



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable/Not Reportable

Case no: JA48/2016

In the matter between:

LABOURNET (PTY) LTD

Appellant

and

DYLLAN JANKIELSOHN

First Respondent

SEESA LTD

Second Respondent

Heard: 24 November 2016

Delivered: 10 January 2017

Summary: Enforcement of a restraint of trade agreement. Employer seeking to restrain an employee for working for a competitor- principle restated that a restraint is only reasonable and enforceable if it serves to protect an interest and that now the reasonableness and enforceability of a restraint depending on the nature of the activity sought to be restrained, the purpose for the restraint, the duration of the restraint, the area of the restraint, as well as the parties' respective bargaining positions – concerning access to confidential documents evidence showing that employee occupying a junior position could not have access to confidential document and employee contending that tools used for work available to public via the internet. In relation to protected interests, evidence pointing that employee having no attachment to employer's clients and employer not demonstrating such since

employee working for the competitor – Court finding the existence of dispute of fact, concerning employee's access to confidential information and protected interest and in accordance with the Plascon-Evans rule, disputes of fact are resolved in favour of the employee.

Court also finding that true dispute about retraining employee working for a competitor – court restating that employee cannot be interdicted or restrained from taking away his or her experience, skills or knowledge, even if those were acquired as a result of the training which the employer provided to the employee. Labour Court's judgment upheld and appeal dismissed.

Coram: Tlaetsi DJP, Landman JA and Coppin JA

JUDGMENT

COPPIN JA

- [1] This is an appeal against the order of the Labour Court (Prinsloo J) dismissing with costs an urgent application brought by the appellant ("*Labournet*") to enforce a restraint agreement against its employee at the time, the first respondent ("*Jankielsohn*") and to interdict the second respondent ("*SEESA*") from employing Jankielsohn. The appeal to this Court was with the leave of the court *a quo*.
- [2] Labournet employed Jankielsohn with effect from about 13 October 2014 as an Industrial Relations Consultant in its Bloemfontein branch. On 26 January 2016, Jankielsohn gave written notice to terminate his employment with Labournet and notified it of his intention to take up employment with SEESA.
- [3] On or about 17 September 2014, Jankielsohn and Labournet concluded a written contract of employment which, *inter alia*, included a confidentiality clause and a very extensive restraint of trade agreement.
- [5] The confidentiality provision in the employment agreement reads as follows:

'13. **CONFIDENTIALITY**

13.1 The employee is required to keep confidential and not to disclose any of the company's trade secrets, confidential documentation, technical know-how and data, systems, methods, software, processes, client lists, programs, marketing and/or financial information to any person other than to persons employed and/or authorised by the company or associated company (where applicable) who are required to know such secrets or information for the purposes of their employment and/or association with the company, both during the continuance of employment in terms of this agreement or at any times thereafter.

13.2 The company and the employee hereby acknowledge that the confidential and/or information represents a substantial monetary value to the company.

13.2 The employee acknowledges that the aforesaid obligations shall remain in force indefinitely and notwithstanding termination of his/her contracts for any reason whatsoever.'

[6] The restraint of trade agreement is quite extensive. I have considered the whole of it. However, for the sake of brevity I only quote clause 14.11 of the employment agreement, which provides the following:

'14.11 In terms of this restraint of trade, the employee specifically undertakes and agrees:

14.11.1 not to establish or to be interested (as defined in this clause) in any business in the territory which carries on business, provides products or renders any service in connection with or identical or similar or comparative to that carried on, sold, supplied, provided, brokered or performed by the company at any time during the period of the employment of the employee up to and including the last day of the employment of the employee; and

14.11.2 not to solicit the custom of or deal with or in any way transact with, in competition to the company, any business, company, firm, undertaking, association or person which during the period of 3 (three) preceding the date of termination of the employment of the employee has been a client of the company; and

14.11.3 not to directly or indirectly offer employment to or in any way cause to be employed any person who was employed by the company as at the termination of the employment of the employee or at any time within a period of 3 (three) years immediately preceding such termination.

14.12 Each and every restraint in this entire clause shall operate and be valid and binding for a period of 3 (three) years in the territory, calculated from the date of termination of the employment of the employee in terms of this agreement. This restraint shall apply irrespective of what the cause or reason of such termination may be and whether the fairness of the termination of the employee's employment is challenged or not by the employee.'

- [7] It was also agreed that the areas to which the restraint applied are the whole of the Free State and Northern Cape Provinces.
- [8] It is further common cause that after Jankielsohn tendered his resignation there was interaction between Jankielsohn and Labournet's Bloemfontein Regional Manager, Mr Mornay Terblanche, concerning the intended resignation and that, ultimately, Mr Terblanche informed Jankielsohn that SEESA was its "*direct competition*" and that his acceptance of its offer of employment would be "*in direct conflict with the restraint of trade*" that applied and that Labournet would be enforcing the restraint. Mr Terblanche also sought a written undertaking from Jankielsohn that he would not take up employment with SEESA.
- [9] In response, Jankielsohn gave a written undertaking dated 18 February 2016 that he would not "*interfere, contact, 'poach', incite or impose to any degree whatsoever with any of Labournet's clients*". He further, *inter alia*, disputed that SEESA was Labournet's direct competition and stated that there was no incentive for him to engage in any unethical behaviour.
- [10] On 16 February 2016, Labournet brought an urgent application to interdict and restrain Jankielsohn and SEESA, respectively. Jankielsohn opposed the application and SEESA gave notice that it would abide by the outcome of the court process. Jankielsohn delivered an opposing affidavit and Labournet delivered a replying affidavit in the application.

[11] According to its notice of motion, in addition to having required that the matter be dealt with on an urgent basis, Labournet sought the following relief:

'2. That a rule nisi be issued with a return date to be determined by the above Honourable Court, in terms of which rule nisi the first respondent and/or the second respondent shall be required and called upon to show cause why a final and binding order should not be granted in the following terms:

2.1 That the first respondent be interdicted and restrained from directly or indirectly:

2.1.1 competing with the business of the applicant for a period of 3 (three) years calculated from 1 March 2016 in the area of the Free State and Northern Cape Provinces;

2.1.2 soliciting and/or accepting any business or custom from any existing customers or clients of the applicant, and/or in any manner dealing with any existing customers or clients of the applicant, for a period of 3 (three) years calculated from 1 March 2016;

2.1.3 being employed with any business or entity or person which conducts business which is similar to or competes with that of the applicant, and in particular the business of the second respondent, for a period of 3 (three) years calculated from 1 March 2016, in the area of the Free State and Northern Cape Provinces.

2.2 That the second respondent be interdicted and restrained from employing the first respondent, or in any way being associated with the first respondent, in breach of the restraint of trade covenant of the first respondent.

2.3 That the costs of this application be paid by the respondents.

3. That it be ordered and determined that paragraphs 2.1, 2.1.1, 2.1.2, 2.1.3, and 2.2 of the rule nisi, as set out above, shall operate as an interim order with immediate effect, pending the return date, and shall be

immediately binding upon the first and/or second respondents and which shall immediately be required to fully comply with and adhere to the same, pending the return date'.

- [12] Mr Terblanche deposed to Labournet's founding affidavit. He stated, *inter alia*, that the business of Labournet could be:

'broadly described as human capital consulting services to employers throughout the Republic of South Africa. This entails in essence, and in a nutshell, on-sight consulting, advice, services, expert assistance, documents and policy and process preparation and implementation, assurance of compliance (whether legislative or otherwise), all dealings with third parties, trade unions and employees, disciplinary issues, incapacity and operational issues and disputes, training, employment law, dispute resolution and finally general advice relating to the following fields of expertise and disciplines:

5.1.1 industrial relations;

5.1.2 human resources;

5.1.3 skills and equity;

5.1.4 industrial relations and human resources training;

5.1.5 payroll outsourcing and management;

5.1.6 labour law;

5.1.7 recruitment;

5.1.8 occupational health and safety.

All of the above will hereinafter be collectively referred to as "the services".'

- [13] Mr Terblanche further, *inter alia*, indicated that in the case of Jankielsohn, the services that were relevant are "services related to industrial relations and labour law disciplines." He also, *inter alia*, explained how Labournet "structures its relationship with its clients" in those areas of service. It, in essence, enters into a fixed term service and retainer agreement with a client

in terms of which services are provided to the client in return for payment of a fixed monthly retainer fee. Once a client has concluded such a fixed term agreement, it is allocated an account on Labournet's Client Management System ("CMS") and according to Mr Terblanche, a specific consultant is allocated to service the client. There are a number of disputes of fact on the papers. Jankielsohn, *inter alia*, denies that particular consultants are allocated to particular clients and states that a consultant does not always provide services to the same client. A consultant, who is available, is assigned by his or her manager to provide the service that is required by a client at a particular time.

[14] Mr Terblanche also avers, *inter alia*, that Jankielsohn was a specialist consultant with commensurate duties. Jankielsohn denies that he was employed as a specialist consultant – describing the services that he was required to perform as limited to the area of industrial relations and involving the application of the Labour Relations Act¹ (*the LRA*). According to Jankielsohn, legal practitioners or any other persons, having regard to the LRA – could have done what was required of him.

[15] Jankielsohn avers that he was expected to and trained to negotiate with unions on behalf of employer businesses (i.e., clients of Labournet) and to prepare charge sheets, conduct disciplinary hearings and make findings, which were in effect recommendations to the client. Jankielsohn avers that his duties were limited to matters involving misconduct and those concerning the basic conditions of employment. He states that those are the only areas in which he received training and was allowed to work in.

[16] Mr Terblanche, on behalf of Labournet, denied those averments of Jankielsohn, but in the replying affidavit concedes that Jankielsohn did not provide all the services which he (Mr Terblanche) had described; that those services were merely part of Jankielsohn's "*career path*" at Labournet and that Jankielsohn resigned before "*achieving this end goal*", i.e., of providing all the services described by Mr Terblanche in the founding papers.

¹ Act No 66 of 1995.

- [17] Mr Terblanche also states that the purpose of the application was to obtain an order that Jankielsohn *“adheres to his written restraint of trade agreement and confidentiality undertaking”* and that he be interdicted from breaching it. Mr Terblanche also avers that Labournet does not seek any relief *“per se against”* SEESA – *“other than to ensure that it does not perpetuate”* Jankielsohn’s breach of his restraint agreement and that if relief were granted against Jankielsohn SEESA would have to give effect to the court’s order.
- [18] A large portion of the appellant’s papers is used up by Mr Terblanche to explain the nature of the training Labournet provides to consultants such as Jankielsohn and how attractive their trainees are to competitors. Shorn of all the verbiage, including all vagueness, repetition and obvious hyperbole, in its founding papers, Labournet is, essentially, relying on two kinds of protectable interest, which, according to it, justifies the enforcement of the restraint, namely, confidential information (or trade secrets) and trade or customer connections. In its founding papers, Labournet seems to conflate these interests.

Confidential information

- [19] In its founding affidavit Labournet contends that, because of his position, Jankielsohn had been *“exposed to sensitive and confidential information concerning the applicant’s clients, pricing, modus operandi and marketing strategies, and [has] in fact built up a detailed and close relationship with such clients”*. Labournet, through Mr Terblanche, further avers that there was, therefore, the risk that such information would be disclosed to and be utilised by its competitor, for whom Jankielsohn intended to work, or by Jankielsohn himself, for their, respective, benefit.

Customer connections

- [20] Mr Terblanche, also averred in its founding affidavit that *“the nature of the relationship between [Jankielsohn] and the clients he was specifically tasked to attend to and service, is one of the utmost trust and confidence. [Jankielsohn] in fact carries the clients he serviced in his pockets. The nature of the relationship was further such, that [Jankielsohn] can easily influence*

and convince clients to do business with him and [SEESA] rather than the applicant”.

- [21] Jankielsohn denied all of these averments of Labournet, including those relating to its alleged protectable interests. He denied that there was any need for him to have any detailed information of any client that he serviced and that he had had such a close relationship with any of the clients of Labournet that would enable him to carry any of its clients “*in his pockets*”, or persuade them to do business with either, himself, or SEESA, in place of Labournet.
- [22] Jankielsohn avers that he occupied “*the lowest possible*” position in the scheme of Labournet’s business. He only had one and a half day’s training. He then completed the probationary period and passed an oral examination at the end of that period. In order for him to progress, he was required to complete “*career path tests*” consisting of eight modules - each module requiring one or more tests and a corresponding assignment. According to Jankielsohn, he only completed three tests and their corresponding assignments and he was never promoted or given an increase.
- [23] Jankielsohn denied ever receiving or being exposed to confidential information of Labournet. He denied having any knowledge of any of its marketing strategies and avers that all the information he had access to, including the procedures referred to by the appellant, was “*readily available to any member of the public*” and that, in addition, his education, before being employed by Labournet, had exposed him to the information and procedures which were applicable to his work at Labournet. Further, that all documentation that was used in his sphere of work at Labournet was obtainable from and was indeed obtained from the Internet.
- [24] In Labournet’s replying affidavit, Mr Terblanche denies the truth and correctness of Jankielsohn’s entire version, including his version about the information he had access to and his connection to its customers. The replying papers are bulky. Excluding the annexures and confirmatory affidavits by Mr Snyman, the replying affidavit itself comprises some 31 pages. The founding affidavit was only 23 pages.

In the court a quo

- [25] Having considered the versions of the parties, the court *a quo* found, in respect of Labournet's contentions regarding the confidentiality of the information that Jankielsohn had access to, that Labournet "*failed to put convincing evidence*" before it "*to firstly, show what the strategies, documentation, modus operandi, specifications or the services supplied by [Labournet], etc, are and that are regarded as confidential, why it is regarded as confidential and why it would be useful to SEESA*". The court *a quo* then found that Labournet had made "*bald and unsubstantiated allegations in that regard*" and was not able to convince it that there was indeed confidential information that required protection.
- [26] Regarding the issue of "*customer relations*" or "*customer connections*", the court *a quo*, having considered the versions of the parties, concluded that there was no "*convincing evidence*" placed before it to show that Jankielsohn "*had a special relationship with some clients*".
- [27] The court *a quo* went on to hold that if it was wrong with regard to the said findings and if Labournet did in fact have a protectable interest, it had not been shown that Jankielsohn's employment with SEESA "*would infringe on such protectable interests or that there was such a breach as alleged by Labournet*".
- [28] The court *a quo* then embarked on a balancing of the respective interests. Having referred to *Reddy v Siemens Telecommunications (Pty) Ltd*² ("Reddy") it found that "*(a) quantitative and qualitative weigh off in this matter favours Jankielsohn's interests to be economically active and productive as opposed to the applicant's interests*".
- [29] The court *a quo* concluded that Labournet "*has no protectable interest, the employment of Jankielsohn at SEESA does not infringe any protectable interest the [Labournet] may have in any event, and the quantitative and qualitative weigh off favours Jankielsohn. To enforce the restraint of trade in*

² 2007 (2) SA 406 (SCA).

these circumstances would not only be unreasonable, but will stifle competition". Having concluded that the costs should follow the result, Labournet's application was dismissed with costs.

Grounds of appeal

[30] In its notice of appeal, Labournet levelled extensive criticism at the court *a quo*'s judgment and order. The criticism formed the basis of the main arguments persisted in before this Court. Briefly, they were the following.

[31] It was submitted that the court *a quo* failed "*to appreciate and consider*" that the confidential information relied upon by Labournet – included the information Jankielsohn had about its customers, their identity, their requirements, contact persons, and the nature of the contracts Labournet had with its clients. It was also contended that the confidential information included Labournet's "*own knowledge base*" which is not a "*LexisNexis*" subscription, but one which it "*constantly develops, and on which it trains its consultants and which is only accessible through passwords*".

[32] In relation to the "*knowledge base*", it was further submitted that Jankielsohn would not have been able to do his work unless he was "*skilled in this by*" Labournet and had used its "*knowledge base*". It was further contended with regard to Jankielsohn's training, that Jankielsohn's version, which, according to Labournet, in effect, was that he was left to his own devices, was not true.

[33] Generally, regarding the issue of confidential information, it was submitted that Labournet had given enough detail of the information it sought to protect and to have given any more information would have destroyed the very object of protecting such information.

[34] Regarding customer relations, Labournet's legal representative submitted that the court *a quo* erred in finding that it did not have such a protectable interest. According to this argument, it was undisputed that Jankielsohn "*extensively dealt with customers*" and his undertaking not to solicit Labournet's customers underscored the influence he had on those customers whom he dealt with.

- [35] Labournet's further contended that the court *a quo* failed to appreciate that Jankielsohn knew nothing of the industry and its business before joining it and that his training by Labournet and his exposure to the confidential information and customers of Labournet made him attractive to SEESA, who "headhunted" him.
- [36] Labournet criticised the court *a quo*'s approach, including its weighing up of the interests of the parties' qualitatively and quantitatively, and its findings that those of Jankielsohn outweighed those of Labournet, and that Labournet's motive for bringing this application was to stifle competition.
- [37] The *crux* of Labournet's criticism of the court *a quo*'s decision was that it rendered restraints meaningless. In its grounds of appeal Labournet, *inter alia*, states:

'With respect, the approach of the learned judge leads to the simple question – why even have restraint? It would be of no value, and this is simply untenable. In its simplest form, what the appellant does is to take someone 'fresh' out of university, give him training, skill and the career, and all it asks in return is that this employee does not further pursue his career with the appellant's competitors. This is not the case of an employee coming to be employed by the appellant with all the skill and experience in tow. Obviously that would belong to the employee himself. Surely the appellant is entitled to say that all of its efforts in respect of training and skilling consultants should not be used to the benefit of its competitors. That is why one concludes restraints.'

I shall return to these statements, which clearly underlie the whole purpose and object of Labournet's restraint agreement with Jankielsohn and which motivated it to seek to enforce the agreement against Jankielsohn and to interdict SEESA.

- [38] Lastly, Labournet, in its notice of appeal, criticises the court *a quo*'s finding that the period of the restraint, namely three (3) years, was unreasonable. Although in argument before us, Labournet's legal representative (Mr Snyman) conceded that the period was not reasonable and that a lesser period, in the order of one year, would be reasonable.

The law and restraints

- [39] According to the decision in *Magna Alloys and Research SA (Pty) Ltd v Ellis*,³ (“*Magna Alloys*”) restraints of trade are enforceable unless they are proved to be unreasonable. Because the right of a citizen, to freely choose a trade, occupation, or profession and to practice such, is constitutionally protected, the *onus* to prove “*the reasonableness*” of a restraint might well have been affected.⁴
- [40] In *Reddy*, the Supreme Court of Appeal preferred not to become embroiled in the issue of *onus* and adopted a pragmatic approach, which according to it, was consistent with an approach where there was a direct application of the Constitution to restraint agreements. This approach was specifically adopted in respect of motion proceedings for the enforcement of restraints where the issue for determination was the reasonableness of the restraint. In terms of that approach, where the facts, concerning the reasonableness, had been canvassed in the affidavits – genuine disputes of fact are to be resolved in favour of the party sought to be restrained by applying the so-called *Plascon-Evans* rule.⁵ If the accepted facts show that the restraint is reasonable, then the applicant must succeed, but if they show that the restraint is unreasonable then the respondent in those proceedings must succeed.⁶

³ 1994 (4) SA 574 (A).

⁴ Views have been expressed and decisions have been made by various courts in support of and against that view. The difficulty with the latter view is that it overlooks the fact that the Constitution (1996) is intended to permeate all areas of law and that no area, or branch, of law, including the law of contract, or the common law, is insulated from the Constitution’s reach. In section 8(1) the Constitution provides that the Bill of Rights applies to all law. In section 2 the Constitution provides that it is the supreme law of the Republic and that law or conduct inconsistent with it, is invalid. At the time of the decision in *Magna Alloys*, freedom of contract was considered, in terms of the common law, to trump the freedom of trade. See *Magna Alloys* at 891 and see also what Didcott J (as he then was) stated in *Roffey v Catterall, Edwards and Goudre (Pty) Ltd* 1977 (4) SA 494 (N) at 507F – namely, “*I am satisfied that South African law prefers the sanctity of contracts ... Freedom of trade does not vibrate nearly as strongly through our jurisprudence ... It is intrinsically the less commanding of the two ideas ...*” Now, in terms of the Constitution, there is clearly a shift in preference. The right to trade is specifically protected in terms of section 22. See also; *inter alia*, I Currie and J de Waal *Bill Of Rights Handbook* 6th Ed. 740-741.

⁵ See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634. See also: *Fry’s Metals (Pty) Ltd v Numsa and Others* [2003] 2 BLLR 140 (LAC) and *Ball v Bambalela Bolts (Pty) Ltd and Another* (2013) 34 ILJ 2821 (LAC) at para 14.

⁶ See *Reddy v Siemens Telecommunications (Pty) Ltd* (above) at 496B-D; and this Court’s decision in *Ball v Bambalela Bolts (Pty) Ltd and Another* (above) at para 14.

- [41] The enquiry into the reasonableness of the restraint is essentially a value judgment that encompasses a consideration of two policies, namely the duty on parties to comply with their contractual obligations and the right to freely choose and practice a trade, occupation or profession. A restraint is only reasonable and enforceable if it serves to protect an interest, which, in terms of the law, requires and deserves protection. The list of such interests is not closed, but confidential information (or trade secrets) and customer (or trade) connections are recognised as being such interests. To seek to enforce a restraint merely in order to prevent an employee from competing with an employer is not reasonable.⁷
- [42] According to the Appellate Division in *Basson v Chilwan and Others*,⁸ the following questions require investigation,⁹ namely, whether the party who seeks to restrain has a protectable interest, and whether it is being prejudiced by the party sought to be restrained. Further, if there is such an interest – to determine how that interest weighs up, qualitatively and quantitatively, against the interest of the other party to be economically active and productive. Fourthly, to ascertain whether there are any other public policy considerations which require that the restraint be enforced. If the interest of the party to be restrained outweighs the interest of the restrainer – the restraint is unreasonable and unenforceable.¹⁰
- [43] It is now clear from, *inter alia*, *Basson* and *Reddy*¹¹ that the reasonableness and enforceability of a restraint depend on the nature of the activity sought to be restrained, the *rationale* (purpose) for the restraint, the duration of the restraint, the area of the restraint, as well as the parties' respective bargaining positions. The reasonableness of the restraint is determined with reference to the circumstances at the time the restraint is sought to be enforced.¹² With

⁷ See *Ball v Bambalela Bolts (Pty) Ltd and Another* (above).

⁸ 1993 (3) SA 742 (A) at 767E-I.

⁹ A fifth question, which was identified in *Reddy v Siemens Telecommunications (Pty) Ltd* (above) is really covered by the relationship between the first and third questions identified in *Basson v Chilwan* (above) and relates to proportionality. See further *Ball v Bambalela Bolts (Pty) Ltd and Another* (above) at para 18.

¹⁰ *Ibid* at 767.

¹¹ See also *Ball v Bambalela Bolts and Another (Pty) Ltd* (above).

¹² See: *Reddy v Siemens Telecommunications (Pty) Ltd* (above) at 497F, at para 16; *Ball v Bambalela Bolts (Pty) Ltd* (above) at para 17.

reference particularly to the facts of this matter, it is an established principle of law that the employee cannot be interdicted or restrained from taking away his or her experience, skills or knowledge, even if those were acquired as a result of the training which the employer provided to the employee.¹³

[44] Even though it is acknowledged that it is difficult to distinguish between the employee's use of his or her own knowledge, skill and experience, and the use of his or her employer's trade secrets, it is accepted that an employee cannot be prevented from using what is in his, or her, head.¹⁴

[45] Also relevant to this matter are the principles relating to the reasonableness of the duration of the restraint. This aspect is generally assessed as part and parcel of assessing the reasonableness of the restraint, but it bears mentioning that the duration must be rational and reasonable. It cannot be reasonable if it is not rational.

Analysis

[46] Against this background and before embarking on an analysis and determination of the issues and facts in this matter, the following ought to be borne in mind. Since about 1 March 2016 Jankielsohn has been employed by SEESA. At the time of argument in this Court on 24 November 2016, it has been for a period in excess of about eight months. Further, no relief in the form of an interim interdict had been given or was in place. While the court *quo* did not mention the *Plascon-Evans* rule, it seems to have assessed or weighed the parties' contradictory versions and concluded that Labournet had not "*put up convincing evidence*" in particular to show that it had the protectable interests which it claimed it had.

[47] With regard to Labournet's claim that Jankielsohn had access to confidential information – which was information about its business and clients, including

¹³ See: *inter alia*, *Easy Find International SA (Pty) Ltd v Insta Plan Holdings* 1983 (3) SA 917 (W) at 929F-930A and the cases cited there.

¹⁴ See; for example, *Northern Office Microcomputers (Pty) Ltd v Rosenstein* [1981] 4 All SA 509; 1981 (4) SA 123 (C); *Knox D'Arcy Ltd v Jamieson* [1992] 4 All SA 275; 1992 (3) SA 520 (W). In, *inter alia*, *Automotive Tooling Systems (Pty) Ltd v Wilkens* 2007 (2) SA 271 (SCA) at 282E-G, it was held that the skills which an employee acquired in the course of developing his or her trade, even if they were specialised, did not constitute a protectable interest of the employer who sought to restrain the employee.

its strategies, documentation and processes which it used to procure new clients and service existing ones, its pricing of its services and the kind of services provided to clients, as well as its, alleged “*knowledge base*” – the court *a quo* was not convinced of the confidentiality of that information and in particular that part of the information that Jankielsohn admitted that he had access to.

[48] It is well-accepted that for information to be confidential “*it must (a) be capable of being applicable in trade or industry, that is, it must be useful; not be public knowledge and property; and (b) it must be known only to a restricted number of people or a close circle, and (c) of economic value to the person seeking to protect it*”.¹⁵

[49] Jankielsohn did not just baldly deny that he had access to confidential information – but explained in the context of the nature of his duties – why he did not have and did not require such access. He states in effect that the confidential information was information in the possession of “*the proprietors*” of Labournet’s business and was never imparted to him. He states that all the documents that were used while he was in the employment of Labournet were retrieved from the Internet and they were thus available to the public. Bearing in mind his relatively junior employment status – his version cannot be rejected as “*far-fetched*” or “*clearly untenable*” or “*palpably implausible*”. His work was to render relatively basic kinds services to clients of Labournet – as were assigned to him by his managers.

[50] So that even if some of the alleged information Labournet alleged it had, has an aura of confidentiality, there is no specific reason given why Jankielsohn would have required access to it. It is, for example, not clear why he would have required access to, *inter alia*, the pricing list of Labournet’s clients (including those pertaining to the clients he was required to service from time to time); the strategies, documentation and processes used by Labournet to procure clients, if his job was not to procure clients or bill them. Mr Terblanche explained that their clients were serviced in terms of a retainer with a fixed

¹⁵ See Van Reenen J in *Walter McNaughten (Pty) Ltd v Schwartz* [2003] 1 All SA 770; 2004 (3) SA 381 (C) at 389.

fee. As far as the knowledge base is concerned, there is no reason, because of his very junior status, why Jankielsohn would have been exposed to, or would have required any kind of precedent or form, other than the most basic forms that are commensurate with the tasks which he had to perform and which, as conceded by Labournet's legal representative in argument before us, are readily and freely available. There is thus, in my view, a genuine dispute of fact, concerning Jankielsohn's access to confidential information, on the papers.

- [51] Regarding the other protectable interests claimed by Labournet, namely, customer or trade connections. They are protectable provided it is established on the facts that the attachment, between the employee sought to be restrained and those customers, was of such a nature that the employee would be able to induce those customers to follow him or her.¹⁶
- [52] In *Rawlins v Caravantruck (Pty) Ltd*,¹⁷ ("Rawlins") it was held that whether there is such an attachment, is a question of fact to be determined in each case. A great deal will depend on the employee's duties, his personality, the frequency of his contact with clients and the duration of such contact, what knowledge he gains of their requirements and business, the general nature of the relationship he or she has with clients; whether the employee is involved in the canvassing of customers and whether any customers were lost after the employee left his or her employment. This is clearly not a closed list of factors.
- [53] There is a dispute about whether Jankelsohn had such attachment with the clients of Labournet, including those for whom he was required to render services from time to time. In light of the concessions made in argument before us by Mr Snyman, Labournet clearly exaggerates in averring in its affidavits that the influence Jankelsohn had over those clients was of such a nature that he could "carry them in his pockets". Jankelsohn avers that he was "*not specialised*" and did not receive the full training that had been given to other consultants employed by Labournet. He, for example, states that he was employed at the lowest level at Labournet; that after completing a day and a

¹⁶ See, *inter alia*, *Reddy v Siemens Telecommunications (Pty) Ltd* (above) at para 20.

¹⁷ [1993] 1 All SA 389 (A); 1993 (1) SA 537 (A) at 541 G-I.

half's training he commenced employment. He never completed the requisite modules that would have ensured his advance and on Labournet's own version, as deposed to by Mr Terblanche, by leaving he had cut short his career path. Jankielsohn's version in that regard is not seriously disputed by Labournet. In so far as it disputes whether Jankielsohn has only passed three tests and has done their corresponding assignments, Labournet did not produce any proof of any other tests, let alone modules, that Jankielsohn had passed or completed, even though it was clearly in a position to do so.

[54] Jankielsohn states that he was only competent to handle "*blue collar misconduct*" matters and received no training in the more complex matters such as "*concerning gross negligence, assault, CCMA preparation, strikes, retrenchments and so on*". He further states that he was not allowed to deal with such matters. When he was instructed by his managers to deal with any such matters he was obliged to do so with his limited knowledge and training. He states that it was his manager's duty to maintain a relationship with clients and that he was not allocated any particular client for any appreciable period of time, which would have enabled him to form an attachment with those clients. Recruitment of clients was not part of his duties and because of the limitations of his training and experience, he was hardly one that could induce clients to follow him. In argument before us Mr Snyman made an important concession in that regard, namely, that there was nothing about Mr Jankielsohn's personality that would have, particularly, endeared him to Labournet's clients, or enabled him to form strong bonds or attachments with those clients.

[55] Jankielsohn further explains that Labournet's office in Bloemfontein has about 500 clients. Consultants, depending on the availability, would serve clients on instruction of their manager. He had no reason to have any confidential detail or extensive information of any client and it was also not necessary for him to have such information because of the nature of the services he would have been required to render.

[56] Jankielsohn's denial of having an attachment to his the clients of Labournet, similarly, cannot be rejected out of hand. In my view, there is a genuine

dispute of fact in respect of the second (alleged) interest Labournet seeks to protect, namely, customer connections.

[57] There is also, *inter alia*, a dispute concerning the reasonableness of the area and duration of the restraint. The period of the restraint is three (3) years. Labournet contended on the papers and in the court a *quo* that the area and duration of the restraint was reasonable. However, at the hearing before us Mr Snyman, for Labournet, conceded that given Jankielsohn's level and experience, the three-year period was probably too long and sought to persuade us that a restraint period of about 12 months (or a year) was justifiable. Even though the concession was, in my view correctly made, no particular reason was furnished why 12 months would be reasonable, or why a lesser period than that would not be reasonable. In any event, the reasonableness of the duration of a restraint is a value judgment to be arrived at upon a consideration of all the relevant facts.

[58] I should point out at this stage that Labournet liberally resorted to generalities regarding consultants and did not deal with specifics, even though it was essential for Labournet to deal specifically with Jankielsohn as an individual it sought to restrain.

[59] If all the (real) disputes of fact, or at least the crucial ones regarding the alleged protectable interests, are resolved in favour of Jankielsohn, then one cannot find that the papers after such an exercise disclose that Labournet has protectable interests.

[60] The overwhelming theme of Labournet's application is its objection to its competitors employing a person whom it has trained, or skilled and equipped to provide certain services. Labournet tried to raise this as an additional "*injury*" to the threat Jankielsohn's employment by a competitor held for its protectable interests. Having described how consultants are selected and trained and equipped, Mr Terblanche, the deponent of Labournet's founding affidavit, states:

'To add insult to injury, the reason why the applicant's consultants are very employable and are often offered lucrative employment elsewhere is because

of what the applicant did for them and because of the services they rendered to clients on behalf of the applicant. The applicant needs to protect itself against such kind of situation, hence the restraint of trade.'

And elsewhere he states:

'The applicant must send a clear and consistent message, and has always sought to enforce its restraints of trade with its consultants.'

[61] As pointed out earlier – even if an employer spent time and effort and money to train or “skill” an employee in a particular area of work the employer has no proprietary hold on the employee, or his, or her, knowledge, skills and experience, even if those were acquired at that employer.¹⁸

[62] In *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another*,¹⁹ the court, *inter alia*, pointed out that:

'In seeking to protect his 'investment' in training the workmen, the employer is pursuing an objective which is unreasonable and contrary to public policy. For public policy requires that workmen should be free to compete fairly in the market place to sell their skills and know-how to their own best advantage; and the enforcement of a restraint which has no objective other than to stifle such free and fair competition is unreasonable and contrary to public policy.'

[63] Since the facts disclosed and assessed as above do not disclose protectable interests, the next stage, namely, to weigh up the interest of the parties qualitatively and quantitatively, falls away.

[64] On the off chance that the facts have disclosed something of a protectable interest, which I do not find, it is my view that those interests, both qualitatively and quantitatively, do not outweigh Jankielsohn's interest to remain economically active in the occupation of his choosing and which he is academically and otherwise qualified for. In any event, the chances of economic exploitation of those interests by Jankielsohn, at this stage, are in my view infinitesimal if not non-existent. Jankielsohn has been employed with

¹⁸ See, for example, *Basson v Chilwan (supra)* at 771C-F and 778D and *inter alia*, *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) at 507D-H.

¹⁹ (*supra*) at 507A.

SEESA since March 2016 and, at the time this matter was argued before this Court, he had been employed there for more than eight months. If there was any exploitation of any protectable interest of Labournet it would have occurred at the earliest available opportunity, which would have been very soon after Jankielsohn's employment by SEESA, when the information was still fresh, valid and commercially relevant. Labournet has not referred to any overt act of exploitation of any protectable interest, other than for objecting to the fact that Jankielsohn has gone to work and was presently working for its competitor.

- [65] The restraint Labournet seeks to enforce against Jankielsohn, as I pointed out earlier, is for a period of 3 years, but which Labournet's counsel correctly conceded to be unreasonable. A period of 12 months was suggested as an alternative, but it was apparently a suggestion made off the cuff by Mr Snyman. There is nothing to show that 12 months in the present circumstances would be reasonable. The purpose of a restraint is not to punish.²⁰ To enforce the restraint against Jankielsohn at this stage would have drastic adverse economic consequences for him. Losing his job in this depressed economic climate – which is also dominated by a very high unemployment rate – is not justified in light of all the facts and circumstances.
- [66] In light of the above, the court *a quo*, in my view, correctly dismissed, with costs, Labournet's application for an interdict restraining Jankielsohn from being employed by SEESA.
- [67] The fate of the application against SEESA is tied to the fate of Labournet's application against Jankielsohn. Accordingly, the court *a quo* was also correct in dismissing the application against SEESA.
- [68] As regards the costs of the appeal, given the nature and circumstances of this particular matter, I am of the view that there should be no costs order.
- [70] In the result, the appeal is dismissed.

²⁰ See *Ntsanwisi v Mbombi* 2004 (3) SA 58 (T) at 62D-63H.

P Coppin

Judge of the Labour Appeal Court

Tlaletsi DJP and Landman JA concur with the judgment of Coppin JA

APPEARANCES:

FOR THE APPELLANT:

Mr S Snyman of S Snyman Attorneys

FOR THE FIRST RESPONDENT :

J L Olivier

Instructed by Rossouws Inc