THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J669/23

In the matter between:

UAV AND DRONE SOLUTIONS (PTY) LTD	**Applicant**
And	
DALE MCERLEAN	**First Respondent**
VAUGHN KYLE VOSTER	**Second Respondent**
ALAN MICHAEL ENEVER	**Third Respondent**
ZAYNE OBERHOLZER	**Fourth Respondent**
GERT JOHANNES MALAN	**Firth Respondent**
VIKKI BRYNARD	**Sixth Respondent**
VUTSHILA MATHEBULA	**Seventh Respondent**
MASEGO LANGA	**Eighth Respondent**
MOOSA AMANJEE	**Ninth Respondent**
FAHEEMA PATON-MAYET	**Tenth Respondent**
LINEAR MANAGEMENT SYSTEMS (PTY) LTD	**Eleventh Respondent**
UAV INDUSTRIES (PTY) LTD	**Twelfth Respondent**

UAV INDUSTRIES TRAINING AFRICA(PTY)LTD **Thirteenth Respondent**

Heard: **11 January 2024**

Delivered: **26 February 2024**

Summary: Restraint of Trade – application to refer disputes of fact to oral evidence.

(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLI. The date on which the judgment is delivered is deemed to be 26 February 2024.)

JUDGMENT

VENTER, AJ

<u>Introduction</u>

[1] This is an application for the referral of certain disputes of fact to oral evidence, for the purposes of the Court adjudicating the urgent application, being an application for the enforcement of confidentiality agreements which contain restraints of trade.

[2] The applicant seeks an order referring the following disputes of fact to oral evidence:

2.1 Whether the first respondent signed the confidentiality agreement which is attached to the founding affidavit as "FA38".

2.2 Whether the applicant waived the restraint of trade of the second respondent which is attached to the founding affidavit as "FA56".

2.3 The exact terms of the second respondent's restraint of trade.

2.4 Whether the first to tenth respondents are in possession of the confidential information of the applicant.

2.5 Whether the business of the eleventh respondent is similar or comparative to or competitive with the business of the applicant.

[3] The applicant launched the urgent application on 7 June 2023 to enforce confidentiality agreements against the first to tenth respondents who had all resigned from the employment of the applicant to take up employment with the eleventh respondent.

[4] The relevant dates in respect of each respondent are as follows:

4.1 The first respondent resigned on 15 February 2023. The applicant seeks to enforce the restraint of trade until 31 March 2024.

4.2 The second respondent resigned on 17 February 2023. The applicant seeks to enforce the restraint of trade until 24 March 2024.

4.3 The third respondent resigned on 17 February 2023. The applicant seeks to enforce the restraint of trade until 16 March 2024.

4.4 The fourth respondent resigned on 23 March 2023. The applicant seeks to enforce the restraint of trade until 23 April 2024.

4.5 The fifth respondent resigned on 15 March 2023. The applicant seeks to enforce the restraint of trade until 18 April 2024.

4.6 The sixth respondent resigned on 6 March 2023. The applicant seeks to enforce the restraint of trade until 6 April 2024.

4.7 The seventh respondent resigned on 1 March 2023. The applicant seeks to enforce the restraint of trade until 15 March 2024.

4.8 The eighth respondent resigned on 24 March 2023. The applicant seeks to enforce the restraint of trade until 24 March 2024.

4.9 The ninth respondent resigned on 26 April 2023. The applicant seeks to enforce the restraint of trade until 23 May 2024.

4.10 The tenth respondent resigned on 15 May 2023. The applicant seeks to enforce the restraint of trade until 31 May 2024.

[5] Prior to launching the urgent application and on 26 April 2023 the applicant's attorney of record, Hoosen Wadiwala Attorneys (HW Inc) addressed letters of demand to the first, second, third, fourth, fifth, seventh and eighth respondents alleging a concern that the first, second, third, fourth, fifth, seventh and eighth respondents are in breach of their obligations in the confidentiality agreements as the eleventh respondent is a direct competitor of the applicant providing management consulting services in competition to the applicant.

[6] The letters of demand in respect of the first and second respondents differed in material respects from the letters of demand addressed to the others in that in respect of the first respondent there is no allegation by HW Inc that she is bound by, signed or concluded a confidentiality agreement or restraint of trade agreement with the applicant.

[7] In respect of the second respondent, the allegation is made that the second respondent was paid for his agreement to conclude a restraint of trade, however, despite this payment, the applicant could not locate the signed restraint of trade. HW Inc quoted the clause in the second respondent's contract of employment providing for the obligation not to disclose confidential information post termination of employment.

[8] In respect of the third, fourth, fifth, seventh and eighth respondents reference is made to signed confidentiality agreements.

[9] On 2 May 2023 HW Inc addressed a letter of demand to the eleventh respondent alleging that:

9.1 In respect of the first respondent she owes common law and contractual obligations to the applicant not to disclose confidential information.

9.2 In respect of the second respondent, that in addition to the contractual obligations not to disclose confidential information, he has an obligation, alternatively, gave an undertaking that he would for a period of 24 months post termination of his employment, not solicit any of the applicant's clients for purposes of employment or providing the same or similar services and that he signed the same confidentiality agreement as the one signed by the other respondents (save the first respondent).

9.3 The employees referred to in the letter of demand being the first, second, third, fourth, fifth, seventh and eighth respondents signed separate confidentiality agreements containing restraints of trade in terms of which they would not be engaged in any capacity whatsoever, for a period of 12 months in any concern or business which is similar or comparative to or in competition with the applicant.

[10] On 8 May 2023, Stein Scop Attorneys (SS Inc) responded to the letters of demand on behalf of the first, second, third, fourth, fifth, seventh, eighth and eleventh respondents.

[11] As this letter was front and centre of the applicant's argument for the referral of the disputes of fact to oral evidence and the respondent's argument in opposition thereto, I will quote the relevant paragraphs from the letter in detail:

'3. The allegations and demands made in your Letters appear to be based on a misunderstanding of the facts and circumstances on the part of your client. In particular, in paragraph 8 of your Letters (save for the letters addressed to Ms McErlean and Mr Enever, in which the relevant wording appears at paragraphs 3 and 5, respectively), you state that LMS is a direct competitor of your client which operates in the private security sector and provides inter alia management consulting service, in competition with your client in relation to the management of security providers including drones, ground crew security teams, Remote Operator Certificate applications to the CAA and others.

4. This is incorrect. LMS is not a direct competitor of your client, nor is it a company that carries on a similar or comparative business to that of your client. We elaborate upon that below so that there can be no <u>misunderstanding which results in unnecessary litigation which can be avoided if your client appreciates the correct position</u>.

<u>The business of LMS</u>

5. LMS is in the audit and compliance business, ensuring that security providers deployed to its clients provide comprehensive service delivery. By contrast, your client's business is primarily security aerial surveillance operations (i.e the deployment of drone surveillance services to clients in order to detect and deter criminal activity). LMS does not conduct any security or drone services whatsoever.

6. Your client is well aware of the nature of LMS' business and the fact that it is not involved in the drone surveillance industry or the provision of security services. In fact, your client has already engaged with LMS in an effort to benefit from each other's complementary rather than competitive services, which it would not have done had LMS and your client been competitors.

8 The SLA makes it clear that your client's primary business is to provide RPAS security monitoring to its clients. LMS' business is entirely different, and LMS does not

offer an RPAS system to its clients. As mentioned above, LMS' services are purely of a consulting nature and they do not provide any security services as such.

9. Your contention that LMS is a direct competitor of your client is therefore plainly incorrect and our Clients are not in breach of the restraints of trade encompassed in their various employment agreements with your client by taking up employment with LMS.

10. The confidentiality obligations that rest on our clients in terms of contract or common law are also not at threat: they are not going to be in a competitive environment where there is an objectively sustainable risk of disclosure (firstly) and, secondly, they have all unequivocally undertaken to abide by their confidentiality obligations.

…

17. The undertakings provided above are given on an open, with prejudice basis, and encompass the undertakings that your client would be entitled to receive by way of an application to Court. In circumstances where there is no basis for your client to believe that our Clients will breach those undertakings, <u>and LMS is not (sic) competitor of your client, there can be no basis whatsoever for your client to approach the Court as threatened in your Letters</u>. Any proceedings launched by your client in that regard will be opposed and this letter will be brought to the attention of the Court.' (own emphasis)

[12] There was no response from HW Inc to this letter from SS Inc.

[13] A month later, on 7 June 2023, the applicant launched the urgent application for hearing on the urgent roll on 19 June 2023. The time periods set out in the notice of motion for the filing of the answering affidavit and replying affidavit were 20 June 2023 and 4 July 2023 respectively.

[14] On 9 June 2023, two days after the urgent application was launched SS Inc addressed a "*with prejudice*" letter to HW Inc, the objective of which was to "*provide what our clients consider to be a fair and reasonable solution to this application, avoiding a drawn- out costly and, in our client's view, meritless litigation*".

[15] SS Inc set out in some detail the reasons why the respondents contended that the applicant and eleventh respondent were not competitors, contended that the founding affidavit did not demonstrate to the contrary and despite, and in order to avoid costly litigation, the eleventh respondent undertook until the end of March 2024 to refrain from approaching the applicant's existing clients.

[16] SS Inc furthermore denied that the second respondent is under any restraint with the deponent to the founding affidavit, Petrus van Niekerk (van Niekerk) having given permission to the second respondent to continue working with Transnet on the Project.

[17] In conclusion SS Inc placed the following on record:

'36. We repeat our client's undertakings, which they make without conceding that they are obliged to give them;

36.1 LMS will refrain from engaging with the Excluded Customers until the end of March 2024;

36.2 UAVI and UAVI Training will refrain from the (sic) engaging with the Excluded Customers until the end of March 2024.

37. In the event that your client persists with this application in the face of these undertakings;

37.1 This letter will be brought to the attention of the Court;

37.2 A with-prejudice draft order reflecting its material parts will be presented to Court; and

37.3 Our clients will seek a punitive costs order.

38. In the interim, our instructions are to proceed with the preparation of our clients' answering affidavit. If we have not received a response by the time that that affidavit is delivered, the contents of this letter will be reiterated in it.

39. All our clients' rights remain strictly reserved.'

[18] In the founding affidavit in support of the urgent application to enforce the confidentiality agreements dated 29 May 2023, and in particular with regard to those confidentiality agreements of the first and second respondents, the deponent, van Niekerk:

18.1 In respect of the first respondent alleges that as at 6 March 2023, the applicant could not locate a signed confidentiality agreement and that on 23 May 2023, shortly before the launching of the application, a signed agreement was located in a box marked for destruction. van Niekerk further alleges that the first respondent at no time during the discussions subsequent to her resignation and when she gave undertakings, mention that she signed a confidentiality agreement in 2019.

18.2 In respect of the second respondent, relies on a one page letter of appointment dated 11 March 2020 signed by the then joint chief executive officers, Georges Sayegh (Sayegh) and Otto Werdmuller von Elgg (Werdmuller von Elgg) in which mention is made of a payment to the second respondent of R100 000.00 for a restraint of trade of a year and contends that the terms of this restraint must be construed to be the same as these agreed to by the 3rd to 10th respondents.'

[19] The respondents' answering affidavit consisting of 138 pages excluding annexures was served and filed on 30 June 2023, seven (7) court days after the deadline imposed by the applicant of 20 June 2023 and some 19 days before the set down on the urgent roll.

[20] The "late" delivery of the answering affidavit resulted in a postponement of the urgent application to the urgent roll for hearing on 31 August 2023.

[21] The respondents, in the answering affidavit deposed to by the first respondent:

21.1 Took issue with the applicant proceeding by motion due to the foreseeability of disputes of fact and contended that at the very least the disputes of fact set out in paragraph 1.1 of the draft order be referred to oral evidence,

21.2 Deny that the eleventh respondent is a competitor of the applicant,

21.3 Deny that the first respondent signed the confidentiality agreement found by the applicant in the box on 23 May 2023,

21.4 Allege that van Niekerk waived the enforcement of the second respondent's restraint of trade.

[22] In respect of the denial of competition, the respondents set out a comprehensive explanation of the business of the eleventh respondent.

[23] In respect of the denial by the first respondent that she signed the confidentiality agreement, annexure "FA38", the first respondent accuses the applicant of manufacturing the document and gives an explanation why the confidentiality agreement is suspect being that:

23.1 She agreed with the former joint chief executive officers of the applicant, Werdmuller von Elgg and Sayegh, when she commenced employment that she would not be required to sign a restraint of trade agreement, this being a condition of her employment.

23.2 Annexure "FA38" is not initialled by her on each page and is signed by her allegedly on Sunday, 1 September 2019, prior to her commencing employment with the applicant on 2 September 2019.

23.3 Regina Maree (Maree) who signed the alleged confidentiality agreement on behalf of the applicant was a junior employee and was not authorised to sign such contracts on behalf of the applicant.

[24] In respect of the second respondent, the first respondent reiterates the allegation set out in the 8 May 2023 correspondence being that van Niekerk waived the enforcement of the restraint of trade.

[25] On 24 July 2023 the applicant with the assistance of a different legal team, brought an *ex parte* Anton Piller application and obtained an order against the first respondent for purposes of searching the first respondent's home, workplace and vehicle for confidential information belonging to the applicant.

[26] On 3 August 2023, SS Inc in response to the execution of the Anton Piller order on 27 July 2023 proposed that the first respondent meet with HW Inc, and van Niekerk for purposes of returning any confidential documents the first respondent has in her possession, deleting any such documents from her hard drives, which would alleviate any unfounded concerns that your client may have regarding the misappropriation or use by Ms McErlean of any of your client's confidential information and to prevent a misleading narrative as to Ms McErlean's *bona fides* from being developed.'

[27] On 4 August 2023 instead of responding to the with prejudice proposal of SS Inc, HW Inc uses the letter of SS Inc to inform SS Inc that the replying affidavit will, now as a result, be served late.

[28] On 10 August 2023, SS Inc responded, *inter alia*, as follows:

'3.14 Fully aware of the contents of Anton Piller application and that your client was in the process of executing that order, on 27 July 2023, you wrote to us. Remarkably, that was to refuse a postponement of the hearing. In that letter, you are silent as to the intended timing of your client's replying affidavit. Our client presumed, quite reasonably, that it would be delivered in accordance with the amended notice of motion: on 4 August 2023.

3.15 Having, on 27 July 2023, received a copy of the Anton Piller application from our clients and having properly considered it, our clients instructed us to make the proposal in our letter of 3 August 2023 regarding the files that were copied from Ms McErlean's hard drive during the execution of the Anton Piller application. We reject the insinuation in your letter of 4 August 2023 that the timing of that proposal indicates a lack of *bona fides*.

3.16 On 4 August, you responded to that proposal, that your client needed more time to consider it and that your client had decided again to amend unilaterally the timeline in its amended notice of motion. Coyly, you said that your client would "hold in abeyance" its replying affidavit until it had had an opportunity to investigate the issues in our letter of 3 August 2023.

3.17 As we write this letter, your client's replying affidavit remains outstanding, weeks after it should have been delivered. Your client has provided no indication when it will be delivered. Indeed, quite the oppose is the case.

…

8. Your client has taken an entirely unreasonable approach to this matter. As we have said to you on previous occasions, the way that your client is conducting itself is causing prejudice to our clients. Your letter of 4 August 2023 is yet a further example of this. Our clients have repeatedly made reasonable proposals on the way forward, all of which have led to naught through your client's recalcitrant stance.

9. The one fact, however, that is as plain as a pikestaff that this matter will not be ready for hearing on 31 August 2023.

10. We, therefore, ask that your client confirms that it will remove the matter from the roll by Monday, 14 August 2023. If this is not done, we hold instructions to approach the Registrar for assistance in this regard. A copy of the letters exchanged between our firms will then be provided to the Registrar. We trust that this will not be necessary and that the parties will instead agree on a reasonable timeline going forward.'

[29] On the same day in separate correspondence, SS Inc reiterated its proposal made on a with prejudice basis which was in effect a proposal for the parties to engage with each other.

[30] On 18 August 2023 SS Inc wrote to HW Inc as follows:

'3. Save to write to us on 4 August 2023 to confirm that your client required more time to consider the Proposal and you would hold the delivery of its answering affidavit in abeyance in the meantime, your client has failed to:

3.1 Respond to Our Letter;

3.2 Respond to the Proposal;

3.3 Remove the matter from the roll on 31 August 2023.

4. In the circumstances, and given your previous insistence that the matter proceeds on 31 August 2023 despite our client's assertions that the matter will not be ready for hearing by then, we have no option but to assume that you intend to proceed with the matter on 31 August 2023 notwithstanding that your client has to date still not delivered its replying affidavit in what it, as applicant, contends is an urgent application, and have briefed counsel accordingly. We point out that your offices were extremely critical of what you contended to be unreasonable delay on the part of our Clients to deliver their answering affidavits. That criticism rings particularly hollow in the light both your Client's inexplicable and considerable delay in delivering a replying affidavit in its own "urgent" application and your offices complete failure to communicate or engage constructively with our offices in an effort to ensure that the Court is not burdened with an application that may an application that may not be ripe for hearing alternatively to ensure that the matter is ripe for hearing without prejudicing any parties' rights as litigants.'

[31] Despite the tight deadlines given to the respondents to file the answering affidavit, the applicant only delivered its replying affidavit on 18 August 2023 almost two (2) calendar months and thirty-two (32) court days after the delivery of the answering affidavit.

[32] In the replying affidavit, van Niekerk accuses the respondents of deliberately creating disputes of fact in an effort to prevent the main application from being heard on 31 August 2023. Van Niekerk refers to the disputes raised by the respondents as "*spurious*" and states that the applicant will be seeking an order to refer the disputes to oral evidence.

[33] In respect of the first respondent's denial of her signature of annexure "FA38", the applicant relies solely on a report from a handwriting expert where the expert, Mr. Bester "*has opined that the signature on the confidentiality agreement is authentic and is that of the first respondent*".

[34] Van Niekerk further alleges that the confidentiality agreement is signed by Maree on behalf of the applicant who has informed Ms Tarynne Willis (Willis), an attorney employed by HW Inc that while she was employed by the applicant, she signed contracts of employment. No confirmatory affidavit by Maree is attached to the replying affidavit.

[35] The applicant expresses the wish to cross examine the first respondent on her allegations.

[36] In regard to the second respondent van Niekerk admits that he did agree that the second respondent continue work on the Project as the client so desired but alleges that he only so agreed on proviso that the second respondent did not do so for a competitor.

[37] In respect of the respondents' denial that the eleventh respondent is a competitor of the applicant, van Niekerk relies on the "*mass exodus*" of the respondents to "*infere"* competition and further relies on statements made by the first

respondent prior to her statements made in the answering affidavit to demonstrate competition and/or that this issue was not a foreseeable dispute of fact.

[38] On 22 August 2023, HW Inc informed SS Inc that the first respondent's proposal to engage was rejected and that on 31 August 2023 at the hearing of the urgent application, the applicant will seek the referral of the disputes of fact to oral evidence. HW Inc demands that SS Inc agree to the referral of the disputes of fact to oral evidence by 24 August 2023 failing which an order will be sought on 31 August 2023.

[39] On 28 August 2023, five (5) court days after the delivery of the replying affidavit, the respondents deliver their supplementary affidavit in reply to the allegations in the replying affidavit and in anticipation of the matter being heard on 31 August 2023.

[40] On or about 29 August 2023 the applicant requested a postponement of the matter set down on 31 August 2023 which the respondents agreed to on condition the applicant tenders the respondents' wasted costs.

[41] On 30 August 2023, HW Inc replied refusing to agree to the applicant paying the wasted costs and proposing costs to be reserved. This proposal was declined by SS Inc. It was, however, eventually agreed that the matter would be postponed *sine die* with costs reserved. The agreement was communicated to the court on 30 August 2023 at 14:56 by email from HW Inc.

[42] On 31 August 2023, Justice Nkutha- Nkontwana issued an order postponing the matter with no order as to costs. The order did not reflect the agreement of the parties that the costs would be reserved.

[43] On 4 October 2023 SS Inc wrote to HW Inc raising the concerns that:

43.1 The urgent application was launched almost four months' prior, a month has passed since 31 August 2023 and the main application has not been re-enrolled.

43.2 Any urgency alleged by the applicant has been lost. The following was stated:

'This is amplified by the leave sought in your client's replying affidavit to refer certain factual issues to oral evidence for determination. It is this relief (i.e the referral of certain issues to oral evidence) that your client must seek at the rescheduled hearing date rather than the relief sought in your client's notice of motion to the Application. Should this relief (the referral to evidence), be granted, the parties would no doubt embark on a protracted discovery process before oral evidence is heard. The list of issues in respect of which your client seeks referral to oral evidence is also extensive and the witnesses that would testify are many.

It is in this context that the parties must consider the relief sought by your client in the Application, i.e. for the respondents to adhere to their restraints of trade and resign from their employment with Linear Management Systems (Pty) Ltd until <u>March/ April 2024</u>. On your own client's own version, the relief that it seeks has a long-stop date of April 2024, when it becomes moot.

Assuming, optimistically, that the hearing of the referral sought to oral evidence is heard this year, there is no conceivable way that the discovery process and presentation of oral evidence will be finalised before (on your client's version) the expiry of the restraints of trade in question. The relief sought in the Application has, therefore, already become moot. Litigants are not to burden a Court with the adjudication of matters that have become moot, lest a punitive costs order be visited upon them.

As said in our client's answering affidavit delivered in the Application, to the extent that your client contends that our clients' conduct has caused your client to suffer harm (which is denied), the correct course of action is for your client to pursue a damages action against our clients. In fact, <u>your client has explicitly acknowledged this by launching a damages action against our client on 7 September 2023 under case number 089851/2023</u>. Those proceedings are, as you are no doubt aware, being defended by our clients.'

[44] SS Inc requested HW Inc to withdraw the main application as the relief the applicant seeks will become moot when the matter is considered and the application constitutes an abuse of the court process. SS Inc cautions that if the applicant persists it will seek a punitive costs order.

[45] On 10 October 2023 HW Inc informed SS Inc that the applicant will not withdraw the matter and requested the honourable Waglay JP to enrol the matter on an expedited basis proposing 28, 29 or 30 November 2023 as suitable dates.

[46] On 15 November 2023, SS Inc again contend to HW Inc that urgency has "*now entirely dissipated*" with the relief sought in the notice of motion ending in April 2024. SS Inc again propose that the applicant withdraw the application and tender costs.

[47] On 11 December 2023, the referral application is set down for hearing on 11 January 2024.

Counsels' Argument

[48] The applicant was represented by Adv I Green SC (Adv Green) with Adv P Bosman.

[49] The respondents were represented by Adv C Whitcutt SC (Adv Whitcutt) with Adv JJ Meiring.

[50] At the outset of the argument for the applicant I enquired from Adv Green whether the application for the enforcement of the confidentiality agreements or an application for the referral of specific disputes as per the draft order attached to his heads of argument was before me.

[51] Adv Green stated that I was tasked only with the determination of the application for oral evidence and not the main application and that as a consequence I am not called on to adjudicate the matter on the basis of the trite principle of *Plascon-Evans*[1]. Adv Green argued that the court is to *"stick to its lane"* and only consider the referral application. Adv Green did agree, however, that if I was inclined to dismiss the referral application, the applicant, on the application of *Plascon-Evans*, will not be entitled to final relief as sought in the amended notice of motion. Adv Green was

[1] *Plascon-Evans Paints v Van Riebeek Paints* 1984 (3) SA 632; [1984] 2 All SA 366 (A) at 634 E -635 C *(Plascon Evans).*

willing to and did so agree that if I dismiss the referral application, the main application is to be dismissed on the strength of *Plascon-Evans*.

[52] Adv Green further contended that the applicant has taken a responsible approach by seeking the referral of the disputes of fact to oral evidence especially in circumstances where the respondents have agreed that the disputes should be referred to oral evidence. The argument was that there is a joint recognition by the parties that *Plascon-Evans* is inappropriate and where the parties have both said this, the Court should not decide otherwise.

[53] The fact that the respondents in the answering affidavit agree that at least the disputes of fact relating to whether or not the first respondent signed the confidentiality agreement, whether or not the applicant waived the restraint of trade of the second respondent and what the exact terms are of the second respondent's restraint of trade should be determined with oral evidence, is a factor that should weigh heavily in the court exercising its discretion in favour of the applicant.

[54] In response, Adv Whitcutt argued that the respondents have never agreed to refer the dispute relating to whether or not the eleventh respondent is a competitor of the applicant to oral evidence and that this is a fundamental issue to the main application. The argument is that the applicant has no case against the respondents as the eleventh respondent is not a competitor and thus there is no breach of the confidentiality agreements.

[55] I raised a concern that should I grant the referral of the restraint of trade disputes to oral evidence, by the time the matter is enrolled and heard, the respondents would have lapsed rendering the matter moot.

[56] Adv Green argued that I am to deal with the matter as at 11 January 2024, the status being that there are valid and operative restraints of trade in place and until the restraints of trade expire, the court is enjoined to hear the referral application.

[57] The argument continued that the restraints of trade have not expired and thus I am not faced with having to consider potential mootness.

[58] Adv Whitcutt contended to the contrary and argued that I am to consider the applicant's conduct in pursuing the main application in deciding whether or not to even entertain the referral application.

[59] Adv Whitcutt submitted that the main application has been *"a dead man walking"* since its inception, that the main application and the referral application was a waste of resources and an abuse of court processes with the applicant refusing to engage and refusing to see sense.

[60] It was contended on behalf of the respondents that the applicant was aware when the answering affidavit was filed on 30 June 2023 that there was a material dispute of fact and the election to apply to have the disputes of fact referred to oral evidence should have been made then. It was contended further that the applicants knew already on 8 May 2023 with the respondent's attorney's letter that there was a material dispute of fact. The applicant did not seek interim relief pending the referral to oral evidence which, it was contended, fatally undermines the referral application.

[61] Adv Whitcutt contended that should I be inclined to refer the disputes of fact to oral evidence and thus grant the referral application, I would be perpetuating an exercise in futility. In response Adv Green contended that the delay in the main application was due to the Anton Piller proceedings. The applicant did not sit on its hands and do nothing. Adv Green stated that when reading the answering affidavit, the election was made to refer the disputes of fact to oral evidence. Adv Green strongly argued that it is not for the presiding judge to guess what the Judge President will or will not do or what the Registrar will or will not do to expedite the matter should I grant the referral application and that it is irrelevant for me as the judge to have regard to the fact that certain of the restraints of trade will lapse in March 2024.

[62] As to the dispute of fact as to whether or not the eleventh respondent is a competitor of the applicant, the focus of the applicant on whether or not a dispute as to the fundamental question in any proceedings for the enforcement of a restraint of

trade agreement, being whether the eleventh respondent is a direct competitor to the applicant, was annexure "FA1" to the founding affidavit.

[63] Annexure "FA1" is SS Inc.'s response on behalf of the respondents' dated 8 May 2023 being the response to the applicant's letter of demand dated 2 May 2023.

[64] Adv Green argued that "FA1" is to be read by the court as an admission by the respondents that the eleventh respondent is a direct competitor of the applicant or that it carries on business which is similar or comparative. The argument was that if I was prepared to regard "FA1" as an admission that the eleventh respondent is a direct competitor of the applicant then in such circumstances the dispute of fact that the eleventh respondent is not a direct competitor was not foreseeable by the applicant.

[65] Adv Green referred to the various allegations contained in the answering affidavit which contradict statements made by the first respondent publicly prior to her departure from the applicant in support of his argument that a dispute as to whether or not the applicant is a competitor of the first respondent was not foreseeable.

[66] Adv Green further argued that the mere fact that there was a planned mass exodus from the applicant to the eleventh respondent is in itself an indicator that the eleventh respondent is a competitor of the applicant.

[67] Adv Green argued that proceedings for the enforcement of a restraint of trade are a perfect example of proceedings before a court where a dispute as to whether the respondent party is a competitor of the applicant could generally be foreseeable by the applicant and that is why foreseeability alone is not sufficient for the court to dismiss the referral application. Something more is required being the applicant having acted with *"reprehensibility"* in bringing the application. Adv Green contended that there was no reprehensibility on the part of the applicant and that as a consequence the court should grant the referral application. It was argued that a clear reading of annexure "FA1" together with the prior statements of the first respondent indicate confirmation of competition by the eleventh respondent. It was further argued that the fact that the applicant's legal team decided to proceed by application and made the *"wrong call"* is not sufficient to satisfy the requirement of reprehensibility. Adv Green was reluctant to

give a label to the term "*reprehensibility*" and contended that it may mean recklessness but not *mala fides*. Adv Green further contended that the applicant should not be punished for its legal teams' "*best guess*" being the wrong one.

[68] Adv Whitcutt argued that there are only two ways of looking at "FA1" being the common sense approach or the approach of "*let's see what we can read between the lines*" to justify why the applicant is proceeding with the main application. The contention of the respondents is that "FA1" must be read with common sense in mind and from such a common sense reading it is clear that there is a denial of competition by the respondents. If "FA1" is read as a denial, then the applicant was forewarned on 8 May 2023 already and at the outset that the aspect of competition would be disputed.

[69] Adv Whitcutt further referred to annexure "AA20" being correspondence addressed to the applicant's attorneys dated 9 June 2023, a few days after the main application was launched and prior to the service and filing of the answering affidavit where the respondents reiterate their "*primary contention*" that the eleventh respondent is not a competitor of the applicant, contend that the main application is premised on a "*misappreciation of a competitive overlap, is fundamentally misconceived and cannot succeed".*

[70] Adv Whitcutt argued that the *"reprehensibility"* on the part of the applicant is in the applicant's refusal to engage with the respondents despite being invited to do so, the applicant's insistence on launching the main application despite the correspondence explaining why the eleventh respondent is not a competitor of the applicant, the undertakings given, the failure of the applicant once it was clear that there were disputes of fact from seeking interim relief pending a referral and the applicant's conduct in the prosecution of the main application with its 32 days delay in filing the replying affidavit without explanation and the further delays in the litigation.

[71] On the dispute of fact on whether the first respondent signed "FA38", the applicant contended that the first respondent is in a "*credibility crisis"* and must be called to be cross examined in that she has never explained why she took confidential

information from the applicant and has denied that she signed the confidentiality agreement accusing the applicant of fraud.

[72] On the dispute of fact as to whether or not the applicant waived the second respondent's restraint and what the exact terms are of the second respondent's restraint, Adv Green argued that the issue of the exact terms of Vorster's restraint of trade, while possibly being foreseeable by the fact that there was a *"loose restraint"* only mentioned in the offer of employment and the payment of R100 000.00 to him, does not meet the threshold of reprehensibility and thus this issue should also be referred to oral evidence.

[73] Adv Whitcutt contended that due to the "*high watermark*" of the applicant's case against the second respondent being the offer of employment, it could not be argued that the applicant could not have foreseen a dispute on the terms of the restraint, when the applicant itself could not do so itself. In addition, the second respondent's opposition was set out in annexure "FA1".

Principles applicable to motion proceedings and applications for referral

[74] The law applicable to applications for the referral of disputes of fact to oral evidence is trite.

[75] The starting point is *Plascon-Evans*. A well-known principle that needs no introduction applicable to motion proceedings where the applicant is seeking final relief.

'It is correct that, where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact… If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6(5)(g) of the Uniform Rules of Court… and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks… Moreover, there may be exceptions to this general rule, as for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers…'[2]

[76] In *Benyon v Rhodes University and Another*[3], the Court set out the position as follows:

'[28] In *Plascon – Evans Paint Ltd v van Riebeek Paints (Pty) Ltd* [1984] ZASCA 51, 1984 (3) SA 623 (A) 634 – 635, the rule was established that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts averred in Applicant's affidavits, which have been admitted by the Respondent, together with the facts alleged by the latter, justify such order. It may be different if the Respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, farfetched all so clearly untenable that the Court is justified in rejecting them merely on the papers. *National Director of Public Prosecutions v Zuma* 2009 (2) SA 279 SCA.

[29] It should be emphasized that whilst generally undesirable to attempt to decide an application on affidavit where there are material facts in dispute, it is equally undesirable for a court to take all disputes of fact that (sic) the face value which would enable a Respondent to raise fictitious issues of fact in avoidance. It is necessary then to examine the alleged disputes and determine whether they are real or can be satisfactorily resolved without the aid of oral evidence.'

[77] Hefer JA in *Wightman t/a JW Construction v Headfour (Pty) Ltd and another*[4], stated the approach to the assessment of disputes of fact as follows:

'[13] A real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be

[2] 1984 (3) SA 623 (A); [1984] 2 All SA 366 (A) at 634H-635C.
[3] [2016] ZAECGHC 161; [2017] 4 BLLR 423 (ECG).
[4] [2008] 2 All SA 512 (SCA); [2008] ZASCA 6 at para 13.

instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment. When the facts averred are such that the disputing party must necessarily possess knowledge of them and be able to provide an answer (or countervailing evidence) if they be not true or accurate but, instead of doing so, rests his case on a bare or ambiguous denial the court will generally have difficulty in finding that the test is satisfied. I say "generally" because factual averments seldom stand apart from a broader matrix of circumstances all of which needs to be borne in mind when arriving at a decision. A litigant may not necessarily recognize or understand the nuances of a bare or general denial as against a real attempt to grapple with all relevant factual allegations made by the other party. But when he signs the answering affidavit, he commits himself to its contents, inadequate as they may be, and will only in exceptional circumstances be permitted to disavow them.'

[78] In *South African Football Association v Mangope*[5]*,* the LAC discussed the different scenarios where disputes of fact could cause:

'[11] As pointed out in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd*, a real dispute of fact will arise in one of three ways. Firstly, the respondent may deny one or more of the material allegations made by the applicant and produce evidence to the contrary, or may apply for the leading of oral witnesses who are not presently available or who though averse to making an affidavit, would give evidence if subpoenaed. Secondly, the respondent may admit the applicant's affidavit evidence but allege other facts which the applicant disputes. Thirdly, the respondent, while conceding that he has no knowledge of one or more material facts stated by the applicant, may deny them and put the applicant to the proof, and himself give or propose to give evidence to show that the applicant and his deponents are untruthful or their evidence unreliable.'

[79] In *Bocimar NV v Kotor Overseas Shipping Ltd*[6]; the Court, in determining an application for oral evidence held that:

[5] [2012] ZALAC 27; (2013) 34 ILJ 311 (LAC) at para 11.

'It would seem that in the Court *a quo* Bocimar's counsel simply applied informally and non- specifically for the hearing of oral evidence, at the end of his argument on the merits, in the event of the Court holding that Bocimar had failed on the papers to establish a genuine and reasonable need for security. No indication was apparently given of who should be required to give evidence or submit themselves to cross-examination nor was any indication given of what evidence new witnesses would be able to give. In *Kalil v Decotex (Pty) Ltd and Another* 1988 (1) SA 943 (A), at 981D -G reference was made to 'the salutary general rule' that an application to refer a matter to evidence should be made at the outset and not after argument on the merits. It was pointed out that the rule was not an inflexible one and that: in exceptional cases the Court may depart from it. It is, however, a factor to be considered in the present case. In *Kalil's* case *supra* this Court said, with reference to the discretion to allow oral evidence in the case of an application for a provisional order of winding-up (at 979H-I): "Naturally, in exercising this discretion the Court should be guided to a large extent by the prospects of *viva voce* evidence tipping the balance in favour of the applicant. Thus, if on the affidavits the probabilities are evenly balanced, the Court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant. And the more the scales are depressed against the applicant the less likely the Court would be to exercise the discretion in his favour. Indeed, I think that only in rare cases would the Court order the hearing of oral evidence where the preponderance of probabilities on the affidavits favoured the respondent."
These observations are, in my view, pertinent to applications generally. In the present case, the probabilities on the affidavits (on those issues where the balance of probabilities is the standard of proof) tend to favour Kotor rather than Bocimar, Moreover, the lack of any specific indication as to what oral evidence Bocimar had in mind increases the difficulty of making a favourable assessment of the prospects of *viva voce* evidence tipping the balance in favour of Bocimar.' (own emphasis)

[80] In *Ripoll-Dausa v Middleton NO and Others*[7], the Court stated as follows:
'In their commentary of rule 6(1)(g) Erasmus *et al Superior Court Practice* at B1-50 A state:

[6] 1994 (2) SA 563 (A); [1994] ZASCA 5 at 587A-H.
[7] [2005] 2 All SA 83 (C); [2005] ZAWCHC 6 at 94.

"In exercising its discretion under the subrule, the court will to a large extent be guided by the prospects of *viva voce* evidence tipping the balance in favour of the applicant. If on the affidavits the probabilities are evenly balanced, the court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant. The more the scales are depressed against the applicant, the less likely the court will be to exercise its discretion in its favour. Only in rare cases will the Court order the hearing of oral evidence where the preponderance of probabilities of affidavits favour the respondent".'

[81] The Court in *Jonsson Workwear (Pty) Ltd v Williamson and Another*[8]; referred to the case of *Kalil v Decotex (Pty) Ltd and Another*[9], as follows:

'[13] The general principles with regard to applications to refer motion proceedings to oral evidence was set out in *Kalil v Decotex (Pty) Ltd and Another* where the Court said the following:

"The applicant may, however, apply for an order referring the matter for the hearing of oral evidence in order to try to establish a balance of probabilities in his favour. It seems to me that in these circumstances the Court should have a discretion to allow the hearing of oral evidence in an appropriate case. … Naturally, in exercising this discretion the Court should be guided to a large extent by the prospects of *viva voce* evidence tipping the balance in favour of the applicant. Thus, if on the affidavits the probabilities are evenly balanced, the Court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant. Thus, if on the affidavits the probabilities are evenly balanced, the Court would be more inclined to allow the hearing of oral evidence than if the balance were against the applicant. And the more the scales are depressed against the applicant the less likely the Court would be to exercise the discretion in his favour. Indeed, I think that only in rare cases would the Court order the hearing of oral evidence where the preponderance of probabilities on the affidavits favoured the respondent".'

[82] The Court further held as follows:

'It has been held in a number cases that an application to refer a matter to evidence should be made at the outset and not after argument on the merits (see *Di Meo v*

[8] [2013] ZALCD 24; (2014) 35 ILJ 712 (LC) at paras 13, 16-17 and 19.

[9] 1988 (1) SA 943 A.

Capri Restaurant 1961 (4) SA 614 (N) at 615H – 616A; *De Beers Industrial Diamond Division (Pty) Ltd v Ishuizuka* 1980 (2) SA 191 (T) at 204C- 206D; *Spie Batignolles Societe Anomyme v Van Niekerk: In re Van Niekerk v SA Yster en Staal Industriele Korporasie Bpk en Andere* 1980 (2) SA 441 (NC) at 448E – G, *Erasmus v Pentamed Investments(Pty) Ltd* (s*upra* at 180H); *Hymie Tucker Finance Co (Pty) Ltd v Alloyex (Pty) Ltd* 1981 (4) SA 175 (N) at 179B – E; cf *Klep Valves (Pty) Ltd Saunders Valve Co Ltd* 1987 (2) SA 1 (A) at 24I – 25D). This is no doubt a salutary general rule, but I do not regard it as an inflexible one. I am inclined to agree with the following remarks of Didcott J in the *Hyme Tucker* case supra at 179D:

"One can conceive of cases on the other hand, exceptional perhaps, … when to ask the Court to decide the issues without oral evidence if it can, and to permit."

[83] The court further held as follows:

'[16] Based on the above, it is clear that as a general principle, the Court has a discretion to decide whether to refer motion proceedings to oral evidence where there is a dispute of fact that needs to be resolved. In exercising this discretion, a litigant applying for a matter to be referred to oral evidence should at least advance reasonable grounds to support this discretion being exercised in favour of the litigant. Proper and formal application must be made in this regard. It should at least be set out what evidence presented by the other litigating party in the affidavit is lacking in credibility and how the referral to oral evidence will resolve this. The Court should consider to what extent this referral to oral evidence could tip the scales in support of the litigant seeking the referral. The final issue to consider is convenience to the Court.

[17] The applicant has unfortunately not make out a case for the matter to be referred to oral evidence in terms of the above principles. The applicant has not made a proper application for this relief, and has simply asked for this to happen in heads of argument. The applicant has further not sufficiently motivated as to which of the contentions of the first respondent in its answering affidavit could be successfully discredited by a referral to oral evidence and what kind of evidence would be led to establish this. Considering the nature of the dispute, being that of a restraint of trade and all its consequences, it is simply not convenient to delay its determination any further by a referral to oral evidence. The applicant has thus simply not convinced me to exercise the wide discretion that I have in this regard in its favour.'

[84] The Court held further that:

'[19] In a restraint of trade dispute, the applicant must surely have anticipated a material factual dispute. The prior correspondence between the parties before this application was brought must surely further confirm that a material factual dispute should have been anticipated from the outset. The applicant should have preempted this with a request for the matter to be referred to oral evidence as an alternative prayer from the outset, should the Court not be inclined to determine the factual dispute on the papers in favour of the applicant party. In not doing this, the applicant in fact indicates that it is satisfied that any factual disputes be determined in terms of the normal principles applicable to motion proceedings, referred to above. This was precisely the sentiment exhibited by the Court in *Singh v Adam* which dealt with a restraint application, and where the Court said: 'In her replying affidavit the applicant revisits the issue by arguing that on receipt of the answering affidavit it has become evident that the anticipated dispute of fact has indeed materialized and that a referral to oral evidence would accordingly be justified. Alternatively, given that the respondent referred a dispute to the CCMA shortly after the launch of the application proceedings, the interim interdict should be granted pending the resolution of the constructive dismissal dispute by arbitration. In my opinion, an application on this basis amounts to an irregular proceeding. <u>Having anticipated a material dispute of fact that could not be resolved on the papers it was inappropriate for the applicant to seek a final interdict by way of notice of motion…'. By not anticipating the factual dispute that was inevitable in arising in this matter and dealing with it accordingly, it is my view that the applicant cannot now be allowed to remedy this defective conduct by a referral to oral evidence</u>.'

[85] On the issue of the inherent urgent nature of proceeding to enforce restraints, I quote the Honourable Prinsloo J in *Slo-Jo Innovation* (Pty) Ltd *v Beedle and Another*[10]:

'[9] Furthermore, one of the fundamental considerations in any assessment of urgency is the ability of the applicant to obtain the relief it seeks in the ordinary course. It is a matter of public record that the ordinary opposed motion roll is full until the end of 2023. The restraint that the applicant seeks to enforce is until 1 November 2023 and would have expired before this application would be enrolled for hearing in the

[10] [2022] JOL 56595 (LC); (2023) 44 ILJ 839 (LC) at para 9.

normal course. If this application is to be enrolled and adjudicated in the normal course, the restraint agreement and obligations will become meaningless and the relief sought academic. Evidently, the Applicant will not get relief in the ordinary course.'

[86] It is trite that when the Court is approached to enforce a restraint of trade and is called on to adjudicate whether or not the restraint the applicant seeks to enforce is unreasonable, the Court must do so with reference to the circumstances of the case which is not limited to the circumstances when the restraints were entered into. The Court can have regard to what has happened since and can have regard to the circumstances prevailing at the time the enforcement is sought.[11]

Analysis

[87] The applicant is asking the Court to exercise its discretion in its favour and refer the motion proceedings to oral evidence for the purpose of certain disputes of fact being resolved hopefully in its favour so it can enforce the confidentiality agreements against the respondents and restrain them from continuing their employment with the eleventh respondent.

[88] On an application of the legal principles as discussed above the applicant in my view faces a number of challenges and difficulties which leads the Court to seriously consider exercising its discretion against the referral of the disputes to oral evidence. The challenges relate to the applicant's conduct in dealing with the disputes of fact when they were raised by the first respondent but also its conduct in the prosecution of an application that by its very nature is urgent considering the time periods set out in the confidentiality agreements and where the applicant seeks final relief against ten individuals almost 12 months later where the proverbial horse has bolted and which relief if granted would pose significant consequences for not only the first to tenth respondents but the eleventh and twelve respondents.

[11] *Arrow Altech Distribution (Pty) Ltd v Byrne and Others* [2007] ZAKZHC 33; (2008) 29 ILJ 1391 (D).

[89] I will deal with some difficult challenges the applicant faces which in my view are factors that weigh heavily against the applicant and from which the Court is inclined to decline to grant the applicant the relief sought of the referral of the disputes of fact to oral evidence. The facts do open the applicant to strong criticism and this in my view meets the test for reprehensibility as referred to in argument.

89.1 The first difficulty which I addressed with both counsel in argument is that in reality the referral to oral evidence if granted will result in further protracted proceedings between the parties. The proceedings to date have been fraught with hostility with accusations being directed both ways in the affidavits between van Niekerk and the first respondent and Anton Piller proceedings with the home and private space of the first respondent being subjected to search. There is no love lost between the parties and any further proceedings will, if regard is had to the overburdened court roll, not take place before most of the periods in the confidential agreements have expired resulting in the relief the applicant seeks in the notice of motion becoming moot. To burden the parties and the court with protracted, costly and time-consuming litigation in these circumstances is illogical and in my view foolish. I disagree with Adv Green that it is not for me to guess what the Registrar will or will not do to expedite the hearing of the oral evidence. It is not up to the Registrar to expedite any proceedings at this stage as the trial proceedings are not ripe for hearing. As Adv Whitcutt contended the referral to oral evidence will be preceded by lengthy preparations such as discovery and subpoenas. Any practitioner of this court will know that such preparations do not magically happen overnight. The applicant only has a few weeks before at least 6 of the 10 restraints expire. I do not agree that I cannot have regard to these facts in exercising my discretion. I am entitled as the presiding officer exercising my discretion to take into account, the facts and circumstances prevailing at the time the applicant is seeking the relief. The circumstances are such that the applicant on its own version, has allowed the respondents to continue their employment in breach of the confidentiality agreements for a period of almost 10 months before coming to court to ask for the referral. The facts weigh heavily against the applicant particularly where the applicant was aware of the disputes of fact in June 2023 already, threatened to bring an application for referral, failed to request interim relief pending the referral, delayed the exchange of affidavits, postponed the urgent application twice and thereafter failed to act with the urgency and expediency necessary to protect its interests which it contended were being prejudiced by the respondents. Instead and despite being cautioned by the respondents, the applicant persisted with the application in circumstances where it must have been aware that if and should the court in the trial proceedings find in its favour, the restraints would have lapsed. In my view just on this basis alone, I should dismiss the application for referral to oral evidence, however, there are other difficulties the applicant faces which I feel I must address.

89.2 Van Niekerk has motivated his request for the referral of the disputes of fact to oral evidence by his desire to cross-examine the first respondent to test her version of the signature or lack thereof to the confidentiality agreement. The challenge van Niekerk has is that none of the allegations by the first respondent in the answering affidavit and the disputes of fact raised by her can be considered as fictitious, palpably implausible, far-fetched or clearly untenable so as for this Court to simply reject them.

89.3 To the contrary, the first respondent in raising the disputes of fact with her denials, does so with full particularity. To illustrate what I believe is the *bona fides* of the first respondent, I refer to her denial that she signed annexure "FA38". The denial in the answering affidavit is not a bare or general denial. The first respondent gives detailed facts surrounding her employment with the applicant and provides confirmatory affidavits of both Werdmuller von Elgg and Sayegh in support thereof. The first respondent even deals with the alleged signature of the confidentiality agreement by Maree alleging that as a junior employee, she was not authorised to sign contracts of employment on the applicant's behalf. The first respondent is so certain of her facts she goes as far as accusing the applicant of manufacturing the confidentially agreement. This is a serious allegation to make under oath.

89.4 Van Niekerk in reply makes the astonishing statement that *"[A] simple comparison of the signature on the confidentiality agreement with the admitted signature on Ms McErlean's contract of employment (FA37) shows that the signatures are the same"*. In support of this statement van Niekerk relies on the expert report of Mr Bester and makes a further astonishing statement that *"Mr Bester has opined that the signature on the confidentiality agreement is authentic and is the same signature as appears on other documents which Ms McErlean signed"*. A similar submission is made in Adv Green's heads of argument that Mr Bester in his report confirms that the signature on the confidentiality agreement is that of Ms McErlean.

89.5 I have perused the expert report numerous times in an attempt to find where Mr Bester confirms that the signature on FA38 is that of the first respondent. I was unable to find this conclusion by Mr Bester. Mr Bester's opinion is in fact the following:

'<u>OPINION:</u> After consideration of the corresponding inherent handwriting characteristics between the questioned signature and the collected specimen signatures, the identification of the absence of fundamental handwriting differences between the questioned signatures and the collected specimen signature, the absence of signature forgery characteristics and the consideration of the examination limitations, it is my opinion that the <u>identified forensic technical evidence support the proposition that the possibility cannot be excluded that the writer of the Dale Keri McErlean collected specimen signatures is the writer of the Dale Keri McErlean questioned signature on the UDS CONFIDENTIALITY AGREEMENT document with signature date 01 September 2019</u>. The possibility expressed in this opinion is supported by the identified forensic technical evidence and is not an opinion of speculative nature.'

89.6 Adv Green, when I asked him to point out exactly where in the expert report Mr Bester's opinion that the signatures are the same is reflected, agreed with me that his submission in the heads of argument is overstated. I agree. Not only is the submission in the heads of argument overstated but the allegation by van Niekerk in the replying affidavit is too.

89.7 With regards to Maree, the best van Niekerk could do in reply to the first respondent's allegation that Maree was a junior employee who did not have the authority to sign contracts of employment, let alone restraints of trade agreements on behalf of the applicant was the following paragraph in his replying affidavit:

'14. The confidentiality agreement is signed on behalf of UDS by Ms Maree. Ms Maree has confirmed to Tarynne Willis ("Ms Willis"), an attorney employed by the attorneys for UDS, that while she was employed by UDS she signed employment-related agreements on behalf of UDS.'

89.8 I do not know what to make of this paragraph and statement by van Niekerk. Not only does it constitute hearsay, but it is not supported by a confirmatory affidavit by Maree, the person who is alleged to have signed the confidentiality agreement, confirming that she in fact did sign the confidentiality agreement in the presence of the first respondent. The fact that Maree told Tarynne Willis, an attorney of HW Inc that she (Maree) signed employment-related agreements on behalf of the applicant is of no value to the Court and does not assist the applicant in its pursuit to show that the first respondent is bound by FA38 as she signed same.

89.9 What makes matters worse for the applicant is the fact that the first respondent replies directly to the applicant in her supplementary affidavit supported by a confirmatory affidavit by Maree in which Maree confirms under oath that she recalls the first respondent's refusal to sign the confidentiality agreement.

89.10 I find it astonishing that the first respondent was able to make contact with Werdmuller von Elgg, Sayegh and Maree for purposes of preparing her opposition to the main application against her and to have these individuals, who had personal knowledge of the facts put forward by the first respondent in her affidavits, sign confirmatory affidavits in support of her opposition but the applicant appears not to have done so. Is the applicant and van Niekerk questioning all these individuals' integrity? Does van Niekerk want to cross question Werdmuller von Elgg and Sayegh as he proposes in respect of the first respondent? The astonishing part is that the applicant, who in its conduct from the outset as demonstrated from the correspondence prior to the launching of the main application, was well aware that there may be an issue with the first respondent's confidentiality agreement, seems to not have taken any reasonable steps one would have expected of it to properly investigate the circumstances surrounding the employment of the first respondent prior to launching the application.

89.11 The applicant appears to have taken the approach that annexure FA38 is sufficient for the purposes of the first respondent. The circumstances surrounding the "*serendipitous*" discovery of the annexure FA38 are in my view not adequately dealt with in the founding affidavit. Van Niekerk does not take the Court into his confidence by giving details of what steps were taken by the applicant over the period from the first respondent's resignation to finding the confidentiality agreement in the box. This is a period of over 2 months that is not explained by van Niekerk. Van Niekerk does not provide any details of who found the confidential agreement in the box. Van Niekerk does not adequately answer the questions raised by the first respondent which cast suspicions over the confidentiality agreement such as being signed on a Sunday, prior to her commencement of employment and the most important being that it was agreed with Werdmuller von Elgg and Sayegh that she would not be bound by a restraint of trade agreement. Van Niekerk ignores these facts and relies on *"a simple comparison* *of signatures"* and an expert report that in my view does not opine that the signature is that of the first respondent.

89.12 In respect of the second respondent, the dispute as to the terms of the restraint of trade agreement could in my view be no other than foreseeable considering that the "*highwater mark* "of the applicant's case is a one year restraint as evidenced by annexure FA56, another document signed on behalf of the applicant by Werdmuller von Elgg and Sayegh.

89.13 The applicant in the founding affidavit submits that the terms of the restraint of trade with the second respondent must be "*construed as the same as those agreed to by other of the Former Employees in the Confidentiality Agreement signed by them"*. The applicant wants the Court to make an assumption, an assumption this Court cannot make and is not prepared to do so either.

89.14 The difficulty here for the applicant is that it could not be contended that the dispute of fact as to the terms of the restraint agreed to between the second respondent and Werdmuller von Elgg and Sayegh is bald, implausible, fictitious and lacking in credibility. The applicant simply wants the Court to find that as the other respondents concluded confidentiality agreements with the applicant on the terms set out in the signed and written confidentiality agreements, it is only logical that the restraint for which the second respondent was paid R100 000.00 was the same as those concluded by the other respondents. This is farfetched and not genuine. The applicant has not even attempted to set out the terms agreed to between Werdmuller von Elgg, Sayegh and the second respondent, I assume for the same reason it has failed to explain its efforts taken to contact Werdmuller von Elgg and Sayegh to obtain further facts relating to the "*missing confidentiality agreement*" signed by the first respondent.

89.15 As to the dispute of fact whether the eleventh respondent is a competitor of the applicant, surely with the correspondence by SS Inc to HW Inc both prior to and shortly after the main application was launched, such a material dispute must have been anticipated by the applicant. It must have been an anticipated dispute from the outset but yet the applicant launched the main application seeking final relief taking the risk of the application of the principles of Plascon-Evans. I agree with Adv Whitcutt that the failure to seek interim relief was fatal for the applicant particularly considering the delays by the applicant in prosecuting the main application. I agree with Adv Whitcutt that **"**FA1" is to be read with common sense. Adv Green's contention that the

Court read a letter that unequivocally and unambiguously denies that the eleventh respondent is a competitor as being an *"admission of competition"* cannot be accepted. The applicant knows that it faces a challenge on the affidavits and is trying to avoid the consequences.

89.16 As to probabilities, Adv Green argued that I am not to consider the probabilities on the affidavits in deciding whether to refer the facts to oral evidence. I again disagree. The probabilities are to be considered and in my view, the probabilities are not evenly balanced with the *"scales"* depressed against the applicant. On the affidavits, the probabilities favour the respondents, for all the reasons mentioned above and thus on the principles set out in *Bocimar NV v Kotor Overseas Shipping Ltd* and *Jonsson Workwear (Pty) Ltd v Williamson and Another*[12] I am inclined not to exercise my discretion in favour of the applicant. The applicant has not set out what allegations of the first respondent could be successfully discredited with oral evidence and what evidence will be led to do so. In the absence of these allegations, I am not in a position to determine the prospects of oral evidence tipping the scales in favour of the applicant. I am of the view the prospects are in any event poor.

[90] In conclusion, considering the nature of the dispute being the enforcement of restraints of trade which will lapse in a few weeks, the conduct of the applicant in prosecuting an *"urgent application"* for final relief in circumstances where material disputes of fact were foreseeable, where the applicant was cautioned by the respondents' attorneys, refused to engage and continued with its pursuit for final relief, I am inclined not to exercise my discretion in favour of referring the disputes of fact to oral evidence. To do so in the circumstances would be a great inconvenience to an already overburdened court and be a great cost for all concerned. The courts are not to condone abuse of its processes and a waste of resources under circumstances where the relief that is being sought will lose all practical significance in a few weeks once the restraints of trade have expired. The applicant is clearly trying to avoid the application of the *Plascon-Evans* rule with its attempt to *"belatedly"* refer the disputes of fact to oral evidence. This is not permissible.[13]

[12] Supra.

[13] *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust and Others* 2008 (2) SA 184 (SCA); [2007] ZASCA 153.

[91] The applicant's application for the referral of the disputes of fact falls to be dismissed. Accordingly, and as accepted by Adv Green, the relief sought by the applicant in the main application is to be dismissed.

Costs

[92] Adv Whitcutt argued that the applicant's conduct in the prosecution of the matter warrants a punitive cost order. The general practice that costs follow the result is not applicable in the Labour Court where cost orders are awarded if the requirements of fairness and law so dictate.[14]

[93] I am of the view that law and fairness require that the applicant be burdened with a cost order considering that the applicant brought the respondents to court on an urgent basis, undertakings were given, the applicant was forewarned about the disputes of fact, the applicant was cautioned, the applicant delayed filing of the replying affidavit, postponed the urgent application twice and refused to engage. The applicant persisted with final relief and allowed time to slip by to a stage where most of the restraints had a few weeks left.

[94] I am, however, not of the view that a punitive cost order is warranted. Although I have strong criticism against the applicant's conduct in the prosecution of the application, I do not feel that the conduct is "*unconscionable*, *appalling and disgraceful*".[15]

[95] I make the following order:

Order

1. The application for referral of the disputes of fact is dismissed.

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[14] *MEC for Finance: KwaZulu-Natal and Another v Dorkin NO and Another* [2007] ZALAC 24; [2008] 6 BLLR 540 (LAC).

[15] *Sentrachem Ltd v Prinsloo* [1996] ZASCA 133; 1997 (2) SA 1 (SCA).

2. The application for the relief sought by the applicant in its amended notice of motion dated 21 July 2023 is dismissed with costs including the costs associated with the postponement on 31 August 2023 as per the agreement between the parties.

3. The costs are on a party and party scale and include the costs of two counsels.

D Venter

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Adv I Green SC with Adv P Bosman

Instructed by: Hoosen Wadiwala Inc

For the respondent: Adv C Whitcutt SC with Adv JJ Meiring

Instructed by: Stein Scop Inc.