THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no. J 2400 / 18

In the matter between:

VUMATEL (PTY) LTD	**Applicant**
and	
MOHAMMED SALMAAN MAJRA	**First Respondent**
MOTHEO CONSTRUCTION GROUP (PTY) LTD	**Second Respondent**
MOTHEO TELECOMS (PTY) LTD	**Third Respondent**
SA DIGITAL VILLAGES (PTY) LTD	**Fourth Respondent**

Heard: **19 September 2018**

Delivered: **9 October 2018**

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

Restraint of trade – requirement to make out proper case in founding affidavit considered – issue of determining factual disputes in restraint applications considered – issue of onus considered

Restraint of trade – nature of confidential information considered – protectable interest on the basis of confidential information shown

Restraint of trade – issue of trade connections – principles considered – protectable interest based on trade connections not shown

Restraint of trade – infringement (breach) of protectable interest considered – no infringement shown in this instance – diminishing value of confidential information considered – impact of delay in proceedings considered

Urgency – principles relating to urgency in restraint applications considered – urgency not shown – but matter dismissed and not struck from roll in the interest of finality

Interdict – final relief sought – principles considered – issue of clear right – whether enforcement of restraint unreasonable – enforcement of the restraint of trade in the circumstances unreasonable – no clear right shown

Interdict – clear right to relief not shown – interdict refused – application dismissed

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter came before me as an urgent application brought by the applicant in terms of which the applicant sought to enforce a restraint of trade covenant against the first respondent. The other respondents have been joined in the application only on the basis of having an interest in the matter, as a result of being associated with the first respondent, but no relief is sought against them. None of these other respondents have in any event opposed the application which was only opposed by the first respondent. For the sake of convenience,

I will refer to the second and third respondents jointly as 'Motheo', and the fourth respondent as 'SADV', in this judgment.

[2] Initially, the application did not involve SADV. It was brought into the matter as the fourth respondent because of what was ultimately said by the first respondent in his answering affidavit. The first respondent stated that he had terminated his contract with Motheo, and has joined SADV, in August 2018. As a result, and in a joinder application brought on 4 September 2018, the applicant then sought to join SADV to this matter. The joinder was not opposed by the first respondent. I am satisfied that SADV will have a material interest in the outcome of this matter, and the applicant thus properly sought to join it. I thus granted the joinder of SADV as fourth respondent to these proceedings.

[3] Preliminaries now being disposed of, and as said, the application was brought as an urgent application. The issue of urgency was very much in dispute, and the applicant would thus have to satisfy the requirements of urgency so as to convince this Court to entertain the matter outside the ordinary course. Further, the applicant seeks final relief, and thus 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.[1]

Urgency

[4] It is best in this case to start with the issue of urgency. As stated, it was very much in dispute. Before considering the facts relating to urgency in this matter, some general statements must be made with regard to urgency in restraint of trade applications. I accept that restraints of trade have an inherent quality of

[1] *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 Suppliers (Pty) Ltd t/a Vital Aire v Meintjes and Another* (2012) 33 ILJ 629 (LC) 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.

urgency. This position comes from the following *dictum* in *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff and Another*[2] where the Court held:

> '…. I accept that breaches of restraints of trade have an inherent quality of urgency…. '(emphasis added)

[5] The concern I have is that this inherent quality of urgency is often abused as a basis for jumping the queue, so to speak, without satisfying the ordinary requirements of urgency. To adopt this kind of approach is ill conceived. An urgent restraint of trade application is still nothing else but an urgent application, just like any other urgent application where final relief is sought. The ordinary requirements applicable to such urgent applications must still find application. The fact that one is dealing with a restraint of trade is not some kind of license that in itself establishes urgency, to the exclusion of all other considerations. This was recognized by the Court in *Ecolab (Pty) Ltd v Thoabala and Another*[3] where the Court said the following, with which I agree:

> 'To summarise then, parties alleging breaches of restraint of trade agreements are not indemnified from satisfying the requirements in rule 8. Thus, a mere contention that the enforcement of a restraint of trade is inherently urgent and therefore must be treated as such by this court without any further consideration cannot by all accounts be sustainable. The fact that these disputes may have an inherent quality of urgency cannot be equated to a free pass to urgent relief on the already over-burdened urgent roll in this court. Like all other urgent matters, more than a mere allegation that a matter is urgent is required. This therefore implies inter alia that the court must be placed in a position where it must appreciate that indeed a matter is urgent, and also that an applicant in the face of a threat to it or its interests had acted with the necessary haste to mitigate the effects of that threat.'

[6] I venture to suggest that the inherent quality of urgency in restraint applications would only save the day where it comes to urgency in those borderline cases where a matter teeters on the edge of being considered urgent, or not urgent. This would of course be in the discretion of the presiding Judge to decide.

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[2] (2009) 30 ILJ 1750 (C) at 1761.
[3] (2017) 38 ILJ 2741 (LC) at para 20. See also paras 17 and 18 of the judgment.

[7] Where it comes to the general principles applicable in establishing urgency, this is dealt with in Rule 8 of the Rules of the Labour Court. In applying Rule 8, the Court in *Jiba v Minister: Department of Justice and Constitutional Development and Others*[4] held:

> 'Rule 8 of the rules of this court requires a party seeking urgent relief to set out the reasons for urgency, and why urgent relief is necessary. It is trite law that there are degrees of urgency, and the degree to which the ordinarily applicable rules should be relaxed is dependent on the degree of urgency. It is equally trite that an applicant is not entitled to rely on urgency that is self created when seeking a deviation from the rules.'

[8] The Court in *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another*[5] succinctly summarized the requirements that have to be met to satisfy this Court that the matter may be entertained as one of urgency. These are: (a) the applicant has to set out explicitly the circumstances which renders the matter urgent with full and proper particularity; (b) the applicant must set out the reasons why the applicant cannot be afforded substantial redress at a hearing in due course; (c) where an applicant seeks final relief, the court must be even more circumspect when deciding whether or not urgency has been established; (d) urgency must not be self-created by an applicant, as a consequence of the applicant not having brought the application at the first available opportunity; (e) the possible prejudice the respondent might suffer as a result of the abridgement of the prescribed time periods and an early hearing must be considered; and (f) the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency.

[9] The above summary considered, this now brings me to the facts of this matter relating to urgency. I must confess that I have many concerns in this regard, and I do consider the applicant's case on urgency to be severely lacking, for the reasons to follow.

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[4] (2010) 31 ILJ 112 (LC) at para 18.
[5] (2016) 37 ILJ 2840 (LC) at paras 20 – 26, and all the authorities cited there.

[10] It was undisputed that by December 2017, the applicant was aware that the first respondent had joined Motheo. On 12 January 2018, the applicant's attorneys sent a letter of demand to the first respondent's attorneys, indicating that the applicant was aware that the first respondent had joined Motheo, and this was in breach of the restraint of trade covenant. It was demanded that the first respondent terminate his relationship with Motheo, by 16 January 2018, or face an urgent application. The applicant even went so far as directing a letter to Vodacom, a customer of Motheo, urging it to engage with Motheo to ensure that the first respondent be removed from any projects Motheo was conducting for Vodacom.

[11] The first respondent's attorneys answered on 16 January 2018, making all kind of untoward statements and threats, but it can be clearly gathered from the answer that there was no way the first respondent was going to terminate his relationship with Motheo. As to the letter to Vodacom, it answered also on 16 January 2018 to the effect that it would not become involved in this matter. A similar approach by the applicant to Motheo itself also bore no fruit.

[12] What then follows as to actual further action by the applicant, is in essence nothing. No urgent application is launched by the applicant as threatened. The entire period from 16 January 2018 to end May 2018 is explained on the basis that the applicant was in negotiations with Vodacom for the acquisition of its business by Vodacom. According to the applicant, and as a result of these negotiations, Vodacom ceased deploying fibre and the 'threat' to the applicant's business caused by the first respondent's association with Motheo 'disappeared'.

[13] I have difficulty following the logic of this explanation, which has all the hallmarks of being a contrived attempt to justify a lengthy period of inaction where there is no such justification. The situation is compounded by the complete lack of any particularity where it comes to this explanation, and in particular whether the situation the applicant had with the first respondent even formed part of these discussions (considering that the applicant initially did seek to involve Vodacom).[6]

[6] Compare *National Union of Metalworkers of SA and Others v Bumatech Calcium Aluminates* (2016) 37 ILJ 2862 (LC) at para 30.

[14] In any event, it appeared from the evidence that Vodacom was indeed a customer of Motheo as well, throughout, and I thus find it difficult to understand how negotiations with the applicant can 'neutralize' the threat of the first respondent remaining associated with a direct competitor such as Motheo. Surely it would be in the interest of both the applicant and Vodacom to immediately deal with the first respondent in urgent proceedings. Using the applicant's own case to illustrate, it contended that by being associated with Motheo, the first respondent would impart all the highly confidential information he had access to at the applicant, to Motheo, and that would seriously prejudice its business. If Vodacom indeed later bought the business of the applicant, it would thus buy a prejudiced business still being diminished by the alleged unlawful conduct of the first respondent who is, day by day, strengthening the direct competitor of the very business Vodacom is trying to buy. If anything, the possibility that Vodacom may buy the business should have strengthened the resolve of the applicant to immediately protect its interest by enforcing the restraint. Truth be told, the more plausible inference is rather that because the applicant could possibly sell its business, the first respondent and his shenanigans would not be its problem going forward, and that is why it did nothing at this time. Such a course of action would of course be entirely destructive of urgency.

[15] But the difficulties with this explanation do not end there. Surely, and if the first respondent's association with Motheo is such a threat to the applicant as articulated in its letter of demand of 12 January 2018, that continued association will on the same basis and for the same reason remain the same threat, no matter what the applicant's dealing with third parties may be. I simply do not understand how mere negotiations with Vodacom, which is but one ISP customer of the applicant, can cause the 'threat' to vanish.

[16] The next part of the applicant's explanation where it comes to urgency is equally unsatisfactory. It explains that in June 2018 it gained knowledge that the first respondent, on behalf of Motheo, was directly conducting competing activities in the areas of Ashley, Pinetown and Westville, and one of the applicant's managers was even informed by the first respondent that the applicant would 'lose' these areas. Despite this, there was still no urgent application forthcoming. Rather, the applicant's attorneys sent another letter of

demand to the first respondent's attorneys on 26 June 2018. Other than containing more detail regarding the actual terms of the first respondent's restraint, the real demand made in this letter is actually the same as in the letter of 12 January 2018. This time, an undertaking to comply with the restraint within 48 hours was demanded, or legal action would follow. Needless to say, this letter solicited the same reaction as before, contained in a letter from the first respondent's attorneys on 29 June 2018.

[17] The urgent application followed on 17 July 2018. Why it was justified that the applicant took just short of three weeks to bring the application, after receiving the response to the letter of demand on 29 June 2018, remains entirely unexplained. This in itself is a further undue delay, and needed to be explained.

[18] All considered, the above falls dismally short of providing an acceptable explanation establishing urgency, so as to convince this Court to entertain the application as one urgency. Even using 12 January 2018 as a commencement date, the period of more than 7 (seven) months it took to ultimately bring this application is grossly excessive, and poorly explained. This is in my view clearly a case of self-created urgency.[7]

[19] Clearly appreciating this to be the case, Adv Whitcutt, representing the applicant, did some fancy footwork. He argued that in the answering affidavit filed on 30 July 2018, the first respondent indicated that he had ended his contract with Motheo, and as from 1 August 2018, he would be contracting with SADV. According to Adv Whitcutt, this constituted some sort of novation, for the want of a better description, of urgency. I cannot agree. At best, this may justify considering the application on an urgent basis only insofar as it concerns the first respondent's association vis-à-vis SADV, and the joinder application that followed. But it cannot serve to remedy the significant failure to establish urgency where it comes to the first respondent's association with Motheo. To describe it simply, and considering urgency as sought to be made out in the founding affidavit at the time when the application was filed, I believe that the applicant would fail on urgency, and what may have developed after

[7] Compare *Ecolab* (*supra*) at paras 28 – 30.

that would have no effect on this.[8] In short, the fortuitous occurrence of the first respondent's own movements cannot save the applicant's case on urgency.

[20] In sum, there was an inordinate delay in the applicant bringing the application. It procrastinated for months, and provided little in the way of a proper explanation for its failure to act expeditiously. The urgency was in the end nothing more than self-created.

[21] This leaves the requirement of the applicant's ability to obtain proper substantive redress in due course, for consideration. Obviously, and where a matter is struck from the roll for want of urgency, then the merits of the application remains undetermined. It follows that the application can still be considered and granted by a Court in the ordinary course. But I understand that in the case of a restraint of trade, there is a unique consideration. Usually, restraints are for a limited period, and considering the undeniable realities of litigating in the ordinary course, by the time a hearing date is available, the restraint may well have long since expired. On face value, this may appear to provide justification for the restraint being heard urgently, as long as the restraint period has not expired, as substantive redress would not be able to be obtained in the ordinary course.

[22] But what appears on face value to be justified, is in my view an oversimplification of the enquiry. If this kind of argument is accepted to hold true as is, then, and of course appreciating this is an extreme example, an applicant in a restraint of trade application despite knowing the employee left employment to join a competitor, can wait until 1 (one) month before the restraint expires, have no explanation for the delay, but convince the Court to hear the application just because the period is about to expire and substantial redress in due course would not be possible. That cannot be. It must always be considered whether the inability to obtain substantial redress in due course is attributable to the applicant's own failures.

[23] In the case of restraints of trade, to what extent the applicant's failure contributes to the inability to obtain substantial redress in due course is an

[8] As said in *Bumatech* (*supra*) at para 32: 'The applicants must make out a case for urgency in the founding affidavit'. See also *Mashiya v Sirkhot NO and Others* (2012) 33 *ILJ* 420 (LC) at para 17.

especially important consideration where it comes to urgency. This is because the clock starts ticking as soon as the employee leaves employment. It follows that as soon as the employer realises that there is a possible violation of the restraint, it must act promptly. If the employer does so, it would be able to successfully argue that the possibility of the restraint period expiring before the matter can be heard in the ordinary course is not due to its own doing. This kind of consideration would be why this requirement is inextricably linked with the other requirements of urgency in the case of restraints.

[24] The Court is not saying that when an employer realises there is a violation of the restraint of trade, an application must be launched yesterday. This Court has said that it is advisable to first try and avoid litigation by demanding compliance and seeking an undertaking to comply.[9] But at best, this kind of pre-emptive approach can account for a period of a week or two in the whole scheme of things. I do not attach a specific time period to this, as it would naturally depend on the interaction between the parties, and the particular facts of the case. But even this consideration certainly cannot account for the kind of delay occasioned in this case now before me.

[25] Therefore, and even if it can be said that because of the period of only about 6 (six) months' left on the restraint means that the applicant cannot obtain substantial redress in due course, this simply cannot save its case on urgency. The applicant could, and should, have brought this application shortly after 16 January 2018, when it received all the negative responses to its letters of demand of 12 January 2018. It is the applicant's own fault that it is now in the predicament that it is. Its own failures cannot serve as justification for this Court to accept that the requisite urgency exists in relying on the inability of the applicant to obtain substantial redress in the ordinary course.

[26] Therefore, the applicant must fail on urgency. Ordinarily, this means that the application be struck from the roll. But it is possible, in appropriate circumstances, to even dispose of the matter on the merits, where a matter is regarded as not being urgent, instead of striking the matter from the roll. The

[9] See *Continuous Oxygen (supra)* at paras 21 – 24; *L'Oreal South Africa (Pty) Ltd v Kilpatrick and Another* [2014] ZALCJHB 353 (16 September 2014) at para 41.

Court in *February v Envirochem CC and Another*[10] dealt with this kind of consideration, and even though the Court accepted that urgency was not established, the Court nonetheless proceeded to dismiss the matter in the interest of finality and so the matter should be dealt with once and for all. For the reasons to follow, I believe this is such a case and should be dealt within in the same fashion.

The issue of a clear right

[27] As touched on above, and in order for the applicant to obtain the relief it seeks, it needs to illustrate the existence of a clear right. Considering this is a restraint of trade, it has been my experience in hearing many of these applications that the same principles are argued in detail over and over again. I will thus now attempt to summarize all the considerations where it comes to establishing whether a clear right exists, in the context of a restraint of trade, below.

[28] 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 does not infringe on the constitutional right to free economic activity.[12]

[29] The issue of the *onus* of who must prove that the enforcement of a restraint of trade is reasonable plays little role in deciding the issue. The practical reality is that an applicant seeking to enforce a restraint of trade must make out a proper case in the founding affidavit, able to sustain a conclusion that enforcement the restraint of trade would be reasonable. If that application is opposed by the respondent, a factual dispute arises, and considering final relief is sought in motion proceedings, that factual dispute is resolved in line

[10] (2013) 34 ILJ 135 (LC) at para 17. See also *Bumatech* (*supra*) at para 33; *Bethape v Public Servants Association and Others* [2016] ZALCJHB 573 (9 September 2016) at para 53.
[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 v Bambalela Bolts (Pty) Ltd and Another* (2013) 34 ILJ 2821 (LAC) 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'.

with the normal principles established in *Plascon Evans Paints v Van Riebeeck Paints*[13]. In summary, these principles entail that the facts as stated by the respondent together with the admitted or facts that are not denied in the applicant'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.[14] Admitted facts include facts that, though not formally admitted, simply cannot be denied.[15] In the end, I refer to *Hudson and Another v SA Airways SOC Ltd*[16], where the Court referred with approval to the following *dictum* from the judgment in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*[17]:

> 'As was noted in *Wightman*:
> 'A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed.''

[30] The *Plascon Evans* principle as summarized above will apply irrespective of where the onus may lie.[18] As stated in *Ball v Bambalela Bolts (Pty) Ltd and Another*[19]:

> 'In *Reddy v Siemens Telecommunications (Pty) Ltd*, it was held that the reasonableness of a restraint could be determined without

[13] 1984 (3) SA 623 (A) at 634E-635C.
[14] See *Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 259C – 263D; *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA) paras 26 – 27; *Thebe Ya Bophelo Healthcare Administrators (Pty) Ltd and Others v National Bargaining Council for the Road Freight Industry and Another* 2009 (3) SA 187 (W) para 19; *Molapo Technology (Pty) Ltd v Schreuder and Others* (2002) 23 ILJ 2031 (LAC) para 38; *SA Football Association v Mangope* (2013) 34 *ILJ* 311 (LAC) at para 12.
[15] *Gbenga-Oluwatoye v Reckitt Benckiser SA (Pty) Ltd and Another* (2016) 37 ILJ 902 (LAC) at para 16.
[16] (2015) 36 ILJ 2574 (LAC) at paras 10 – 11.
[17] [2008] 2 All SA 512 (SCA).
[18] In *Reddy* (*supra*) *at* para 4 the Court said that '…. A final order can only be granted in motion proceedings if the facts stated by the respondent together with the admitted facts in the applicant's affidavits justify the order, and this applies irrespective of where the onus lies' (see also para 14 of the judgment). I also refer to *L'Oreal* (*supra*) at para 4 where this same approach was followed. See also *SPP Pumps* (*supra*) at para 20.
[19] (2013) 34 ILJ 2821 (LAC) at para 14.

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 ….'

[31] Whether the enforcement of the restraint of trade would be reasonable is dependent upon deciding the following questions set out in *Basson v Chilwan and Others*[20]: *(a)* Does the one party have an interest that deserves protection after termination of the agreement?; *(b)* If so, is that interest threatened by the other party?; *(c)* In that case, 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? Following the judgment in *Basson*, a further enquiry has been added, which can be called a question (e), being whether the restraint goes further than necessary to protect the relevant interest?[21] The above approach of answering these five questions in deciding whether the enforcement of a restraint of trade would be reasonable is now trite and has been consistently applied in this Court and the Labour Appeal Court.[22] Answering each of these questions is a determination on the facts of that particular case, applying, as held in *Ball*[23], the following approach:

'… 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'

[20] 1993 (3) SA 742 (A) at 767G-H.
[21] *Jonsson* (*supra*) at para 44; *Medtronic (Africa) (Pty) Ltd v Van Wyk and Another* (2016) 37 ILJ 1165 (LC) at para 15; *Esquire* (*supra*) at paras 50 – 51.
[22] *Labournet* (*supra*) at para 42; *Jonsson (supra*) at para 44; *Medtronic* (*supra*) at paras 14 – 15; *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.
[23] (*supra*) at para 17. See also *Labournet* (*supra*) at para 40.

[32] The protectable interest of the applicant in a restraint of trade can mostly be found in one or both of two considerations, being confidential information (trade secrets), or trade connections.[24] In *Labournet (Pty) Ltd v Jankielsohn and Another*[25] 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. …'

[33] Described as simply as possible, confidential information would be:[26] (a) Information received by an employee about business opportunities available to an employer; (b) the information is useful or potentially useful to a competitor, who would find value in it; (c) Information relating to proposals, marketing to submissions made to procure business; (d) information relating to price and/or pricing arrangements, not generally available to third parties; (e) the information 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 knowledge or public property or in the public domain. In short, the confidential information must be objectively worthy of protection and have value.

[34] On the other hand, trade connections is where the employee has access to customers and is in a position to build up a particular relationship with the

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[24] *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; *Medtronic* (*supra*) at para 16 – 17; *FMW (supra)* at para 36; *Vox* (*supra*) at para 30.

[25] (2017) 38 ILJ 1302 (LAC) at para 41.

[26] 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; *Medtronic (supra)* at para 16.

customers so that when he 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.[27] Whether the employee can be seen to have the ability to exert this kind of influence, is dependent upon the duties of the employee, the employee's particular personality and skill, the frequency and duration of contact between the employee and the customer, the nature of the relationship between the employee and the customer and in particular whether the relationship carried with it a notion of trust and confidence, the knowledge of the employee of the particular requirements of the customer and the nature of its business, how competitive the rival businesses are, and the nature of the product or services at stake.[28]

[35] A more recent development in the consideration of the issue of a protectable interest is having regard to the seniority of the employee concerned.[29] 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.[30] 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.

[36] In deciding whether a protectable interest has been infringed upon, it is not necessary to show that there has been actual harm to the employer. It is about the risk created to the employer.[31] For example, it is not necessary to show that the employee had actually solicited the custom of the customers he or she dealt with whilst employed at the employer (even though this would of course leave little doubt that there is breach). All that must be shown for example is that the employee indeed had a close working relationship with customers,

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[27] 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.

[28] *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; *Medtronic* (*supra*) at para 17.

[29] 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.

[30] See *David Crouch* (*supra*) at para 21;

[31] See *Reddy* (*supra*) at para 20; *Den Braven SA (Pty) Ltd v Pillay and Another* 2008 (6) SA 229 (D) at para 17; *Point 2 Point Same Day Express CC v Stewart and Another* 2009 (2) SA 414 (W) at para 14; *L'Oreal* (*supra*) at para 77; *SPP Pumps (supra)* at paras 30 and 37; *Esquire (supra)* at para 27; *Continuous Oxygen (supra)* at para 34.

and that it is likely that the employee is in a position to convince these customers to take their business elsewhere. In sum, is the employee in a position to act to the detriment of the erstwhile employer?[32]

[37] The same risk consideration applies to confidential information, the only consideration being whether it could harm the employer or lead to an unfair advantage to the competitor if disclosed.[33] In order to defeat this, the employee party would have to show, as described in *SPP Pumps*[34]:

> ' … The respondent must establish that he or she had no access to that information or that he or she never acquired any significant personal knowledge of, for instance, the applicant's customers while in the applicant's employ. …'

[38] There is another nuance to considering the question of the infringement of the protectable interest. This is the lapse of time. The reasonableness of the enforcement of the restraint must be assessed at the time when the restraint is sought to be enforced.[35] In the case of trade connections, the longer the employee has no contact with erstwhile customers, the more his or her influence over them diminishes. In the case of confidential information, there may well be some instances where confidential information does not diminish through a lapse of time. This would be where the employer, for example, had a unique and secret manufacturing method that would always be of great value to a competitor. However, where it comes to confidential information relating to general operations, marketing, planning, finances, customer details and business plans, these clearly become less and less relevant as time progresses.[36] After all, nature of business is that it must change to remain relevant and competitive.

[39] 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

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[32] *Continuous Oxygen (supra)* at para 42; *Medtronic* (*supra*) at para 30; *Vox* (*supra*) at para 31.
[33] *IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Hall (Aka Baghas) and Another* 2004 (4) SA 174 (W) at para 13.4.1; *Medtronic v Kleyhans and Another* (2016) 37 ILJ 1154 (LC) at para 40; *Medtronic* (*supra*) at para 34; *New Justfun Group (Pty) Ltd v Turner and Others* [2014] ZALCJHB 177 at para 12.
[34] (*supra*) at para 30.
[35] *Labournet* (*supra*) at para 43.
[36] *Tuv Sud SA (Pty) Ltd v Branders and Another* (2015) 36 ILJ 2398 (LC) at para 12.

enforcement, whilst an unduly long and broad restraint would mitigate against it.[37] 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.[38] For example, where the employer employed the employee as an already qualified and experienced engineer, it would be unreasonable to seek to prevent the employee from pursuing the chosen occupation of an engineer. 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. Whether the employee is wholly or partly remunerated for the restraint period is also a consideration in favour of enforcement, but this is not a requirement.

[40] It does not matter whether the employee, where employment with a competitor can be seen to be a violation of the restraint, gives an undertaking that the employee will not exploit trade connections or disclose confidential information, as this is not a consideration that can be applied in favour of the employee and simply does not serve as a defence.[39]

[41] As to whether the restraint goes further than needed to protect a protectable interest, the essence of the enquiry is to establish whether restraint only serves to stifle competition.[40] In other words, enforcing the restraint does nothing more than spiting the employee and the competitor for whom the employee intends to work, and does nothing to protect the business or interests of the erstwhile employer.

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[37] *Labournet* (*supra*) at para 43; *Continuous Oxygen* (*supra*) at para 47

[38] *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.

[39] As said in *BHT Water Treatment (Pty) Ltd v Leslie and Another* 1993 (1) SA 47 (W) at 57J-H: '… the applicant should not have to content itself with crossing its fingers and hoping that the first respondent would act honourably or abide by the undertakings he has given....'. See also *Reddy* (*supra*) at para 20; *Ball* (*supra*) at para 22; *Shoprite Checkers (supra)* at para 43; *Vox (supra)* at para 32; *Medtronic* (*supra*) at para 34.

[40] *North Safety Products (Africa) (Pty) Ltd v Nicolay* (2007) 28 *ILJ* 350 (C) at 353H-I; *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) at 507A-B; *Labournet* (*supra*) at paras 41 and 62; *FMW* (*supra*) at para 43.

[42] Finally, and where it comes to public interest, this consideration would arise where the enforcement of the restraint may be *contra bones mores*, or seek to support some kind of device or illegality or prohibited business model.[41] That which is unlawful cannot be protected.

[43] Considering all the above, I now turn to the facts at hand. These facts as set out in this judgment are gathered from the respective affidavits filed by the parties, and applying the *Plascon Evans* principles discussed above.

[44] The first respondent was employed by the applicant as implementation programme manager in terms of a written contract of employment signed on 4 February 2015. The first respondent commenced services on 1 March 2015, and upon commencing employment, actually headed up the newly established project management office at the applicant. The first respondent was also a shareholder of the applicant, sat on the executive committee of the applicant, and had about 200 employees of the applicant reporting to him.

[45] The applicant conducts business as a 'fibre-to-the-home' ('FTTH') network operator. This FTTH industry is succinctly described by the first respondent as having three separate layers. The first layer is the construction of the physical network, which, in simple terms, is laying the fibre lines. Once the lines are in place, layer two then entails connecting the fibre lines to metro hubs that provide internet access, though the use of computers and other technology. The third and final layer is then providing internet access to end users, such as the residents in the suburbs, who pay a monthly service fee. The applicant's business is conducted in layers one and two. The applicant does not conduct business in level three, which businesses are in essence what is commonly known as internet service providers, or "ISPs".

[46] In his contract of employment, the first respondent agreed to a restraint period of 6 (six) months following the termination of his employment, applying to the geographical area comprising of the entire country. The restraint itself prohibited the first respondent from being associated with a competing business, with the association being broadly described as including employment and otherwise contracting. The restraint further prohibited the first

[41] *FMW* (*supra*) at paras 62 – 63.

respondent from soliciting the customers of or dealing with the applicant's customers or potential customers. Finally the restraint prohibited the first respondent from soliciting the employment of the applicant's employees with a competitor, and enticing the suppliers of the applicant to stop doing business with it.

[47] Motheo and SADV are indeed direct competitors of the applicant, in either level one or two or both. It however appears that the applicant and all these other operators share the same basic customers, which are the ISPs. The customer base of the applicant (and the mentioned competitors) are not the individual residential home owners that ultimately connect to the fibre network and pay a subscription / usage fee for it. The customer base of the applicant is the ISPs that utilize the fibre infrastructure provided by the applicant, who in turn, sell on individual services to the individual residence owners in the suburb. These ISPs are not dedicated to any one infrastructure provider. Certainly, both the applicant and Motheo share Vodacom as a customer.

[48] Turning then back to the first respondent, he was involved in the roll out strategy of the applicant in deploying fibre lines in the various suburbs. The first respondent assisted building the applicant's processes and contract capacity in this regard. He had access to and was in control of all the budgeting, planning, operations and then handover of the network, relating to all the activities that resorted under his office. In his capacity as exco member, the first respondent not only attended exco meetings, but also board meetings, where he was privy to the kind of confidential and sensitive information and strategy normally discussed at these kind of high level meetings. In short, where it came to the construction of the fibre network, the first respondent knew everything about the applicant's operations, transactions and strategies. As he says in his answering affidavit, things were done because 'Mo says' (the first respondent's nickname).

[49] The first respondent's employment with the applicant terminated on 1 March 2017 by way of agreement. In this agreement, the first respondent undertook to fully adhere to the restraint of trade covenant as contained in his employment contract, and the restraint period was extended to 24 (twenty four) months. Both parties had issues as to whether the other breached the

termination agreement, and devoted a fairly large part of what is contained in the affidavits to this, but in my view and for the purposes of this judgment, and even accepting that the applicant may have contravened some of the terms of this agreement, nothing turns on this.[42] I will simply accept, for the purposes of argument, that the restraint period was extended to 24 (twenty four) months by agreement, which is in any event consistent with the simple wording of the termination agreement.

[50] Having left the applicant, the first respondent in fact did not work in the industry for a period of 7 (seven) months, in which time his activities at the applicant must surely have been attended to by someone else, without encountering any interference from the first respondent at a competitor. The first respondent only contracted with Motheo as from 1 October 2017. It however does appear that at Motheo, the first respondent did much the same as that which he did at the applicant, especially where it came to the rolling out of fibre networks in targeted suburbs.

[51] The first respondent remained contracted with Motheo until 1 August 2018, which was after the current application was brought. He then terminated his contract with Motheo and took up contracting with SADV. SADV is not in the business of installing fibre networks, and SADV only operated in what was described as the level two sphere, being to connect fibre networks to the hubs giving access to the internet. SADV works with Motheo which is primarily focussed on fibre network installation (level one).

[52] Considering the above factual matrix, I am satisfied that the applicant has a proper protectable interest where it comes to confidential information. The applicant's summary of the kind of confidential information it seeks to protect, and that this can properly be considered as confidential information worthy of protection, was not pertinently or effectively challenged by the first respondent, and I accept it qualifies as the kind of confidential information worthy of protection. Considering the first respondent's level of seniority, the fact that he

[42] See *Reeves and Another v Marfield Insurance Brokers CC and Another* 1996 (3) SA 766 (A) at 772F-G where it was held: '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. The need for the protection exists therefore independently of the manner in which the contract of employment is terminated and even if this occurs in consequence of a breach by the employer'. See also *Bonfiglioli SA (Pty) Ltd v Panaino* (2015) 36 ILJ 947 (LAC) at para 2*4; Benchmark Signs (supra)* at para 17.

was effectively in change of the business unit doing installations, that he had access to the applicant's information infrastructure, and that he sat on the executive committee and board, I accept that the first respondent had full access to, and was aware of, this kind of information, and I simply do not believe his feeble attempts at denying this.[43] No doubt, and at the time the first respondent left the applicant, this information would be of value to a competitor such as Motheo and having access to it, *via* association with the first respondent, would give Motheo an undue advantage it would never have had, in competing with the applicant.

[53] But where it comes to trade connections, the situation is somewhat different. I do not believe the applicant has made out a proper case of trade connections worthy of protection. There is no proper evidence of the first respondent having any kind of close or influential relationship with the customers of the applicant, which as stated are only the ISPs. Not itself being an ISP, the applicant does not do business with individual residents in a suburb. It is clear that the ISPs do not exclusively deal with the applicant, and already have existing relationships with the various infrastructure providers, such as the applicant. I accept the first respondent's assertions that in the areas where the infrastructure providers compete, the business will go the provider with whom the ISP can negotiate the best deal. The first respondent will have little or no influence in this regard, and has said he did not even deal with the ISPs. This is evidenced by the fact that despite the first respondent having spent more than 9 (nine) months with Motheo by the time the application was brought, there is no indication of the applicant having lost any business to Motheo.[44]

[54] Advocate Whitcutt attempted to counter this difficulty by referring to the fact that the first respondent had a unique relationship with contractors that did installations, and this could also be considered to be trade connections. This argument is however defeated by the provisions of the restraint itself. It draws a distinction between customers and suppliers, and only seeks to prohibit the first respondent from enticing suppliers to stop doing business with the applicant. There is no prohibition of, for example, the first respondent getting a contractor of the applicant to do installations for Motheo, provided of course

[43] Compare *L'Oreal* (*supra*) at paras 71 and 73.
[44] Compare *Labournet* (*supra*) at para 64.

that that contractor does not as a result stop doing business with the applicant. No case was made out that any contractor stopped doing business with the applicant, after the first respondent went to Motheo.[45]

[55] Therefore, the applicant has failed to establish the existence of a protectable interest where it comes to trade connections.

[56] But where the applicant's application completely falls down is when it comes to the consideration of the principle of breach of the protectable interest. There are a number of reasons for this, which I will deal with hereunder. But importantly, many of these reasons are directly linked to the excessive delay occasioned by the applicant in bringing this application. It is for this reason that I intimated earlier in this judgment that the lack of urgency spills into the merits of the matter resulting in it being dismissed, rather than just stuck from the roll.

[57] Accepting that the applicant has a proper protectable interest worthy of protection where it comes to confidential information, and that the contracting of the first respondent with Motheo on face value infringes on this protectable interest, the simple answer to this is that when this application was finally moved in Court, the first respondent had ceased contracting with Motheo. If the application was brought much earlier, this would clearly not have been the case. The applicant in essence shot itself in the foot. In the absence of any existing relationship or association of any kind between the first respondent and Motheo, which was indeed the case as from 1 August 2018, there is simply no live controversy between the parties. The matter is for all intents and purposes moot. I accept that even if a matter is moot can still be decided if justice demands it.[46]

[58] But this would not be a case where justice demand that this Court nonetheless consider the previous association between the first respondent and Motheo as basis for deciding this matter. The simple reason for this is that the applicant, principally, seeks an interdict. If there is nothing to interdict, then all that remains is giving advice to the parties without a real and underlying *lis* and no

[45] Compare *Vox* (*supra*) at paras 37, 49 – 50.
[46] See *Police and Prisons Civil Rights Union v South African Correctional Services Workers' Union and Others* [2018] ZACC 24 (23 August 2018) at paras 73 and 82; *MEC for Education, KwaZulu-Natal and Others v Pillay* 2008 (1) SA 474 (CC) at para 32; *Karoo Hoogland Municipality v Nothnagel and Another* (2015) 36 ILJ 2021 (LAC) at para 4.

practical effect to granting relief.[47] Therefore, and where it comes to considering whether there is a breach of the protectable interest of the applicant vis-à-vis the first respondent's association with Motheo, this must be answered in the negative, because as matters now stand, it simply does not exist.

[59] I may add that in the founding affidavit, the applicants lists no fewer than 12 (twelve) of its former employees that are now employed by Motheo. Other than making a general allegation that these employees were solicited for employment with Motheo by the first respondent (which the first respondent denies), it is clear that the positions of several of these employees at the applicant are of the nature that they would have access to the same kind of confidential information the applicant complains the first respondent was possessed of. One then has to ask – did these employees have restraints themselves, if so was this enforced, and if not, why? The applicant has not taken this Court into its confidence by answering these questions. The first respondent has rightly in his answering affidavit raised concerns about this, and even provided examples of the contracts of employment signed by these employees with the applicant, which reflects that indeed there was a restraint of trade. One is then left with the nagging question, especially considering the extreme delay in this case, whether the applicant is really just trying to protect a breach of its genuine protectable interests, or whether the enforcement of the restraint is rather not act of retribution and to simply stifle competition. The latter circumstance certainly appears more likely.

[60] This then leaves the first respondent's current association / contract with SADV. Does this constitute a breach of the protectable interest of the applicant where it comes to confidential information? In my view, this is not the case. In this regard, the applicant unfortunately shot itself in the other foot. The entire

[47] In *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC) at para 21 footnote 18 the Court said: 'A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law'. See also *City of Cape Town v SA Municipal Workers Union on behalf of Abrahams and Others* (2012) 33 ILJ 1393 (LAC) at para 11; *Multichoice Africa (Pty) Ltd v Broadcasting Electronic Media & Allied Workers Union and Others* (2012) 33 ILJ 177 (LAC) at para 16; *SA Transport and Allied Workers Union v ADT Security (Pty) Ltd* (2011) 32 ILJ 2112 (LAC) at paras 4 – 5. In *Sun International Ltd v SA Commercial Catering and Allied Workers Union* (2017) 38 ILJ 1799 (LAC) at para 21 the Court described it as 'The appellant has in effect asked for an advisory opinion as to future conduct'.

case of the applicant in the founding affidavit was built around showing a breach of the protectable interest where it comes to Motheo. The only reason why SADV came into the picture is because of what the first respondent said in his answering affidavit. Other than seeking to then join SADV to the proceedings, very little effort is expended by the applicant in making out a similar case of breach of the protectable interest where it comes to the first respondent's association / contract with SADV. The applicant could, and should, have done a lot more in this regard.

[61] However, and even considering the merits of the matter as is stands, the association of the first respondent with SADV only came about on 1 August 2018, with him having left the applicant as far back as 1 March 2017, and being out of the industry entirely for 7 (seven) months. In my view, this has derogated the value of the confidential information the first respondent has access at the time when he left the applicant to be virtually valueless.[48] As a matter of common sense and logic, information about projects, installations, finances, marketing and the like in March 2017 is simply not current in August 2018. As a simple example, it can hardly be said that knowledge of pricing in March 2017 would have any value in August 2018. There is no evidence of any trade or business secret or manufacturing methodology that is unique to the applicant, and would remain worthy of protection even as time goes by, and which a competitor such as SADV would dearly love to get its hands on. In short, the kind of confidential information applicable here is operational in nature, has a sell by date, and that date has passed. The first respondent has in fact said as much, with proper motivation for this view, in the answering affidavit, and there is no reason not to accept this.

[62] It is clear from the evidence that the majority of the first respondent's duties at the applicant, and knowledge of operations, were dedicated to the installation of fibre infrastructure. SADV is not in that business. It is only in the business of activating the infrastructure and then contracting with the ISPs. In this context, it would only be possible trade connections the first respondent may have had that would be of value to SADV, but, as discussed above, the first respondent simply had no such connections.

[48] Compare *Henred Freuhauf (Pty) Ltd v Davel and Another* (2011) 32 ILJ 618 (LC) at para 20.

[63] It follows that when the first respondent contracted with SADV on 1 August 2018, this did not constitute a breach of the applicant's protectable interest relating to confidential information, as what could have been confidential information had since expired.

[64] In the result, the applicant fails at the point of establishing a breach of its protectable interest as contemplated by enquiry (b) in *Basson*. It is therefore not necessary to consider any of the other issues. The consequence of this is that the applicant has failed to establish the existence of a clear right to the relief sought, and as such, is not entitled to the interdict sought. It is not necessary to then consider any of the other requirements for final relief, as well.

[65] It is also clear that the procrastination of the applicant in bringing this application is a large contributor to this failure, and that is also why this matter must be dismissed instead of just being struck from the roll.

Conclusion

[66] In summary, the applicant has failed to satisfy the requirements necessary for this matter to be considered urgent. But nonetheless, this is an instance where this failure does not lead to the matter simply being struck from the roll, but leads to it being actually dismissed. The reason for this is that the applicant has failed to establish the existence of a clear right to the relief sought, and an important contributor to its failure in this regard is equally the delay occasioned in bringing the application. The applicant's application falls to be dismissed.

[67] 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 of the LRA. It must of course be considered that the applicant was unsuccessful, and should have with much more circumspection considered whether it was still competent to bring this application after such a long delay. If these were the only considerations, I may have been inclined to award costs against the applicant. But some of the issues raised by the first respondent also leaves me concerned. I find the first respondent's approach of trying to distance himself from his level of seniority and the clear terms of the

termination agreement he signed to be concerning. It also appears that despite signing an agreement extending the restraint period to 24 months, the first respondent acts in flagrant violation thereof after only 7 (seven) months. It cannot be said that the first respondent did this because the applicant breached the agreement by not paying his last R 1 million instalment, because this payment was only due shortly before the first respondent actually contracted with Motheo. It follows that he must have been negotiating with Motheo, to join it, even before this. In any event, the first respondent never instituted breach proceedings as prescribed by the agreement itself. Overall considered, and having regard to all that it set out above, I believe that this is a case where it would be just and equitable to make no order as to costs.

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

Order

1. The application is dismissed.
2. There is no order as to costs.

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S. Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicant:	Advocate C Whitcutt SC together with Advocate L M Maite
Instructed by:	Cliffe Dekker Hofmeyr Attorneys
For the First Respondent:	Advocate A Redding SC together with Advocate M Meyerowitz
Instructed by:	Pandor Attorneys