



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: J 1722/17

In the matter between:

MACNEIL JHB (PTY) LTD

Applicant

and

MICHAEL NICHOLAS COCOLARAS

First Respondent

BOLTFIX (PTY) LTD

Second Respondent

Heard: 12 December 2017

Delivered: 11 January 2018

Summary: Practice and procedure – urgent application – allocation on the opposed motion roll on expedited basis – unreasonable delay in launching the application erodes urgency.

Restraint of trade – enforcement is inherently urgent – applicant must approach the court as soon as it becomes aware that there is a breach of the restraint – alternative remedy in damages.

JUDGMENT

Nkutha-Nkontwana J

Introduction

- [1] In this application, the applicant seeks an order, by way of an urgent application, interdicting and restraining the first respondent for a period of 24 months from 1 June 2017 and in the areas of Gauteng, Mpumalanga and the Free State from being engaged in any business which wholly or partly competes with the business of the applicant. In the alternative, the applicant seeks an order for a period and in a geographical area which the Court deems appropriate.
- [2] The applicant also seeks an order interdicting and restraining the first respondent from soliciting, canvassing or procuring orders or otherwise obtaining business from customers or clients who were customers or clients of the applicant at any time in the 12 months' period prior to the termination of the first respondent's employment on 31 May 2017.
- [3] In addition, the applicant seeks an order that the first respondent be interdicted and restrained from using and/or disclosing its confidential information and that the first respondent be directed to return to the applicant any confidential information in his possession.
- [4] The first respondent opposes the application.

Background facts

- [5] The first respondent commenced employment with the applicant on 1 February 2012 for a period of approximately 5½ years. He was initially employed as a sales manager and subsequently promoted to the position of area sales manager for the region of Mpumalanga, Gauteng and Free State.
- [6] On 1 May 2017, the first respondent tendered his resignation, effective from 31 May 2017, and indicated that he was intending to start a gym. The first respondent subsequently joined this second respondent as an agent.

- [7] It is common cause that there is an overlap, to some extent, in the business of the applicant and the second respondent. The applicant offers a wider range of sanitary ware and plumbing supplies than the second respondent. The applicant does not stock ironmongery, windows, aluminium hardware, security fittings and fasteners. Ironmongery, security fittings and fasteners are supplied by its associate DCLSA Distributors (Pty) Ltd (DCSLA). The competition between the applicant and the second respondent is restricted.
- [8] The relevant portions of the restraint agreement which is part of the first respondent's contract of employment are set out below:

'23. Restraint

23.1 Interpretation

23.1.2 "trade secrets" means without limiting the generality of "trade secrets" the following matters, all of which are hereafter referred to as "trade secrets" –

23.1.2.1 process and techniques, technical detail, know-how, method of operating the cause and source of any material, pricing and purchasing of goods;

23.1.2.2 names of customers and potential customers of McNeil JHB brackets including potential customers of McNeil JHB with McNeil JHB has not as yet contacted, but in terms contacting for the peoples of doing business); ...

23.2 Confidentiality

The employee will not, either during the employment with MacNeil JHB or at any time thereafter, unless the employee has obtained McNeil JHB prior written consent, directly or indirectly divulge or make known to any unauthorised person

McNeil JHB Trade Secret or any confidential information relating to the business, clients, employees, products, methods of or processes of McNeil JHB and/or its clients at whose premises the Employee is assigned from time to time, that may have come to the knowledge of the Employee at any time during the employment with MacNeil JHB, whether before or after signature thereof, nor make any unauthorised use of such confidential information.

23.3 Restraint of trade

23.3.1 For a period of twenty-four (24) months after the termination of his/her employment with McNeil JHB, the Employee shall not hold any position as a director, officer, employee, consultant, partner, principal or agent, in any business which is or is likely to be wholly or partly in competition with the business of McNeil JHB.

23.3.3 for a period of 24 months after the termination of his contract of employment with McNeil JHB, the Employees shall not, whether directly or indirectly, or as a servant, agent or otherwise howsoever;

23.3.2.1 solicit, canvass or procure orders from otherwise seek to obtain business from customers or clients whose were customers or clients of McNeil JHB at any time during a period of twelve (12) months prior to the termination of the employee's employment;

23.3.2.2 solicit from or place orders with or otherwise seek to obtain business from suppliers for suppliers of McNeil JHB at any time during a period of 12 months prior to the termination of Employee's employment;

23.3.2.3 seek any business, orders or customers in relation to any products or services provided by McNeil JHB with which the employee was concerned during the time she was employed by McNeil Johannesburg;

23.3.2.4 induce or attempt to persuade, procure or otherwise facilitate Employees of McNeil JHB to leave the employment or to accept employment with any business that is wholly or partly in competition with McNeil JHB.

23.4 Territory

The restraint set out in the Agreement shall apply to Southern Africa, Mainland China, Hong Kong, Thailand and Vietnam.'

[9] It is not disputed that the first respondent signed a restraint of trade agreement, incorporating clauses which correspond with the relief sought by the applicant in the notice of motion. It is also not in dispute that the first respondent did have access to the applicants SAP system and the nature of the information in the SAP system is contained in the applicant's confidential affidavit. The applicant contended that this information is confidential as it contains its trade secrets and would be highly valuable to a competitor who would use it to gain an upper hand in the market.

[10] The first respondent is opposing the enforcement of the restraint of trade on the basis that it is unreasonable and therefore unenforceable and submits as follows.

10.1 The first respondent is engaged as an independent contractor serving only the areas of Pretoria and Johannesburg to sell the second respondent's products that are not sold by the applicant and which the first respondent did not sell while he was in the applicant's employ.

- 10.2 There is an overlap in the customer's supplied by the applicant and the second respondent. The second respondent, to the extent that it services the same customers as the applicant, has its own proprietary relationships with those customers which are well established.
- 10.3 The first respondent conceded that he had a limited access to the applicant's SAP system but disputes that the information is confidential or would be of value to the second respondent. Also, there are other two employees of the applicant who had access to the applicant's SAP system during their employment with the applicant and have since taken up employment with the second respondent and yet the applicant has not taken up steps to enforce the restraints against them.
- 10.4 The period for which the applicant seeks the enforcement against the first respondent is unreasonably long. Even though the applicant seeks a 'reading down' of a period of 24 to 12 months, the first respondent contended that both periods are unreasonable.
- 10.5 The first respondent also contended that the area in respect of which the restraint is sought is also unreasonable. It applies to geographical areas of Southern Africa, Mainland China, Hong Kong, Thailand and Vietnam when there is case of any business conducted outside of South Africa. Even the amendment of the area in which enforcement of restraint is sought to Gauteng, Mpumalanga and the Free State is also unreasonable, so it was further argued.

Urgency

[11] Ms Govender, for the applicant, submitted, in her opening submissions in Court, that the applicant is abandoning urgency on the basis that the matter has since been allocated on an opposed motion roll. That is so, the argument went further, because on 5 October 2017, Ms Govender, on behalf of the applicant, wrote a letter to the Judge President of this Court, on notice to the respondents, requesting an expedited date for the hearing of the matter. The details of the letter are as follows:

- '1. We refer to above matter and confirm we behalf of McNeil JHB, the applicant in the matter. The matter concerns a restraint application.
2. The restraint of trade is limited in duration of 24 months alternatively a period the court deems appropriate as per the notice of motion. The applicant has made provision for "reading down" of the duration of enforcement and contended that 12 months would be reasonable. It is trite that restraint applications are urgent by their very nature and in vast number of cases; the court has reduced the duration of the restraint. In the circumstances, our client will be prejudiced should the matter be enrolled under the normal course on the opposed roll. The dates for the opposed motion are usually allocated 6 to 12 months from the request of set down. Hence, given the possible limited period for enforcement of the restraint, the Applicant will suffer severe prejudice should the matter not be set down on the expedited roll *alternatively* semi-urgent roll.
3. We have further provided the Respondents, 10 (ten) days to file their answering papers and all the papers in excess of 400 pages. It is pertinent to mention at this juncture; that leave is further sought for a confidential affidavit. In the circumstances, it would not be prudent to set the matter down on the urgent roll in light of the volume of the papers and the practice that parties are only allowed to set down urgent matters three weeks in advance.
4. In the circumstances, we humbly request for an expedited date for the hearing of the matter preferably prior to 15 December 2017 alternatively should the court not be amenable to do so, we humbly

request a date in November 2017 on semi-urgent roll in order to eliminate any prejudice to the Respondents and the Court.

5. We trust you find the above in order and respectfully request an urgent response.'

[12] The matter was then set down as per the applicant's request on an opposed roll on expedited basis.

[13] In reply, Ms Govender submitted, as alternative, that the applicant has made a case in its papers before the Court for the hearing of the matter on urgent basis. The applicant's main assertion is basically rehashed in the reasons provided in its request for an expedited allocation and it dealt with urgency for the first time in its replying affidavit.

[14] The explanation tendered for the delay in launching the application is that there was some communication between the parties and their attorneys, including requests for undertakings that were not forthcoming. The matter became urgent once it became aware that its proprietary interests worthy of protection, were indeed threatened. The applicant was alive to the fact that it has challenges with urgency hence a half-hearted concession that, "at first blush", urgency appears to be self-created.

[15] The first respondent vehemently challenged the hearing of the matter either on urgent or expedited basis as argued by the applicant. It was argued by the respondent's counsel that the applicant failed to act with reasonable expedition as soon as it gained cognisance of the fact that the first respondent was seemingly acting in breach of the restraint of trade and confidentiality undertakings.

[16] The first respondent, in its written submissions, mapped out the chronology of events that led to the launching of the application as follows:

- 16.1 The first respondent resigned from the applicant's employ on 1 May 2017 and his last day of employment was 31 May 2017.

- 16.2 On the applicant's own version, by 13 June 2017 the applicant had received unsubstantiated reports that the first respondent had joined the second respondent.
- 16.3 Accordingly, on 13 June 2017, the applicant dispatched a letter to the first respondent in which it is recorded that it had become apparent that the first respondent intended taking up employment with the second respondent, a direct competitor of the applicant. The applicant sought an undertaking from the first respondent within 48 hours of the dispatch of the letter dated 15 June 2017 that the first respondent would abide by the terms of his contract of employment, failing which an urgent application would be brought against both the first respondent and the second respondent.
- 16.4 While the reports that the applicant had heard that the first respondent had taken up employment with the second respondent by June 2017, are alleged to be unsubstantiated, it certainly knew sufficient information to dispatch a letter of demand to the first respondent threatening litigation.
- 16.5 The applicant asserts that it became aware of the relationship between the first and the second respondent during early July 2017 albeit that the exact nature of the relationship was allegedly unknown to it.
- 16.6 The applicant claims that the first respondent solicited its clients and procured orders for the second respondent from July 2017 and, as a result, it sought the advice of its attorneys on or about 5 July 2017 which led to the dispatch by the applicant's attorneys of two further letters of demand, one to the first respondent and the other to the second respondent.

- 16.7 Again, a written undertaking was sought by the applicant from the first respondent by not later than 16h00 on 7 July 2017 that he would abide by the terms of his restraint agreement failing which the applicant would institute the necessary proceedings to interdict him from breaching the terms of his restraint agreement. A similar undertaking was sought from the second respondent.
- 16.8 On 10 July 2017, the second respondent responded to the applicant's attorneys indicating that it had not employed the first respondent, but that he was an independent contractor. A copy of the first respondent independent contractor agreement was forwarded to the applicant. The second respondent also indicated that the first respondent would be engaged in servicing the second respondent's existing client base and that the second respondent would not engage with any client of the applicant in respect of which the applicant had any 'intellectual rights' or 'exclusivity'.
- 16.9 A similar email was dispersed by the first respondent to the applicant on 11 July 2017 in which the first respondent highlighted that he would only service the existing clients of the applicant and that he would not approach any client of the applicant that are not part of the second respondent's client base. The first respondent indicated that he would be predominantly selling ironmongery and hardware products which were not sold by the applicant.
- 16.10 Accordingly, by not later than 11 July 2017, the applicant knew that the first and the second respondents would not provide the undertaking that it had demanded in its attorneys' letter dated 6 July 2017. The applicant also knew the precise nature of the first respondent's involvement with the second respondent.

16.11 Despite not receiving the undertaking that it sought, the applicant did not launch interdict proceedings against the first respondent as threatened in its letters of 13 June 2017 and 6 July 2017. The applicant cannot contend that it was satisfied with these undertakings given that it records specifically that, in its view, to render services to the existing clients of the applicant would involve it 'divulging the confidential information' of the applicant to the second respondent. There is no explanation provided as to why proceedings were not launched by the applicant at this stage.

16.12 The applicant asserts further that on or about 27 July 2017, it was informed by a client, Autoplumb Suppliers CC (Autoplumb), that the first respondent had contacted Autoplumb and forwarded an email to Autoplumb. It is common cause that the second applicant never contacted Autoplumb but Wholesale Plumbing Services who are the applicant's client but not the second respondent's existing client.

16.13 On 16 August 2017, notwithstanding the first and second respondents' stances, the applicant dispatched another set of similar letters of demand to the first and second respondents seeking an undertaking by 17 August 2017 that the first respondent would abide by the terms of his restraint agreement. The applicant yet again threatened to launch these proceedings. The second respondent, after consulting with attorneys, posed various questions to the applicant with regard to the details of the undertakings sought but was not favoured with a response.

16.14 The applicant only launched these proceedings on 1 September 2017, 3 months after the second respondent left its employ, and almost 2 months after its letter of demand dated 13 June 2017 which threatened to launch this application within 48 hours if the undertakings it had sought were not forthcoming.

16.15 The applicant afforded the respondents 10 days to file their answering affidavits. The first respondent filed its answering affidavit on 19 September 2017. A further delay was occasioned by the filing of the confidentiality affidavit. Despite having sought the confidentiality undertakings from the first respondent on 26 September 2017 and being provided them on 4 October 2017, the confidentiality affidavit was only delivered on 11 October 2017.

16.16 The first respondent is effectively engaged by the second respondent for more than 6 months now.

[17] The first respondent further argued that axiomatically, the horse has bolted. The urgency of the application is self-created as the applicant folded its arms and elected to launch this application at its leisure. There is no explanation for the delay other than the fact that the applicant had been dilatory and capably remiss in its conduct.

The legal principles and evolution

[18] The principles applicable to urgent applications in relation to restraint of trade litigation are succinctly echoed in *Ecolab (Proprietary) Limited v Thoabala and Others*,¹ where the Court said that:

'[20] ... parties alleging breaches of restraint of trade agreements are not indemnified from satisfying the requirements in Rule 8. Thus, a mere contention that the enforcement of restraint of trade is inherently urgent and therefore must be treated as such by this court without any further consideration cannot by all accounts be sustainable. The fact that these disputes may have an inherent quality of urgency cannot be equated to a free pass to urgent relief on the already over-burdened urgent roll in this court. Like all other urgent matters, more than a mere allegation that a matter is urgent is required.² This therefore

¹ [2017] ZALCJHB 300; (2017) 38 ILJ 2741 (LC) at paras 16 to 20.

² See *Moyo & Others v Administrator of the Transvaal & Another* (1988) 9 ILJ 372 (W) at 387I:

implies *inter alia* that the Court must be placed in a position where it must appreciate that indeed a matter is urgent, and also that an applicant in the face of a threat to it or its interests had acted with the necessary haste to mitigate the effects of that threat.’

[19] In essence, urgency must not be self-created as a consequence of the applicant’s failure to launch the application at the first available opportunity. It stands to reason that a litigant seeking an indulgence to be heard on urgent basis must act swiftly in instituting the litigation. Urgency dwindles with time, hence the applicant must come to Court immediately, or risk failing on urgency.³ In *Valerie Collins t/a Waterkloof Farm v Bernickow NO and Another*⁴ the Court held:

‘[9] It is clear from the above that the Courts do not easily grant urgent relief. This caution is justified given the exceptional and drastic nature of such relief. The Labour Court Rules set out the proper procedure through which applications to the Court should be pursued and these rules exist to ensure that due process is allowed to run its course. They have not been arrived at arbitrarily but after careful consideration as developed over years of practice. Thus, deviation from the usual rules should not be taken lightly, it is only in exceptional circumstances that the Court will deal with applications on an urgent basis. In order to succeed in an urgent application, the applicant must satisfy the Court that on balance the interests of justice outweighs the right of the parties to have a considered opportunity to place their case before this Court. Although the Courts recognise that financial consideration may be taken into account, the onus is on the applicant to show the prejudicial effect that will give rise to the injustice and plus the urgency of the situation. In particular, the applicant must show that he has launched the application at the first available opportunity; that special circumstances exist justifying the granting of the order; and there is no alternative remedy available to it.’

“An applicant who seeks relief by way of notice of motion should put all the facts, in as much detail as possible, before the Court. The mere fact that an application is urgent and urgent relief is sought does not relieve an application of this duty.”

³ See *Public Servants Association of SA and Another v Minister of Home Affairs and Others* [2016] ZALCJHB 439 at paras 12 to 18.

⁴) [2001] ZALC 223 at para 9.

- [20] In the present case, the applicant faced with the challenge of justifying approaching this Court on urgent basis sought to have the matter allocated on expedited basis without seeking the first respondent's indulgence. The first respondent objected to the applicant's approach as at the time the request was made, it had not filed its supplementary answering affidavit and there was no agreement on the process and enrolment moving forward as the matter was launched as an urgent application.
- [21] To the extent that the applicant persists that the matter is urgent, I deal first with urgency. The applicant in this matter acted with inexplicable laxity. There is no explanation as to why it failed to launch this application as early as June 2017, when it first became aware that the first respondent was in breach of his restraint undertakings. Better still, in July 2017 when it was clear, consequent to the first and second respondents' respective responses to its letters of demand, that the undertakings it was seeking were not forthcoming.
- [22] When the applicant launched these proceedings, the first respondent had already been engaged by the second respondent for 3 months and 6 months when the matter was heard in Court. There is only one isolated incident where the first respondent is accused of pursuing the applicant's customer. There is no evidence that the first respondent successfully marketed the applicant's clients and won them over during the 6 months' period.
- [23] The applicant was alive to the fact that it has insurmountable difficulties with urgency hence it asserts in its replying affidavit that, "at first blush", urgency appears to be self-created. Certainly, urgency in this matter is self-created. The applicant failed to act with reasonable haste once it became aware that the first respondent was seemingly conducting himself in breach of the restraint.⁵ The applicant, like in the case of *Ecolab*, has not made a case for the Court to hear this matter on urgent basis.

⁵ See also *Jiba v Minister: Department of Justice and Constitutional Development and Others* (2010) 31 ILJ 112 (LC) at para 18.

- [24] *In National Police Services Union and Others v National Negotiating Forum and Others*⁶this Court expressed an unwillingness to assist applicants who act in slumber where there is threat of injustice when it held that:

‘The latitude extended to parties to dispense with the rules of this court in circumstances of urgency is an integral part of a balance that the rules attempt to strike between time-limits that afford parties a considered opportunity to place their respective cases before the court and a recognition that in some instances, the application of the prescribed time-limits or any time limits at all, might occasion injustice. For that reason, rule 8 permits a departure from the provisions of rule 7, which would otherwise govern an application such as this. But this exception to the norm should not be available to parties who are dilatory to the point where their very inactivity is the cause of the harm on which they rely to seek relief in this court...’

- [25] That takes me to the second issue of expedited allocation of the matter. The applicant was not open to the Judge President when it sought an expedited allocation. It did not explain that the matter has been launched on urgent basis. Despite having afforded the respondents 10 days to file their replying papers, the applicant clearly understood that it was launching an urgent application, seeking an indulgence not to be heard on the ordinary opposed motion roll.

- [26] In terms of clause 12.14 of the Practice Manual of this Court, ‘An applicant that wishes to have an application heard on an expedited but not an urgent basis may approach the Judge President or his deputy, with a properly motivated request in writing, for a direction as to the conduct of the application, time periods that will apply and the allocation of a date for hearing.’ Clearly, the practice directive refers to a situation where a litigant who intends to launch proceedings in the ordinary course but has a justification for the expedited or speedy allocation of the matter could approach the Judge President or his deputy.

- [27] The approach undertaken by the applicant causes the mind to boggle. It requested an expedited allocation of a matter launched on urgent basis. This

⁶ (1999) 20 ILJ 1081 (LC) at para 39

it did without seeking consent of the respondents. As it turned out in Court, the first respondent vehemently challenged the expedited allocation in light of the fact that the applicant failed to proffer any reasonable justification. Despite an acknowledgement that restraint litigations are inherently urgent, the applicant abandoned the urgent application to follow a normal course simply because, in my view, it could not deal with the inexplicable dilatory manner it dealt with the application.

- [28] It is impermissible for the applicant to seek a speedy allocation on the opposed motion roll simply because it was slack in enforcing the restraint agreement once it was apprised with the breach thereof by the second respondent and, as such, could not pass the hurdle of proving urgency. The Court has a duty to protect its processes from this kind of abuse.
- [29] *In re: Several matters on the urgent court roll 18 September 2012*,⁷ the Court considered the force and effect of the provisions of Chapter 9.24 of the Practice Manual of the South Gauteng High Court regarding the failure by the applicant to set out the explicit circumstances which rendered the matter urgent and stated that in law the Judge President was entitled to issue practice directives relating to the procedure of setting down matters on the roll.
- [30] Therefore, the applicant seeking to be heard on expedited basis is also expected to justify the granting of the indulgence sought, particularly when it seeks a final interdict that is vehemently challenged by the respondent.⁸ In *Warner-Lambert v Teva UK Limited and Others*,⁹ an English authority of the Chancery Division, the defendant to a patent claim was bound by an interim injunction and sought an expedited trial to reduce the period for which it might be at a competitive disadvantage. The following principles set out by the Court are instructive:

⁷ [2012] 4 All SA 570 (GSJ).

⁸ *Tshwaedi v Greater Louis Trichardt Transitional Council* [2000] 4 BLLR 469 (LC) at para 11.

⁹ [2011] EWHC 2018 (Ch) at para 12. The court referred to *CPC Group Limited and Qatari Diar Real Estate Investment Company* [2009] EWHC, 3204 (Ch) with approval.

30.1 The general principle is that cases are to be brought to court as soon as reasonably possible (consistent with the overriding objective).

30.2 The issue of whether to grant expedition, and if so, how much and on what terms, is a matter essentially for the discretion of the judge.

20.3 That discretion must of course be exercised judicially; which is partly a question of principle and partly a question of practice.

30.4 Any order for expedition involves giving preference to one case in the allocation of court time over other cases. The court therefore has a wider responsibility and must take into account the requirements of other litigants. This aspect has even more weight in relation to Court of Appeal cases.

30.5 Therefore, the applicant must satisfy the court that there is an objective urgency to deciding the claim.

30.6 The procedural history in any case is relevant. Delay in seeking an order is a factor which may count against an applicant. By contrast, the attitude of the respondent is not really of importance unless he can show some real prejudice to him if the trial is expedited.

30.7 In judging whether urgency is justified, the court does not consider urgency to necessarily mean that a case needs to be heard in the immediate future. A case may be urgent in the sense that an answer is needed before the hearing date would, in the ordinary course of proceedings, arrive.

30.8 The court should resolve timetabling in a way which is the least unjust to all the interests concerned.

[31] In my view, the above principles constitute a guideline even in expedited motion proceedings in terms of this Court's Practice Manual. Clearly, the

applicant who wishes to launch an application that is not necessarily burning but needs to be resolved before the hearing in due course, may request an expedited allocation. The Judge President or the allocated judge will assist the parties in dealing with the timetable for the filing of papers and the set down of the matter.

- [32] In this instance, the converse is true. Whilst it is given that urgency is a matter of degree and a litigant approaching the Court on urgent basis is expected to factor that in when setting the matter down the matter, urgency in this matter has been eroded by the delay in launching the application.
- [33] Even though the matter is allocated on an opposed motion roll, the applicant had to satisfy the Court that it had made a case to be heard on urgent basis or expedited basis. There are several matters that are struck off the urgent roll for lack of urgency in each and every sitting of the urgent Court. It would be disastrous if all those matters would be re-enrolled on expedited basis.
- [34] In addition, nothing is placed before the Court to indicate that the second respondent's undertaking not to solicit business from the applicant's customers, who are not supplied by the second respondent in future was not made in good faith. During the period of 6 months that the first respondent has been engaged by the second respondent, there is only one incident of him pursuing the applicant's customer who is not in the current customer list of the second respondent. The marketing was only in relation to the products that are not supplied by the applicant.
- [35] Also, given the lapse of time due to the delay at the instance of the applicant, there is a great possibility that the confidential information has lost its value. Likewise, there seems to be other former employees of the applicant who had access to the SAP system and who are now in the employment of the second respondent but the applicant has taken no steps to enforce the restraint of trade agreements against them.
- [36] The applicant is not without a suitable alternative remedy in due course. It can sue the second respondent for damages for breach of contract, if at all.

Conclusion

- [37] In instances, such as this one, where a litigant who alleges a breach of the restraint of trade agreement, drags its feet and unreasonably delays to approach the Court, it must accept that it gambled away urgency and the Court would be disinclined to hear the matter on urgent or expedited basis.
- [38] I am convinced that the applicant has failed to make a case to be heard on expedited or urgent basis as such the application accordingly stands to be stuck off the roll.
- [39] On costs, both parties argued that costs should follow the result. I agree, there is no reason why costs should not follow the result.
- [40] In the circumstances, I make the following order:

Order

1. The applicant's application is struck off the roll for lack of urgency.
2. The applicant is ordered to pay to the costs of this application.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: P Govender from Macgregor Erasmus Attorneys.

For the Respondents: Advocate: P Bosman

Instructed by: Hogan Lovells Inc

LABOUR COURT