

SOUTH AFRICA / JUDGMENT

Imithetho Labour Law CC ta Labour Law Distributors v Van Eck and Others

(2024/102799)

[2024] ZAGPJHC 1252 (2 December 2024)

[2024] ZAGPJHC 1252

COURT

South Gauteng High Court, Johannesburg

BEFORE

Dosio

CASE / FILE NUMBER

2024/102799

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SAFLII

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Policy

FLYNOTES:

LABOUR

– Restraint – Confidential

information –

Employee

providing quote for competitor while still working for applicant –

Emailing clients of applicant on behalf

of competitor – Had

duty to preserve confidential information obtained during

employment – Using contact details

to solicit applicant's

clients for the benefit of competitor – Two year and 50 km

restraint reasonable and enforceable

– Respondents

interdicted from using the applicant's confidential

information and from approaching applicant's

clients.

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

	GAUTENG
	LOCAL DIVISION, JOHANNESBURG
	(1)
	REPORTABLE: NO
	(2)
	OF INTEREST TO OTHER JUDGES: NO
	(3)
	REVISED
	2
	December 2024
	CASE
	NUMBER: 2024-102799
	In
the matter between:	IMITHETHO
	LABOUR LAW CC. t/a
	LABOUR
	LAW DISTRIBUTORS
	(Registration
	number: 2008/195195/23)
	Applicant
	and
	GERMARé
	VAN ECK
	(Identity
	number: 7[...])
	First
	Respondent
	LABOUR
	LAW GROUP (PTY) LTD
	(Registration
	number: 2020/036395/07)
	Second
	Respondent
	DUNCAN
	LEE NAUDé
	(Identity
	number: 0[...])
	Third
	Respondent
Coram:	DOSIO J

JUDGMENT

DOSIO J:

Introduction

[1] This is an urgent application in terms of which the applicant seeks final relief against Germaré Van Eck (first respondent), Labour Law Group (PTY) Ltd (second respondent) and Duncan Lee Naudé (third respondent).

[2] Having decided that the matter is urgent, the parties proceeded to address me.

[3] Condonation is granted to the respondents for the late filing of the answering affidavit.

[4] The applicant seeks the following relief:

‘2. That the First, Second and Third Respondents be interdicted and restrained from:

2.1 Utilising the Applicants’ confidential information, inclusive of the Applicant’s client databases and client connections, business methods, pricing methods (including, but not limited to, the details of cost prices and mark-up), products (including, but not limited to training manuals), suppliers and know-how, for the benefit of the Respondents or any other person;

2.2 Approaching, directly or indirectly, or assisting any other person in approaching, directly or indirectly, the Applicant’s clients, as more specifically listed in Annexure “X”, attached to the Notice of Motion;

2.3 Doing business with, and servicing, the Applicant’s erstwhile client, Langplaas;

2.4 Using the Applicant’s confidential information to unlawfully compete with the Applicant whether as a labour law distributor or otherwise and to advance the business interests and activities of the Second and/or Third Respondent or any other person, in direct competition with, and to the detriment of the business interest of the Applicant;

2.5 Participating in any conduct which will have the effect of damaging the goodwill or client or business relationships of the Applicant;

2.6 Copying, transmitting or transcribing, or rendering in usable form, any of the aforementioned confidential information of the Applicant;

2.7 Making available to any other party or entity, whether in digital form or otherwise, any of the aforementioned confidential information of the Applicant;

3. That the First, Second and Third Respondents are ordered to surrender all confidential information in their possession relating to the Applicant’s business, to the Applicant’s representative, such information to include but not be limited to:

- 3.1 All the Applicant's client databases including but not limited to client and supplier lists and information indicating the primary needs of particular clients of the Applicant, identifying the type and quantity of labour law distribution services the client would be likely to purchase;
- 3.2 All pricing details and product lists pertaining to the services offered by the Applicants;
- 3.3 All documents containing details of the Applicant's business methods, strategies, operational systems, branding business systems and procedures, including training manuals.
4. That the First, Second and Third Respondents are ordered to delete, in the presence of the Applicant's representatives, all of the Applicant's confidential information on any computer hardware possessed by the Respondents.
5. Declaring that the First Respondent is in breach of her restraint of trade agreement concluded with the Applicant on 19 October 2022.
6. Declaring that the employment of the First Respondent by the Second and/or Third Respondent is in breach of the restraint of trade agreement concluded between the Applicant and the First Respondent.
7. Interdicting and restraining the First Respondent from directly or indirectly using, revealing, disclosing, or in any way utilizing for the First Respondent's own purposes, or for the purposes of any third party, including the Second and/or Third Respondent, any of the Applicant's confidential information.
8. Interdicting and restraining the First Respondent in accordance with the provisions of the restraint of trade agreement for a period of two years, from:
- 8.1 Being directly or indirectly employed by the Second and/or Third Respondent in any capacity whatsoever;
- 8.2 Being directly or indirectly associated and/or concerned with, interested and/or engaged in and/or interested herself in any firm, business, company, close corporation or other association ("entity") which is a competitor of the Applicant and who has its registered office within a 50 km radius of the registered office of the Applicant;
- 8.3 Rendering services to any person or business which is a competitor of the Applicant and who has its registered office within a 50 km radius of the registered office of the Applicant, and in particular the Second Respondent and/or Third Respondent;
- 8.4 Conducting, accepting, soliciting, canvassing or discussing business or mandates in respect of any of the services rendered by the Applicant in the ordinary course of business with and/or from any principal, supplier or client of the Applicant;
- 8.5 Encouraging or enticing to persuade any principal, supplier or client of the Applicant to terminate their relationship with the Applicant.

9. Interdicting and restraining the Second and/or Third Respondent from employing or being associated with the First Respondent in breach of the restraint of trade agreement between the Applicant and the First Respondent.
10. That the First, Second and Third Respondents pay the costs of this application, jointly and severally, the one to pay the other to be absolved, on an attorney-and-client-scale.'
- [5] The respondent contends that the restraint of trade agreement is vague and too wide as to scope, ambit and duration, and is therefore contra bonos mores.

Background

- [6] The applicant was created to provide services and training to companies that have to comply with the Occupational Health and Safety Act.
- [7] The first respondent started her employment with the applicant on 6 May 2021. On 26 July 2022, the applicant and the first respondent entered into a written agreement of employment, ('contract of employment'), in terms of which the first respondent was appointed as a training administrator/sales representative, at the applicant's Boksburg branch. Clause 36 of the contract of employment regulates the relationship between the parties regarding confidential information. On 19 October 2022, the applicant and the first respondent entered into a restraint of trade agreement ('restraint agreement').
- [8] It is alleged by the applicant that on 8 August 2024 and whilst still in the employ of the applicant, and unbeknown to the applicant, the first respondent provided a quote to the applicant's client Langplaas, on behalf of the second respondent, for similar services but at a reduced and undercut price, which was accepted and paid for by Langplaas to the second respondent.
- [9] The first respondent resigned from her employment with the applicant on 19 August 2024.
- [10] It is alleged by the applicant that on 21 August 2024, the first respondent, whilst still in the employ of the applicant, and unbeknown to the applicant, forwarded an email to various clients of the applicant from an email belonging to the second respondent. It is alleged by the applicant that in this email the first respondent encouraged the clients of the applicant to 'move with her' to a new training company with lots of discounts. It is alleged the first respondent requested that the email be treated with confidentiality. The applicant only became aware of this email on 2 September 2024.
- [11] The applicant forwarded correspondence to the first respondent on 28 August 2024, via its attorney of record, to remind the first respondent of her confidentiality obligations and restraint conditions, as per the aforementioned restraint agreement. On 30 August 2024, which was the first respondent's last day with the applicant, the first respondent was removed from the applicant's systems.

[12] On 3 September 2024, the applicant's attorney of record forwarded correspondence to the first, second and third respondents advising

them that their conduct was unlawful and allowed the respondents to give undertakings by Thursday, 5 September 2024. The applicant is of the contention that the second respondent will continue to undercut the prices of the applicant.

Common cause facts

[13] The following are common cause facts:

- (a) the express wording of the contract of employment and the restraint agreement.
- (b) that the registered address of the applicant is situated at [...] O[...] Street, M[...], Brakpan, with its head office, (principal place of business), at [...] D[...] Street, Boksburg.
- (c) that the second respondent's registered address is situated at 6[...] P[...] G[...] Avenue, Brakpan and that it has its principal place of business at 4[...] H[...] Road, S[...], Pretoria.
- (d) that the first respondent knew the identity and contact details of the applicant's clients.
- (e) that Langplaas was a client of the applicant and that the second respondent provided services to Langplaas on 7 September 2024 for which they were paid.
- (f) that the first respondent is employed by the second respondent, who also deals in labour law distribution services and was established to provide services and training to companies that have to comply with the Occupational Health and Safety Act.

Evaluation

[14] Clause 1.1 to 1.4 of the restraint agreement reads as follows:

‘ 1.1 Party 2 acknowledges that as an Employee employed by Party 1 he/she will by reason of his/her employment be in possession of and have access to most of the Company's accumulation of trade secrets, formulas, price lists, client lists, and/or other confidential information.’

1.2 It is specifically recorded by the Parties that Party 2 is employed and remunerated inter alia to have a good relationship with the clients of Party 1 at all times, and to maintain such relationship as far as possible.”

1.3 It is furthermore agreed and recorded that such relationship with the clients of Party 1 would leave the Company vulnerable, should the services of Party 2 with Party 1 be terminated for whatsoever reasons, especially if Party 2 acts in competition to the Company after the termination of his/her services.”

1.4 Party 2 acknowledges that the provisions hereinafter set out are fair, reasonable and necessary for the protection of the propriety

interest of the Company of Party 1, and that all restraints in this Agreement are for the benefit of Party 1.'

[15] Clause 1.5.3 of the restraint agreement states 'the territory shall mean radius of 50 (fifty) kilometres within the physical address of Party 1 as referred to here above'.

[16] Clause 1.8 of the restraint agreement states the following:

'In terms of the restraint of trade Party 2 specifically undertakes and agrees:

1.8.1 Not to establish, or be interested in any business in the territory, which carries on business, manufactures, sells, or supplies any commodity or goods, brokers, or acts as an agent in the sale or supply of any commodity or goods, and/or performs, or renders any service in competition with, or identical, or similar, or comparative to that sold, supplied, brokered, or performed by the Company after the termination of his/her employment by party 1;

1.8.2 Not to solicit the custom of, or deal with, or in any way transact with, in competition with the business, any business, company, firm, undertaking, association or person who has been a customer or supplier of the business in the territory; and

1.8.3 That each and every restraint in this entire Agreement shall be valid and binding for a total period of 2 (two) years, calculated from the official date of termination of the employment of Party 2 with Party 1. This restraint shall apply, irrespective of what the cause(s) and/or reason(s) for the termination of Party 2's services might have been, and also whether the fairness of the termination of Party 2's services was challenged in any way by party 2, or not.'

[17] Clause 36.4 of the contract of employment reads as follows:

'The Employee shall not, (during her employment, or after termination of her employment), be entitled, whether for her own benefit, or that of a other, to make use of, or avail herself, or to deprive profit, from any trade secrets, confidential records, and/or information, relating to the defined business of affairs of any of the Clients of her Employer, which she may have acquired by reason of her position in, or association with the business of her Employer.'

Whether the registered or physical address of the companies are applicable

[18] The applicant argued that the first respondent is in breach of the agreement as it is the registered address and not the physical address that should be considered for purposes of clause 1.5.3 of the restraint agreement.

[19] The respondent, on the other hand, argued that the reference to a physical address clearly must refer to the physical address where they conduct business, it cannot be the registered address, as the registration address of a company is simply an address for administrative purposes.

[20] A radius is, in terms of the dictionary, defined as a straight line from the centre to the circumference of a circle. The registered addresses of both the applicant and second respondent fall within the Brakpan area. The applicant's head office is based in Boksburg whereas, the second applicant's head office is based in Silver Lakes, Pretoria.

[21] In the matter of Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd [1]('Sibakhulu'), the Western Cape High Court had to determine the 'place of residence' of a company for purposes of determining which court would have jurisdiction and stated that:

'... whereas the 1973 Companies Act expressly acknowledged the possibility of a distinction between a company's registered office and its 'main place of business', the 2008 Act requires the registered office and the principal place of business for jurisdictional purposes to be at one and the same address.' [2]

'I consider that it would give effect to the purposes set out in s 7(k) and (l) to interpret s 23 of the Act to the effect that a company can reside only at the place of its registered office (which, as mentioned, must also be the place of its only or principal office).'

[3] [my emphasis]

[22] Although the matter of Sibakhulu [4] dealt with jurisdiction, the same principle can be applied for purposes of territory in terms of a restraint agreement.

[23] The registered office of the applicant is situated at [...] O[...] Street, M[...], B[...] and the registered office of the second respondent is situated at 6[...] P[...] G[...] Avenue, Brakpan. Both companies are resident in Brakpan and therefore the second respondent is resident within a 50-kilometer radius of the applicant.

[24] Even if this Court is wrong, if one looks at the 'physical business addresses' of the parties and not the registered addresses and one measures the distance, in a straight line, from the business address of the applicant, situated at 41 David Street, Boksburg, to the second respondent's business address, situated at 49 Hadedda Road, Silverlakes, then, according to Google Maps, it measures 50.406 kilometres. The respondent's argument that the address falls 0.406 kilometres outside the 50-kilometer radius is negligible. A few hundred meters beyond the radius is irrelevant. For purposes of the agreement, 406 meters cannot be a limit to the applicant not enforcing the agreement.

Whether the restraint of trade is too wide and against public policy

[25] The applicant argued the restraint agreement is not too wide and is not against public policy. The applicant contended that it does not merely seek to enforce the restraint agreement for the sake of restricting fair competition, but also to legitimately protect the applicant's protectable proprietary interest. Reference was made to the case of *Slo Jo Innovation (Pty) Ltd v Bendle and Another* [5].

[26] The respondents allege that the agreement is too wide and contrary to public policy and therefore unenforceable, alternatively

unsustainable in law. Furthermore, there is no proprietary interest or confidential information known to the respondents that is indeed protectable, and no enforcement of a restraint of trade should be allowed. It was argued not only has the applicant failed to identify or describe any 'confidential information' worthy of that name in the legal sense, it is also clear that the applicant has 'unclean hands'. In addition, a two-year period as mentioned in the restraint agreement is contra bona mores, rendering the agreement invalid and unenforceable, restricting fair competition.

[27] The respondent's counsel referred this court to the matter of *Reddy v Siemens Telecommunications Ltd* [6], where the Supreme Court of Appeal pointed out that the incidence of onus plays no role in the question whether a restraint is reasonable or not on a given set of facts, since answering that question calls for a value judgment.

[28] In the matter of *Labournet (PTY) Ltd v Jankielson & Another* [7] ('Labournet'), the Labour Appeal Court held that:

'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 [see *Ball v Bambalela Bolts (PTY) Ltd and Another* (2013) 34 ILJ 2821 (LAC) para 14] [8]'

'According to the Appellate Division in *Basson v Chilwan and Others* [1993] ZASCA 61; [1993 (3) SA 742 (A) at 767 E-I] 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.... If the interest of the party to be restrained outweighs the interest of the restrainer – the restraint is unreasonable and

unenforceable.’ [9][my emphasis]

‘... 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.’ [10]

[29] The purpose of a restraint agreement is to limit the ability of an employee to accept future employment to the detriment of the current employer.

[30] It is trite law that covenants in restraint agreements are valid and become unenforceable when their enforcement would be contrary to public policy. A clause in a restraint agreement will be enforceable if there is an interest that requires protection.

[31] A protectable proprietary interest as per the decision of Labournet [11] is usually in the nature of trade secrets, know-how, pricing or customer connections and therefore, a restraint agreement would be an enforceable restriction on the activities of an employee who had access to the company’s customers and who used such relations with the company’s customers to the advantage of a competitor and to the detriment of the company.

[32] In order to protect the applicant's confidential information by way of an interdict, the applicant needs to allege and prove the following:

- (a) that the applicant has a proprietary interest in the confidential information;
- (b) that the information has the necessary quality of confidentiality;
- (c) that there is a relationship, usually contractual, between the parties which imposes a duty (expressly, impliedly or tacitly) on the respondent to preserve the confidence of the information. An example of a contractual relationship is that between employer and employee;
- (d) that the second respondent is in direct competition with the applicant and obtained the information in an improper manner; and
- (e) that the first respondent had knowledge of the confidentiality of the information and its value;
- (f) that there has been improper possession and use of the information by the respondents; and
- (g) that damages have been suffered by the applicant.

[33] The respondents contend that if the applicant chooses to call something ‘secret’ or ‘confidential’ it does not per se make it so. Reference was made to the case of *Telefund Raisers CC v Isaacs and Others* [12]. It was further argued that the first respondent is no longer in the employ of the applicant and that slightly different principles apply both in relation to the adjudication of proprietary interests and what an employee may do.

[34] A protectable proprietary interest by implication can include customer connections and pricing. In the matter of *Refinery Post Production Facilities (Pty) Ltd v Lautre* [13] (‘Refinery’) the Labour Court noted that:

‘The Court in *Square One Power Solutions* [

[2004] ZAFSHC 11] quoted with approval *Easyfind International v Instaplan Holdings* [(1983(3) SA 917) (W)] that “our law also recognizes certain categories of information or documents as being of a confidential

nature. A customer’s list is one such type of document.’

[14] [my emphasis]

[35] In the matter of *Pam Golding Properties v Neille* [15], the Court recognised that the details of sellers and potential buyers constitute a proprietary interest in the hands of the applicant. [16]

[36] The onus is on the respondents to satisfy this court that the applicant does not have a proprietary interest. In the matter of *Digicore Fleet Management v Steyn* [17] (‘Digicore’), the Supreme Court of Appeal stated that:

‘It is now trite that provisions in restraint of trade are enforceable unless shown by the person wishing to escape an undertaking to be unreasonable and hence contrary to public policy. It is not necessary to rehearse the principles that have been set out by this and other courts governing agreements in restraint of trade. Suffice it to say that Steyn, in order to escape her contractual undertaking, must show that Digicore has no proprietary interest that is threatened by her working for a competitor of Digicore.’ [my emphasis]

[37] It is common cause that the first respondent knew the identity and contact details of her clients and it is to be accepted that the applicant has a proprietary interest in its customer connections, as the applicant has spent considerable time and money to build its client base. It is also common cause that the first respondent is currently employed by the second respondent and there exists a relationship between these parties which imposes a duty (expressly, impliedly or tacitly) on the first respondent to preserve the confidence of the information obtained during the course of her employment with the applicant.

[38] The first respondent not only has knowledge of the customer details of the applicant, but has knowledge of how discounts and charges were imposed on the applicant’s existing clients, thereby affecting the price that the applicant would charge for its services.

[39] The first respondent sent an email to various of the clients of the applicant from an email address belonging to the second respondent. Had the first respondent's intentions been so pure she would not have stated in her email the following, namely:

‘Please keep this mail confidential as I am sending this mail to you discreetly and in all confidence.’ In addition, the e-mail encourages these clients to ‘move with her’ and that she will ensure that she will continue to service these clients and get them ‘even better prices of course’... ‘and give the new company I am joining a chance to do better in all aspects’. [my emphasis]

From the wording of this email, it is clear to this Court that the first respondent understood and had knowledge of the confidentiality of the information and the value of the information, especially in respect to pricing.

[40] Notwithstanding the proprietary interest the applicant had with the client Langplaas, the first respondent, whilst still in the employ of the applicant sent out an invoice on 25 July to Langplaas whilst fully aware of what services Langplaas required and also what price the applicant would charge for these services. In addition, whilst still in the employ of the applicant, with the knowledge she had, she sent out on 8 August 2024, on behalf of the second respondent to Langplaas, exactly the same services invoiced by the applicant, but at an undercut price, without the knowledge of the applicant.

[41] The first respondent, whilst an insider and working for the applicant, divulged this confidential information to the second respondent thereby causing damage to the applicant. It is common cause that the applicant and the second and third respondents are in direct competition with each other.

[42] There is a major difference between various companies approaching a potential client as compared to an insider of the applicant, such as the first respondent, with the knowledge she had and whilst still working for the applicant, to use such information for the benefit of a direct competitor, namely, the second respondent.

[43] This Court is aware of the decision of *Basson v Chilwan* [18], where the Appellate Division, as it then was, stated that if one weighs the competing interests, qualitatively against the interests

of the other with the result that the defendant will be economically inactive and unproductive, then the court should lean towards the invalidity of the document. The second and third respondents have an existing client base. To prevent the first respondent, in terms of the restraint agreement, from using the applicant's client base, as well as information pertaining to how the applicant dealt with its pricing, is not unreasonable.

[44] In light of the principles set out in *Digicore* [19], I am not satisfied that the first or second respondent have discharged this onus or that the restraint agreement is *contra bonos mores*.

- [45] This Court is not implying that the first respondent cannot use what she has learnt and what is in her head. An ex-employee will always retain some knowledge of their former employer. It is clear that such an employee cannot unlearn the skills they have derived. The first respondent is free to use and disclose such generally used recollected knowledge in her own interests and those of anyone else, including a new employer, provided that she does not take confidential information with her.
- [46] In the matter in casu, the first respondent did take confidential information to a direct competitor.
- [47] This Court does not find that the contract of employment and the confidentiality clause the first respondent signed is invalid or unenforceable. Even if this Court is wrong and the restraint agreement is declared invalid, the fact remains that clause 36.4 of the contract of employment is not limited by time or territory.
- [48] The second respondent has not given a convincing explanation how it came to service Langplaas. As a result, this Court must accept that the first respondent, whilst still in the employ of the applicant, unlawfully sent the applicant's pricing in respect of Langplaas to the second respondent.
- [49] The first respondent had a duty to preserve the confidence of the information she obtained during the course of her employment with the applicant. The applicant spent a considerable amount of time and money to build up its client base. The first respondent cannot now use the contact details of the applicant to solicit its clients for the benefit of the second and third respondents. The respondents contend that the first respondent had a contractual obligation to maintain a good relationship with the clients of the applicant at all times. This may be so, but such relationship ended when the first respondent stopped working for the applicant. To send an e-mail indicating that she would be moving and that the applicant's clients must move with her goes way beyond maintaining a good relationship. In fact, it is detrimental to the applicant.
- [50] Even if the second and third respondents did not know that the first respondent sent this e-mail to existing clients of the applicant, the fact remains that the second and third respondents would in any event benefit from this once the first respondent started working for them, as these clients would have already followed the first respondent to her new employment.
- [51] A restraint agreement should not place an unreasonable restraint on an employee to seek new employment. The restraint agreement does not extend to the whole of South Africa, therefore the first respondent could have applied her mind to seek employment outside the radius of 50 kilometres. She could have sought employment in any other area of Gauteng or South Africa as a training administrator or sales representative without being in breach of her restraint of trade agreement. Neither does the restraint agreement prevent the first respondent from using the skills she derived whilst working for the applicant, or the skills derived since 2014. The restraint agreement is merely to prevent the first respondent from

contacting the applicant's clients and dispersing confidential information she derived whilst working for the applicant.

- [52] The respondents contend that annexure X to the notice of motion is evident that the applicant seeks a nationwide protection from free trade and competition, to which it is not entitled and which should not be countenanced. In other words, the applicant is attempting to quash competition. The second and third respondents contend that annexure X is virtually a 'who's who of the JSE listed companies'. It is true that in annexure X there are certain companies which have offices nationwide, for example Spar, Shoprite, PG Glass, Spur Corporation, KFC, Goldwagen, Ackermans, WBHO, Yokohama, Hudaco, RCL Foods, PSG, Bidvest, Pioneer Foods, CTM and Bell Equipment. The second respondent stated that it has been doing business with certain of these companies. The interdict the applicant seeks is to prevent the second and third respondents from approaching, directly or indirectly, or assisting any other person in approaching, directly or indirectly, the applicant's clients, as more specifically listed in annexure 'X'. There is nothing wrong with the wording of this request. If there is an existing relationship between the second and third respondents with any of the companies listed on annexure X, then there is nothing preventing these companies, themselves, in approaching the second and third respondents.
- [53] As regards the issue raised by the respondents that two years is contra bonos mores, this Court does not agree. The first respondent was fully aware of the two years stipulated when she signed the agreement. To now state that it is contra bones mores is non-sensical.
- [54] Despite a request by the applicant that the respondents give an undertaking that they would not unlawfully compete or unlawfully use the information the first respondent derived from the applicant, no such undertaking was forthcoming. The only undertaking given was in the answering affidavit where it was stated that the first respondent would not be assigned to any of the clients she had dealt with whilst in the employee of the applicant. However, there is no undertaking that the first respondent would not make contact with the clients. There was also no undertaking with regard to the clients of the applicant that the first respondent had already contacted in the e-mail dated 21 August 2024 and what the situation would be when the clients, contacted by the first respondent, responded to that e-mail.
- [55] This court finds the first respondent breached the restraint agreement in that:
- (a) she joined a direct competitor of the applicant, namely the second respondent, within the two years of restraint.
 - (b) she joined a direct competitor of the applicant whose registered address is situated within a 50-kilometre radius of the applicant's registered address.
 - (c) The first respondent solicited the clients of the applicant for the advancement of the business of the second and third respondents who are in direct competition with the applicant, an example being Langplaas.

- [56] The misuse of confidential information to advance one's own business interest and activities at the expense of a competitor constitutes unlawful competition. [20] An interdict is the preferred remedy for unlawful competition.
- [57] The applicant has succeeded to demonstrate to this court that the first respondent was privy to confidential information of the applicant and that with this knowledge, prices were undercut by the second respondent, resulting in the client Langplaas accepting the quote and services of the second respondent.
- [58] Accordingly, this Court finds that the restraint agreement is reasonable and enforceable. The applicant has successfully sought to enforce the restraint agreement to protect its legitimate proprietary interests.

Final relief/ interdict

- [59] In the matter of Refinery [21], the Court held that in order for a restraint covenant to be enforced by way of a final interdict, an employer has to show that there is a valid restraint agreement and that the same has been breached or there is a reasonable apprehension that same will be breached and that the employer will suffer irreparable harm. Thereafter, the onus shifts to the employee to show that the covenant is either invalid or unenforceable because it is unreasonable and/or because it is against constitutional values and public policy. [22]

Clear right

- [60] The requisites for a final interdict were stated in *Setlogelo v Setlogelo* [23] , as follows:

‘The requisites for the right to claim an interdict are well known; a clear right, injury actually committed or reasonably apprehended, and the absence of similar protection by any other ordinary remedy.’

- [61] This Court has already found that the restraint agreement has been breached and that it is not contra bonos mores. This Court has also found that there has been confidential information of the applicant which was used by the first respondent. Even if this Court is wrong in regard to the issue of confidential information, in the matter of Refinery [24] the Court stated that:

‘The applicant avers that it has a protectable interest both in the form of confidential information that if disclosed to the respondent’s

new employer would be detrimental to their business and secondly that the respondent has customer connections which if exploited by her new employer would cause irreparable harm to the applicant. I believe it should be mentioned from the outset that both of these do not have to be present in order for the applicant to show that it has a protectable interest. If one is shown to exist, and not the other, the applicant would still have a protectable interest.[25] [my emphasis]

And further

‘The respondent herein raises a few grounds in defence of whether her conduct would amount to unlawful competition. The first being that the information taken was not confidential. The Court in Square One Power Solutions (supra) went further to state that the absence of confidentiality does not militate against the applicant’s clear right. The applicant has a right to the goodwill of its business and to the protection of such right against wrongful infringement.’[26] [my emphasis]

[62] The Court in Refinery [27] stated further that:

‘[39] Once the applicant has established that it has a clear right, the Court needs to determine whether the applicant will suffer

irreparable harm and whether there is an appropriate alternative remedy but for the interdictory relief sought. Steenkamp J, stated

the following in his judgment of Continuous Oxygen Suppliers [28]:

‘I have come to the conclusion that the restraint of trade agreement is enforceable and that the applicant has interests worthy of

protecting. It is axiomatic that the applicant will suffer irreparable harm if it is not enforced. The potential harm caused by an employee who is in a position to divulge trade secrets to and exploit customer connections in favour of her new employer cannot be easily remedied by a damages claim in due course.’[29]

‘... The obvious 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 likely to be heard, the horse would have bolted and the harm would have been done. That harm is very difficult to repair.’ [30]

[40] Therefore the applicant has shown that it has a protectable interest that if not enforced will cause irreparable harm to its business. The applicant should not be denied urgent relief because it has an alternative remedy in due course, because such a remedy will be cold comfort.’ [my emphasis]

[63] As stated the applicant has a clear right in that the first respondent’s conduct is in direct breach of not only the restraint agreement but also the confidentiality clause in the contract of employment and the applicant has demonstrated that it has a protectable interest in the form of confidential information which includes the applicant’s customer details.

Actual harm or the reasonable apprehension of harm

[64] The first respondent does not have the applicant's permission to be in possession of the information or to make use of the information and has used the information in an improper manner. It has already been shown that the first respondent used the contact details of the applicant's client, Langplaas, to solicit this client of the applicant. There is also the reasonable apprehension of harm that all the other clients contacted in the email dated 21 August 2024, may still approach the first respondent.

- [65] The first respondent has used the applicant's client's contact details to solicit them. This was done purely for the advancement of the business of the second and third respondents, resulting in the undercutting of the prices of the applicant which has been manifested in the agreement concluded between the second respondent and Langplaas.
- [66] The applicant has suffered damages as a result of the first, second and third respondents' actions, and will continue to suffer irreparable harm if the first respondent continues to disclose the applicant's confidential information to the second or third respondent.
- [67] The applicant has made out a proper case for the protection of its confidential information by way of an interdict, as the harm already caused cannot be easily remedied by a damages claim in due course.

The absence of similar protection by any other ordinary remedy

- [68] The lead times for civil trials in this division is approximately five years. This means that a damages claim cannot be heard for some time, thereby allowing the harm caused to continue. This is not a tenable situation.
- [69] As a result, this court finds that the applicant has adduced all the requirements necessary for a final interdict to be granted.
- [70] This court has borne in mind the provisions as set out in the matter of Plascon-Evans Paints (TVL) Ltd. V Van Riebeck Paints (Pty) Ltd [31], where the Supreme Court of Appeal noted the following with regard to a dispute of fact:

'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's

affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.

The power of the court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or bona fide dispute of fact.'

- [71] This Court does not find that the respondents have raised a real, genuine or bona fide dispute of fact regarding the fact that the applicant does not have confidential information to protect. This Court finds that the confidential information extends beyond just mere training manuals. Neither does this Court find the allegations of the applicant, pertaining to the existence of confidential information, as being vague and unsupported.

Costs

[72] The general rule in matters of costs is that the successful party should be given his costs, and this rule should not be departed from except where there be good grounds for doing so, such as misconduct on the part of the successful party or other exceptional circumstances.
[32]

[73] This court is aware that this matter was on the roll the prior week and that it was struck off and placed on the roll on 1 October 2024, before this court, in order to allow the respondents to upload their answering affidavit. The late filing of an answering affidavit in an urgent court should not be a ground to order that punitive costs be paid for this. It is inevitable that in urgent court proceedings pleadings of this nature require proper attention before filing such pleadings.

Order

[74] In the premises the following order is made:

1. The First, Second and Third Respondents are interdicted and restrained from:

1.1 Utilising the Applicants' confidential information, inclusive of the Applicant's client databases and client connections, business methods, pricing methods (including, but not limited to, the details of cost prices and mark-up), products (including, but not limited to training manuals), suppliers and know-how, for the benefit of the Respondents or any other person;

1.2 Approaching, directly or indirectly, or assisting any other person in approaching, directly or indirectly, the Applicant's clients, as more specifically listed in Annexure "X", attached to the Notice of Motion;

1.3 Doing business with, and servicing, the Applicant's erstwhile client, Langplaas;

1.4 Using the Applicant's confidential information to unlawfully compete with the Applicant whether as a labour law distributor or otherwise and to advance the business interests and activities of the Second and/or Third Respondent or any other person, in direct competition with, and to the detriment of the business interest of the Applicant;

1.5 Participating in any conduct which will have the effect of damaging the goodwill or client or business relationships of the Applicant;

1.6 Copying, transmitting or transcribing, or rendering in usable form, any of the aforementioned confidential information of the Applicant;

1.7 Making available to any other party or entity, whether in digital form or otherwise, any of the aforementioned confidential information of the Applicant;

2. The First, Second and Third Respondents are ordered to surrender all confidential information in their possession relating to the Applicant's business, to the Applicant's representative, such information to include but not be limited to:

- 2.1 All the Applicant's client databases including but not limited to client and supplier lists and information indicating the primary needs of particular clients of the Applicant, identifying the type and quantity of labour law distribution services the client would be likely to purchase;
- 2.2 All pricing details and product lists pertaining to the services offered by the Applicants;
- 2.3 All documents containing details of the Applicant's business methods, strategies, operational systems, branding business systems and procedures, including training manuals.
3. The First, Second and Third Respondents are ordered to delete, in the presence of the Applicant's representatives, all of the Applicant's confidential information on any computer hardware possessed by the Respondents.
4. The First Respondent is in breach of her restraint of trade agreement concluded with the Applicant on 19 October 2022.
5. The employment of the First Respondent by the Second and/or Third Respondent is in breach of the restraint of trade agreement concluded between the Applicant and the First Respondent.
6. The First Respondent is interdicted and restrained from directly or indirectly using, revealing, disclosing, or in any way utilizing for the First Respondent's own purposes, or for the purposes of any third party, including the Second and/or Third Respondent, any of the Applicant's confidential information.
7. The First Respondent is interdicted and restrained in accordance with the provisions of the restraint of trade agreement for a period of two years, from:
- 7.1 Being directly or indirectly employed by the Second and/or Third Respondent in any capacity whatsoever;
- 7.2 Being directly or indirectly associated and/or concerned with, interested and/or engaged in and/or interested herself in any firm, business, company, close corporation or other association ("entity") which is a competitor of the Applicant and who has its registered office within a 50 km radius of the registered office of the Applicant;
- 7.3 Rendering services to any person or business which is a competitor of the Applicant and who has its registered office within a 50 km radius of the registered office of the Applicant, and in particular the Second Respondent and/or Third Respondent;
- 7.4 Conducting, accepting, soliciting, canvassing or discussing business or mandates in respect of any of the services rendered by the Applicant in the ordinary course of business with and/or from any principal, supplier or client of the Applicant;
- 7.5 Encouraging or enticing to persuade any principal, supplier or client of the Applicant to terminate their relationship with the Applicant.

8. The Second and/or Third Respondent are interdicted and restrained from employing or being associated with the First Respondent in breach of the restraint of trade agreement between the Applicant and the First Respondent.
9. The First, Second and Third Respondents are to pay the costs of this application, jointly and severally, the one to pay the other to be absolved.

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JUDGE OF THE HIGH COURT

JOHANNESBURG

APPEARANCES

ON BEHALF OF THE APPLICANT: Adv. K Potgieter Instructed by Chris Janeke Attorneys ON

BEHALF OF THE RESPONDENT: Adv. S Davies Instructed by JW Wessels and Partners Inc

[1] Sibakhulu Construction (Pty) Ltd v Wedgewood Village Golf Country Estate (Pty) Ltd (27956/2010)

[2011] ZAWCHC 439 (16 November 2011)

[2] Ibid para 19

[3] Ibid para 23

[4] Ibid

[5] Slo Jo Innovation (Pty) Ltd v Bendle and Another (J737/22)

[2022] ZAL, CJHB 310 (9 November 2022) para 46

[6] Reddy v Siemens Telecommunications Ltd 2007

(2) SA 486 SCA

[7] Labournet (PTY) Ltd v Jankielson & Another (2017) 38 ILJ 1302 (LAC)

[8] Ibid para 41

[9] Ibid para 42

[10] Ibid para 43

[11] Ibid

[12] Telefund Raisers CC v Isaacs and Others 1998

(1) SA 521 at 528E-G

[13] Refinery Post Production Facilities (Pty) Ltd v Lautre (J1836/18)

[2018] ZALCJHB 263 (16 August 2018) at paragraph 46

- [14] Ibid para 46 (see also Square One Power Solutions [2004] ZAFSHC 11 at para 12)
- [15] Pam Golding Properties v Neille [2017] ZAGPJHC (28 July 2017)
- [16] Ibid para 12
- [17] Digicore Fleet Management v Steyn 2009] All SA 442 (SCA)
- [18] Basson v Chilwa 1993(3) SA 742 (A)
- [19] Digicore (note 17 above)
- [20] see Amler's Precedents and Pleadings, 9th Edition, Page 367)
- [21] Refinery (note 13 above)
- [22] Ibid para 16
- [23] Setlogelo v Setlogelo 1914 AD 221
- [24] Refinery (note 13 above)
- [25] Ibid para 26
- [26] Ibid para 43
- [27] Ibid
- [28] Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjies and Another
(2012) 33 ILJ 629 (LC)
- [29] Ibid para 49
- [30] Ibid para 50
- [31] Plascon-Evans Paints (TVL) Ltd. V Van Riebeck Paints (Pty) Ltd (53/84)
- [1984] ZASCA 51
- [32] See Myers v Abramson 1951(3) SA 438 (C) at 455

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