

SOUTH AFRICA / JUDGMENT

K2014266944 South Africa (Pty) Ltd t/a Hyperion Development v Govender (22420/2024) [2025] ZAWCHC 225 (23 May 2025) [2025] ZAWCHC 225

COURT

Western Cape High Court, Cape Town

BEFORE

Mangcu-Lockwood

CASE / FILE NUMBER

22420/2024

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FLYNOTES:

LABOUR – Restraint – Protectable
interest –
Respondent's
access to confidential information – Admissions strategies,
pricing models, and student leads –
Constitutes trade
secrets and goodwill worthy of protection – Restraint's
purpose was to prevent potential misuse
of confidential
information and not just actual misuse – No unreasonableness
in restraint's scope or duration
– Applicant proved a
protectable interest and a breach of restraint – Final
interdict granted.
IN THE HIGH COURT OF
SOUTH AFRICA
(WESTERN CAPE
DIVISION, CAPE TOWN)
Case No: 22420/24
In

the matter between: K2014266944
SOUTH AFRICA (PTY)
LTD
Applicant
t/a
HYPERION DEVELOPMENT
(Registration
No: 2014/266944/07)
and
SINISHEN
GOVENDER
Respondent
(ID
No: 8[...])

JUDGMENT

DELIVERED ELECTRONICALLY ON 23 MAY 2025

MANGCU-LOCKWOOD, J

A. INTRODUCTION & BACKGROUND

[1] This is an application for enforcement of the terms of a restraint of trade agreement between the applicant and the respondent. The applicant seeks an order interdicting the respondent from rendering services to a company called Project Y, or any entity conducting

similar business, for a period of 12 months from the date of the order, alternatively for a period of 12 months commencing on 10 July 2024 which was the termination date of the respondent's employment at the applicant.

[2] The applicant operates in the field of Education Technology – what the industry calls EdTech – and provides online education

platforms for people to acquire or improve skills in various fields, including software engineering in several programming languages and database frameworks. It is one of only three businesses of its size and reach in the South African education market, the others being Get Smarter and Master Start.

[3] Students apply for admission and are accepted into the applicant's bootcamps, which are intensive courses. One of the vital elements of its business is the cultivation of relationships with these students, from the admissions stage until after their studies, as the students put to use their newly acquired skills.

[4] The respondent commenced employment at the applicant on 1 June 2021, and was employed as Head of Admissions, Collections and Student Success, which was a senior managerial post. His responsibilities are described in annexure B to the employment contract between the parties dated 23 April 2021, and were later augmented in a guidance document, which is also attached to the papers. Amongst other things, he was tasked with

managing the admissions and setting the admissions policy, including developing innovative student payment options such as student loan financing, forecasting revenue from admissions, and ensuring that the applicant's business to customer admission strategies were effective.

[5] As part of the management team of the applicant, the respondent was responsible for contributing to shaping and managing the company

culture, scaling a sales team from South Africa to multiple markets, collaborating with the CEO and management team on strategic planning, and refining the generation of leads and tracking processes of the applicant.

[6] Some of his responsibilities included data analysis to understand application registration flow, quality, team productivity and

conversion rates; building and maintaining strong relationships with finance partners; staying informed about competitors in the education technology and higher education space; and identifying new business opportunities in current and planned markets. He was also in charge of bootcamps described as Full Stack Developer and Data Science.

[7] On 10 April 2024, the respondent gave three months' notice of his resignation, and his employment terminated on with effect from 10 July 2024. It is common cause that part of his contract of employment at the applicant included a restraint of trade agreement, also dated 23 April 2021 when he started employment there.

[8] The terms of the restraint are common cause. Clause 16 precludes the respondent from seeking employment, or becoming employed by or contracted to, any 'Competitor' of the applicant during 'the Restraint Period', all of which are defined terms. A 'Competitor' is any "entity which engages in commercial and/or economic competition with the [applicant] with the same or similar Business as the [applicant]";[1]the applicant's 'Business' is defined by reference to 20 core features; and the 'Restraint Period' is "a period of twelve (12) months after the ...date on which the [applicant's] employment with the [respondent] is terminated". [2]

[9] On 1 July 2024, whilst the respondent was serving his three months' notice of termination, the applicant experienced a security breach targeting one of its platforms called Nutshell, a key element to the applicant's business which is managed by the team that was led by the respondent. Nutshell is a system used by the applicant to manage leads, which are the identities and details of students who have indicated an interest in taking one of the courses offered by the applicant. According to the applicant's investigations, an unauthorised user gained access to the system using the respondent's login details, and downloaded a file,

which had previously been exported on 11 June 2024 by also using the respondent's login details.

- [10] After his resignation from the applicant, the respondent became associated with an entity trading under the name "Project Y". According to the respondent, Project Y is the brand name of a German entity, Y Nation UG, that through its German subsidiary, SA Future Talents, funds a small number of disadvantaged, unemployed South Africans through a model similar to an income share arrangement.
- [11] According to the LinkedIn profile for Project Y, the business has existed since at least October 2023, or at the earliest, May 2023. In the same profile, the respondent is described as 'Co-Founder and Chief Operations Officer' of Project Y, who is a "renowned ed tech celebrated for his transformative impact on the educational technology landscape. [The respondent] has played a pivotal role in scaling some of the industry' most innovative companies from startup phases to successful acquisitions...". On the basis of this information the applicant states that the necessary implication is that the respondent took an active role in the founding of the business whilst still employed by the applicant.
- [12] On 13 August 2024 Mr Moola of the applicant sent an e-mail to the respondent, advising that he had become aware of his involvement as a co-founder of Project Y, which he regarded as a direct competitor to some of the applicant's business, in contravention of the restraint of trade, and asking him to sever his relationship with that business.
- [13] The respondent replied on 16 August 2024, seeking clarity regarding the alleged breach, and also requesting documents relating to a similar matter which was referred to in the e-mail of Mr Moola of 13 August 2024. There was further exchange of communication, to and fro, from 13 August 2024 until 12 September 2024 when the applicant's attorneys issued a letter of demand, which elicited more questions of clarity from the respondent. On 10 October 2024 the respondent's attorney sent a letter to the applicant's attorneys in which any alleged breach of the restraint of trade agreement was disputed.
- [14] In all these letters the parties mentioned the possibility of an amicable resolution of the dispute between them, and although dates and times for such an endeavour were proposed, no such resolution occurred. Instead, on about 15 October 2024, the applicant launched these proceedings as urgent proceedings. On 30 October 2024, the matter was struck of the roll for want of urgency.
- [15] The applicant states that it has a protectable interest that is safeguarded by the restraint provisions, which it is seeking to enforce, in the form of valuable and confidential resources which, if made available to a competitor, would save the competitor time, money and resources and allow it a springboard to enable it to compete faster and more effectively than would be the case if it did not have access to that information. And that by working for Project Y, which is its competitor, the respondent is engaging in conduct which is contrary to the provisions of the restraint agreement.

B. THE LAW

- [16] The law regarding restraints of trade is now reasonably settled.[3] Restraint of trade agreements are enforceable unless their enforcement would be contrary to public policy.
- [17] A party seeking to enforce a contract in restraint of trade is required only to invoke the restraint agreement and prove a breach thereof. Thereafter, a party who seeks to avoid the restraint bears the onus to demonstrate, on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable.[4]
- [18] A restraint of trade is unreasonable if it does not protect some proprietary interest of the person who seeks to enforce it.[5] There are two kinds of proprietary interest that can be protected by a restraint of trade, namely:
- a) Relationships with customers, potential customers, suppliers and others that make up what is compendiously referred to as the 'trade connections' of the business, being an important aspect of its incorporeal property known as 'goodwill';
 - b) confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him, to gain a relative competitive advantage. Such confidential material is sometimes compendiously referred to as 'trade secrets'. [6]
- [19] Not all trade connections are protected. It must be established as a fact that the employee has acquired "such personal knowledge of and influence over the customers of his employer... as will enable him ... if competition were allowed, to take advantage of his employer's trade connections." [7]
- [20] Whether information constitutes a trade secret is also a factual enquiry. For a trade secret to constitute a protectable interest it must meet each of the following three requirements: (a) it must be useful in trade or industry and not be public knowledge;
- (b) it must be known only to a restricted number of people; and (c) it must be of economic value to the party seeking to protect it. Evidence must be provided to establish the existence of all three requirements. [8]
- [21] As regards the bona fides of an ex-employee, the following was stated in *Experien South Africa*:
- "The ex-employer seeking to enforce against his ex-employee a protectable interest recorded in a restraint does not have to show that the ex-employee has in fact utilised information confidential to it: it need merely show that the ex-employee could do so. The very purpose of the restraint agreement is to relieve the applicant from having to show bona fides or lack of retained knowledge on the part of the respondent concerning the confidential information. In these circumstances, it is reasonable for the applicant to enforce the bargain it has exacted to protect itself. Indeed, the very ratio underlying the bargain is that the applicant should not have to content itself with crossing its fingers and hoping that the respondent would act honourably or abide by the undertakings that it has given. It does not lie in*

the mouth of the ex-employee who has breached a restraint agreement by taking up employment with a competitor to say to the ex-employer, 'Trust me, I will not breach the restraint further than I have already been proved to have done.'"[9] (own emphasis)

- [22] Only once it established that the party seeking to enforce the restraint has an interest worthy of protection, and that the other party is threatening that interest, does the enquiry shift to whether enforcing the restraint would be unreasonable.[10]
- [23] In *Basson v Chilwan*[11] the Supreme Court of Appeal set out the elements to be taken into account in determining whether or not it is reasonable to enforce a restraint, which are translated as follows: (a) Is there an interest of the one party which is deserving of protection at the termination of the agreement?
- (b) Is such interest being prejudiced by the other party? (c) If so, does such interest so weigh up qualitatively and quantitatively against the interest of the latter party that the latter should not be economically inactive and unproductive? (d) Is there another facet of public policy having nothing to do with the relationship between the parties, but which requires that the restraint should either be maintained or rejected?
- [24] Since this is an application for final relief, the principles established in the matter *Plascon-Evans Paints v Van Riebeeck Paints*[12] are applicable concerning disputes of fact arising. That is that a final order will 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 an order.

- [25] It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or so clearly untenable that the court is justified in rejecting them merely on the papers.[13] The court has to accept those facts averred by applicant that were not disputed by respondent, and respondent's version insofar as it was plausible, tenable and credible.[14] It is otherwise undesirable to decide an application upon affidavit where the material facts are in dispute[15], and a final interdict may be granted on application if no bona fide dispute of fact exists.[16]

C. DISCUSSION

- [26] The applicant states that it has a clear contractual right enshrined in an express written agreement containing a covenant in restraint of trade; that the restraint of trade provisions are not contrary to public policy, nor are they unreasonable; and that there has been an injury actually committed, in the form of a breach of the agreement. Further, that it has a well-grounded and reasonable apprehension that it will suffer further irreparable harm should the interdict not be granted and there is no other effective remedy available to it.

[27] The respondent opposes the application on the basis, firstly that the applicant has failed to establish a proprietary interest that would be protected by enforcing the restraint. In this regard, it states that the applicant relies on generic references to confidential information and company strategies, without adducing any evidence of

exactly what proprietary information it says is actually in the possession of the respondent, or of what goodwill it contends is

threatened by the respondent's association with Project Y.

[28] However, there are a number of averments made by the applicant in relation to its proprietary interest, which are not disputed in the papers. First is the applicant's averment that Mr Moola, the sole director of the applicant, has made the building of the business of the applicant his primary responsibility and focus for the last 10 years, both in South Africa and in other countries particularly the United Kingdom. It is also not disputed that he has spent much of that time developing products and cultivating customer relationships; and that he has also extensively investigated the possibility of extending the applicant's course offering to cover all elements of modern business and technology. None of this is disputed by the respondent.

[29] It is also common cause that a vital element of the applicant's business is the cultivation of relationships with students who are admitted into the various bootcamps, from the admissions stage, through during the students' progression during studies, and thereafter as the students put to use their newly acquired skills. It is not disputed that the respondent was privy to all the admissions and student improvement strategies associated with such a hybrid learning product.

[30] The respondent seeks to minimise his relatively significant exposure and prowess in admissions and student improvement strategies of the applicant by stating that he was only privy to the applicant's admissions and student improvement strategies until December 2021. That, however, does not detract from the fact of his exposure to the strategies, which are indisputably an important aspect of the business of the applicant.

[31] The applicant states that the respondent was privy to significant confidential information regarding existing student leads and current state of negotiations with various partners including prospective partners. To this the respondent states he had limited knowledge relating to marketing and negotiations and was not part of 'everything'. But he does not deny that he was

privy to significant confidential information regarding existing student leads and current state of negotiations with current and

prospective partners. In fact, it is not denied that the respondent was tasked with various contractual obligations, which involved

confidential information.

[32] The applicant states that, by virtue of his position the respondent acquired an intimate and commercially valuable understanding of how the bootcamps are priced, sold and delivered. Although the respondent denies that there was intimate and commercially valuable understanding or learning about the pricing of bootcamps, he also states that “at times various members would be tasked with conducting an analysis of past pricing and propose a new set of fees”. There would be no need to embark on such a task if the information was not commercially valuable, and if it did not require intimate

understanding of the business of the applicant.

[33] It is not denied that the respondent was involved in all strategic planning and had access to quarterly objectives and key results set across the applicant’s business, which are goal setting frameworks for the applicant. Further, that he attended monthly meetings known as syncs in which various company metrics were highlighted and discussed. The syncs were conducted by using confidential documents containing the data of every metric that the applicant tracks, known as strategy blueprints. It is not disputed that these are highly valuable to the applicant and are confidential, and that access to them would be of extremely valuable to a competitor.

[34] The respondent does not dispute the confidentiality of the documents used at the sync meetings. He explains, however, that various employees were, at different stages, part of the syncs and that the information shared was not specific only to himself or his role at the applicant. Even in the respondent’s version, it is not claimed that the information used at the syncs was public knowledge. And there is no allegation that, by granting access to other employees, the confidential nature of the information which he admits, was diminished. I do not understand the law to require confidential information to be shared with only one individual, in this case the respondent, in order to meet the requirements of confidentiality set out in Townsend[17] and Moss gas[18]. There is certainly no evidence that those other employees who were privy to the confidential information used at syncs were not entitled to information of a confidential nature at the applicant. There is otherwise no dispute that the information used at those meetings is useful in the industry in which the parties operate, and that it is of economic value to the applicant.[19]

[35] All of the above is sufficient to conclude that the applicant has established a protectable interest in the form of trade secrets and goodwill. The next question is whether there has been a breach of the restraint by the respondent. The main bases on which the respondent denies any breach is firstly that Project Y is not a competitor of the applicant, and secondly, on the basis of his limited role there.

[36] As regards the argument that Project Y is not a competitor of the applicant, the respondent emphasises that the business models of the two companies are different. He emphasises that the applicant and its competitors in the market are providers of Education Technology and are involved in the curation and delivery of academic programmes or bootcamps, which are in turn sold at a commercial level to clientele. Further, that the applicant and its

competitors operate by earning revenue for their bootcamps through various payment methods, irrespective of the customers'

background. The applicant, according to him, only provides services to those who can afford it.

- [37] By contrast, the respondent states that Project Y is a membership platform which offers a small group of disadvantaged youth access to a cash stipend used for basic needs, transport, housing, education and necessities; education should they need it; trauma counselling, laptops and infrastructure such as a safe working space. It is not a coding bootcamp provider. Further, that it is an international project, and is not a list of the applicant's small list of competitors, who are named in the founding affidavit as Master Start and Get Smarter.
- [38] Whilst the respondent admits that Project Y indirectly offers 3 of the 20 services defined in the restraint clause as comprising the 'business' of the applicant, he distinguishes those three services in that they are not limited to careers in software development and may include any career pathway, such as sales. Further, that Project Y aims to place its members mainly with German employers, and the applicant does not operate in the German market and is only focused in the UK and South Africa. Furthermore, he states that, after attainment of employment by the students, Project Y continues to support the members by providing infrastructure and benefits for a period of two years.
- [39] In addition to the admitted indirect overlaps above, the papers indicate that there are more significant overlaps between the businesses of the applicant and Project Y. It is important to bear in mind that, when determining whether the two businesses are competitors, the relevant question is not whether their business models or areas of emphasis are identical – all businesses have different business models
- but rather whether the business or services offered by the two are sufficiently similar to amount to a breach of the restraint provisions. The degree of the overlaps is not the point, since the restraint is not aimed at the business of Project Y but at the conduct of the respondent.
- [40] In the restraint agreement, 'Business' is defined as follows:

"16.1.2.1 Building, supporting, and delivering mentor-led online and on-site coding bootcamp education;

16.1.2.2 Providing, building or supporting on-demand code review systems;

16.1.2.3 Providing or building platforms for, or supporting, online and on-site coding education;

16.1.2.4 Providing, building or supporting the assessment of coding, software development or technical skills of candidates in the hiring process;

16.1.2.5 Providing, building or supporting synchronous code review systems;

16.1.2.6 Integrating Artificial Intelligence techniques to make code review

more scalable and effective in an educational context and/or for students learning how to code;

16.1.2.7 Building course content for programmers learning mobile, web, and/or

software engineering to be delivered online or on-site in a mentor-led manner with a human mentor;

16.1.2.8 Building course content for software development education with the support/partnership of tech companies such as Google or Facebook;

16.1.2.9 Building both the technical and operational infrastructure to provide review of code at scale in both an education and software development context;

16.1.2.10 Building course platforms from both an operational and technical perspective;

16.1.2.11 Developing mentor-led online and on-site education systems and processes;

16.1.2.12 Integrating mentors from one relatively low cost market to support students in a higher income market on online or on-site education;

16.1.2.13 Supporting projects such as Jobs Fund and SDL-funded education projects in South Africa.

16.1.2.14 Fundraising from investors in South Africa, the US, and the UK for the purpose of furthering an online or on-site edtech product.

16.1.2.15 Building a community of coding education, coding mentors, and code reviewers in the development world to service educational needs of students learning to code in another or the same market as the community;

16.1.2.16 Developing a system for sourcing mentors, code reviews, and code educators from top technical talent in African countries;

16.1.2.17 Building free trials for coding education to be delivered on an online education platform;

16.1.2.18 Placing software developers and data scientists in tech roles with companies;

16.1.2.19 Providing recruitment services to companies hiring developers;

16.1.2.20 Building and hosting an online careers platform to connect companies with developers, data scientists and software engineers.”

[41] From the evidence in the papers already discussed above, there are some overlaps in at least 7 of the above itemised business areas of the applicant, namely 16.1.2.1, 16.1.2.7, 16.1.2.10, 16.1.2.11, 16.1.2.13, 16.1.2.16, 16.1.2.19 and 16.1.2.20. The overlaps between the two businesses, as identified from the papers may be summarized as follows:

(a) Both companies offer and deliver online learning products to students.

- (b) They both market online learning products to students that provide education in the field of computer technology.
- (c) They both market courses designed to upskill learners in the fields of coding (writing programs) and other related fields.
- (d) They both offer funding opportunities to students who cannot afford the offered bootcamps.
- (e) They both cultivate relationships with third party employers to provide employment opportunities to students coming out of the offered courses.
- (f) The courses marketed by the applicant and Project Y are not solely digital in that both offer the interpersonal mentorship.

[42] The respondent emphasises the fact that Project Y does not itself offer courses, but that they are provided by third parties. Thus, argues the respondent, the product offering and business model of Project Y is materially different to the applicant's, whose core focus is bootcamp training.

[43] The business model is not the point, because the restraint is not aimed at Project Y. In K2014266944 South Africa (Pty) Ltd t/a Hyperion Development v Du Plessis[20], a matter from this Division involving the same contract wording as in the present matter, the respondent argued that the company he joined did not offer bootcamps itself, but referred students to online programs offered by a third entity (Cambridge Spark). On this basis, the ex-employee argued that the new employer was not a competitor of the applicant. The court dismissed this argument stating inter alia:

"As regards the four courses supplied by Cambridge Spark, both Cambridge Spark and the applicant vie for the same goal. They are pitted against each of the for the provision of the same courses and services. They scramble for the same clientele. They compete..."[21]

[44] The difference in business models does not mean that businesses are not competing for the same clientele. The fact that Project Y does not itself provide the education, or take part in any designing, delivering or improving the bootcamps itself, and instead engages with other bootcamp providers in South Africa, must be seen in that light. In its engagements with those other businesses who are the applicant's competitors, there is an overlap in the services provided.

[45] The same may be said in response to the respondent's argument that the mentorship provided by Project Y relates to life skills guidance, uplifting and motivating members, rather than coding which is the emphasis of the applicant. Whilst employed by the applicant, the respondent was placed at the forefront of one of the largest mentor-led education programmes in the world, including its campaigns and strategies.

- [46] It is also not disputed that school leavers are within the catchment of Project Y, although that is not its main focus. Nor that its business is aimed at the South African market, save that Project Y is aimed at individuals who are disadvantaged and lack the resources to become employed.
- [47] In support of their cases, both parties refer to an approach made by the founder of Project Y, Mr Felix Anthonj, to the applicant's sole director, Mr Riaz Moola, on 24 May 2023. In the email, Mr Anthonj wrote as follows:
- "I am pretty much at the beginning of a new venture and also quite new to the African startup ecosystem in general (my network is mainly in Germany), hence the reason for contacting you was to:*
- (a) Extend my network/ meet the most successful and promising founders in Cape Town area...
 - (b) Get feedback on my new venture idea and validate my assumptions (e.g. underprivileged talents do not have access or the necessary funding to education programmes such as [the applicant] or 'ed-tech providers such as [the applicant] happy to let me integrate and distribute their products to people that cannot afford it 'free of charge' o[r] 'at cost').
 - (c) Pre-select potential vendors for my ecosystem (I do not have the intention to build any of the education services myself), but to partner with the best service providers available and help them grow their brand internationally, to increase their social impact and provide them with free leads for cross- or upsells and access to the talent)."
- [48] On 1 June 2023 Mr Moola declined the invitation, stating that he did not have time or incentive to assist Mr Anthonj. In these proceedings, he states that he declined the invitation because he realised that Mr Anthonj's business venture, which was to promote other companies that offer online education, would be in competition with the applicant, which already offered funding services for students who could not afford payment. He states that, since the e-mail of 24 May 2023 makes clear that Project Y was considering using the applicant as a potential vendor, it is axiomatic that the vendor selected in its stead is in the same or similar business.
- [49] The respondent denies that Mr Moola perceived Project Y as a competitor, because he did not mention any such perceived competition. He points to the fact that Mr Moola later reached out to Mr Anthonj on 13 August 2024, "recalling that we didn't have a chance to chat. I am now more open- would you be open to a quick call to share notes?"
- [50] In a further email of 14 August 2024, Mr Moola stated as follows: "we've recently raised R100 million to fund free courses for unemployed SA youth and so let me know if you want to talk for pathways on that as I see you operating an ISA model which is a part of the project we've been working on." According to the respondent, the further email of 14 August 2024 should be viewed with suspicion and should be viewed as a surreptitious attempt to create competition with Project Y, which did not exist. He states that the timing of this e-mail is highly suspicious in that, in all his years at the applicant, there was never any project in terms of which free courses were offered to unemployed South Africans. In that regard the

respondent challenged the applicant to provide proof that he did indeed receive such funding. There is no reply to these allegations.

[51] It is understandable that the applicant did not reply to the challenge to provide proof of the funding. In the answering affidavit, the respondent states that he was 'not aware' of any specific strategies aimed at fully funding disadvantaged South African students who could not afford to pay for the boot camps; and he 'has no recollection' of any active strategy aimed at fully funding disadvantaged South Africans who could not afford the boot camps; he 'is not aware' of the applicant developing any innovative student payment options". There is no outright denial in this regard. Given his previous position at the applicant, I would have expected him to have knowledge on this issue and to be able to deny it if that was his stance in these proceedings. It is difficult to conclude that the respondent's denial in this regard is genuine or credit worthy.

[52] As regards the perception of the approach by Mr. Anthonj in May 2023, it is correct that Mr Moola did not decline the invitation on the basis of a perceived competition. And even in his follow up e-mail in which he was now available to connect with Mr. Anthonj, there was no indication of any perceived competition. However, it might be argued that, by reaching out to Mr Anthonj, he wanted to gain more understanding of the nature of his business so that he could reach a conclusion in that regard. And the fact that he

did not expressly refer to perceived competition does not mean that he did not have such perception or suspicion. The question is whether this issue raises a genuine dispute of fact.

[53] I am of the view that this issue is a red herring and does not rise to the level of a genuine dispute of fact because, when these emails commenced (May 2023) on their express wording, the business of Project Y had not yet been established. The case law indicates that a restraint must be determined at the time that a court is requested to enforce that restraint. [22] The context of those emails indicates that there had been no comprehensive discussion between Mr. Moola and Mr. Anthonj regarding

the detail of the business of Project Y, which would have caused the applicant to approach the Court at that stage.

[54] As for the later e-mail from Mr Moola of 13 August 2024, it was sent on the same date as the e-mail sent to the respondent in which his association with Project Y was referred to as a transgression of the restraint. In the e-mail addressed to the respondent, Project Y was pointedly referred to as a competitor. There is accordingly no substance to the respondent's argument that the applicant did not view project Y as a competitor.

[55] I am otherwise in agreement with the applicant's conclusion that, since the e-mail of 24 May 2023 makes clear that Project Y was considering using the applicant as a potential vendor, that the vendor selected in its stead is in the same or similar business as the applicant.

- [56] I am accordingly satisfied that the two businesses are competitors as defined in clause 16.1.3 of the employment agreement in that they engage in commercial or economic competition with each other and with the same or similar business.
- [57] The respondent denies being contracted or employed by Project Y, and states that he offers pro bono services to it. He states that, contrary to what is advertised on the website of Project Y, he is not a co-founder of the business, and that the title was offered to him as an honorarium. Moreover, he states that at Project Y he performs none of the duties that he previously performed at the applicant. He explains that his role at project Y consists predominantly of soft coaching with members in need, facilitating access to counselling services, assisting with housing disputes and building soft skills such as business professional English.
- [58] In answer to the various overlaps between the businesses of the applicant and of Project Y, some of which are not in dispute, his constant refrain is that he performs none of the functions that he performed whilst employed by the applicant, and there is accordingly no danger of him transgressing the terms of his restraint.
- [59] What the respondent is restrained from is taking up work, whether paid or unpaid, with a business that is a competitor of the applicant as defined in the common cause agreement, and which conducts a similar business. As stated in *Experien*, it is not necessary for the applicant to show that the respondent is in fact sharing information of a confidential nature. It is enough that he can. The applicant should not have to contend with the anxiety of whether he will act in good faith whilst in that environment. That was the point of the restraint agreement.
- [60] One example in this case is the fact that it is not disputed that he has retained contact with the third parties who provided funding for the bootcamps he was responsible for, namely Stack Developer and Data Science, and that he acquired in-depth understanding and contact with them from his work at the applicant. That experience is, no doubt, beneficial and valuable to Project Y.
- [61] Yet another example is the common cause fact that he was privy to significant confidential information regarding existing student leads and current state of negotiations with current and prospective partners. To this the respondent can only retort that he was not privy to everything.
- [62] In the same vein, whilst employed by the applicant, the respondent headed the admissions department for one of the largest mentor-led education programmes in the world, and by virtue of that position, was placed at the forefront of that mentor-led online learning campaign. Whilst he states that mentors are only involved post enrolment, and that he was not involved at that stage at all, he does not deny that he was exposed to, and had access to, the mentoring strategies.

- [63] It is not enough for the respondent to state that the information he acquired is not relevant to his current role. It is very valuable information to the applicant which would similarly be valuable to Project Y. Otherwise, there would be no point in leveraging the respondent's experience, which is advertised in Project Y's website as a "renowned ed tech celebrated for his transformative impact on the educational technology landscape".
- [64] I am accordingly of the view that the applicant has discharged the onus to establish facts necessary to establish a breach of restraint of trade provisions. It is not necessary to determine the issue of the security breach involving Nutshell. The above-discussed issues are sufficient to discharge the onus placed upon the applicant. The matter is, in any event, still under investigation, and it would not be appropriate to determine it in motion proceedings.
- [65] What remains for consideration is whether it would be unreasonable to enforce the restraint, in respect of which the respondent bears the onus. In this regard, the respondent's case is mainly premised on the argument that the two companies are not competitors. I have already made findings in this regard.
- [66] What is more, the terms of the restraint are common cause. There is otherwise no case made out by the respondent that its terms are excessively prohibitive in duration or regarding its area of effect. Nor does the restraint of trade prohibit him from working. As the applicant points out, the restraint does not prohibit the respondent from working in the field of education, in respect of

which he has qualifications and experience. It only prevents him (for a limited time) from working for a limited set of businesses that are competitors of the applicant and conduct similar business. For all these reasons, the respondent has accordingly failed to show that the terms of the restraint agreement are unreasonable.

- [67] In the language of an interdict, all of the above has established that the applicant has established a clear right, and a reasonable apprehension of continuing harm. Furthermore, as set out earlier, prior to the launching of these proceedings the parties engaged in correspondence in which mention was made of an amicable resolution of the dispute, but that bore no fruit. There is accordingly no alternative remedy available to the applicant, other than to enforce the terms of the restraint.

D. REMEDY

- [68] Clause 16.5 of the restraint agreement provides as follows:

"Should any of the provisions of this Agreement be breached by the Employee, then the restraint period will be deemed, at the instance and in the discretion of the Company, to be extended by a period equal to the period from when such a breach came to the attention of the Company until the date on which the Employee ceases to be in breach of this Agreement. If the Company exercises its rights to extend such period as aforesaid, the provisions of this Agreement will apply mutatis mutandis in respect of such extended period."

[69] In effect, clause 16.5 allows the applicant, at its discretion to delay the start of the 12-month restraint period, until the breach of the agreement has been cured. Relying on that provision, the applicant seeks an order interdicting the respondent from continuing to be employed or contracted with Project Y, for a period of 12 months, commencing on the date of the order. In the alternative, it seeks an order interdicting the respondent from continuing to be employed or contracted with Project Y for a period of 12 months, commencing 10 July 2024 ending on 10 July 2025.

[70] Given that the respondent states he provides his services on a pro bono basis, I do not consider the scope, nature and duration of the restriction to unduly burden his right to earn a living, or to be against public policy and unenforceable. The restraint of trade does not prohibit him from working in the field of education. I also take into consideration that the effect of the alternative order would render the restraint nugatory, since it would amount to a restraint period of approximately a month and a half.

[71] There is otherwise no reason why costs should not follow the result.

E. ORDER

[72] In the circumstances, the following order is granted:

1. The respondent is interdicted from rendering services to Project Y or any entity conducting similar business, for a period of 12 months, calculated from the date of judgment, which is 23 May 2025.
2. The respondent is to pay the costs of this application, including costs of counsel, on a party-party basis, on Scale C.

N. MANGCU-LOCKWOOD

Judge of the High Court

APPEARANCES

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[1] Clause 16.1.3.

[2] Clause 16.1.7.

- [3] See synopsis of authorities set out in *Avis Southern Africa (Pty) Ltd and Others v Porteous and Another* 2024 (2) SA 386 at [87] to [98].
- [4] *Experian South Africa (Pty) Ltd v Haynes & Another* 2013 (1) SA 135 (GSJ) at 140 F-G.
- [5] See *Basson v Chilwan Avis SA* supra at [87] and the authorities cited therein at fn 42-44.
- [6] *Experian* (supra) at 141 A-C; *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) at 502
- [7] *Avis SA* supra at [90], quoting *Herbert Morris Ltd v Saxelby* [1916] 1 AC 688 (HL) at 709.
- [8] *Avis SA* supra at [95].
- [9] At 142 F-I.
- [10] *Avis SA* supra at [88].
- [11] *Basson v Chilwan & Others* [1993] ZASCA 61; 1993 (3) SA 742 (A) at 767 G-J.
- [12] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).
- [13] *Media 24 Books (Pty) Ltd v Oxford University Press Southern Africa (Pty) Ltd* 2017 (2) SA 1 (SCA); *National Director of Public Prosecutions v Zuma* [2009] 2 All SA 243; 2009 (2) SA 279 (SCA).
- [14] *Airports Company South Africa Soc Ltd v Airports Bookshops (Pty) Ltd t/a Exclusive Books* [2016] 4 All SA 665 (SCA).
- [15] Harmse Civil Procedure in the Supreme Court, B6.45.
- [16] *Plascon-Evans* supra.
- [17] *Townsend Productions (Pty) Ltd v Leech & Others* 2001 (4) SA 33 (C) at 53J-54B.
- [18] *Mossgas (Pty) Ltd v Sasol Technology (Pty) Ltd* [1999] 3 All SA 321 (W) at 333F.
- [19] See *Avis SA v Potgieter* para [94].
- [20] K2014266944 *South Africa (Pty) Ltd t/a Hyperion Development v Du Plessis* (case no 1577/23)

[21] Para 9 of the Judgment.

[22] Magna Alloys and Research (SA) (Pty) Ltd v Ellis

[1984] ZASCA 116; 1984

(4) SA 874 (A) at 894G, 896C-E, 898D.

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