



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

CASE NO: 20987/2024

In the matter between:

SD RECRUITMENT (PTY) LTD

Applicant

Registration number: 2011/114952/07

and

SIMONÉ WAGNER

First Respondent

THE COMPLIANCE BUREAU (PTY) LTD

Second Respondent

Registration number: 2016/364420/08

IMMPLOY RECRUITMENT AGENCY CC

Third Respondent

Registration number: 2009/088597/23

JUDGMENT

PARKER, AJ:

Introduction

[1] In this urgent Application issued on 30 September 2024 which was set down for hearing on 24 October 2024, and postponed to the 13 November 2024, Applicant seeks an order requiring the First Respondent (Wagner) to comply with her restraint

obligations for a period of 24 months from the date of this order, alternatively from 13 September 2024. This it contends is in keeping with the provisions of the Employment Contract (EC) which holds the restraint and confidentiality clauses whilst the Non-disclosure Agreement (NDA) is on its own. Applicant seeks to enforce the confidentiality undertakings made by Wagner.

[2] All three Respondents opposed the application. The Second and Third Respondents are cited as they may have an interest in the outcome of the matter. Although not cited as a party, Applicant mentions Solutions for Africa (Pty) Ltd (hereinafter referred to as "*Solutions*") in the founding affidavit. A Mr Tian Liebenberg deposed to a confirmatory affidavit on behalf of Second and Third Respondents as well as Solutions in his capacity as Chief Executive Officer with Solutions. He exercises control over all the companies within the group controlling the Second Respondent and the Third Respondent.

The Applicant

[3] The Applicant carries on business where it provides innovative medical recruitment solutions to more than one industry including the hospitality industry. Its main focus is to provide innovative medical recruitment solutions to the public and private health sectors throughout South Africa.

[4] It professes to have an established track record in professional medical recruitment by delivering quality medical recruitment solutions to help clients fulfil their recruitment needs and reduce the cost and time to recruit. According to Applicant, the medical recruitment industry in South Africa is a niche market and very small.

[5] Relative to this matter, the services it renders are by providing contract locum staffing and the bulk of its medical recruitment relates to the public sector. In efforts to secure work in the public sector, the Applicant has to tender and/or respond to requests for quotations and in this regard it alleges that its margins, are of critical importance, and thereby a trade secret. Secondly, in the private sector, the Applicant contends it had built up a relationship with clients over years and as such its customer connections are of critical importance to it.

Issues for determination

[6] The issues are whether:

- 6.1 The matter is (a) urgent (b) the Applicant would not be able to seek substantial redress in the ordinary course; (c) the Applicant did not delay in bringing its application;
- 6.2 The validity of the restraint of trade agreement;
- 6.3 The Applicant was entitled to enforce the confidentiality and restraint of trade undertakings because the First Respondent has breached her confidentiality and restraint undertakings;
- 6.4 The Applicant has established the existence of a protectable interest, if it is found that the restraint is applicable;
- 6.5 The Respondents have harmed or prejudiced that interest;

Employment

[7] It is common cause that Wagner was employed as the Applicant's Tender Administrator since 28 July 2023. Her primary responsibility was for sourcing new business through tenders and compliance processes. Her last day of employment with the Applicant was 13 September 2024.

[8] It was argued by the Applicant that Wagner has intimate knowledge of the information used by the Applicant in tendering. More specifically, she knows exactly the margins Applicant is using and this knowledge she will be able to use to the benefit of a competitor of the Applicant - and to the detriment of the Applicant.

The restraint of trade clauses

[9] The relevant clauses of restraint of trade agreement are as following:

"2. RESTRAINT

2.2 It is recorded that:

2.2.1 *the Employee has been employed by the Company and will continue to be so employed for an indefinite period; and*

2.2.2 *in the course of fulfilling his duties to the Company, the Employee:*

- a. *Has become and will continue to become intimately concerned with the business and affairs of the Company; and/or*
- b. *Has had and will continue to have access to the Company's trade secrets; and/or*
- c. *Has acquired and will continue to acquire considerable knowledge and know-how relating to the Company and its business matters.*

2.3 *The Employee acknowledges that if he is not restricted from competing with the Company as provided for herein, the Company will potentially suffer considerable economic prejudice including loss of custom and goodwill. The Employee further acknowledges that it is essential for the Company to protect its interests. As such, the Employee agrees to restraint of trade undertakings which preclude the Employee from carrying on certain activities that would be harmful to the Company's interests.*

2.4 *The Employee undertakes and warrants in favour of the Company and its successors-in-title or assigns that, for as long as he is employed by the Company and for a period of 24 months from the terminate date ('the restraint period'), he will not anywhere in the prescribed area, whether directly or indirectly:*

- 2.4.1 *Render, or attempt to render, any prescribed services to or for the benefit of any prescribed Client;*
 - 2.4.2 *Solicit, interfere with, entice or otherwise attempt to draw away from the Company any prescribed Client;*
 - 2.4.3 *Solicit, interfere with, entice or otherwise attempt to draw away from the Company any prescribed staff.*
- 2.5 *The Employee further undertakes and warrants in favour of the Company and its successors-in-title or assigns that, for the restraint period, he will not anywhere in the prescribed area be directly or indirectly interested, engaged, concerned, associated with or employed whether as proprietor, partner, director, shareholder, employee, consultant, contractor, financier, principal, agent, representative, assistant, adviser, administrator or otherwise and whether for reward or not in any company, firm, business undertaking, concern or other association of any nature which furnishes or renders, directly or indirectly, any form of prescribed services.*
- 2.6 *The Employee acknowledges that:*
- 2.6.1 *The restraints imposed upon him in terms hereof are fair and reasonable as to the subject matter, area and duration and are reasonably necessary to protect the proprietary interests of the Company, to maintain the goodwill of the Company, and are within the context of the benefits to be derived by the Employee under this agreement;*
 - 2.6.2 *The provisions hereof shall be construed as imposing a separate and an independent restraint, severable from the rest of them, in respect of:*
 - a. *Each month of the periods referred to;*
 - b. *Every locality falling within the prescribed area;*
 - c. *The categories and identities of persons falling within the definition of prescribed Client;*
 - d. *The categories of and specific services falling within the definition of prescribed services;*
 - e. *The categories and identities of persons falling within the definition of prescribed staff.*

- 2.7 *The Employee acknowledges and agrees that the restraints contained in this clause are stipulations for the benefit of the Company, of whom any authorized person shall be entitled to elect whether to exercise its rights hereunder or not. It is specifically noted that a decision not to act on such entitlement shall not alter the Company's right to do so at a later stage."*

The Non-Disclosure Agreement

[10] Under the rubric of confidentiality, the restraint agreement provides as follows:

"1. CONFIDENTIALITY

- 1.1 *The Individual acknowledges that in the course of their work with and/or for the Company, the Individual will be exposed to valuable confidential and/or trade secret information of the Company. The Individual agrees to treat all such information as confidential and to take all necessary precautions against the disclosure of such information to third parties during and after the term of this Agreement.*
- 1.2 *The Individual acknowledges that trade secrets of the Company will consist of, but will not be necessarily limited to:*
- 1.2.1 *Technical information: Methods, processes, formulas, compositions, systems, techniques, inventions, machines, computer programs and research projects,*
- 1.2.2 *Business information: Customer lists, pricing data, sources of supply, financial data and marketing production, or merchandising systems or plans, client database.*
- 1.3 *The individual understands that this Agreement does not and will not prevent them from working for any other entity subsequent to the termination of their contract with the Company, but only prohibits the individual from using or disclosing any of the Company's confidential and/or trade secret information."*

1.4 *The Individual agrees that if they commit a breach of any of the provisions of this Agreement, the Company shall have the right to enforce this Agreement in any court having equity jurisdiction. The Individual acknowledges and agrees that any such breach of this Agreement will cause irreparable injury to the Company and that monetary damages will not provide an adequate remedy to the Company. In addition, the Company shall have any other rights and remedies available at law or in equity.*

1.5 **The Individual agrees to pay liquidated damages in the amount of R100 000.00 for any violation of the covenant not to disclose confidential and/or trade secret information, whether contained in this Agreement or any other agreement with the Company.**

(my emphasis)

A PROTECTABLE INTEREST

[11] It is argued that Wagner, in the course of her employment with the Applicant had substantial ongoing exposure to highly confidential information pertaining to the Applicant's business, including the costing, the candidate database, client information, and the margins which is acknowledged by Wagner.

[12] Therefore the Applicant argues, based on the protectable interest, it has a clear right to protect its proprietary interests especially in respect of the margins which knowledge she would be able to undermine the Applicant when she submits tenders in competition with it. It obtained the restraint undertakings from the First Respondent so as to protect it from the unpoliceable danger of her using or communicating its trade secrets and confidential business information to a competitor in breach of the restraint agreement, as she is currently providing her services to a company in control of a direct competitor.

[13] The competitiveness of the industry and the nature of the confidential

information concerning the Applicant's business to which the First Respondent was exposed to, are the reasons why the Applicant secured the undertakings contained in the restraint agreement from her.

[14] In addressing the alternative remedy available to Applicant, in so far as the penalty provisions contained in clause 1.5 are concerned, even if Applicant was able to quantify its damages flowing from the breach of the restraint, there are no realistic prospects that the First Respondent would have the means to satisfy a damages claim.

The Respondents

[15] First Respondent acknowledges and reaffirms her commitments under Clause 15.3.1 (Employment Agreement) and Clause 1.3 (NDA) to maintain confidentiality and protect the company's trade secrets and confidential information, which is expressed in a detailed letter addressed to Applicants Attorneys dated 26th September 2024.

Wagner says she has never breached, and commits to never breaching, the confidentiality undertakings, past, present, or future. Regarding the operation of the 'prescribed area' the restraint of trade clause excessively restricts Wagner's employment opportunities, covering the entire Republic of South Africa, which she believes is unconstitutional. There is no clear justification or legitimate interest to warrant such a broad restraint, rendering it unreasonable and overly restrictive. Furthermore, the 'prescribed client' pertains to her position as Compliance Manager employed by The Compliance Bureau. The (TCB) prescribed services' pertain to her current role in the Audit Department, which is distinct from her previous responsibilities with Applicant.

[16] The thrust of the argument by Wagner is that the restraint of trade clauses lacks:

- 16.1 Reasonableness: The clause must be reasonable in terms of duration, geographical scope, and restricted activities.
- 16.2 Protectable Interest: Employers must demonstrate a legitimate protectable interest to justify the restraint.
- 16.3 Constitutional Compliance: These clauses must comply with the South African Constitution, specifically section 22, which protects the right to choose a trade, occupation, or profession freely.
- 16.4 Balancing Interests: Courts balance the public interest in enforcing agreements against the societal benefit of allowing individuals the freedom to trade and pursue profession.

[17] Wagner concedes her exposure to confidential affairs of the Applicant however, does not justify the overly broad restraint of trade, which disproportionately restricts her future employment opportunities.

[18] The restraint of trade is unreasonable and the constitutionality of the restraint, particularly considering that geographical scope (entire Republic of South Africa), lack of clear protectable interests and the unbalanced restriction on her right to choose her profession.

[19] Regarding the alleged theft of confidential information, Wagner denied any wrongdoing, as there is no evidence that she stole or misused any confidential information, including client lists, contact details, or financial information, nor has she unauthorizedly taken or shared confidential information. Furthermore, Applicant has failed to make out a case of what the confidentiality nature of the information is that was breached. Alternatively, she contends that the Applicant has not disclosed the information in its founding papers, and to the extent that any confidentiality that may

have existed has been eroded is now post the application, in the public domain, since Applicant did not seek protection when it shared the confidential matter as it simply proceeded to identify and disclose the nature of the confidential information in its papers.

[20] Of critical importance is, even if Applicant could establish a contravention of the breach of the confidentiality clause the Applicant is met with a hurdle – the parties have agreed that the damages Applicant may suffer, is limited to an amount of R100 000,00. This means Applicant has to establish that in fact Wagner breached the confidentiality clauses of the employment agreement and if it can do that, claim R100 000,00 from her. Applicant has therefore essentially waived the right to obtain an interdict as it has circumscribed its harm in the form of agreed damages.

Urgency

[21] It is common cause that the NDA and EC exists and that Wagner was exposed to highly confidential information. However, Wagner contends that the inappropriate route of urgency was followed in circumstances that does not render it urgent because of the provisions of a penalty clause in the restraint of trade agreement which therefore limits the agreed R100 000 liquidated damages in the event there is a violation of the covenant not to disclose confidential information and/ or trade secret information. Therefore, Wagner argues, Applicant have limited that harm; they have identified what it will cost and therefore the Applicant's remedy lies elsewhere. Applicant should institute proceedings for the sum of R100 000.00 if they believe that she has breached the restraint, and as such they have alternative remedies to obtain substantial redress in due course.

[22] On the contrary Applicant argues that by virtue of the competitiveness of the industry in which it operates, the Applicant had no alternative way to protect itself and its proprietary interest against unlawful competition. According to Applicant it learnt on 16 September 2024 that Wagner took up employment with Second Respondent who is a company closely associated with a direct competitor of the Applicant, namely the Third Respondent. On 19 September 2024 Applicant's attorneys addressed a letter of demand to Wagner. This was met with opposition by First Respondent attorneys in a correspondence dated 26 September 2024 denying impropriety. The application was issued four days later and was set down for three weeks from the date it knew of Wagner's employment.

[23] Wagner argues that Applicant has not explained the delay since the date it bore knowledge of her new employment. Her further reasons as to why the matter is not urgent is that Applicant has not shown that she is employed by a direct competitor, it has failed to join her current employer (TCB) or Solutions which Applicant identified as the true competitor. In the absence of such *prima facie* evidence that Wagner have contravened the restraint, the application is not urgent.

[24] Regarding the non-soliciting - there is no evidence that she has contacted any of Applicant's clients.

[25] In respect of the breach of confidentiality, in terms of clause 7 of the NDA Wagner, agreed to the indemnification for any contravention of the confidentiality clause to a maximum of a R100 000, 00 which indemnification constitutes substantial redress. Applicant has decided to agree and limit its claim for a contravention of the confidentiality clause to this amount. There is no need for relief on an urgent basis to enforce the alleged contravention of the non-disclosure agreement.

[26] According to clause 2.1.2 of the restraint clause in the employment agreement, it is only effective against her if she should be employed by a client of Applicant. TCB has never been a client of Applicant. Applicant has not established that she has even attempted to commit the conduct listed in clauses 2.4.1 - 2.4.3 of the employment agreement. These clauses prohibit Wagner from rendering services, solicit Applicant's clients or attempt to draw away Applicant's staff. In terms of clause 2.5 of the employment agreement Applicant has not shown that Wagner is currently employed in a position that is direct or even indirectly in competition with Applicant's business. Lastly, in respect of the confidential information, Applicant has failed to make out a case that she has used or disclosed any of Applicant's confidential and/or trade information. In any event Wagner denies that there is anything confidential and/or secret or unique about Applicant's business, whether it is technical or business information. Even if there was, Applicant has disclosed such information with the launching of the application and in so doing no confidentiality attaches to the information as it is now in the public domain.

Vendetta

[27] Wagner states, the motivation for the application lies in a personal vendetta and it seems to be driven by Applicant's broader belief that Solutions or the shareholder of the company harbours a personal vendetta against Applicant, particularly due to past conflicts involving the CEO of Applicant. Mr Moosa for Applicant, acknowledged to Wagner at her exit interview that Applicant does not typically enforce the restraint of trade clause unless circumstances warrant it, and the primary concern in this instance is the competitor's targeting of Applicant, rather than any misconduct on her part. To her this suggests that Applicant's focus is less on Wagner's actions and more on an adversarial relationship with the competitor.

[28] Applicant has not provided substantive grounds for doing so. It is not sufficient to act based on extraneous motivations, such as a belief in a vendetta or personal conflict with a competitor. The law requires that the party seeking enforcement demonstrate a legitimate basis, showing that she has in fact contravened or is likely to contravene the relevant contractual terms. Without evidence of an actual or imminent breach of confidentiality or restraint, she argued that the court cannot be expected to grant relief simply to address broader business or personal concerns. Judicial intervention must be based on genuine and justifiable concerns, not merely speculative fears or ulterior motivations.

Unreasonableness

[29] Wagner states in her opposing affidavit that, her new role at TCB is vastly different from the work she performed at Applicant. Her current position focuses on governance, risk, and compliance, which does not overlap with the core business or operations of Applicant and is distinct from the type of business Applicant conducts.

[30] The nature of her responsibilities at TCB is removed from any sensitive information she may have had access to during Wagner's time at Applicant. TCB's focus on helping businesses enhance efficiency through sound governance frameworks does not directly compete with Applicant's services.

[31] Given the significant divergence in the nature of her role, the enforcement of the restraint would not serve any justifiable purpose and would merely act as an unwarranted limitation on her ability to exercise her constitutional right to choose a trade or profession under section 22. Thus, enforcing the restraint in this context would be contrary to public policy and should not be upheld.

Evaluation

[32] As a general rule, agreements in restraint of trade are generally enforceable, unless they are unreasonable or unlawful and against public policy. It must also be borne in mind that courts should always give effect to contracts entered into freely. That is an established principle of our law of contract. It creates certainty in the commercial world. However, every person should, as far as possible, be able to operate freely in the commercial and professional world. The Respondents in this matter therefore bear the onus of showing that the restraint of trade clause is unreasonable, unenforceable and/or contrary to public policy.

[33] Ordinarily a restraint will be unenforceable if it does not protect a trade connection and/or confidential information to which the ex-employee was exposed. What the Applicant needs to show is that there is confidential information to which the employee had access to and which she could transmit, if so inclined. It is not necessary to show that the employee has in fact used information confidential to the Applicant.¹

[34] Generally, a party seeking to enforce a contract in restraint of trade need only invoke the contract and prove a breach of its terms. A Respondent who seeks to avoid the restraint then bears an onus to demonstrate, on a balance of probabilities, that the restraint agreement is unenforceable, because it is unreasonable.² In *Basson*³ the Court set out the criteria for reasonableness.

¹ *Den Braven SA (Pty) Ltd v Pillay & Another* 2008 (6) SA 229(D) This judgment was dealt with in *Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another* 2009(3) SA 78(C) 83D-85B

² *Basson v Chilwan & Others* 1993 (3) SA 742 (A)

³ (i) Is there an interest of the one party deserving of protection at termination of the agreement?
 (ii) Is such interest being prejudiced by the other party?
 (iii) If so, does such interest so weigh up qualitatively and quantitatively against the interest of the latter that the latter should not be economically inactive and unproductive?
 (iv) Is there any other facet of public policy having nothing to do with the relationship between the parties, but which requires that the restraint should either be maintained or rejected.

[35] The proprietary interest that can legitimately be protected by a restraint generally speaking has been held to fall into two categories. The first is confidential information and the second is the relationship with customers whilst in the employ of Applicant.⁴ This is not denied by Wagner.

[36] Turning to case law *Magna Alloys and Research (SA) (Pty) Ltd v Ellis*⁵ stated the position in our law with regard to agreements in restraint of trade, and the principles enunciated therein have been applied in a long line of cases as succinctly captured in the Headnote as follows:

"The position in our law is that each agreement should be examined with regard to its own circumstances to ascertain whether the enforcement of the agreement would be contrary to public policy, in which case it would be unenforceable. Although public policy requires that agreements freely entered into should be honoured, it also requires, generally, that everyone should be free to seek fulfilment in the business and professional world. An unreasonable restriction of a person's freedom of trade would probably also be contrary to public policy, should it be enforced.

Acceptance of public policy as the criterion means that, when a party alleges that he is not bound by a restrictive condition to which he had agreed, he bears the onus of proving that the enforcement of the condition would be contrary to public policy. The Court would have to have regard to the circumstances obtaining at the time when it is asked to enforce the restriction."

[37] The principles set out in *Magna Alloys* were comprehensively re-stated in *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another*⁶

"A contractual restraint curtailing the freedom of a former employee to do the work for which he is qualified will be held to be unreasonable, contrary to the public interest and

⁴ Prinsloo and Van Niekerk Labour Court Manuel 39 - 40

⁵ 1984(4) SA 874 (A)

⁶ 1991 (2) SA 482 (T) at 502 J - 503 B

therefore unenforceable on grounds of public policy if the ex-employee (the covenantor) proves that at the time enforcement is sought, the restraint is directed solely to the restriction of fair competition with the ex-employer (the covenantee); and that the restraint is not at that time reasonably necessary for the legitimate protection of the covenantee's protectable proprietary interests, being his goodwill in the form of trade connection, and his trade secrets. If it appears that such a protectable interest then exists and that the restraint is in terms wider than is then reasonably necessary for the protection thereof, the Court may enforce any part of the restraint that nevertheless appears to remain reasonably necessary for that purpose."

[38] With regard to protectable interests, the court in *Sibex Engineering*⁷ defined proprietary interests, in the context of a protectable interest consisted of the relationships with customers, potential customers, suppliers and others that go to make up what is compendiously referred to as the "trade connection" of the business, being an important aspect of its incorporeal property known as goodwill. *"The second kind consisted of all confidential matter which is useful for the carrying on of the business and which could therefore be used by a competitor, if disclosed to him, to gain a relative competitive advantage. Such confidential material is sometimes compendiously referred to as "trade secrets".*

[39] In looking at protectable interests, Nestadt JA in *Rawlins and Another v Caravantruck (Pty) Ltd* [1992] ZASCA 204; 1993 (1) SA 537 (A), at 541 C-H remarked that:

"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 (Joubert General Principles of the Law of Contract at 149)."

⁷ Ibid at 502 D-E

[40] In the present matter, Wagner acknowledge that she voluntarily entered into the employment contract containing the restraint of trade clause. Apart from asserting that the restraint of trade clause cannot be enforced because of her right to practice her trade and earn a living would be negatively impacted as it would severely prejudice her freedom to be gainfully employed.

Constitutional rights

[41] Wagner's career is negatively impacted if the restraint of trade is operational against her as it indicates a stifling of competition albeit that according to her, her current employer is not a competitor. Limiting her occupation opportunities under these circumstances cannot be justified. The methodology mandated by s 39(2) of the Constitution must be implemented whenever a dispute about the validity of a restraint of trade agreement is before Court.⁸ With regard to freedom to choose a trade, a restraint of trade clause being a contractual term is subject to constitutional rights. Courts will invalidate and refuse to enforce agreements that are contrary to public policy. Section 22 of the Republic of South Africa Constitution Act, 1996 provides:-

"Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law."

Conclusion

[42] The test for a final interdict is trite. An Applicant must establish a clear right, a reasonable apprehension of immediate harm if the relief sought is not granted, and a lack of a suitable alternate remedy. Whilst it is so that applications of restraint are invariably urgent by their very nature.⁹ However, because of the prevailing penalty clause, the application has a hurdle. In any event the argument of the prescribed area

⁸ Supra Mozart Ice Cream franchises (Pty) Ltd v Davidoff and Another 85G-H

⁹ Supra Prinsloo Manual 38

as being overly broad and restrictive in applying to the whole of RSA with no clear justification or legitimate interest to warrant its application. Nothing turns on the time period occasioned by the delay in bringing the application earlier as Applicant explained the delay. However, the application fails on the issue of obtaining substantial redress in due course because of the penalty provision in the agreement.

[43] To sum up, firstly on the law and on the facts Wagner is working for a different company in a different position as a general manager in Compliance. She is not working for a competitor. The entire application is premised that Wagner used to do tenders and she will come and do tenders now and then she will disclose the margins and what profit Applicant made. Furthermore, her denial that the Applicant's business was particularly innovative averring there is nothing innovative about canvassing medical personnel to register on databases. Moreover, she denied that the *"medical recruitment industry in South Africa is a "niche market and very small"* and states that *"it is in fact a very vibrant market and falls under the general umbrella of recruitment. Almost all companies that focus on recruitment would be able to supply staff to medical facilities. While I understand that there are certain nuances that are particular to recruiting medical staff, there is nothing unique or sophisticated about it."*

[44] Secondly, the damages that Applicant may suffer is limited to a sum of R100 000.00 and therefore its remedy lies elsewhere. Thirdly, Applicant has failed to establish a breach of the confidentiality clause. Lastly the relief sought in terms of prayer 2.2 of the Notice of Motion against Solutions cannot stand as Solutions was not joined as a party. In the result Applicant has failed to make out a case for the relief it seeks.

Costs

[45] There are no reasons for the costs not to follow the result. Save for the wasted costs of 24 October 2024, which was occasioned by the First Respondent, who did not adhere to the time frames of the Notice of Motion to file her answering affidavit. Neither was any condonation sought for the late filing of the answering affidavit to adhere to the chosen dates and times¹⁰. Such costs are therefore awarded against the First Respondent on scale B.

Order

[46] Having heard counsel it is ordered

- 1) The application is dismissed;
- 2) The applicant is liable for the legal costs on a party and party scale;
- 3) First Respondent is liable for the wasted costs of the postponement to 24 October 2024, on scale B.



R K PARKER

**Ms Acting Justice of the High Court
Western Cape Division**

Appearances

Counsel for Applicant:

Adv Marten Daling

Instructed by:

Le Roux Sampson Inc. t/a S L Law

Counsel for Respondents:

Adv Adrian Montzinger

Instructed by:

E Rowan Inc.

¹⁰ Mamahule Traditional Authority v Mabyane & Others (2449/2021) [2021] ZALMPPHC 19 (14 May 2021)

Date of Hearing: 13 November 2024
Date of Judgment: 29 January 2025

This judgment was handed down electronically by circulation to the parties' representatives by email.