

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: YES / <u>NO</u>
(2)	OF INTEREST TO OTHER JUDGES: YES / <u>NO</u>
(3)	REVISED.
 	
..... SIGNATURE DATE	

CASE NUMBER: 20442/2021

In the matter between:

IVETTE DU TOIT EIENDOMME (PTY) LTD t/a DU TOIT REAL ESTATES Applicant

and

LEONIE SWARTZ First Respondent

TANYA BRAND t/a BRAND & ASSOCIATES Second Respondent

JUDGMENT

WINDELL J**INTRODUCTION**

[1] This is an urgent application for an interdict enforcing a written restraint of trade agreement entered into between the applicant, as employer, and the first respondent, as employee. No relief is sought against the second respondent. I am satisfied that the matter is urgent.

[2] The applicant conducts business as an estate agency. The applicant's principal place of business is situated in Nigel and it conducts its business primarily on the East Rand in the districts of Nigel, Heidelberg, Balfour, Grootvlei, Dunnottar, Sharon Park and Springs. The first respondent was employed by the applicant as an estate agent from 1 June 2020 until the date of her resignation on 29 March 2021.

[3] The applicant's business (ordinarily undertaken by persons employed as estate agents) concerns the sourcing and acquisition of sellers and/or persons interested in selling immovable property, whether residential, commercial or agricultural, as well as sourcing and/or acquiring prospective purchasers for such properties. This involves constant networking on a personal basis with clients on both sides of the spectrum in order to establish their specific needs with the ultimate goal of concluding a successful sale between a seller and a purchaser. The applicant's primary source of income is commission which is shared with the estate agent responsible for the deal.

[4] The first respondent's primary duties and responsibilities was to source and/or acquire prospective sellers and purchasers of properties and to strive to conclude a successful sale between a seller and a purchaser as a result of which the applicant would earn a commission to be shared with the first respondent. Moreover, it was the first respondent's responsibility to assist in managing the relationship between a prospective seller and a prospective purchaser throughout.

[5] It is common cause that the first respondent signed a written employment agreement that contained a restraint clause. In the agreement the first respondent acknowledged that she agrees that the only effective and reasonable manner in which the applicant may protect its rights and interests with regard to the activities of its business, is by imposing a restriction on the first respondent upon the termination of

her employment. In terms of the agreement the first respondent bound herself towards the applicant not to have *“any interest in, nor to be involved in any capacity, whether alone or together with someone else..... with any person or legal person who is directly or indirectly involved in, or has a share in, or an interest in a competing activity within the district of Nigel, Heidelberg, Balfour, Grootvlei, Dunnottar, Sharon Park and Springs”* for a period of six months after termination of her employment with the applicant.

[6] The applicant alleges that the restraint of trade and confidentiality clause in the employment agreement are reasonable and necessary for the legitimate protection of its confidential information which includes, but not limited to, the applicant's customer connections. The applicant alleges that the first respondent had breached the restraint undertakings and that despite a demand from the applicant's attorneys, Messrs Kruger & Okes Attorneys ("Okes") to desist, the first respondent refused to provide the necessary undertaking and persisted that she is not bound to any restraint. This has left the applicant with no option but to protect its rights by enforcing the undertakings given by the respondent in terms of her employment contract.

[7] The first respondent alleges that the applicant has failed to establish the requirements for an interdict and specifically disputes that she was aware of the restraint when she signed the contract and/or that she was in breach thereof. In addition, the first respondent contends that the restraint of trade is unreasonable and unenforceable.

[8] The application is one for final relief. It is trite that, being motion proceedings, disputes of fact are to be dealt with in accordance with the principles laid down in

Plascon Evans Paints Ltd v Van Riebeeck Paints Ltd.¹ A final interdict may therefore only be granted if the facts stated by the respondents' answering affidavits together with the admitted facts in the applicant's founding affidavit justify such an order.

[9] In *Basson v Chilwane*,² the Appellate Division (as it then was) stated that the incidence of the *onus* in a case concerning the enforceability of a contractual provision in restraint of trade does not entail any greater or more significant consequences than in any other civil case in general. Botha JA stated that "*the effect of it in practical terms is this: the covenantee seeking to enforce the restraint need do no more than to invoke the provisions of the contract and prove the breach; the covenantor seeking to avert enforcement is required to prove on a preponderance of probability that in all the circumstances of the particular case it will be unreasonable to enforce the restraint; if the Court is unable to make up its mind on the point, the restraint will be enforced. The covenantor is burdened with the onus because public policy requires that people should be bound by their contractual undertakings. The covenantor is not so bound, however, if the restraint is unreasonable, because public policy discountenances unreasonable restrictions on people's freedom of trade.*" The court further held that to determine the reasonableness or otherwise of a restraint of trade provision, the following questions should be asked:

- 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?

¹ 1984 (3) SA 623 (A) at 634 E-I.

² 1993 (3) SA 742 (A).

- 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?

THE CONTRACT OF EMPLOYMENT

[10] The first respondent admits that she signed and concluded a contract of employment with the applicant. She further admits that the applicant (Ms Ivette Du Toit) explained the terms of the contract to her. She, however, states that she did not bother to read the actual terms of the contract and that she was unaware of the restraint clause.

[11] The first respondent was previously employed by Mint Properties as an intern estate agent for a period of four months. There was an agreement with her previous employer that she could retain 30 properties that she had listed during her employment with Mint Properties and move them over to the applicant. The first respondent contends that the applicant was aware of this fact when she commenced her employment with the applicant. She stated that the way the applicant explained the contract to her was that in the event she resigned, she will be allowed to retain her properties she worked on as per her previous employer's agreement. She stated that *"being an intern estate agent with limited knowledge, I assumed this to be standard practice and a practice readily accepted by estate agent agencies that when a person resigns as an employee; they could retain the properties worked on during their employment."*

[12] The applicant denies this allegation. The applicant states that the first respondent expressed no concerns with regard to the terms and conditions of her employment contract or the restraint undertakings and instead expressed the view of wanting to spend the rest of her working life employed by the applicant. The contract contained a non-variation clause which specifically states that the agreement constitutes the complete agreement between the parties and no variation, change or addition will be of any force or effect unless in writing and signed by both parties. It is further recorded in the employment contract that the first respondent *"understands the conditions of the agreement as explained to her and which she voluntarily accepts"*.

[13] The first respondent's version on whether she was aware of the restraint or not, is incongruent. Firstly, on 15 April 2021, two weeks after the first respondent's resignation from the applicant, the applicant received an email from a certain Mr Charl Cronje ("Cronje"). Cronje informed the applicant that the first respondent had contacted him and his wife during the middle of March (2021) about a property which they had viewed on the Property 24 platform, but which was listed by another estate agent, namely Harcourts Property. The first respondent arranged to take Cronje and his wife to view the property whereupon they filled in various documentation after having expressed interest in purchasing the property, which they then returned to the first respondent. The first respondent was at this stage still employed by the applicant. On 29 March 2021, the first respondent sent Cronje a WhatsApp message informing him that she had left the applicant and that she was with a new estate agency. The first respondent further informed Cronje that his loan application had been approved and that her new principal would assist with the further steps. The first respondent further informed Cronje that if he is contacted by "Anelda" of BetterBond for information and documentation, he should not provide her with anything and to inform Anelda that

they were no longer interested in the deal. BetterBond is a business which conducts business as bond originators who assist prospective purchasers to secure the necessary financing against registration of a mortgage bond over the property sought to be purchased. The applicant and in particular the first respondent dealt with BetterBond and in particular Anelda during her tenure with the applicant in assisting prospective purchasers to secure financing. One of the WhatsApp messages that Cronje shared with the applicant that was received from the first respondent, shortly after her resignation from the applicant, loosely translated, reads as follows:

*“Just want to inform you that I will no longer be with Du Toit Properties. I have decided for personal reasons to join another agency. We will then do the offer to purchase through them. I have already confirmed with my new principal and discussed you with her. So you will be in our safe hands. **Then I just want to ask that you and Monique for now say nothing thereabout.** I must still submit my resignation to my previous boss. Do not wish to elaborate too much, but I think I can offer and give my clients something better as at the moment with Du Toit Properties. If Anelda contacts you with feedback you can just say that I will complete the offer and send as soon as it is done. Hope you understand.”* (Emphasis added)

[14] Cronje thereafter became uncomfortable with the matter and enquired from the first respondent whether there were other properties available which they could view. A few days later the first respondent notified Cronje that there was a property that she could show to them on the following Friday. Cronje's misgiving about the situation persisted and they thereafter decided to approach a different estate agent whereupon they put in an offer to purchase a different property.

[15] If, as the first respondent alleges, she believes that there was nothing wrong with her conduct, then why would she specifically ask Cronje and his wife not to say anything about the dealings with them? The first respondent's attempts to keep her

dealings in this regard a secret demonstrates not only that she was aware that her conduct was dishonest (and by virtue of her restraint of trade undertaking), but also provides an indication that she was aware of the restraint.

[16] Secondly, the first respondent's denial that she was aware of the restraint provisions in her employment contract and that she only became aware thereof upon receipt of the applicant's attorney's letter of demand for an undertaking to desist from her conduct on 16 April 2021, is not supported by the written response to Okes. In this response, no mention was made that the first respondent was not aware of the restraint. This would surely have been her first response and it would have been included in the letter. A further incongruence in the first respondent's denial that she was aware of her restraint undertakings, is found in her assertion in her answering affidavit that *'the restraint hung around her neck like an albatross'*.

[17] Thirdly, the first respondent was fully aware that without the permission of her erstwhile employer, any clients would remain the clients of her erstwhile employer. It is for that reason she first sought the permission from her previous employer, Mint Properties, before she moved her clients to the applicant. Clients who either moved to the applicant together with the respondent at the start of her employment or who were sourced by her during her employment with the applicant, remain the applicant's clients. There is no basis either in law or fact entitling the respondent to claim such clients as her clients pursuant to the termination of her employment with the applicant.

[18] In any event, the first respondent's defence, namely, that she signed the agreement, but did not read its terms and is therefore unaware of the restraint, is bad in law. In *George v Fairmed (Pty) Ltd*³ the court held that if a person signed a document

³ 1958 (2) SA 465 (A).

which contained the terms of the contract and chooses not to read those terms, then such person did it with his or her eyes wide open and cannot plead ignorance of that which he or she signed.

PROTECTABLE INTEREST

[19] The applicant proved that there was a valid agreement containing the restraint clause. The question is whether there is an interest which must be protected at the termination of the agreement.

[20] In *Bridgestone Firestone Maxiprest Ltd v Taylor*,⁴ it was accepted that:

“[o]nce it is established that there is an agreement, the contract must be enforced, unless the party sought to be restrained shows that the party seeking to enforce the restraint has no protectable interest, which protectable interest may take the form of trade secrets or confidential information, or goodwill or trade connections, i.e. he must discharge onus of proving that at the time the enforcement is sought, the restraint is directed solely to the restriction of first respondent competition with the ex-employer (the covenantee); and that the restraint is not at that time reasonably necessary for the legitimate protection of the covenantee’s protectable interests, being his goodwill in the form of trade connections and his trade secrets”.

[21] One of the core mechanisms utilised by the applicant is to compile a list of properties up for sale and to market such properties by posting a list on a website known as Property 24 where prospective buyers and interested persons may view the properties that are up for sale. Property 24 describes itself on its website as South Africa's number 1 property platform whose goal is to assist people to find homes

⁴ 2003 JDR 0203 (N) at page 6.

through the provision of a brand- building and marketing platform with the opportunity to connect with home-buyers and renters searching for properties online. This includes various search tools on their website for the use of interested persons based on a person's particular needs and the availability of properties that meet those needs. The first respondent took up employment with the applicant without any prior knowledge of the applicant's business model or its confidential information and customer connections. In particular, the first respondent, who was previously employed as a sales representative and as an intern estate agent for a period of four months, had very limited knowledge of the estate agency industry. The applicant alleges that the first respondent acquired knowledge of each of these aspects while in the employ of the applicant and was continuously exposed to information regarding the applicant's clients, including sellers and purchasers, and their specific needs.

[22] In *Alum-Phos (Pty) Ltd v Spatz*,⁵ the court held that in order to qualify as confidential information, such information must comply with the following three requirements:

- (a) It must involve and be capable of application in trade or industry; that is it must be useful.
- (b) It must not be public knowledge and public property, that is objectively determined, it must be known only to a restricted number of people or to a closed circle of persons.⁶
- (c) The information objectively determined must be of economic value to the person seeking to protect it.⁷

⁵ [1997] 1 All SA 616 (W).

⁶ See also *Telefund Raisers CC v Isaacs* 1998 (1) SA 521 (C) at 528E.

⁷ At 632F-624A.

[23] It is common cause that the first respondent, whilst employed at the applicant, was responsible for marketing and selling immovable property by bringing willing sellers and/or landlords and able buyers and/or tenants together. The first respondent was provided with and had access to confidential information of the applicant, including property lists, details and portfolios of sellers and buyers, as well as seller and buyer lists. The property list includes the applicant's subscription to the Property 24 platform where the properties are listed and advertised for sale and letting. In order to gain access to the applicant's property listings on the Property 24 platform, the first respondent required the applicant's access codes thereto in order to allow her to either post new listings and to vary or delete existing postings. The first respondent's access to, and knowledge of this information was vital in order for her to successfully carry out her daily tasks. In order to conclude a successful transaction, the first respondent would apply her knowledge regarding the seller's peculiar requirements not advertised on the listing such as, for example, the minimum price or rent which a seller is prepared to accept and which is obviously lower than the listed price or rent. Coupled herewith is the first respondent's personal knowledge of the applicant's peculiar requirements in regard to commission payable by the seller and the minimum commission that the applicant is willing to accept. I agree with the applicant that although this information is not static and may be of a limited duration, it is compiled by the applicant over a period of time involving skill and knowledge of the real estate industry and is intended only for the use of its employees, including the first respondent.

[24] In *Oasis Group Holdings (Pty) Ltd v Bray*,⁸ the court recognized that trade connections which include customer connections and information about business

⁸ [2006] 4 All SA 183 (C) at par [31].

opportunities available to the employer and knowledge of the identity of a supplier as well as customer lists and information, have enjoyed consistent recognition as a protectable interest in the context of restraint of trade. In *Rawlins & Another v Caravan Truck (Pty) Ltd*,⁹ the Appellate Division (as it then was) held that:

"The need of an employer to protect his trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with the customer so that when he leaves the employer's service he could easily induce the customers to follow him to a new business (Joubert: General Principles of Law of Contract at 149). Heydon, The Restraint of Trade Doctrine (1971) at 108, quoting an American case says that the 'customer contact' doctrine depends on the notion that

'the employee, by contact with the customer, gets the customer so strongly attached to him that when the employee quits and joins a rival he automatically carries the customer with him in his pocket'."

[25] In *New Justfun Group (Pty) Ltd v Turner*,¹⁰ the court held that it is sufficient for the applicant to show that the customer contacts exist and that it can be exploited by the former employee. Once that conclusion has been reached and it is demonstrated that the prospective new employer is a competitor of the applicant, the risk of harm to the applicant if its former employee would take up employment becomes apparent. A similar view was adopted in *Vumatel (Pty) Ltd v Majra*.¹¹ In *HE Sergay Estate Agencies (Pty) Ltd v Romano*,¹² the court also recognised that an estate agent can enjoy certain proprietary rights including the retention of clients and customers which can be protected. The court in this matter held as follows:

⁹ 1993 (1) SA 537 (A) at 541D-I.

¹⁰ (2018) 39 ILJ 2721(LC) See also *Pam Golding Properties v Neille* (26039/17) [2017] ZAGPJHC 219 (28 July 2017).

¹¹ [2018] 39 ILJ 2771(LC) at par [34].

¹² 1967 (3) SA 1 (R) at 3G.

"Moreover, even if more than one estate agent is employed to sell a property, knowledge of prospective purchasers is no doubt of great importance. An estate agent who knows the requirements of persons who are potential buyers of property by reason of being speculators or investors in property enjoys an advantage or interest which is entitled to protection".¹³

[26] The protectable interest of customer connections does not automatically come into being when the employee has built up a relationship with the customer, but rather where it is evident that the connection between the former employee and the customer is such that the employee is able to exert influence over the customer and persuade the latter to transfer its business elsewhere. In other words, a protectable interest in the form of customer connections does not come into being by simply having contact with an employer's customers.¹⁴ The existence or otherwise of such relationships is a question of fact and depends on the nature of the employee's duties; the frequency and duration of the contact with customers; where such contact takes place; what knowledge he or she gains of their requirements and business; the general nature of their relationship; how competitive the rival businesses are; and whether there is evidence that customers were lost after the employee left.

[27] The applicant alleges that it has a protectable interest in its confidential information and customer connections which include prospective and/or existing sellers and purchasers. The question is whether the relationship between the respondent and the applicant's clients (i.e., sellers and purchasers) was such that she could easily induce the clients to follow her to a new business.

¹³ See also *Den Braven Limited v Pillay* 2008 (6) SA 229 (D) wherein the court dealt with the employer's trade connections and specifically the employee's interaction with the employer's customers.

¹⁴ *Walter McNaughton (Pty) Ltd v Schwartz* 2004 (3) SA 381 (C) 390 C-D.

[28] The applicant explained that properties are often listed by other estate agents each vying to sell the same property. This, however, does not detract from the advantages which one estate agent may have over the other based on an estate agent such as the applicant's peculiar knowledge of client requirements and the concessions which an estate agent is willing to make in order to conclude a successful transaction. It is in this regard that the first respondent is in a position to exploit the applicant's client list and to assist the applicant's competitors to tailor their services in a manner that will enable it to attract customers from the applicant, where such information is not freely available to third parties.

[29] The first respondent does not dispute that she had access to the applicant's information, including the applicant's access codes to its listings on Property24. She also does not dispute that in order for her to conclude a successful transaction on behalf of the applicant she was required to apply her knowledge in regard to the applicant's foresaid information and in particular that: *"(she) would apply her knowledge regarding the seller's peculiar requirements not advertised on the listing such as for example the minimum price of rent which a seller is prepared to accept and which is obviously lower than the listed price for rent"*. Coupled herewith is the first respondent's personal knowledge of the applicant's peculiar requirements in regard to commission payable by the seller and the minimum commission that the applicant is willing to accept which is obviously lower than that ordinarily disclosed in a contract or to a prospective purchaser. Furthermore, the first respondent does not dispute that the applicant's listing on Property24 together with other estate agents require a mandate from the seller to market the property and that coupled with the foresaid information the applicant is able to gain an advantage over a competitor in regard to the sale of a property. The first respondent further admits that she had limited knowledge

concerning the estate agent industry when she joined the applicant. It is with this limited knowledge that she was exposed to the applicant's business model and confidential information, as well as customer connections in order to successfully render services as an estate agent for the applicant.

[30] Despite all of the foregoing, the first respondent persists in her denial that she is not in a position to assist the applicant's competitors to tailor their services in a manner that would enable her to attract the applicant's clients. The first respondent, however, concedes that she has the ability to retain a relationship with the applicant's clients which she attributes to her own capabilities. This is evident from the contents of the statements by three erstwhile clients of the applicant attached to the first respondent's answering affidavit wherein the deponents explain their election to move their business from the applicant and to follow the first respondent as it were, to her new employment. The statements by the erstwhile clients, as well as the communication with Cronje, irrefutably demonstrates not only that the first respondent has filched the applicant's clients, but also that she is actively carrying on business as an estate agent in competition with the applicant in breach of her restraint undertakings.

[31] Taking into consideration the estate agent industry and the facts in this matter, I am satisfied that the trade connections and detailed customer information, which belongs to the applicant and which is used by the applicant in its business, is useful, of economic value and capable of application in the estate agency industry and constitutes a protectable interest in regard to enforcement of a restraint undertaking.

THE BREACH

[32] On 29 March 2021, the first respondent tendered her immediate resignation from the applicant. The first respondent did not, when she resigned, divulge what her

intentions were in regard to her future employment or whether she intended taking up employment with a competitor or not pursuant to her resignation from the applicant. In the circumstances the period of the first respondent's restraint undertakings run for a period of six months from 1 April 2021 to 30 September 2021. The first respondent however informed the applicant, just prior to her resignation, that she had removed approximately 98 of her listings from the Property 24 platform.

[33] The applicant alleges that the first respondent also edited the information of 98 of the applicant's Property 24 listings, by changing the listed prices (with the exception of one property which remains listed at its original purchase price of R840 000.00), to an amount of R12 345.00; and changing the addresses of the listed properties all to either "Hendrik Verwoerd Street" or "Somerset Road, Nigel"; and changing the owner or seller's name to "aaaa aaaa". Moreover, so it is alleged, the first respondent has identified herself as the listing agent and has amended the status of the listing to read as either "mandate withdrawn", "mandate cancelled" thereby creating the false impression that the applicant is no longer mandated to sell the property. The first respondent does not seriously dispute these allegations, but submits that she deleted a number of properties from the applicant's listing on Property24 *'because such listing no longer served any purpose'*. It is noteworthy that this "editing" of the applicant's listing occurred just prior to the respondent's resignation from the applicant. The first respondent, however, insists that the properties removed from the applicant's listing on Property24 constitute *'her own client base, all of which emanate from her employment with the applicant'*. It is obvious that the first respondent gained access to the platform by using the applicant's personal information and applicant's code and password to which she was previously afforded access during her employment with the applicant.

[34] The first respondent contends that she has not entered into a contract of employment with the second respondent or with any other third party, and has therefore not breached any restraint. The first respondent, however, admits that she had approached the second respondent and discussed “eventually working with her”.

[35] The evidence that the first respondent breached the restraint is overwhelming and mainly undisputed. Firstly, notwithstanding the alleged absence of a written contract of employment between the first and second respondent, the first respondent's WhatsApp messages to Cronje make it clear that the first respondent and second respondent have entered into an employment relationship. Secondly, the first respondent's conduct as described by Cronje constitutes a breach of her restraint undertaking as well as her undertaking in regard to the protection of the applicant's confidential information. She actively assisted with, and/or engaged in the business of a competitor of the applicant, namely, the second respondent, as a sales representative and/or estate agent. Thirdly, the first respondent admitted that she has “taken her listings with her”. No such permission was sought by the first respondent from the applicant, nor was any such permission granted when the first respondent resigned from the applicant. Moreover, the first respondent has conceded her intention to render a professional service as an estate agent to numerous clients whom she believed she was entitled to take with her to her new employer or place of employment and more particularly to the second respondent whose place of business is situated in Heidelberg.

[36] The first respondent's belief that she is entitled to take “*her listings*” with her after resignation from the applicant is misguided. The first respondent at all times during her tenure with the applicant acted as an agent on behalf of the applicant, her principal. Accordingly, any clients acquired and/or sourced by the first respondent during her

tenure with the applicant are the applicant's clients. The first respondent was fully aware that without the permission of her erstwhile employer, the said clients would remain the property of her erstwhile employer. It is because of this knowledge that she first sought the approval from her erstwhile employer Mint Properties, who consented to her retaining the clients. She never sought the permission of the applicant nor was she granted permission to take her supposed clients with her to her new employment.

[37] In the matter of *Pam Golding Properties (Pty) Ltd v Neille*,¹⁵ the court held that an admission by an employee that it was bound by a restraint undertaking with his previous employer and who had admitted contacting customers of the previous employer whilst in the employ of the new employer, constitutes an admission of the breach of the restraint and "*(that) nothing came of it is irrelevant.*"¹⁶

[38] It is insightful to note that despite the bald denials by the first respondent regarding the breach of her restraint undertakings, she persists with her insistence that she is entitled to '*take her clients*' with her from the applicant in pursuit of new employment. This flies in the face of her denial that she is in breach of her restraint undertakings. The first respondent's intention to exploit the applicant's trade connections in competition with the applicant is a clear breach of her restraint undertaking.

ENFORCEABILITY OF RESTRAINT

[39] It is generally accepted that a restraint will be considered to be unreasonable, and thus contrary to public policy, and therefore unenforceable, if it does not protect some

¹⁵ At par 7.

¹⁶ See also *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA).

legally recognisable interest of the employer, but merely seeks to exclude or eliminate competition.¹⁷

[40] It is trite that the first respondent bears the *onus* of demonstrating that enforcement of her restraint undertakings would be unreasonable and therefore against public policy. The first respondent alleges that the restraint of trade unreasonably infringes on her constitutionally enshrined right to pursue the career of her choice and is far wider than is reasonably necessary to protect any protectable interest that the applicant might have and offends public policy. She avers that she is in the process of getting a divorce and that the applicant is effectively attempting to restrain her from earning an income to maintain herself and her minor children. She also contended that any customer base wishing to follow her will do so out of their own free will and due to the fact that they have no relationship with the applicant.

[41] There is no merit in any of the first respondent's contentions. The first respondent on the one hand admits that she only worked for four months as an intern estate agent with her previous employer Mint Properties and started work with the applicant with very limited knowledge of the estate agency industry. On the other hand, she asserts that *"my whole working career to date in South Africa involved the selling of properties"* and that she has not worked with any other products or service and have not gained experience in any other field. The first respondent, however, does not disclose the nature and extent of her previous employment or a description of her qualifications and experience in the employment sector. The applicant alleges that the first respondent previously worked as a sales agent for Tupperware and as an administrative clerk for a farmer and was also employed by an attorney's firm in Nigel

¹⁷ *Automotive Tooling Systems (Pty) Ltd v Wilkins* 2007 (2) SA 271 (SCA) at [8]. See also Neethling *Unlawful Competition* above fn 29 at 20 fn 46.

as a receptionist for a number of years. This is not disputed by the first respondent. In fact, in contradiction to her earlier statement, the first respondent stated that she has spent her entire working life in sales, *"as well as stints in various other places of employment such as a sales agent for Tupperware and an administrative clerk for a farmer and a receptionist at an attorney's firm."*

[42] The first respondent further contends that the relief sought by the applicant would have an extremely prejudicial and detrimental effect on her ability to generate an income and earn a living for herself and her children, *"and that it would be against public policy to restrain her for six months while going through a divorce"*. The first respondent however fails to take this court into her confidence by not disclosing any details regarding her personal circumstances and those of her children, or what or how a pending divorce might impact on her personal circumstances. It is however noteworthy that pursuant to the first respondent's resignation from the applicant she (first) *"wanted to take a bit of a break"* thereby suggesting that she has no immediate intention of taking up employment with the second respondent or even earning an income just yet. The contradiction in this regard is that if the first respondent wishes to take a break and is in no hurry of taking up employment with second respondent, then she is not too concerned or desperate to earn an income at present. This is more so in view thereof that the first respondent voluntarily resigned from a gainfully employed position with the applicant.

[43] It is further not correct that the first respondent is barred from working for any competitor of the applicant (and regardless of where the competitor may be located) for a period of six months. The restraint is restricted to certain towns and suburbs. By virtue of the nature of an estate agency business, the clients, whether sellers or purchasers, are of limited duration, hence the limited duration of the first respondent's

restraint undertaking of six months. The applicant conducts business beyond the borders of the area recorded in the restraint agreement including the city of Pretoria. No restraint is sought against the first respondent in regard thereto.

[44] The first respondent furthermore alleges that she had no choice in signing the contract of employment and nor did she have any bargaining power when signing her contract of employment. The first respondent however has failed to provide any detail or explanation regarding the basis of these allegation or what is meant thereby. It behoves repeating that the respondent also voluntarily resigned from her previous employer Mint Properties, and willingly took up employment with the applicant. The same shortcomings apply in regard to the first respondent's assertion that her restraint undertakings are unduly oppressive. Likewise, the first respondent has failed to set out the grounds upon which she contends that the restraint is "*far wider than is reasonably necessary*".

[45] The first respondent's assertion that the restraint infringes her constitutional right to pursue a career of her choice is also ill-conceived. Section 22 of the Constitution provides that: "*Every citizen has the right to choose their trade, occupation or profession freely.*" It is trite that a restraint of trade, *per se*, does not offend the provisions of section 22 of the Constitution.¹⁸ In the present instance the first respondent is not denied the right to pursue a career of an estate agent, but is merely restricted to a few towns and districts for a very limited period of time from pursuing that particular career; she is otherwise not restricted from generating any other form of income whatsoever.

¹⁸ *Oasis Group Holdings (Pty) Ltd v Bray* supra at par [21]; *Canoa Kwazulu Natal (Pty) Ltd t/a Canon Office Automation v Booth* [2005] 3 All SA 205 (N).

[46] A court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint. The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the *maxim pacta servanda sunt*. The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions. Both considerations reflect not only common-law but also constitutional values.¹⁹

[47] The first respondent has failed to demonstrate that her employment contract, including the restraint undertakings are unduly oppressive. Accordingly, the first respondent has failed to acquit herself of the *onus* of proving that the restraint undertaking is unreasonable and therefore unenforceable.

CONCLUSION

[48] Despite having allegedly that she had not concluded a contract of employment with the second respondent, it is clear from the WhatsApp messages and annexures attached to the first respondent's answering affidavit that she was able to build up and maintain a close relationship with clients who have mandated the applicant to either sell or let their properties and was able to do so during her employment with the applicant. It is further clear that her resignation from the applicant had already caused at least three other erstwhile clients of the applicant to sever ties with the applicant and instead to pursue the first respondent with their business. The first respondent therefore has the prowess and skill to utilise the relationship that she has built up with her clients, including both sellers and purchasers, to entice these clients to move their business to a competitor.

¹⁹ *Reddy v Siemens Telecommunications (Pty) Ltd supra* at paragraph [14] and [17].

[49] The applicant has no alternative way of protecting itself and its proprietary interests against the first respondent's breach of her restraint undertakings and unlawful exploitation of the applicant's confidential information. In the circumstances of this matter and the industry in which the applicant competes and having regard to the nature of the first respondent's duties, the applicant's damages would be impossible to quantify. Quite apart from the difficulties in quantifying and proving such damages, the applicant would have to embroil its clients and in such an enquiry, something which is counter-productive. Moreover, the first respondent would be entitled to defend any damages claimed to secure from the applicant financial information pertaining to its business, clients and other highly confidential information, the disclosure of which would aggravate the prejudice to the applicant. There is no doubt that, unless the relief sought is granted, the first respondent will continue to pursue her intention to breach her restraint undertakings. In addition, the first respondent would be duty bound by virtue of her fiduciary duties to a new employer to disclose information that will assist it/her to obtain custom. Any such information which is confidential to the applicant or was obtained by the first respondent through her employment relationship with the applicant is at a real risk of disclosure.

[50] I am satisfied that the first respondent's use of the confidential information, to which the first respondent had access as a consequence of her employment with the applicant, will result in the applicant suffering financial loss and loss of market share. This is particularly so if, and when, the confidential information is being made available to the applicant's competitors who will in turn gain an unfair advantage of undercutting the applicant by appropriating business originally intended for the applicant. Moreover, the first respondent is possessed of all of the information pertaining to the listed properties edited by her from the Property 24 platform as well as the details regarding

the seller and the seller's requirements regarding the sale of the property. As stated previously this information belongs to the applicant regardless of whether the first respondent assisted in sourcing the seller as a client of the applicant.

[51] The first respondent's belief that she is entitled to take her listings with her pursuant to her resignation from the applicant, coupled with her admission that she has indeed now "*taken her listings with her*", underscores the applicant's reasonable apprehension of harm based on the first respondent's filching of the applicant's clients. In addition, the first respondent's admission that she has been in discussions with the second respondent regarding her eventually working for her, coupled with her and the second respondent's refusal to give an undertaking as sought by the applicant, further underscores the applicant's ground of a reasonable apprehension of harm if an interdict is not granted.

[52] In the result the following order is made:

1. The application is granted with costs.
2. The Draft Order is marked "X" and made an order of court



L. WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically to the parties/their legal representatives

by email and by uploading it to the electronic file of this matter on CaseLines. The date for the hand-down is deemed to be 21 May 2021.

APPEARANCES

Counsel for applicant:	Advocate HP West
Instructed by:	Kruger and Okes Attorneys
Counsel for respondents:	Advocate N Smit
Instructed by:	Etienne de Heus Attorneys
Date matter heard:	6 May 2021
Judgment date:	21 May 2021