IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

Case Numbers: 21517/17

In the matter between:

BDCE STAFFING SOLUTIONS CC Applicant

(Registration no. 2004/0140/014032/23)

and

SAMANTHA NADINE STOBER (previously DUNCAN) First Respondent

MVG RECRUITMENT SPECIALISTS CC Second Respondent

JUDGMENT DELIVERED 21 FEBRUARY 2018

Andrews AJ

Introduction

[1] This is the return date of a *rule nisi* wherein Applicant seeks to interdict and restrain First Respondent from conducting the activities and performing the duties of a recruiter of candidates or a consultant or a manager or supervisor of a recruiter or consultant with any other company, partnership, close corporation trust

or other person or with any other entity that carries on the same or similar activities as the applicant, namely for appointment of candidates in posts in the medical and pharmaceutical professions and industries in South Africa for a period of 18 months in the Republic of South Africa.

[2] The matter was argued on 13 February 2018. Adv. M Verster appeared on behalf of Applicant and Adv. L Myburgh appeared on behalf of First Respondent. There were no appearances on behalf of Second Respondent. The ruling in the matter was reserved until 21 February 2018.

Factual Background

[3] First Respondent was appointed by Applicant as a senior recruitment consultant and specialist on 15 July 2013. First Respondent signed an employment contract on 2 August 2013 with Applicant together with *inter alia* a secrecy undertaking and restraint of trade agreement. At the time of First Respondent's appointment, she was the subject of an interdict based on a restraint in her employment contract with her previous employer which interdict expired at the end of September 2013.

[4] The salient terms of the restraint of trade agreement included *inter alia*:

(a) Intellectual property; trade secrets; potential business opportunities; business contacts, clients, confidential information which the restrainee had acquired and or had had access to and or may in the future acquire or have access to;

(b) Precluding the restrainee from carrying on activities that are in competition with the company's business or that would be harmful to the company's business and to protect the confidential information and other proprietary interests of the company.

(c) That for a period of 18 months, the restrainee would not conduct directly or indirectly any services constituting the activities specified namely:

> *'4.1 The restrainee will not, and is restrained from, conducting the following activities for the period: (the "activities") Perform duties as a Recruiter whether in a consultant or in a management / supervisory role whether directly or indirectly, and whether individually or in any way associated with any other company, partnership, closed corporation, trust, or other person, or with any other entity that carries on the same or similar activities as the business.*
>
> *4.2 It is specifically agreed that in the event of any competent authority determining that such activities are too wide, the activities shall be amended and limited to such activities as are acceptable.*
>
> *4.3 Without derogating from the above, the restrainee is restrained from, directly of (sic) indirectly:*
>
> *4.3.1 Carrying on any business or activities that are in competition with that being carried on by the company;*
>
> *4.3.2 Being employed or contracted in any way with any organisation that conducts the activities;*
>
> *4.3.3 Being in any way interested in the activities as principal, partner, director, agent, shareholder, trustee, investor, and consultant or otherwise in any entity;*
>
> *4.3.4 Financing or guaranteeing the obligations of any person conducting the activities; or*
>
> *4.3.5 Soliciting the business of any person that is a client of the company.*
>
> *5…*

5.1 The restraint as referred to in clauses 3 and 4 above shall apply and be limited to activities conducted in the following geographical areas: (the "area/s"): -
i) within the province of Gauteng / Western Cape / Northern Cape; or
ii) within a 300 (Three hundred) kilometre radius of the physical address of the place of business or the Company, or
iii) within the Republic of South Africa, as constituted in terms of ACT 200 (sic) OF 1993)…'

[5] First Respondent tendered her resignation on 2 October 2017 which was withdrawn thereafter. First Respondent again tendered her resignation on 31 October 2017 because she had received an offer of employment from Second Respondent.

[6] In First Respondent's letter of resignation, she requested a relaxation of her restraint from 18 months to 12 months. First Respondent, in motivation explained that Second Respondent serviced the three large Private Hospital Groups (i.e. Netcare, Mediclinic and Life Health Care), Pharmaceutical, Managed Healthcare and Medical Devices Companies nationally. First Respondent indicated that she intended to focus on Pharmaceutical, Managed Healthcare and Medical Devices Companies. First Respondent furthermore undertook not to approach or attempt to do business with any of Applicant's clients that were not already also the clients of Second Respondent.

[7] In terms of First Respondent's letter of appointment with Second Respondent, she is required to do successful placement of medical, pharmaceutical and technical staff nationally in South Africa. Applicant claims that First Respondent

has openly acted in breach of her undertaking with it. In amplification hereof, Applicant alleges that deleted lists of names of candidates were discovered on the computer of First Respondent. According to Applicant, the discovery of the deleted lists constituted conclusive proof that First Respondent intended to continue work which she started while she was in Applicant's employ as she made a list of names of candidates whose CV's she sent to clients in October 2017 which list was deleted. The list furthermore shows the names of clients she contacted about the candidates and the dates when she sent the CV's to those clients. Applicant alleges that First Respondent needed the list in order to follow up on placements of the candidates.

[8] In this regard, some of the breaches alleged to have been committed by First Respondent included *inter alia*:

(a) First Respondent, on 30 October 2017 undertook to assist one Ilze Holtzkamp (a candidate) who enquired about a pharmaceutical post. Based on the e-mail correspondence exchanged it is evident that First Respondent had given this undertaking when she knew she was going to resign. Applicant avers that First Respondent intended to assist Ms Holtzkamp after her termination of employment.

(b) Similarly, on the same date, First Respondent gave a candidate, one Zaahira Hamid, an undertaking that she would be contacting pharmaceutical companies and hospitals over the next few weeks to enquire about opportunities. Applicant avers that First Respondent clearly intended to do so after termination of employment.

(c) Applicant avers that First Respondent was in contact with at least six clients during 2017 with a view of placing one Munyaradzi Gambakwe who enquired about a pharmacist post.

(d) Applicant also discovered that First Respondent was in contact with one Iqbal Tarmahomed about a pharmacist post after her contract of employment ended with Applicant.

(e) Applicant also claims that First Respondent placed at least four advertisements on PNet by Second Respondent for posts for newly qualified pharmacists. Applicant was aware that prior to First Respondent leaving their employ, she was working on commserve pharmacists on the basis of lists which Applicant bought from SAPC on 28 July 2017. Applicant claims that First Respondent is continuing to do work which she started whilst employed with Applicant. Additionally, there are advertisements which indicate that First Respondent is working on pharmaceutical placement, according to Applicant, as her initial appear at the bottom of the advertisement.

(f) According to Applicant, the First Respondent's LinkedIn profile lists the industries she is recruiting in on behalf of Second Respondent.

Applicant's Principal Submissions

[9] The restraint which Applicant seeks to enforce is contained in the restraint of trade agreement, more specifically clause 4.1 which covers the performance of the

duties of a recruiter in several roles by the employee and which is not limited to any field. However, Applicant submits that it is not seeking to fully restrict First Respondent's activities but is limiting the restraint only to recruiting in the medical and pharmaceutical industries.

[10] Applicant submitted that the restraint is reasonable as it covers a limited market segment on which Applicant has invested effort, time and money to develop when First Respondent was in its employ. Applicant does not apply for an interdict which covers the entire field of recruiting in which Applicant is actively engaged.

[11] Applicant contends that the protectable interest is a segment of the market share which was developed by First Respondent and which she was in the process of developing. In this regard, Applicant submitted that First Respondent was responsible as its employee for placements in the medical and pharmaceutical industries. According to Applicant, First Respondent became the face of the business in the development of these markets.

[12] As Applicant funded the development, it contends that the market share and potential market share of it in these two industries are worthy of protection, even if it was still in the process of being developed. Applicant submitted that the investment into the industries was developed over time. In this regard, Applicant argues that what it has invested may be lost to Second Respondent should First Respondent be allowed to exploit the very market she was instrumental in developing while she was employed at

the Applicant. Furthermore that the customer goodwill which First Respondent established has become an asset of the business and as such, the restraint clause will extend to protect potential business opportunities as well.

[13] Applicant contends that by limiting the relief sought only to the medical and pharmaceutical industries, First Respondent would be free to recruit in any other industry and will not render her economically inactive as she would be at liberty to practise her chosen profession in any other field.

[14] Applicant further contends that in view of First Respondent's experience in making placements in other fields, it should not be difficult for her to find work at a generalist agency as she had done when she was previously placed under restraint at the commencement with her employment with the Applicant.

[15] Applicant motivated its rationale for the 18 month period it seeks as being the reasonable period to find a replacement in First Respondent's post to train and gain the necessary experience in order to do the work. It was argued that a new recruiter would not be able to effectively take over within a shorter period.

[16] Applicant contented that the area of restraint in the medical and pharmaceutical field cannot be limited to any city or province or smaller area as clients are spread out over the entire country. Applicant essentially has a market share in the entire country which it seeks to protect which interest includes candidates and clients in the medical and pharmaceutical fields.

[17] Applicant furthermore submits that an undertaking by an ex-employee before or after interdict proceedings have been lodged that she will not act in breach of the restraint does not carry much weight and is inadequate because it cannot prevent the employer from enforcing the restraint agreement entered into by way of an interdict.

[18] Applicant argued that on First Respondent's own version she is acting in breach of her restraint as she admitted that she is in contact with candidates on Applicant's database while she was employed at Applicant. Applicant contends that First Respondent is mistaken to argue that the restraint does not prohibit her from doing so. Applicant argued that the breach by First Respondent is serious as work began by an employee should be left for the employer to continue with. In this regard, the employee is precluded from taking work she commenced with at Applicant with her to her new employer, the Second Respondent, and continue with the placement of the candidates. The fact that First Respondent deleted the list from her computer is indicative that she did not wish to leave the particulars of the candidates with Applicant for continuation of the follow up and placement. According to Applicant this is a clear violation or breach of the restraint agreement at least insofar as the continued work with Mr Tarmahomed on First Respondent's own admission.

[19] In the circumstances, Applicant contends that it will be reasonable to interdict the respondent as claimed in the notice of motion.

First Respondent's Principal Submissions

[20] First Respondent stated that when she received the offer of employment with Second Respondent she disclosed that she was bound by a restraint of trade agreement. According to First Respondent, Second Respondent's offer to employ her contained a list of the Second Respondent's existing clients that First Respondent had contact with or made placement with. First Respondent contends that she deemed it wise to not disclose the identity of all Applicants' clients to Second Respondent as she regarded this as a breach of confidentiality.

[21] First Respondent contends that she had tendered an undertaking not to make contact with or do business with any of Applicant's clients but no agreement was reached between the parties as according to her, Applicant required an undertaking that she would not place any candidate who is on their database. First Respondent submits further that the candidates typically list their names with a number of placement agencies. It is contended that due to the nature of the industry, candidates do not fall within the ambit of a protectable interest because they are listed with many different agencies. Notwithstanding, First Respondent undertook not to have any dealings with any candidates who appeared on Applicant's database.

[22] First Respondent acknowledged that there was a small overlap in the market share of Applicant and Second Respondent and had given Applicant an undertaking not to encroach on Applicant's market share.

[23] First Respondent contends that her undertaking to work in Second Respondent's market share in the fields of medical manufacturing, scientific and managed healthcare complies with the limited enforcement envisaged by the Applicant as she undertook not to continue to work in the market segment where the protectable interest of the Applicant is vested. This indulgence would allow First Respondent to remain economically active, whilst protecting the interest of Applicant.

[24] First Respondent contends that should she be required to find employment with a generalist recruitment agency it would prejudice her ability to generate an income. It should be born in mind that she is a senior recruiter and generalists, according to First Respondent usually are appointed in junior positions. Her concerns in this regard are that she may have to accept a salary reduction. First Respondent argues that generalist recruitment agencies seek to make placements in all areas which includes placement in private hospitals or pharmaceutical retail. Consequently, First Respondent claims that Applicant will be better protected should Second Respondent commit to recruiting in the segments of the market as proposed by her, which excludes any placement in competition with the Applicant.

[25] First Respondent argued that her right to practise her chosen profession as entrenched in the constitution should be narrowly interpreted in relation to the limitations of the rights listed in the Bill of Rights insofar as it relates to the promotion of the values that underlie an open and democratic society, based on human dignity, equality and

freedom.[1] In relation to the narrow interpretation, First Respondent argued that the prohibition should be limited to her doing work for private hospitals and Pick n' Pay retail pharmacies. It was submitted that freedom to practise a chosen profession should therefore only be limited to the extent necessary to protect the interests as stipulated in the restraint of trade agreement. It was further submitted that a restraint of trade agreement should not result in a significant reduction in earning potential for the sake of enforcing the letter of agreement where the spirit of the agreement between the parties has the potential of being honoured without such reduction in earning potential. It was further mooted by First Respondent that there are less restrictive means available to achieve the purpose sought by Applicant.

[26] It was also argued that an undertaking by First Respondent not to place candidates in the market segment held by the Applicant or to obtain an order of court to this effect, would achieve the same purpose, namely to protect Applicant from losing its market share to the Second Respondent, or the First Respondent in her personal capacity should she decide to open her own business or other recruitment agency employing the First Respondent, without restricting the earning potential of the First Respondent as well as her right to practise her chosen profession.

[27] First Respondent submits that it will not take 18 months for a new recruiter to effectively take over. She also undertook to honour her undertakings for the full period of 18 months from the date of termination of her service with the Applicant. First Respondent indicated that she does not seek to place a geographical limit on her

[1] Sections 22, 36 and 39 of The Constitution of the Republic of South Africa, of 1996.

undertaking not to recruit in private hospitals or pharmaceutical retail. In this regard, she accepted and agreed that the clients in these segments of the market are national and cannot be limited geographically.

[28] First Respondent, in an attempt to secure future earning capacity for herself stated that she never intended to compete with Applicant and proposed a list of market segments where she would seek to make placements, none of which overlap with the business of the Applicant which may compromise Applicant's market share. It was argued that First Respondent has demonstrated her *bona fides* throughout the process by disclosing the existence of the restraint agreement to her prospective employer.

[29] Second Respondent has contractually excluded First Respondent from working on any of Second Respondent's clients which are also common to Applicant. It was mooted that this is an indication that Second Respondent does not wish to take advantage of any information or trade connections that the First Respondent gained from her employment with the Applicant. Both First and Second Respondents, it was argued, have made a *bona fide* attempt to avoid breaching the restraint agreement entered into between Applicant and First Respondent.

[30] First Respondent explained that the list she had printed was in order to comply with an instruction to provide statistics in the form of a monthly report to the Applicant at the end of each month. She further explained that she deleted the list as soon as she completed the statistics for the month and that she never intended to use the list of candidates for herself in future. First Respondent submits that she has not attempted to hide her plans or activities since leaving the employment of the Applicant.

[31] First Respondent also endeavoured to explain that the nature of the industry is such that candidates do not remain on the database of an agency for long periods of time as they generally seek to find employment as soon as possible and lists of candidates that date back six months for example, will not hold any economic value for any recruitment company. Additionally, First Respondent intimated that it would not be possible for her to continue work that she started with the Applicant anywhere else, as she would not have access to the clients where placements were sought by the candidates.

[32] First Respondent submitted that Applicant has failed to show that it has a protectable interest in the market segments where First Respondent proposes to make placements on behalf of the Second Respondent. First Respondent proposed that an order be obtained prohibiting First Respondent from making any placement for Private Hospitals or Pharmacists for a period of 12 months. It was argued that this restraint will be sufficient to protect the interest of Applicant.

Legal Principles

[33] Every citizen has the constitutional right to choose their trade, occupation or profession freely. However, the practise of a trade, occupation or profession may be regulated by law.[2] It is settled law that the right may be limited by agreement. Additionally, it is trite that restraint of trade agreements are regulated by the law of contract. There is no *numerous clauses* in terms of interests which are regarded as protectable.[3] The matter of ***Magna Alloys and***

[2] Section 22 of Act 108 of 1996.
[3] Saner J *'Agreements in Restraint of Trade in South African Law'* (LexisNexis) at 6-30.

Research (SA) (Pty) LTD v Ellis[4] is instructive in relation to the principle considerations in respect of restraint of trade agreements more specifically whether the enforcement of the restrictive condition would be contrary to public policy.[5]

[34] In considering the reasonableness of the restraint of trade in relation to whether the employer has a protectable interest, Conrade AJ, as he then was, referred to the trite principles in ***Petre & Madco (Pty) Ltd t/a T-Chem v Sanderson-Kasner and Others***[6] that a covenant would only be valid *'…unless the applicant had an interest which the law protects. An Applicant's interest (which must be a proprietary interest in what is really an asset of his business) operates in time and area. If the covenant purports to restrain the covenantor over an area or for a time which is not co-extensive with the interest, it is said to be unreasonable and therefore against public policy. This makes it void.'*

[35] The protection of potential business opportunities as well as the commodity in the form of customer goodwill is also a protectable interest. In this regard, Nestadt JA stated in ***Rawlins and Another v Caravantruck (Pty) Ltd***[7], that *'[e]ven though the persons to whom an employee sells and whom he canvasses were previously known to him and in this sense "his customers", he may nevertheless during his employment, and because of it, form an attachment to and acquire an influence over them which he never had before. Where this occurs, what I call the customer goodwill which is created or enhanced, is at least in part an asset of the employer. As such it becomes a trade*

[4] 1984 (4) SA 874 (A) at 875G-I.
[5] See also *J Louw and Co (Pty) Ltd V Richter and Others* 1987 (2) SA 237 (NPD) at 243A.
[6] 1984 (3) SA 850 (W) at 858D.
[7] 1993 (1) SA 537 (A) at 542G-H.

connection of the employer which is capable of protection by means of a restraint of trade clause.'

[36] The matter of ***Den Braven SA (Pty) Ltd v Pillay and Another***[8] offers guidance as to the considerations in relation to the period of restraint. In this regard, Wallis AJ stated that *'…the period of the restraint should not be any longer than is necessary to enable the applicant to place a new salesperson in the field, enable them to become acquainted with the products and the customers and to make it plain to the latter that they are now the person with whom to deal on behalf of the applicant…'.* This judgment was however criticised in ***Mozart Ice Cream Franchises (PTY) LTD v Davidoff And Another***[9]***,*** *but was however applied in* **Experian South African (PTY) LTD v Hayes And Another**[10] **.**

[37] In considering an undertaking made by an employee in relation to the enforcement of the restraint of trade agreement Malan AJA stated in ***Reddy v Siemens Telecommunications (Pty) Ltd***[11] that:

> *'Public policy requires contracts to be enforced. This is consistent with the constitutional values of dignity and autonomy. The restraint agreement in this matter is not against public policy and should be enforced. Its terms are reasonable. What Reddy is required to do is to honour the agreement he entered into voluntarily and in the exercise of his own freedom of contract. While it is correct that his employment with Ericsson will be restricted, it remains a breach of his contractual undertaking. It follows that it is no answer to suggest that an undertaking would be sufficient to protect Siemens' interests and that less restrictive means could therefore achieve the same purpose as enforcing the*

[8] 2008 (6) SA 229 (D) at 263E-F.
[9] 2009(3) SA 78 (C).
[10] 2013 (1) SA 135 (GSJ.
[11] 2007 (2) SA 486 (SCA)at 500E-G and 501C.

restraint….It follows that the Judge a quo was correct in holding Reddy to his contractual undertaking…'[12]

Evaluation

[38] First Respondent acknowledged that the restraint of trade agreement entered into between herself and Applicant is a valid agreement and as such is in principle enforceable. First Respondent submitted that both she and Second Respondent have acted in good faith at all times and that First Respondent undertook not to compete with Applicant for the remainder of the restraint period.

[39] Applicant and First Respondent entered into a contractual agreement. First Respondent was aware of the limitations through the restraint clauses. Applicant was aware of the terms of the agreement and had to have understood the terms. In this regard, First Respondent's version is that Second Respondent never wished for her to breach the restraint agreement and as such the offer to employ her contained a list of the Second Respondent's existing clients that first Respondent had contact with or made placement with. How would Second Respondent have a list of the Appliant's existing clients that First Respondent had contact with or made placement with? The only plausible explanation would be that First Respondent provided her client list to Second Respondent which is supported by Applicant's version that information was deleted from the computer. From this alone, the First Respondent appears to have breached her restraint agreement.

[12] See also *IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Tarita and Others* 2004 (4) SA 156 (W) at 166H-167C *'…The restraint is accordingly enforceable and should be enforced for what limited time remains…'*.

[40] Applicant's concerns in relation to First Respondent's non-compliance with the Restraint of trade are not without merit. First Respondent offers no good explanation for the breaches. She offers the justification that the lists were required for statistical purposes. The deletion thereof remains ominous especially if First Respondent purportedly acted in good faith. There is every indication that she breached the agreement which includes her admission that she continued servicing the clients after she left the employ of Applicant. She admitted that she was in contact with candidates to make placement for them. The only conclusion is that she wished to continue with old candidates at her new employer, the Second Respondent.

[41] For First Respondent to say that the list does not contain all the clients of Applicant and that the First Respondent had contact either or made placements with, as those clients whose names appear on the list are not clients of Second Respondent, appear to be nonsensical. Those candidates as rightfully pointed out by Applicant do not belong to anyone. Even First Respondent did not disclose Applicant's complete client list to Second Respondent, nothing precludes her from accessing that resource.

[42] Applicant contends that First Respondent's undertaking not to compete in private hospitals is not clear as the undertaking does not cover all the hospitals on which she worked when she was in the employ of Applicant. On First Respondent's own version she is in breach of the restraint. Applicant should have continued rendering the services to the clients First Respondent was servicing prior to her leaving.

[43] First Respondent made several attempts to come to an agreement with Applicant on whether or not she should be able to take up employment with Second Respondent and how this may be done without compromising the interest that Applicant seeks to protect. Of paramount importance is the fact that the core business of the Second Respondent's market share is in the fields of medical manufacturing, scientific and managed healthcare. The restraint of trade agreement specifically precludes First Respondent from operating in these sectors, yet she accepted employment, notwithstanding her limitation which she was fully aware of.

[44] For First Respondent to claim that she laboured under the impression that she could still engage with candidates is not probable as the clause in the restraint agreement is prefaced by "without derogating from above".

[45] First Respondent argued that interdicting her from being employed by Second Respondent will not in any way protect the interests of the Applicant, but will prejudice her as she would have to seek employment with a generalist agency where she will earn substantially less. This will in turn impact her right to practise her chosen profession which right is firmly entrenched in the Constitution. First Respondent argued that this limitation is not reasonable.

[46] I am of the view that the guiding factors set out in Section 36 of the Constitution[13] is of assistance to this court in making a determination which is fair, just

[13] *'36 (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –*

(a) the nature of the right;

and equitable in the circumstances. These factors include whether the restriction is reasonable and justifiable having regard to the nature and extent of the limitation; the purpose of the limitation; the nature of Applicant's and First Respondent's right(s); the impact on the dignity of First Respondent; equality; freedom and whether there are any other less restrictive means to achieve this purpose. This court is enjoined to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.[14]

[47] Inasmuch as effect should be given to a contract, which approach has been met with approval through various authorities, I am of the view that a rigid approach disregards fundamental constitutional considerations to the detriment of people like First Respondent who will essentially be rendered unemployed for a period of 18 months because she cannot choose her area of trade. When weighing up the competing interests regard must be had to the considerations above in order to strike a balance which is fair and equitable. I am of the view that restrictions should be put in place to protect Applicant's vested interest, but it should not be so restrictive as to render First Respondent unproductive or unemployed to the point where her human dignity is impaired in an open and democratic society. Inasmuch as Applicant appears to be generous in "allowing" First Respondent to operate as a generalist recruiter, the restrictions it insists on would essentially mean that she may have to seek alternative employment as a generalist recruiter elsewhere.

(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.'

[14] Section 39 of Act 108 of 1996.

[48] This matter must be decided on its own merits. The *de facto* position is that First Respondent is in the employ of Second Respondent. Based on the terms of the contract First Respondent entered into with Second Respondent, she is essentially caught between a rock and a hard place, proverbially speaking as the *proviso* recorded in the "Offer of Employment" to First Respondent stipulates:

> ***'The Employee has informed the Employer that she is subject to a restraint of trade. She has undertaken to obtain the necessary agreement from her former employer to accept employment with the Employer, MVG Recruitment Specialist.***
>
> ***It is specifically recorded that, should her former employer take legal action against her, the Employer shall not assist her in any way whatsoever, but will retain the right to terminate her employment with immediate effect, <u>should that be in the best interest of the Employer.'</u>***

[49] The reality is that First Respondent accepted the terms of this offer with Second Respondent, well knowing that Applicant rejected her undertaking. In other words First Respondent took a risk by accepting the offer subject to the *proviso* contained therein. First Respondent should be allowed to continue being in the employ of Second Respondent until the restraint is lifted however, First Respondent was fully aware that the refusal by Applicant to relax the restraint would potentially render her unemployed.

[50] First Respondent will however be at liberty to explore employment as a generalist recruiter during the restraint period, should Second Respondent decide to terminate her employment. I am of the view that First Respondent is the author of a self-

created restriction of her right to choose where she wishes to work by agreeing to the terms of the offer of employment and deciding to seek employment at a competitor of Applicant.

Conclusion

[51] The crisp issues to be decided are whether the interest that is sought to be protected is an interest that needs protection; whether the restraint is reasonable in the context of whether the enforcement of the restraint would be against public policy if regard is had to the developing jurisprudence and constitutional imperatives.

[52] I am of the view that the restraint is not purely aimed at restricting the First Respondent. She was employed to develop the market. Applicant invested in First Respondent and sent her around the country to develop what Applicant termed to be a very special market. Applicant did so in order to tap into the potential that the market had to offer in the sphere. The issue here is the terms of the restraint and the protectable interest that Applicant has in the form of existing and future business. I am mindful of the fact that Second Respondent is privy to confidential information with regards to the Applicant, relating to, amongst others, strategies and contacts within the market because of her experience, training, expertise, name and face in the industry. It is so that Applicant does not own the candidates or clients. Applicant simply wishes to protect a certain market segment in which it invested.

[53] I am *ad idem* with Applicant in relation to First Respondent down-playing the value of the investment that Applicant made in order to develop the market throughout

South Africa. Applicant identified a protectable interest in the market and has succeeded in developing the market to the point where it has made significant inroads nationally. In this regard, First Respondent accepted and agreed that the clients in these segments which Applicant seeks to restrict are national in the Republic of South Africa and cannot be reduced geographically. I find this to be reasonable in the circumstances.

[54] Although First Respondent indicated that she has complied with the limited interim order obtained by Applicant on 13 December 2017, I agree that it was necessary for Applicant to protect its market share. I am of the view that the enforcement of the limited restraint which Applicant seeks is reasonable as the agreed restraint is limited to the medical and pharmaceutical industries. I am persuaded that Applicant succeeded to show that it has an interest deserving of protection.

[55] Based on the fundamental principles referred to in the Rawlins's case, I am of the view that Applicant does have an asset worthy of protection. This asset is a proprietary interest which encapsulates *inter alia* customer goodwill as well as potential business throughout the Republic of South Africa.

[56] I am satisfied that the restraint will not leave the First Respondent unproductive or destitute as she would still be able to operate in many other spheres as a generalist recruiter which market remains available to her to exploit and in which she has previous experience. I am of the view that this court should encapsulate an order

which allows First Respondent to remain economically active, whilst protecting the interests of the Applicant.

[57] Finally, on a conspectus of the evidence, I am of the view that the interest that is sought to be protected is an interest that needs protection; that the restraint is reasonable and not contrary to public policy. However I am not persuaded that the time period sought by Applicant is reasonable, and should therefore be shortened.

Costs

[58] Applicant contends that it is entitled to the costs of this application, including the costs occasion on 30 November 2017.Applicant contends that malice is not a requirement in order to decide on costs. Applicant was not only entitled to approach the court for relief but also obliged to seek relief in view of the breaches committed by First Respondent, notwithstanding First Respondent's undertakings. On the other hand, First Respondent made every effort to part ways with Applicant amicably which is borne out by the content of her resignation letter and subsequent correspondence between her and Applicant. The authorities are clear that an undertaking does not stop an applicant from approaching a court and does not take away Applicant's right to obtain an interdict.

[59] It is trite that the issue of costs lies in the unfettered discretion of the court. In the matter of ***Ball v Bambelela Bolts (Pty) Ltd & Another***[15] the Labour Appeal Court held that:

[15] (2013) 34 ILJ 2821 (LAC).

> *'…the enforcement of a restraint, technically, involves a constitutional issue. Restraints of the kind being considered, constitute a limitation on a citizen's right, in terms of s 22 of the Constitution, which, arguably, requires justification…In constitutional matters, the general rule that costs follow the result does not apply. In such matters costs orders are generally eschewed out of concern that they may produce a "chilling effect", in that litigants may be deterred from approaching a court to litigate concerning an alleged violation of their constitutional rights for fear of being penalised with costs if they are unsuccessful.'*

Order

[60] In the result, after considering the submissions made by Counsel on behalf of both parties and after considering the documents filed on record, the following orders are made:

1. That the First Respondent is interdicted and restrained from conducting the activities of performing the duties of a recruiter of candidates; or a consultant; or a manager or supervisor of a recruiter or consultant, whether directly or indirectly, or individually or associated with any other company, partnership, close corporation, trust or other person or with any other entity, that carries on the same or similar activities as the applicant namely for appointment of candidates in posts in the medical and pharmaceutical professions and industries in South Africa, which interdict will apply for a period of 12 months in the Republic of South Africa, calculated as from the date of termination of the First Respondent's employment being 31 October 2017.
2. I make no order as to costs.

P ANDREWS, AJ
Acting Judge of the High Court

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

REPORTABLE

	Case no: 21517/2017
In the matter between:	
BDCE STAFFING SOLUTIONS CC	Applicant
(Registration no. 2004/0140/014032/23	
and	
SAMANTHA NADINE STOBER (previously DUNCAN)	First Respondent
MVG RECRUITMENT SPECIALISTS CC	Second Respondent

RESTRAINT OF TRADE

JUDGE	**:**	Andrews AJ
JUGDMENT DELIVERED BY	**:**	Andrews AJ
FOR APPLICANT	**:**	Adv. M Verster
INSTRUCTED BY	**:**	De Lange Attorneys
FOR RESPONDENT	**:**	Adv. L Myburgh
INSTRUCTED BY	**:**	Greenberg & Associates
DATES OF HEARING	**:**	13 FEBRUARY 2018
DATE OF JUDGMENT	**:**	21 FEBRUARY 2018