

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

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

Case Number:025959-2025

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED: NO
SIGNATURE DATE: 02 April 2025	

In the matter between:

COMMUNICATION GENETICS (PTY) LTD

Applicant

And

STEFAN SCHÖNENBERGER

First Respondent

OPIA TECH (PTY) LTD

Second Respondent

JUDGMENT

NOKO J

Introduction

[1] The applicant instituted urgent proceedings for an interdict restraining the first respondent taking up employment with, be connected with and being interested personally or financially in any trade, business, company or undertaking (“*collectively referred in this judgment as employment*”) competitive with any of the business conducted by the applicant as at the time of termination of employment with the applicant. The relief sought include that the first respondent should also be restrained from taking up such *employment* with second respondent. The restraint should apply for a period of one year after termination of employment anywhere in the Republic of South Africa.

[2] The application is opposed only by Mr Stefan Schöenenberger, first respondent who, *inter alia*, disputed urgency. Reference in this *lis* to the respondent would mean Mr Stefan Schöenenberger.

The parties.

[3] The applicant is Communication Genetics (Pty) Ltd, (“CG”)(previously Mail Genetics (Pty) Ltd) a private company duly incorporated in terms of the company laws of the Republic of South Africa, with its principal place of business situated at The Block, Units G[...] and G[...], L[...] L[...] E[...], T[...] Avenue, Beverly, Fourways Ext 27, Gauteng.

[4] The first respondent is Stefan Schöenenberger an adult male resident at 1[...] G[...] Street, J[...] Park, Gauteng.

[5] The second respondent is Opia Tech (Pty) Ltd a private company duly incorporated in terms of the company laws of the Republic of South Africa, with its registered address situated at A[...] D[...] B[...], m[...] Drive, Tableview, Western Cape. This registered address is the address of its sole director, Mr Colin Branson (“Mr Branson”).

[6] The respondent and Mr Branson are both former employees and directors of the applicant.

History of the applicant.

[7] The applicant's shareholders at the beginning were, *inter alia*, Sirus Trust and Taweca Family Trust.¹ The respondent was a trustee and a beneficiary of the Sirus Trust whereas Mr Branson was the Trustee and beneficiary of the Taweca Trust. The shareholders and Alphatech Holdings (Pty) Ltd ("Alphatech") entered into shares of shares and claims agreement in terms of which Alphatech purchased 100% of the issued share capital in CG for the amount of R70 000 000.00 (Seventy Million Rand) on 25 November 2020.

[8] CG is in the business of selling and distributing software products supplied by international technology companies, namely, FIS Payments LLC f/k/a Metavante Corporate (FIS), Rocket, Compart GmbH ("Compart") and Kiteworks. To this end the applicant entered into a Master Distribution Agreement with FIS. The service provider included, Customer Communication Management (CCM), Enterprise Content Management and Archiving, Data Conversion-Output Management/ data Processing, Secure Data Communication and Mainframe Modernisation Technology².

[9] The applicant's main clients included ABSA Bank, Standard Bank of South Africa (SBSA), First National Bank (FNB) and Momentum Metropolitan Investment Holdings (MMI). The contracts with the applicant's clients end on different dates set out as follows: Absa - end of 2025, MMI - ends on 31 July 2026 and SBSA ends on 31 March 2027.

¹ Other parties in the agreement included Taweca Property Trust and Hertzog Guillaume Oberholzer.

² Other services included consulting, implementation, training, maintenance & support, managed services and resourcing.

[10] The initial contracts of employment for both Mr Branson and the respondent came to end at the same time with the sale of the shareholding in the applicant. They both entered into new contracts of employment in different capacities. Mr Branson was appointed as a joint managing director in terms of the contract of employment concluded on 7 December 2020. The said contract contained a clause on restraint of trade. He resigned on 30 September 2021 and entered into a consultancy agreement with the applicant. He continued to provide business development and strategic advice to the applicant through his company called Opia Investment (Pty) Ltd. The consultancy agreement was terminated on 31 December 2022. He subsequently registered another company on 22 April 2024 called Opia Tech (Pty) Ltd (“the second respondent”).

[11] The respondent who was employed since 2012 was initially appointed as a Technical Manager and later as a Director of the applicant signed a new contract of employment on 7 December 2020. He was then appointed as the Head of Technical and Operations. The contract of employment signed contained a restraint of trade clause in terms of which the respondent, *inter alia*, acknowledged that he will keep applicant’s information and trade secrets confidential³. The respondent agreed that by virtue of his employment he possessed of knowledge relating to, *inter alia*, business secrets, goodwill and personal knowledge of customers and he accepted that he will not, either directly or indirectly, be employed by and/or be connected, have interest in, or interest himself in (either personally or financially) any trade, business, company or undertaking competitive with any business conducted by the company for a period of 12 months from the date of termination of employment.⁴

[12] The respondent tendered his resignation on 30 September 2024 and gave three months’ notice with his last working day being 31 December 2024.

³ In terms of clause 14 of the standard Conditions of Employment at CL 02-176.

⁴ Id, clause 17 at CL 02-177.

[13] On 20 September 2024 FIS gave the applicant termination notice of the Master Software Distribution Agreement which was effective on 31 December 2024. FIS made it known of its intention to the applicant on 17 October 2024 to appoint Opia Tech as its new distributor.

Background.

[14] The background in this *lis* was set out as follows by the applicant. During October 2024 the applicant was tipped by one of its vendors that the respondent intends joining the second respondent once his notice with the applicant comes to an end. The applicant then penned a letter on 6 November 2024 to FIS, Mr Branson and the respondent making them aware that there is a restraint of trade agreement with its employees. Further that there was a suspicion that the respondent is planning to breach the restraint of trade by joining the second respondent and proposed that this issue be referred to mediation. The suggestion for mediation was rejected by the attorney for the respondent Lanham-Love Galbraith-van Reenen Inc (“LLGVR”) (also representing Mr Branson) who stated on 13 December 2024 that allegations relating to the breach of restraint clause were speculative, premature and hypothetical and as such threats to approach court are not actionable.

[15] The employees of the applicant conducted an internet search on 18 December 2024 and discovered email addresses of [s\[...\]](#) and [s\[...\]](#) The applicant also brought to the attention of LLGVR that there was no denial in their letter of 13 December 2024 that the respondent is not acting in breach of the clause and requested written undertaking that he would not act in contravention of the restraint of trade clause. In retort the attorneys replied in writing in a letter dated 29 January 2024 and refused to provide the undertaking requested.

[16] On 18 February 2025 an email was received by the applicant from FIS which was addressed to both Mr Branson and [S\[...\]](#) relating to a PDF control feature for SBSA. This related to an issue which CG and FIS discussed before FIS terminated its contract with CG. On the same date the respondent was seen

attending a conference arranged by Rocket at the offices of Axiz at the International Business Gateway Park, Midrand. Heitmuller, who attended the conference on behalf of the applicant took photographs of the respondent's name tag which showed that the respondent was attending the conference as a representative from Opia Tech.

[17] The applicant conveyed the information of the email received from FIS and the attendance of the conference by the respondent on 19 January 2025 to LLGVR and further inquired if they held the mandate to receive of the court processes on behalf of the respondents. In turn the attorneys replied on 20 February 2025 and stated that they held instructions to receive service court processes on behalf of both the respondent and Opia Tech. The applicant then instituted the urgent proceedings against both respondents. The papers were issued and accordingly served on the attorneys.

Parties' submissions.

Urgency.

[18] The applicant contends, in support of the application for urgency, that the *lis* relating to restraint of trade disputes is generally construed as urgent as they are time barred. In this instance the restraint of trade is only for a period of 12 months. If the legal process is launched on a normal basis the *lis* may be adjudicated after a period of 12 months and as such there would not be any substantial redress. And there is a significant risk of the respondent exploiting the information for as long as he is in the employ of Opia Tech. The applicant's attempts were first made to communicate directly with the respondent so as to obviate the need to institute court proceedings but the requests for mediation and undertaking were spurned by the respondent.

[19] The respondent contends that the applicant had a suspicion as early as October 2024 that the respondent was allegedly involved with Opia Tech hence the applicant penned a letter to him making him aware of the restraint of trade clause and further stated that the applicant may pursue legal action for an

interdict restraining the respondent from breaching the restraint of trade agreement. Further that the respondent adopted a supine posture and not proceed to court with the requisite urgency.

[20] The respondent stated further that the applicant demanded an undertaking on 23 January 2025 and reserved the applicant's rights. The request for the undertaking was rejected in writing on 29 January 2025 by the respondent's attorneys. The fact that the proceedings were only launched almost 4 months from 6 November 2024 to 25 February 2025 later meant that urgency was self-created.

[21] In retort the applicant contended that there was no cogent evidence to support the breach at the time of the exchanges until 18 February 2025 when an email was received from FIS and the attendance of the respondent of the conference representing Opia Tech that he was involved and/ or connected and/ or interested in Opia Tech. What was communicated to the applicant's employee by a vendor was hearsay and could not be used to found a cause of action. The fact that the respondent clearly disputed the allegations of the suspicion of breach made before 18 February 2025 as being speculative, hypothetical and premature would have meant that there is a dispute and it would have been improper for the applicant to launch an application where there is a clear dispute of facts.

[22] I had regard to the submissions made by both parties and conclude that the real time at which the applicant could launch the proceedings was after 18 February 2025 after the concrete evidence became available. The respondent already raised a dispute regarding the information at the applicants disposal before 18 February 2025. This is repeated by the respondent who said on 4 March 2025 (which was long after the 18 February 2025) that "The entirety of the applicant's case, *ex facie* the founding affidavit, is based on incorrect facts and on pure speculation and conjecture."⁵ It was therefore prudent for the applicant to

⁵ See para 57 of the First Respondent's Answering Affidavit at CL 02-348.

await concrete and persuasive evidence even though open to question or not necessarily watertight. Proceeding to issue papers 7 days later is not inordinate and cannot be construed as self-created urgency. It is also clear that no redress will be obtained if proceedings were instituted in the normal cause. I conclude that this matter deserves of an audience of the urgent court.

Regulation 6(5)(e) application.

[23] The applicant delivered a supplementary affidavit after its replying affidavit was already served hence the contents/information therein were not canvassed in the affidavits before the court. The said information was received by the applicant on 10 March 2025. The respondent has reacted to the contents of the supplementary affidavit and it appears that no prejudice has visited the respondent and to this end I granted leave that a further affidavit be delivered and to be considered for the purposes of judgment in this matter. As I found that the applicant provided satisfactory explanation.⁶ In the alternative, same is admitted in the interest of the administration of justice.⁷

[24] The applicant has delivered a further supplementary affidavit relating to further communication received after the first supplementary affidavit and the respondent has not reacted to it except to state that this may open a flood gates of further and more documentation being filed. I agree with the submission by the respondent and therefore would not accept the second supplementary affidavit to be considered for the purposes of this matter.

Merits

Applicant's versions and submissions

[25] The applicant avers that the respondent had by virtue of his position as a senior employee remained a key employee who had strong relationships with

⁶ *Ndlebe v Budget Insurance Limited* 2019 ZAGPJHC 320.

⁷ *James Brown & Hamer (Pty) Ltd v Simmons* No 1993(4) SA 65 (A).

CG's clients and technology providers. Further that he became one of the most skilled technical and support specialists in South Africa. The respondent acquired and retained knowledge in the employ of the applicant since at least 2012 until date of termination on 31 December 2024. The clients of CG who dealt with the respondent were customers of CG even before the sale of shares agreement.

[26] In addition to the email received from FIS on 10 March 2025⁸ which lend credence to the breach based on communication with the applicant's clients. Another email was received from Compart, (another company which supplies the applicant with software) which was copied to [s\[...\]](#). This email also supports the conclusion that the respondent is employed by the second respondent. The said email was copied to MMI, being a client to the applicant. If there was an error the email should have been forwarded to the respondent's email address which he used whilst he was still with the applicant and not the email of the second respondent created for the respondent.

[27] The applicant argued further that, he has a clear right to enforce obligations emanating from the restraint of trade clause as he took up employment or being involved with Opia Tech, a direct competitor of the applicant.

[28] There are no suitable alternative remedies available and it would be difficult to compute damages once clients are enticed and respondent may not be able to satisfy a claim for damages. The applicant re-iterated that restraint is enforceable throughout the Republic of South Africa as its clients operate throughout the Republic. Further that the restraint is only for a reasonable period of 12 months. Under the circumstances the applicant is entitled to an order for specific performance.

[29] The applicant contends further that for as long as the respondent is employed and or connected with Opia Tech there would be harm being

⁸ Which was attached the Applicant's Supplementary Affidavit at CL 02-505.

committed which is irreparable alternatively there is also a reasonable apprehension of harm. The damages suffered would not be assuaged by a claim for damages.

Respondent's version and submissions.

[30] The respondent also provided the background of how the applicant was formed and agreed in principle with the historical background as mosaicked by the applicant. He confirmed that he was involved in the birth of the applicant and that he has been in the employ of the applicant in the capacities as indicated by the applicant.

[31] He stated that his personal matrimonial circumstances and stressful work environment had an impact on his mental health hence he decided to terminate his employment with the applicant.

[32] He has a personal relationship with Mr Branson and did contact him after he learned that FIS would enter into contract with Opia Tech. That notwithstanding, the latest information at his disposal is that Opia Tech is not yet in business but was only used by FIS to provide support to its current customers. He denied any involvement with Opia Tech and since he resigned, he never took up employment directly or indirectly with any company including Opia Tech. He has not received any financial benefit or remuneration from Opia Tech or any other competitor of the applicant. To this end there is no breach of the restraint of trade and there is no reasonable apprehension of harm as alleged by the applicant.

[33] The email addresses of [s\[...\]](#) and [S\[...\]](#) referred to by the applicant were created without his knowledge. Mr Branson conveyed to him that they were created by him thinking that the respondent would assist him with setting up of the internal technical processes as the respondent has expertise in IT. Even if he could have been assisting Mr Branson as alleged, he is not employed, or has interest or received any financial or personal reward from Opia Tech.

[34] The respondent confirms that he was a director prior to his resignation in 2020 and his subsequent job profile was purely operational and his employment beyond December 2020 “was to ensure that operations continued in a smooth fashion ...had expertise to give and which the applicant required”.⁹ Though the job description was not amended in his new role certain aspects of the original job description no longer applied after the signing of the new contract.¹⁰

[35] He was “*responsible for managing the technical team on the suite of CCM products provided by the applicant. This included sale and presales of CCM solutions, business development, professional services and product management.*”¹¹ Besides this was not involved in the negotiations of contracts with the applicant’s clients which was done by Mr Branson together with Janse van Vuuren till his resignation.

[36] It would not be correct to contend that the mere access to the applicant’s systems meant he used the information beyond employment, respondent contends. He had access to the applicant IT infrastructure as a function of his responsibilities to oversee IT operations. Any interactions, so he contended, with customers during his employment and his knowledge of the client is technical and not confidential or proprietary information belonging to the applicant.¹²

[37] He has not contacted any of the applicant’s clients to solicit business and that it is not his intention to do so. He has never been involved with the negotiations of contracts with any of the clients of the applicant, including the main clients, being SBSA, Absa Bank, MMI. He believed that the applicant’s real gripe is with Mr Branson with whom the restraint of trade contract has come to an end. The attempt is now to restrain Mr Branson through the respondent.

⁹ See para 88 of the Respondent’s Answering Affidavit at CL02-354.

¹⁰ *Id*, para 137 at CL 02 -363.

¹¹ *Id*, para 46 at CL 02-367.

¹² *Id* at para 158 at CL 02-348.

[38] The respondent further states that he is not in possession of the applicant's alleged confidential information though he had access to the IT infrastructure and was not accessing same for personal use. He also had access to customers in the ordinary course of his duties but did not built relationship which he could exploit to induce them to move to a competitor.

[39] In any event because of the nature and duration of the contracts with its main client the respondent would not, so he contends, be able to influence them to leave the applicant.

[40] In this regard, he submits, that the requirements of the interdict have not been met as there is no evidence of breach of the restraint clause and there is no reasonable apprehension of the harm.

[41] With regard to the enforceability of the restraint the respondent contends that the restraint is unreasonable and therefore not enforceable. In all his life he has exclusively sharpened his skills in CCM products and finding work outside the CCM market would not possible. Other jobs he could find would be low paying jobs from which he would not be able to sustain his living standard and maintain his children. As such enforcing the restraint clause would make him destitute. Therefore, the restraint is contrary to public policy, unreasonable and unenforceable.

[42] He is not planning on not taking employment in the 12 months as he has obligations to meet including those he was ordered to comply with in terms of the decree of divorce. He would enter the market now that he has recovered. The restraint for 12 months would be unreasonable and it is found to be enforceable then 6 months would be reasonable. It would be unfair, so he continued, that the applicant be entitled to restrict the respondent from working for the whole of the Republic of South Africa.

[43] The respondent further contends that he does not know why FIS sent an email to him and has never seen the said email until the application was served.

Further that it was not the first time that an email was sent to the applicant in error as they previously sent a renewal invoice email in error to the applicant. He however noted that the email pertained to the functionality of Adobe's PDF solution rather than CSF functionality.

[44] He further states that he does not have any knowledge as to why Compart may have wanted to send him an email. This must have been done in error and it is likely that Compart intended to send the email to me at my erstwhile Communication Genetics email address. There would be no reason for Compart to send me the details of a licence that has nothing to do with me or Opia Tech. Put it differently, the licence is of no use to me or Opia Tech."¹³

[45] He accepts that he attended the Rocket's conference with Mr Branson, (his personal associates and business associate) to keep up with development and trends in the industry. He denies any personal or business interest in attending the conference.

[46] It is noted that the applicant is seeking an order for specific performance this is within the discretion of the court to grant and he implores the court to exercise the discretion against granting the order.

[47] In reply the applicant stated that it is incorrect that Opia Tech has no customers as this was admitted by FIS which appointed Opia Tech as its new distributor.¹⁴ Furthermore the job description clearly states that he is in a senior management position which is of a strategic nature as it is critical to the success of the company. He was doing more than just to manage IT infrastructure as set out in the job description. He negotiated contracts and discussed pricing, renewal and concluding contracts with clients though may have not signed them.

Legal principles

¹³ See paras 5 and 6 of the Respondent's Answering Affidavit at CL 02-521.

¹⁴ See para 11 of the Applicant's Replying affidavit.

Restraint of trade.

[48] It is settled in our jurisprudence that in order to protect the proprietary interests¹⁵ of the employer parties may enter into a restraint of trade agreements restraining the employee from exploiting such interest once he leaves the employment. Protectible interests would ordinarily includes client base, list of clients and trade secrets.¹⁶

[49] The agreements in the main have two aspects namely, “... *a non-compete clause prohibiting an employee from having an interest in being employed by, or as, a competitor for a certain period, and a non-solicitation clause, preventing an employee from taking clients away from the employer.*”¹⁷ This would also include restraining the ex-employee from exploiting the confidential information he had access to during his employment.

Reasonability of the restraint of trade.

[50] It is also trite that restraint of trade agreement would only be enforceable provided they are not contrary to public policy¹⁸ or would unreasonably restrict the ex-employee’s freedom to trade or work.¹⁹

[51] The restraint of trade would be unreasonable if it unfairly restricts the employee to benefit from his own skills and applicable over an extended

¹⁵ This will be proprietary interest of the business, geographical area and period of the restraint.

¹⁶ *Emlink Pty Ltd and Others v Mathee and Others* [2023] JOL 61571 (GJ). See also *Micros SA and 2 others v Kleynhans and 2 Others* (074606/2023[2023] ZAGPPHC (01 September 2023), where it was held that “... the applicants do indeed have protectable interests in the form of customer connections and confidential information. As was stated by this Court in *Experian SA v Haynes and Sibex Engineering services (Pty) Ltd v Van Wyk*, there are two kinds of proprietary interests that can be protected by a restraint of trade undertaking. The first is ‘the relationship with customers, potential customers, suppliers and others that go to make up what is compendiously referred to as the trade connections of the business, being an important aspect of its incorporeal property known as goodwill. And the second is confidential matter which is useful for the carrying on a business and which could therefore be used by a competitor, if disclosed to him, to gain a competitive advantage”.¹⁶

¹⁷ See *Arteflex (Pty) Ltd v Pieters and Ano* (2023/024313) [2023] ZAGPPHC (11 April 2023).

¹⁸ *Magna Alloys & Research Pty Ltd v Ellis* 1984 (4) SA 874 at 891, *Basson v Chilwan* 1993(3) SA 742 (A) at 767.

¹⁹ *Basson v Chilwan* 1993(3) SA 742 (A) at 767.

geographical area. It was held in *Seboko*²⁰ that the fact that the restraint is effective throughout the Republic of South Africa is not itself unreasonable. In *Kleynhans*²¹ a restriction throughout SADC region was considered not to be unreasonable.

[52] That notwithstanding, it must still be acknowledged that there is a disjuncture or tension between the restraint of trade clause and freedom to trade as set out in section 22 of the Constitution. In pursuit of the exercise of freedom of trade in the face of a restraint of trade clause one should not seek to violate the common law principle of *pact sunt servanda* in terms of which it is generally expected that with the principle of sanctity and privity of contract parties would structure their agreement as they prefer and the Court cannot be invited to protect such parties from bad bargains. The Constitutional Court confirmed that this principle is still part of our law and stated that “This court has emphasised that the principle of *pact sunt servanda* gives effect to the “central constitutional values of freedom and dignity”. It is further recognized that in *general* public policy requires that contracting parties honour obligations that have been freely and voluntarily undertaken. *Pact sunt servanda* is thus not relic of our pre-constitutional past and that in general public policy required contracting parties to honour obligations that have been freely and voluntarily undertaken”.²²

Specific performance.

[53] It is trite that a party claiming specific performance must prove the terms of the contract, demonstrate his own compliance and failure to comply by the other party and seek the order directing compliance by the other party.²³

²⁰ *Tax Consulting South Africa and Ano v Seboko and Another* (A2022/055430) 2023 ZAGPJHB (13 September 2023).

²¹ *Id* n17.

²² *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* [2020] ZACC 13.

²³ LTC Harms, *Amlers' Precedents of pleadings*, 8th edition, LexisNexis, 2015 at 126.

[54] It is further noted that the court has discretion either to grant the order or refuse same which shall be exercised judicially.²⁴

Final Interdict

[55] The requirements for final interdict are settled in our jurisprudence and were clearly delineated more than a century ago in *Setlogelo*²⁵. The applicant has to present evidence of *prima facie* right; that there is imminent and irreparable harm and that there is no alternative remedy.

[56] The application is for a final interdict and ‘... *such an order can only be granted in motion proceedings if the facts stated by the respondent together with the admitted facts in the applicant’s affidavits justify the order, and this applies irrespective of where the onus lies*’.²⁶ It was also stated in *Seboko*²⁷ at para 12 that

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

²⁴ *Ethekwini Municipality v Cooperative Muratori & Cementisti – CMC di Ravenna Societa Cooperativa* (Case no 181/2022) [2023] ZASCA 95 (12 June 2023).

²⁵ *Setlogelo v Setlogelo* 1914 AD 221.

²⁶ *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA) at para 4.

²⁷ *Tax Consulting South Africa and Ano v Seboko and Another* (A2022/055430) 2023 ZAGPJHB (13 September 2023). See also *Stellenbosch Farmers’ Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235, *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* (53/84) [1984] ZASCA 51; 1984 (3) SA 623 (A) at 635C; *National Director of Public Prosecutions v Zuma* (573/08) [2009] ZASCA 1; 2009 (2) SA 277 (SCA) at para 26; *South African Reserve Bank v Leathern NO* 2021 (5) SA 543 (SCA) at para 24 n 12; *Mtolo v Lombard* (CCT 269/21) [2021] ZACC 39; 2022 (9) BCLR 1148 (CC) at para 38.

[57] It follows therefore that the matter will be decided on the respondent's version where the court finds his version plausible and not fictitious.

Analysis

[58] The respondent has categorised his grounds of opposition into three, first, that the restraint clause has not been breached, secondly, that there are no protectible interests infringed and thirdly, that the clause is unreasonable and unenforceable.

[59] The evidence suggest that there was employment relationship between the respondent and Opia Tech. First, the creation of the email addresses allegedly by Mr Branson lends credence to the allegation that there is employment relationship and his version that he was not involved in the creation is untenable and fictitious. The same email address was used by FIS and Compart after the respondent had left the applicant. The only inference that can be drawn is that the respondent is employed to Opia Tech. His explanation that he does not know why FIS sent the email to him is also far-fetched. It is understandable that the applicant could not obtain explanation from FIS with whom relations were terminated but Mr Branson was copied and could have told the respondent, (as his friend and close business associates) why his supplier (FIS) copied respondent in his email as he has also informed the respondent that FIS had previously sent emails by mistake to the applicant.²⁸ The receipt of the email from another client of the applicant, Compart also feed in the narrative of an employment relationship with Opia Tech (even worse it was copied to MMI), except that the applicant could have inquired from Compart why the respondent was copied. He attended a conference with his business associates and found nothing untoward in providing his friend support.

²⁸ As his friend Branson was able to tell the respondent that Opia Tech has no customers as yet. He created email addresses as he hoped to get assistance with IT set up. This is implausible and far-fetched.

[60] The respondent has refused to give any undertaking that he would abide by the clause and rebuffed same. He has in fact conceded that he will breach the clause²⁹ as he would seek employment as he has personal obligations to discharge and may not take employment with lower income which will not sustain his living standard. The above factors support employment relationship and the denial that the respondent has not benefitted financially is of no moment. Otherwise, they demonstrate that the respondent is connected to Opia Tech and /or being interested personally or financially in Opia Tech. The respondent further appeared to be nonchalant about the fact that at least two applicant's customers had the email address created for him by his friend and business associate. He did not find it prudent to instruct the said friend not to distribute email addresses created for him especially to the applicant's clients. It has been correctly contended the respondent's case is replete with factors to justify the inference that his quiescence should be construed as acquiescence.³⁰

[61] The contention that there are no protectible interests is hollow as authority cited above clearly confirms that the list of clients is also a protectible interest. The respondent conceded that he had access to the IT infrastructure and had interactions with customers.³¹ In addition, customers do call him for support even though he is not a central call person for all clients.³² It is clear that he was being preferred by the applicant's clients. It is also not disputed that he occupied a senior position and had customer connection.³³

[62] In addition to the respondent having acknowledged in the agreement that he has access to confidential information and client's contacts, the fact that he

²⁹ See para 163 of the First Respondent's Answering Affidavit at CL 02-368 where he stated that "I am actively exploring my options, and I will re-enter the technology ... when I find a job that interests me. I can afford to remain unemployed for much longer"

³⁰ See Applicant's reference to *McWilliam v First Consolidated Holdings (Pty) Ltd* 1982 (2) SA 1 (A) where it was affirmed that when a correspondence requires a reply and none is forthcoming an inference can be drawn that an obligation set out therein is accepted.

³¹ See para 158 of the Respondent's Answering Affidavit at CL 02-367.

³² See para 144 of the First Respondent's Answering Affidavit at CL 02-364.

³³ It was held in *Rawlins*³³ that to determine whether customer connection do necessarily constitute a protectable interest would depend on, *inter alia*, "... on the duties of the employee, his personality, frequency and duration of contact between the employee and customer...".

had access to the IT infrastructure places him at the centre and had easy access to the data base, strategies etc. He conceded that

“While I had access to the applicant’s systems in my capacity as Head of Technical and Operations, this was solely due to my role in managing the applicant’s IT infrastructure. My access does not mean I actively accessed, utilised or retained confidential information beyond what was required for my responsibilities. Furthermore, whilst I had contact with customers in the ordinary course of my duties, I have not built relationships with these customers, and I am unable to induce them to move with me to a competitor.”³⁴

[63] The applicant placed evidence to demonstrate that the respondent participated in the drafting of the contracts. His denial is therefore more improbable and far-fetched. His further contention that his knowledge is limited to CCM and that the information he acquired disappeared after 2020 is betrayed or belied by his expertise as set out in his curriculum vitae attached to the applicant’s founding affidavit.³⁵

[64] Lastly the contention that the restraint is unreasonable is unsustainable as authorities also confirmed that the restraints could apply throughout South Africa or even throughout the SADC region. In any event the respondent conceded that there are opportunities available except that they may not sustain his living standard. The respondent has received amount of approximately 7 million from the applicant for the value of the company which was his brain child. It would certainly be a tragedy to have one benefitting from selling his product and be allowed to compete with the purchaser in the market of the same product. It is almost like double dipping. This is the central mischief aimed to be arrested by restraint of trade agreements.

³⁴ See para 54 of the Respondent’s Answering Affidavit at CL 02-347.

³⁵ Marked FA 27.

[65] The respondent has further failed to demonstrate the basis to contend that 12 months period is excessive. It has been concluded in some cases that 12 months is indeed reasonable.³⁶

[66] The contracts with applicant's clients though for a period of a minimum of 12 months do have termination clauses and therefore the contention that such client cannot be wooed elsewhere is without merit. MMI has already received an email from Compart copied to the respondent who now with a measure of comfort and conviction can just say he does not know why he was copied to an email which was created for him by his friend and business associate. The respondent further stated on behalf of Opia Tech that he does not know why the email could be sent to him and Opia Tech as both do not need it.³⁷ This averment was said without equivocation by the respondent without confirmation from the Opia Tech whilst denying being employed by Opia Tech.

[67] The version presented by the respondent in resisting the applicant's case is implausible and far-fetched. Even if it was to be argued that the disputes he raised had merits the version he presented support the conclusion which is at odds with his case.

Conclusion

[68] From the foregoing I am persuaded that the applicant has made out a persuasive case for the relief sought. The creation email addresses could not convincingly be accounted for. The emails sent after his departure from the

³⁶ The court reduced a period of 2 years to one year in *Sadan and Another v Workforce Staffing (Pty) Ltd* (JA38/23 /JA 88/23) ZALAC 17 August 2023) whereas the LAC Court *Beedle v Slo-Jo Innovations Hub (Pty) Ltd* (J21/23/JA37/22) [2023] ZALAC (17 August 2023) it was found that a period of two years is reasonable.

³⁷ See para 5 of the First Respondent's Supplementary Affidavit at CL 02-521 he stated that "I do not know why Compart sent the applicant's Compart licence to the email address [s\[...\]](#). This must have been done in error, and it is likely that Compart intended to send the email to me at my erstwhile Communication genetics email address. And at para 6 that "There would be no reason for Compart to send me the details of a licence that has nothing to do with me or Opia Tech. Put differently, the licence is of no use to me or Opia Tech." also at para 9 that "What I can say is that neither me nor Opia Tech have or have had any involvement with or affiliation to either MMI or Compart's customer base."

applicant cries for a proper explanation and none is provided. The exchange to his new email address feed into the reasonable inference that the respondent is with Opia Tech. The said inference could not be displaced by the respondent. The communication with the applicant's supplier and Compart after his departure could not be persuasively explained. He is determined to enter the market and would not wait for 12 months or accept any other offer which does not fit his standard of living. He attended conference on behalf of a competitor and would not hesitate to provide support to such a competitor, his business associate. To this end I find in favour of the applicant.

Costs

[69] The question of costs is within the discretion of the court. It was held in *Bam*³⁸ that “[T]he general rule relating to the costs is that costs follow the result. Re-imbursing a successful party of his or her out of pocket expenses is a settled principle which brooks no further ventilation.” The applicant has asked for costs at punitive scale. Ordinarily such order is warranted in exceptional circumstances where conduct of the litigant attract the wrath of the court. The Constitutional Court held in *Mkhatshwa*³⁹ “... that the purposes of punitive costs, being an extraordinarily rare award, are to minimise the extent to which the successful litigant is out of pocket and to indicate the court’s extreme opprobrium and disapproval of a party’s conduct.”⁴⁰ The opposition by the first respondent was vexatious and frivolous. The costs at punitive scale is justified.

Order

[70] In the premises I make the following order.

1. The application is urgent and non-compliance with the Unfirm Rule of Court is condoned in terms of Rule 6(12).
2. For a period of 12 months from 1 January 2025 and throughout South Africa, the first respondent is interdicted and restrained from:

³⁸ *Bam v Holtzhausen and Others* (2024/097438) [2025] ZAGPPHC (21 February 2025).

³⁹ *Mkhatshwa and Others v Mkhatshwa and Others* [2021] ZACC 15.

⁴⁰ *Id* at para 21.

1.1. Directly or indirectly, being employed by, connected with or interested in, personally or financially, any trade, business, company or undertaking competitive with any business conducted by the applicant at the time of the termination of the first respondent's employment with the applicant on 31 December 2024.

1.2. directly or indirectly being in the employ, connected with, interested in, personally or financially, the second respondent.

3. The first respondent is ordered to pay the cost of this application on the attorney and client scale.

M V NOKO

Judge of the High Court
Gauteng Division, Johannesburg

DISCLAIMER: This judgment was prepared and authored by Judge Noko and is handed down electronically by circulation to the Parties /their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be **02 March 2025 at 14:00**.

Dates:

Hearing: 12 March 2025.

Judgment: 02 April 2025.

Appearances:

For the Applicant : L Hollander, instructed by
Shepstone & Wylie Attorneys.

For the First Respondent: N Cassim SC and K Naidoo, instructed by
Lanham-Love Galbraith-Van Reenen Attorneys.