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**REPUBLIC OF SOUTH AFRICA
IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG.**

Case Number: 2024/077866

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
21 August 2024	
_____	_____
DATE	SIGNATURE

In the matter between:

ACDC DYNAMICS (2024) (PTY) LTD

Applicant

and

DOUW PETRUS JACOBUS VAN STADEN

First Respondent

**POWER AND SUN SOLAR SOLUTIONS SOUTH
AFRICA (PTY) LTD**

Second Respondent

JUDGMENT

Noko J

Introduction

[1] The applicant instituted an urgent application for final relief seeking an order, *inter alia*, interdicting the first respondent from breaching the terms of the employment agreement between the applicant and the first respondent. The employment agreement restrains the first respondent to take up employment with a competitor and restrict the first respondent to divulge confidential information.

[2] The application is opposed only by the first respondent and reference to the respondent/ employee in this judgment would mean the first respondent. The respondent disputes, first, that the applicant has made out a case for urgency. Secondly, the respondent contends that the restraint of trade clause is unreasonable and lastly, that the applicant has failed to identify confidential information he allegedly divulged.

Background

[3] The following are in general common facts between the parties. The applicant is a business enterprise “...selling electrical equipment and products, including alternative power products such as solar panels, batteries and related products”.¹ The applicant’s principal place of business is situated at 26 Nguni Drive, Longmeadow Business Estate West, Edenvale, Gauteng.

¹ See para Applicant’s Founding Affidavit, at CaseLines (“CL”)

[4] The respondent commenced employment with the applicant in June 2017 and signed a written contract of employment on 27 July 2021 which provides, *inter alia*, for the restraint of trade and restriction to take up employment with a competitor or divulge confidential information. The respondent was employed in various capacities over a period of time, namely, Sales Specialist (June 2017 – January 2020), Category Manager – Flame Proof (from 2 February 2021) National Product Manager (from 8 February 2022).

[5] The respondent tendered his resignation on 2 April 2024 and commenced new employment on 1 May 2024 with the Power and Sun Solar Solutions South Africa t/a Powernsun (“*Powernsun*”), second respondent, carrying its business at Unit [...] O[...] P[...], [...] V[...] Road, B[...], Johannesburg.

[6] The clauses in the employment agreement between the applicant and respondent apropos to this *lis* are as follows:

18. Confidentiality

18.1. During the period of employment of the employee and subsequent thereto, the employee shall keep confidential and shall not disclose any of the Company's secrets or confidential information ...

18.2. The employee acknowledges that whilst the employee is in the Company's employ, the employee shall have access to the Company's price lists, customer lists, suppliers and various confidential documents and information of Company interests that is essential to safeguard.

18.3. For the purposes of this clause “confidential information” means any and or all information which is stated confidential, or imparted and received in confidence, including particulars of the Company's:

18.3.1. Customers or suppliers and arrangements made with them,

18.3.2. ...

[7] Clause 32 provides for restraint against the respondent from, first, taking up employment with a competitor within a period of 12 (twelve months) from the

date of termination of employment, secondly, from soliciting business from the applicant's customers as at termination or prospective customers who have communicated with the applicant with the intention of entering into or enquiring about business within 12 months preceding the date of termination of the respondent.² The restraint with regard to taking up employment with a competitor shall apply within "...100km (one hundred kilometers) radius of each of the constituent companies in the Republic of South Africa where the Company has business concerns."³

[8] The employment agreement further provides that respondent acknowledges that he will acquire the know how relating to, *inter alia*, marketing strategies, pricing, supplies and sales information during his tenure as an employee of the applicant.⁴ The employee further acknowledges that he will solicit orders, sell or supply or canvass business for goods and services to the applicant's customers.⁵

[9] The applicant contends that it was brought to the attention of its CEO on 2 July 2024 that the respondent has provided one of its established customer, SUN RG, a quotation for services or products. Further that the respondent is in the employ of second respondent, a competitor to the applicant.

[10] The applicant was aggrieved by the conduct of the respondent as aforesaid and launched these proceedings on urgent basis and sought the following redress:

1. That the non-compliance of the prescribed form, time and service requirements be condoned in terms of Rule 6(12) and that leave be granted that this application be heard as one of urgency.

² Clause 32.2.4. and 32.2.7.

³ See clause 32.2.8. of the Contract of Employment at CL 001-45.

⁴ Id clause 32.3.

⁵ See clause 32.6,

2. That the first Respondent be ordered to comply with clauses 18 and 32 of the employment contract annexed to the founding affidavit, marked annexure RR1.

3. Without derogating from its general ambit, the aforesaid is to include, but not limited necessarily to the following:

3.1. The first Respondent is not to be employed at, contracted with, associated with and/or covered with any business and/or enterprise that competes directly or indirectly with an applicant within a radius of 100km from Nguni Drive, Longmeadow Business Estate West, Edenvale, Gauteng and/or within a 100km radius of the Applicant's constituent and associated companies in the Republic of South Africa where the Applicant has business concerns;

3.2. Without limiting, prayer 3.1 supra, it is specifically also include the Second respondent;

3.3. The First Respondent is not to directly or indirectly solicit, entice and/or make any attempt to solicit and or entice, be it for his benefit or for benefit of others, any of the persons and or entities that was the Applicant's customers as at 30 April 2024, those customers who purchased products and/or contracted with the Applicant during period of 12 months prior to 30 April 2024 and/or those prospective customers with whom the Applicant communicated within a period of 12 months prior to 30 April 2024 who had the intention of entering into a transaction with the Applicant; and

3.4. That the First Respondent is not to purchase and/or attempt to purchase any goods related to the alternative power industry, solar industry and/ related industries from any of the suppliers, both locally or internationally, with whom the Applicant contracts with for the supply of goods and/or services. This is to include, but not necessarily limited

to those listed in Annexure EE14 to the founding affidavit, be it for his benefit or for the benefit of others.

4. That prayers 2. 3.1 -3.4 supra operates as an interdict until 30 April 2025.

5. In addition to the foregoing, that the First Respondent be ordered to:-

5.1. Forthwith provide the Applicant with full particulars of any quotations provided to any of the Applicant's clients and/or good sold to any of the Applicant's clients during the First Respondent's appointment and /or affiliation with the second Respondent;

5.2. Forthwith provide the Applicant with the names of all the Applicant's clients who has been approached by the First Respondent since his employment was terminated with the Applicant to date;

5.3. Return to the Applicant all confidential information of the Applicant, including all documents or copies of documents, files, systems, financial information, documentation pertaining to customers, suppliers, products, production processes, methods of operation, marketing strategies and marketing techniques, whether in hard copy, computerised or otherwise and to delete any computerised documents from any computer, cellular phone or other similar device in their possession or under their control, and report to the Applicant's attorneys in writing that he has done so; and

5.4. Not to directly or indirectly utilise any of the Applicant's confidential information, whether it be for his own benefit, or for the benefit of others.

6. That the first Respondent be ordered to pay the costs of this application.

7. ...

8. In the alternative

Parties' submissions

Urgency

[11] It is averred on behalf of the applicant that subsequent to becoming aware of the respondent soliciting business and having taken up employment with Powernsun, the applicant caused a letter of demand (to comply with the terms of the employment agreement) to be despatched to the respondent on 5 July 2024. The response from the respondent attorneys paid no serious attention to the essence of the letter of demand and this was then followed 5 days later by the launching of this application. Noting that the period of restraint is only for 12 months approaching the court on normal basis may defeat the objective of the restraint of trade enforcement. There are previous court's pronouncements, so the argument continued, which stated that enforcements of restraint of trade agreement disputes are by their nature urgent.

[12] The respondent on the other hand contended that two of the employees of the applicant were aware even before his resignation that he is joining the applicant's competitor and they in fact had business transactions *inter se*. This information was not hidden and the applicant should have therefore acted with haste. To this end urgency is self-created, so the respondent contended. In retort the applicant contends that the information which was made available to the two employees was not brought to the attention of the CEO or at least HR who knew that there is restraint of trade agreement between the respondent and the applicant. The CEO or the HR executive would have been the relevant persons to communicate with more particularly because communications between the respondent and the said employees would not have readily reached them.

[13] It sound like the respondent was aware that joining the competitor is in contravention of the restraint clause and was hoping for condonation or waiver

but failed to ensure that same is properly procured. The respondent did not ensure that the clause is waived by instructing the said employees to obtain confirmation of waiver from the CEO or HR if that was his intention.

[14] I am satisfied that conduct of the applicant after becoming aware that the respondent is soliciting business (as alleged) and further that he has taken up employment with a competitor wasted no time in starting the ball rolling to exert its rights in accordance with the restraint covenant. There appears not to be persuasive and strong argument to gainsay that this matter was attended with the urgency it deserves. In any event it is generally accepted that enforcements of restraint of trade are invariably matters deserving of urgent attention of the courts.⁶

Employment with the competitor.

[15] The applicant contends that it is common cause that the respondent is employed by a competitor carrying business at Unit [...] O[...] P[...], [...] V[...] Road, B[...], Johannesburg, which is within the prohibited 12 kilometres radius from the applicant's head office. The respondent on the other hand contended that indeed he is employed by a competitor who is big in solar business in contrast to the applicant who has a small segment of solar business. To this end the restraint clause should not be enforced.

[16] The respondent further contended that since the applicant has footprint throughout the Republic of South Africa it would mean that the respondent would not be able to work anywhere in the country and this became an unreasonable restraint and therefore tramples unfairly the respondent's right set out section 22 of the constitution.

⁶ *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel Group v Kuhn* 2008 (2) SA 375 (C) at para [4] p378. Also *Mozart Ice Cream Franchises (Pty)P Ltd v Davidoff* 2009 (3) SA 78 (C).

[17] The applicant referred to *Seboko*⁷ where the full bench of this division held that a restraint against the employee not to take employment in the whole of the Republic of South Africa is not *ipso facto* unreasonable. It was also ordered in *Kleynhans*⁸ that a restraint against an employee not to work for a competitor in the SADC regions is not unreasonable and was considered enforceable.

[18] With regard to the contention that the applicant has a small segment the applicant contends that that submission is relative and in fact the profit returns for the solar portfolio of the applicant account for 31% which is in the range of 500 million and to this end the contention that it has a small portfolio is without merits.

Confidential information.

[19] The applicant contended that the respondent's positions whilst in the employ of the with the applicant allowed him access to customers including his role in the preparation of the catalogue of products. In retort the respondent contended that "... *he admit that my role was extended to all Applicant's products it was in no way limited to solar power.*"⁹ The applicant contended that the courts have held that list of customers is always confidential.

[20] The respondent stated further that he no longer has access to the applicant's IT system to which the applicant contends that such an argument is of no moment. The fact is that he had access whilst in the employ and the objective of the restraint is to restrict the respondent from exploiting that information. In any event the case of the applicant is not based on common law in terms of which the applicant would be required to prove that the employee has taken the confidential

⁷ See supra at fn 12.

⁸ *Micros SA and 2 Others v Kleynhans and 2 Others* (074606/2023) [2023] ZAGPPHC (01 September 2023).

⁹ See para 49 of the Respondent's Answering Affidavit at CL 006-15.

information which is different in relation to a suit based on contract as it is with the current *lis*.

Soliciting business from applicant's customers

[21] The applicant contended that the respondent has attempted to solicit business from its customers by sending a quotation to SUN G and this was in contravention of the employment contract which prohibited dealings with applicant's customers. The contention by the respondent, so the argument continues, that he did not proactively pursue the customer and that the customer is the one who approached the respondent should not matter as it does not matter who started the exchange. The applicant referred to *Experian*¹⁰ where the court held that it is irrelevant as to who started the communication to get business.

[22] The respondent in retort disputes that the allegations that he sent a quotation to SUN G and attached email from SUN G sent to info@powernsun.co.za on 12 April 2024 demonstrating that the business relationship preceded his employment with Powernsun. He stated that there is no indication on the said quotation as to who send it and same cannot be linked to him. The applicant failed to put up a version to gainsay this assertion and present evidence explicitly linking the respondent to the quotation. To the extend, that this is in dispute it cannot be resolved in these papers and the finding should be in favour of the respondent.

Purchasing and/or attempt to purchase any goods related to the alternative power industry.

¹⁰ *Experian SA (Pty) Ltd v Haynes* 2013 (1) SA 135 (GSJ).

[23] The arguments mounted by the applicant are linked to the attempt to solicit business from SUN G and as it is mentioned above the dispute with regard to whether the respondent did send a quotation has to be decided in favour of the respondent having regard to the fact the relief sought is a final interdict in a motion court. The applicant has also not vigorously advanced a case to support the prayer as identified under para 3.4.

Requirements for the interdict

[24] The applicant dealt with requirements of an interdict and contended that the agreement gave rise to rights which the respondent has already trampled upon. Further that it would be difficult to ‘... *prove Applicant’s exact quantum of damages*’ which may require ‘... *to prove which of the unlawfully procured customers would otherwise have used the Applicant’s service in future and how long they would have remained the Applicant’s clients.*’¹¹ This would have been a tedious process.

Legal principles

[25] The application is for a final interdict and ‘... *such an order can only be granted in motion proceedings if the facts stated by the respondent together with the admitted facts in the applicant’s affidavits justify the order, and this applies irrespective of where the onus lies.*’¹² It was also stated in *Seboko*¹³ at para 12 that

¹¹ See para 72 of the Applicant’s Founding Affidavit at CL 001-36

¹² *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at para 4.

¹³ *Tax Consulting South Africa and Ano v Seboko and Another* (A2022/055430) 2023 ZAGPJHB (13 September 2023). See also *Stellenbosch Farmers’ Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235, *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* (53/84) [1984] ZASCA 51; 1984 (3) SA 623 (A) at 635C; *National Director of Public Prosecutions v Zuma* (573/08) [2009] ZASCA 1; 2009 (2) SA 277 (SCA) at para 26; *South African Reserve Bank v Leathern NO* 2021 (5) SA 543 (SCA) at para 24 n 12; *Mtolo v Lombard* (CCT 269/21) [2021] ZACC 39; 2022 (9) BCLR 1148 (CC) at para 38.

“It is trite that where the material facts are in dispute and there is no request for the hearing of oral evidence, a final order will only be granted on notice of motion if the facts as stated by the respondent, together with the facts alleged by the applicant that are admitted by the respondent, justify such an order unless, of course, the court is satisfied that the respondent’s version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is so far-fetched or so clearly untenable or so palpably implausible as to warrant its rejection merely on the papers”.

[26] Restraint of trade covenants are common in employment contracts and their imports are well documented and trite. Generally, the restraint of trade agreements have two main aspects, namely, “... *a non-compete clause prohibiting an employee from having an interest in being employed by, or as, a competitor for a certain period, and a non-solicitation clause, preventing an employee from taking clients away from the employer.*”¹⁴ The essence of the restraint of trade therefore relates to a party’s proprietary interest of the business, geographical area and period of the restraint. That notwithstanding such agreements invariably restrict individual rights enshrined in the Constitution of the Republic of South Africa and are intended to protect the proprietary interest of an employer. The courts are enjoined to balance the competing rights between the parties.¹⁵ For the benefit of employee such agreement would only be enforced if they are not unreasonable, unlawful and not contrary to public policy.

¹⁴ See *Arteflex (Pty) Ltd v Pieters and Ano* (2023/024313) [2023] ZAGPPHC (11 April 2023).

¹⁵ It was held in *Yovanka Torrente & Others v Grant Monaghan and Associates Incorporated* (JA45/23 & JA 25/23, (23 January 2024) at para 24 that: *In general, a Court which is required to evaluate illustrate of trade agreement has also to engage with the reasonableness of the restraint. It is now trite law to know that this inquiry is a value judgement which involves a consideration of a public interest which requires that a party which requires that a parties to a contract should comply with their contractual obligations (pact sunt servanda) and the principle reinforced in Section 22 of the Constitution of the Republic of South Africa, 1996, namely that every citizen has a right to choose their trading occupation or profession freely.* It is also stated in *Ball v Babalela Bolts (Pty)Ltd and Another* that, “... a court that seeks to achieve a balance between the respective gravitational pull of *pacta sunt servanda* and s 22 of the Constitution by carefully examining the nature of the activity prevented by the relevant clause, the area of operation of the restraint, and the overall balance of the competing interest between the parties”.

[27] With regard to the confidential information, it was stated in *Kleynhans*¹⁶ that

“... the applicants do indeed have protectable interests in the form of customer connections and confidential information. As was stated by this Court in *Experian SA v Haynes and Sibex Engineering services (Pty) Ltd v Van Wyk*, there are two kinds of proprietary interests that can be protected by a restraint of trade undertaking. The first is ‘the relationship with customers, potential customers, suppliers and others that go to make up what is compendiously referred to as the trade connections of the business, being an important aspect of its incorporeal property known as goodwill. And the second is confidential matter which is useful for the carrying on a business and which could therefore be used by a competitor, if disclosed to him, to gain a competitive advantage’.¹⁷

[28] It was held in *Rawlins*¹⁸ that to determine whether customer connection do necessarily constitute a protectable interest would depend on, *inter alia*, “... on the duties of the employee, his personality, frequency and duration of contact between the employee and customer...”. In addition the court *Emlink (Pty) Ltd*¹⁹ held that employer’s protectible interest includes client base, list of client and trade secrets.

[29] It is not sufficient for the ex-employee to state that he will keep his end of the bargain and the employer need not approach court for the interdict. The SCA in *Reddy*²⁰ referred to *BHT Water*²¹ where it was stated that

“...in my view, ex-employee bound by a restraint, the purpose of which is to protect the existing confidential information of his former employer,

¹⁶ See fn 8 above.

¹⁷ At para [18].

¹⁸ *Rawlins v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A).

¹⁹ *Emlink (Pty) Ltd and Others v Mathee and Others* [2023]JOL 61571 (GJ) at para 9.

²⁰ *Reddy v Siemens Telecommunications (Pty) Ltd* [2007] (2) SA 486 (SCA).

²¹ *BHT Water Treatment (Pty) Ltd v Leslie* 1993 (1) SA 47 (W).

cannot defeat an application for a restraint by giving an undertaking that he will not divulge the information if he is allowed, contrary to the restraint, to enter the employment with a competitor of the applicant. Nor, in my view, can the ex-employee defeat the restraint by saying that he does not remember the confidential information to which it is common cause that he has access. This would be more so where the ex-employee, as in the case here, has already breached the terms of the restraint by entering the service of a competitor.”²²

[30] The respondent’s defences can broadly be categorised into the following, first, that the applicant failed to prove that the respondent attempted to solicit business from SUN G. Second, that the restraint covenant is unreasonable and lastly that no confidential information is identified and or disclosed and as such the application should be dismissed.

Analysis

Employment with a competitor.

[31] The respondent does not deny that the employment agreement signed between both parties contains a restraint of trade clause prohibiting him to take up employment with a competitor. He further conceded that the second respondent is a competitor but contends that the restraint is unreasonable as the applicant has a smaller segment of solar business whereas second respondent is mainly into solar business. The respondent has failed to put forward authority supporting the argument that the enforcement of a restraint of clause is dependent on the determination of whether the competitor has a bigger segment in contrast with the business of the previous employer. If anything, the competitor with a big portfolio may then be able to silence the companies who are entering

²² Supra fn 11 at para 20.

the space or have smaller portfolios and thus eliminating competition. Notwithstanding the respondent's contention the applicant's version that the profit generated by the solar business constitute 31% of the overall profit of the company it appears to be reasonable to warrant protection.

[32] In support of the contention that the restraint against taking up employment from a competitor the respondent just submitted that he has "*...been in the electricity industry since 2007 and would not easily change industries in as far as employment is concerned.*"²³ The respondent fails to indicate to what extent the restraint unfairly excludes him from all opportunities in the electricity space. This is insufficient to enable the court to come to the respondent's rescue that the restraint is indeed unreasonable.

[33] As a further reason for contending that it is unreasonable the respondent states that it is indeed unreasonable to state that he "*...cannot work within a 100km radius of not only the Applicant but any of its constituent or related company.*"²⁴ Further that from the applicant's website the applicant has footprint through-out the country. The applicant's reply did not address this aspect specifically except that during arguments it was mentioned that there is nothing strange as other restraints could be for all SADC regions or specified countries in the continent. Restraint clauses on territories as was contended by the applicant were dealt with in *Seboko*²⁵ and also in *Kleynhans*²⁶. It therefore follows that the respondent's argument must fail.

Confidential information.

²³ See para 86 of the Respondent Answering Affidavit, at CL 006-23.

²⁴ Para 88 of the Respondent's Answering Affidavit at CL 006-24. See also clause 32.2.8 of the CL 001-56 defining the Restraint territory to be "*... a 100 km (one hundred kilometer) radius of each of the constituent companies in the Republic of South Africa where the company has business concerns.*"

²⁵ Where the restraint territory/area was within the whole of RSA. Though *Soboko* judgment dealt more with- access to customers and not restricted area.

²⁶ Where the restraint territory/area was in SADC region.

[34] The respondent does not deny that he had access to the list of the Applicant's customers except to state that he does not "*... have a copy of the list and I have not had access to any customer lists of the Applicant since my resignation was effective.*"²⁷

[35] The respondent conceded that indeed at some stage as an employee his responsibilities were not limited to solar power part of the applicant's business but the business in its entirety,²⁸ further that he "*...was not responsible for the solar power division but for the entire product offering of the Applicant.*"²⁹ This countenance the submission by the applicant that he had access to information on customers of the applicant and should he therefore be restricted or restraint to exploit or from making such information available to any competitor. It is sufficient for respondent to have had access to the information. Noting that the court in *Leslie*³⁰ has stated that "*... the very ratio underlying the bargain was that the applicant should not have to content itself with crossing fingers and hoping that the first respondent would act honourably or abide by the undertakings that he has given.*" The applicant has therefore correctly been pro-active to ensure that an interdict should be obtained. Granting the order will not in any way prejudice the respondent. It was stated in *BHT Waters* above that it will not be a bar to proceed to obtain an interdict even if the respondent gives an undertaking or claims that he does not remember such information. It therefore follows that a clause restricting access to applicant's customers is not unreasonable and contentions by the respondent are unsustainable.

²⁷ See para 121 of the Respondent's Answering Affidavit at CL 006-32.

²⁸ See para 33 of the Respondent's Answering Affidavit at CL 006-11.

²⁹ Id at CL 006-14.

³⁰ Supra fn 20 at 58D.

[36] A further contention by the respondent that the applicant has failed to show that it has a protectible interest is also of no moment as it was stated in *Emlink* that customer list or connections are assets which must be protected.

Interdict

[37] I am satisfied that the applicant demonstrated that it has protectable interest which is the subject of restraint of trade. Further that the taking of employment with a competitor amount to the breach of the restraint in trade clause agreed to by the parties. This would satisfy the requirement that the applicant's rights are breached. Finally, there would not be a possibility of obtaining any satisfactory alternative remedy.

[38] The applicant further sought redress which are not in clear terms or properly argued and also an interim interdict but has failed to address the requirement for balance of convenience. In view of the findings in this *lis* no further attention would be applied to this aspect of the case.

Other issues

[39] The restraint of trade agreement need to be fair also to the employees. The employer need to generally show compensation awarded to the employee to forgo opportunities offered in the space as a result of the restraint of trade agreement. In this case the applicant presented a package given to the respondent without a clear indication what is the market related package and which part of the package is the compensation for the restraint. This should be clearly spelt out in the restraint agreement itself. In addition, where the employee is compelled to resign or is unfairly dismissed enforcements of the agreements may be construed unfair to the employee who out of the reasons not of his making, finds himself in the unemployed. The respondent contends that he was compelled to resign as his grievance were not properly attended to. This appear

to have been an afterthought by the respondent. This was also not vigorously pursued and nothing can be said of its veracity more so the respondent did not contend that there was constructive dismissal. The essence of this view has not been interrogated and shall therefore await another day.

[40] It is noted that the employee cannot argue that he is in a weaker position and could not have bargained with employer³¹ but with the new constitutional dispensation such power dynamic may unfairly impact on the ability of the employee to bargain. It was stated by the Constitutional Court³² that unequal bargaining powers deprive those entering in some markets of the ability to vociferously argue for better conditions and common law may have to be developed to remedy this position.³³ A reflection at some stage may call for the development of the common law

Conclusion

[41] I find that the respondent has indeed breached the restraint of trade by taking up employment with a competitor and further that persuasive arguments has been presented warranting an interdict being issued against the respondent not to divulge confidential information.

Costs

[42] The legal costs are ordinarily within the discretion of the court which must be exercised judicially having regard to the relevant factors. It was held in

³¹ See *Ball v Bambela Bolts (Pty) Ltd and Another* (2013) 34 ILJ 2821 (LAC) at para 19 where the LAC held that an employee is not forced to accept the terms of their contract in a manner akin to coercion.

³² Mhlantla J explained that: *“Unequal bargaining power in the petroleum industry is pervasive even in more developed countries such as our common law comparator, England, whose history of inequality pales in comparison with our own.”*

³³ This judgment dealt with limitation on entering petroleum industry which is totally a different issue and is just referred to on the basis of parity of reasoning.

*Affordable Medicines Trust and Others*³⁴ that “[T]he award of costs is a matter which is within the discretion of the Court considering the issue of costs. It is a discretion that must be exercised judicially having regard to all relevant considerations.” It is also trite that the costs follow the result, and, in this instance, no persuasive argument was mounted warranting deviation therefrom.

Order

[43] In the result I grant the following order.

1. The application is considered as urgent in terms of rule 6(12) of the Uniform Rules of Court and non-compliance with the Rules of Court is condoned;
2. The first respondent is interdicted not to directly or indirectly take up employment with, not to contract or consult, not to be associated or concerned with or not to be interested or engaged in any business or enterprise that competes directly or indirectly with the applicant within a radius of 100km from 26 Nguni Drive, Longmeadow Business Estate West, Edenvale, Gauteng and or within 100 km radius of the Applicant’s constituents companies in the Republic of South Africa where the Applicant has business concerns for period ending April 2025;
3. First respondent is interdicted from directly or indirectly solicit, entice and or make any attempts to solicit and or entice, be it for his benefit or for the benefit of others, any of the persons and or entities which were the applicant’s customers as at 30 April 2024 or those who communicated with the applicant with the intention of entering into business or enquiring about business within 12 months preceding date of termination of employment with the respondent.

³⁴ *Affordable Medicines Trust and Others v Minister of Health and Others* 2006(3) SA 247 (CC)

4. The first respondent is ordered to pay the applicant's costs.

M V Noko
Judge of the High Court.

Dates:

Hearing: 2 August 2024.

Judgment: 21 August 2024.

Appearances:

For the applicant

Instructed by

JS Steenkamp

Thotharam Attorneys, Ferndale.

For the first respondent

Instructed by

Shawn Wiggers

Strydom Attorneys, Edenvale.