THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: 2025-009793

In the matter between:

EAZI ACCESS RENTAL (PTY) LTD	**Applicant**
and	
WAHYEED SULEMAN	**First Respondent**
BISEDGE SOUTH AFRICA (PTY) LTD	**Second Respondent**

Heard: **20 March 2025**

Delivered: **12 May 2025**

JUDGMENT

MAFA-CHALI, AJ

Introduction

[1] This is an application to enforce a restraint of trade brought on an urgent basis by Eazi Access Rental (Pty) Ltd, the Applicant, and it is opposed by the

First Respondent, Wahyeed Suleman. The application was filed digitally on CaseLines.

[2] The Applicant seeks the following order:

> '1. For the 12 months from 01 December 2024 and throughout South Africa, the First Respondent is interdicted and restrained from being interested or engaged in any capacity whatsoever, including a trustee, proprietor ,shareholder, member, manager, director, consultant, partner, employee, financier or agent in or for any company, closed corporation, partnership, business concern, firm, undertaking, individual enterprise or entity other than the applicant which is directly or indirectly engaged, interested or concerned in the rental, repair and sale of access platforms, telehandlers and accessories, or any other method of assisting people to gain access to work at heights, to all facts of the construction, industrial, transport, entertainment and mining industries, or any other industry in which the applicant operates and any other services rendered, work performed or products offered by the Applicant in the ordinary course of business of the Applicant during the First Respondent's employment with the applicant; and
>
> 2. From being employed by the Second Respondent.
>
> 3. The First Respondent is to be ordered to pay costs of the Applicant including costs of two counsels.'

[3] In keeping with the provisions of Rule 39 of the Labour Court's Rules[1], which makes allowance for the filling of a supplementary (fourth) affidavit by the Respondent in restraint applications, four affidavits were filed.

[4] No relief is sought against the Third Respondent, Bisedge South Africa (Pty) Ltd cited herein by virtue of the interest it may have in the relief sought in

[1] GN 4775 of 2024: Rules Regulating the Conduct of the Proceedings of the Labour Court (effective, 17 July 2024).

these proceedings, save in the event the Third Respondent opposes this application, in which case the Applicant will seek costs against the Third Respondent as well.

[5] The Third Respondent has not opposed the application but has delivered an affidavit on 10 March 2025.

[6] The application was brought in terms of Rule 39 of the Labour Court Rules.

[7] This Court has the necessary jurisdiction to adjudicate this application in terms of section 77 of the Basic Conditions of Employment[2] (BCEA).

Background

[8] The First Respondent was previously employed by the Applicant on 3 February 2020 as a Field Service Technician at the Applicant's branch in Richards Bay. Subsequently, the First Respondent entered into a confidentiality and restraint of trade agreement with the Applicant for a period of 12 months. Clause 15 of the First Respondent's contract required him to sign the confidentiality and restraint of trade agreement forming part of the terms and conditions of employment, which would survive the termination of the contract of employment, which agreement was signed on 24 February 2020. In terms of the restraint agreement, the Third Respondent would not be interested or engaged in any capacity of any person which is directly or indirectly engaged, interested or concerned in a competitive activity in the territory; and disclose any trade secrets and/or confidential information of the Applicant other than to persons concerned with the Applicant and who are required to know such secrets or to have such confidential information.

[9] The First Respondent was later promoted to Technical Specialist from 1 October 2021 in Midrand, Gauteng. The First Respondent then entered into an addendum to the employment contract with the Applicant. This agreement

[2] Act 75 of 1997, as amended

is an extension of the first contract, and all the other aspects, including the restraint of trade and non-disclosure agreements, remained.

[10] The restraint agreement has restraints on activity and person, for a period of 12 months, from the date on which the restrainee ceases to be employed or engaged in the company for whatsoever reason as well as the territory being South Africa, Zimbabwe, Zambia, Mozambique and many other countries in Africa in which the company operates.

[11] The First Respondent resigned from the Applicant effective November 2024 and had taken up work with the Third Respondent. It is common cause that the Third Respondent is a direct competitor of the Applicant as it offers the same services and products offered by the Applicant.

[12] The Applicant has its head office in Annandale, Germiston and other branches across the country in various towns and cities in all the provinces of South Africa, and in the countries of Mozambique, Zambia, Zimbabwe, Namibia and other African countries.

[13] The Applicant specialises in work-at-height and material handling solutions and rents, sells, services and trains people to use two types of machines: the access machines (for working at heights) and material handling machines (forklifts, pallet trucks and pallet jacks). It also supplies material handling solutions to the agricultural, construction, energy, entertainment, mining, retail, heavy industrial and industrial sectors. However, the application concerns the material handling side of the business, Linde forklifts, pallet trucks and pallet jacks.

[14] The Applicant imports Linde forklifts from the Linde company and attracts a premium price, and requires premium service and skills. The Applicant has a model that offers service level agreements and staff technicians who service and repair customers' machines and are trained to work on the machines. The technicians who work on Linde machines had to undergo online training and

submit a portfolio of evidence and complete several modules over a period of 6 years until they get accreditation from the Linde company.

[15] Linde Germany used to have Linde South Africa, which ceased operating in 2019. Linde Germany entered into a written import agreement in terms of which the Applicant will be the sole importer of Linde forklifts, pallet trucks and pallet jacks to South Africa.

[16] The Third Respondent offers electric container handling equipment and material handling solutions, and then partnered with the Linde company. The applicant was no longer the sole importer into South Africa of the Linde handling equipment, and the Applicant and the Third Respondent became direct competitors. The First Respondent became employed by the Third Respondent after his resignation from the Applicant.

Submissions

[17] The Applicant argued that during his time as a Field Service Technician at the Applicant, the First Respondent was one of the most skilled Linde specialist in South Africa, and was tasked to service and repair Linde handling material equipment on site, at the premises of customers and also conducted inspections of forklifts, at the customers within estimated number of hours, prepared necessary information to the branch administrators in order to prepare quotations, carried out the repair of service and assisted workshop to provide advice and guidance.

[18] The Applicant also submitted that the First Respondent acquired knowledge of its suppliers and still has that knowledge, and the training he attended at Linde company in 2023, and the Applicant's costs assisted the First Respondent to be qualified to train other people to be qualified and certified. The First Respondent knew the sites in the country with Linde forklifts, pallet trucks and pallet jacks are supplied by the Applicant. He knew what equipment was at the customers' sites and what repairs they needed. He also

has access to a list of technicians employed by the Applicant to assist him with performance evaluation, using his close relationship with customers.

[19] Given that relationship, there is a very high likelihood that the Applicant's customers might cease doing business with it, but instead do business with the Second Respondent. The First Respondent has stated that he has previously induced customers away from the Applicant, as he was part of a division of Technical Specialists that took care of all technical issues in the entire Eazi Access business. Given that the First Respondent left for the Second Respondent, the competitor could gain an unfair advantage over the Applicant with confidential information, so was argued by the Applicant. Furthermore, the First Respondent acknowledged that he has knowledge of Eazi Access' service agreements, which are tied to long-term maintenance agreements and the terms thereof.

[20] The Applicant contended that it has a clear right, and it was entitled to enforce the restraint of trade which is part of the First Respondent's contract of employment, given the protectable interests of the Applicant. The Applicant has invoked the restraint and proved the breach as it is required to do so. It was also reasonable for the Applicant to enforce the restraint in the light that the First Respondent has not placed in issue the reasonableness of the duration or geographical area of the restraint or that he will suffer prejudice, nor did he raise public policy considerations.

[21] It was argued that the Applicant has no other suitable remedies available as it would be difficult to compute damages to be suffered subsequent to the First Respondent inciting the customers away from the Applicant to the Second Respondent; and the damages claim would take time to be heard as opposed to an immediate interdict.

[22] It was also argued that the restraint should be enforced for the duration of 12 months throughout South Africa, which period would allow the Applicant to employ someone to replace the First Respondent. The Applicant did not seek to restrict the First Respondent from his employment, but to protect its

proprietary rights, which is its confidential information - the First Respondent has knowledge of and customers' connections.

[23] The First Respondent was at liberty to be employed by another employer or render his services to a third party as long as the employer is not a competitor to the Applicant. The Applicant's qualifications, skills and experience would allow him to secure alternative employment as a mechanic technician in the mining or industrial equipment industries.

[24] The First Respondent opposed the application on the basis that the Applicant seeks to sterilise him from utilising his specialist skills for the benefit of the Second Respondent, and thereby stifles his ability to earn a living in the specialist field.

[25] It was argued and submitted by the First Respondent that the Applicant operates a wider scope of operations than the Second Respondent, dealing with three brands: JLG, Manitou and Linde, and that Linde accounts for a small percentage of the Applicant's business, whereas the Second Respondent deals only with Linde machinery.

[26] It was denied that the First Respondent acquired some of the relationship with customers during his employment with the Applicant but rather that he got to know some of the customers before he joined the Applicant whilst working for Linde South Africa South32, and as such, he was a proficient and skilled Linde specialist when he joined the Applicant. Further that his job description displays that his role was technical in nature and had no insight into protectable interests in confidential information or customer connections. He submitted that the loss of his specialist skills is the one that caused the Applicant to bring the application rather than a sustainable concern as to the misuse of confidential information or proprietary customer's connections as the Applicant's business remained intact and therefore there was no contractual or public policy for interfering with his position at the Second Respondent.

Urgency

[27] Rule 8 of the Labour Court Rules provides for urgent applications. An applicant that approaches the Court on an urgent basis essentially seeks an indulgence and to be afforded preference, in order to prevent the prejudice and harm that may materialise or persist if the conduct complained of continues. Central to a determination of whether a matter is urgent is whether the applicant has, in the founding affidavit, set forth explicitly the circumstances which render the matter urgent and the reason why substantial relief cannot be attained at a hearing in due course. Thus, it is required of an applicant to set out adequately in his or her founding affidavit the reasons for urgency and to give cogent reasons why urgent relief is necessary. In general, urgent applications are justified when the right an applicant is entitled to enforce cannot be effectively realised if it follows the normal timetable for initiating and prosecuting a claim in the ordinary course of motion or trial proceedings.

[28] In the case of restraint applications, the right an applicant normally wishes to enforce is the right to compel the respondent to comply with the terms of the restraint, which amounts to an order for specific performance. Suing for damages flowing from a breach in due course by means of an action is a cumbersome and invariably more costly way of obtaining some recompense, but it is not a direct or effective way of realising the employer's contractual right to enforce the terms of the agreement and halt the unlawful action from continuing. Waiting for an application for enforcement to be enrolled in the ordinary course is normally considered inappropriate because the restraint is likely to be near its expiry date by the time the application is heard.

[29] The inability of obtaining substantial relief in due course is a weighty factor in favour of granting urgent relief, because to deny it effectively bars an Applicant from accessing their primary remedy. This is one reason why it is recognised that applications to enforce restraint of trade agreements are

considered inherently urgent in nature[3]. Another reason is possibly their limited duration.[4]

[30] Factors which might nonetheless preclude the success of an urgent application include whether the urgency is self-created, whether respondents might suffer any procedural prejudice or whether the administration of justice may be prejudiced.

[31] In *Jiba v Minister: Department of Justice and Constitutional Development and Others*[5], the Court applied Rule 8 of the then-Labour Court Rules[6] as follows:

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

[32] It was succinctly described by the Court in *Maqubela v SA Graduates Development Association and others*[7] that:

> 'Whether a matter is urgent involves two considerations. The first is whether the reasons that make the matter urgent have been set out and secondly whether the applicant seeking relief will not obtain substantial relief at a later stage. In all instances where urgency is alleged, the applicant must satisfy the court that indeed the application is urgent. Thus, it is required of the applicant adequately to set out in

[3] See: *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff and Another* (2009) 30 ILJ 1750 (C) at 1761.
[4] See: *Vumatel (Pty) Ltd v Majra and Others* (2018) 39 ILJ 2771 (LC) at para 21.
[5] (2010) 31 ILJ 112 (LC) at para 18.
[6] GN 1665 of 1996: Rules for the Conduct of Proceedings in the Labour Court (repealed, effective 17 July 2024).
[7] (2014) 35 ILJ 2479 (LC) at para 32.

his or her founding affidavit the reasons for urgency, and to give cogent reasons why urgent relief is necessary…'

[33] The factors the Applicant must show are set out in *Mojaki v Ngaka Modiri Molema Municipality and Others*[8], in which the court referred with approval to the following dictum from *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*[9]:

> '… An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.'

[34] In *National Union of Metalworkers of SA and Others v Bumatech Calcium Aluminates*[10], the Court held:

> 'Urgency must not be self-created by an applicant, as a consequence of the applicant not having brought the application at the first available opportunity. In other words, the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency. But the longer it takes from the date of the event giving rise to the proceedings, the more urgency is diminished. In short, the applicant must come to court immediately, or risk failing on urgency. In *Collins t/a Waterkloof Farm v Bernickow NO and Another* the court held that —

[8] (2015) 26 ILJ 1331 (LC) at para 17.
[9] [2011] ZAGPJHC 19 at para 6.
[10] (2016) 37 ILJ 2862 (LC) at para 26.

> "if the applicants seeks this court to come to its assistance it must come to the court at the very first opportunity, it cannot stand back and do nothing and some days later seek the court's assistance as a matter of urgency."'[11]

[35] The Court must also further consider the interests of the respondent party, and in particular, the prejudice the respondents may suffer if the matter is urgently disposed of.

[36] In *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another*[12] *(Northam Platinum)*, the Court held as follows:

> 'But it is not just about the applicant. Another consideration is possible prejudice the respondent might suffer as a result of the abridgement of the prescribed time periods and an early hearing.'

[37] Finally, urgency must not be self-created by an applicant as a consequence of the applicant not having brought the application at the first available opportunity, as the Court said in *Northam Platinum*[13]:

> '… the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency. But the longer it takes from the date of the event giving rise to the proceedings, the more urgency is diminished. In short, the applicant must come to court immediately, or risk failing on urgency. …'

[38] In *Sihlali and Others v City of Tshwane Metropolitan Municipality and Another*[14], the Court dealt with an urgent application to interdict and restrained the City from taking further steps in recruiting, interviewing and appointing candidates to the advertised posts, pending the final determination of another

[11] Cited with approval in *Radebe and Others v Aurum Institute* (2024) 45 ILJ 876 (LC) at para 17.
[12] (2016) 37 ILJ 2840 (LC) at para 24.
[13] Ibid at para 26.
[14] (2017) 38 ILJ 1692 (LC) at para 21.

dispute between the parties. The Court refused to entertain the application and held that:

> 'There is what is termed self-created urgency. The situation herein is a classic case of such. By the time the advertisements arose, the applicants had a gripe already, which gripe they expressed in no uncertain terms to the mayor on 8 November 2016. The applicants should have, if there was any urgency, approached this court then. Why they did not do so, is not explained. Instead what is apparent is that they sat back, took their time until they obtained a legal opinion after almost three months.'

[39] Emanating from the provisions of Rules 37 and 38 of the Labour Curt Rules and the principles set out in the authorities above, it is evident that urgency is not there for taking and an applicant seeking an urgent relief must adequately and in details set out in the founding affidavit the reasons why the matter before the Court should be treated with urgency.

[40] In *casu,* the question is whether the Applicant has made out a case for urgency. For any argument to be sustained, the applicant must have acted with due haste when knowledge of the respondents' prejudicial behaviour or actions is gained, as it is trite that an applicant is not entitled to rely on urgency that is self-created.

[41] In applying the principles relating to urgency to the facts of this matter, I find no reason why this application cannot be entertained on an urgent basis. The restraint of trade is for the next 12 months and therefore approaching this Court in terms of the ordinary applications will not be a useful route under the circumstances, as the matter will most likely be heard far after the lapse of the 12 months, bearing in mind the length of time before the matter can be enrolled for a hearing in court. I therefore find that the Applicant did approach this Court when it was necessary to do so, and is entitled to be heard on an urgent basis.

Analysis

[42] In South Africa, restraint of trade clauses are presumed to be enforceable, but an employee can challenge them in court if they are unreasonable or unlawful and against public policy. The employer must demonstrate that the restraint is necessary to protect a legitimate business interest by invoking the contract. Then the respondent who avoids the restraint bears the onus to demonstrate on a balance of probabilities that the restraint agreement is unenforceable because it is unreasonable and/or contrary to public policy**.**

[43] South African courts consider four key factors when determining whether a restraint is enforceable, which are a protectable interest**,** reasonableness of duration and scope**,** geographical limits and public interest.

[44] It is trite that if an employer fails to prove substantial harm from an employee joining a competitor, the restraint may be declared unenforceable. A restraint of trade can be found to be unenforceable if it overly broadens restrictions and tries to block an employee from working in an entire industry, has excessive duration preventing an employee from working for more than two years and fails to show how the employee's actions could damage the business or cause harm.

[45] There is no doubt that whilst in the Applicant's employ, the First Respondent formed close relationships with the customers and third parties with whom the Applicant conducted business. However, the First Respondent denied that he was also privy to the Applicant's confidential information and had access to confidential documents. The First Respondent denied that he had access to confidential information in any protectable sense, as he was not a salesman at the Applicant but rather a specialist technician applying his skills and experience to Linde handling equipment.

[46] It must also be borne in mind that courts should always give effect to contracts entered into freely. That is an established principle of our law of contract. It creates certainty in the commercial world. However, every person

should, as far as possible, be able to operate freely in the commercial and professional world**.**

[47] *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*[15] (*Magna Alloys*) stated the position in our law with regard to agreements in restraint of trade, and the principles enunciated therein have been applied. The approach laid down by the court was succinctly captured as follows in the headnote to the judgment:

> 'The approach, followed in many South African judgments, that a covenant in restraint of trade is prima facie invalid or unenforceable stems from English law and not our common law, which contains no rule to that effect. The position in our law is that each agreement should be examined with regard to its own circumstances to ascertain whether the enforcement of the agreement would be contrary to public policy, in which case it would be unenforceable. Although public policy requires that agreements freely entered into should be honoured, it also requires, generally, that everyone should be free to seek fulfilment in the business and professional world. An unreasonable restriction of a person's freedom of trade would probably also be contrary to public policy, should it be enforced.
>
> Acceptance of public policy as the criterion means that, when a party alleges that he is not bound by a restrictive condition to which he had agreed, he bears the onus of proving that the enforcement of the condition would be contrary to public policy. The Court would have to have regard to the circumstances obtaining at the time when it is asked to enforce the restriction. In addition, the Court would not be limited to a finding in regard to the agreement as a whole, but would be entitled to declare the agreement partially enforceable or unenforceable.'

[15] 1984 (4) SA 874 (A).

[48] The principles set out in *Magna Alloys* were comprehensively re-stated in *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another*[16] (*Sibex*) as follows:

> 'A contractual restraint curtailing the freedom of a former employee to do the work for which he is qualified will be held to be unreasonable, contrary to the public interest and therefore unenforceable on grounds of public policy if the ex-employee (the covenantor) proves that at the time enforcement is sought, the restraint is directed solely to the restriction of fair competition with the ex-employer (the covenantee); and that the restraint is not at that time reasonably necessary for the legitimate protection of the covenantee's protectable proprietary interests, being his goodwill in the form of trade connection, and his trade secrets. If it appears that such a protectable interest then exists and that the restraint is in terms wider than is then reasonably necessary for the protection thereof, the Court may enforce any part of the restraint that nevertheless appears to remain reasonably necessary for that purpose.'

[49] With regard to protectable interests, the court in *Sibex*[17] defined proprietary interests, in the context of a protectable interest, thus:

> 'The proprietary interests that could be protected by such a restraint were essentially of two kinds. The first kind consisted of the relationships with customers, potential customers, suppliers and others that go to make up what is compendiously referred to as the "trade connection" of the business, being an important aspect of its incorporeal property known as goodwill. The second kind consisted of all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him,

[16] 1991 (2) SA 482 (T) at 502J – 503B.
[17] Ibid at 502D-

to gain a relative competitive advantage. Such confidential material is sometimes compendiously referred to as "trade secrets". …'[18]

[50] It is a fact that the Applicant and the Third Respondent are two competitors in the hiring, selling, service, repair and maintenance of Linde machines, and consequently, their businesses are comparable as they both import Linde forklifts, pallet trucks and pallet jacks. It must be established if the First Respondent taking up work with the Second Respondent is in breach of his restraint of trade undertakings, and there is a reasonable apprehension of harm which will affect the competitiveness with its only competitor in the distribution and supply of Linde equipment.

[51] It is common cause that the First Respondent has around seven years of experience working as a mechanic and is highly skilled in the technical field. He has general mechanical skills that are also marketable in the industries of light and heavy material.

[52] The First Respondent though disputed the Applicant's allegations that he was privy to confidential information because he was involved in preparing quotes for service or repair, provided information to customers' departments to assist in drawing up service contracts and assisting in tender bids; but rather that he gave technical input that was used by separate department who were tasked to prepare quotes, draw up contracts or prepare tender bids. He submitted that his input was limited to technical advice, and he was not privy to the calculations involved in generating quotes, contracts or tender bids, nor did he see the final quotes, contracts or tender bids.

[53] In the present matter, it must also be determined if the First Respondent's right to practice his trade and skill and earn a living would be negatively impacted, as it would severely prejudice the freedom to be gainfully employed.

[18] See also *Experian South Africa v Haynes and Another* 2013 (1) SA 135 (GSJ) at para 17.

[54] In this case, most of the important facts relied on by the Applicant to show the existence of its protectable interests and the breach of restraint of trade by the First Respondent were either undisputed or admitted. There is no doubt that the industry in which the Applicant and its competitor operate is highly and technically specialised and requires service and relationship with customers.

[55] The First Respondent has acquired knowledge of the Applicant's customers, the on-site and off-site requirements, he has also visited some customers at their premises for machine requirements. As a contact person at the Applicant, the First respondent had a close relationship with the Applicant's customers. He has also acquired an in-depth knowledge and relationship with the customers he serviced, and was familiar with the confidential information relating to customers, impacting on the competitiveness of Linde material handling equipment and related services.

[56] It is undisputed that the First Respondent advised customers on their equipment and service and parts need, pricing, products, and operational activities of the Applicant. He assisted with quotes or furnished information to the administrator who initiated a quote for services. He furthermore has knowledge of the Applicant's service agreements and their terms.

[57] It can be concluded on that basis that the Applicant has protectable interest worthy of protection in the form of trade connections (relationship with customers, potential customers, suppliers), an important aspect of the Applicant's property of goodwill, as well as trade secret in the forms of confidential information which is useful for commercial operations of business which can potentially be used by a competitor if disclosed by the First Respondent for gaining of a competitive advantage. Because of the position occupied by the First Respondent and his duties in the business, he was required in terms of Clause 15 of his employment contract to conclude and abide by a restraint of trade and confidentiality undertaking for a period of 12 months in the specific geographical area.

[58] It is evident that on 20 November 2024, the Applicant sent the First Respondent a notice reminding him of the terms of the restraint agreement and warning him not to act in breach of the restraint agreement, and further not to use the confidential information he was exposed to or familiar with. There is no question that the First Respondent has bound himself to a restraint of trade agreement and confidentiality undertaking in favour of the Applicant.

[59] This Court and the Labour Appeal Court have been consistent in applying the considerations in determining whether the enforcement of restraint of trade undertakings is reasonable. These considerations are set out in *Basson v Chilwan and Others*[19]:

(a) Does the one party have an interest that deserves protection;
(b) If so, is that interest threatened;
(c) Does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive;
(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;
(e) Whether the restraint goes further than necessary to protect the relevant interest.[20]

[60] Deciding each of the above considerations is a determination on the facts of each particular case, applying the following approach as held in *Ball v Bambalela Bolts (Pty) Ltd and Another*[21]:

'…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

[19] 1993 (3) SA 742 (A) at 767G-H.
[20] See: *Jonsson Workwear (Pty) Ltd v Williamson and Another* (2014) 35 ILJ 712 (LC) at para 44.
[21] (2013) 34 ILJ 2821 (LAC) at para 17.

restraint and factors peculiar to the parties and their respective bargaining powers and interest".'

[61] The seniority of the employee is also an important consideration for evaluating the existence of a protectable interest. If the employee is more senior, it is more likely that the employee would be entrenched in a protectable interest, based on those considerations. The seniority involves the level of employee in the organisation, influence, knowledge, expertise and the nature of duties involved.

Protectable interest

[62] In considering the issue of protectable interest in *casu*, the First Respondent's employment with the Second Respondent must be dealt with, and the determination must also be made whether this employment infringes on the Applicant's protectable interests. The restraint of trade agreement prohibits the employment of the First Respondent with a competitor in the Republic of South Africa, Zimbabwe, Zambia, Mozambique, Namibia and other countries in Africa in which the company operates or conducts business; and therefore, such employment would be a violation of the restraint of trade. It must, however, still be determined if, despite the restraint of the terms, it would actually infringe on the protectable interest of the Applicant.

[63] I do not believe that, in this case, the First Respondent's employment with the Second Respondent would infringe on any protectable interest of the Applicant. Firstly, the Applicant has indicated that the First Respondent informed it when resigning on 25 October 2024, and even gave written notice with effect from 25 November 2024. Although it is a disputed fact whether the First Respondent disclosed to the Applicant whether he was going to join a competitor, according to the Applicant, the First Respondent indicated that the was going to join a Nigerian forklift company and would be working in the rest of Africa and not operating in South Africa, but it was later established that the First Respondent was actually working for the Second Respondent, who deposed of the affidavit to confirm such employment relationship and the

letter to the Applicant's attorneys. On the other hand, the First Respondent submitted that he told the Applicant that he was joining another Linde dealer and specifically mentioned the Second Respondent by name, Bisedge; and further indicated that he was going to work for them in Nigeria as Bisedge was not yet operating in South Africa, but he spent the first week of his employment in Nigeria.

[64] The Applicant has established that the First Respondent's employment with the Second Respondent is evidence of the breach of the restraint undertakings, thereby establishing a clear right to enforce it to protect its interests and confidential information with the First Respondent's knowledge and customer connections. It seems that the Applicant is much more concerned about the knowledge, experience and skills acquired by the First Respondent in the course of his employment with the Applicant and that he will use the skill and knowledge at the Second Respondent as he learnt about Linde forklifts, pallet trucks and pallet jacks and the repairs thereof. Such knowledge could be used as an advantage for the Second Respondent to penetrate the market and become more competitive.

[65] It is also so that the core of the application is the protectable interest, its most valuable interest being the Applicant's client base, which may be anywhere in the country or outside the country, which is in terms of the restraint agreement. I therefore find that the Applicant's prayer for an interdict prohibiting the First Respondent from being employed with the Second Respondent is bound to fail in this regard as the Applicant has failed to show a breach of its protectable interest in this respect.

[66] Regarding the Applicant's client base and confidential information, that's where the Applicant's real protectable interest lies. It is most critical that what would distinguish the Applicant and Second Respondent and other competitors would be sensitive and confidential. The Applicant would legitimately be entitled to protect its client base from being solicited, encouraged, persuaded or induced by First Respondent to terminate their business agreements with the Applicant and move to the Second

Respondent. I find that this is the very purpose of enforcing the restraint of trade in *casu*, as held in *Bonfiglioli SA (Pty) Ltd v Panaino*[22]*:*

> '…The restraint agreement is therefore geared at protecting the employer's proprietary interest after the employee has left the employer's employment. In *Reeves and Another v Marfield Insurance Brokers CC and Another*, the object of a restraint of trade term was described as follows:
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> > "The legitimate object of a restraint of trade is to protect the employer's goodwill and customer connections (or trade secrets) and the restraint accordingly remains effective for a specified period (which must be reasonable) after the employment relationship has come to an end."'

[67] In *TWK Agriculture Ltd v Wagher and Another*[23], the Court held:

> '…The applicant's interest in those connections is an important aspect of the applicant's incorporeal property in the form of goodwill and it is trite that it is entitled to protect that interest. When the respondents dealt with those clients, they did so on behalf of the applicant's business and not for their own account. Whether those clients were ones that they had originally brought into the applicant's business through the sale agreement, or whether those with clients they acquired in the course of working for the applicant, the insurance business and the relationship developed with those clients and was that of their employer and not theirs to exploit for their own personal gain, even if they had been responsible for obtaining such business or sustaining it through their personal relationship with those clients.'

[68] I am satisfied that the Applicant has succeeded in establishing the existence of the protectable interest. It is undeniable that the Second Respondent had access to some kind of information that would clearly qualify as confidential

[22] (2015) 36 ILJ 947 (LAC) at para 24.
[23] (C633/15) [2015] ZALCCT 50 (12 August 2015) at para 8.

information and also quality as confidential information which would be classified as sensitive concerning the clients and business strategies of Applicant which the Applicant may not want to be disclosed to competitors such as the Second Respondent who is also in the same comparable business to import Linde forklifts, pallet trucks and pallet jacks, both sell, hire out, services and repairs.

[69] I furthermore find that the Applicant has clearly established the existence of trade connections, and the nature of the relationship between First Respondent and the Applicant' clients is of such that he developed a close relationship with them, which the First Respondent has conceded to in his answering affidavit as he stated that customers followed him from Linde SA to the Applicant as they were very happy with the service he gave them; and as such, the data he presented showed that customers were not happy at the Applicant's business and the potentially that they could again follow him to the Second Respondent is not far-fetched.

[70] The Applicant's protectable interest has been breached as evidenced by the First Respondent taking up work with the Second Respondent, the Applicant's direct competitor. In his position during the course of employment with the Applicant, he dealt with customers and developed a relationship of trust with them as he serviced them. I would not expect the Applicant to trust the *bona fides* of the First Respondent that he will pass all those trade connections and knowledge of confidential information of the Applicant to the Second Respondent, especially considering that the two businesses are competitors and with similar services.

[71] I accordingly find that the Applicant has succeeded in establishing a protectable interest in relation to both trade connections and confidential information, and also in establishing the existence of the breach or the infringement of those protectable interests by the First Respondent, which justifies the enforcement of the restraint of trade.

[72] The scope of the restraint must be considered in the sense that if it is shorter and on a limited geographical area, it may mitigate in favour of the enforcement, whereas if it is longer and with a broader restraint, it would mitigate against it. Another consideration is whether the Applicant had possession of the skills, expertise, qualification and experience before joining the Applicant, because it would be unfair to prevent the First Respondent from earning a living under such circumstances.

[73] In *casu*, it can be concluded that the continued employment of the First Respondent with the Second Respondent has been found to be prohibited and he can continue his employment using his skills, expertise and experience he accumulated over the years, even before his employment with the Applicant; but he must find his own customers and not exploit the confidential information and client base of the Applicant.

[74] The Applicant must be allowed to protect its interest in this regard, as trade connections and confidential information are critical features of any commercial business. The protection of the client base and confidential information will also cure the issue of the restraint area.

[75] Regarding the issue of the restraint period, the First Respondent has not discharged the onus to provide factual information that the restraint period should be considered unreasonable. I am therefore satisfied that the 12-month restraint period in this industry and the position held by the First Respondent and the relationship with the Applicant's clients is reasonable.

[76] I furthermore find that the Applicant has no alternative remedy available in this instance. An interdict is the only way the Applicant will mitigate the risk associated with the employment of the First Respondent with a direct competitor for the restraint period, and also to give the Applicant an opportunity to settle with its clients with an assurance that the confidentiality of its information is secured with time.

[77] The Applicant has satisfied the requirements necessary for the final relief it seeks against the First Respondent to be granted. A clear right has been demonstrated. There is a legitimate restraint of trade and confidentiality undertaking in place with the First Respondent, capable of enforcement in relation to confidential information and trade connections, as the First Respondent infringed such protectable rights. The restraint period is reasonable, no alternative remedy is available, and the applicant will be prejudiced if the relief is not granted, as it has been demonstrated that there is a reasonable apprehension of harm.

Costs

[78] This Court has a wide discretion on the issue of costs, in consideration of the requirements of law and fairness and the terms of section 162 (1) of the Labour Relations Act[24] (LRA), and the Applicant is successful in this application. This is a contractual dispute and not an LRA dispute, where costs ordinarily do not follow the result.

[79] Under the circumstances, fairness dictates that the Applicant should be entitled to costs.

[80] In my view, this is a case where the interest of justice will be best served by making an order as to costs.

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

Order

1. The forms and service provided for the Rules of this Court are dispensed with, and the matter is dealt with as an urgent application.

[24] Act 66 of 1995, as amended

2. The First Respondent is interdicted and restrained from encouraging and/or enticing any employee of the Applicant to terminate his or her employment with the Applicant.
3. For 12 months from 1 December 2024 and throughout South Africa, the First Respondent is interdicted and restrained from furnishing advice or information or advise customers of the Applicant that he intends to or will, directly or indirectly, be interested or engaged in or concerned with and from divulging or using the confidential information of the Applicant to any third parties including the Second Respondent.
4. The First Respondent is interdicted and restrained from furnishing any advice or information or advise customer or supplier or using any other mans or taking any other action which is directly or indirectly designed, or in the ordinary course of the events calculated, to result in such customer or supplier terminating its association with the Applicant or transferring its business to or purchasing any products or services from any person other than the Applicant.
5. The First Respondent is to pay the costs of the Applicant.

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G. Mafa-Chali

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Counsel L Hollander
Instructed by:	LDA Incorporated Attorneys
For the First & Second Respondent:	SC C Whitcutt
Instructed by:	Solomonholmes Attorneys Inc