamental principle which applies generally in

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[22] In courts of law this rule is not likely to be departed from except on good grounds. See, for example, *Union Government v Gass* 1959 (4) SA 401 (A) at 413C-E, *Letsitele Stores (Pty) Ltd v Roets* 1959 (4) SA 579 (T) and *Smit v Maqabe* 1985 (3) SA 974 (T) at 977D-E.

[23] *Pretorius v Herbert* 1966 (3) SA 298 (T) at 301H-302B.

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courts of law, as I have stated above. If that is so, then the court *a quo* has erred. In the Labour Court, specifically, the law and fairness are prime considerations when considering costs. The normal rule that costs follow the result is not automatically applicable in Labour Court proceedings. The court is required to consider factors like the financial state of the parties, their *bona fides* and their continuing relationship, in coming to a decision whether to order the unsuccessful party to pay costs. Litigants are not to be deterred from defending or prosecuting *bona fide* actions for fear of adverse costs orders. In *MEC for Finance, KwaZulu-Natal and another v Dorkin NO and another,*[24] Zondo JP summarised the position, regarding the awarding of costs in the Labour Court, as follows:

> 'The rule of practice that costs follow the result does not govern the making of orders of costs in this Court. The relevant statutory provision is to the effect that orders of costs in this Court are to be made in accordance with the requirements of the law and fairness. And the norm ought to be that costs orders are not made unless those requirements are met. In making decisions on costs orders, this Court should seek to strike a fair balance between, on the one hand, not unduly discouraging workers, employers, unions and employers' organisations from approaching the Labour Court and this Court to have their disputes dealt with, and, on the other, allowing those parties to bring to the Labour Court and this Court frivolous cases that should not be brought to court. That is a balance that is not always easy to strike but, if the court is to err, it should err on the side of not discouraging parties to approach these courts with their disputes. In that way, these courts will contribute to those parties not resorting to industrial action on disputes that should properly be referred to either arbitral bodies for arbitration or to the courts for adjudication.
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> In this case, the second respondent will lose his job and he has had to defend the decision taken by the first respondent and has even engaged senior counsel to defend such decision. Unless there is a trade union behind which will foot his legal bill, he stands to spend a lot of money on legal fees. In all of the circumstances, I am of the view that the requirements of the law of

[24] *MEC for Finance, Kwazulu-Natal and another v Dorkin NO and another* [2008] 6 BLLR 540 (LAC) paras 19-20 at 551B-E.

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fairness dictate that no order would be made as to costs on appeal and none should have been made in the court below.'

[30] Another important aspect which the court *a quo* clearly did not consider before making the costs order, is the fact that the enforcement of a restraint, technically, involves a constitutional issue. Restraints of the kind being considered, constitute a limitation on a citizen's right, in terms of section 22 of the Constitution, which, arguably, requires justification (although the procedure employed in *Reddy,*[25] would suffice in most cases). In constitutional matters, the general rule that costs follow the result, does not apply. In such matters costs orders are generally eschewed out of concern that they may produce a 'chilling effect', in that litigants may be deterred from approaching a court to litigate concerning an alleged violation of their Constitutional rights for fear of being penalised with costs if they are unsuccessful.[26] If constitutional matters are raised or defended in good faith and not vexatiously and the issues raised have merit or are important, like the violation of a right guaranteed in the Bill of Rights, and the proceedings that ensued, resolved those issues, the party complaining of the violation, even if unsuccessful, would, generally, not be ordered to pay the costs.[27]

[31] It was not in dispute that the appellant had to contend with perilous financial circumstances. She could not afford legal representation and defended herself in the court *a quo*. Before us she was represented on a *pro bono* basis. She is a layperson and may not have drafted the papers and put her case in the court *a quo* as well as it may, or could, have been put by an experienced legal practitioner, if one had been employed at the appropriate time. The appellant's disadvantage of having defended herself also was compounded by the fact that matters involving restraints of trade and confidentiality are technical and generally complex. Another consideration is that it was not shown that the appellant acted out of ill-will or malice in defending the action. In all probability she was of the *bona fide* belief that as

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[25] *Reddy v Siemens Telecommunications (Pty) Ltd* (above).
[26] See, for example, *Ferreira v Levin (II)* 1996 (2) SA 621 (CC).
[27] *Motsepe v Commission for Inland Revenue* 1997 (2) SA 898 (CC) para 30; *Beinash v Ernest and Young* 1999 (2) SA 91 (CC) para 30; *De Reuck v Director of Public Prosecutions, WLD* 2003 (3) SA 389 (W) paras 94-97.

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long as she did not impart with, or use, the confidential information, she was not in breach of the restraint. This perception was wrong, but it is not unreasonable for a layperson to have. Other considerations are, that at the time of her resignation the appellant informed the first respondent of her intention to work for the second respondent. Her change of employment was necessitated by legitimate financial needs. It was not shown that she actually used any of the first respondent's confidential information, either at all or, for the benefit or advantage of the second respondent. In my view, the requirements of law and fairness dictate that the court *a quo* should not have ordered her to pay the costs even though she was unsuccessful. Such an order is most likely to ruin her financially. On the other hand, it has not been alleged that the first respondent would be in a similar financial situation if no costs order had been made. For the same reasons, I am also of the view that no costs order should be made on appeal.

[32] At the hearing before us the appellant did not persist with the ground that the court *a quo* erred in ruling that the matter was not urgent. In the circumstances, I need not say much on the point, save for restating that, generally, rulings on urgency, by themselves, are not appealable, because they are not final and definitive of the rights of the parties.[28]

[33] In the result, the following is ordered:

1. The appeal against the court *a quo's* order is partly upheld.

2. The order of the court *a quo* is set aside and its order is replaced with the following order:

> '1) The rules of the above Honourable Court relating to forms and manner of service are dispensed with and this matter is dealt with as one of urgency.
>
> 2) The first respondent is interdicted and restrained from being employed by, conducting business with, or associating herself directly or indirectly whether as partner, proprietor, shareholder, director, member, consultant or otherwise with any supplier, manufacturer or retailer of any products stocked, supplied

[28] See eg. *Lubambo v Presbyterian Church of Africa* 1994 (3) SA 241 (SE).

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or sold by the applicant (Bambalela Bolts) during the six months prior to 28 October 2011.

3) The interdict and restraint endures for a period of one (1) year from 28 October 2011 to and including 28 October 2012 and applies within the Provinces of Gauteng, Mpumalanga, Free State, Limpopo and North West.

5) No costs order is made.'

3. No costs order is made in respect of the appeal.

_____

P Coppin

Acting Judge of the Labour Appeal Court

I agree:

_____

B Waglay

Judge President of the Labour Appeal Court

I agree:

_____

L P Tlaletsi

Judge of the Labour Appeal Court

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APPEARANCES:

FOR THE APPELLANT:	MR Snyman of Snyman Attorneys
FOR THE FIRST RESPONDENT:	A Dippenaar of Du Randt Du Toit Pelser Attorneys

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