

SOUTH AFRICA / JUDGMENT

# Automation & Control Components Gauteng (Pty) Ltd t/a MCA v Searle and Another (J 426/2024) [2024] ZALCJHB 305 (7 August 2024)

[2024] ZALCJHB 305

## COURT

Labour Court Johannesburg

## BEFORE

Prinsloo

## CASE / FILE NUMBER

J 426/2024

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## Source record

## FLYNOTES:

LABOUR – Restraint –  
Confidential information –  
Employment with competitor constitutes breach of agreement –  
Protectable interest in form of trade secrets –  
Threatened  
by employment with competitor – Operational knowledge of  
business – Gained institutional knowledge  
by virtue of  
employment – Position to disclose confidential information  
to applicant's detriment – Use  
of information in  
unfair competition – Restraint reasonable and enforceable –  
Interdicted and restrained.  
THE  
LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG  
Not  
Reportable  
Case  
no: J 426/ 2024  
In

the matter between:       AUTOMATION  
                                      & CONTROL COMPONENTS  
                                      GAUTENG  
                                      (PTY) LTD t/a MCA  
                                      Applicant  
                                      And  
                                      ANDREW  
                                      SEARLE  
                                      First  
                                      Respondent  
                                      AFRILEC  
                                      PROJECTS (PTY) LTD t/a AMS  
                                      Second  
                                      Respondent

Heard:                         25 July 2024

Delivered:                    7 August 2024  
                                      This  
                                      judgment was handed down electronically by consent of the parties’  
                                      representatives by circulation to them via email.  
                                      The date for  
                                      hand-down is deemed to be 7 August 2024.

## JUDGMENT

PRINSLOO, J

### Introduction

- [1] The Applicant trades as a highly specialised electrical and instrumentation manufacturing, installation and projects management team since 2000. It provides high-quality electrical, automation, and site installation solutions which include the assembly, manufacture, supply and installation of switchgears, switchboards and sheet metal products in respect of high, medium and low voltage installations. Since 2015, the Applicant has been one of only four approved licensees in South Africa, licensed by Siemens AG, to develop and modify products, assemble, manufacture, configure, design, sell and install switchgear and switchboard systems in South Africa.
- [2] The Second Respondent (AMS) is also a Siemens-approved licensee and the Applicant’s case is that AMS is a direct competitor. On AMS’ own version, it is a role player in the industry of motor control and switchgear manufacturing and it operates in the low voltage industry.
- [3] The First Respondent (Respondent) was employed by the Applicant for more than 21 years and held the position of a senior estimator. The Respondent signed a contract of employment and clause 11 of the said contract deals with ‘restraint against competition and disclosure’ and clause 13 provides for ‘confidentiality’.

- [4] The restraint of trade clause provided inter alia that, after termination of his employment, the Respondent was restrained for a period of one year from the date of termination of the agreement, and within the territorial borders of the Republic of South Africa, from taking up employment or having an interest in any capacity in any undertaking which carries on operations or business in competition with the Applicant's business. The confidentiality clause provided inter alia that the Respondent would keep confidential and not divulge or disclose any trade secrets or confidential information regarding the Applicant's business.
- [5] The Respondent resigned on 8 March 2024 and on the same date he was handed a letter confirming that the Applicant would be enforcing the restraint and confidentiality undertakings, as per the terms of the employment contract. It is common cause that the Respondent left the Applicant's employ and that he took up employment with AMS.
- [6] On 4 April 2024, the Applicant's attorney addressed a letter to the Respondent and demanded that he terminate his employment with AMS with immediate effect. A similar letter of demand was sent to AMS.
- [7] The Respondents did not accede to the Applicant's demands, as per the letter of 4 April 2024, and an urgent application seeking to enforce the restraint of trade was filed with this Court on 19 April
2024. The application was enrolled for hearing on 23 May 2024, when it was postponed to 25 July 2024.

#### The urgent application

- [8] The Applicant approached the Court on an urgent basis to enforce the terms of the restraint of trade and confidentiality agreements, as contained in the Respondent's written employment contract.
- [9] The Applicant essentially seeks an order to interdict and restrain the Respondent from inter alia using, disclosing, or divulging the trade secrets and confidential information of the Applicant and from being employed by AMS or being engaged in any way or concerned in any entity that carries on operations or business in competition with the Applicant until 30 March 2025.
- [10] The Respondents opposed the application.
- [11] Although urgency was disputed in the Respondents' opposing papers, it was not challenged during argument and submissions were made on the merits of the application. The application will be decided as an urgent application.

#### The applicable legal principles

- [12] In *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronjé and another*[1], the position regarding restraints of trade in our law, having considered the position before and after the constitutional dispensation, has been summarised as follows:

‘1. Covenants in restraint of trade are valid. Like all other contractual stipulations, however, they are unenforceable when, and to the extent that, their enforcement would be contrary to public policy. It is against public policy to enforce a covenant which is unreasonable, one which unreasonably restricts the covenantor's freedom to trade or

to work.

2. Insofar as it has that effect, the covenant will not therefore be enforced. Whether it is indeed unreasonable must be determined with reference to the circumstances of the case.

3. Such circumstances are not limited to those that existed when the parties entered into the covenant. Account must also be taken of what has happened since then and, in particular, of the situation prevailing at the time the enforcement is sought.

4 Where the onus lies in a particular case is a consequence of the substantive law on the issue.

5. What that calls for is a value judgment, rather than a determination of what facts have been proved, and the incidence of the onus accordingly plays no role.

6. A court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint:

6.1. The first is that the public interest required that parties should comply with their contractual obligations, a notion expressed by the maxim *pacta servanda sunt*.

6.2. The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions....’

[13] The point of departure is that restraint of trade agreements are valid. The restraint of trade clause will be enforceable if there is an interest that requires protection and insofar as it is reasonable.

[14] The party seeking to enforce a restraint of trade is required to invoke the restraint agreement and prove a breach thereof. If the restraint is reasonable, it will be enforceable.

[15] The party seeking to avoid the restraint, bears the onus to show that on a balance of probabilities, the restraint agreement is unenforceable because it is unreasonable.[2]

[16] In *Labournet (Pty) Ltd v Jankielsohn and Another*[3] (*Labournet*), the Labour Appeal Court (LAC) considered the applicable legal principles and held that:

‘[40] In *Reddy*, the Supreme Court of Appeal preferred not to become embroiled in the issue of onus and adopted a pragmatic approach which, according to it, was consistent with an approach where there was a direct application of the Constitution to restraint agreements. This approach was specifically adopted in respect of motion proceedings for the enforcement of restraints where the issue for determination was the reasonableness of the restraint. In terms of that approach, where the facts,

concerning the reasonableness, had been canvassed in the affidavits, genuine disputes of fact are to be resolved in favour of the party sought to be restrained by applying the so-called Plascon-Evans rule. If the accepted facts show that the restraint is reasonable, then the applicant must succeed, but if they show that the restraint is unreasonable then the respondent in those proceedings must succeed.

...

[43] It is now clear from, inter alia, Basson and Reddy that the reasonableness and enforceability of a restraint depend on the nature of the activity sought to be restrained, the rationale (purpose) for the restraint, the duration of the restraint, the area of the restraint, as well as the parties' respective bargaining positions. The reasonableness of the restraint is determined with reference to the circumstances at the time the restraint is sought to be enforced. With reference particularly to the facts of this matter, it is an established principle of law that the employee cannot be interdicted or restrained from taking away his or her experience, skills or knowledge, even if those were acquired as a result of the training which the employer provided to the employee.'

[17] Whether a restraint of trade clause will ultimately be enforceable, is a separate question that requires an assessment of the reasonableness thereof.

[18] The test set out in *Basson v Chilwan and Others*[4] (Basson), to determine the reasonableness or otherwise of a restraint of trade provision is the following –

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?

[19] In *Kwik Kopy (SA) (Pty) Ltd v van Haarlem and Another*[5], a further consideration was added namely whether the restraint goes further than is necessary to protect the interest.

[20] In *Jonsson Workwear (Pty) Ltd v Williamson and Another*[6] (Jonsson), the Court summarised the factors to be considered and held that:

'In simple terms therefore, and what needs to be considered in determining whether or not the enforcement of a restraint of trade

would be reasonable, are five issues, being (a) the existence of a protectable interest, (b) the breach of such protectable interest, (c) a quantitative and qualitative weigh off the respective interests of the parties, (d) general considerations of public interest, and (e) whether the restraint goes further than necessary to protect the relevant interest. All these considerations need to [be] determined as a whole, as part of a value judgment to be exercised, in order to finally conclude whether or not the restraint should be enforced.’

[21] Insofar as the first leg of the test in *Basson* is concerned, it is well established that the proprietary interests that can be protected by a restraint agreement are essentially of two kinds, namely –

1. All confidential matter which is useful for the carrying on of the business and which could be used by a competitor, if disclosed to the competitor, to gain a relative competitive advantage. Such confidential material is compendiously referred to as “trade secrets”; and
2. The relationships with customers, potential customers, suppliers, and others that make up what is compendiously referred to as the “trade connections” of the business.

[22] Whether information constitutes a trade secret is a factual question. For information to be confidential it must be –

1. capable of application in trade or industry, that is, it must be useful and not be public knowledge and property;
2. known only to a restricted number of people or a closed circle; and
3. of economic value to the person seeking to protect it.[7]

[23] As to customer connection, the need of an employer to protect its trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with a customer so that when the employee leaves the employer’s service, he or she could easily induce the customers to follow him or her to a new business.

[24] In *Labournet*, the LAC held that:

‘[41] The enquiry into the reasonableness of the restraint is essentially a value judgment that encompasses a consideration of two policies, namely the duty on parties to comply with their contractual obligations and the right to freely choose and practice a trade, occupation or profession. 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. To seek to enforce a restraint merely in order to prevent an employee from competing with an employer is not reasonable.

[42] According to the Appellate Division in *Basson v Chilwan and Others*, the following questions require investigation, namely, whether the party who seeks to restrain has a protectable interest, and whether it is being prejudiced by the party sought to be restrained. Further, if

there is such an interest – to determine how that interest weighs up, qualitatively and quantitatively, against the interest of the other party to be economically active and productive. Fourthly, to ascertain whether there are any other public policy considerations which require that the restraint be enforced. If the interest of the party to be restrained outweighs the interest of the restrainer – the restraint is unreasonable and unenforceable.’[8] [Footnotes omitted]

[25] It is within the context of the aforesaid principles that this application is to be decided.

[26] The party seeking to enforce a restraint need only invoke the restraint agreement and prove a breach of the agreement, nothing more. In *New Justfun Group (Pty) Limited v Turner and Others*[9] (*New Justfun*), the Court enforced the restraint of trade and held, with reference to customer connections, that “it is sufficient for the applicant to show that the customer contacts exist and that they can be exploited by the former employee”[10] and, with reference to confidential information, that:

‘[15] The respondent must establish that he or she had no access to that information or that he or she had never acquired any significant personal knowledge of, for instance, the applicant’s customers while in the applicant’s employ. All that an applicant need show is that there is secret information to which the respondent had access and which in theory the respondent could transmit to the new employer should he or she desire to do so...

[19] It remains ultimately for [the respondent] to establish that [he or] she had no access to confidential information and that [he or] she never acquired any significant personal knowledge of, or influence over, the applicant’s customers...’[11]

[27] An applicant must establish that the former employee respondent furnished the restraint undertakings sought to be enforced and that he or she has breached those undertakings in the respects as alleged by the applicant.

#### The contract

[28] In casu, it is common cause that the Respondent signed the agreement containing the restraint of trade and confidentiality undertakings sought to be enforced by the Applicant.

[29] The Applicant seeks to interdict the Respondent from utilising its confidential information and from being employed by a competitor.

#### The Respondent’s breach

[30] It is also common cause that the Respondent took up employment with AMS. In the opposing papers, a significant portion was spent on disputing that the Applicant and AMS are competitors and the Respondents’ argument was that as they do not compete, the restraint of trade finds no application. However, in Court, Mr Jacobs for the Respondents conceded that the parties are indeed competitors but the extent of competition is limited to “low voltage [industry] within the borders of South Africa”. Mr Nhutsve for the Applicant agreed and this application is decided on the premise that the Applicant and AMS are indeed

direct competitors, albeit limited to low voltage industry within South Africa.

- [31] The fact that the Respondent took up employment with AMS, a direct competitor of the Applicant, constitutes a breach of the agreement.
- [32] In seeking to avoid the enforcement of the restraint, the Respondent has to show that the restraint against him should not be enforced because to do so would, on an application of the test in Basson, be unreasonable and contrary to public policy. As the Respondent challenges the enforcement of the restraint and confidentiality

undertakings, it is for him to show that the Applicant has no protectable proprietary interest.

- [33] In the averments made in the Respondents' papers, it appears as if the Respondent and AMS are of the view that the onus is on the Applicant to show that it has a protectable interest worthy of protection and that without the enforcement of the restraint, it will suffer damages. This is not in accordance with the applicable authorities. In *New Justfun*, it was held that all that the applicant needs to show is that there is confidential information to which the respondent had access and which in theory could be transmitted to the new employer should he or she desire to do so.

## Issues

to be decided

- [34] The existence of the agreement is not in dispute, neither is the breach thereof and the issue to be decided in the main is whether it is enforceable, which is a separate question that requires an assessment of the reasonableness thereof. The test as set out in *Basson* to determine the reasonableness or otherwise of a restraint of trade provision will find application and the first consideration is whether there is an interest deserving of protection at the termination of the agreement.
- [35] A restraint holder's proprietary interests fall into two categories, namely confidential information (trade secrets) and relationships with customers, potential customers, suppliers, and others (trade connections).
- [36] It is evident from the Applicant's founding affidavit that the essence of the Applicant's protectable interest is its trade secrets / confidential information and this application does not concern the protection of trade connections.
- [37] The first question this Court must consider is whether the Applicant has a protectable interest in the form of trade secrets, which is threatened by the Respondent's employment with AMS.
- [38] Whether information constitutes a trade secret is a factual question.[12]

[39] The Applicant's case is that it has a protectable interest in the form of confidential information and trade secrets, wherefore it has a clear right to enforce the restraint and confidentiality undertakings provided by the Respondent. The protectable interest is the Respondent's

knowledge of the Applicant's costing/estimation methodologies and practices, knowledge of the products utilised and the sourcing of such products, clients' details and requirements, internal and external manufacturing details, processes and design, which knowledge would, in the hands of a direct competitor, cause immeasurable damage to the Applicant. The Respondent is employed by a competitor, and he is indeed in a position to disclose the Applicant's confidential information to its detriment and to use it in unfair competition with the Applicant.

[40] I already alluded to New Justfun where the Court held, with reference to confidential information, that all that the applicant needed to show is that there was secret information to which the respondent had access and which, in theory, he could transmit to the new employer should he desire to do so. In casu, the Applicant made those averments and it is for the Respondent to establish that he had no access to confidential information and that he never acquired any significant personal knowledge thereof.

[41] The onus is on the Respondent to prove the unreasonableness of the restraint[13] and he must establish that he had no access to confidential information.

The opposing papers

[42] Having stated supra what the Respondent has to prove to escape the restraint and confidentiality clauses he agreed to in his contract of employment, the next consideration is what the Respondent's case is, as set out in his affidavit.

[43] The Respondent's opposing affidavit stated that he has read the affidavit deposed to by Mr Burger on behalf of AMS, he confirms the contents thereof insofar as it relates to him and he expanded on specific issues that pertain to him personally. In his affidavit, the Respondent stated that he is 54 years old, incapable of being employed in any other capacity than the one in which he had been operating for some time, he spent two decades performing duties as an estimator and he is unable to plot a new career in any non-related industry. If the relief sought by the Applicant were to be granted, it would effectively render him unemployed for the remaining period of the restraint and that would be unfair and unreasonable and would have a prejudicial effect on his ability to earn an income. The Respondent dwelled into his personal circumstances including his health, his financial challenges and the reasons for his resignation from the Applicant's employ.

[44] In the affidavit deposed to by Mr Burger on behalf of AMS, it was denied that AMS was a competitor of the Applicant. I already alluded to the fact that this issue was conceded during argument. AMS' opposing affidavit however went far beyond merely denying that it was a competitor of the Applicant. The affidavit deposed to by AMS indicated that there would be a confirmatory affidavit from the Respondent, which was not attached, and it is unclear if the

intention was for the Respondent's answering affidavit to be understood or accepted as being a confirmatory affidavit too.

[45] It has to be kept in mind that the agreement which the Applicant seeks to enforce in this application was entered into between the Applicant and the Respondent and AMS is not a party to the agreement. The only relief sought against AMS is that it be interdicted from employing the Respondent for the period of the restraint agreement. It is customary for the new employer in restraint of trade disputes to file either an explanatory affidavit or a notice to abide by the Court's decision, as it is not a party to the contractual terms agreed to between the old employer and the employee and which the old employer seeks to enforce. It is customary to join and cite the new employer as it is an interested or necessary party, which could be directly affected by the outcome of the litigation. In casu, however, AMS adopted the position of an invested litigant and deposed to an affidavit addressing issues that are either not within

its deponent's personal knowledge or which fell within the ambit of issues the Respondent has the onus to prove. The consequences of the approach adopted by the Respondents will become clear infra.

#### Confidential information

[46] In *Experian SA (Pty) Ltd v Haynes and Another*[14], the issue of confidential information was considered and the Court held that:

'It is trite that the law enjoins confidential information with protection. Whether information constitutes a trade secret is a factual question. For information to be confidential it must be capable of application in the trade or industry, that is, it

must be useful and not be public knowledge and property; known only to a restricted number of people or a close circle; and be of economic value to the person seeking to protect it...'

[47] In *Jonsson*, the Court found that:

'What thus must now be done, as part of the value judgment to be exercised in this matter, is to determine whether there is a case made out on the proper accepted facts as to whether the information the first respondent had access to whilst employed with the applicant would fall within the parameters of what could be classified as confidential information in terms of the above authorities, and also whether this information would be of benefit to the second respondent as employer of the first respondent.'[15]

[48] The Applicant's case is that during the course of the Respondent's 21 years of service and in his capacity as senior estimator, he has acquired specialized knowledge of the Applicant's quoting and tendering processes, and he acquired intimate knowledge of the Applicant's products, pricing, mark-ups, margins, methodologies of product mixes and uses, manufacturing processes and capabilities necessary for competitive quoting and tendering. A large portion of the projects awarded to the Applicant are pursuant to a quoting or tender

process and the knowledge acquired by the Respondent over the years of the Applicant's processes, pricing, adaptations, and product usage in any quote or tender is of a highly confidential nature, is not accessible to the general public and in the hands of a competitor, would be extremely detrimental to the Applicant's business.

- [49] The Applicant further submitted that, by virtue of being a senior estimator, the Respondent is knowledgeable about the Applicant's internal administrative and financial structures and information, which is also confidential and not in the public domain.
- [50] The Respondent signed the agreement voluntarily and acknowledged that the restraints imposed were reasonable and necessary for the protection of the Applicant's proprietary rights in its trade secrets and confidential information, so the Applicant submitted. The Respondent acknowledged on 7 March 2024 that his "contract is against me working for the opposition for a period of one year, the odds were not in my favour to accept the offer at AMS".
- [51] It warrants emphasis that in an application such as the present, all the Applicant needs to show is that there is confidential information to which the Respondent had access and which he could transmit, if so inclined. It is not necessary to show that the Respondent has in fact used the information confidential to the Applicant.[16]
- [52] It is incumbent on the employee under restraint to establish that he or she had no access to confidential information and never acquired any significant personal knowledge of confidential information while in the applicant's employ. In other words, it is enough for the party seeking to enforce a restraint to show that the employee had access to confidential information and that it could be disclosed and exploited if the employee were to be employed by a competitor or compete with the business of the applicant. It is not for the applicant to have to run the risk of the employee communicating its trade secrets or utilising its confidential information to the advantage of a competitor. It is also not incumbent on an applicant to enquire into the bona fides of the employee or to demonstrate that he or she is mala fides before it is entitled to enforce a contractually agreed restraint. The holder of the restraint also does not have to show that the employee in fact utilised information confidential to it – it is enough that the employee could do so.[17]
- [53] In his opposing affidavit, the Respondent did not deny that he had access to the Applicant's confidential information, nor did he dispute that the information as set out by the Applicant in its founding affidavit was indeed confidential or could be of value to a competitor.
- [54] Confidential information is a protectable interest and should be protected if it could be used to the benefit of a competitor and to the detriment of the applicant.
- [55] In casu, the question is whether the Respondent could use his knowledge of the Applicant's confidential information, acquired in the context of his employment relationship with the Applicant, to the advantage of AMS or another competitor and to the Applicant's

detriment.

- [56] AMS deposed to an affidavit wherein it is stated that AMS poses no threat to the Applicant. This is irrelevant as it was conceded that they are competitors, albeit limited to the low voltage industry within the borders of South Africa. In any event, the extent of the ‘threat’ is not a consideration in casu – the question is whether the Respondent had access to confidential information by virtue of his position at the Applicant and whether he is in a position to transmit such to a competitor.
- [57] Mr Burger disputed that the Applicant has a protectable interest worthy of protection because the Respondent is not in possession of confidential information. This is not a fact that would fall within Mr Burger’s personal knowledge and he is not in a position to dispute, and that under oath, that the Respondent is not in possession of the Applicant’s confidential information. Mr Burger went further and elaborated on this statement by making a comparison between the Applicant and AMS and he stated that the “First Respondent has advised me that, in contrast to the methodology of the Second Respondent, the Applicant utilizes the Simaris SCF quote tool to compile a configured product and thereafter exports the material required to manufacture a product to a Microsoft Excel spreadsheet, whereafter the calculation of monetary values must be computed. This appears... to be a somewhat cumbersome process....”
- [58] In my view, the statement made by Mr Burger fuels the Applicant’s fear that the Respondent is disclosing its confidential information to a competitor. Mr Burger would not have been able to compare the processes as set out in his affidavit and comment on the Applicant’s process, without being provided with the information to do so and the only source of such information is

the Respondent. To make matters worse, the Respondent never denied that he had access to confidential information – a material

issue to be addressed in his own affidavit and certainly not an issue Mr Burger is in any position to allege under oath. Be that as it may, Mr Burger’s statements confirm that the Respondent had advised AMS about the methodologies and tools utilised by the Applicant, which is clearly in breach of the agreement.

- [59] In his affidavit, the Respondent stated that allowing him to remain employed at AMS will “have little, if any effect on the Applicant’s ability to continue to participate in the industry it is engaged in”. He explained that, after being exposed to AMS’ business model, he knows that AMS utilises a superior version of the Siemens license technology, it has a vastly improved Simaris quoting tool used by all Siemens licensed technology partners, and that AMS is “vastly more competitive than the Applicant. My mere employment as an estimator by the Second Respondent plays no role in allowing the Second Respondent to be more competitive”.

- [60] The aforesaid statements confirm the Applicant's fears and show that the Respondent is indeed able to share confidential information of the Applicant with AMS, a direct competitor, to the Applicant's detriment and to place AMS in an advantaged position to understand and compare the Applicant's processes with its own and to use that information to its own benefit.
- [61] The Applicant had obtained the confidentiality undertakings from the Respondent to protect itself from the danger of the Respondent communicating its trade secrets for the benefit of a direct competitor, after entering such a rival's employ. The Applicant is entitled to protection in this regard.
- [62] The Applicant should not have to content itself with crossing its fingers and hoping that the Respondent would act honourably or abide by the undertakings that he has given. It does not lie in the mouth of the ex-employee who has breached a restraint agreement by taking up employment with a direct competitor to say to the ex-employer "trust me: I will not breach the restraint further than I have already been proved to have done".[18]
- [63] I already alluded to the fact that the Applicant has to show that it has an interest in its confidential information that is worthy of protection and that for information to be confidential, it must be capable of application in the trade or industry; must be useful and not be public knowledge and property; known only to a restricted number of people or a closed circle; and be of economic value to the person seeking to protect it. These requirements apply because not all information obtained by an employee during the course of his or her employment or which he or she had access to during the execution of their duties will be secret or confidential. The Applicant made all the necessary averments in this regard and the Respondent dismally failed to deny or rebut them. Instead, AMS and Mr Burger, who would not know whether the Respondent had such access, deposed to an affidavit which clearly indicates that information about the Applicant's processes and methodologies was indeed shared.
- [64] In summary: The question is whether a case was made out on the proper accepted facts as to whether the information the Respondent had access to whilst employed by the Applicant, would fall within the parameters of what could be classified as confidential information. In my view, the Applicant has made out a case that it has a protectable interest in its confidential information – it is information the Respondent had access to, it is not in the public domain and could be of value to a competitor. The Respondent gained institutional knowledge by virtue of his employment over a period of 21 years with the Applicant, which information could be useful to a competitor that would quote or tender for the same projects.
- [65] The Respondent, on the other hand, never denied that he is in possession or had access to the Applicant's confidential information or trade secrets that could be disclosed to AMS to the Applicant's detriment.

## Reasonableness

[66] If the restraint is reasonable, it will be enforceable. In *Reddy v Siemens Telecommunications (Pty) Ltd*[19], the Supreme Court of Appeal upheld a 12-month restraint against an employee who had joined a competitor (Ericsson). The Court restated the following principles:

‘[15] A Court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint. The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim *pacta servanda sunt*. The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions. Both considerations reflect not only common-law but also constitutional values. Contractual autonomy is part of freedom informing the constitutional value of dignity, and it is by entering into contracts that an individual takes part in economic life....

[16] In applying these two principal considerations the particular interests must be examined. A restraint would be unenforceable if it prevents a party after termination of his or her employment from partaking in trade or commerce without a corresponding interest of the other party deserving of protection. Such a restraint is not in the public interest.’

[67] In applying the two aforesaid principal considerations, the particular interest must be examined. A restraint would be unenforceable if it prevents a party, after termination of his or her employment, from partaking in trade or commerce without a corresponding interest of the other party deserving of protection.

[68] Whether a restraint of trade agreement is enforceable and whether the applicant in such an application is entitled to an interdict, and if so, to what extent, are questions to be carefully considered by this Court and it entails a weighing up of interests. The weighing up of the parties’ interests requires a consideration of what is reasonable in the context of a unique set of

## facts

and of the parties’ respective rights and the protection they deserve, within that specific and unique context.

[69] The Applicant’s confidential information constitutes a protectable interest. That is however not the end of the enquiry.

- [70] Applying the test in Basson, the question is whether the protectable interest is threatened by the other party. In other words, this Court has to determine, even where it is found that the Applicant has a protectable interest, whether or not the Respondent's employment with AMS would infringe on such protectable interest. This is a factual question, based on what the Respondent would actually do at AMS and what possible risks the Applicant would be exposed to if he is allowed to remain employed by AMS
- [71] It is common cause that the Applicant and AMS participate in the supply and manufacturing of switchgear in the low voltage industry and they both operate within the borders of South Africa. It is further common cause that they quote or tender for the same projects and that the Respondent was an estimator in the Applicant's employ for more than 20 years. He is now employed as an estimator at AMS.
- [72] On AMS' own version, there is a benefit to have the Respondent in its employ and that is "the fact that, just as he was able to do when employed by the Applicant, the First Respondent is able to utilise the Simaris quoting tool that is utilised by all Siemens-licenced technology partners".
- [73] In *Dot Activ (Pty) Ltd v Daubinet and Another*[20] (*Dot Activ*), the Court held that:  
'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.'
- [74] The Respondent's answering affidavit remains problematic – it is silent on material aspects, it does not address the terms of the agreement and the reasonableness thereof, nor does it dispute the necessity to protect the Applicant's confidential information. The Respondent rather addressed his personal circumstances instead of putting up a version to discharge his onus in an application such as this one. The Respondent provided no reasons in law why the restraint is unreasonable and not enforceable and the reasons he provided are summarized in the Respondents' heads of argument as that he suffers from Asperger syndrome, he has been diagnosed with early onset Parkinson's disease and he and his spouse have been placed under debt review. Those are nothing but considerations *ad misericordiam*, which have no place in an application to enforce a contractually agreed term. If considerations *ad misericordiam* were the only reason not to enforce a restraint of trade, it would defeat the purpose of a restraint and undermine the consequence and effect of a valid and binding agreement.
- [75] Strangely, AMS addressed the issue of the reasonableness of the restraint. AMS submitted that the effect of the enforcement of the agreement would render the Respondent unemployed and unemployable for a period of 12 months and therefore the time period and the geographical area the Applicant seeks to enforce, are unreasonable.

[76] There is no evidence before this Court to show that the area or the period of the restraint is unreasonable or that it goes further than necessary to protect the Applicant's interests. Once again, the only defence raised in respect of the period and geographical area is the Respondent's personal circumstances. It was stated that he is not professionally qualified and has no tertiary qualification and he faces health and financial challenges. That is not sufficient to make out a case that the period or geographical area is unreasonable. Relevant factors that could have been considered by the Court would have been for instance that the area is too wide because the operations of the competitor or the applicant for that matter, are limited to a single province or a specific area and to enforce a restraint in a wider geographical area, would go further than what is necessary. There are however no averments made to that effect for this Court to consider.

[77] The Respondent is certainly not unemployable for a period of 12 months, as alleged by AMS. He remains free to be economically active but within the parameters of the terms of the restraint of trade agreement he had entered into. Put differently, the agreement seeks to protect the Applicant against the jeopardy and prejudice of its confidential information being shared with competitors, it does not prevent the Respondent from seeking alternative employment, but imposes a specific restriction on employment with the Applicant's competitors. The Respondent could be employed by employers in a

similar industry, but not by a direct competitor. Furthermore, he was employed by AMS for a period exceeding four months and the Respondent will be interdicted from taking up employment with a competitor only for the remaining period of the restraint, until 31 March 2025.

[78] The Respondent did not discharge the onus to show that the restraint is unreasonable and therefore unenforceable.

[79] In summary, I accept that the Applicant has a protectable interest and that the Respondent remains free to be economically active, but within the boundaries of the agreement he had entered into. The restraint is reasonable and therefore enforceable and this is a matter where the public interest requires that *pacta servanda sunt* be applied.

[80] The last aspect that has to be considered is whether there is an aspect of public policy, having nothing to do with the relationship between the parties, which requires the restraint to be enforced or not. In my view, there is no aspect of public policy that militates against the enforcement of the restraint. This is not a matter where

the restraint is unreasonable or where it seeks to go further than necessary to protect the Applicant's interests. In any event, the Respondent did not place anything before this Court to consider in this regard.

Costs

[81] The Applicant elected to invoke this Court's jurisdiction under section 77(3) of the Basic Conditions of Employment Act[21] (BCEA), a jurisdiction that the Court exercises concurrently with the civil courts.

[82] The LAC has held[22] that when this Court exercises its jurisdiction under section 77(3) of the BCEA, as it does in this instance, the rule established by section 162 of the Labour Relations Act[23], to the effect that costs do not follow the result and must be determined by reference to the requirements of the law and fairness,

does not apply. The rule to be applied in proceedings such as the present is that costs follow the result, save in exceptional

circumstances.

[83] In casu, there are no exceptional circumstances and counsel for both parties argued for costs to follow the result. There is no reason to deprive the Applicant of its costs, including the costs of counsel, as costs should follow the result. As the Second Respondent

actively participated in the litigation, when there was no onus on it to do so and when it could have abided by this Court's decision as it is not a party to the contract the Applicant seeks to enforce, it will also be held liable for costs.

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

Order

1. The First Respondent is interdicted and restrained:

1.1. From being employed by the Second Respondent, or directly or indirectly carrying on, be interested, associated or engaged in or in any way concerned in any undertaking which carries on operations or business which is in competition with the Applicant, for a period of 1 (one) year from 1 April 2024 within the Republic of South Africa;

1.2. From divulging or disclosing to any person or making use of, directly or indirectly, any trade secrets or confidential information of any nature whatsoever concerning or in relation to the business of the Applicant, for a period of 1 (one) year from 1 April 2024; and

1.3. From offering or causing to be offered any special inducement to any person who is employed by the Applicant, to terminate his/her employment with the Applicant, for a period of 1 (one) year from 1 April 2024.

2. The Second Respondent is interdicted and restrained from, directly or indirectly, or through any affiliated company of the Second Respondent, employing the First Respondent for a period of 1 (one) year from 1 April 2024.

3. The Respondents are to pay the taxed costs of the application, including the cost of counsel, jointly and severally, the one paying the other to be absolved, on a scale as between party and party.

Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances: For the Applicant: Advocate E Nhutsve Instructed by: DMO Inc Attorneys For the Respondents: Advocate A Jacobs Instructed by: S J Naude Attorneys

- [1] [2010] ZALC 198; (2011) 32 ILJ 601 (LC) at para 36.
- [2] Basson v Chilwan and Others [1993] ZASCA 61; 1993
- (3) SA 742 (A) (Basson) at 776I-J; Magna Alloys and Research (SA) (Pty) Ltd v Ellis [1984] ZASCA 116; 1984
- (4) SA 874 (A) (Magna Alloys); Reddy v Siemens Telecommunications (Pty) Ltd [2006] ZASCA 135; 2007 (2) SA 486 (SCA) (Reddy); Den Braven SA (Pty) Ltd v Pillay and Another [2008] ZAKZHC 22; 2008 (6) SA 229 (D) (Den Braven); and Experian South Africa (Pty) Ltd v Haynes and Another [2012] ZAGPJHC 105; 2013 (1) SA 135 (GSJ) (Experian).
- [3] [2017] ZALAC 7; (2017) 38 ILJ 1302 (LAC) at paras 40 and 43.
- [4] Basson supra at 767 C-H.
- [5] 1999 (1) SA 472 (W) at 484E.
- [6] [2013] ZALCD 24; (2014) 35 ILJ 712 (LC) at para 44.
- [7] Townsend Productions (Pty) Ltd v Leech and Others 2001
- (4) SA 33 (C) at 53J-54B; Mossgas (Pty) Ltd v Sasol Technology (Pty) Ltd [1999] 3 All SA 321 (W) (Mossgas) at 333F; and Walter McNaughtan (Pty) Ltd v Schwartz and Others 2004
- (3) SA 381 (C) (Walter McNaughtan) at 389.
- [8] Labournet supra at paras 41 – 42.
- [9] [2014] ZALCJHB 177; (2018) 39 ILJ 2721 (LC).
- [10] Ibid at para 12.
- [11] Ibid at paras 15 and 19.
- [12] See: Mossgas supra at 333; and Walter McNaughten.
- [13] See: Magna Alloys supra, Basson supra, and Reddy supra.
- [14] Experian supra at para 19.
- [15] Jonsson supra at para 49.
- [16] See: Den Braven supra at 240H.
- [17] BHT Water Treatment (Pty) Ltd v Leslie and Another 1993

(1) SA 47 (W) at 57J - 58D.

[18] IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Tarita and Others 2004

(4) SA 156 (W) at 167B - C. See also: IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Hall (aka Baghas) and Another 2004 (4) SA 174 (W) at para 13.2.

[19] Reddy supra at paras 15 – 16.

[20] [2022] ZALCJHB 318; (2023) 44 ILJ 785 (LC) at para 36.

[21] Act 75 of 1997, as amended.

[22] See: Baise v Mianzo Asset Management (Pty) Ltd [2019] ZALAC 42; (2019) 40 ILJ 1987 (LAC) at para 48.

[23] Act 66 of 1995, as amended.

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