THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no. J 2113 / 19

In the matter between:

PLUMBLINK SA (PTY) LTD **Applicant**

and

KENNY LEGODI **First Respondent**

CHANDLERS PLUMBING DEPOT (PTY) LTD **Second Respondent**

Heard: **28 November 2019**

Delivered: **24 December 2019**

Summary: **Restraint of trade – principles stated – application of principles to matter – issue of protectable interest and infringement of such interest considered**

Restraint of trade – protectable interest in the form of trade connections and confidential information considered – protectable interest shown

Restraint of trade – breach of restraint – employment with direct competitor constitutes breach – undertaking not to compete insufficient – employer entitled to mitigate risk caused by employment with competitor

Interdict – requirements of interdict satisfied – interdict upheld – application granted – restraint enforced

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JUDGMENT

SNYMAN, AJ

Introduction

[1] The applicant has brought an urgent application to enforce a restraint of trade against the first respondent. In the application, the applicant seeks an interdict against the first respondent, to prevent him from continuing his employment with the second respondent, which employment he took up upon leaving his employment with the applicant. The second respondent has been joined by the applicant in the application, only on the basis of having an interest in the matter, as a result of the employment of the first respondent with the second respondent. The first respondent has opposed the application.

[2] When this matter was argued, it was not disputed that the first respondent had indeed concluded a restraint of trade with the applicant, and had taken up employment with the second respondent. Further, and in presenting argument in Court, as confirmed by his written heads of argument, it was submitted by the first respondent that he did not oppose the enforcement of the restraint of trade, and simply considered the application of the restraint of trade to be unreasonable insofar as it concerned the area and duration of the restraint. However, the answering affidavit does appear to suggest that the breach of the applicant's protectable interest under the restraint was in issue.

[3] Where is comes to urgency, this was in reality not in issue when this matter was argued. In particular, the first respondent did not dispute that the matter is urgent. Overall considered, I am satisfied that the applicant met all the requirements of urgency in this matter.[1] The applicant became aware that the

[1] For the requirements of urgency see *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another* (2016) 37 ILJ 2840 (LC) at paras 20 – 26, and in particular where it comes to restraint of trade applications *Vumatel (Pty) Ltd v Majra and Others* (2018) 39 ILJ 2771 (LC) at paras 4 – 5; *Ecolab (Pty) Ltd v Thoabala and Another* (2017) 38 ILJ 2741 (LC) at para 20.

first respondent took up employment with the second respondent on or about 1 October 2019. As will be dealt with further below, an initial letter of demand was sent to the first respondent on 8 October 2019 to bring him to other insights, after further violations of the restraint of trade came to light over the next few days, which attempted intervention was not successful. This course of action is appropriate, as it is advisable that parties first try and find an alternative way to secure compliance with the restraint, before resorting to litigation.[2] The current application then followed about a week after the expiry of the deadline in the letter of demand, when it became apparent that the first respondent would continue with his employment with the second respondent. Considering the nature of the relief sought, and the purpose sought to be achieved by the enforcement of a restraint of trade, there is also no other form of substantial redress in due course.[3] Restraints of trade also carry with them an inherent quality of urgency.[4]

[4] Because the applicant seeks final relief, the applicant must satisfy three essential requisites to succeed, being (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the absence of any other satisfactory remedy.[5] I will commence deciding whether the applicant met these requirements by first setting out the relevant facts.

The relevant facts

[5] Fortunately, and in this matter, most of the important factual matrix was either common cause, or admitted.[6] Insofar as there are factual disputes, I will resolve this in line with the principles established in *Plascon Evans Paints v*

[2] In *Continuous Oxygen Suppliers (Pty) Ltd t/a Vital Aire v Meintjes and Another* (2012) 33 ILJ 629 (LC) at para 21 it was said that: *'… In my view, litigants should be encouraged in any attempt to avoid litigation, rather than rushing to court as a first option. Litigation is costly and often unnecessary. …*'

[3] See *Maqubela v SA Graduates Development Association and Others* (2014) 35 ILJ 2479 (LC) at para 32; *Transport and Allied Workers Union of SA v Algoa Bus Co (Pty) Ltd and Others* (2015) 36 *ILJ* 2148 (LC) at para 11.

[4] See *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff and Another* (2009) 30 ILJ 1750 (C) at 1761.

[5] *Setlogelo v Setlogelo* 1914 AD 221 at 227; *V & A Waterfront Properties (Pty) Ltd and Another v Helicopter & Marine Services (Pty) Ltd and Others* 2006 (1) SA 252 (SCA) para 20. In particular, and where it comes to restraint applications, see *Esquire System Technology (Pty) Ltd t/a Esquire Technologies v Cronjé and Another* (2011) 32 ILJ 601 (LC) at para 38 – 40; *Continuous Oxygen* (*supra*) at para 26; *Experian SA (Pty) Ltd v Haynes and Another* (2013) 34 ILJ 529 (GSJ) at para 59; *Jonsson Workwear (Pty) Ltd v Williamson and Another* (2014) 35 ILJ 712 (LC) at para 54; *FMW Admin Services CC v Stander and Others* (2015) 36 ILJ 1051 (LC) at para 1.

[6] Admitted facts include facts that, though not formally admitted, simply cannot be denied – see *Gbenga-Oluwatoye v Reckitt Benckiser SA (Pty) Ltd and Another* (2016) 37 ILJ 902 (LAC) at para 16.

Van Riebeeck Paints[7]. The Court in *Ball v Bambalela Bolts (Pty) Ltd and Another*[8] succinctly summarized the nature of the factual enquiry to be made as follows:

> '… In *Reddy v Siemens Telecommunications (Pty) Ltd*, it was held that the reasonableness of a restraint could be determined without becoming embroiled in the issue of onus. This could be done if the facts regarding reasonableness have been adequately explored in the evidence and if any disputes of fact are resolved in favour of the party sought to be restrained. If the facts, assessed as aforementioned, disclose that the restraint is reasonable then the party, seeking the restraint order, must succeed, but if those facts show that the restraint is unreasonable, then the party, sought to be restrained, must succeed. Resolving the disputes of fact in favour of the party sought to be restrained involves an application of the *Plascon-Evans* rule ….'

[6] The applicant conducts the business of a merchant of plumbing, bathroom and kitchenware products and equipment throughout the Republic of South Africa, at a total of 104 branches. It obtains its products from local and overseas suppliers, and also retails its own 'Plumbline' house brand of products. The current application related to the applicant's Polokwane Express store, which services the Limpopo province.

[7] The applicant has a broad range of customers. This includes the normal day to day consumer customer and DIY enthusiast that visits a particular store, but also includes a variety of contractors and corporate customers, which includes commercial, construction and commercial contractors. At stake in this case is not the ordinary retail customers, but the specific and dedicated contract customers.

[7] 1984 (3) SA 623 (A) at 634E-635C. These principles are, in sum, that the facts as stated by the respondent party together with the admitted or facts that are not denied in the applicant party's founding affidavit constitute the factual basis for making a determination, unless the dispute of fact is not real or genuine or the denials in the respondent's version are bald or not creditworthy, or the respondent's version raises such obviously fictitious disputes of fact, or is palpably implausible, or far-fetched or so clearly untenable, that the court is justified in rejecting that version on the basis that it obviously stands to be rejected.

[8] (2013) 34 ILJ 2821 (LAC) at para 14.

[8] Turning to the business of the second respondent, it is a general DIY operation, but it has a strong emphasis on the supply of plumbing products that are the same or comparable to that of the applicant. The business of the second respondent is also located in Polokwane, and supplies the same area as the applicant's Polokwane Express store. The second respondent also supplies the same range of customers the applicant, and this includes contract customers. In fact, and on the evidence, the applicant and the second respondent on occasion shared customers, even though not necessarily of the same products.

[9] Therefore, and even though it appears that the second respondent offers a broader range of products to customers and prospective customers than the applicant, there can be little doubt, on the facts, that the second respondent is a direct competitor of the applicant insofar is it concerns plumbing products and equipment.

[10] Turning then to the first respondent, he commenced employment with the applicant as far back as February 2008. He started out as a trade counter sales representative reporting to the branch manager. When he was employed, he did not sign a restraint of trade. He did sign a letter of employment on 12 December 2009, which did not include a restraint of trade.

[11] The first respondent progressed from being a trade counter representative to being a contract sales representative. This was in essence the most senior sales representative position at the Polokwane operation of the applicant. In this capacity, the first respondent was tasked with maintaining and cultivating a close business relationship with several of the large contract customers of the applicant. He was dedicated to servicing them.

[12] In and during March 2013, the first respondent resigned from his employment with the applicant, and indicated that he would be joining the business of the second respondent. Considering the seniority and nature of his position, the applicant sought to convince him to stay. It offered him a substantial salary increase, but subject to the proviso that he sign a restraint of trade as a *quid pro quo* as well. The first respondent accepted, and as a result did not push

through with his resignation, signed the restraint of trade on 13 March 2013, and received his salary increase.

[13] In terms of his restraint agreement, the first respondent agreed not to be interested in any business in the defined territory that competed with the business of the applicant. The term 'interested' was specifically defined in the restraint agreement as including employment. The defined territory was the Limpopo province. The restraint further prohibited the first respondent from soliciting the custom of any of the applicant's customers he dealt with whilst employed with the applicant. The restraint period was 24 months.

[14] As a contract sales representative, the first respondent was responsible for the customer contracts, quotations and after-sales support at the branch. He was also responsible for identifying and developing new business opportunities in the branch operations area. But most importantly, he was fully aware of the particulars and requirements of the contract customers at the branch, and maintained the customer database. He was directly responsible for developing and maintaining the contract customer relationships at the branch. He dealt with the contract customers on a day to day or at least weekly basis.

[15] According to the applicant, the contract customers the first respondent dealt with would contact him directly for orders, even telephonically. He developed a strong and very close working relationship with these customers. It must be emphasized that there are not walk-in or DIY customers purchasing products in a store. These are dedicated contract customers who place large orders in bulk, and as such, receive special discounts and pricing.

[16] But specifically, the first respondent directly dealt with and was responsible for several key customers at the branch. These were Rembu Construction, HLTC, Lilithalethu, BSB, Mums Enterprise and Mukhumuli. There was a factual dispute about the extent of the orders of these customers with the branch. In the founding affidavit, the applicant states that it was between 35% and 40% of the branch revenue. The first respondent, in his answer, stated that the figure was 12.5%. The applicant appeared to concede the point, and indicated in reply that what it was referring to was the first respondent's total sales at the branch which accounted for 35% to 40% of the revenue, which included these mentioned customers. Be that all as it may, what all this clearly indicated is

that the first respondent is fully aware of the extent of sales to these customers and even 12.5% of sales is still a significant figure.

[17] The applicant also contended that the first respondent had access to confidential information. In particular in this regard, and according to the applicant, the first respondent was fully familiar with the pricing and discounts offered to contract customers, which is not freely available in the market place. This confidential pricing and discount structure was essential to retaining these customers. He also knew the identity, contact persons, and purchasing patterns of the contract customers.

[18] The first respondent was dismissed by the applicant on 1 October 2019, following disciplinary proceedings, in which he was found guilty of two charges. The first charge related to the release of stock without the necessary supporting paperwork. The second charge related to the failure in invoice a customer for solar panels, despite being instructed to do so.

[19] Virtually immediately upon being dismissed by the applicant, the first respondent took up employment with the second respondent. When two other sales representatives, Maud Manyelo ('Manyelo') and Kagiso Mokgapa ('Mokgapa'), were dispatched by the applicant to inform the contract customers previously dealt with by the first respondent, that the first respondent had departed and to introduce themselves to these customers for the purposes of a point of contact for future orders, they encountered what appeared to be further breaches of the restraint of trade. All this occurred in the period between 1 and 3 October 2019.

[20] In particular, all these customers had already been contacted by the first respondent and informed by him that he had joined the second respondent. Mukhumuli had in fact been sent a credit application form for the second respondent, by the first respondent, and this customer had completed and returned the credit application. BSB Trading informed the applicant on 15 October 2019 that it would be following the first respondent to the second respondent.

[21] On 8 October 2019, the applicant's attorneys of record sent a letter of demand to the first respondent, drawing his attention to the terms of his restraint of

trade. The applicant stated that it was aware that the first respondent was employed at the second respondent, and contended that the first respondent's employment with the second respondent *per se* constituted a breach of the restraint. A written undertaking was demanded by 10 October 2019 that the first respondent would terminate his employment with the second respondent and comply with the undertakings in his restraint of trade not to solicit the custom of the applicant's customers. The first respondent was threatened with urgent Labour Court proceedings should the undertaking not be forthcoming.

[22] The applicant's attorneys also dispatched a similar letter of demand to the second respondent on 8 October 2019. It was specifically drawn to the attention of the second respondent that the first respondent was subject to a restraint of trade. The second respondent was also informed that an interdict would be sought against the first respondent if the undertakings demanded would not be forthcoming.

[23] The first respondent personally answered the letter of demand by e-mail the same day, being 8 October 2019. In essence, he stated that because he was dismissed and did not resign, he was entitled to 'take' the opportunity that came his way. On 11 October 2019, attorneys acting for both respondents asked for a copy of the first respondent's restraint of trade, so that a proper response could be given to the letters of demand. The applicant provided it on the same date, and extended a final deadline for a response until 14 October 2019. When no response was forthcoming by the deadline, the current application then followed.

Restraint principles

[24] As stated above, there can be no doubt that the first respondent bound himself to a restraint of trade covenant, in favour of the applicant, in a written restraint agreement signed on 13 March 2013. It is trite that restraints of trade are valid and binding, and as a matter of principle enforceable, unless the enforcement thereof is considered to be unreasonable.[9] A restraint of trade also does not infringe on the constitutional right to free economic activity.[10]

[9] *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A) at 891B-C; *Reddy v Siemens Telecommunications* (2007) 28 ILJ 317 (SCA) at paras 14; *Labournet (Pty) Ltd v Jankielsohn and Another* (2017) 38 ILJ 1302 (LAC) at para 39; *Ball* (supra) at para 13; *Esquire* (*supra*) at para 26; *SPP*

[25] Since the restraint of trade concluded between the applicant and the first respondent is binding, whether or not the enforcement of the restraint of trade against the first respondent would be reasonable is dependent upon deciding the following questions set out in *Basson v Chilwan and Others*[11]: (a) Does the one party have an interest that deserves protection after termination of the agreement?; (b) If so, is that interest threatened by the other party?; (c) In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?; and (d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected? Following the judgment in Basson, a further enquiry has been added, which can be called a question (e), being whether the restraint goes further than necessary to protect the relevant interest?[12]

[26] This Court and the Labour Appeal Court have been consistently applying these five considerations in determining whether the enforcement of a restraint of trade would be reasonable.[13] Deciding each of these considerations is a determination on the facts of that particular case, applying, as held in *Ball supra*[14], the following approach:

> '… the determination of reasonableness is, essentially, a balancing of interests that is to be undertaken at the time of enforcement and includes a consideration of 'the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests …'

[27] The protectable interest of an applicant in a restraint of trade can be found in one or both of two considerations, being confidential information (trade

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Pumps (SA) (Pty) Ltd v Stoop and Another (2015) 36 ILJ 1134 (LC) at para 26; *Shoprite Checkers (Pty) Ltd v Jordaan and Another* (2013) 34 ILJ 2105 (LC) at para 20.

[10] *Reddy (supra)* at paras 15 – 16. See also *Fidelity Guards Holdings (Pty) Ltd t/a Fidelity Guards v Pearmain* 2001 (2) SA 853 (SE) where the Court said: '*The Constitution does not take such a meddlesome interest in the private affairs of individuals that it would seek, as a matter of policy, to protect them against their own foolhardy or rash decisions*'.

[11] 1993 (3) SA 742 (A) at 767G-H.

[12] *Jonsson* (*supra*) at para 44; *Van Wyk* (*supra*) at para 15; *Esquire* (*supra*) at paras 50 – 51.

[13] *Labournet* (*supra*) at para 42; *Jonsson (supra*) at para 44; *Vox Telecommunications (Pty) Ltd v Steyn and Another* (2016) 37 ILJ 1255 (LC) at paras 28 – 29; *Shoprite Checkers* (*supra*) at paras 23 – 24; *Benchmark Signs Incorporated v Muller and another* [2016] JOL 36587 (LC) at para 15.

[14] Id at para 17. See also *Labournet* (*supra*) at para 40.

secrets), or trade connections.[15] In *Labournet (Pty) Ltd v Jankielsohn and Another*[16] the Court held:

> '… 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. …'

[28] Dealing firstly with confidential information, this would be the following:[17] (a) Information received by an employee about business opportunities available to an employer; (b) the information is useful or potentially useful to a competitor, who would find value in it; (c) Information relating to proposals, marketing to submissions made to procure business; (d) information relating to price and/or pricing arrangements, not generally available to third parties; (e) the information has actual economic value to the person seeking to protect it; (f) customer information, details and particulars; (g) information the employee is contractually, regulatory or statutory required to keep confidential; (h) Information relating to the specifications of a product, or a process of manufacture, either of which has been arrived at by the expenditure of skill and industry which is kept confidential; and (i) information relating to know-how, technology or method that is unique and peculiar to a business. Importantly, the information summarized above must not be public knowledge or public property or in the public domain. In short, the confidential information must be objectively worthy of protection and have value.

[29] Next, trade connections would be where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he or she leaves employment and becomes employed by a competitor, the employee could easily or readily induce the customers to

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[15] *Dickinson Holdings Group (Pty) Ltd and Others v Du Plessis and Another* (2008) 29 *ILJ* 1665 (N) at para 32; *Basson (supra)* at 769 G – H; *Bonnet and Another v Schofield* 1989 (2) SA 156 (D) at 160B-C; *Hirt and Carter (Pty) Ltd v Mansfield and Another* (2008) 29 ILJ 1075 (D) at para 37; *Esquire* (*supra*) at para 27; *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) at 502E-F; *FMW (supra)* at para 36; *Vox* (*supra*) at para 30.

[16] (2017) 38 ILJ 1302 (LAC) at para 41.

[17] See *Dickinson (supra) at* para 33; *Jonsson* (*supra*) at paras 46 – 49; *David Crouch Marketing CC v Du Plessis* (2009) 30 ILJ 1828 (LC) at para 21; *Esquire (supra)* at para 29; *Experian* (*supra*) at para 19.

follow the employee to the new business.[18] Whether the employee can be seen to have the ability to exert this kind of influence, is dependent upon the duties of the employee, the employee's particular personality and skill, the frequency and duration of contact between the employee and the customer, the nature of the relationship between the employee and the customer and in particular whether the relationship carried with it a notion of trust and confidence, the knowledge of the employee of the particular requirements of the customer and the nature of its business, how competitive the rival businesses are, and the nature of the product or services at stake.[19]

[30] The seniority of the employee concerned is also an important consideration where it comes to evaluating the existence of a protectable interest.[20] The more senior the employee, the more likely it is that the employee would be entrenched with what can legitimately be considered to be a protectable interest based on the above two considerations.[21] Seniority is not just the level of the employee in the organization of the erstwhile employer, but also includes factors such as the influence, knowledge, expertise, nature of duties, relationships and even the particular person of the employee.

[31] The above being the applicable legal principles relating to the forcement of a restraint of trade and what constitutes a protectable interest, I will now proceed to apply the facts *in casu* to the same. Clearly, and on the facts, the applicant seeks protection of both kinds of protectable interests, being confidential information and trade connections.

<u>The protectable interest</u>

[32] First, it is undeniable that the kind of customer relationships at stake in this case, being the particular relationships the first respondent had with the contract customers, is the particular kind of customer relationships that would constitute a proper protectable interest for the purposes of the enforcement of

[18] See *Rawlins and another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A) at 541D-F; *FMW* (*supra*) at paras 46 – 48; *Esquire* (*supra*) at paras 31 – 32; *Experian* (*supra*) at para 18; *LR Plastics (Pty) Ltd v Pelser* [2006] JOL 17855 (D) at para 26.
[19] *Caravantruck* (*supra*) at 541F-I; *FMW (supra)* at para 45; *Aquatan (Pty) Ltd v Jansen van Vuuren and Another* (2017) 38 ILJ 2730 (LC) at para 24.
[20] See *Dickinson* (*supra*) at para 38; *Stewart Wrightson (Pty) Ltd v Minnitt* 1979 (3) SA 399 (C) at 404B-C; *Random Logic (Pty) Ltd t/a Nashua*, *Cape Town v Dempster* (2009) 30 ILJ 1762 (C) at para 32; *Experian* (*supra*) at para 43; *Jonsson (supra)* at para 51.
[21] See *David Crouch* (*supra*) at para 21;

a restraint of trade.[22] In *Rawlins and another v Caravantruck (Pty) Ltd*[23] the Court said:

> 'The need of an employer to protect his trade connections arises where the employee has access to customers and is in a position to build up a particular relationship with the customers so that when he leaves the employer's service he could easily induce the customers to follow him to a new business …
>
> Much will depend on the duties of the employee; his personality; the frequency and duration of contact between him and the customers; where such contact takes place; what knowledge he gains of their requirements and business; the general nature of their relationship (including whether an attachment is formed between them, the extent to which customers rely on the employee and how personal their association is); how competitive the rival businesses are; in the case of a salesman, the type of product being sold; and whether there is evidence that customers were lost after the employee left …'

[33] The first respondent ticks most of the boxes identified in the *dictum* in *Caravantruck supra* needed for the enforcement of the restraint based on trade connections. The first respondent is a skilled and experienced sales representative, dedicated to a particular category of large contract customers. He is the most senior sales representative in the branch. He has more than a decade of service with the applicant, and is clearly fully familiar with all information relating to contract customers at the branch. The first respondent personally was responsible for approximately 40% of sales at the branch. I am satisfied that on the facts, the first respondent established a close working relationship with the contract customers whilst employed at the applicant, directly serviced these customers, and has all relevant information relating to those customers, including pricing and purchasing patterns. He contacted all these customers immediately when he left the applicant to inform them of his new whereabouts. At least one of the contract customers (BSB) indicated that it would taking its business to the second respondent, following the first respondent. Undoubtedly, he has influence over these customers. Finally, the products and services are of such a nature that the purchasing thereof can

[22] In *Hirt and Carter* (*supra*) 29 ILJ 1075 (D) at para 37 it was held: '*…. Customer goodwill and trade connections have long been regarded as proprietary interests worthy of protection*'.
[23] 1993 (1) SA 537 (A) at 541D-I. See also *Esquire* (*supra*) at para 27; *Continuous Oxygen* (*supra*) at paras 34 – 36; *FMW* (*supra*) at para 45.

readily be moved to a new supplier.[24] Applicable is the following *dictum* in *Lifeguards Africa (Pty) Ltd v Raubenheimer*[25]:

> '…. in competing directly with the plaintiff in the contracts obtained from the above-mentioned institutions, the defendant took advantage of trade connections of the plaintiff which constituted protectable interests. ….'

[34] It is not necessary to even show that the first respondent actually exploited the trade connections with the contract customers. All that has to be shown is that he could.[26] In this instance, the fact that the first respondent is in a position to exploit these trade connections cannot be gainsaid. As said above, at least one customer indicated that it would continue to place its orders with the first respondent at his new employer (the second respondent). In my view, it is thus clear that the applicant has shown the existence of a proper protectable interest where it comes to trade connections.

[35] On the issue of confidential information, the confidential information at stake is the information the first respondent had about the customer particulars, the prices they pay, discount structures and what their requirements were and what they ordered. This kind of confidential information is actually inextricably linked to the issue of trade connections. In *SPP Pumps (SA) (Pty) Ltd v Stoop and Another*,[27] the Court said:

> 'In my view, the respondent acquired confidential information of the business of the applicant including personal knowledge of the customers by virtue of his duties and the relationship he had with the suppliers and customers of the applicant. It is for this reason that I am of the view that the applicant has made out a case which has not been seriously challenged. The case is that the applicant has an interest in the confidential information acquired by the respondent during his employment. There is very strong evidence that the respondent had, during his employ with the applicant, acquired confidential information which requires protection. The information which the respondent acquired, particularly the relationship with the customers, is of such a nature

[24] Compare *Medtronic (Africa) (Pty) Ltd v Kleynhans and Another* (2016) 37 ILJ 1154 (LC) at para 46.
[25] (2006) 27 ILJ 2521 (D) para 41.
[26] See *SPP Pumps* (*supra*) at para 30; *Continuous Oxygen (supra)* at para 42; *Medtronic (Africa) (Pty) Ltd v Van Wyk* (2016) 37 ILJ 1165 (LC) at para 30; *Vox* (*supra*) at para 31.
[27] (2015) 36 ILJ 1134 (LC) at para 37.

> that when he left the applicant's employ, he posed a risk to the applicant's business if he were to join any other competitor. The level of risk rose higher when he established the second respondent and commenced conducting the business in competition with the applicant.'

[36] Therefore, the applicant has thus shown that it has a protectable interest where it comes to confidential information. The confidential information is not in the public domain, has commercial value in the industry, and would be useful to a competitor. It is known to the first respondent, worthy of protection, and useful and of value to the second respondent. In summary, and as said in *Continuous Oxygen supra*:[28]

> '… The employee has intimate knowledge of the applicant's products and pricing; she is intimately acquainted with the prescribing doctors and the patients who use the products; and she is ideally situated to persuade those doctors and patients to use the products of her new employer - ie similar products under a different brand name, supplied by Ecomed - rather than the products supplied by her old employer that they had been using hitherto. …'

[37] Insofar as the first respondent may say that he formed the attachment to and relationship with customers due his own efforts and abilities, this cannot help him. The fact is that he did so in the course of the discharge of his duties with the applicant, as expected of him. In *Rawlins supra*[29] the Court said:

> 'Even though the persons to whom an employee sells and whom he canvasses were previously known to him and in this sense "his customers", he may nevertheless during his employment, and because of it, form an attachment to and acquire an influence over them which he never had before. Where this occurs, what I call the customer goodwill which is created or enhanced, is at least in part an asset of the employer. As such it becomes a trade connection of the employer which is capable of protection by means of a restraint of trade clause. ….'

And in *Den Braven SA (Pty) Ltd v Pillay and Another*[30] it was held as follows:

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[28] Id at para 40.
[29] Id at 542F-I
[30] 2008 (6) SA 229 (D) at para 15.

> '…. Mr Pillay's simple response in his affidavit is to say that he is an excellent salesman. No doubt that is true and it is equally true that he is entitled to take his qualities and skills as a salesman to another employer. However, to the extent that the applicant has built up a trade connection with its customers in KwaZulu-Natal through the efforts of Mr Pillay over the eight years of his employment it is entitled to protect itself against being deprived of that connection by Mr Pillay's activities on behalf of a competitor.'

[38] There is also no doubt that *in casu*, the applicant's protectable interest has been breached. In this regard, the unassailable evidence is that the applicant and the second respondent are direct competitors, sell the same products and services, and share the same kind and nature of customer base. Thus, employment of the first respondent with the second respondent is breach of the restraint. A further breach is found in the fact that the first respondent contacted these customers immediately upon leaving the applicant, and at least one customer has decided to take its business to him. The risk to the applicant's business caused by what is summarized above is patently obvious, and is all the applicant has to show to succeed in establish a breach.[31] The Court in *IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Hall (Aka Baghas) and Another*[32] said the following:

> 'Where the ex-employer seeks to enforce against his ex-employee a protectable interest recorded in a restraint, the ex-employer does not have to show that the ex-employee has in fact utilised information confidential to it - merely that the ex-employee could do so. (See International Executive Communications Ltd (Incorporated in the Netherlands) t/a Institute for International Research v Turnley and Another 1996 (3) SA 1043 (W) ([1996] 3 B All SA 648) at 1055D - F (SA).) In short, the ex-employer 'has endeavoured to safeguard itself against the unpoliceable danger of the [ex-employee] communicating its trade secrets to a rival concern after entering their employ. The risk that the [ex-employee] will do so is one which the [ex-employer] does not have to run, and neither is it incumbent upon the [ex-employer] to inquire into the bona fides of the [ex-employee] and demonstrate that [he or she] is

[31] See *Reddy* (*supra*) at para 20; *Den Braven* (*supra*) at para 17; *Point 2 Point Same Day Express CC v Stewart and Another* 2009 (2) SA 414 (W) at para 14; *SPP Pumps (supra)* at paras 30 and 37; *Esquire (supra)* at para 27; *Continuous Oxygen (supra)* at para 34.
[32] 2004 (4) SA 174 (W).

mala fide before being allowed to enforce its contractually agreed right to restrain the [ex-employee] from entering the employ of a direct competitor.''

[39] In his answering affidavit, the first respondent undertook not to deal with the contract customers referred to by the applicant in the founding affidavit. However, and as a matter of principle, an employee cannot escape the enforcement of a restraint by providing undertakings. The undertaking is given in the context where a *prima facie* breach of the restraint already exists. In such circumstances, an employer can hardly be criticized for not being trustful of the employee and his or her *bona fides*, and to simply believe that the undertakings will be complied with and accept all the risk associated with it. In *Ball supra*[33] the Court said:

'… the appellant does not deny that she knows who the first respondent's customers and suppliers are. A customer list is generally confidential. Implicit in her version is that even though she was privy to confidential information she has not and does not intend using it. An undertaking not to use the confidential information, in the circumstances, is no defence. An employer does not have to show that the former employee has in fact utilized its confidential information, but merely that she could do so.'

[40] The Court in *Reddy supra*[34] also dealt with this approach of seeking to avoid a restraint by way of undertakings as follows:

'I agree with the remarks of Marais J in *BHT Water*:

'In my view, all that the applicant can do is to show that there is secret information to which the respondent had access, and which in theory the first respondent could transmit to the second respondent should he desire to do so. The very purpose of the restraint agreement was that the applicant did not wish to have to rely on the bona fides or lack of retained knowledge on the part of the first respondent, of the secret formulae. In my view, it cannot be unreasonable for the applicant in these circumstances to enforce the bargain it has exacted to protect itself. Indeed, the very ratio underlying the bargain was that the applicant should not have to content itself with crossing its fingers and hoping that the first respondent would act honourably or abide by the undertakings he has given …''

[33] Id at para 22.
[34] Id para 20.

[41] Accordingly, the applicant was entitled to reject the undertakings provided by the first respondent. The applicant cannot be expected to trust the *bona fides* of the first respondent to not pass on all his trade connections and knowledge of confidential information to his new employer, the second respondent, especially considering the competitive nature of the industry and interchangeable products and services. In any event, these undertakings would be virtually impossible to monitor or police, meaning that the applicant would be entirely dependent on the *bona fides* of the first and second respondents, which is a risk it is simply not required to run. In *Medtronic (Africa) (Pty) Ltd v Kleynhans and Another*[35], this was dealt with by the Court as follows:

> 'I agree with Medtronic that the danger that Kleynhans will exploit customer connections for the benefit of his new employer is essentially 'unpoliceable'. Where Medtronic has tried to safeguard itself against the unpoliceable danger of a former employee utilising its customer connections on behalf of a rival concern by obtaining a restraint, the risk that the former employee will do so is one that Medtronic does not have to run. It is also not incumbent upon Medtronic to enquire into the bona fides of Kleynhans and demonstrate that he is mala fide before being allowed to enforce its contractually agreed right to restrain him. In those circumstances, all that the Medtronic needs to do is to show that there is a trade connection Kleynhans could exploit should he desire to do so. The very purpose of the restraint agreement is that Medtronic did not wish to have to rely on the bona fides or lack thereof on the part of Kleynhans when he left their employ.'

[42] An apposite comparable example to the case *in casu* can be found in *LR Plastics (Pty) Ltd v Pelser*[36], where the Court specifically dealt with the relationship between a sales representative and a customer base in the context of the enforcement of a restraint of trade. The Court also specifically dealt with the scenario of customers following the sales representative to another employer, as a result of the relationship built up at the erstwhile employer, and said:[37]

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[35] (2016) 37 ILJ 1154 (LC) at para 40. See also *Van Wyk* (*supra*) at para 34.
[36] [2006] JOL 17855 (D).
[37] Page 35 of the judgment.

> 'In the course of his employment with the applicant the respondent, through cold canvassing and by the transfer of existing customers to him, came to have knowledge of the identities of the customers; the contractual arrangement between the applicant and its customers (the respondent himself caused such contractual arrangements to take place); the financial details of applicant's relationship with its customers (arranged by respondent himself); the customer requirements (conveyed to respondent when taking orders); and all the other confidential information (arranged and negotiated by respondent) mentioned in clause 4.4.1 of the restraint agreement. It is precisely in exchange for such knowledge in the building of its customer goodwill, that the applicant required the restraint to be signed. The applicant's reciprocal obligation in exchange for the respondent rendering such services and acquiring such knowledge (not technical knowledge or knowledge of trade secrets; but knowledge of the identity, requirements and financial arrangements between applicant and its customers) was to make payment to respondent.'

The same considerations clearly apply *in casu*.

[43] All said, the applicant is entitled to expect the first respondent to stay out of employment with the second respondent. It is only through the lapse of time

[38] Page 55 of the judgment.

with the first respondent remaining inactive in the particular industry that the applicant's risk will be diminished. As said in *Vumatel supra*:[39]

> 'There is another nuance to considering the question of the infringement of the protectable interest. This is the lapse of time. The reasonableness of the enforcement of the restraint must be assessed at the time when the restraint is sought to be enforced. In the case of trade connections, the longer the employee has no contact with erstwhile customers, the more his or her influence over them diminishes. In the case of confidential information, there may well be some instances where confidential information does not diminish through a lapse of time. This would be where the employer, for example, had a unique and secret manufacturing method that would always be of great value to a competitor. However, where it comes to confidential information relating to general operations, marketing, planning, finances, customer details and business plans, these clearly become less and less relevant as time progresses. After all, the nature of business is that it must change to remain relevant and competitive.'

[44] Accordingly, I am satisfied that the applicant has succeeded in establishing a protectable interest in relation to both trade connections and confidential information, and in establishing the existence of a breach / infringement of its protectable interest by the first respondent, justifying the enforcement of the restraint of trade.

Other considerations

[45] Where it comes to the quantitative and qualitative weigh off to be conducted, the scope and period of the restraint is relevant. A shorter restraint and properly limited geographical area (if applicable) would mitigate in favour of enforcement, whilst an unduly long and broad restraint would mitigate against it.[40] It must also be considered whether the employee was possessed of the skills, expertise, qualifications and experience before joining the employer, as it could be seen as unfair in the weigh off to prevent the employee from

[39] Id at para 38.
[40] *Labournet* (*supra*) at para 43; *Continuous Oxygen* (*supra*) at para 47.

earning a living under such circumstances.[41] In *Vumatel (Pty) Ltd v Majra and Others,*[42] the Court said:

> '…The nature of the industry is also an important consideration. The more specialized the industry is, the more the weigh off will favour the employer, as it limits the scope of the restraint and leaves much more avenues open to the employee to procure gainful employment in other industries. …'

[46] In the current matter, the first respondent obtained all his skills and knowledge in the course of his employment with the applicant. He also obtained all his experience in the industry in the course of his employment with the applicant. He in fact agreed to stay employed with the applicant, under circumstances where he had resigned without any restraint, in exchange for more money but then signing a restraint. He should be held to this bargain, as he made a deliberative and conscious choice to stay with the applicant on these terms when he did not have to.

[47] In *casu*, the thrust of the first respondent's attack on the restraint of trade is based on the application of the weigh off. He in essence made a passionate plea founded on his own personal considerations that the restraint be limited to a six months' period, and only to the area of Polokwane and surrounds. What the applicant was willing to agree to up front is to only seek enforcement of the restraint for a period of 12 months, despite the restraint period in the restraint itself being 24 months. In my view, the 12 month restraint period is reasonable, and comparable to most authorities where it comes to enforcing restraints of trade in the sales representative environment. There is simply no proper basis to reduce the restraint of trade period to six months, as pleaded for by the first respondent.

[48] As to the restraint area, it is only limited to the Limpopo province. I accept the applicant's argument that the entire Limpopo province is principally serviced out of Polokwane, and to only limit the restraint area to Polokwane and surrounds, is an artificial limitation which does not consider the reality of now

[41] *Automotive Tooling Systems (Pty) Ltd v Wilkens and Others* (2007) 28 ILJ 145 (SCA) at para 8; *Labournet* (*supra*) at paras 43 - 44; *Jonsson (supra)* at para 51.
[42] (2018) 39 ILJ 2771 (LC) at para 39.

business is conducted in the province, and may well negate the restraint. Even though the applicant is a nationwide business, the restraint area is only limited to the area where the first respondent was actually stationed, and where the customers he dealt with was based. There is nothing unreasonable in the restraint area being designated to be the Limpopo province.

[49] The applicant has no alternative remedy available to it in this instance. A future damages claim based on breach of contract would be cold comfort for business lost, in a market where as already said products are readily interchangeable. It much more appropriate to take the first respondent completely out of the equation in the plumbing industry, for a period of time, and have the risk to the applicant dissipate as a result. An interdict is the only way this can be achieved. As held in *Esquire supra*:[43]

> 'As I have stated above, the alternative remedy of a damages claim is cold comfort to an applicant that seeks to enforce a legitimate restraint of trade covenant. By the time a damages claim is heard, the horse had bolted and the harm is done. That harm is very difficult to repair. I am satisfied that, where a restraint of trade is enforceable, the alternative remedy of a damages claim in due course is more apparent than real …'

[50] The first respondent had the onus to provide proper information or factual basis upon which the restraint period and/or area would be considered unreasonable. Other than in essence a plea for clemency, the first respondent has provided no factual basis for such a finding. It must also be considered that the applicant was already willing to compromise to reduce the restraint period by half. In *Document Warehouse (Pty) Ltd v Truebody and Another*[44] the Court said:

> '…. In my view, the period of the restraint, as well as the geographical area, are reasonable. The fact that the applicant has been willing to reduce the restraint period from three years to two years does not affect its enforceability. In this application however, other than her bald *ipse dixit* that the period is excessive and unreasonable, Truebody makes out no case for such assertions.'

[43] Id at para 40.
[44] [2010] JOL 26270 (GSJ) at para 47.

[51] In sum, and based on the aforesaid, the Court in *Ball supra*[45] held:

> 'In my view, quantitatively and qualitatively, the interest of the first respondent surpassed that of the appellant. The fact that the appellant stated that she did not intend and did not use any of the information in favour of or for the benefit of the second respondent is irrelevant in determining whether the restraint is reasonable, or in determining whether the restraint had been breached. Furthermore, in my view, there was no other fact or aspect of public policy, at the time when the restraint was to be enforced, which required that the restraint be rejected. In the circumstances, I am satisfied that the court a quo correctly concluded that the restraint was reasonable and enforceable and in granting relief accordingly.'

[52] The applicant has thus satisfied all the other requirements necessary for the final relief it seeks against the first respondent to be granted. In short, the weigh off favours the applicant, it faces real prejudice if relief is not granted in the form of the risk created to it by way of the first respondent's employment with the second respondent, and there is no suitable alternative remedy available.

Conclusion

[53] In summary, the applicant has demonstrated the existence of a clear right, having a legitimate and proper restraint of trade covenant in place with the first respondent, susceptible to being enforced, where it comes to confidential information and trade connections. The applicant has also established that the first respondent is indeed infringing on such protectable interest. The weighing off of interests favour the applicant and there is no intervening issue of public interest. Finally, the applicant demonstrated the existence of an injury reasonably apprehended, and has no proper alternative remedy available to it.

Costs

[54] This then leaves only the issue of costs. This Court has a wide discretion where it comes to the issue of costs, considering the provisions of section 162 of the LRA. It must of course be considered that the applicant was ultimately

[45] Id at para 25.

successful. It must however also be considered that the first respondent had just started employment at the second respondent by the time this application was brought. I also consider that the first respondent was dismissed and did not leave of his own accord to join a competitor. The first respondent was also not completely obstinate (albeit misguided), trying to mitigate the situation by providing an undertaking and pleading for clemency. I also consider that the relief granted in this judgment will leave him unemployed. For these reasons, I exercise my discretion by making no order as to costs.

[55] For all the reasons as set out above, I make the following order:

Order

1. The application is heard as one urgency.

2. The first respondent is interdicted and restrained until 1 October 2020 and in the province of Limpopo from being directly or indirectly interested in or concerned with, in any capacity whatsoever:

   2.1 The second respondent;

   2.2 Any person, business, company, association, corporation, partnership, undertaking whether incorporated or not which:

      2.2.1 Carries on business, manufactures, sells or supplies; or

      2.2.2 Brokers or acts as agent in the sale or supply; or

      2.2.3 Performs or renders any service.

      in competition with or identical or similar or comparative to that carried on, sold, supplied, brokered or performed by the applicant, being the sale of plumbing supplies.

3. The first respondent is interdicted from directly or indirectly using or disclosing the confidential information of the applicant for his own

benefit or for the benefit of any third party, including the second respondent.

4. There is no order as to costs.

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S. Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate P Bosman

Instructed by: Webber Wentzel

For the First Respondent: Mr J Matthee of Cranko Karp Attorneys