

SOUTH AFRICA / JUDGMENT

Cooper Environmental (Pty) Ltd v Kuhn and Another (J851/24: 2024/105220)

[2024] ZALCJHB 400 (18 October 2024)

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COURT

Labour Court Johannesburg

BEFORE

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CASE / FILE NUMBER

J851/24: 2024/105220

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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no. J 851 / 24

Case no. 2024 / 105220

In the matter between:

COOPERS ENVIRONMENTAL SCIENCE (PTY) LTD Applicant and CORNEY KUHN First
Respondent AGRO-SERVE (PTY) LTD t/a EFEKTO Second Respondent

Heard: 11 October 2024

Delivered: 18 October 2024

These

reasons

were handed down electronically by circulation to the parties' legal representatives by email. The date and time for hand-down is deemed to be 18 October 2024

Summary: Restraint of trade – urgency – principles considered – provisions of Rule 39 considered – Rule 39 prescribes process to be followed to enforce restraints of trade – process has compulsory time periods – restraint applicant cannot be non-suited based on urgency because of application of such time periods

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

Restraint of trade – protectable interest in the form of trade connections and confidential information considered –

protectable interest shown

Restraint of trade – breach of restraint – employment with direct competitor constitutes breach – employer entitled to mitigate risk caused by such breach – confidential information and trade connections held by employee unreasonable risk if associated with competitor – infringement of protectable interest shown

Restraint of trade – conducting of weigh off – factors considered – restraint area reasonably limited – weigh off favouring employer

Restraint of trade – restraint period – period unreasonably long – period reduced

Restraint of trade – enforcement of restraint justified

Interdict – requirements of interdict satisfied – interdict granted – restraint enforced

Costs – principles considered – costs awarded

REASONS

SNYMAN, AJ

Introduction

- [1] This judgment concerns an urgent application brought by the applicant on 7 August 2024 to enforce a restraint of trade covenant against the first respondent, who is a former employee of the applicant. The first respondent has entered into an association (agency) with the second respondent. In the application, the applicant effectively seeks an interdict against the first respondent, to prevent him from continuing his agency with the second respondent. The applicant also seeks further relief in the form of interdicting the first respondent from soliciting the custom of the applicant's customers. The second respondent has been joined by the applicant in the application only on the basis of having an interest in the matter, as a result of its association with the first respondent. Only the first respondent has opposed the application.
- [2] After hearing argument by both the parties on 10 October 2024, and considering the pleadings filed in this case, I made the following order:
- ‘1. The forms, service and periods for filing provided for in the Rules of this Court are dispensed with and this application is heard as one of urgency.
2. The First Respondent is interdicted and restrained until 30 September 2025 and within the magisterial districts of the Northern Cape and North West Provinces:

- 2.1. from becoming engaged, whether directly or indirectly, as proprietor, partner, shareholder, employee, financier, agent, consultant, or otherwise in any firm, partnership, company or trust, in any business which sells any goods/products which are dealt with by the Applicant in the ordinary course of business as at the date upon which the First Respondent's employment by the Applicant terminated;
- 2.2. from soliciting or inducing others to solicit, directly or indirectly, any customers of the Applicant or suppliers of the Applicant (including potential customers whom the Applicant has not yet contacted, but intends contacting for the purposes of doing business), for the purpose of inducing them to cease doing business with the Applicant;
- 2.3. from taking up or attempting to take up employment with any customers, past or current, and/or supplier(s) of the Applicant
3. The First Respondent is interdicted and restrained from directly or indirectly, using for his personal benefit or for the benefit of any other person, confidential information of the Applicant, which confidential information shall include, but not be limited to, information relating to the identity of Applicant's customers and trade connections and contractual arrangement with them, business model, training material and techniques, business techniques and modus operandi, marketing strategies, long and short term strategies, measures for remedying business problems, tender model, budgets, pricing structures, financial position, discount structures, profit margins, the identity of potential customers and target markets, priority structures, preferential pricing, credit terms, product positioning, future strategies and action plans.
4. The first respondent is ordered to pay the costs of this application on party and party scale A.
5. Written reasons for this order will be circulated to the parties by e-mail on 18 October 2024.
- [3] This judgment now constitutes the written reasons as contemplated by paragraph 5 of my order, above.

Urgency

- [4] The first respondent disputed that urgency had been established by the applicant in this case. It is common cause that the first respondent resigned on 28 June 2024. It appears that there was some interaction between the applicant and the first respondent about his resignation on 3 July 2024, in the course of which the applicant was informed that the first respondent intended taking up a position with the second respondent. However, the first respondent would only actually take up his position with the second respondent after his notice period expired on 31 July 2024. This gave the applicant effectively about a month to bring the first respondent to other insights, and thus avoid litigation.

- [5] The applicant therefore did not immediately launch into litigation. It first sought to try and resolve the issue by way of seeking to procure an undertaking by the first respondent that he would comply with his restraint of trade. In this regard, the applicant, though its attorneys, on 19 July 2023 requested the first respondent in writing on to undertake that he will, for the restraint period, cease and/or not become involved with any competing business, that he will not use or disclose any of the applicant's confidential information to any third party, and that he would not solicit the custom of the applicant's customers.
- [6] The first respondent answered on 23 July 2024, through his attorneys, in essence denying all the applicant's contentions, and in turn contended that his restraint of trade was invalid and unenforceable, and that he would not provide any undertakings. When the first respondent actually took up an association with the second respondent (more fully dealt with below) on 1 August 2024, the applicant's application then followed within a week after that.
- [7] Considering the aforesaid, and despite the complaint by the first respondent of a lack of urgency, I am satisfied that overall considered, the applicant met all the requirements of urgency in this matter.[1] I accept that as a general proposition, it was appropriate for the applicant to delay the institution of any legal proceedings until the first respondent's employment with it finally ended and the first respondent actually took up association with the second respondent. After all, it is the act of taking up employment with the second respondent that constitutes actual breach of the restraint of trade by the first respondent, and it is this actual breach that establishes the urgency.
- [8] In any event, the applicant's conduct in first trying to resolve this matter by way of seeking undertakings from the first respondent is appropriate, as it is advisable that parties first try and find an alternative way to secure compliance with the restraint, before resorting to litigation.[2] The applicant promptly resorted to instituting legal proceedings when this intervention was not successful. Also, and considering the nature of the relief sought, and the purpose sought to be achieved by the enforcement of a restraint of trade, there is no other form of substantial redress in due course, other than by way of this application.[3] Restraints of trade also carry with them an inherent quality of urgency.[4] I am therefore satisfied that this application should be dealt with as one of urgency in terms of Rule 38, as read with Rule 39.
- [9] The first respondent, in argument, also raised an issue that the application has only been heard some two months after it was brought, which he contended dispelled urgency. It is therefore appropriate to now deal with the brand-new Rule 39, as contained in the new Labour Court Rules.[5] It is the first time that specific regulation was adopted for restraint of trade applications. There was a good reason for doing so. Restraint of trade applications are more often than not quite vigorously opposed, with extensive affidavits being filed by the litigating parties. Where it came to applying the ordinary practice relating to urgent applications in this Court, to these kinds of restraint applications, difficulties often arose. These difficulties included the matter not being ready to be heard when the set down date arrived and parties requesting more time to file opposition and replies. Because of

complexity with the onus in restraint applications, there were often further sets of affidavits required to be filed by the parties. All this meant that time was taken up on the urgent roll and Judges preparing themselves, for matters that were simply not finally ripe to be heard, which was a waste of resources and certainly not ideal.

- [10] In order to provide a solution for the aforesaid, Rule 39 was adopted. It is prescribed in Rule 39(1) that when an application to enforce a restraint of trade is brought, the process stipulated in Rule 39 must be followed (barring exceptional circumstances). Provision must be made for four sets of affidavits.[6] Further, specific time periods are provided for the exchange of these affidavits,[7] being seven days to file an answering affidavit, five days to file a replying affidavit, and a further five days to file a fourth affidavit. Once the time period for the filing of a fourth affidavit expires, the applicant must immediately index the matter,[8] and the parties must file heads of argument within five days of such index.[9] Importantly, and when first bringing the application and seeking a hearing date from the Registrar, the applicant must account for all of these time periods, in obtaining such date. [10] And finally, the matter will only be finally enrolled for the week following the filing of heads of argument.[11]
- [11] The consequence of all the above is that any applicant seeking to enforce a restraint of trade is looking at a time period of at least 22 Court days from when the application is first brought and until it is finally heard. Added to this, and considering the congestion of the urgent Court Roll and the fact that the Registrar must have a date available for the matter to be set down, practice in this Court has shown that even considering the time periods prescribed by Rule 39 as discussed, it may take up to a further two weeks for the actual set down date. It is not unusual that restraint of trade applications are set down only six to eight weeks from when these applications are first brought. This is simply the reality of these kinds of bespoke applications. This period of delay, for the want of a better description, cannot be held against an applicant in any manner where it comes to assessing whether the requirements of urgency have been satisfied. The delay is as a result of the prescribed process under Rule 39, and in my view effectively caters for the urgent prosecution of the application in a pre-determined manner. As long as the applicant sticks to the time periods in Rule 39, the applicant would be immune from an urgency challenge because of the time taken in this process.
- [12] But what I have said above does not mean that the requirements of urgency now flies completely out of the window where it comes to restraint of trade applications. The issue of urgency and all the requirements for establishing urgency still remain very much alive and applicable, and must be satisfied, where it comes to any time taken and / or delay up to the actual bringing of the application to Court.

[13] Based on the above, the first respondent's criticism of the time taken for the application to be heard from when it was first brought is unfounded, and unjustified. The applicant, overall, has acted in a manner contemplated by Rule 39, after the application was brought. The applicant thus cannot be non-suited for want of urgency in this respect.

[14] The matter thus being urgent, and because the applicant seeks final relief, the applicant must satisfy three essential requisites to succeed, being

(a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.[12] I will commence deciding whether the applicant met these requirements by first setting out the relevant facts.

The relevant facts

[15] Most of the important facts necessary to decide this application were either undisputed or admitted.[13] Insofar as factual disputes legitimately emerge from a consideration of the first respondent's answering affidavit, I will determine these in line with the principles established in *Plascon Evans Paints v Van Riebeeck Paints*[14]. The Court in *Ball v Bambalela Bolts (Pty) Ltd and Another*[15] succinctly summarized the nature of the factual enquiry to be made as follows:

'... In *Reddy v Siemens Telecommunications (Pty) Ltd*, it was held that the reasonableness of a restraint could be determined without becoming embroiled in the issue of onus. This could be done if the facts regarding reasonableness have been adequately explored in the evidence and if any disputes of fact are resolved in favour of the party sought to be restrained. If the facts, assessed as aforementioned, disclose that the restraint is reasonable then the party, seeking the restraint order, must succeed, but if those facts show that the restraint is unreasonable, then the party, sought to be restrained, must succeed. Resolving the disputes of fact in favour of the party sought to be restrained involves an application of the *Plascon-Evans* rule ...'

[16] The summary of the facts set out below is arrived at on the basis of the application of the above principles. I may add that much the first respondent had to say constituted little more than bald denials.

[17] The applicant commenced business in 1999 and operates in what can be described as the pest control industry. The pest control industry encompasses pesticides and related products such as pest killers, pest equipment, application equipment for pesticides, electronic fly killers, disinfectants, sanitizers, disinfection equipment, rodenticides and rodent control equipment and various products for the retail market. The applicant's head office is situated in Pomona, Kempton Park and it has branch offices situated in Durban, Cape Town, Port Elizabeth and Bloemfontein. It employs some 60 employees. The applicant has a customer base throughout South Africa.

- [18] The applicant has its own range of products under the 'Coopers Ultrakill' Brand. It also has arrangements with international and multi-national companies (such as BASF, UPL and Alcochem) and markets these brands to extend its own range of product offerings. The applicant's range of products are supplied by it in the professional pest control industry, the grain storage industry as well as resellers (retailers) of pesticides for the domestic market.
- [19] The pest control industry in which the applicant operates is very competitive. The applicant has 12 main direct competitors, and one of these is the second respondent. The second respondent conducts business under the directly competing 'Efekto' product range, and also conducts business across the entire South Africa and in the same markets. The applicant and the second respondent in fact have some 39 directly competing products provided to the same kind of customer base.
- [20] The applicant's largest customers in the retail market and DIY market include Hinterland, NWK (Noord-Wes Kooperasie), Builders Warehouse, and the retail outlets of all these customers. However, a large portion of the applicant's business also lies in numerous smaller DIY shops and regional businesses that deal and retail in pesticides.
- [21] According to the applicant, goodwill of customers in the pest control industry is mainly acquired and maintained through pricing, service and good customer relationships, built over a long period of time. Personal and continuous contact between the applicant's marketing and sales personnel, and customers, is essential to the success of its business. The applicant's sales agents are thus a key component of its business, and the cornerstone of the establishment and maintenance of trade connections.
- [22] The first respondent commenced employment with the applicant on 1 October 2017 as a sales representative for the Northern Cape region. The applicant and the first respondent concluded a written contract of employment on 10 October 2017, regulating the terms of his employment. This contract of employment contained a number restraint of trade covenants and a confidentiality undertaking, as found in clause 2.28 of such contract.
- [23] In terms of the restraint of trade provisions in the contract of employment, the first respondent firstly agreed and undertook to keep all of the applicant's confidential information, confidential, and not to disclose it to any third party. Confidential information is defined as including any pricing and all customer particulars. Secondly, the first respondent agreed to a non-solicitation

obligation where it came to the recruitment of employees of the applicant for an alternative employer. Thirdly, the first respondent

agreed and undertook not to directly or indirectly compete with the applicant in any competing business. A competing business is defined as a business selling or supplying the same or similar products and / or services as the applicant. A competing activity is defined as any engagement with or interest in any competing business, which includes employment or agency. Fourthly, the first respondent agreed and undertook not to solicit the custom of any of the applicant's

customers. Save for the confidentiality undertaking, which was perpetual, all the other restraint obligations referred to above would apply for a period of two years following termination of employment of the first respondent. The restraint area was defined as: 'The area of restraint referred to shall be the Republic of South Africa and each Magisterial District thereof (as a separate restraint in each such district)'.

- [24] The first respondent was based in Upington in the Northern Cape. At the time when the first respondent's employment with the applicant ended, he was reporting to Celeste Meyer (Meyer), the applicant's National Sales and Marketing Manager based at head office. The first respondent made use of a home office. He was also the applicant's only sales representative in the Northern Cape region, which comprises the entire Northern Cape province. He was provided with the tools needed to conduct his activities, such as a laptop, cell phone, company vehicle, and fuel card.
- [25] The first respondent's principal duties were direct marketing and sales, procuring new customers, and establishing and maintaining customer relationships in his region. He was also required to be the contact between the customers and the applicant's business. He had to regularly visit customers and gather market and customer information on behalf of the applicant. He also had reporting duties, such as reporting sales, buying trends, and the particulars of customers' businesses and requirements. He would also prepare and submit quotations to customers, based on pricing information provided to him by the applicant. He needed to keep and maintain an updated customer database on the applicant's system.
- [26] The first respondent had no prior knowledge of or experience in the pest control industry, prior to joining the applicant. He was provided with extensive product training by the applicant, to the extent that he was able to provide product training at all the cooperative branches serviced by him as sales representative. He was also provided with generic sales training, which is of little moment in deciding this application, as it is not bespoke to the applicant's business.
- [27] The first respondent directly serviced 113 of the applicant's customers in his capacity as sales representative in the Northern Cape region, over the period 2017 to 2021. Most of these customers were existing customers of the applicant, however the first respondent did manage to recruit some new customers. The first respondent at all times properly discharged his duties.
- [28] In 2021, the applicant decided to move the first respondent to the North-West region. The North-West region comprises the entire North West province, Northern Free State and Southern Gauteng. The applicant had other sales representatives in the Northern Free State and Southern Gauteng regions as well, however the first respondent was the only sales representative for the applicant in the North West region. The first respondent was now based in Potchefstroom, continued to report to Meyer, and again operated from a home office.

[29] Upon being moved to the North West region, the first respondent's contract of employment did not change. Therefore, the first respondent's employment continued to be governed by his original contract of employment concluded in October 2017. Clause 2.1.1 of this contract of employment read:

'The Employee will be based at Branch or anywhere else the offices may move to. The Employee may be required to render service at any of the Company's various offices, should the need arise. The employee will use a 'home office'. Refer Annexure 'B.' (sic)

The parties also concluded such an annexure "B" in October 2017, along with the employment contract. It set out the first respondent's remuneration and benefits, first during probation and then after probation.

[30] The applicant and the first respondent did conclude a new annexure "B" on 19 September 2022, after the first respondent moved to the North West region. This new annexure "B" set out his new remuneration and benefits. It also added a further incentive bonus if set targets were achieved / exceeded. It recorded that this annexure "B" replaced all previous annexure "B"s, and concluded by reading:

'With the signature of this, the Employee accept that all the clauses of the Contract of Employment between Coopers Environmental Science (Pty) Ltd and the Employee as was updated in September 2013 and the added Annexures and Amendments that may be added from time to time to meet Operational demands.'

[31] The first respondent directly serviced 150 of the applicant's customers in his capacity as sales representative in the North West region. He did not recruit any new customers during his tenure in the region, but managed to expand the applicant's product offering sold to its existing customers that he serviced. Again, it is true that the first respondent at all times properly discharged his duties.

[32] The applicant has stated that even after his move to the North West region, the first respondent still remained in regular contact with the customers in the Northern Cape region. In fact, and as late as September 2023, the first respondent still visited and called upon those customers. It is only when the applicant appointed a new sales representative for the Northern Cape region (Stefan Buys) in September 2023, that the first respondent's contact with those customers diminished.

[33] The first respondent was allowed to remote store the contact particulars and details of all the customers he dealt with (such as on his phone), so as to facilitate ease of contact with them. That information could be readily copied. The first respondent did not dispute this, but said he did not copy anything.

[34] The applicant also maintains a database of all of its customers, to which database the first respondent had access to until 3 July 2024. This database contains all customer details and particulars, including the order history and buying patterns of each customer, as well as any specific contractual arrangement the applicant may have with a particular customer. The

database could be downloaded, and the first respondent had complete access to it by way of the applicant's Achemex and SAP systems. Again, the first respondent did not dispute this, and explained he only accessed his own customer base on the system.

- [35] In order to be kept apprised of the applicant's operations, the first respondent attended at least four management meetings per year, at head office. In these meetings, information would be shared with the first respondent concerning business and marketing strategies, measures for remedying business problems, tender model, budgets, pricing structures, financial position, discount structures, profit margins, the identity of potential customers and target markets, priority structures, preferential pricing, credit terms, product positioning, future strategies and action plans which set out the vision, mission, goals and objectives of the applicant.
- [36] The first respondent resigned on 28 June 2024, giving his one calendar months' contractual notice from 1 July 2024 to 31 July
2024. In the letter of resignation, written in Afrikaans, the first respondent makes a number of pertinent statements. He thanks the applicant for all the experience and training he received over the last seven years. He recorded that he could say with pride that he serviced the area very well and that he established 'uitstekend' (excellent) relationships with 'my' (his) customers. He also stated that he resigned because a new opportunity came across his way which would assure him a better future.
- [37] The first respondent however contended in his answering affidavit that the reasons why he resigned included that the applicant had a linear model of conducting its business and would thus stagnate in the same position in years to come, it was unlikely that he would be promoted, the CEO of the first respondent was close to retirement, and future employment with the applicant appeared uncertain. None of this was however alluded to in the letter of resignation.
- [38] The applicant's CEO, David Faber (Faber), called the first respondent upon receiving the first respondent's resignation letter. The first respondent informed Faber that he had been allocated an agency, but did not want to provide the particulars. He stated his decision was 'all about the money'. The first respondent subsequently attended at Faber's office on 3 July 2024. It is at this point that the first respondent disclosed he would be joining the second respondent. The first respondent reiterated in this meeting that he decided to leave the applicant and join the second respondent for financial considerations. Faber reminded the first respondent that he was bound by a restraint of trade.
- [39] At the time of the meeting on 3 July 2024, Faber believed the first respondent would be employed by the second respondent. It however later turned out, which was common cause, that the first respondent had taken up a sales agency with the second respondent, acting as its agent to sell all the second respondent's products into the pest control market, for commission only.

- [40] Because Faber was made aware on 3 July 2024 that the first respondent would be joining the second respondent, Faber decided not to require the first respondent to work out his notice. The first respondent then handed in his company laptop and cell phone in on 5 July 2024 and returned the company vehicle and fuel card on 10 July 2024.
- [41] On 8 July 2024, Faber contacted the applicant's current attorneys of record for legal advice on the issue of the restraint of the first respondent. A consultation was arranged for 15 July 2024. The applicant was advised that it preferable that undertakings first be sought from the first respondent. In a letter of demand on 19 July 2024, the applicant demanded that the first respondent undertake that he will, for the restraint period ending 1 August 2026, cease and/or not become involved with any competing business within the restraint area, that he will not use or disclose any of the applicant's confidential information to any third party, and that he would not solicit the custom of the applicant's customers.
- [42] The first respondent's attorneys answered this letter of demand on 23 July 2024. In this answer, it was stated that the restraint did not extend and remain binding upon relocation of the first respondent to the North-West region as the parties did not conclude any new contract of employment. It was further contended that the first respondent did not have knowledge of confidential information, that the knowledge and information he may have would not be useful to the second respondent, because he was appointed as a 'contractor' and not an employee of the second respondent, and his knowledge and experience in any event belonged to him as his right to earn a living. It was also said that the business of the second respondent was different to that of the applicant. The upshot of the answer was that the first respondent declined to end his relationship with the second respondent and refused to provide the undertakings sought.
- [43] The current urgent application then followed.

The existence of the restraint

- [44] In the answering affidavit, the first respondent contended that he was not subject to a restraint of trade for the North West region, because he never concluded a new contract of employment with the applicant when he transferred to the North West region in 2021. The first respondent stated that the document he signed on 19 September 2022 contained no reference to a restraint.
- [45] Added to the aforesaid, the first respondent appears to suggest that he signed the contract of employment containing the restraint under duress on 10 October 2017. He stated that he had already resigned from his previous position and started employment with the applicant, when he was called on to sign the contract, leaving him with little choice. He added that he would not have been able to continue his employment with the applicant if he did not sign the restraint. The suggestion is that he was thus under some sort of economic pressure to conclude the restraint, and as such, it should not be enforced against him.

[46] I will first deal with the economic pressure point raised by the first respondent. It is trite that the first respondent had the onus to prove that sufficient duress existed so as to invalidate the restraint undertakings in his employment contract.[16] To succeed, the first respondent must show the following, as set out in *Arend and Another v Astra Furnishers (Pty) Ltd*[17]:

‘... Where a person seeks to set aside a contract, or resist the enforcement of a contract, on the ground of duress based upon fear, the following elements must be established:

- (i) The fear must be a reasonable one.
- (ii) It must be caused by the threat of some considerable evil to the person concerned or his family.
- (iii) It must be the threat of an imminent or inevitable evil.
- (iv) The threat or intimidation must be unlawful or contra bonos mores.
- (v) The moral pressure used must have caused damage. ...’

[47] This economic pressure defence is a defence often defaulted to by respondent parties in a restraint of trade application, as a basis to attempt to defeat the restraint. This defence, more often than not, would not have any substance. The case in casu is yet another example of such defence with no substance. The first respondent signed the contract of employment (containing the

restraint of trade) and agreed to its terms, as far back as 2017, without raising any protest. To now contend some seven years later, when the shoe pinches because the restraint he agreed to is sought to be enforced, that he was somehow forced by circumstance to sign the restraint of trade, is an untenable proposition.[18] In addition, and because the first respondent has not even pleaded that he was specifically informed or threatened with termination of employment should he not sign the contract, he has not shown the existence of a threat of considerable evil.[19] As held in *Mac Brothers Catering Equipment (Pty) Ltd v Cunningham*[20]:

‘In his opposing affidavit it is, furthermore, contended that he was actually indirectly forced or bullied into signing the

restraint agreement in the sense that he felt that should he not sign the agreement he would be unemployed. I fail to see a proper basis for this contention to serve as a proper defence. The First Respondent had, as is the case with any employee employed by the Applicant or any other employer having a protectable interest, a free choice to sign such an agreement. The fact that he would not have been employed had he refused to sign the agreement is in my view irrelevant for purposes of any claim lodged against a breach of such an agreement. It remains a fact, despite how he felt at the stage he signed the agreement, that he, having duly alerted to the terms of the agreement, voluntarily concluded the agreement and there is no reason why it should not be enforced against him.’

[48] At best for the first respondent, his case is based on the risk of economic harm or ruin, and in this respect, the Court in *Medscheme Holdings (Pty) Ltd and Another v Bhamjee*[21] said:

‘... While there would seem to be no principled reason why the threat of economic ruin should not, in appropriate cases, be recognised as duress, such cases are likely to be rare. (The point is underlined by the dearth of English cases in which economic duress was found to have existed.) For it is not unlawful, in general, to cause economic harm, or even to cause economic ruin, to another, nor can it generally be unconscionable to do so in a competitive economy. In commercial bargaining the exercise of free will (if that can ever exist in any pure form of the term) is always fettered to some degree by the expectation of gain or the fear of loss. I agree with Van den Heever AJ (in *Van den Berg & Kie Rekenkundige Beamptes* at 795E–796A) that hard bargaining is not the equivalent of duress, and that is so even where the bargain is the product of an imbalance in bargaining power. Something more — which is absent in this case — would need to exist for economic bargaining to be illegitimate or unconscionable and thus to constitute duress.’

[49] It follows from all of the above that the first respondent has failed to make out a proper case of duress that could legitimately serve to contradict the enforcement of the restraint of trade as contained in his contract of employment. At best for him, he may have been subject to some economic duress at the time, which is not sufficient. This defence of the first respondent thus falls to be rejected.

[50] I will next deal with the contention that when the first respondent was moved to the North West region, it was required that he sign a new contract of employment. But this cannot be correct. Clause 1.4 of the contract reads: ‘The Employee acknowledges and agreed that the Company may transfer the Employee elsewhere within the Republic of South Africa should the Company deem it necessary’. The contract thus specifically provides for the move of the first respondent to the North West region, without the need for a new agreement or new contract of employment.

[51] The first respondent opportunistically said, with reference to annexure “B” which was signed by him on 19 September 2022, that it refers to an updated contract in 2013, and he signed no such contract. But as the applicant explained, what was being referred to was the employment contract template of the applicant undated in 2013, which was form of contract actually signed by the first respondent on 10 October 2017. This explanation rings true, considering the first respondent was only employed in 2017, and the annexure “B” specifically emanates from clause 2.1.1 of this main employment contract itself. In any event, a simple reading of the concluding clause in annexure “B” in my view makes it clear that the terms of the October 2017 contract are confirmed.

[52] There was no evidence or even contention by the applicant that the employment contract signed by him on 10 October 2017 was ever terminated or cancelled. On the realities, this in any event could never have been the case, for two reasons. First, the first respondent’s move to the North West region was effected in terms of the employment contract itself. It is

difficult to understand how the application of a clause in the employment contract would contemplate its termination. Second, the annexure “B” document, as touched on above, is concluded in terms of and as part of the original employment contract. It is an annexure referred to in clause 2.1.1, and is updatable from time to time. The document signed on 19 September 2022 is simply such an update, and actually records that it replaces not the contract, but all previous annexure “B”s. Thus, the original contract signed on 10 October 2017 clearly remains extant, with all its provisions, including the restraint.

[53] In the circumstances, I accept and find that a valid and binding employment contract has been concluded between the applicant and the first respondent, which is still extant, contains the restraint of trade covenant and confidentiality undertaking applicable in this case, and which restraint of trade and confidentiality undertaking is readily enforceable against the first respondent.

Restraint principles

[54] It is trite that restraints of trade are valid and binding, and as a matter of principle enforceable, unless the enforcement thereof is considered to be unreasonable.[22] A restraint of trade also does not infringe on the constitutional right to free economic activity, [23] and the first respondent’s in essence side argument that the restraint of trade infringed on his constitutional right to free economic activity thus has no merit.

[55] Whether the enforcement of the restraint of trade against the first respondent would be reasonable is dependent upon deciding the following questions set out in *Basson v Chilwan and Others*[24]:

- (a) Does the one party have an interest that deserves protection?;
- (b) If so, is that interest threatened by the other party?;
- (c) does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?; and (d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected. More recently, a further enquiry has been added, which can be called question (e), being whether the restraint goes further than necessary to protect the relevant interest.[25]

[56] This Court and the Labour Appeal Court have been consistently applying these five considerations in determining whether the enforcement of a restraint of trade would be reasonable.[26] Deciding each of these considerations is a determination on the facts of that particular case, applying, as held in *Ball supra*[27], the following approach:

‘... the determination of reasonableness is, essentially, a balancing of interests that is to be undertaken at the time of enforcement and includes a consideration of 'the nature, extent and duration of the restraint and factors peculiar to the parties and their respective

bargaining powers and interests ...'

[57] The protectable interest of an applicant in a restraint of trade can be found in one or both of two considerations, being confidential

information (trade secrets), or trade connections.[28] In *Labournet (Pty) Ltd v Jankielsohn and Another*[29] the Court held:

'... A restraint is only reasonable and enforceable if it serves to protect an interest, which, in terms of the law, requires and deserves

protection. The list of such interests is not closed, but confidential information (or trade secrets) and customer (or trade) connections are recognised as being such interests. ...'

[58] Confidential information would be:[30] (a) Information received by an employee about business opportunities available to an employer; (b) information that is useful or

potentially useful to a competitor, who would find value in it; (c) Information relating to proposals, marketing or submissions made to procure business; (d) information relating to price and/or pricing arrangements, not generally available to third parties; (e) information that has actual economic value to the person seeking to protect it; (f) customer information, details and particulars; (g) information the employee is contractually, regulatory or statutory required to keep confidential; (h) Information relating to the specifications of a product, or a process of manufacture, either of which has been arrived at by the expenditure of skill and industry which is kept confidential; and (i) information relating to know-how, technology or method that is unique and peculiar to a business. Importantly, the information summarized above must not be public knowledge or public property or in the public domain. In short, the confidential information must be objectively worthy of protection and have value.

[59] Trade connections as an interest worthy of protection would be where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he or she leaves employment and becomes employed by a competitor, the employee could easily or readily induce the customers to follow the employee to the new business.[31] Whether the employee can be seen to have the ability to exert this kind of influence, is dependent upon: (a) the duties of the employee;

(b) the employee's particular personality and skill; (c) the frequency and duration of contact between the employee and the customer(s); (d) the nature of the relationship between the employee and the customer(s) and in particular whether the relationship carried with it a notion of trust and confidence; (e) the knowledge of the employee concerning the particular requirements of the customer and the nature of its business; (f) how competitive the rival businesses are, and (d) the nature of the product or services at stake.[32]

[60] The seniority of the employee concerned is also an important consideration where it comes to evaluating the existence of a protectable interest.[33] The more senior the employee, the more likely it is that the employee would be entrenched with what can legitimately be

considered to be a protectable interest based on the above two considerations.[34] Seniority is not just the level of the employee in the organization of the erstwhile employer, but also includes factors such as the length of service, position, influence, knowledge, expertise, nature of duties, relationships and even the particular person of the employee.

The protectable interest

- [61] In my view, it is undeniable that the applicant has a legitimate protectable interest in this case. Although in essence baldly disputed, the first respondent could not really contradict this reality. It is undisputed that the industry is very competitive, with a limited availability of customers. It is also undisputed that the first respondent has now taken up a sales agency with the second respondent, marketing and selling the second respondent's competing products to the very same limited customer base. It is in my view an untenable proposition to effectively allow the first respondent to be associated with a direct competitor to the applicant, in the form of the second respondent, in such a competitive environment.
- [62] The first respondent has sought to contend that the second respondent is not really conducting business in competition to the applicant. I however have little hesitation in rejecting this contention. Even on the common cause facts, it is acknowledged that the second respondent does have a number of directly competing products with the applicant. In the replying affidavit, and in answer to this contention of the first respondent, the applicant has done an analysis of the directly competing products between the applicant and the second respondent, and has identified not less than 39 directly competing products. That certainly, in my view, establishes a competing activity as contemplated by and defined in the restraint of trade. The first respondent also adds that he would be focussing on the domestic market, and not the professional market. But this does not account for the fact that the applicant also conducts extensive business in the domestic market. I am therefore satisfied that the second respondent is a competitor to the applicant, as they share the same customer base, and provide the same services and products. The fact that the second respondent has a far broader product base including products not supplied by the applicant, does not change this. On the

first respondent's own version, he would have his own sales agency with the second respondent, in which he earns a living by selling the second respondent's products. Added to that, he only earns commission from what he sells. In this context, it would be untenable to have someone like the first respondent, especially considering the nature of the sales position that he held with the applicant, and the information about pricing and customers he had access to, take up such an association with the second respondent. This association, in the form of the first respondent's sales agency, would therefore in principle be in direct violation of the restraint of trade.

- [63] The applicant explained that its business was built over decades, and that it was only by way of long-term operation and investment in the industry that the applicant developed the necessary expertise and know how in what is a specialized industry, and also developed

valuable relationships with the applicant's customers and suppliers. It is this knowledge, relationships and information that was passed directly onto the first respondent, who had no prior knowledge of or experience in the industry. The nature of the applicant's products and services are such that information relating to its customers, as the life blood of its business, and then of course also pricing and customer arrangements, would be strictly confidential. I am satisfied that the following dictum in *SPP Pumps (SA) (Pty) Ltd v Stoop and Another*,^[35] can equally be applied to the first respondent in casu:

'In my view, the respondent acquired confidential information of the business of the applicant including personal knowledge of the customers by virtue of his duties and the relationship he had with the suppliers and customers of the applicant. It is for this reason that I am of the view that the applicant has made out a case which has not been seriously challenged. The case is that the applicant has an interest in the confidential information acquired by the respondent during his employment. There is very strong evidence that the respondent had, during his employ with the applicant, acquired confidential information which requires protection. The information which the respondent acquired, particularly the relationship with the customers, is of such a nature that when he left the applicant's employ, he posed a risk to the applicant's business if he were to join any other competitor. The level of risk rose higher when he established the second respondent and commenced conducting the business in competition with the applicant.'

^[64] Therefore, the applicant has shown that it has a protectable interest where it comes to confidential information. The confidential information is not in the public domain, has commercial value in the industry, and would be useful and valuable to a competitor such as the second respondent, as it can readily be deployed by the first respondent in his sales agency to the benefit of the second respondent. In summary, and as said in *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes and Another*:^[36]

'... The employee has intimate knowledge of the applicant's products and pricing; she is intimately acquainted with the prescribing doctors

and the patients who use the products; and she is ideally situated to persuade those doctors and patients to use the products of her new employer - ie similar products under a different brand name, supplied by Ecomed - rather than the products supplied by her old employer that they had been using hitherto. ...'

^[65] Turning then to the issue of trade connections, it is equally undeniable that the applicant has a legitimate protectable interest in this regard. This is established firstly by the very nature of the first respondent's position in the applicant and what his job description required of him. To describe it as simply as possible, the first respondent is a salesperson, required to make sales. That by necessary implication requires effective and good customer relationships. He was quite good at his job, on the common cause facts. He was required, on a day to day basis, to deal directly with the applicant's customers and would have access to confidential information about these customers. He was a trusted employee of the applicant, and it was thus expected of him to maintain and cultivate a close working relationship with

these customers. I accept that the kind of customer relationships at stake in this case, would constitute a proper protectable interest for the purposes of the enforcement of a restraint of trade.[37] In *Rawlins and another v Caravantruck (Pty) Ltd*[38] the Court said:

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

[66] As stated, the first respondent was directly responsible for selling the applicant's products in the Northern Cape and North West regions. He was the only sales representative in those regions. The bulk of the applicant's business in these regions are the smaller retailers / service providers, making relationships with the decision makers even more likely. He was effectively the face of the applicant to those customers. The first respondent also prepared quotes to customers of the applicant. In the above context, the first respondent had intimate knowledge of who the customers were, and what their requirements were. He also knew the applicant's pricing. I am satisfied that it is highly likely that the first respondent would utilise all this information where it came to conducting his sales agency for the second respondent.

[67] There is a limited availability of customers in the industry. Most of these customers were already customers of the applicant and were not recruited by the first respondent. However, and considering what is set out above, the first respondent got to know these customers, and established a close working relationship with them, so he could make sales. This is evident from the fact that in the North West province, in particular, he expanded the range of products sold to these existing customers. All this being the case, it is not hard to appreciate that for the first respondent to earn his commission in his brand-new sales agency for the second respondent, he would certainly pluck at this low hanging fruit. It cannot be ignored that the nature of the products is such that it can readily be exchanged for the competing products of the second respondent. This all exposes the applicant's customer base to material risk,

[68] I am in any event doubtful of the first respondent's bona fides. Whilst he does not dispute anything the applicant had said about the issue of his customer relationships, he simply glibly states that he 'cannot remember' all the customers on the customers lists he had, which I do not believe is a forthright answer. In addition, he was asked, even before he left employment and whilst still in notice, to provide undertakings that he would not violate his restraint of trade. It would have gone a long way for him to at least say, in answer to the request for undertakings, that he needed to have the agency to make a living, but that he would not in any way seek to solicit the applicant's customers in doing so. But instead, he had a full go at the restraint, effectively contradicting it in all respects. I believe that the first respondent would be required and could exploit trade connections, in order to make a success of his sales agency and earn a living from commissions only.

- [69] It is not even necessary to show that the first respondent actually exploited trade connections, and all that must be shown is that he could.[39] In this instance, and for the above reasons, the fact that the first respondent is in a position to exploit these trade connections cannot be gainsaid. I have little doubt that giving the first respondent free reign, would result in him approaching and dealing with the customers he dealt with whilst employed at the applicant. In my view, it is thus clear that the applicant has shown the existence of a proper protectable interest where it comes to trade connections, even if the first respondent has as yet not specifically called on a customer of the applicant.
- [70] There is also no doubt that in casu, the applicant's protectable interest has been breached, as it is now undisputed that he concluded a sales agency agreement with the second respondent to sell its products into the same customer base. Although simply denying that the information he had is confidential, the first respondent has not denied that he had access to all the information the applicant said he had access to, as summarised earlier in this judgment. There is no doubt that this information would be most useful and valuable to first respondent in his own new sales agency, and thus also indirectly to the second respondent.
- [71] I must emphasize that the conduct of the first respondent is such that he simply cannot be trusted to act honourably and comply with the terms of his restraint of trade. This is demonstrated by his opportunistic denial of the validity and / or existence of the restraint of trade. It is further demonstrated by his reaction when being asked to provide undertakings, instead of at the time rather seeking a compromise. It is also not lost on me that he stated that he would not proceed with his resignation if applicant

tripled his salary.

- [72] I am also satisfied that the applicant and the second respondent are direct competitors, sell the same products and services, and share the same kind and nature of customer base. What makes it worse is that the business is specialized, and suitable customers are in short supply. I have little hesitation in concluding that any association of the first respondent with the second respondent would be breach of the restraint. The risk to the applicant's business caused by what is summarized above is patently obvious, and that is all the applicant has to show to succeed in establishing a breach.[40] The Court in IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Hall (Aka Baghas) and Another[41] said the following:

‘Where the ex-employer seeks to enforce against his ex-employee a protectable interest recorded in a restraint, the ex-employer does not have to show that the ex-employee has in fact utilised information confidential to it - merely that the ex-employee could do so. (See International Executive Communications Ltd (Incorporated in the Netherlands) t/a Institute for International Research v Turnley and Another 1996

(3) SA 1043 (W) ([1996] 3 B All SA 648) at 1055D - F (SA).) In short, the ex-employer 'has endeavoured to safeguard itself against the unpolicable danger of the [ex-employee] communicating its trade secrets to a rival concern after entering their employ. The risk that the [ex-employee] will do so is one which the [ex-employer] does not have to run, and neither is it incumbent upon the [ex-employer] to inquire into the bona fides of the [ex-employee] and demonstrate that [he or she] is mala fide before being allowed to enforce its contractually agreed right to restrain the [ex-employee] from entering the employ of a direct competitor.'

[73] In sum, the applicant cannot be expected to trust the bona fides of the first respondent to not pass on all his trade connections and knowledge of confidential information of the applicant, effectively

to the second respondent, through the conducting of his own sales agency, especially considering the competitive nature of the

industry, the similarity and interchangeability of products, and the limited availability of suitable customers. In *Medtronic (Africa) (Pty) Ltd v Kleynhans and Another*[42], the Court held as follows:

'... It is also not incumbent upon Medtronic to enquire into the bona fides of Kleynhans and demonstrate that he is mala fide before being allowed to enforce its contractually agreed right to restrain him. In those circumstances, all that the Medtronic needs to do is to show that there is a trade connection Kleynhans could exploit should he desire to do so. The very purpose of the restraint agreement is that Medtronic did not wish to have to rely on the bona fides or lack thereof on the part of Kleynhans when he left their employ.'

[74] All said, the applicant is entitled to expect the first respondent to stay out of his association with the second respondent. It is only through the lapse of time with the first respondent remaining inactive in the particular industry that the applicant's risk will be diminished. As said in *Vumatel (Pty) Ltd v Majra and Others*[43]:

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

[75] Accordingly, I am satisfied that the applicant has succeeded in establishing a protectable interest in relation to both trade connections and confidential information, and in establishing the existence of a breach / infringement of its protectable interest by the first respondent, justifying the enforcement of the restraint of trade.

Other considerations

[76] Where it comes to the quantitative and qualitative weigh off to be conducted, the scope and period of the restraint is relevant. A shorter restraint and properly limited geographical area (if applicable) would mitigate in favour of enforcement, whilst an unduly long and broad restraint would mitigate against it.[44] It must also be considered whether the employee was possessed of the skills, expertise, qualifications and experience before joining the employer, as it could be seen as unfair in the weigh off to prevent the employee from earning a living under such circumstances.[45] In *Vumatel supra*,[46] the Court said:

‘...The nature of the industry is also an important consideration. The more specialized the industry is, the more the weigh off will favour the employer, as it limits the scope of the restraint and leaves much more avenues open to the employee to procure gainful employment in other industries. ...’

[77] In the current matter, I am satisfied the first respondent obtained all his expertise, skills and knowledge in the industry in the course of his employment with the applicant. The first respondent never made out a case that he came into employment with the applicant already possessed of his skills, experience and knowledge of and in the industry.

[78] Where it comes to the restraint period, the first respondent had the onus to provide proper information or a factual basis upon which the restraint period would be considered to be unreasonable.[47] Even though he has not really put up a case why the two years’ restraint period would be unduly excessive or unreasonable, I do consider the nature of his position at the applicant and the tasks he was required to fulfil.[48] All said, I believe that after about a year, the value of any confidential information other than customer particulars would have

sufficiently diminished so as sufficiently mitigate the risk to the applicant caused by the first respondent’s possession of the same. Where it comes to customer information and trade connections, it is my view that if the applicant cannot bed its customers down within a year, it would never be able do so. I am satisfied that the restraint period, in this case, would be unduly lengthy, and a restraint period of about a year would be reasonable. I also take into account the period it took for this application to come before Court, and I will therefore limit the restraint period, all considered, to 30 September 2025, which in my view would be a reasonable period.

[79] As to the restraint area, it is informed by the nature of the applicant’s business and the geographical scope of the activities conducted by the first respondent in the course of his employment. According to the first respondent, the restraint area as defined does not cover the North West province. But in this regard, the first respondent misconstrues the clear terms of the restraint area defined in the employment contract. Effectively, and because the

applicant is a nationwide business, and its employees can be transferred to different areas from time to time in terms of their employment contracts, the restraint area as defined in the employment contract is for all the magisterial districts in the entire South Africa. However, the applicant has not sought to enforce the restraint of trade against the first respondent for the entire South Africa. It only seeks to enforce the restraint of trade in the areas where the first respondent did his work and exclusively serviced customers. This, in my view, is a reasonable and proper approach to adopt. It means that the applicant does not seek to enforce the restraint more than is necessary, which would count in its favour in the weigh off of interests to be conducted.

[80] The applicant has no alternative remedy available to it in this instance. A future damages claim based on breach of contract would be cold comfort for business lost, in a market where customers are scarce, and competition is fierce. It is much more appropriate to take the first respondent completely out of the equation in the industry, for the restraint period, and so have the risk to the applicant dissipate as a result. An interdict is the only way this can be achieved. As held in *Esquire supra*:^[49]

‘As I have stated above, the alternative remedy of a damages claim is cold comfort to an applicant that seeks to enforce a legitimate

restraint of trade covenant. By the time a damages claim is heard, the horse had bolted and the harm is done. That harm is very

difficult to repair. I am satisfied that, where a restraint of trade is enforceable, the alternative remedy of a damages claim in due course is more apparent than real ...’

[81] The applicant has thus satisfied all the other requirements necessary for the final relief it seeks against the first respondent to be granted. In short, the weigh off favours the applicant, it faces real prejudice if relief is not granted, in the form of the risk created to it by way of the first respondent’s continued association with the directly competing business of the second respondent. The restraint period (as moderated) and restraint area is reasonable, and there is no suitable alternative remedy available.

Conclusion

[82] In summary, the applicant has demonstrated the existence of a clear right, having a legitimate and proper restraint of trade covenant in place with the first respondent, susceptible to being enforced, where it comes to both confidential information and trade connections. The applicant has also established that the first respondent is indeed infringing on such protectable interest. The weighing off of interests favours the applicant and there is no intervening issue of public interest. Finally, the applicant demonstrated the existence of an injury reasonably apprehended, and has no proper alternative remedy available to it.

Costs

[83] This then leaves only the issue of costs. This Court has a wide discretion where it comes to the issue of costs, considering the provisions of section 162(1) of the LRA. It must of course be considered that the applicant was ultimately successful, and that the current dispute is principally a contract dispute, and not an LRA dispute where ordinarily costs do not follow the result. However, there are a number of other reasons why the first respondent should be visited with a costs order in this case, which I will set out below.

[84] First, the first respondent sought to rely on the spurious issue of his restraint of trade not being valid. This shows, in my view, a lack of forthrightness. Then there is also the unacceptable manner in which the first respondent conducted himself when he was asked for undertakings, which, if properly appreciated by him, may have avoided litigation. The first respondent knew that he did wrong, but he chose to be confrontational and obstinate. Fairness dictates, in the circumstances, that the applicant should be entitled to its costs. But considering he may be without an income as a result of the order granted against him, I believe a party and party costs order at scale A is appropriate.

Order

[85] It is for all the reasons as set out above that that I made the order that I did on 11 October 2024, as set out in paragraph 5 of this judgment, *supra*.

S. Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate R Grundling

Instructed by: Maritz Smith Inc Attorneys

For the First Respondent: Mr C Meyer of Keet Attorneys

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

[2] In *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes and Another* (2012) 33 ILJ 629 (LC) at para 21 it was said that: ‘... In my view, litigants should be encouraged in any attempt to avoid litigation, rather than rushing to court as a first option.

Litigation is costly and often unnecessary. ...’.

[3] See *Maqubela v SA Graduates Development Association and Others* (2014) 35 ILJ 2479 (LC) at para 32; *Transport and Allied Workers Union of SA v Algoa Bus Co (Pty) Ltd and Others*

(2015) 36 ILJ 2148 (LC) at para 11.

[4] See Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff and Another (2009) 30 ILJ 1750 (C) at 1761; Dot Activ (Pty) Ltd v Daubinet and Another

(2023) 44 ILJ 785 (LC) at para 5; Plumbblink SA (Pty) Ltd v Legodi and Another

(2020) 41 ILJ 1743 (LC) at para 3.

[5] As published GN 4775 contained in GG 50608 dated 3 May 2024. The Rules became effective on 17 July 2024.

[6] Rule 39(2).

[7] Rule 39(3).

[8] Rule 39(9).

[9] Rule 39(1).

[10] Rule 39(4).

[11] Rule 39(11).

[12] Setlogelo v Setlogelo 1914 AD 221 at 227; V & A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd and Others 2006 (1) SA 252 (SCA) para 20. In particular, and where it comes to restraint applications, see Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronjé and Another

(2011) 32 ILJ 601 (LC) at para 38 – 40; Continuous Oxygen (supra) at para 26; Experian SA (Pty) Ltd v Haynes and Another

(2013) 34 ILJ 529 (GSJ) at para 59; Jonsson Workwear (Pty) Ltd v Williamson and Another

(2014) 35 ILJ 712 (LC) at para 54; FMW Admin Services CC v Stander and Others

(2015) 36 ILJ 1051 (LC) at para 1.

[13] Admitted facts include facts that, though not formally admitted, simply cannot be denied – see Gbenga-Oluwatoye v Reckitt Benckiser SA (Pty) Ltd and Another (2016) 37 ILJ 902 (LAC) at para 16.

[14]

[1984] ZASCA 51; 1984

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

rejecting that version on the basis that it obviously stands to be rejected.

[15] (2013) 34 ILJ 2821 (LAC) at para 14.

[16] See *Hohne v Super Stone Mining (Pty) Ltd* 2017 (3) SA 45 (SCA) at para 29; *Paragon Business Forms (Pty) Ltd v Du Preez* 1994 (1) SA 434 (SE) at 439E-G; *Savvides v Savvides and Others* 1986

(2) SA 325 (T) at 330B.

[17] 1974

(1) SA 298 (C) at 306A-C. See also *Gbenga-Oluwatoye v Reckitt Benckiser SA (Pty) Ltd and Another*

(2016) 37 ILJ 902 (LAC) at para 15; *Zondo and Others v St Martin's School*

(2015) 36 ILJ 1386 (LC) at paras 14 – 15.

[18] Compare *FMW Admin Services CC v Stander and Others*

(2015) 36 ILJ 1051 (LC) at para 34; *Buthelezi v Liberty Group Ltd* (2012) 33 ILJ 607 (LC) at para 8; *Paragon Business Forms* (supra) at 441C-I.

[19] See *Paragon Business Forms* (supra) at 440E-H.

[20] 2013 JDR 1108 (GNP) at para 20.

[21] 2005

(5) SA 339 (SCA) at para 18.

[22] *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* [1984] ZASCA 116; 1984

(4) SA 874 (A) at 891B-C; *Reddy v Siemens Telecommunications* (2007) 28 ILJ 317 (SCA) at paras 14; *Labournet (Pty) Ltd v Jankielsohn and Another*

(2017) 38 ILJ 1302 (LAC) at para 39; *Ball* (supra) at para 13; *Esquire* (supra) at para 26; *SPP Pumps (SA) (Pty) Ltd v Stoop and Another* (2015) 36 ILJ 1134 (LC) at para 26; *Shoprite Checkers (Pty) Ltd v Jordaan and Another*

(2013) 34 ILJ 2105 (LC) at para 20.

[23] *Reddy* (supra) at paras 15 – 16. See also *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* 2001

(2) SA 853 (SE) where the Court said: ‘The Constitution does not take such a meddlesome interest in the private affairs of individuals that it would seek, as a matter of policy, to protect them against their own foolhardy or rash decisions’.

[24]

[1993] ZASCA 61; 1993

(3) SA 742 (A) at 767G-H.

[25] Jonsson (supra) at para 44; Van Wyk (supra) at para 15; Esquire (supra) at paras 50 – 51.

[26] Labournet (supra) at para 42; Jonsson (supra) at para 44; Vox Telecommunications (Pty) Ltd v Steyn and Another (2016) 37 ILJ 1255 (LC) at paras 28 – 29; Shoprite Checkers (supra) at paras 23 – 24; Benchmark Signs Incorporated v Muller and another

[2016] JOL 36587 (LC) at para 15.

[27] Id at para 17. See also Labournet (supra) at para 40.

[28] Dickinson Holdings Group (Pty) Ltd and Others v Du Plessis and Another (2008) 29 ILJ 1665 (N) at para 32; Basson (supra) at 769 G – H; Bonnet and Another v Schofield 1989

(2) SA 156 (D) at 160B-C; Hirt and Carter (Pty) Ltd v Mansfield and Another (2008) 29 ILJ 1075 (D) at para 37; Esquire (supra) at para 27; Sibex Engineering Services (Pty) Ltd v Van Wyk and Another 1991

(2) SA 482 (T) at 502E-F; FMW (supra) at para 36; Vox (supra) at para 30.

[29] (2017) 38 ILJ 1302 (LAC) at para 41.

[30] See Dickinson (supra) at para 33; Jonsson (supra) at paras 46 – 49; David Crouch Marketing CC v Du Plessis

(2009) 30 ILJ 1828 (LC) at para 21; Esquire (supra) at para 29; Experian (supra) at para 19.

[31] See Rawlins and another v Caravantruck (Pty) Ltd [1992] ZASCA 204; 1993

(1) SA 537 (A) at 541D-F; FMW (supra) at paras 46 – 48; Esquire (supra) at paras 31 – 32; Experian (supra) at para 18; LR Plastics (Pty) Ltd v Pelser [2006] JOL 17855 (D) at para 26.

[32] Caravantruck (supra) at 541F-I; FMW (supra) at para 45; Aquatan (Pty) Ltd v Jansen van Vuuren and Another

(2017) 38 ILJ 2730 (LC) at para 24.

[33] See Dickinson (supra) at para 38; Stewart Wrightson (Pty) Ltd v Minnitt 1979

(3) SA 399 (C) at 404B-C; Random Logic (Pty) Ltd t/a Nashua, Cape Town v Dempster

(2009) 30 ILJ 1762 (C) at para 32; Experian (supra) at para 43; Jonsson (supra) at para 51.

[34] See David Crouch (supra) at para 21; Plumbblink (supra) at para 30.

[35] (2015) 36 ILJ 1134 (LC) at para 37.

[36] (2012) 33 ILJ 629 (LC) at para 40.

[37] In Hirt and Carter (supra) at para 37 it was held: ‘... Customer goodwill and trade connections have long been regarded as proprietary interests worthy of protection’.

[38]

[1992] ZASCA 204; 1993

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

[39] See SPP Pumps (supra) at para 30; Continuous Oxygen (supra) at para 42; Medtronic (Africa) (Pty) Ltd v Van Wyk (2016) 37 ILJ 1165 (LC) at para 30; Vox (supra) at para 31.

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

[41] 2004

(4) SA 174 (W).

[42] (2016) 37 ILJ 1154 (LC) at para 40. See also Van Wyk (supra) at para 34.

[43] (2018) 39 ILJ 2771 (LC) at para 38.

[44] Labournet (supra) at para 43; Continuous Oxygen (supra) at para 47.

[45] Automotive Tooling Systems (Pty) Ltd v Wilkens and Others

(2007) 28 ILJ 145 (SCA) at para 8; Labournet (supra) at paras 43 - 44; Jonsson (supra) at para 51.

[46] Id at para 39.

[47] Plumblink (supra) at para 50.

[48] See Waco Africa (Pty) Ltd t/a Form-Scaff v Sack and Others (2020) 41 ILJ 1771 (LC) at para 44.

[49] Id at para 40. See also Plumblink (supra) at para 48.

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