



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J442/20

In the matter between:

AIRCONDUCT CC

Applicant

and

DUNN, DIVAN

First Respondent

DUCT FOR AFRICA (PTY) LTD

Second Respondent

Heard: 4 June 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10h00 on 18 May 2020.

Summary: Restraint of trade – employee joined the ex-employer's competitor – public policy challenges untenable – the full terms of the restraint of trade covenant and confidentiality undertakings are enforceable.

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] This is an urgent application brought by the applicant, Airconduct CC (Airconduct), for final relief regarding the enforcement of a restraint of trade covenant and confidentiality undertakings against the first respondent, Mr Divan Dunn (Mr Dunn). Airconduct seeks an order interdicting Mr Dunn, until 28 February 2021, from:

- 1.1 soliciting, interfering with, inducing or enticing or endeavour to entice away from Airconduct any person, firm, company, close corporation, or institution, who was a customer, or canvassed client of, or accustomed to dealing with Airconduct during the period of his association with Airconduct and/or as at date of termination of his employment with Airconduct;
- 1.2 directly or indirectly, whether for reward or otherwise, be concerned with, engaged or interested, in any capacity whether as employee, agent, partner, shareholder, director, consultant or otherwise, in any business similar to or competing with or intending to compete with Airconduct's business and/or any client or potential client to whom or for whom Airconduct has submitted or prepared a quote, and which operates or conducts business within a 150 kilometer radius of Airconduct's premises at 414 Rustic Road, Silvertondale, Pretoria, Gauteng; and
- 1.3 using or disclosing or divulging to any person or entity any confidential information of Airconduct, which information shall include but not be limited to the names and contact details of clients or prospective clients and target markets, suppliers and other trade connections; the requirements of clients; the contractual arrangements between Airconduct and its clients, suppliers and other trade connections; the financial details of Airconduct's relationship with clients, suppliers and other trade connections;

Airconduct's pricing and discount structures; the Airconduct's manufacturing processes; Airconduct's quoting and tender methods and principles; know - how; Airconduct's business techniques and modus operandi and trade secrets.

- [2] Airconduct also seeks an order directing Mr Dunn to terminate his employment with the second respondent, Duct for Africa (Pty) Ltd (DFA). There is no relief sought against DFA as it is joined as a party to these proceedings purely by virtue of its interest in the matter as Mr Dunn's new employer.
- [3] The application is only opposed by Mr Dunn, but concedes urgency. The grounds of his challenge are as follows:
- 3.1 Airconduct and DFA conduct different businesses;
 - 3.2 The restraint which Airconduct seeks to enforce is too wide and unreasonable; and
 - 3.3 An undertaking has been provided by Mr Dunn.
- [4] This Court is indebted to counsel for the helpful written submissions.

Factual Background.

- [5] Airconduct is a leading independent ducting manufacturer for the air - conditioning and ventilation industry in Southern Africa and has a strong reputation for service and quality. It conducts business from a 7 000m² premises in Silvertondale and its facilities enable it to provide outstanding service to its clients and an efficient work environment for its employees.
- [6] Airconduct believes in investing in new machinery, software and ongoing personnel training to enable it to deliver quality ducting and exact documentation in the required time, for large and small quantities as per clients' requirements. It has CNC cutters, fed by motorized decoilers, which is one of the factors that enable it to have a high output ratio of weight per production worker.

- [7] The total workforce presently in Airconduct's employ is approximately 27 permanent employees. It also employs employees on a temporary basis during peak production periods.
- [8] Airconduct manufactures ducting from high quality galvanised sheet metal according to client specifications and requirements. The galvanised sheet metal is purchased from reliable manufacturers or suppliers in coil form. In addition to ducting, it also supplies clients with various consumables for duct installation, among these, a unique time and money saving duct hanging bracket.
- [9] It is not disputed that the ducting manufacturing industry is an extremely competitive industry. There are approximately 30 ducting manufacturers in Gauteng alone. Airconduct's largest competitors in Gauteng include DFA, Ductshop, Airclear, Ductpro, Express Ducts and Simplex Ducting.
- [10] Airconduct's client base comprises of air-conditioning contractors, both large and small in size, throughout the Republic of South Africa. Approximately 90% of its clients are situated within a radius of 150 km of its premises in Silvertondale. The remaining 10% are situated elsewhere in the Republic and even in neighbouring countries such as Swaziland.
- [11] There are approximately 200 air-conditioning contractors within a radius of 150 km of its premises in Silvertondale. Approximately 125 of them form part of Airconduct's client base. Airconduct markets its products on its website at airconduct.com and by directly liaising with air-conditioning contractors.
- [12] It is common cause that air-conditioning contractors tender on projects and are then requested to provide quotations for the ducting component of the particular project. A number of factors are taken into consideration in preparing a quotation for an air-conditioning contractor on their tender request.
- [13] Airconduct asserts that even though the specifications and aspect ratios of the tender play an important role, so do the profile of the contractor in the industry, the amount of orders received from a specific contractor by Airconduct, the credit worthiness of the specific contractor, the length of the client relationship with a particular contractor, etc.

- [14] Airconduct contends that goodwill of clients in the ducting manufacturing industry is mainly acquired and maintained through pricing, service and good client relationships. As such, personal contact between Airconduct's administration and operational personnel and the clients' key personnel, particularly Project Managers in each project, is one of the most important ways of maintaining client relationships. Project Managers fulfil an important task in acquiring quotations, placing orders, solving problems and liaison between the building programmes and suppliers of material on site.
- [15] Airconduct's biggest clients include HVAC Installations, Luft Technik, Airgro and Enviroware Construction. It has no alternative source of income apart from its stated business activities.
- [16] Mr Dunn was employed by Airconduct on 7 February 2008 in the capacity of Production Administrator and his contract of employment incorporated a restraint of trade covenant. On 18 September 2012, both Airconduct and Mr Dunn concluded a confidentiality agreement. Mr Dunn concedes that he had no experience in the ducting manufacturing industry prior to his employment with Airconduct.
- [17] Mr Dunn agreed to the terms and conditions of the restraint covenant and confidentiality undertakings that, *inter alia*, for a period of 12 months from the date on which his association as an employee of Airconduct, for whatever reason, terminates, he would not be employed by a competitor or solicit customers of Airconduct within the restraint territory and that he would not disclose confidential information relating to its business.
- [18] On 29 January 2020, Mr Dunn resigned from his employment with Airconduct. The circumstances surrounding his resignation are in dispute. However, it is common cause that Mr Dunn never disclosed his intention to join the DFA, as a result, he was allowed to serve notice. His employment effectively terminated on 29 February 2020.

Do Airconduct and DFA conduct different businesses?

- [19] It is trite that a party seeking to enforce a contract in restraint of trade is required to invoke the restraint agreement and prove a breach thereof. Forthwith, a respondent who seeks to avoid the restraint bears an onus to demonstrate, on a balance of probabilities, that the restraint agreement is unenforceable because it is unreasonable.¹
- [20] Mr Dunn concedes that he concluded the restraint covenant and confidentiality undertakings. He, however, disputes that he is in breach of the restraint covenant and confidentiality undertakings by taking employment with DFA in a similar position to the one he held with Airconduct.
- [21] The restraint provisions prohibit Mr Dunn from being concerned with, engaged or interested in any business similar to or competing with the business of Airconduct. Mr Dunn concedes that both Airconduct and the DFA manufacture and sell aircon ducting as their principal business. Clearly, that makes their businesses similar and as such competitors.
- [22] Mr Dunn seems to suggest that because DFA does not tender for large volume projects like Airconduct, DFA is not capable of competing with the applicant on volume pricing as its business model is totally different. This version is quickly put to rest by Airconduct's argument that 76.8% of its client accounts over the period 1 March 2019 to 29 February 2020 were below R500 000.00 *per annum*. Approximately 10 of the 125 regular Airconduct's clients can be classified as large air - conditioning contractors and, in any event, it will amount to a financial suicide to focus on certain projects in these difficult economic times, so it was further argued. It is also common cause that the DFA has provided competing quotes on several projects on which the Airconduct has quoted in the past, a clear indication that there is an overlap of business.

¹ See: *Experian South Africa (Pty) Ltd v Haynes and Another* 2013 (1) SA 135; *Basson v Chilwan and Others* 1993 SA 742 (A) at 7761I-J; *Magna Alloys and Research (SA) (Pty) Ltd v 486* (SCA) at [10] to [14], pp 493E/F to 496D; *Sibex Engineering Services (Pty) Limited v Van Wyk and Another* 1991 (2) SA 482 (T) at 502D-F; *IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Tarita and Others* 2004 (4) SA 156 (W) at 167 B-C; *IIR South Africa BV (Incorporated in the Netherlands) t/a Institute for International Research v Hall (aka Baghas) and Another* 2004 (4) SA 174 (W) at 178E-F, para [17]; *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 406 (SCA); *Den Braven SA (Pty) Ltd v Pillay and Another* 2008 (6) SA 229 (D).

[23] If indeed DFA's business model is different, Mr Swart, from DFA, could have made that point when he was confronted about employing Mr Dunn in breach of his restraint covenant.

[24] I note that Mr Dunn's counsel did not address this point in his written submissions nor during oral argument and I should accept that it is abandoned, prudently so.

[25] I am satisfied that Mr Dunn is clearly in breach of the restraint covenant by accepting employment with DFA.

Is the restraint covenant Airconduct seeks to enforce is too wide and unreasonable?

[26] The principles applicable to restraint agreements are trite and accepted by both parties. In *Labournet (Pty) Ltd v Jankielsohn and Another*² referred to by Airconduct, the Labour Appeal Court (LAC) succinctly captured them as follows:

[39] According to the decision in *Magna Alloys and Research SA (Pty) Ltd v Ellis*, ("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.

[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. If the accepted facts show that the

² (2017) 38 ILJ 1302 (LAC)

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.

[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.

[42] According to the Appellate Division in *Basson v Chilwan and Others*, the following questions require investigation, 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.

[43] It is now clear from, inter alia, *Basson* and *Reddy* 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. With 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.

- [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.' (Footnotes omitted)

Customer connection

- [27] Mr Dunn concedes that he did have dealings with a large number of Airconduct's clients and knows the names and surnames of people employed by those clients. He also had direct contact with several Project Managers employed by Airconduct's clients. He does not dispute that he had good relationships with Airconduct's clients, socialised with them and have their mobile numbers in his possession.
- [28] Mr Dunn was the second senior employee during his employ by Airconduct and the key liaison between Airconduct and its clients. His attempt to down play his seniority at Airconduct by contending that he held the same position and performed the same functions as Mr Jannie Kotze (Mr Kotze) is disputed by Mr Kotze.
- [29] It is clear that Mr Dunn's connections with Airconduct's clients were not superficial or transient, as correctly submitted by Airconduct's counsel. In fact, Mr Dunn points out that out of 125 clients of Airconduct, 11 are also clients of DFA. He does not dispute that he had contacts with the other 114 Airconduct's clients who are not the clients of FDA but may well become its clients through his efforts. In any event, the fact that the clients are shared cannot trump the fact that through Mr Dunn's good relationship with them, he is able to carry them across to FDA.³
- [30] Mr Dunn's argument that, since Airconduct's business is essentially tender based, he is unable to influence decision makers to steer business away from

³ See: *Rawlins and Another v Caravantruck (Pty) Ltd* 1993 (1) SA 537 (A).

Airconduct as pricing is always being the determining factor is negated by his assertion in the answering affidavit where he stated that:

‘Several factors do come into play in the manner in which the applicant tenders on projects, and it will happen that customer relationships do play a role in the applicant securing tenders. As an example, the applicant may be advised by a customer that the applicant's price is not in line with the pricing received from other duct manufacturer which could, in turn, lead to the applicant amending its pricing downwards to provide competitive pricing.’⁴

[31] It is without doubt that given the connection that Mr Dunn has with Airconduct's clients, he would be able to take advantage of that connection.⁵ Still, in *Den Braven SA (Pty) Ltd v Pillay and Another*,⁶ confronted with a similar argument, that pricing is more important than client connections, it was stated that:

‘It is not in my view necessary for an applicant in this situation to winnow the wheat of trade connections and customer contact from the chaff of other factors that may influence purchasing decisions. It suffices for the applicant to show that trade connections through customer contact exist and can be exploited by the former employee if employed by a competitor.’

[32] There is no evidence to suggest that Mr Dunn will not influence Airconduct's clients to jump ship and move their patronage to DFA.⁷ The fact that DFA does not tender in large scale projects is inconsequential given the fact that he is occupying the same position as the one he held whilst in the employ of Airconduct.

Confidential information

[33] Mr Dunn concedes that he performed core functions in the Applicant's business. He does not dispute the fact that he gained intimate knowledge of Airconduct's method of preparing quotations for different clients and that he prepared thousands of quotations using such method.

⁴ See Answering Affidavit, page 132, para 15.2.

⁵ See: *Walter McNaughton (Pty) Ltd v Schwartz and Another* 2004 (3) SA 381 (C).

⁶ 2008 (6) SA 229 (D) at para 17; see also: *Waco Africa (Pty) Limited t/a Form Scaff v Sack and Others* (J2393/19) [2019] ZALCJHB 360 (23 December 2019) at para 35.

⁷ Ibid at para 15.

- [34] Also, it is common cause that Airconduct maintains a database with a list of projects indicating the air-conditioner contractor, project name and project value. Even though Mr Dunn does not dispute that he had access to the database, he contends that it is not confidential or beneficial to a competitor due to its historic nature. Airconduct is adamant, still, that the value of the database is not time bound given the fact that a project may commence only two years after the tender had been awarded to the air - conditioning contractor. Airconduct asserts that, if that information were to end up in the hands of a competitor, it could be used to undercut the price quoted by Airconduct and obtain the work from the successful contractor.
- [35] Airconduct accepts that information from its database systems could easily be downloaded by a limited number of people, who included Mr Dunn. However, it is not Mr Dunn's case that he did not download the information.
- [36] Mr Dunn, in his own version, was part of the team that attended sales meetings and obtained knowledge of Airconduct's business strategies and ancillary business activities. It is not disputed that confidential information relating to Airconduct's business techniques and *modus operandi*, marketing strategies, pricing structures, financial position, discount structures, profit margins, the identity of potential clients and target markets, priority structures, preferential pricing, credit worthiness of clients, credit terms and action plans which set out the vision, mission, goals and objectives of the Applicant, etc. were disclosed and discussed during such meetings. Mr Dunn does not dispute that he became aware of the supplier's contractual arrangements with Airconduct such as pricing, terms of payment, discounts, delivery lead times, etc.
- [37] Mr Dunn cannot dispute that he was aware of the confidential nature of the information obtained by him nor dispute that he was exposed to confidential information proprietary to Airconduct. Notwithstanding, he offered an enfeebled denial that he is in possession of confidential material which he can use for the benefit of DFA because of the different focuses of the business of Airconduct and DFA. This averment is without merit and I have already dealt with it elsewhere in this judgment. What is obvious from Mr Dunns' own version that each competitor has its own policies and practices regarding production,

costing quoting and client interaction. This, as correctly contented by Airconduct, makes them unique and of value to a competitor.

[38] Airconduct does not seek to restrain Mr Dunn's general knowledge, experience and skills.⁸ Conversely, Airconduct only seeks to restrain him from using the confidential information he was exposed to during his employment with it.⁹ It is not disputed that Mr Dunn had access to Airconduct's pricing structures and profit margins for purposes of preparing quotations and negotiating prices. This information is of value in the industry and not public knowledge. In *L'Oreal South Africa (Pty) Ltd v Kilpatrick and Another*,¹⁰ it was stated that:

'Even if some of the information is ultimately in the public domain, which is one of the first respondent's principal defences, the fact remains that it did take substantial time, effort and resources to create, compile and reduce it down to a useable form, and that the distribution of most of such information was done on a confidential basis. An example would be the applicant's price list and discount structures. Whilst it may be so that this information is provided to customers, and even accepting the first respondent's version that the customers may share this information with other suppliers, the fact remains that the information is given to customers not to disseminate into the market place but to keep for themselves. This information, despite being made so available, remains confidential.'

Weighing up the interest of the parties

[39] The next stage is to determine how the interest of Airconduct weighs up, qualitatively and quantitatively, against the interest of Mr Dunn to be economically active and productive. Mr Dunn's impugn is greatly hinged on the dictum in *Pinnacle Technology Shared Management Services (Pty) Limited and Another v Venter and Another*,¹¹ where this Court, as per Whitcher, J, dealing with the potential prejudice associated with confidential information stated that:

⁸ See: *Aranda Textile Mills (Pty) Ltd v Hurn and Another* [2000] 4 All SA 183 (E) at para 33.

⁹ See: *Automotive Tooling Systems (Pty) Ltd v Wilkens* 2007 (2) SA 271 (SCA) at 279E – F.

¹⁰ (J1990/2014) [2014] ZALCJHB 353 (16 September 2014) at para 75, see also: *Multi Tube Systems v Ponting and Others* 1984 (3) SA 182 (T) at 189C - E; *Experian South Africa (Pty) Ltd v Haynes and Another* 2013 (1) SA 135 (GSJ) at para 44.

¹¹ [2015] ZALCJHB 199 at paras 57 - 59.

- [57] It seems to me that, where a company has competitors, adjustments to its profit margins and discount packages will be made fairly often. Unlike a 'secret recipe', the exact amount of profit a company sets out to make or gives up by way of discount to attract business on any given deal is not an immutable piece of information. Likewise, knowing this information does not give a competitor a permanent advantage.
- [58] If the second respondent were to come to know this information, there is nothing to suggest that it would be able to better the prices the applicants already offer their customers. While it is not ideal that a competitor knows the applicant's exact mark-up, it strikes me that undercutting, itself, is a routine business threat.
- [59] It is difficult to calculate the applicants likely prejudice should their historical sales to the other 18 customers the first respondent dealt with be disclosed the second respondent. It seems to me that the value of this information would principally be to alert a competitor when a customer's stock was low or equipment needed replacement. While undoubtedly confidential, this information is unlikely to be a deciding issue in winning customers away.'

[40] To my mind, *Pinnacle* is distinguishable. In the present case, Mr Dunn was a senior employee and had access to Airconduct's confidential information in the form of business techniques and *modus operandi*, marketing strategies, pricing structures, financial position, discount structures, profit margins, the identity of potential clients and target markets, priority structures, preferential pricing, credit worthiness of clients, credit terms and action plans which set out the vision, mission, goals and objectives of the Applicant, etc. Unlike in *Pinnacle*, this information, in the hands of Airconduct's competitor, would be valuable and useful.

[41] Mr Dunn misconstrued the actual enquiry. The test is not whether the confidential information would be used indeed, but whether it could be used to the benefit of the new employer. In *Turner Morris (Pty) Ltd v Riddell*,¹² it was pertinently stated that:

¹² 1996 (4) SA 397 (E) at 409J - 410A.

‘However, the employer need not show actual harm. In order to claim an infringement of its proprietary interests, the employer need prove only that its erstwhile employee is potentially able to exploit its trade secrets or business connections in his or her new employment. The loyalty which the employee owes his or her employer is sufficient to create the real probability that he or she will, consciously or unconsciously, do so.’

[42] The undertaking not to use the confidential information does to render any assistance to Mr Dunn. In *Ball v Bambalela Bolts (Pty) Ltd and Another*,¹³ the LAC stated that:

‘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...’

[43] Mr Dunn’s assertion that he was compelled to resign is inconsistent with the evidence before me. Mr Gerrit Antoni Wibbelink (Mr Wibbelink), the sole member of Airconduct and the deponent to the founding affidavit, asserts that even though Airconduct had commenced with a rationalisation process with a view to retrench some of its employees, Mr Dunn’s position was not affected. It is clear from the conversation that he had with Mr Dunn before his resignation that he assured Mr Dunn that his position and salary would not be affected by the rationalisation exercise. Still, Mr Dunn resigned, stating that he was going to pursue something else after he had been with Airconduct for 12 years. Absent from Mr Dunn’s resignation letter is a decry that he departs under compulsion or a mention that he was to take employment with DFA, Airconduct’s competitor. I, therefore, accept that Mr Dunn’s resignation was voluntary.

[44] There is no other means that Airconduct would have been able to protect the confidential information. Mr Dunn was not open to Airconduct as to his future employment when he tendered his resignation. Mr Wibbelink was adamant that had he known that Mr Dunn was going to join DFA, he was not going to allow

¹³ (2013) 34 ILJ 2821 (LAC) at para 25; see also: *New Justfun Group (Pty) Ltd v Turner and Others* (2018) 39 ILJ 2721 (LC) at para 21; *Discovery Life Limited v De Meyer* 2018 JDR 2035 (GJ) at para 15; *African Independent Brokers (Pty) Ltd v Coetzee and Others* (J 2012/19) [2020] ZALCJHB 62 (13 March 2020) at para 30.

him to serve his notice period. It is not unreasonable for Airconduct to prohibit Mr Dunn from working for DFA in order to protect its proprietary interest. In *Reddy v Siemens Telecommunications (Pty) Ltd*,¹⁴ the Supreme Court of Appeal (SCA), confronted with a similar claim, espoused the view that, to render the restraint effective, it is necessary that the employment of the offending employee with the competitor be terminated. It was stated that:

‘Public policy requires contracts to be enforced. This is consistent with the constitutional values of dignity and autonomy. The restraint agreement in this matter is not against public policy and should be enforced. Its terms are reasonable. What Reddy is required to do is to honour the agreement he entered into voluntarily and in the exercise of his own freedom of contract. While it is correct that his employment with Ericsson will be restricted it remains a breach of his contractual undertaking. It follows that it is no answer to suggest that an undertaking would be sufficient to protect Siemens' interests and that less restrictive means could therefore achieve the same purpose as enforcing the restraint ...

...The reason is because it is so difficult to draw the line between information which is confidential and information which is not; and it is very difficult to prove a breach when the information is of such a character that a servant can carry it away in his head. The difficulties are such that the only practical solution is to take a covenant from the servant by which he is not to go to work for a rival in trade. Such a covenant may well be held to be reasonable if limited to a short period.’ (Emphasis added)

[45] Mr Dunn’s argument that it is highly unlikely for him to obtain work in any other industry because he has no real knowledge of any other industry and that he is not trained to perform any other function is untenable in the absence of proof of his attempts to obtain employment in another industry. Also, he made bald assertions that he had looked for positions throughout the country.

[46] Mr Dunn also submitted an argument *ad misericordiam* that his children are enrolled in school in Gauteng, and his wife is receiving medical treatment there.

¹⁴ 2007 (2) SA 486 (SCA) at para 21.

Given his wife's medical condition, he relies significantly on family to assist with his children which family is all based in the Pretoria area. However, he failed to give an explanation as to why he could not secure employment outside the geographical area covered by the restraint; and for the limited duration of about nine months of the remaining period of restraint.¹⁵

[47] In my view, the geographic area covered by the restraint is not too wide given the interest sought to be protected. As correctly argued by Airconduct, the restraint period is necessary in the light of the period it would take to train Mr Dunn's successor, Mr Kotze, to perform his duties and to rebuild and strengthen the client relationships formed and/or maintained by Mr Dunn during the 12 years of his employment with Airconduct.

[48] Mr Dunn argues that he did not receive any quid pro quo in return for the signing of the restraint of trade covenant and that he was even a junior employee prior to obtaining any knowledge of the business or industry subjected him to such restraint of trade covenant. This submission is untenable because at the time of his departure, he was the second senior employee, reporting directly to Mr Wibbelink. It is also instructive that he concluded the confidentiality undertakings after he had completed four and half years in the employ of Airconduct.

[49] Quantitatively, the conduct of Mr Dunn has placed the business of Airconduct and the livelihood of its employees and their families in jeopardy. Clearly, contrary to Mr Dunn's argument, the risk to Airconduct should the restraint of trade covenant and confidentiality undertakings not be enforced far outweighs the prejudice to Mr Dunn if the relief sought is granted.

Urgency

[50] It is generally accepted that enforcement of the restraint of trade agreement is inherently urgent. There is no need to overly deliberate on this issue as, having read the papers before me, I am satisfied that the matter is urgent and have treated it as such.

¹⁵ See: *Dickenson Holdings (Group) (Pty Ltd and Others v Du Plessis and Another* 2008 (4) SA 214 (N) at para 46.

Conclusion

[51] In all the circumstances, I am satisfied that Airconduct had made out a case for the grant of a final relief as the restraint covenant and confidentiality undertakings are neither unreasonable nor contrary to public policy.¹⁶ Airconduct, has demonstrated, with great success, that it has a clear right which has since been breached by Mr Dunn when he accepted employment with DFA, its competitor. The very breach is 'an injury actually committed or reasonably apprehended' and that there is no other appropriate alternative remedy than to hold Mr Dunn to his contractual undertakings.¹⁷

Costs

[52] This Court has a wide discretion in awarding costs with principles of law and fairness serving as guides. Additionally, in *Ball*¹⁸ the LAC gave the following guidance in cases of restraint of trade:

'Restraints of the kind being considered, constitute a limitation on a citizen's right, in terms of section 22 of the Constitution, which, arguably, requires justification... In constitutional matters, the general rule that costs follow the result, does not apply. In such matters costs orders are generally eschewed out of concern that they may produce a 'chilling effect', in that litigants may be deterred from approaching a court to litigate concerning an alleged violation of their Constitutional rights for fear of being penalised with costs if they are unsuccessful... If constitutional matters are raised or defended in good faith and not vexatiously and the issues raised have merit or are important, like the violation of a right guaranteed in the Bill of Rights, and the proceedings that ensued, resolved those issues, the party complaining of the violation, even if unsuccessful, would, generally, not be ordered to pay the costs...'

[53] In the present instance, it is my view that even though Mr Dunn's opposition is ill-considered, it is far from being *mala fide* or pursued without sufficient grounds.¹⁹ Put otherwise, it is not vexatious. Hence, I am disinclined to saddle him with costs.

¹⁶ See *Experian South Africa supra* at para 19; and *Reddy supra* n 14 at para 20.

¹⁷ *Reddy supra* n 14 at para 22.

¹⁸ *Supra* n 13 at para 30.

¹⁹ *Fisheries Development Corp v Jorgensen* 1979 (3) SA 1331 (W) at 1339E-F.

[54] In the circumstances, I make the following order:

Order

1. This application is heard as one of urgency and the applicant's non-compliance with the normal time limits in relation to service is condoned.
2. Mr Divan Dunn is interdicted and restrained until 28 February 2021:
 - 2.1 From soliciting, interfering with, inducing or enticing or endeavour to entice away from Airconduct CC any person, firm, company, close corporation, or institution, who was a customer, or canvassed client of, or accustomed to dealing with Airconduct CC during the period of his association with Airconduct CC; and/or as at date of termination of his employment with Airconduct CC;
 - 2.2 From directly or indirectly, whether for reward or otherwise, be concerned with, engaged or interested, in any capacity whether as employee, agent, partner, shareholder, director, consultant or otherwise, in any business similar to or competing with or intending to compete with Airconduct CC's business and/or any client or potential client to whom or for whom Airconduct CC has submitted or prepared a quote, and which operates or conducts business within a 150 kilometer radius of the Airconduct CC's premises at 414 Rustic Road, Silvertondale, Pretoria, Gauteng
3. Mr Divan Dunn is ordered to terminate his employment with Duct for Africa (Pty) Ltd;
4. Mr Divan Dunn is interdicted and restrained from using or disclosing or divulging to any person or entity any confidential information that belongs to Airconduct CC, including but not limited to the names and contact details of clients or prospective clients and target markets, suppliers and other trade connections; the requirements of clients; the contractual arrangements between Airconduct CC and its clients,

suppliers and other trade connections; the financial details of Airconduct CC's relationship with clients, suppliers and other trade connections; Airconduct CC's pricing and discount structures; Airconduct CC's manufacturing processes; Airconduct CC's quoting and tender methods and principles; know-how; Airconduct CC's business techniques and *modus operandi* and trade secrets.

3. There is no order as to costs.

P. Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant:

Advocate R Grundlingh

Instructed by:

Maritz Smith Incorporated

For the Respondent:

Advocate AJ Nel

Instructed by:

Lee McAdam attorneys