IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/ NO**

Case number: **5872/2021**

In the matter between:

MED 24/7 (PTY) LTD **APPLICANT**

and

KRYSTAL LYNNE KRUGER **1st RESPONDENT**

ROHAN BENN **2nd RESPONDENT**

TSHEPO JUSTICE MOKETEMAFELA **3rd RESPONDENT**

ROKANG RAMOLULA **4th RESPONDENT**

BRIAN MOKHETHI **5th RESPONDENT**

VR MED (PTY) LTD **6th RESPONDENT**

CORAM: NAIDOO, J

HEARD ON: 10 FEBRUARY 2022

DELIVERED ON: 19 April 2022

JUDGMENT

[1] This matter started out as an urgent application but became opposed. It was subsequently enrolled and argued as an opposed motion, and urgency was not being pursued. It is an application to enforce the restraint of trade clause contained in the contracts of employment between the applicant and the first to fifth respondents. Adv CD Pienaar appeared for the applicant and Adv (Ms) JF Mitchley for the first to fifth respondents. The 6th respondent did not participate in these proceedings. I shall refer to the first to fifth respondents as “the respondents”, unless it is necessary to refer to them individually.

[2] The applicant filed a Supplementary Affidavit, without obtaining the consent of the respondents or the leave of the court to do so. At the start of proceedings in this application, the respondents objected, and the applicant withdrew the Supplementary Affidavit. The relief claimed in the Notice of Motion was also amended by the applicant at the start of these proceedings. Consequently, the applicant sought relief in the following terms:

2.1 The first and second respondents be interdicted from engaging in any other business, in competition with the applicant's business, including the sixth respondent, be it direct or indirect, or as a shareholder, partner, member of a close corporation, director of a company or in any other capacity, for a period of I (one) year from 1 September 2021 in the area known as Med 247 Area which includes the Bloemfontein area, and/or surrounding areas to a maximum distance of 100 (one hundred) kilometres radius from the city centre.

2.2 In the alternative to the prayer in 2.1, that the third, fourth and fifth respondents be interdicted for a period of two years from the date on which he/she ceases to be employed by the applicant, in any area, from soliciting a customer or dealing with a customer of the applicant in respect of the business of an Ambulance and Paramedic Service.

2.3 The first and second respondents be interdicted for a period of 2 (two) years from 1 September 2021 from soliciting any employee of the applicant or in any way entice an employee of the applicant to leave the employment of the applicant, and/or to accept employment with any other firm, company or business.

2.4 The first to fifth respondents be interdicted from using and/or divulging any confidential information belonging to the applicant for whatever reason.

2.5 The first to fifth respondents, and any other party opposing the relief sought, be ordered to pay the costs of this application.

The applicant sought, in the alternative to the above prayers, an order that a *rule nisi* be issued calling on the respondents or any interested party to appear before the court and show cause why the above orders should not be granted. This was clearly foreshadowed in the event that the matter was dealt with as an urgent application and that interim relief would be granted. The urgency fell away and the matter was dealt with as an opposed motion. I shall not deal further with this aspect of relief sought.

[3] By way of background, the first to fifth respondents are former employees of the applicant, which is a company that provides ambulance and paramedic services in certain areas of South Africa, namely, Bloemfontein, Kimberly, East London and Rustenburg. The applicant alleges that these areas are referred to as the Med 24/7 area. It further alleges that the first to fifth respondents are aware of this. The respondents each entered into a contract of employment with the applicant, and each contract contained a restraint of trade clause. The restraint of trade clause in respect of the first to third respondents is the same and reads as follows:

"28.1 The employee undertakes not to be engaged in any other business, in competition with the employer's business, be it direct or indirect, or as a shareholder, partner, member of a Close Corporation, director of a company or in any other capacity, within 1 (one) year of termination of this agreement, in the area known as MED 247 AREA and/or surrounding areas to a maximum distance of 100 (one hundred) kilometres radius from the city centre/s.

28.2 The employee further undertake that he/she shall not, for a period of 2 (two) years from the date on which he/she ceases to be employed by the employer, for any reason whatsoever, within the territory, **solicit an employee** of the company or in any way entice an employee of the company to leave the employment of the employer, and/or to accept employment with any other firm, company or business.

28.3 The employee acknowledges and agrees that the aforesaid restraint is fair, reasonable and necessary for the protection of his/her employer, his/her employer's trade name and goodwill attached thereto.

28.4 Without prejudice to any other rights which the employer may have in law, the employee acknowledges that the agreed damages due to his/her employer will be an amount of R5000-00 (five thousand rand) in respect of each calendar month during which any breach of the aforesaid restraint continues, and that the employer shall be entitled to recover such amount, and any associated recovery costs, from the employee in respect of such breach."

[4] The restraint of trade clause in respect of the fourth and fifth respondents reads as follows:

"16.1 The EMPLOYEE agree that he/she shall not without the EMPLOYER'S prior written consent, for a period of (I) one year calculated from the date on which he cease to be employed by the EMPLOYER, be engaged in, whether directly or indirectly and whether jointly or solely, or as Director, Manager, Agent, Consultant or Sales Representative or in any other capacity, any business or concern which carries on the business of an Ambulance and Paramedic Service, within the perimeters of the territory;

16.2 The territory shall mean Rustenburg and Kimberly and surrounding areas, to a maximum distance of 100km radius from city centre/s;

16.3 For the purpose of this agreement, the term “cease to be employed” shall mean the termination of the EMPLOYEE’S contract of employment with the employer, for any reason whatsoever;

16.4 The EMPLOYEE agree that he/she shall not, for a period of two years from the date on which he/she cease to be employed by the EMPLOYER, for any reason whatsoever, in any area, solicit a customer or deal with a customer of the EMPLOYER in respect of the business of an Ambulance and Paramedic Service.

16.5 for the purposes of the preceding paragraph, “Customer” shall mean any company (**regardless of the area where it may be situated**) or other corporate body, partnership, close corporation, individual or other person:

16.5.1 who at the date of termination of the EMPLOYEE’S employment is indebted or obliged to the EMPLOYER, or

16.5.2 with whom negotiations were taking place at that date, which negotiations, if successful, would have resulted in the Customer becoming so indebted or obliged to the EMPLOYER, or

16.5.3 who at any time during the period of six (6) months prior to the date on which the EMPLOYEE ceased to be employed by the EMPLOYER was so indebted or obligated to the EMPLOYER.

16.6 The EMPLOYEE further agrees that he/she shall not, for a period of two years from the date on which he/she cease to be employed by the EMPLOYER, for any reason whatsoever, within the territory, solicit an employee of the company or in any way entice an employee of the company to leave the employment of the EMPLOYER, and/or to accept employment with any other firm, company or business.

16.7 The restraints contained in this undertaking are separate and divisible and should any court of law deem any portion of this clause or this contract to be null and void, it will not affect any other part thereof.

16.8 The EMPLOYEE acknowledge and agree that:

16.8.1 During the course of his/her employment, both past and present, he/she have acquired or will acquire a considerable amount of expertise and confidential information to the EMPLOYER'S methods of operation and in particular with regard to manufacture, marketing, selling and pricing of services referred to in paragraph 16.1, as well as confidential information relating to the EMPLOYER'S customers and their use and application of services referred to in par 16.1;

16.8.2 the EMPLOYER have a proprietary interest in the above expertise and confidential information;

16.8.3 such expertise and confidential information would be of invaluable benefit to any of the EMPLOYER'S competitors and the EMPLOYER will suffer substantial prejudice if he/she were to breach any of the above restraints after ceasing to be employed by the EMPLOYER;

16.8.4 the restraints are the minimum restraints required by the EMPLOYER to protect his proprietary interests and accordingly the EMPLOYEE regard the restraints as entirely reasonable;

16.8.5 in the event of the EMPLOYEE committing a breach of any of the above restraints the EMPLOYER will be entitled to bring legal proceedings against the EMPLOYEE to remedy such breach, which proceedings may include, but need not be limited to, an interdict against the EMPLOYEE and, or alternatively, a suit for the recovery of any such damages as can be shown to have been caused to the EMPLOYER as a result of the breach by the EMPLOYEE;

16.8.6 in the event of the EMPLOYER having to bring legal proceedings against the EMPLOYEE for reasons of the employees' breach of any of the above, the employee will be liable to pay the employer's legal fees on an attorney client basis."

[5] It is common cause that the first and second respondents were employed to work in the Kimberly area, and that at some stage they moved to Bloemfontein and continued to work for the applicant in what the latter alleges to be senior positions. The applicant alleges that the first and second respondents requested to be moved to Bloemfontein so that they could better manage the business of the applicant for the Northern Cape and the Free State. In so doing, they dealt directly with the applicant's clients and connections. The applicant also financed the training of the first and second respondents, through which they gained knowledge on how to operate an ambulance service.

[6] Whilst in the applicant's employ, the first and second respondents formed close relationships with the clients and third parties with whom the applicant conducted business, and they were also privy to the applicant's confidential information, such as the applicant's methods of operation, pricing and costing and its client lists. They also had access to confidential documents, including Patient Report Forms (PRF). The second respondent attended and passed a course financed by the applicant. One of the third parties that referred a considerable amount of work to the applicant, was VR Security with whom the first and second respondents formed a close relationship.

[7] During May 2021, the applicant noticed a downturn in the volume of work, which would normally be referred to the applicant by VR Security and other third parties. This was discussed at a team building event, which included the manager of VR Security, during June 202. It was agreed that all calls from VR Security would go through the applicant's call centre. In spite of this, the second respondent insisted that all calls be received on his private mobile telephone. Although both the first and second respondents were with work telephones, they refused to use them. Both the first and second respondents resigned, with immediate effect, from the employ of the applicant on 1 September 2021.

[8] In December 2021, the applicant learned that the first and second respondents had taken up employment with the sixth respondent, which was registered on 3 September 2021, two days after the first and second respondent had resigned from its employ. The applicant further alleges that the first and second respondents solicited and enticed the third, fourth and fifth respondents to resign from the employ of the applicant and take up employment with the sixth respondent. The fourth respondent resigned without notice on 13 December 2021, whilst the third and fifth respondents simply absconded from its employ during November 2021. The applicant alleges that the third to fifth respondents are also in breach of the restraint of trade clause in their respective employment contracts. The applicant concludes that the conduct of the first and second respondents constitutes unlawful competition in that they are using the applicant's confidential information and the relationships they have

built with the applicant's trade connections to benefit themselves and the sixth respondent. It is thus entitled to the relief it seeks, as set out in the Notice of Motion.

[9] The respondents' opposition to the application is based on a number of grounds. They allege that the applicant has misled the court with regard to the harm it allegedly suffered. They deny soliciting any of the applicant's clients or employees, and allege that the applicant is inconsistent in enforcing the restraint of trade clause against them, but not against approximately twelve other former employees who are now working for competitors of the applicant. In addition the first and second respondents allege that they were led to believe that the Med 24/7 area referred to Kimberly and would not knowingly have agreed to a contractual term which prohibited them from working in the Free State, Northern Cape, North West and Eastern Cape Provinces. It is also noteworthy that the restraint of trade clause in the employment contracts of the fourth and fifth respondents restricts their ability to work within the perimeters of the "territory". Clause 16.2 defines "territory", as "Rustenburg and Kimberly and surrounding areas, to a maximum distance of 100km radius from city centre/s". The respondents allege further that it is unreasonable to enforce the restraint of trade clause against the latter two respondents as they were not permanently employed by the applicant.

[10] The respondents allege further that the applicant has breached the employment contract by failing to pay the respondents for overtime

worked, by requiring them to work illegal and inhumanely long hours, by failing, on occasion, to timeously pay their salaries and, to use the respondents' words, "most alarmingly" the applicant made deductions from the respondents' salaries in respect of Pay As You Earn (PAYE) tax and in respect of the Unemployment Insurance Fund (UIF) but did not pay these deductions over to the South African Revenue Service (SARS) and the Department of Labour respectively. They also allege that a deduction was made from their salaries in respect of a training course, which they were never sent to attend. The respondents also allege that the applicant has failed to prove the existence of a protectable interest or any actual harm suffered. Therefore, it would be unreasonable and against public policy to grant the relief that the applicant seeks, as this would be an unjustifiable infringement of their constitutional rights.

[11] The issues for this court to decide are whether:

11.1 the restraint of trade clause may be enforced against the respondents in respect of the Bloemfontein area;

11.2 the applicant has established the existence of a protectable interest, if it is found that the restraint is applicable in respect of Bloemfontein;

11.3 the respondents have harmed or prejudiced that interest;

11.4 the applicant's interest is of such a nature that it weighs substantially against the interests of the respondents, and justifies an order enforcing the restraint of trade clause, preventing the respondents from being economically active and denying them the right to earn a living.

[12] As a general rule, agreements in restraint of trade are generally enforceable, unless they are unreasonable or unlawful and against public policy. It must also be borne in mind that courts should always give effect to contracts entered into freely. That is an established principle of our law of contract. It creates certainty in the commercial world. However, every person should, as far as possible, be able to operate freely in the commercial and professional world. The respondents in this matter bear the onus of showing that the restraint of trade clause is unreasonable, unenforceable and/or contrary to public policy.

[13] The case of *Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984(4) SA 874 (A)* stated the position in our law with regard to agreements in restraint of trade, and the principles enunciated therein have been applied in a long line of cases in the thirty-eight years since that matter was decided. The approach laid down by the court was succinctly captured in the Headnote as follows:

"The approach, followed in many South African judgments, that a covenant in restraint of trade is *prima facie* invalid or unenforceable stems from English law and not our common law, which contains no rule to that effect. The position in our law is that each agreement should be examined with regard to its own circumstances to ascertain whether the enforcement of the agreement would be contrary to public policy, in which case it would be unenforceable. Although public policy requires that agreements freely entered into should be honoured, it also requires, generally, that everyone should be free to seek fulfilment in the business and professional world. An unreasonable restriction of a person's freedom of trade would probably also be contrary to public policy, should it be enforced.

Acceptance of public policy as the criterion means that, when a party alleges that he is not bound by a restrictive condition to which he had agreed, he bears the *onus* of proving that the enforcement of the condition would be contrary to public policy. The Court would have to have regard to the circumstances obtaining at the time when it is asked to enforce the restriction. In addition, the Court would not be limited to a finding in regard to the agreement as a whole, but would be entitled to declare the agreement partially enforceable or unenforceable."

[14] The principles set out in *Magna Alloys* were comprehensively re-stated by Stegman J in *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another 1991 (2) SA 482 (T)* at 502 J - 503 B as follows:

"A contractual restraint curtailing the freedom of a former employee to do the work for which he is qualified will be held to be unreasonable, contrary to the public interest and therefore unenforceable on grounds of public policy if the ex-employee (the covenantor) proves that at the time enforcement is sought, the restraint is directed solely to the restriction of fair 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 proprietary interests, being his goodwill in the form of trade connection, and his trade secrets. If it appears that such a protectable interest then exists and that the restraint is in terms wider than is then reasonably necessary for the protection thereof, the Court may enforce any part of the restraint that nevertheless appears to remain reasonably necessary for that purpose."

[15] With regard to protectable interests, the court in *Sibex Engineering* at 502 D-E defined proprietary interests, in the context of a protectable interest, thus:

"The proprietary interests that could be protected by such a restraint were essentially of two kinds. The first kind consisted of the relationships with customers, potential customers, suppliers and others that go to make up what is compendiously referred to as the "trade connection" of the business, being an important aspect of its incorporeal property known as goodwill. The second kind consisted of all 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".” [See also *Experian v Haynes and Another 2013(1) SA 135 (GSJ) at para 17*].

[16] With regard to goodwill and protectable interests, Nestadt JA in *Rawlins and Another v Caravantruck (Pty) Ltd 1993 (1) SA 537 (A), at 541 C-H* remarked 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 customers 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 the 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'.

In *Morris (Herbert) Ltd v Saxelby* [1916] 1 AC 688 (HL) at 709 it was said that the relationship must be such that the employee acquires 'such personal knowledge of and influence over the customers of his employer . . . as would enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer's trade connection . . .'.…Whether the criteria referred to are satisfied is essentially a question of fact in each case, and in many, one of degree. Much will depend on the duties of the employee; his personality; the frequency and duration of contact between him and the customers; where such contact takes place; what knowledge he gains of their requirements and business; the general nature of their relationship (including whether an attachment is formed between them, the extent to which customers rely on the employee and how personal their association is); how competitive the rival businesses are; in the case of a salesman, the type of product being sold; and whether there is evidence that customers were lost after the employee left…" [see also Walter McNaughtan (Pty) Ltd v Schwartz and Others 2004(3) SA 381 (C)]

[17] In the present matter, the respondents acknowledge that they voluntarily entered into the employment contracts containing the restraint of trade clause. Apart from asserting that the restraint of trade clause in their respective contracts cannot be enforced against them in respect of the Bloemfontein area, they contend that due to circumstances that arose during the period of their employment by the applicant, and which prevailed at the time of their respective resignations, it would be unfair and unconstitutional for the restraint of trade clause to be enforced against each of them. Their right to practice their trade and earn a living would be negatively impacted as it would severely prejudice their freedom to be gainfully employed. I will deal with the restraint of trade clauses in their respective contracts.

[18] The contracts of the first and second respondents are the same, and bear the name "SEESA" at the top of the first page of the contract, a company which apparently provides "Professional Legal Support for Business". Their place of work in clause in 5 is listed as "Kimberley" and in clause 28, the area to which the restraint of trade applies is "Med 247 Area". The respondents allege that a person called "Charl", who was the applicant's employment representative, explained to them that the Med 247 area referred to Kimberley, and that they would not be allowed to work for a competitor in Kimberley. They did not agree or envisage that they would not be able to work outside the area

of Kimberley. “Med 247 Area” is not defined in the contract. The applicant alleges that the respondents are aware of its areas of operation and that they ought to know that if they were working in Bloemfontein, that area would be included in the restraint.

[19] The first respondent was employed as an Emergency Care Technician, while the second respondent was employed as a Basic Life Support practitioner. They contend that they were asked by the applicant to assist with operations in Bloemfontein, as a result of the resignations of employees in Bloemfontein, and that Kimberley was their place of employment. They did not perform management functions. The applicant did not deny that Charl was its employment representative or that he advised the first and second respondent that the restraint applied only to Kimberley and surrounding areas, to a maximum radius of 100 km from the city centre. The first and second respondents also explained that each base from which the applicant operates has an individual operating licence from the Department of Health, hence they were not aware that the Med 247 area referred to any other area than Kimberley. The latter was specified as their base and it was always the intention that the restraint would apply to their actual base. I will return to this aspect later.

[20] The third respondent’s employment contract also emanates from SEESA, and records his place of employment as Bloemfontein. The restraint of trade clause relates to Bloemfontein. This is contrary to the applicant’s allegation that the third respondent’s contract contains the same restraint of trade clause as that of the first and second

respondents. He was also employed as a Basic Life Support practitioner. The respondents all contend that the applicant's conduct made their continued service to the applicant untenable and that they had no option but to resign. I have set out, earlier in this judgment, their contentions relating to the applicant's treatment of them.

[21] The fourth and fifth respondents' contracts are different from that of the other respondents, and does not appear to emanate from SEESA. The fourth respondent was employed as a Basic Ambulance Assistant for a fixed period of three months from 5 June 2021 to 5 September 2021, while the fifth respondent was employed as a Basic Life Support practitioner for a fixed period of four months from 15 January 2021 to 15 May 2021. Their contracts specifically provide that the contract will terminate automatically on the end date, without notice. There is no indication that new contracts were entered into after those termination dates, although it appears that they continued to work for the applicant at least until November or December 2021. As I indicated, the applicant alleges that the fourth respondent resigned on 13 December 2021 while the fifth respondent absconded in November 2021. The respondents deny this and indicate that the fifth respondent was on sick leave during November 2021 and produced a medical certificate to this effect.

[22] The restraint of trade clause relevant to the fourth and fifth respondents, which I have set out earlier, specifically prohibits them from working in Rustenburg and Kimberley after termination of their employment with the applicant. These areas are defined as the

"territory" referred to in the contract. Rustenburg and Kimberley are more than 100 kilometres from Bloemfontein. The respondents contend that the fourth and fifth respondents are therefore not prohibited from working in Bloemfontein. Moreover, they were not permanently employed by the applicant, rendering the enforcement of the restraint of trade clause against them, unreasonable, unfair and unconstitutional.

[23] The applicant's response to this lies in the amended relief it seeks against the third, fourth and fifth respondents, namely that *"they be interdicted for a period of two years from date on which he/she ceased to be employed by the Applicant, in any area, from soliciting a customer or deal with a customer of the Applicant in respect of the business of an Ambulance and Paramedic Service"*, on the basis that the words *"or any other place"* in the third respondent's contract are sufficient to grant the relief it seeks against these respondents. I remark that no evidence whatsoever has been placed before this court to show that the third, fourth and fifth respondents were in any way responsible for soliciting or dealing with customers of the applicant. The applicant, in fact, alleged that it was the first and second respondent who attempted to sabotage its business by soliciting and enticing the third to fifth respondents to leave the employ of the applicant and seek employment with the sixth respondent.

[24] With regard to the contention that the applicant, is entitled to the relief it claims against the third to fifth respondents by virtue of the words referred to above, I point out that clause 5.2 of the third respondent's contract refers to the place of work entitling the applicant to deploy the

third respondent to any other place(s), than Bloemfontein. The restraint of trade clause 28.2, as set out in paragraph [3] above, restrains the third respondent from soliciting any employee of the applicant, within the territory, to leave the employ of the applicant. The word "territory" is not defined in the third respondent's contract. In the contracts of the fourth and fifth respondents, there is no clause relating to place of work or deployment to "any other place". The restraint of trade clause 16, set out in para [4] above defines territory as Rustenburg and Kimberley and surrounding areas within a radius of 100 kilometres from the city centre/s. Clause 16.4 prohibits these two respondents from soliciting or dealing with a customer of the applicant, *"in any area".* Clause 16.6 contains a prohibition against soliciting any employee of the applicant to leave its employ.

[25] The relief claimed by the applicant in prayer 3 of the Notice of Motion has no foundation in the contract of the third respondent. As I indicated, the territory is not defined and he is prohibited from soliciting an employee of the applicant, and not a customer. The fourth and fifth respondents are not restrained from working in Bloemfontein. They are operational employees on a lower level, who clearly do not deal or interact with customers of the applicant to the extent that they would be able to solicit or entice the applicant's customers away from the applicant. They would interact almost exclusively with the patients that require to be transported to a medical facility. No evidence of their interaction with the applicant's customers or ability to influence them, or of them actually doing so, has been placed before this court. If the

applicant relies on the words “in any area” in respect of the fourth and fifth respondents, this would imply that the prohibition would apply to any area in South Africa where the applicant has customers.

[26] This would place the fourth and fifth respondents in a position that their ability to find employment and earn an income would be unduly and unreasonably be fettered for a period of two years. The applicant has, in my view, not shown that it has a protectable interest for such broad relief to be granted against the fourth and fifth respondents. Similarly, the relief claimed against the third respondent, which is not based on the contract between him and the applicant, would be unreasonable, and even unlawful. The respondents raise the fact that at least twelve former employees of the applicant, who also signed restraint of trade agreements with the applicant, have left its employ and are now employed by competitors of the applicant. The latter has not sought to enforce such restraint of trade agreements against those employees. The applicant’s response to this allegation by the respondents is not a denial thereof, but the stance that those were operational employees. In my view, exactly the same consideration would apply to the third to fifth respondents, who are operational employees. The applicant’s bid to enforce the restraint of trade agreements against them is, in my view, arbitrary, unreasonable, unfair and not in keeping with public policy.

[27] It appears, therefore, that the applicant’s main complaint is against the first and second respondents. I will accordingly deal with the case

against them. As a starting point, I am alive to the fact that in an opposed motion, the Plascon-Evans Rule applies. In the matter of Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984(3) SA 623 (A), court held at p 634 H that "*where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order".*

This has become known as the Plascon-Evans Rule. In this matter, the first and second Respondents have raised a dispute of fact with regard to the interpretation of the term "Med 247 Area".

[28] Not every dispute of fact raised by a respondent is necessarily a genuine or *bona fide* dispute and the court has to examine such dispute in the light of the circumstances of the matter to make a determination in this regard. I have set out what the contentions of the parties are in respect of the relevant interpretation. "Med 247 Area" is not defined in the employment contract, and it is common cause that the first and second respondents were employed in Kimberley. The applicant alleges that they requested to be transferred to Bloemfontein and as such, they knew that this fell within the Med 247 Area. The restraint of trade clause would apply to them in Bloemfontein. The first and second respondents deny this and tender the explanation that the applicant experiences a high turnover of staff. The successive resignations of senior staff caused the applicant to request the first and second respondents to move to Bloemfontein to assist in the running of that base.

[29] As I indicated, the respondent does not deny that Charl advised the first and second respondents that the Med 247 Area refers to Kimberley. The court would therefore have to accept the respondent's version regarding their understanding of the parameters of the Med 247 Area, and that it did not include Bloemfontein. On this aspect alone, the application stands to be dismissed, as the applicant has failed to show that it is entitled to enforce the restraint of trade agreement against the first and second respondents. There is a material dispute of fact which the applicant was aware of before this application was launched. This dispute of fact cannot be resolved on the papers. However, it will be useful to examine whether the applicant has demonstrated that it has a protectable interest which is being harmed or is likely to be harmed by the first and second respondents.

[30] The applicant alleges that when the first and second respondents moved to Bloemfontein, the first respondent stepped into a managerial position. The first respondent in Answer, explains that she was appointed as an operations medic in Kimberley but due to a lack of management at that base she was asked to step in and prevent the "looming disaster". Thereafter due to the resignations/transfers of managers in Bloemfontein, she was asked to assist in operations management in Bloemfontein. The first respondent avers that he was appointed as a basic life support medic in Kimberley and due to staff shortages in Bloemfontein, he was asked to assist there too. He was not employed as a manager at any time.

[31] Neither the applicant nor the first respondent set out exactly what the duties of the first respondent were in Bloemfontein. This information is gleaned from averments that each makes in Founding, Answer and Reply. It appears that the first respondent was responsible for allocating shifts to the various employees and thereafter submitting information regarding shifts/hours worked by the employees to the applicant's head office for payment to the respective employees. It also appears that the first respondent was responsible for ordering oxygen from the service provider. There is an indication in the papers that the applicant at times did not pay for the oxygen. The service provider withheld the oxygen tanks, making it impossible for the employees such as the respondents to do their work. The applicant also alleged in Reply that the first respondent, assisted by his father, was responsible for processing salary payments to the employees.

[32] The applicant makes a bald allegation that since the resignation of the first and second respondents, it noticed a downturn in the volume of its work, of approximately 60%. No details are provided as to how this figure was calculated, nor which of its clients were no longer servicing it. The applicant merely asserts that the first and second respondents were sabotaging its business and cited the resignations of the third to fifth respondents a few months after the first and second respondent as an example, especially as they were all employed by the sixth respondent around the same time in December 2021. The respondents answer to this is that it became untenable to continue in their employment with the applicant for the reasons I enumerated above in para [10], and which caused severe prejudice to the respondents. The applicant clearly does not deny this in Reply, but

startlingly alleges that he requested his accountant to attend to the matter of the unpaid PAYE and UIF deductions.

[33] With regard to soliciting its clients /customers, the applicant sets out two scenarios from which it earns its income. The one is what is referred to as “self-sourced”, being referrals from towing companies, security companies and hospitals. The other category is “administrative incidents”, which involves contracts with service providers. With regard to the former, the respondents set out in detail that the applicant does not enjoy exclusive clients because of the manner in which that work is obtained. They describe a “Whats-app” group of over 200 different role-players such as police and towing companies who post news of accidents on this group. Ambulance service providers and paramedics, such as the respondents, are also members of this group. So whichever ambulance service responds first to the accident scene, gets the client.

[34] One of the towing companies referred to by the parties is Cobra Towing. The respondents explain that this is a company under whose auspices several independent contractors, driving trucks, operate. They are not employees of Cobra Towing. There are five such independent contractors, who each have their own contact persons to whom referrals are made. The second respondent is a friend to one of these contractors, who refers work to the second respondent, irrespective of which company he works for. Therefore, the

respondents claim that the applicant is falsely alleging that they are soliciting or enticing away the customers of the applicant. The respondents also allege that there is no contractual relationship between towing companies and any ambulance service. They are not even obliged to make such referrals and they do not pay paramedics. The applicant does not grapple meaningfully with this allegation, save to simply deny it, and allege that the respondents were previously employed in Grahamstown and were unlikely to have any professional dealings with role-players in Bloemfontein. It seems that the applicant does not deny the manner in which self-sourced referrals are made

[35] The applicant also alleged that VR Security was one of its clients, but no longer refers any work to it. The sixth respondent is a subsidiary of VR Security. The respondents undertook a detailed explanation in their Answering Affidavit in this regard. They admit that VR Security was a client of the applicant, but the applicant began refusing to despatch its paramedics (respondents) for the referrals made by VR Security unless the patients paid up-front. This was often impossible as VR Security serviced approximately eight thousand clients, the large majority of whom were low-income earners who had no medical aid cover or sufficient funds to pay cash. This resulted in VR Security forming its own company in the form of VR Med, the sixth respondent, to service indigent members of the public. This is what caused VR Security to stop referring incidents to the applicant. The respondents had no part in the establishment of the sixth respondent. The applicant did not deny this or even tender any explanation in this regard.

[36] The respondents further allege that the sixth respondent does not handle administrative incidents which involve contracts with service providers. Payments received in respect of these contracts emanate either from medical aid companies or the Road Accident Fund. The applicant also does not deny this, but instead speculates that the sixth respondent is not a non-profit organisation, and must operate for profit. Therefore, it is likely to engage with the applicant's customers. In a similar vein, the respondents point out that ambulance service providers do not enjoy any exclusivity with regard to referrals from hospitals. The latter refer cases to any ambulance service which is presumably available. With regard to a hospital called Busamed, the respondents explain that the sixth respondent does have a contract with the hospital for the transportation of indigent patients, free of charge, to government hospitals. In return, the hospital sterilises the sixth respondent's linen and equipment at no cost. The applicant has its own contract for sterilisation of its equipment and linen but refuses to transport indigent patients. Therefore, the contract that the sixth respondent has, causes no financial prejudice to the applicant. The applicant did not deny or respond to this allegation.

[37] There are many other instances which the applicant raised in its Founding papers regarding the relationship between the first and second respondents and the customers of the applicant, each of which have been countered by the respondents, but which were not dealt with in Reply by the applicant. I do not deem it necessary to traverse each and every one of these aspects, and have highlighted what I

consider to be the most important. It is not disputed that the first and second respondents have been paramedics for over ten years and have accumulated a fair amount of experience in that time. The manner in which ambulance and paramedics services operate (at least in Bloemfontein) and the nature of the work, as detailed by the respondents, is not seriously in dispute. The courses which the applicant alleges it sent the respondents on, at its cost, turns out not to be the case. The respondents allege that such amounts were deducted from their salaries but they were never sent on those courses.

[38] On a conspectus of all the facts and evidence before this court, it is clear that several disputes of fact have arisen, the most important one being the interpretation of the term “Med 247 Area”. This is a material dispute of fact which is relevant to a determination of whether the restraint of trade clause is enforceable against the first and second respondents in Bloemfontein. It would no doubt, require oral evidence to be led, especially that of Charl. The other disputes which I have outlined above go to the determination of whether the applicant has a protectable interest and whether the conduct of the respondents has harmed or will harm that interest.

[39] There is no evidence that the first respondent dealt with or built up a relationship with the customers of the applicant to the extent that she is now in a position to take those customers with her to the new employer. At best, she appears to have assisted with operational and administrative matters. There is nothing to indicate that she had access to confidential information such as costing, pricing and the like,

and whether her knowledge of such information has or will seriously harm the applicant's business. There is likewise nothing to indicate whether the applicant did in fact have a client list to which the first respondent had access and therefore, the means to use it to the prejudice of the applicant. The first respondent indicated that all such information is dealt with by the applicant' head office and that she did not have access to such information.

[40] With regard to the second respondent it has not been disputed that he did not occupy any managerial position and did not have access to the applicant's confidential or financial information. He was a basic life support practitioner who worked in the field transporting patients in need of care. He sets out the manner in which ambulance service providers work in Bloemfontein, which is not in dispute, and which indicates that he has not, by his conduct jeopardised the applicant's business. The applicant would surely have suffered the inconvenience of losing five employees in a short space of time, but the circumstances leading to their resignations can be attributed directly to the applicant's treatment of them, its non-compliance with its statutory obligations towards the respondents, as well as its own conduct regarding referrals, particularly in the case of VR Security. It is clear that the applicant did not hold up its end of the obligations created in terms of the employment contracts. This would entitle the respondents to raise the defence of *exceptio non adempleti contractus* [exception of unfulfilled contract; exception on the ground that the plaintiff, too, is

in default (and therefore cannot demand performance)] against the applicant's attempts to enforce the restraint of trade.

[See in this *regard Bk Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk 1979(1) SA 391 (A)* and the Labour Court decision in *Megafreight Services (Pty) Ltd v Bezuidenhout & Another (J1591/19) [2019] ZALCJHB 218 (28 August 2019)* accessible on SAFLII, where the court considered the principles in *BK Tooling.*].

[41] In my view, therefore, the dispute regarding the interpretation of" Med 247 Area" cannot be resolved on the papers. I am not satisfied that the applicant has established that it has an interest deserving of protection by this court or that the respondents have caused harm or are likely to cause harm to its interest. The enforcement of the restraint of trade clause in the employment contracts in respect of the first to third respondents would be unreasonable, unfair and against public policy, as it would unduly interfere with the right of these respondents to practice their trade and earn a living. I have already found that in respect of the fourth and fifth respondents, the applicant is not entitled to enforce the restraint, and its attempt to extend the application of clause 16.1 and 16.2 through the provisions of 16.4 is impermissible and would also unreasonably and unjustifiably interfere with the rights of the fourth and fifth respondents to practise their trade and to be economically active.

[42] In the circumstances, the following order is made:

The application is dismissed with costs.

S NAIDOO J

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Westdene

Bloemfontein

(Ref: J Nortje/NO5884/cdp)

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