THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

REPORTABLE

Case no. J 1188 / 22

In the matter between:

DOT ACTIV (PTY) LTD **Applicant**

and

ERIN DAUBINET **First Respondent**

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

Heard: **9 November 2022**

Delivered: **17 November 2022**

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

Restraint of trade – protectable interest in the form of trade connections and confidential information considered – protectable interest shown only in respect of confidential information – no protectable interest relating to trade connections shown

Restraint of trade – breach of restraint – employment with competitor does not constitute breach in this instance – employment not in competing activity – no risk to applicant as a result of employment with competitor – employee not associated with competing business

Restraint of trade – issue of undertakings – circumstances where undertaking would defeat possible breach of restraint – principles considered – undertakings in this case mitigating breach – undertakings endorsed by new employer – no breach of restraint shown

Restraint of trade – skills and qualifications of employee accruing to employee – deployment of skills and qualifications in new employer in non-competing activity does not constitute breach of restraint

Restraint of trade – weighing off of interests – principles considered – weigh off favouring employee – enforcement of restraint unreasonable

Restraint of trade – applicant failing to make out case of breach of protectable interest – weigh off also favouring first respondent – enforcement of restraint prohibiting employment with the second respondent would be unreasonable

Interdict – requirements of interdict not satisfied – no clear right shown – no reasonable apprehension of prejudice – application refused – undertakings however incorporated into order

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JUDGMENT

SNYMAN, AJ

Introduction

[1] I must confess that where it comes to the numerous restraint of trade applications I have been called upon to decide, this is one of the more difficult ones. I do believe that both sides had legitimate interests they sought to pursue and protect, and in this context, it is difficult to accept that one party must win and the other party must lose, outright. After all, and where it comes

to the enforcement of restraints of trade, it is always about what is reasonable in the context of each unique set of facts.

[2] The above being said, this judgment concerns an urgent application brought by the applicant on 29 September 2022 to enforce a restraint of trade covenant against the first respondent, who is a former employee of the applicant. The first respondent has commenced employment with the second respondent. In the application, the applicant effectively seeks an interdict against the first respondent, to prevent her from continuing her employment with the second respondent. The applicant also seeks further relief in the form of an order directing the first respondent to keep the applicant's confidential information, confidential. The first respondent has opposed this application.

[3] Contrary to what is normally the case, the second respondent, as the first respondent's new employer, has actively engaged in this matter and has made common cause with the first respondent in opposing the enforcement of the restraint of trade by the applicant.

[4] The application first came before Prinsloo J on 19 October 2022. In an order granted on such date, the learned Judge postponed the application to 9 November 2022, and afforded the parties the opportunity to file further sets of answering and replying affidavits. It was also ordered that the first respondent's employment with the second respondent be suspended pending the finalization of this matter.

[5] The application then came before me on 9 November 2022, pursuant to the order of Prinsloo J of 19 October 2022. When presenting argument, neither party took issue with requirements of urgency. It appears to me that the issue of urgency has been largely disposed of when the matter first came before Prinsloo J, having regard to the terms of the order granted by the learned Judge. In any event, I am satisfied that the applicant met all the requirements of urgency in this matter.[1] The first respondent, through her attorneys, only

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

confirmed on 16 September 2022 that she would proceed with taking up employment with the second respondent. It then only took two weeks to file the application, to which the respondents were also given some two weeks to answer. Also, and considering the nature of the relief sought, and the purpose sought to be achieved by the enforcement of a restraint of trade, there is no other form of substantial redress in due course, other than this application.[2] Restraints of trade also carry with them an inherent quality of urgency.[3] I am therefore satisfied that this application should be dealt with as one of urgency in terms of Rule 8.

[6] Because the applicant seeks final relief, the applicant must satisfy three essential requisites to succeed, being (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.[4]

[7] After hearing argument by the applicant and the respondents on 9 November 2022, I reserved judgment. I will now proceed to hand down judgment in this application, as will be set out below, commencing by first setting out the relevant facts.

The relevant facts

[8] In this case, a number of important facts were fortunately either undisputed or admitted.[5] Where it comes to the factual disputes that emerge from a consideration of the first respondent's answering affidavit, the applicant's replying affidavit, followed by the further affidavits filed by the parties, I will determine all these factual disputes in line with the principles established in

[2] See *Maqubela v SA Graduates Development Association and Others* (2014) 35 ILJ 2479 (LC) at para 32; *Transport and Allied Workers Union of SA v Algoa Bus Co (Pty) Ltd and Others* (2015) 36 *ILJ* 2148 (LC) at para 11.
[3] See *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff and Another* (2009) 30 ILJ 1750 (C) at 1761.
[4] *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.
[5] Admitted facts include facts that, though not formally admitted, simply cannot be denied – see *Gbenga-Oluwatoye v Reckitt Benckiser SA (Pty) Ltd and Another* (2016) 37 ILJ 902 (LAC) at para 16.

Plascon Evans Paints v Van Riebeeck Paints[6], which equally applies in restraint of trade enforcement applications. As said in *Ball v Bambalela Bolts (Pty) Ltd and Another*[7]: '*… Resolving the disputes of fact in favour of the party sought to be restrained involves an application of the Plascon-Evans rule ….*'. The background facts as summarized below are arrived at on the basis as set out aforesaid.

[9] The business of the applicant was established in 2011. That business concerns the development and sale of software and the provision of related services linked to that software, concerning the creation of data-driven product layout in a retail store, or better known as '*planograms*'. Planograms are used in the retail industry to structure and determine a retail store layout, and in particular, where to place particular products in a retail store (the location of products), and also what the appropriate quantity would be of the products so displayed. Generally speaking, this can be called '*retail space planning*'. It is undisputed that there is a particular science and methodology applicable to this discipline, which is highly specialized.

[10] The applicant has developed its own unique software which is utilized for the purposes of preparing the planograms. This software is data driven, and allows for the development of cluster plans and assortment plans, as part of the planogram. These plans are then reflected in the final planogram forming the basis of the final in-store layout execution tool. All of these activities are called '*category management*', and the applicant's software facilitates this category management, and is called the '*Activ8 system*'. The applicant's category management software is provided to clients in either one of two ways. First, the applicant sells the software to clients who in turn use the software themselves to do their own category management. Second, the

[6] 1984 (3) SA 623 (A) at 634E-635C. These principles are, in sum, that the facts as stated by the respondent party together with the admitted or facts that are not denied in the applicant party's founding affidavit constitute the factual basis for making a determination, unless the dispute of fact is not real or genuine or the denials in the respondent's version are bald or not creditworthy, or the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable, that the court is justified in rejecting that version on the basis that it obviously stands to be rejected.

[7] (2013) 34 ILJ 2821 (LAC) at para 14. See also *Reddy v Siemens Telecommunications* (2007) 28 ILJ 317 (SCA) at para 4; *Labournet (Pty) Ltd v Jankielsohn and Another* (2017) 38 ILJ 1302 (LAC) at para 40; *Ball* (*supra*) at para 14; *Vumatel* (*supra*) at para 29; *New Justfun Group (Pty) Ltd v Turner and Others* (2018) 39 ILJ 2721 (LC) at para 10.

applicant provides the software to clients on a software for service basis, in which instance the applicant services the clients by conducting the category management needs itself, on behalf of the clients.

[11] The applicant counts as its clients a number of well known South African retail brands, which includes Pick ‘n Pay and Dis-Chem. It has also been pointed out by the applicant that an overseas retailer, WHSmith, is one of its clients.

[12] The first respondent commenced employment with the applicant on 7 January 2019 as a shelf planner. She was employed by way of a letter of employment with accompanying employment conditions signed by her on 13 December 2018. The conditions of employment required the signature of a confidentiality and restraint agreement. As stated above, it is undisputed that the first respondent then indeed signed such a restraint of trade and confidentiality agreement (the restraint agreement).

[13] The restraint agreement is comprehensive. The ‘*business*’ covered by the restraint is the applicant’s promotion, supply, development and after sale support of the Activ8 software, the category management services relating to such software, and matters directly and indirectly relating thereto. There is a detailed definition of ‘*category management services*’, which is in essence store planning and the generation of associated planograms in all its facets, as provided to retailers. The similarly comprehensive definition of confidential information in essence defines confidential information as all information relating to the aforesaid business, software, services and activities, and clients of the applicant.

[14] The restraint itself is found in clause 5 of the restraint agreement. Suffice it to say, and of relevance to what is now before this Court, the restraint prohibited employment of the first respondent with a direct or indirect competitor of the applicant. The restraint also required the first respondent to keep all confidential information of the applicant confidential, and not to solicit or canvass the custom of the clients of the applicant or sell or otherwise supply any competing products or services to the clients of the applicant. The restraint undertakings would apply for a period of six months calculated from the date of termination of the employment of the first respondent with the applicant, and for the entire Republic of South Africa.

[15] It appears that the first respondent had quite a meteoric rise in the applicant. After only some eight months service, and on 23 September 2019, she was promoted to account manager. In that capacity, she was in essence in charge of a team of space planners. It appears from the evidence that space planners are the persons rendering the category management services to clients, utilizing the applicant's software.

[16] Another promotion of the first respondent followed on 1 December 2020, when she was appointed as operations manager. As operations manager, she led a team of account managers, and would also be involved in sales and new product and service innovations.

[17] Finally, and on 1 June 2022, the first respondent was appointed as vice operations executive, which meant that she was in essence second in command of operations at the applicant. In that capacity, she oversaw a number of client accounts and was responsible for leading the account managers directly responsible for running those accounts. She assisted the head of operations in leading the operations managers. She also continued to have a sales responsibility, and was required to grow existing client accounts and oversee servicing of prospective clients who booked consultations with the applicant.

[18] According to the applicant, and as vice operations executive, the first respondent would be in a position to stand in for the head of operations and she participated in meetings with the applicant's top ten most important client accounts. The applicant further states that the first respondent assisted with sales to prospective clients, was a member of the management team, and regularly spent time with the applicant's directors.

[19] After just more than two months in the role of vice operations executive, the first respondent communicated her intention to resign to the applicant's CEO, Kyle Dorfling (Dorfling), on 17 August 2022. She, at the time, indicated to Dorfling that she intended to move to the second respondent. Dorfling indicated to her that this was of concern to him, as the second respondent was a competitor of the applicant. The first respondent undertook to consider her position and revert to Dorfling about her intentions.

[20] Dorfling and the first respondent revisited the issue on 24 August 2022. Dorfling stated that as far as he was concerned, the employment of the first respondent with the second respondent was a breach of the restraint of trade. There is a dispute about what exactly transpired in the discussions between Dorfling and the first respondent, but in my view nothing turns on this where it comes to the merits of this matter, because ultimately, the first respondent made it clear that she would be taking up employment with the second respondent, and she at least always disclosed to Dorfling that employment with the second respondent remained on the table.

[21] It is undisputed that Dorfling requested the first respondent to reconsider her position, and remain with the applicant. He offered her a pay increase and undertook to match, over time, the package offered to her by the second respondent. Another option suggested to the first respondent was that the first respondent remain employed with the applicant for an interim period whilst she found employment with an alternative employer that was not a competitor of the applicant. Again, the first respondent undertook to consider these proposals and revert, and then on 30 August 2022 informed Dorfling that she would be leaving the applicant. The applicant then resigned on 30 August 2022 (the same date), and it is common cause that she took up employment at the second respondent on 3 October 2002, after her notice period expired on 30 September 2022.

[22] It is perhaps appropriate to at this stage deal with the business of the second respondent. The second respondent is a large multinational undertaking with some 17 000 employees, which conducts the business of the development and then sale of many software products in different disciplines (areas of business) in the retail environment. In simple terms, the second respondent conducts an all-encompassing retail and consumer data platform. It was undisputed that one of the software products sold by the second respondent to clients is a product called '*Spaceman*', which is a directly competing software product to the applicant's category management software. The Spaceman product also facilitates the generation of planograms to be used by clients in retail store layout planning.

[23] It appears that the second respondent does not offer its Spaceman product on the basis of a software for service model, as the applicant does. The second respondent sells its Spaceman software to clients to use for themselves. It also appears that the second respondent does most of its Spaceman sales through agencies. But insofar as it concerns the second respondent's Spaceman software, it is clear that it is a direct competitor to the applicant's category management software. A clear example of this is that the applicant took over WHSmith from the second respondent's Spaceman software into its own category management software.

[24] On the admitted facts, the first respondent is employed by the second respondent in the capacity of a Price and Retail Promotion Lead: Analytics Global Brand. There is no suggestion by the applicant that the first respondent is in any way associated with the Spaceman software or business of the second respondent, or in the marketing, sale, development or servicing of that software. It actually appears from the facts that the first respondent is not associated with Spaceman at all. The first respondent in her employment at the second respondent does not deal with any clients of the applicant, and in particular, has no dealings with WHSmith.

[25] As to what the first respondent actually does at the second respondent, price and promotion analytics is the discipline concerned with the analysis of how consumers respond to changes in prices and to product promotions, which are implemented by retail stores operating in a retail environment. In this context, the second respondent has an advanced research team, of which the first respondent has become a part. She is focussed on research relating to price and promotion elasticity and responsible for Africa, and reports to the Director of Eastern Europe, Africa and Middle East of the second respondent. She fulfils her duties principally on a work from home basis, and reports into an office in Portugal.

[26] The first respondent holds a Bachelor's Degree in Consumer Science which she obtained prior to joining the applicant. In the course of her employment with the applicant, the first respondent also obtained a Master's Degree in Retail specializing in consumer analytics, which she funded herself and studied for after hours. According to the first respondent, her employment with

the second respondent is squarely in line with what she had studied for, and her duties would be aligned to what her qualifications would have direct relevance to.

[27] In was conceded that part of the duties of the first respondent in her position as Price and Retail Promotion Lead would include building relationships with the clients of the second respondent, in order to assist those clients in the fast-moving consumer goods market, so that those clients can make the right choices where it comes to the price and promotion strategies relating to those goods. This however has nothing to with store layout planning or planograms.

[28] It has been explained by the first respondent that the software used by her in fulfilling her tasks at the second respondent is a reporting function generated on the second respondent's own database called 'Answers', and the Microsoft Power BI software, which is a product developed by Microsoft which has a primary focus on business intelligence. Nothing in the applicant's category management software can assist her in these tasks.

[29] Following the first respondent's resignation on 30 August 2022, and on 14 September 2022, the applicant's attorneys sent a letter of demand to the first respondent. In this letter of demand, the first respondent was specifically referred to her restraint of trade and confidentiality undertaking, and the purpose behind its conclusion with the applicant. The first respondent was referred to her resignation and intention to take up employment with the second respondent, and informed that this would constitute a breach of her restraint and confidentiality undertakings, as the second respondent was a direct competitor of the applicant. It was contended that the second respondent sought to employ the first respondent because of her knowledge of the applicant's confidential information, trade secrets and relationship with clients. The first respondent was given until 17h00 on Friday 16 September 2022 to confirm whether she would continue to take up employment with the second respondent, and told she would face enforcement of the restraint of trade if she chose to proceed with that course of action.

[30] The first respondent's attorneys answered on 16 September 2022. In the answer, it was stated that the first respondent intended taking up employment with the second respondent on 1 October 2022, and that the applicant had

known this since 24 August 2022. It was further stated that the first respondent did not intend breaching her restraint, and that the second respondent was not a direct competitor of the applicant. The applicant was further informed that the work the first respondent would be doing at the second respondent was not the same as her work at the applicant and not in competition with it. The first respondent then provided the applicant with a number of undertakings in this letter. This included keeping all the applicant's confidential information confidential and not disclosing it to any third parties, and not soliciting the custom of the applicant's clients or in any manner seeking to sell or otherwise provide products or services to such clients in competition to the applicant. It was even tendered to provide such undertakings for a twelve months' period. It was stated that the second respondent would also provide written confirmation of such undertaking. It was ultimately made clear that the first respondent would not terminate her employment with the second respondent and any attempt to enforce the restraint would be opposed.

[31] Attached to the answer of the first respondent of 16 September 2022 was a letter from the second respondent. In this letter, the second respondent in essence made common cause with the undertakings provided by the first respondent, and undertook that it would never require the first respondent to act in breach of her restraint and would ensure that she adhered to the same.

[32] In a reply dated 20 September 2022, the applicant's attorneys indicated that the undertakings provided was insufficient to protect the applicant's interests and that the applicant would proceed to enforce the restraint of trade, which the first respondent was breaching by continuing to take up her employment with the second respondent.

[33] The current urgent application then followed, as set out above.

Restraint principles

[34] In *A J Charnaud & Co (Pty) Ltd v van der Merwe and Others*[8] the Court summarized the process where it comes to enforcing restraints of trade as follows:

> 'In short, the logical sequence that applies in the case of an employer (the applicant) seeking to enforce a restraint against an employee, is firstly to prove the existence of a restraint obligation that applies to the employee. Secondly, and if a restraint obligation is shown to exist, the employer must prove that the employee acted in breach of the restraint obligation imposed by the restraint. Finally, and once the breach is shown to exist, the determination then turns to whether the facts, considered as a whole, show that the enforcement of the restraint would be reasonable in the circumstances.'

[35] It is trite that restraints of trade are valid and binding, and as a matter of principle enforceable, unless the enforcement thereof is considered to be unreasonable.[9] A restraint of trade also does not infringe on the constitutional right to free economic activity.[10]

[36] Where it comes to determining whether the enforcement of a restraint of trade is unreasonable, it is true that the onus rests on the person against whom the restraint of trade is sought to be enforced, to show that enforcement would be unreasonable.[11] But it is seldom necessary to become embroiled in the issue of where the onus lies, when deciding this issue of whether the enforcement of the restraint would be reasonable. The proper approach to follow was summarised in *Reddy v Siemens Telecommunications (Pty) Ltd*[12] as follows:

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[8] (2020) 41 ILJ 1661 (LC) at para 56.

[9] *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 891B-C; *Reddy* (*supra*) at para 14; *Labournet* (*supra*) at para 39; *Ball* (supra) at para 13; *Esquire* (*supra*) at para 26; *SPP Pumps (SA) (Pty) Ltd v Stoop and Another* (2015) 36 ILJ 1134 (LC) at para 26; *Shoprite Checkers (Pty) Ltd v Jordaan and Another* (2013) 34 ILJ 2105 (LC) at para 20.

[10] *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*'.

[11] See *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 875H-I; *Dickinson Holdings Group (Pty) Ltd and Others v Du Plessis and Another* (2008) 29 ILJ 1665 (N) para 89; *Bridgestone Firestone Maxiprest Ltd v Taylor* [2003] 1 All SA 299 (N) at 302J-303B; *Jonsson* (*supra*) at para 8.

[12] (2007) 28 ILJ 317 (SCA) at para 14. This approach was also applied by the LAC in *Labournet* (*supra*) at para 40.

> '…. If the facts disclosed in the affidavits, … disclose that the restraint is reasonable, then Siemens must succeed: if, on the other hand, those facts disclose that the restraint is unreasonable then Reddy must succeed. What that calls for is a value judgment, rather than a determination of what facts have been proved ….'

Similarly, and in *Ball supra* the Court said:[13]

> '… The reasonableness of a restraint could be determined without becoming embroiled in the issue of onus. This could be done if the facts regarding reasonableness have been adequately explored in the evidence and if any disputes of fact are resolved in favour of the party sought to be restrained. If the facts, assessed as aforementioned, disclose that the restraint is reasonable then the party, seeking the restraint order, must succeed, but if those facts show that the restraint is unreasonable, then the party, sought to be restrained, must succeed.'

[37] Whether the enforcement of the restraint of trade against the first respondent would be reasonable is dependent upon deciding the following questions set out in *Basson v Chilwan and Others*[14]: (a) Does the one party have an interest that deserves protection?; (b) If so, is that interest threatened (breached) by the other party?; (c) does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?; and (d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected. More recently, a further enquiry has been added, which can be called question (e), being whether the restraint goes further than necessary to protect the relevant interest.[15]

[38] This Court and the Labour Appeal Court have been consistently applying these five considerations in determining whether the enforcement of a restraint

[13] Id at para 14.
[14] 1993 (3) SA 742 (A) at 767G-H.
[15] *Jonsson* (*supra*) at para 44; *Medtronic (Africa) (Pty) Ltd v Van Wyk* (2016) 37 ILJ 1165 (LC) at para 15; *Esquire* (*supra*) at paras 50 – 51.

of trade would be reasonable.[16] Deciding each of these considerations is a determination on the facts of that particular case, applying, as held in *Ball supra*[17], 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 …'

[39] The protectable interest of an applicant in a restraint of trade can be found in one or both of two considerations, being confidential information (trade secrets), or trade connections.[18] In *Labournet (Pty) Ltd v Jankielsohn and Another*[19] 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. …'

[40] Confidential information would be:[20] (a) Information received by an employee about business opportunities available to an employer; (b) information that is useful or potentially useful to a competitor, who would find value in it; (c) Information relating to proposals, marketing or submissions made to procure business; (d) information relating to price and/or pricing arrangements, not generally available to third parties; (e) information that has actual economic value to the person seeking to protect it; (f) customer information, details and particulars; (g) information the employee is contractually, regulatory or

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[16] *Labournet* (*supra*) at para 42; *Jonsson (supra*) at para 44; *Vox Telecommunications (Pty) Ltd v Steyn and Another* (2016) 37 ILJ 1255 (LC) at paras 28 – 29; *Shoprite Checkers* (*supra*) at paras 23 – 24; *Benchmark Signs Incorporated v Muller and another* [2016] JOL 36587 (LC) at para 15.
[17] Id at para 17. See also *Labournet* (*supra*) at para 40.
[18] *Dickinson* (*supra*) at para 32; *Basson (supra)* at 769 G – H; *Bonnet and Another v Schofield* 1989 (2) SA 156 (D) at 160B-C; *Hirt and Carter (Pty) Ltd v Mansfield and Another* (2008) 29 ILJ 1075 (D) at para 37; *Esquire* (*supra*) at para 27; *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) at 502E-F; *FMW (supra)* at para 36; *Vox* (*supra*) at para 30.
[19] (2017) 38 ILJ 1302 (LAC) at para 41.
[20] 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.

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.

[41] Trade connections as an interest worthy of protection would be where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he or she leaves employment and becomes employed by a competitor, the employee could easily or readily induce the customers to follow the employee to the new business.[21] Whether the employee can be seen to have the ability to exert this kind of influence, is dependent upon: (a) the duties of the employee; (b) the employee's particular personality and skill; (c) the frequency and duration of contact between the employee and the customer(s); (d) the nature of the relationship between the employee and the customer(s) and in particular whether the relationship carried with it a notion of trust and confidence; (e) the knowledge of the employee concerning the particular requirements of the customer and the nature of its business; (f) how competitive the rival businesses are, and (d) the nature of the product or services at stake.[22]

[42] The seniority of the employee concerned is also an important consideration where it comes to evaluating the existence of a protectable interest.[23] 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.[24] Seniority is not just the level

[21] 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.
[22] *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.
[23] 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.
[24] See *David Crouch* (*supra*) at para 21; *Plumblink SA (Pty) Ltd v Legodi and Another* (2020) 41 ILJ 1743 (LC) at para 30.

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.

The protectable interest

[43] In my view, there is little doubt that the applicant has a legitimate protectable interest in this case, despite the first respondent's contentions to the contrary, where it comes to the issue of confidential information. Firstly, this protectable interest is found in the fact that the applicant and the second respondent are direct competitors where it comes to the applicant's category management software product and business, and the second respondent's Spaceman software product and business. It is true that the applicant's only business is its category management software and related support and services offered to clients in this regard. Secondly, I am satisfied that in the various management positions held by the first respondent throughout her tenure at the applicant, she was exposed to the kind of confidential information that would be valuable or useful to a competitor conducting business in the same market. Thirdly, I am also convinced that the first respondent had sufficient knowledge of confidential information relating to applicant's client base and requirements of these clients, that would have similar value to a competitor. Fourthly, the first respondent's level of seniority was such that the kind of information she would have had access to in the discharge of her duties would be of the sensitive and confidential kind, which the applicant would not want disseminated to competitors. All this, therefore, in my view, establishes a protectable interest of the applicant worthy of protection under the restraint of trade where it comes to confidential information.

[44] However, and where it comes to trade connections as a protectable interest, I am unconvinced that that the applicant has established the existence of a protectable interest. Considering the nature of the applicant's business, in particular the integration of its software with the complete service offering to clients, and again the role of the first respondent throughout her tenure at the applicant in this context, it is doubtful that she had the kind of relationship with or influence over clients of the applicant that would readily convince them to move their business elsewhere. In my view, the actual interaction between the

first respondent and the applicant's clients was more of the nature of ensuring a quality of service, rather that establishing the kind of close working relationship attached to the person of the first respondent that would cause a client to follow her wherever she may go. In short, I do not believe the first respondent was adequately involved in business development (growth) and sales at the applicant, which is often found in restraint applications relating to salespersons. I also consider that the nature of the product and services of the applicant is such that it is not readily interchangeable with a competing product, without considerable effort and data transfer. Ironically, the applicant, after the first respondent left, sent a message to all its employees seeking information of any client that had converted from its software after the first respondent had left. Not one instance of such an occurrence was found. I thus conclude that the applicant has failed to establish a protectable interest relating to trade connections, in line with the following *dictum* in *Rawlins and another v Caravantruck (Pty) Ltd*[25] where the Court said:

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

[45] The above being said, the issue of trade connections as a protectable interest is somewhat moot, considering the undertakings both the first and second respondents are willing to provide, which I will deal with below, and which in my view would fully and adequately cater for any risk to the applicant in this regard.

[46] Where it comes to whether the applicant's application is capable of succeeding, the answer in this case, in my view, lies squarely with satisfying the second requirement of whether the applicant's protectable interest relating to confidential information has been breached (threatened), as a result of her having taken up employment with the second respondent. Or, in other words, whether the first respondent's employment with the second respondent puts

[25] 1993 (1) SA 537 (A) at 541D-I. See also *Esquire* (*supra*) at para 27; *Continuous Oxygen* (*supra*) at paras 34 – 36; *FMW* (*supra*) at para 45.

the applicant's proprietary interests relating to its confidential information at risk. It is trite, as discussed above, that no actual damage, harm or prejudice has to be shown by the applicant, and all the applicant has to establish is that there is a risk of such unfortunate happenstance.

[47] I must concede that on face value, a determination in favour of the applicant that the employment of the first respondent with the second respondent does infringe *per se* on its protectable interest relating to confidential information, seems appetising. But matters are not decided on face value, and it cannot be said simply because the first respondent is employed with the second respondent it must follow that there is a breach. This is because, in case of the enforcement of restraint of trade, there must be a proper and justified determination of what would be reasonable, and thus an in-depth analysis of all the facts is required. Or differently put, there is a lot more to the story than just what is contained on the cover page.

[48] As the story unfolds, and in my view, a different picture emerges. One must first look at the respective businesses of the applicant and the second respondent. As stated, it is true that the applicant with its category management software and the second respondent with its Spaceman software are direct competitors in this context. If the only business of the second respondent was the Spaceman software, there would be little doubt that the employment of the first respondent with the second respondent would be a material and intolerable risk to the applicant and its business. This is the approach the applicant pursues in this application. Focussing on the second respondent's Spaceman software, the core of the case of the applicant is that it must follow that the mere employment of the first respondent with the second respondent establishes material breach of the restraint. However, it is not as simple as that in this case, because the business of the second respondent is far more than just the Spaceman software, and involves a number of disciplines that has nothing got do with the applicant and its business.

[49] It is equally necessary to conduct a comparison between what the first respondent did at the applicant, and what she would be doing at the second respondent, especially considering the second respondent's multi-disciplinary

business. In a nutshell, retail space planning as the business conducted by the applicant involves the science concerning what products should be placed at what location and in what quantity, in a retail store. Price and promotion analytics involves conducting research and analysis to determine the appropriate price and methods of promotion for fast moving consumer goods in a retail store. Space planning has a marketing focus. Price and promotion analytics have a financial and economics focus. As a matter is common sense and logic, it is clear that these two disciplines are simply not comparable, and the latter is a separate business not in competition with the applicant at all.

[50] Much has been said by both parties as to whether the Spaceman software business of the second respondent was actually considered or should even be considered by the applicant to be a competing business to that of the applicant. According to the first respondent, the second respondent is at best a limited indirect competitor of the applicant. According to the applicant, the second respondent is a direct and significant competitor. Both parties relied on various survey documents attached to their respective affidavit in substantiation of their respective views. However, I do not believe that there is any purpose in becoming embroiled in this dispute of fact. It is my view that on the facts, for the purposes of deciding this matter, the Spaceman software business of the second respondent is a directly competing business to that of the applicant, as contemplated by the definition of a competing business in the restraint of trade. But where it comes to all the other business activities, software and interests of the second respondent, I accept on the facts that it is not in competition to the applicant at all.

[51] This then brings one of the position the first respondent has taken up at the second respondent. In simple terms, in what business of the second respondent did the first respondent end up? Is it in the competing business, or in the non-competing business? Answering these questions, and firstly, the applicant never made out a case that the first respondent is in any way associated with the Spaceman software business at the second respondent. Where both the first and second respondents make it clear in answer that the first respondent has nothing to do with the business of the second respondent relating to the Spaceman software, this appears to be undisputed by the applicant. It must follow that the first respondent is not engaged in that part of

the second respondent's business that could be seen to compete with the applicant. Added to this, and in any event, I struggle to find any proper case presented by the applicant of how any confidential information the first respondent may have concerning the applicant's category management software and business could be leveraged by the second respondent.

[52] What the first respondent does at the second respondent has nothing to do with space planning, planograms, or the distribution of products in a retail store. What she does for the second respondent, as I see it and to describe it as simply as possible, is conducting research and analyses of pricing and promotions for fast moving consumer goods in retail stores for clients of the second respondent in Africa. In fulfilling these functions, she utilizes her tertiary qualification and Master's Degree which of course accrues to her, personally, and software that is entirely unrelated to space planning and planograms. It also appears that she is now part of a team at the second respondent that conducts research and analysis in an entirely different discipline to that related to the business of the applicant, and interacts with clients of the second respondent entirely within that context. For all intents and purposes, the first respondent may as well be working in an entirely different business, that happens to be owned by the second respondent. Comparable is the following *dictum* in *Truworths Ltd v De Bruyn and Another*[26] where the Court had the following to say:

> '… The evidence also demonstrates that any knowledge concerning the 'Hey Betty' range that Ms De Bruyn has taken with her from her employment at Truworths is unlikely to have any practical application in her work at Adidas, where she will be involved in working with a quite distinguishable range of women's clothing in the context of an entirely different work model, and where the marketing plans and strategies for the 2020 calendar year have already been settled. The skills and experience that Ms De Bruyn has developed as a buyer while in the employ of Truworths will, of course, be of practical benefit to Adidas under her new employment, but it is trite that those are personal to her, and not proprietary to her employer, even if that employer might have expended time and money on training her. …'

[26] (2020) 41 ILJ 1617 (WCC) at para 24.

[53] Undeterred, the applicant advances its case further by contending that the first respondent was effectively head hunted by the second respondent as a senior member of management, and it is highly likely that in the course of discharging her duties at the second respondent and interacting with other members of management at the second respondent, she will disseminate all the applicant's confidential information to her new employer as she after all would now have to serve its interests. To put it differently, the applicant is saying that it does not matter what job the first respondent is performing at the second respondent, her mere employment, per se, at the second respondent, is in violation of the restraint of trade and that exposes the applicant to risk. For the reasons to follow, I believe the applicant is substantially exaggerating the situation and it simply does not follow that the first respondent's employment with the second respondent necessarily and without more puts the applicant at risk.

[54] In my view, and *in casu*, it is insufficient for the applicant to say that mere employment of the first respondent in a multi-disciplinary environment and business such as that conducted by the second respondent constitutes breach of the restraint of trade. Again, I accept that in a single business environment, where the competitor only does what the former employer does, the mere employment at a competitor would more often than not be seen to be breach of the restraint, especially where the employee is a senior management employee. In such a case, the competitor would greatly benefit from the knowledge and / or information the employee may bring along with the employee to the competitor about all the important business activities and operations of the former employer. One of the applicant's own arguments aptly illustrates the point. It has been established on the facts that the second respondent principally sells the Spaceman software through agents to be used by the clients themselves. The second respondent does not offer a fully supported service solution linked to the software as the applicant does with its category management software. If the second respondent only conducted the Spaceman software business, it follows that the first respondent could only be associated with such a business (no matter what her job title was), and it would be most beneficial to the second respondent if the first respondent conveyed to it the methodology and processes applicable to offering a fully supported service solution to clients, so it could link this to its Spaceman

software. The risk to the applicant's business in the aforesaid circumstances would in my view be obvious, and that is all the applicant would need to show to succeed in establish a breach of the restraint.[27] The Court in *IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Hall (Aka Baghas) and Another*[28] said the following:

> 'Where the ex-employer seeks to enforce against his ex-employee a protectable interest recorded in a restraint, the ex-employer does not have to show that the ex-employee has in fact utilised information confidential to it - merely that the ex-employee could do so. (See International Executive Communications Ltd (Incorporated in the Netherlands) t/a Institute for International Research v Turnley and Another 1996 (3) SA 1043 (W) ([1996] 3 B All SA 648) at 1055D - F (SA).) In short, the ex-employer 'has endeavoured to safeguard itself against the unpoliceable danger of the [ex-employee] communicating its trade secrets to a rival concern after entering their employ. The risk that the [ex-employee] will do so is one which the [ex-employer] does not have to run, and neither is it incumbent upon the [ex-employer] to inquire into the bona fides of the [ex-employee] and demonstrate that [he or she] is mala fide before being allowed to enforce its contractually agreed right to restrain the [ex-employee] from entering the employ of a direct competitor.''

[55] But the aforesaid state of affairs is not even close to the situation *in casu*, where it comes to the realistic possibility of the first respondent communicating or otherwise conveying the applicant's confidential information to the second respondent. As touched on above, the Spaceman software is a small part of the second respondent's entire business, and on the facts the first respondent is not in any manner involved in that business. What the first respondent may know about the fully supported service solution linked to the applicant's category management software is of no use or value to the second respondent where it comes to researching and analysing trends relating to the pricing and promotion of fastmoving consumer goods in retail stores, which is what it employed the first respondent to do. Further, there is no indication that the second respondent is even of the intention to even expand its Spaceman

[27] See *Reddy* (*supra*) at para 20; *Den Braven* (*supra*) at para 17; *Point 2 Point Same Day Express CC v Stewart and Another* 2009 (2) SA 414 (W) at para 14; *SPP Pumps* (*supra*) at paras 30 and 37; *Esquire* (*supra*) at para 27; *Continuous Oxygen* (*supra*) at para 34.
[28] 2004 (4) SA 174 (W).

software offering to clients by including a fully supported service solution linked to that software. Next, there is no indication that the first respondent would be in any position to assist the second respondent in developing the Spaceman software, as the first respondent was never involved in the development of the applicant's software itself. Finally, it does not appear that the first respondent would fulfil any strategic managing role in the second respondent and is in essence simply part of a research team in a specific discipline. These factual considerations show that there is very little risk that the first respondent could or would use the confidential information that was at her disposal whilst employed at the applicant.[29]

[56] I appreciate that what one often finds in oppositions to the enforcement of a restraint of trade is a contention that the employee does another job in another department at a competitor. More often than not, this is done by way of bald statement, without the Court being provided with particulars of this purported alternative job and the employment contract at the new employer. The lack of such particularity to substantiate such a defence would ordinarily severely compromise the sustainability of such a defence. But this is not what the first respondent did in this case. She provided comprehensive particulars of her position and duties at the second respondent, discovered her employment contract, and all this information conveyed was confirmed by the second respondent itself. I am satisfied that in this case, the defence that the first respondent would be doing something completely different to what she did at the applicant is sustainable, especially considering the multi-disciplinary scope of the second respondent's business.

[57] It follows that the any risk created by the first respondent's employment with the second respondent cannot be operational in kind. The risk can therefore only be found in what can be described as pillow talk. It is about the first respondent either inadvertently or deliberately conveying confidential information to the second respondent so as to please it as her new employer, and to advance its interests. Whatever risk this may create, which is still minimal, it is in my view mitigated by the undertakings the first and second

[29] Compare *Vumatel* (*supra*) at para 62.

respondents sought to provide *in casu*, which then brings me neatly to the issue of the undertakings as the next issue to consider.

[58] It is common cause that when first confronted with the enforcement of the restraint of trade, the first respondent sought to provide a number of undertakings. These are set out above. In short, the first respondent undertook not to disclose any confidential information of the applicant and to take reasonable steps to ensure that there no inadvertent disclosure thereof, not to solicit the employment of any of the applicant's employees for any third party, and not to communicate with or solicit the custom of or entice away from the applicant or solicit any orders (business) from or in any manner service or supply products to any of the applicant's clients. In turn, the second respondent undertook that it would never require the first respondent to do any of the things she undertook not to do and would take all steps to ensure that she complied with those obligations in her restraint of trade. Therefore, and what makes this case different from most cases where employees, who are already in breach of a restraint, seek to avoid the consequences of its enforcement by glibly providing a general undertaking after the fact, is that the undertakings in this case are specific and detailed, and are fully endorsed by the second respondent, who, despite not even being bound by the restraint, effectively binds itself to the undertakings as well.

[59] I appreciate and accept that there is no obligation on an employer such as the applicant to have to accept undertakings provided by an already errant employee that has acted in a manner which the applicant considers to be breach of the restraint. These undertakings often ring hollow, are often made after prejudice has already accrued, and are ordinarily unpoliceable. It has been made clear that an employer cannot sit by and cross its fingers and hope that the employee would act honourably in complying with undertakings where the employee has already shown he or she cannot be trusted. In *Reddy supra*[30] the Court held:

> 'I agree with the remarks of Marais J in *BHT Water*:
>
> 'In my view, all that the applicant can do is to show that there is secret information to which the respondent had access, and which in theory the first

[30] Id at para 20.

> respondent could transmit to the second respondent should he desire to do so. The very purpose of the restraint agreement was that the applicant did not wish to have to rely on the bona fides or lack of retained knowledge on the part of the first respondent, of the secret formulae. In my view, it cannot be unreasonable for the applicant in these circumstances to enforce the bargain it has exacted to protect itself. Indeed, the very ratio underlying the bargain was that 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 …''

[60] I also accept that the undertakings provided by the first and second respondents cannot be a conclusive defence in itself, and would simply be a factor forming part of the reasonableness evaluation in order to decide whether to enforce the restraint, so therefore the provision of the undertakings cannot *per se* defeat the enforcement of the restraint.[31] In this regard, in *Ball supra*[32], the Court said the following, under circumstances where the employee party had taken up employment with a competitor and provided an undertaking:

> '…. 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 utilized its confidential information, but merely that she could do so.'

[61] Therefore, and although it can be said that in general the provision of undertakings is no defence to a restraint of trade being enforced, it is my view that it cannot always hold true that undertakings have no value and can never serve to defeat a case of breach of a restraint. In my view, a requirement of '*reasonableness*' can never be satisfied by such a proposition. There may be instances where the providing of an undertaking would serve to establish that there is no breach of a restraint. There can be no hard and fast rules as to when this will be appropriate, and there must be a complete conspectus of all

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[31] 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 *Shoprite Checkers (supra)* at para 43; *Vox (supra)* at para 32; *Medtronic* (*supra*) at para 34; *New Justfun* (*supra*) at para 21; *Vumatel* (*supra*) at para 40; *Van Wyk* (*supra*) at para 34.

[32] Id at para 22.

the facts, in the context of whether the protectable interests of the party seeking to enforce the restraint would still be at sufficient risk despite the undertakings provided. In my view, and in this regard, much will be dependent upon the nature of the competing businesses, the kind of information at stake, the position (duties) of the employee with the competitor, whether the competitor itself makes common cause with the undertakings, as well as the conduct of the employee and the competitor associated with the employee taking up employment with the competitor.[33] The following *dictum* in *A J Charnaud supra*[34] is an apposite illustration:

> '… whatever current confidential information the individual respondents may have had in their possession when joining Dromex, this is entirely mitigated by the undertakings given by them in this regard, as set out above. All the individual respondents confirmed in writing that they had not in any way utilised the applicant's confidential information, nor did they intend ever to do so. Van der Merwe and Reinhardt confirmed on affidavit that they had returned all property and information of the applicant they had in their possession to the applicant. Added to this, and even though there would be no obligation on it to do so, Dromex has made common cause with these undertakings, and confirmed that it will not require the individual respondents to utilise any confidential information they may have about the applicant. In my view, that is a complete answer to any allegation of breach of the obligation the individual respondents may have in terms of clause 7.2 of the restraint agreement. …'

[62] *in casu*, I believe that this is a case where the undertakings, reasonably considered, can legitimately serve to mitigate any possible breach of the restraint in the form of the first respondent being employed with the second respondent, for the reasons to follow. The undertakings, as fully endorsed by the second respondent, are squarely directed at insulating the applicant's business, in effect immunizing it entirely from the second respondent's

[33] It is not necessary to prove bad faith or mala fides. In *Medtronic (Africa) (Pty) Ltd v Kleynhans and Another* (2016) 37 ILJ 1154 (LC) at para 40 the Court held: *'… It is also not incumbent upon Medtronic to enquire into the bona fides of Kleynhans and demonstrate that he is mala fide before being allowed to enforce its contractually agreed right to restrain him. In those circumstances, all that the Medtronic needs to do is to show that there is a trade connection Kleynhans could exploit should he desire to do so. The very purpose of the restraint agreement is that Medtronic did not wish to have to rely on the bona fides or lack thereof on the part of Kleynhans when he left their employ …*'.

[34] (2020) 41 ILJ 1661 (LC) at para 69.

Spaceman business. The point in this regard is that the second respondent's business is so extensive that it would hardly be affected by giving the undertakings sought, so there is no need for it to conceal underlying adverse intentions by providing non-genuine undertakings. These undertakings not only include the issue of confidential information, but even throw the applicant's client base into the mix, indicating that even the second respondent would not utilize the first respondent in any manner in pursuit of the applicant's clients. The undertakings fully conform to what was disclosed to the applicant as to the actual position and duties the first respondent would be required to fulfil at the second respondent, showing that the applicant's business would be unaffected by her employment at the second respondent and that she has nothing to do with the second respondent's Spaceman software business, which is the only part of the second respondent's business that competes with the applicant. The description of the duties of the first respondent at the second respondent also show that it will not in any manner be needed of her to utilize any of the applicant's confidential information in discharging these duties, as it is an entirely different discipline.

[63] The applicant argues that nonetheless, these undertakings have little value, because how would it know if the first respondent does not pass on client leads to the second respondent's sales force (in the context of the Spaceman software business) who then call upon the applicant's clients, with the first respondent nowhere to be seen. There are two answers to this argument. First, and as I have discussed above, I am satisfied that the applicant has failed to establish the kind of protectable interest relating to trade connections where it comes to the first respondent, that could be seen to be worthy of protection.[35] Second, the promise given in the undertaking to stay away from the applicant's clients is endorsed by the second respondent itself, and is not just a promise by the first respondent. To me, that indicates that the second respondent has no interest in the applicant's client base, or is seeking to go after the applicant's software business. By holding the first and second respondent to these undertakings provided, any possible breach of the

[35] Compare *Labournet (supra*) at paras 54 – 56.

restraint is in my view fully ameliorated. It must also be considered that the second respondent principally sells its software through agents.

[64] The applicant made much of the issue that in her conversations with Dorfling in August 2022, the first respondent was not forthright, sought to misrepresent facts to Dorfling, and when confronted with this in the founding affidavit by the applicant, she sought to dishonestly contend that some of the things that the applicant contended was said by her, was never said.[36] This would of course be a relevant consideration in deciding whether it was reasonable for the applicant to have rejected the undertakings, which I will now do.

[65] The applicant's complaints, in this regard, are in my view an exaggeration. I am convinced that what the applicant was doing in August 2022 was avoidance and deflection, upon being taken to task by her CEO for intending to do what she said she wanted to do. She never concealed that she was looking at employment at the second respondent and informed the applicant accordingly from the start. In fact, as these conversations progressed in August 2022, Dorfling became confrontational, saying things like the first respondent working with the second respondent would harm the applicant's business, that such employment would be a threat the applicant's business, and that there is nothing civil about anyone who goes to work for a competitor that has the underbelly of the applicant's business in mind. Dorfling actually demanded an undertaking that the first respondent would not join the second respondent, and it is in this context that the first respondent said she had other offers. I believe that the first respondent, being young and obviously inexperienced in handling this kind of conflict, and upon being so pressed by Dorfling, simply sought to deflect the conflict all this was causing by referring to what was likely non-existent 'other options' and of being supported by the second respondent. Importantly however, she never said that she would not take up employment at the second respondent so as lure the applicant into some false sense of security. Although being less than forthright, the first

[36] These statements related to the first respondent saying she had other offers she could consider, that she waiting for an opinion about the restraint, that she would reconsider her employment with the second respondent when she already accepted it, and the fact that she stated that the second respondent would support her in the litigation about the restraint.

respondent was not, in my view, '*downright devious, unscrupulous and deceitful*'.[37]

[66] The first respondent of course would be open to criticism for denying in her answering affidavit what she had said in the discussions with Dorfling in August 2022, when that denial was clearly false. But it must be remembered that the undertakings were provided before the dispute even proceeded to Court, thus being at a time when this consideration of dishonesty on the part of the first respondent did not exist, and it could thus not have featured in the applicant's decision in deciding to reject the undertakings. But even if it is accepted that the first respondent was not honest where it came to these events, I do not believe that it is of such a magnitude so as to serve as justification for the enforcement of the restraint of trade against her, despite the undertakings provided. As correctly point out by the first respondent's counsel, this is nothing but a red herring, and at best, would have an impact on the issue of costs.

[67] The applicant also sought to ascribe ulterior motives to the second respondent because of its willingness to fund the first respondent's litigation and in pursuing her to be employed with the second respondent. I do not believe this criticism is justified. Considering what the second respondent had employed the first respondent to do, I do not think there was anything wrong for it to support her in her quest to remain employed with it. Often new employers fund the restraint litigation of their new employees behind the scenes. The second respondent can hardly be chastised for not being so clandestine. I believe it took the Court into its confidence, made it clear why it employed the first respondent and what it wanted her to do, and put its money where its mouth was. There is in any event no case made out that the second respondent specifically recruited the first respondent with the plan to use what she knew about the applicant's business to advance its own competing business. The first respondent made it clear in the answering affidavit that she was working through a recruiter for employment opportunities, and had in fact in the past sought employment from the second respondent, because she wanted to be employed with a multinational such as the second respondent where she

[37] See *Banking Insurance Finance and Allied Workers Union and Another v Mutual & Federal Insurance Co Ltd* (2006) 27 ILJ 600 (LAC) at para 19.

could use what she actually studied for. There is in reality nothing to gainsay this version. In this regard, the following dictum in *Rectron (Pty) Ltd v Govender and Another*[38] is apposite:

> '… Govender can only disclose the information to Axis if it is a willing recipient thereof. Axis will only receive the information if it could be useful for the purpose of unlawfully competing with Rectron. Dishonest conduct of this nature is not lightly presumed …'

[68] All considered, it is my conclusion that the applicant has failed to establish that the mere employment of the first respondent with the second respondent in the capacity she was employed in, and in the particular business of the second respondent she was deployed into, constituted a breach of the applicant's protectable interests under the restraint of trade. My conclusions in this regard are bolstered by the undertakings both the first and second respondents were clearly willing to provide. Although there was no legal obligation on the applicant to have accepted those undertakings, it reasonably should have done so, especially where the second respondent was willing to back it up.[39] Even if not accepted by the applicant, these undertakings, if the first and second respondents are held to them, as I intend to do, would serve to dispel breach of the restraint going forward.

[69] I therefore do not believe that prohibiting the first respondent's current employment with the second respondent would be reasonable, as such employment, overall considered, does not constitute a violation of the applicant's protectable interests. Without such breach being shown to exist, the enforcement of the restraint of trade where it comes to the employment of the first respondent with the second respondent, per se, would not be reasonable. This however will be tempered by affording the applicant the protections contemplated by the undertakings, in an order of this Court.

[70] Accordingly, I am satisfied that the applicant has succeeded in establishing a protectable interest in relation to confidential information, but has failed in establishing the existence of a breach / infringement of this protectable interest

[38] [2006] 2 All SA 301 (D) at 323J-324A.
[39] Compare *Kopano Copier Company (Pty) Ltd v Gibson* 2013 JDR 1994 (GSJ) at para 16.

by the first respondent, justifying the enforcement of the restraint of trade. I arrive at this conclusion subject to the enforcement of the undertakings the first respondent has provided, which will be reflected in the order at the conclusion of this judgment. Even though this should be the end of the enquiry, I intend to deal with the other restraint enforcement considerations as well, assuming it is said that I was mistaken in finding there was no breach of the restraint.

Other considerations

[71] Where it comes to the quantitative and qualitative weigh off to be conducted, the Court in *Plumblink SA (Pty) Ltd v Legodi and Another*[40] summarized the factors to be considered, being (1) the scope and period of the restraint;[41] (2) whether the employee was possessed of the skills, expertise, qualifications and experience before joining the employer;[42] (3) the nature of the industry;[43] and (4) the ability of the employee to secure gainful employment elsewhere, It must also be considered whether the enforcement of the restraint would go further than necessary in order to protect the interests of the employer.

[72] In the current matter, it is true that the first respondent obtained all her expertise, skills and knowledge in the retail space planning industry and associated software in the course of her employment with the applicant. But his does not hold true where it comes to any position concerning the research and analysis of pricing and promotions for fast moving consumer goods in the retail sector. Nothing the first respondent learnt at the applicant could equip her for such position. But the Masters' Degree she obtained off her own bat would. This qualification and skill attaches to her, and it would be unreasonable to prevent her from using this in the course of her employment career. In any event, any general management skills and expertise the first

[40] (2020) 41 ILJ 1743 (LC) at para 45.
[41] For example, shorter restraints and properly limited geographical area (if applicable) would mitigate in favour of enforcement, whilst an unduly long and broad restraint would mitigate against it – see *Labournet* (*supra*) at para 43; *Continuous Oxygen* (*supra*) at para 47.
[42] *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.
[43] In *Vumatel* (*supra)* at para 39, it was held: *'… 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. …*'.

respondent may have accrued in the course of her employment with the applicant, would belong to her and she would be entitled to deploy the same in her new position at the second respondent. In *Automotive Tooling Systems (Pty) Ltd v Wilkens and Others*[44] the Court said:

> 'In my view, the facts establish that the know-how for which the appellant seeks protection is nothing other than skills in manufacturing machines albeit it that they are specialised skills. These skills have been acquired by the first and second respondents in the course of developing their trade and do not belong to the employer - they do not constitute a proprietary interest vesting in the employer - but accrue to the first and second respondents as part of their general stock of skill and knowledge which they may not be prevented from exploiting. As such the appellant has no proprietary interest that might legitimately be protected.'

[73] Where it comes to the nature of the industry, this is not a case, as discussed above, where there is head to head competition by two competing businesses in the specialized field of retail store layout planning and associated software. The applicant's software product cannot be placed at risk by the employment of the first respondent with the second respondent, as the first respondent is not a software developer and was not involved in any development or maintenance of the software. The software is of the kind that the first respondent certainly could not copy and take with her. This side of the applicant's business is thus so specialized that there is no risk that it could be moved to the second respondent just because the first respondent is working for the second respondent.

[74] On the service side of the applicant's business, which is where any risk would really lie, the fact that the second respondent is multinational and multi-disciplinary business must come into the equation. As discussed, the first respondent does not work at the second respondent, in the discipline associated with the business of the applicant. This reality is bolstered by the undertakings provided, which is endorsed by the second respondent. In the context of any weigh off, these considerations also favour the first respondent.

[44] (2007) 28 ILJ 145 (SCA) at para 20.

[75] I would in any event consider it unreasonable to prevent the first respondent from pursuing a career in a large business like the second respondent, which clearly has many career opportunities available to her, including in a field that the first respondent devoted her studies to and is academically qualified for. These kinds of opportunities are rare, and if the first respondent is kept out of a job with the second respondent for the restraint period, the second respondent may well move along, and the first respondent would lose this opportunity. And once again, this harm is exacerbated by the undeniable truth that this job, considered as it stands, is in no way related to or associated with the business of the applicant. In this regard, the following reference to *Labournet supra*[45] is apposite:

> '… it is my view that those interests, both qualitatively and quantitatively, do not outweigh Jankielsohn's interest to remain economically active in the occupation of his choosing and which he is academically and otherwise qualified for. In any event, the chances of economic exploitation of those interests by Jankielsohn, at this stage, are in my view infinitesimal if not non-existent. … Labournet has not referred to any overt act of exploitation of any protectable interest, other than for objecting to the fact that Jankielsohn has gone to work and was presently working for its competitor.'

[76] I am convinced that this is case where the applicant has sought to dispense retribution for the first respondent leaving its employ. It is clear that the applicant considered her to be a valued employee, as is evident from her progression in the business and all the attempts by the applicant to retain her in employment, which even included matching the second respondent's remuneration offer.[46] When the first respondent decided nonetheless to leave, I am convinced that applicant dispensed its dissatisfaction by way of the enforcement of the restraint of trade, and this is not appropriate. As said in *Labournet supra*[47]: *'… The purpose of a restraint is not to punish …*'.

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[45] Id at para 64.
[46] See *Laser Junction (Pty) Ltd v Fick* (2017) 38 ILJ 2675 (KZD) at para 58 where it was held: *'… That he was endowed with his own talent and capabilities is borne out by the applicant expressing its appreciation to him in writing, promoting him, refusing to retrench him voluntarily, and eventually attempting to re-employ him at a significantly higher rate of remuneration. …*'.
[47] Id at para 65.

[77] All said, I am of the view that the weigh off must favour the first respondent. The prejudicial consequences to her if the restraint is enforced greatly outweighs any prejudicial consequences to the applicant if it is not. Her employment with the second respondent will have no financial consequences to the applicant, whilst the first respondent will have no income for the restraint period of six months.[48] I reiterate, the employment of the first respondent with the second respondent in the job that she is doing at the second respondent, coupled with the undertakings provided, mitigates any real risk of prejudice to the applicant.

[78] Where it comes to the restraint period, the first respondent had the onus to provide proper information or a factual basis upon which the restraint period would be considered to be unreasonable.[49] The first respondent did not challenge this. I am satisfied that the 6(six) months restraint period can be considered to be a short period and is reasonable.

[79] As to the restraint area, it is informed by the nature of the applicant's business. Again, the first respondent has not challenged this consideration. The undisputed fact is that the applicant does business throughout the country, and that the business is very specialised with limited clients available. There is accordingly nothing unreasonable in the restraint area being designated to be the country wide area prescribed in the restraint of trade.

[80] Therefore, and even though the restraint period and restraint area are reasonable, the applicant has not satisfied the requirement of the quantitative and qualitative weight off favouring it, in this instance. Such weigh off favours the first respondent, and this factor thus equally counts against enforcement of the restraint of trade.

Conclusion

[81] In summary, the applicant has not demonstrated the existence of a clear right, despite having a legitimate and proper restraint of trade covenant and confidentiality undertaking in place with the first respondent, susceptible to

[48] Compare *Pinnacle Technology Shared Management Services (Pty) Ltd and Another v Venter and Another* (J1095/15) [2015] ZALCJHB 199 (14 July 2015) at para 62.
[49] *Plumblink* (*supra*) at para 50.

being enforced. The reason for this is that the applicant has failed to demonstrate the existence of a protectable interest where it comes to trade connections, and where it comes to the protectable interest relating to confidential information, the applicant has failed to establish a breach (violation) thereof. The weighing off of interests favours the first respondent and there is no intervening issue of public interest. For these reasons, the applicant would also fail to demonstrate the existence of an injury reasonably apprehended. The application must fail.

[82] Despite the aforesaid, the first and second respondent have provided undertakings. In my view, these undertakings form an important part of my reasoning in finding that there was no breach of the protectable interest relating to confidential information and the weigh off favouring the first respondent. Therefore, these undertakings must be given the necessary legal effect, by way of incorporating the same as part of the orders granted in this judgment.

Costs

[83] This then leaves only the issue of costs. Both parties sought costs against the other, with the applicant even going so far as seeking punitive costs. However, and despite this position of the parties, I must nonetheless exercise the wide discretion I have in terms of section 162(1) where it comes to costs.[50] It must of course be considered that overall, the applicant was ultimately unsuccessful, and that the current dispute is principally a contract dispute, and not an LRA dispute where ordinarily costs do not follow the result.

[84] The above being said, it is my view that in this case, and for the reasons to follow, no order to costs is appropriate. I do not believe that either party acted inappropriately or unreasonably in respectively bringing and opposing this application. I also consider that the first respondent's conduct in some of the contexts of her answering affidavit to be open to some criticism. I also consider that in the interim, and pending this judgment, the first respondent has not taken up actual employment with the second respondent. Another

[50] See *Long v SA Breweries (Pty) Ltd and Others* (2019) 40 ILJ 965 (CC) at paras 28 – 29.

important factor where it comes to the costs consideration is my view that the applicant should have accepted the undertakings, and was perhaps overly suspicious and apprehensive in this regard. Fairness in this case, given the nature and circumstances of the matter *in casu*, dictates that no order of costs be made.[51]

[85] For all the reasons as set out above, I make the following order:

Order

1. The application is heard as one urgency.

2. Save for the orders granted in paragraphs 3 and 4 of this order, the applicant's application is dismissed.

3. The first respondent is interdicted and restrained until 31 March 2023 and in the Republic of South Africa from directly or indirectly soliciting the custom of the clients of the applicant, and/or accepting any business or custom from the clients of the applicant, and/or in any manner enticing the clients of the applicant to terminate their business with the applicant.

4. The first respondent is interdicted and restrained from directly or indirectly using or disclosing the confidential information of the applicant for her own benefit or for the benefit of any third party, including the second respondent.

5. The second respondent shall take all reasonable steps or actions to ensure that the first respondent complies with paragraphs 3 and 4 of this order during the course of her employment with the second respondent.

6. There is no order as to costs.

[51] See *Labournet* (*supra*) at para 68.

S. Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Advocate M Maddison
Instructed by:	Cliffe Dekker Hofmeyr Inc Attorneys
For the First and Second Respondents:	Advocate G Fourie SC with Advocate M Lennox
Instructed by:	Botoulas Krause & da Silva Inc Attorneys