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

20/02/23
DATE

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THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 1712/2022

In the matter between:

ABERDARE CABLES (PTY) LTD **Applicant**

And

LERATO AGNES LEGOALE **First Respondent**

MALESELA TAIHAN ELECTRIC CABLE (PTY) LTD ("M-TEC") **Second Respondent**

Heard: 20 January 2023

Delivered: 20 February 2023

(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLI. The date on which the judgment is delivered is deemed to be 20 February 2023.)

JUDGMENT

VAN NIEKERK, J

[1] The applicant seeks to enforce restraint and confidentiality undertakings for a period of 12 months as from 5 January 2023, within the Gauteng Province, against the first respondent. Although the applicant initially sought an interim order, counsel agreed that all of the relevant facts are before the court and that the application ought properly to be adjudicated on the basis that a final order is sought. The application is opposed by the first respondent; the second respondent abides by the decision of the court.

[2] The restraint and confidentiality undertakings are incorporated in a contract of employment concluded between the applicant and the first respondent. The terms of the contract record an acknowledgment by the first respondent that she would gain access to the applicant's trade secrets and confidential information in the course of her employment, and her agreement to a restraint period of 12 months following immediately upon termination of her employment for any reason whatsoever against involvement in any entity which carries on the same business as the applicant's business, or a business similar to the applicant's business. Clause 13 of the contract contains an undertaking by the first respondent to the effect that in order to protect the proprietary interests of the applicant in respect of trade secrets, she would not during her employment or on termination of her employment and for a reasonable period thereafter, disclose to any person any of the applicant's trade secrets. Clause 14.2 of the employment contract reads as follows:

> 'The employee is obliged to keep the Group's Trade Secrets private and confidential during the term of his/her employment and thereafter. Accordingly if the employee becomes involved in a business which competes with all may be utilized or applied in substitution of the employer's and/or Group's business then notwithstanding the employee's duty not to disclose, it is inevitable that the employee will use and apply, whether intentionally or not, his or her knowledge of the Group's and/or the employer's strategic, commercially sensitive and confidential Trade Secrets and his/her relationship with the Group's and/or the

employer's customers for his/her and benefit and the benefit of a competing business.

[3] Clause 14.4.1 reads as follows:

> Having regard to the facts recorded in 13.1, 13.2, 13.3 and 14.2 the employee acknowledges and agrees that the employer's and/or the Group's proprietary interests in the employer's Trade Secrets and/or the Group's Trade Secrets will be prejudiced if he takes up employment or otherwise becomes associated with or interested in any concern that competes with the employer's business.

Clause 14.4.3 reads:

> The employee therefore shall not, during the period of his employment by the employer and for a period of 12 months after the termination date, either directly or indirectly within the prescribed area, have an involvement in any entity which carries on the same business as the employer's business or a business similar to the employer's business…

Although the agreed restraint is applicable throughout the Republic of South Africa, the applicant seeks to enforce the restraint only within the Gauteng Province.

[4] It is not in dispute that the applicant is one of the country's largest manufacturers of cabling, including high voltage cables. It is also not in dispute that the applicant is a major supplier to Eskom. The first respondent was employed in 2006, and progressed from the position of trainee to key accounts manager, the position that she held until her resignation in January 2023. The applicant contends that in the course of her employment, the first respondent had specific historical involvement with the applicant's efforts to secure new business, inclusive of Eskom contracts. In particular, the applicant contends that the first respondent had been involved with analysing Eskom's tender requirements and presenting a review of those requirements to senior and executive management, inclusive of a proposed tender strategy and pricing recommendations, via the applicant's internal tender committee. The applicant avers that in her capacity as key accounts manager, the first respondent routinely had access to contractor documents pertaining to already

secured Eskom business, the costing analysis in respect of each contract, the technical designs and data sheets pertaining to the applicant's products and the applicant's strategy to secure Eskom tenders. The applicant submits that for the purposes of the restraint, these qualify as 'trade secrets', knowledge of which will enable a competitor '*to predict with considerable accuracy the prices at which Aberdare will tender for new business, such as Eskom tenders.*'

[5] The applicant avers further that the first respondent played a central role in securing an Eskom tender for the applicant in the course of 2022. In doing so, she was responsible for overseeing the tender process, coordinating with the tender team, the factory, quality and technical teams, and the costing team. Further, the first respondent was responsible for preparing and presenting the intended strategy and pricing recommendations to the applicant's senior and executive management for final approval. In particular, the applicant avers that the first respondent's involvement with the 2022 Eskom tender would give her and the second respondent, her new employer, a significant unfair advantage on the occasion that the next Eskom tender is published, in anticipation of the expiry in November 2023 of the existing supply contract for cables.

[6] The first respondent does not deny the existence of the restraint undertakings, nor does she dispute that the second respondent, by whom she is now employed, is a competitor of the applicant. The only basis of the first respondent's opposition to the application is that the enforcement of the restraint undertakings would be unreasonable. In essence, and in relation to forthcoming Eskom tenders, the first respondent disputes that she would be in a position to disclose confidential information to the second respondent pertaining to a request for tenders that Eskom is due to issue during the first quarter of 2023. The first respondent also disputes that she is in a position to disclose confidential information to the second respondent which is either relevant to the tender, or which would in any way give the second respondent an unfair competitive advantage.

[7] It is generally accepted that a restraint will be considered to be unreasonable (and thus contrary to public policy and unenforceable), if it does not protect some legally

recognisable interest of the employer, but merely seeks to exclude or eliminate competition. (For a summary of the relevant principles, see the judgment of the Labour Appeal Court in *Labournet (Pty) Ltd v Jankielson & another* (2017) 38 *ILJ* 1302 (LAC) at paragraphs 39 to 45.)

[8] In *Basson v Chilwan & Others* 1993 (3) SA 742 (A) at 767A-D, the court held that to determine the reasonableness or otherwise of a restraint of trade, the following questions should be asked: -

1. Is there an interest of the one party, which is deserving of protection at the termination of the agreement?
2. Is such interest being prejudiced by the other party?
3. If so, does such interest so weigh up qualitatively and quantitatively against the interest of the latter party that the latter should not be economically inactive and unproductive?
4. Is there another facet of public policy having nothing to do with the relationship between the parties but which requires that the restraint should either be maintained or rejected?

[9] For the purposes of the first question, a restraint holder's proprietary interests fall into two categories. The first is confidential information which is useful for the carrying on of the business and which could be used by a competitor, if it were to be disclosed to that competitor, to gain a relative competitive advantage (sometimes referred to as 'trade secrets'). The second is relationships with customers, potential customers, suppliers and others that go to make up what is sometimes referred to as the 'trade connection' of the business, this being an important aspect of its incorporeal property known as goodwill (see *Sibex Engineering Services (Pty) Ltd v Van Wyk & Another* 1991 (2) SA 482 (T) at 502D-F).

[10] In the present instance, trade connections are not in issue - the applicant seeks to protect what it contends to be trade secrets. Whether information constitutes a trade secret is a question of fact (see *Mossgas (Pty) Ltd v Sasol Technology (Pty)*

Ltd [1999] 3 All SA 321 (W) at 333; *Walter McNaughten (Pty) Ltd v Schwartz & others* 2004 (3) SA (C)). For information to be confidential, it must be capable of application in trade or industry, i.e. it must be useful and not public knowledge and property; secondly, it must be known to a restricted number of people or a closed circle; and thirdly, it must be of economic value to the person seeking to protect it (see *Townsend Productions (Pty) Ltd v Leech & others* 2001 (4) SA 33 (C) *Walter McNaughten (Pty) Ltd v Schwartz & others* (*supra*)).

[11] When an applicant asserts (as the applicant does in the present proceedings) a protectable interest in confidential information, it must first be determined, with reference to the requirements of confidentiality and economic value, whether the information concerned actually constitutes a trade secret.

[12] In so far as factual disputes are concerned, these being motion proceedings in which a final order is sought, the court must have regard to those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, and determine whether the order sought is justified (*Plascon-Evans Paints Ltd v van Riebeeck Paints Pty) Ltd* 1984 (3) SA (A). This is not an immutable rule, and the court is justified in rejecting allegations or denials that are far-fetched or clearly untenable. The affidavits must be carefully scrutinised to determine whether they disclose real, genuine or *bona fide* disputes of fact (*Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 (SCA)). This approach to the resolution of factual disputes applies notwithstanding the onus in relation to the reasonableness of the restraint. A respondent who does not dispute the existence of the restraint undertaking and seeks only to avoid its enforcement is required to prove, on a balance of probabilities, that it would be unreasonable in the circumstances to enforce the restraint. In other words, the application of *Plascon-Evans* to the determination of factual disputes in motion proceedings is unaffected by any shift of the onus in any dispute concerning the reasonableness of restraint undertakings.

[13] As I have indicated, the first respondent does not dispute that she agreed to the restraint undertakings. She does not dispute that she resigned from the applicant's

employ or that the second respondent, her current employer, is a competitor of the applicant. The only issue in dispute is whether during the course of her employment with the applicant the first respondent became privy to information that is confidential to the applicant, and which the first respondent can disclose to the second respondent in circumstances where the second respondent will be afforded a competitive advantage.

[14] 'Trade secrets' are defined in clause 13 of the first respondent's employment contract to include know-how, processes, techniques and strategies developed, used and applied in the development, marketing and selling of the applicant's products and services, knowledge of the applicant's strategic plans, knowledge of the financial details of the applicant's relationships with its business associates, and knowledge of contractual arrangements between the applicant and its suppliers and customers.

[15] At the core of the present application is the anticipation that Eskom will publish a request for proposals in the first quarter of 2023 in respect of contracts for the supply of cable, to replace the existing contracts, which all expire in November 2023. The applicant has elaborated on its concerns by recording that the first respondent assisted with a tender for Eskom in 2022, and that the anticipated tender for 2023 will essentially involve the same cable and conductor requirements as the 2022 tender. In reply, the applicant does not dispute that the 2022 tender was for a different (multicore) cable, whereas the 2023 tender is likely to be for ABC cable, overhead line cable, low and medium voltage cable and Saferdac products. The applicant does not assert that work has actually commenced on the 2023 tender, or that the first respondent actually had access to confidential information which will, as a fact, be included in any tender that it will submit in future.

[16] What the applicant in essence contends is that notwithstanding the fact that the 2023 tender has not yet been issued and that the applicant has not yet commenced work on its bid submission, the first respondent's knowledge and experience

gained in relation to prior tenders and her historical access to confidential information will, in combination, afford the second respondent a competitive advantage in respect of its bid submission pursuant to the 2023 tender.

[17] Counsel for the applicant submitted that there were three discrete categories of confidential information to which the first respondent had been privy during the course of her employment by the applicant – strategy, pricing and non-pricing components. In relation to strategy, the applicant contends that in her capacity as key accounts manager, the first respondent was responsible for preparing and presenting intended strategy and pricing recommendations relating to the 2022 Eskom tender, and that the 2023 tender will involve essentially the same cable and conductor requirements. In relation to pricing, the applicant contends that the first respondent is aware of the prices that the applicant is charging Eskom for the different products supplied to it as well as other terms of agreements with Eskom, and that there is no suggestion that this information is available in the public domain. Regarding non-pricing components, the applicant contends that the first respondent has had access to significant information that is not in the public domain.

[18] The common cause facts in relation to the anticipated Eskom request for proposals in the first quarter of 2023 are the following. The tenders likely to be for the supply of the same kinds of cable as those stipulated in the 2018 tender. In 2018, the second respondent was not able to compete with the applicant on price and is still not able to compete with the applicant on price. Further, pricing is one element of a tender and while it is significant, it is not determinative. Eskom takes into account other considerations including BBBEE, ability to meet supply development requirements, contractual terms and the like. It is not disputed that the first respondent had not done any work on the anticipated tender. It is also not disputed that the applicant's executive set minimum profit margins as a starting point across all of the applicant's products, and that the first respondent left the applicant's employ prior to these minimum margins being disclose to her. Further, it is not in dispute that Eskom is likely to continue to diversify its supply chain, and not toward

100% of any one item to particular supplier (as was the case in respect of the 2018 tender).

[19] I deal first with the applicant's assertions that the first respondent has been privy to its strategy when setting out to secure Eskom tenders. It is not disputed that the first respondent is not privy to the applicant's strategy in so far as securing the 2023 tender is concerned. 'Strategy' in a corporate context and for purposes such as the present must necessarily be specific – a plan of action to achieve a specific aim. It is not sufficient to rely on the aura of confidentiality that attaches to words such as 'strategy' (or indeed, 'pricing'), to contend that an employee who was privy to one or more corporate strategies should be held to a restraint. Put another way, it is not sufficient to label information as of strategic value and contend that it necessarily follows that the information is confidential. More is required. In the present instance, the first respondent's exposure to any strategic information relates to tenders already awarded and safe in the hands of the applicant. The first respondent states that she does not know the strategy which the applicant is likely to adopt, because she does not know what the terms of the tender will require. In particular, she adds that it is unlikely that Eskom's requirements for the 2023 tender will be the same as in previous years. Nowhere does the applicant assert that any particular strategy to achieve any particular business goal has actually been discussed with the first respondent; the assertion appears to be that the first respondent's historical knowledge will assist her in 'predicting' the applicant's 'likely strategy'. In short, the applicant does not assert that the first respondent knows, as a fact, what the applicant will include in its bid submission.

[20] In so far as pricing is concerned, insofar as the applicant contends that the first respondent has knowledge of its costing analysis in respect of existing contracts, the first respondent states that the costing model that applied to the 2018 tender is outdated and will not necessarily apply to the 2023 tender, that she does not know the applicant's pricing strategy for 2023, a strategy that is set by the product manager and which was not communicated to her prior to the termination of her employment. Further, it is also not disputed that the minimum profit margins for

products have not yet been communicated to the first respondent. In regard to non-pricing components, there is no specific evidence that the first respondent is privy to any knowledge or information regarding the non-pricing components of the anticipated 2023 tender. Both parties accept that pricing is but one component of a successful tender and that other components are relevant. Again, there is no specific evidence that the first respondent was privy to any confidential information in this regard. In particular, there is nothing to show how the first respondent's knowledge of any non-pricing component in any tender is not in the public domain, or how this knowledge could be put to use in a concrete way to afford the second respondent a competitive advantage.

[21] Further, the common cause process adopted by the applicant in the preparation and submission of a tender does not disclose any access by the first respondent to information that might be described as historically confidential in relation to the anticipated 2023 tender. Tender administrators (to be distinguished from the position occupied by first respondent) trigger the technical team's design of the cables according to the tender specifications. Once the technical design has been completed, the cost analysts work on the costing of the cables. The technical team would prepare technical schedules. Ordinarily, the first respondent would provide the tender administrator with initial profit margins determined by the applicant's executive team and senior managers, and disclose to the first respondent. The tender administrator would incorporate the minimum costing and revert to the technical team for a response. Thereafter, a pricing sheet would be produced, to include anticipated costs and initial markup. The first respondent, with the tender manager, general manager and executive director would approve the pricing sheet and the tender administrator would then compile the tender document with input from the legal department and comments from several other employees and other departments assume responsibility for requirement tax compliance, BBBEE compliance and the like. Finally, Eskom may require clarification meetings and further negotiation. At this point, given that tender has not yet been invited, the first respondent is unaware of any tender specifications or any design that will emanate from the technical team, or of any pricing. Self-evidently, the process of compiling

a tender is informed by collaboration and input from several people. While the first respondent does not deny that she was indeed involved in assisting with the preparation of tenders, there is no evidence to suggest that her role was as central as the applicant claims. In this regard, this being an application for final relief, the first respondent's version must be accepted. In short, the respondent has established that any information to which she had access while employed by the applicant related either to tenders already grounded and safe in the hands of the applicant, or to a tender that is anticipated, the terms, conditions and requirements of which have yet to be formulated. Specifically, any contentions relating to the confidentiality of information relating to the 2023 tender are necessarily speculative.

[22] In relation to the geographic component of the restraint, the applicant seeks to restrain the first respondent in the province of Gauteng on the basis, it would appear, that the first respondent is able to influence the Eskom's tender in the second respondent's favour. The limitation of the restraint to the Gauteng province alone illustrates that if the applicant's true objective in enforcing the restraint is to protect itself against the disclosure of confidential information, that protection is illusory. This is so because even if the relief sought against the applicant were to be granted, there would be nothing to preclude the first respondent from being employed by the second respondent in another province where, bearing in mind that the first respondent was privy to information concerning the administration of the Eskom account on a national basis, she would be free to disclose that information.

[23] In summary, the application fails at the first stage, i.e. the facts disclose that the information that applicant seeks to protect does not constitute a trade secret by reference to the requirements of confidentiality and economic value. Put another way, the facts do not disclose a protectable interest on the part of the applicant. The application stands to be dismissed on this basis, and it is thus not necessary for the court to engage in the second stage weighing up of the parties' interests

qualitatively and quantitatively to whether the use of any information by the first respondent is justified despite its confidential nature.

[24] Finally, in relation to costs, the Labour Appeal Court has held that when this court exercises its jurisdiction under section 77(3) of the Basic Conditions of Employment Act, 1997, section 162 of the LRA does not apply and the rule applicable in the civil courts, i.e. that costs follow the result save in exceptional circumstances, ought to be applied. In the present instance, there are no exceptional circumstances and there is no reason to deny the first respondent her costs.

I make the following order:

1. The application is dismissed, with costs, such costs to include the costs of two counsel where so employed.

André van Niekerk
Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	F le Roux
Instructed by:	Chris Baker & Associates
For the respondent:	C Whitcutt SC, with him C de Witt
Instructed by:	PSN Inc.