



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

CASE NO: 20986/2024

In the matter between:

SD RECRUITMENT (PTY) LTD

Applicant

Registration number: 2011/114952/07

And

FRANCOIS VRYBURG

First Respondent

SOLUTIONS FOR AFRICA (PTY) LTD

Second Respondent

Registration number: 2016/012416/07

IMMPLOY RECRUITMENT AGENCY CC

Third Respondent

Registration number: 2009/088597/23

JUDGMENT

PARKER, AJ:

Introduction

[1] This opposed application came before me as an urgent application to enforce a

covenant regarding restraint of trade. The Applicant seeks an order that mandates the First Respondent to comply with his restraint obligations to be employed by a competitor, as well as refraining from, or for soliciting business for, or rendering services to Second Respondent or Third Respondent, (and any entities associated with First and Second Respondent) for a period of 24 months from the date of the order, alternatively from 30 June 2024.

The Applicant

[2] The Applicant carries on business that provides innovative medical recruitment solutions across multiple industries including hospitality. It's primary focus is to provide innovative medical recruitment solutions to both the public and private health sectors across South Africa.

[3] It claims to have an established track record in professional medical recruitment by delivering quality medical recruitment solutions to assist clients fulfil their recruitment requirements, while minimizing both cost and time associated with the recruitment process. According to the Applicant, the medical recruitment industry in South Africa is a niche market and very limited.

[4] Relative to this matter, the services it renders are by providing contract locum staffing, with the majority of its medical recruitment focused on 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 constitute a trade secret. Secondly, in the private sector, the Applicant contends it has

developed a relationship with clients over years, making its customer connections of utmost importance to it.

Issues for determination

[5] The issues are whether:

- 5.1 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;
- 5.2 the validity of the restraint of trade agreement;
- 5.3 the Applicant was entitled to enforce the confidentiality and restraint of trade undertakings because the First Respondent has breached his confidentiality and restraint undertakings;
- 5.4 the Applicant has established the existence of a protectable interest, if it is found that the restraint is applicable;
- 5.5 the respondents have harmed or prejudiced that interest;

The Respondents

[6] All Respondents opposed the application. First Respondent (Vryburg) states he is a consultant to Second Respondent and its entities. According to the analysis conducted by Applicant, First Respondent's attorneys described the Second Respondent (hereinafter called Solutions) as the holding company of the Third Respondent, (herein after called Immploy). It observed that eight entities, each having their principal place of

business at the same address, operating under the umbrella of Solutions. Furthermore, Solutions offer solutions including that of Third Respondent and The Compliance Bureau (Pty) Ltd (the latter is not cited as a party). Applicant contends that Immploy is a direct competitor, does the exact same business as the Applicant, namely that of medical recruitment with its main focus in the public sector where it has to provide tenders or responses to a request for a quote. On the contrary, Vryburg argues that he serves as a consultant for the group.

Urgency

[7] The Applicant states that it became aware during the first two weeks of August 2024, that First Respondent had accepted a position as general manager with the Second Respondent. This resulted in it appointing its attorneys Herold Gie to enforce the restraint of trade as Vryburg was at the very minimum indirectly involved and associated with a direct competitor of applicant. However, the attorneys failed to act timeously, resulting in new attorneys being appointed on 1 September 2024. A letter of demand was issued on 3 September 2024. This was met with opposition by First Respondent attorneys dated 4 September 2024, specifically regarding (a) the matter of urgency, and (b) and that the restraint of trade was concluded at the end of the employment term. Furthermore, Mr Moosa (for the Applicant) was aware as far back as 5 August 2024 of Vryburg's new employment, and Applicant should have launched the application sooner. Applicant argues that it had two sets of papers to prepare including that of the other erstwhile employee a Ms Wagner. I heard argument on both matters simultaneously.

[8] In holding Applicant to a lack of urgency, First Respondent advances the decision, in 168 Short Term Solutions Johannesburg (Pty) Ltd & Styles and Company (Pty) Ltd v Leslie Heppell & Alternative Risk Solutions¹ where the matter was struck from the roll with costs due to the Applicant taking 48 days to approach the court.

[9] The Applicant became aware during the period of 50 – 55 days, specifically from 5 August - 14 August 2024. On this basis the argument levelled by Respondents against Applicant was that you cannot allege a protectable interest and then wait for 30 days, whilst a person secured a new position and establishes him by making life changing decisions. Vryburg expressed dissatisfaction with the explanation of delay occasioned by a previous attorney stating that Applicant should have acted sooner. Especially when the invalidity of the restraint was made by Vryburg's attorney on 4 September 2024.²

[10] The essence of urgency as agreed by the Applicant is that time runs out if the matter would be pursued in the normal course. By the time a litigant reaches Court, the remedy will have been eroded. There is nothing that will give a litigant satisfactory return for the harm that was caused if it is not brought on an urgent basis. The argument led by Respondents are, that there was never any urgency on 24 October 2024. The explanation for the delay was therefore inadequate in these circumstances.³ especially where the Applicant seeks relief on an urgent basis. In this matter I am of the view the urgency was self-created.

¹ 168 Short Term Solutions Johannesburg (Pty) Ltd and Another v Heppell and Another (27664/2022) [2023] ZAGPJHC 300 (4 April 2023)

² *Supra* at para [7]

³ *Supra* para [15]

Employment

[11] It is common cause that First Respondent was employed by the Applicant for the period 1 June 2019 - 30 June 2024 in the role of Director Operations, during which time he had access to highly confidential information. A mutual separation agreement terminated the employment relationship. The First Respondent was not initially employed under a restraint of trade agreement however according to the Applicant, First Respondent agreed to sign such restraint agreement at the end of the termination which is contained as an annexure to the mutual separation agreement. The Applicant contends that the 24 months restraint is reasonable given its footprint across South Africa.

The Restraint

[12] An extract of the relevant clauses of the restraint of trade agreement reads:

“

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 are, 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."

Employment

[13] Vryburg's responsibilities were to manage and oversee, and had access to the Applicant's medical recruitment sector of the business, along with its tender and RFQ department. He had access to all company information, which including the company financial statements, supply information, candidate database and information, pricing and costing information, the Applicant's strategies and access to all of its clients. He was involved in the bulk of the operational side of its business, possessing an in depth understanding of it.

[14] Vryburg disputes the claim that he breached the confidentiality and knowledge of the trade secrets, customer relations and the margins used by Applicant in tendering for work in the public sector since Applicant failed to advance facts to substantiate the alleged breach. Applicant persists that in the course of his employment with the Applicant, the First Respondent had substantial, ongoing exposure to highly confidential information pertaining to the Applicant's business. Vryburg avers that the aforesaid information is of no value to use at Solutions or its related entities.

Duress

[15] A cardinal defence raised by Vryburg, is that he claims he was never subjected to a restraint during his employment. The confidentiality clause is invalid and does not impose any binding obligations on him. His last working day was 28 June 2024. No restraint of trade or confidentiality agreement existed at that point. On 1 July 2024, Mr Moosa (for the Applicant) called him back to the office, and at that point, it is alleged Mr Moosa had still not paid what was owed to him. He alleges the meeting was confrontational. He claimed it was hostile, confrontational and intimidating. It was then that he was presented with the mutual separation agreement that included the confidentiality agreement. He had little time to review it or seek legal advice. Without fully appreciating the contents thereof, Vryburg signed it, which he says was done under duress. He contends that he was owed an amount of R460 000,00 by the Applicant and he desperately needed the money and *"was not sure how else I could recover it"*.

[16] Turning to the merits of the alleged duress, Applicant denies the averments made by Vryburg and argues in order to avoid a contract on the basis of duress, it is necessary

for a party to allege and prove that there was a threat of considerable harm to himself or their family, such as to induce a reasonable fear of an imminent or inevitable evil.⁴ For duress to exist the **BOE Bank Bpk v Van Zyl** enumerated elements to be established in respect for economic pressure, although in *Medscheme Holdings (Pty) Ltd & Another v Bhamjee*⁵, Nugent JA found as follows:

“English and American law both recognize that economic pressure may, in appropriate cases, constitute duress that allows for the avoidance of a contract.”

[17] Applicant advances,

“That principle (that of duress) has yet to be authoritatively accepted in our law such cases are likely to be rare.”⁶

[18] The Applicant argues that the allegations regarding duress could never succeed. Firstly, it is of a financial nature and secondly falls far short of a threat of “*considerable evil*”.

[19] On Mr Vryburg’s version he was afraid that Applicant was not going to pay him and for that reason he signed the restraint of trade agreement.

[20] In general, financial duress does not exist in our law and Applicant dismisses the contention by Vryburg, as he does not specify whether he did not get that money he would

⁴ *BOE Bank Bpk v Van Zyl* 2002(5) SA 165(C) at para [36]

⁵ 2005(5) SA 339 (SCA)

⁶ *Ibid*

be ruined. It must be a threat of considerable evil which induce a fear of imminent of inevitable evil. Not financial rupture, considerable evil. That it says is the test.

[21] In a nutshell the First Respondent contends that there is no valid and enforceable restraint of trade agreement in place since it never regulated the employment relationship. Secondly even if a valid mutual separation agreement is in place, it was done under duress.

[22] This brings to bear the question of the bargaining power at the conclusion of the restraint of trade agreement. I cannot ignore the circumstances as described by Vryburg of 1 July 2024. Placing myself in the shoes of the First Respondent. I cannot ignore his fears although something more, I concede, the facts peculiar to the Medscheme case were required. The First Respondent also would have had other remedies available to pursue monies owing to him, regardless of whether he signed the restraint of trade. However, the timing of the signature to this restraint agreement seems to be ill timed, influencing my decision to favour Vryburg given the circumstances surrounding the restraint of trade. In my view it was unconstitutional to present the restraint agreement after the last day of work had passed because of the methodology mandated by s 39(2) of the Constitution.⁷

"For it is not unlawful, in general, to cause economic harm, or even to cause economic another, nor can it generally be unconscionable to do so in a competitive economy. In commercial bargaining the exercise of free will (if that can ever exist

⁷ Mozart Ice Cream Franchises (Pty) Ltd v Davidoff and Another 2009(3) SA 78(C) 85G-H

in any pure form of the term) is always fettered to some degree by the expectation of gain or the fear of loss.⁸

"Hard bargaining is not the equivalent of duress, and that is so even where the bargain is the product of an imbalance in bargaining power. Something more would need to exist for economic bargaining to be illegitimate or unconscionable, and thus to constitute duress."⁹

The breach

[23] The First Respondent argued that he had not breached the fundamental restraints set out in the applicant's restraint of trade covenant as it is invalid and not binding on him. Furthermore, he contends that the applicant's assertion that he was privy to the confidential protection information is unfounded as this information is in the public domain. Lastly, the First Respondent also contends that any information he may have been privy to does not assist him or the Third Respondent in carrying on the Third Respondent's business.

[24] It is also argued that the breaches complained of by Applicant are empty because the provisions at paragraph 2.1.2 of ("Annexure 1") does not apply, as he is not employed by a client of Applicant or by Solutions. He is an independent contractor. The conduct listed in clauses 2.4.1 - 2.4.3 has not been established by Applicant. Lastly Applicant has

⁸ Ibid

⁹ Supra

Medscheme Holdings (Pty) Ltd and Another v Bhamjee (214/2004) [2005] ZASCA 48; [2005] 4 All SA 16 (SCA); 2005 (5) SA 339 (SCA) (27 May 2005) (paragraph [18] at 346A-D)

failed to establish that he is either directly or indirectly in competition with the Applicant's business. No proof was provided by Applicant that confidential information was disclosed.

[25] The purpose of the restraint of trade is to ensure that a person adheres to contractual terms that have been agreed upon., to hold or reason otherwise would render the majority of the provisions relating to restrictions in restraint covenants that pertains to business relationships in the service industry completely worthless. This would undermine the purpose of a restraint covenant and render it extremely challenging, if not impossible, for an entity in the position of the applicant to demonstrate that the provisions of a restraint covenant have been breached. This is due to the likelihood that the affected clients will support the entity or person/s in the position of the first and second respondent.

[26] It is self-evident that the same must principle must be applied to confidential information. Similarly, it would be nearly impossible to establish that confidential information had been disclosed to a third party, unless direct forensic evidence is presented in this regard. The possibility that the Vryburg may disclose the Applicant's confidential information to the Second and Third Respondents is still present and must be carefully considered.

Selective enforcement because of a vendetta extraneous motivations

Public policy

[27] Respondents argued that the issue of the reasonableness of the restraint should still be a consideration¹⁰.

¹⁰ Arrow Altech Distribution (Pty) Ltd v Byrne and another [2008] 1 All SA 356 (D) [para 4](f)

"A Court must make a value judgment with two principle policy considerations in mind in determining the reasonableness of a restraint.

- (i) The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim pacta servanda sunt.*
- (ii) One point should be cleared up at the outset. Although relief may be sought, as it is here in the alternative, in the form of an interim interdict, if in substance the relief is for an interdict to endure for the entire unexpired period of the restraint, it should be treated as substantially an application for final relief (see BHT Water Treatment (Pty) Ltd v Leslie & Another 1993 (1) SA 47 (W) at 55A-E). This was the submission of Mr Marais SC, who appeared for the respondents. Mr Sutherland SC, who appeared for the applicant, together with Mr Peter, did not contend otherwise and in fact conceded as much.*

[28] As the Applicant is seeking relief of a final nature against the Respondent and there are disputes of fact, the proper approach to follow was set out by Plascon Evans Paints Ltd v Van Riebeeck Paints Ltd,¹¹ carries, which applies in this case, given the amount of factual disputes that have arisen on the papers. The denial on those issues that are material for the Applicant to succeed with the relief, those are the issues that is in dispute, that the Respondents get the benefit of the relief.

¹¹ Burmbuild (Pty) Ltd v Ndzama (EL 1248/2012, ECD2948/2012) [2013] ZAECELLC 3; [2013] 2 All SA 399 (ECG) (8 January 2013), para 5

[29] Moving forward to the enforcement of the restraint and whether it is reasonable in the circumstances.

"The first is the public interest that requires that parties should comply with their contractual obligations. The second is that all persons should, in the interest of society be productive and be permitted to engage in trade and commerce."

[30] It was agreed that Applicant has failed to establish a compelling reason for Vryburg to be denied to take part in a normal commercial traffic and therefor, the Applicant has not made out a case. They have not returned to contest the reasonableness allegation, or at least, on the Respondent's version that it is unreasonable.

Onus

[31] In order to enforce a contract in restraint of trade, a party must merely invoke the contract in a restraint of trade and demonstrate a breach of its terms. If that is accomplished, the onus shifts to the respondent to demonstrate on a balance of probabilities that it will be unreasonable to enforce restraint. In such event Respondent who seek 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.¹²

[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 that courts are required to always give effect to contracts entered into freely. That is an established principle of our law of contract. It creates certainty in the

¹² Basson v Chilwan & Others 1993(3) SA 742 (A)

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 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. All the Applicant needs to show is that there is confidential information to which the employee had access to and which he could transmit, if so inclined. It is not necessary to show that the employee has in fact used Applicant's confidential information.¹³

Reasonableness

[34] The Court in **Basson v Chilwan and Others, supra**,¹⁴ held that to determine the reasonableness or otherwise of the restraint of trade provision should be assessed by asking the following four questions:

- “(a) Is there an interest of the one party deserving of protection at termination of the agreement?”*
- “(b) Is such interest being prejudiced by the other party?”*
- “(c) 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?”*

¹³ Den Braven SA (Pty) Ltd v Pillay & Another 2008(6) SA 229(D)

¹⁴ Basson v Chilwan and Others (332/1991) at 767 G-H [1993]

- (d) *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] In weighing up the interest to be protected, *"if the interest of the party sought to be restrained weighs more than the interest to be protected, the restraint is unreasonable"*¹⁵

Protectable interests

[36] Protectable interests, were dealt with in Sibex Engineering Services (Pty) Ltd v Van Wyk.¹⁶

"The proprietary interests that could be protected by such a restraint were essentially of two kinds. The first kind 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".

[37] With regard to goodwill and protectable interests, Nestadt JA in Rawlins and Another v Caravantruck (Pty) Ltd¹⁷ quotes:

¹⁵ Supra [19]

¹⁶ 1991 (20 SA 482 (T)). Med 24-7 (Pty) Ltd v Kruger and Others (5872/2021) [2022] ZAFSHC 79 (19 April 2022). [See also Experian South Africa (Pty) Ltd v Haynes and Another 2013(1) SA 135 (GSJ) at para 17] **at 502 D-E**

¹⁷ Rawlins and Another v Caravantruck (Pty) Ltd [1992] ZASCA 204; 1993 (1) SA 537 (A), at 541 C-H

"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."

[38] Learning through past cases, in *Morris (Herbert) Ltd v Saxelby*¹⁸ it was said that the relationship must be such that the employee acquires "such personal knowledge of and influence over the customers of his employer . . . as would enable him (the servant or apprentice), if competition were allowed, to take advantage of his employer's trade connection ..." and was applied in *Recycling Industries (Pty) Ltd v Mohamed and Another*.¹⁹

"Whether the criteria referred to are satisfied is essentially a question of fact in each case, and in many, one of degree. Much will depend on the duties of the employee; his personality; the frequency and duration of contact between him and the customers; where such contact takes place; what knowledge he gains of their requirements and business; the general nature of their relationship (including whether an attachment is formed between them, the extent to which customers rely on the employee and how personal their association is), how competitive the rural business are, in the case of a Salesman, the type of product being sold, and whether there is evidence that customers where last after the employee left".

(Joubert *General Principles of the Law of Contract* at 149). Heydon *The Restraint of Trade Doctrine* (1971) at 108, quoting an American case, says that the 'customer contact' doctrine depends on the notion that 'the employee, by contact with the customer, gets the customer so strongly attached to him that when the employee quits and joins a rival he automatically carries the customer with him in his pocket'

¹⁸ *Morris (Herbert) Ltd v Saxelby* [1916] 1 AC 688 (HL) at 709

¹⁹ 1981 (3) SA 250 E at 256 C - F

[39] In the thirty-eight years since *Magna Alloys and Research*²⁰ was decided, the principles enunciated in that case have been applied in a long series of cases, establishing the position in our law with respect to agreements in restraint of trade. The Headnote succinctly encapsulated the court's approach.

"The approach, followed in many South African judgments, that a covenant in restraint of trade is prima facie invalid or unenforceable stems from English law and not our common law, which contains no rule to that effect. 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. In addition, the Court would not be limited to a finding in regard to the agreement as a whole, but would be entitled to declare the agreement partially enforceable or unenforceable."

²⁰ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984(4) SA 874 (A)

[40] The principles set out in *Magna Alloys supra* were comprehensively re-stated by Stegman J in *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another*²¹ as follows:

“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 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.”

[41] All that the Applicant must demonstrate is an agreement in restraint of trade and the actions of the employee, that he violated the restraint laws by visiting a competitor. If there is an agreement where the restraint of trade say you may not for 24 months work for a competitor, the moment the employee goes to a competitor the breach is established. According to the Applicant, if it is demonstrated that an employee had access to trade secrets, confidential information and that employee is now with a competitor, that is sufficient, as the employee can, if so inclined divulge that information. The very ratio underlying the argument was that the Applicant should not have to content itself with

²¹ *Sibex Engineering Services (Pty) Ltd v Van Wyk and Another* 1991 (2) SA 482 (T) at 502 J - 503 B

crossing its fingers and hoping that the First Respondent would act honourably or abide by the undertakings that he has given.

[42] It is common cause that Mr Vryburg was a director of the applicant and held a senior position. However, he is currently employed as an Independent Consultant with Second and Third Respondents and connected entities.

[43] I accept that the holder of the restraint does not have to show that the employee has in fact utilized information confidential to it. It is enough if it is shown that the employee could do so if so inclined.²²

"the very ratio underlying the bargain was that the applicant should not have to content itself with crossing its fingers and hoping that the first respondent would act honourably or abide by the undertakings that he has given."

[44] When one examines what transpired, initially, he intended to sign the mutually separation agreement. Then, when he got to the meeting he signed a restraint of trade. It comprises two documents as an annexure to the mutual separation agreement.

Margins

[45] The entire application is about the margins. Applicants alleged that now *"everybody is going to know how much money we make, as both these companies Immploy, which they operate in the public medical recruitment space."*

²² BHT Water Treatment (Pty) Ltd v Leslie & Another 1993(1) SA 47 (W) at 57 J – 58 D

[46] The first respondent argues that the margins can be determined by the amount of compensation the locums receive. This is because the locums are aware of their compensation and communicate with one another, and therefore is in the public domain (payrate) that the company receives. Discovering the margin is not an exceptionally clandestine endeavour.

[47] Furthermore, Vryburg contends that the confidentiality information that the Applicant is attempting to safeguard is ambiguous, as it is not explicitly delineated in the confidentiality agreement. It was expounded on only in their founding papers as to what Applicant says is confidential. On closer scrutiny of the confidentiality agreement under "Annexure A", there are no specifics and no mention is made of locum database, benefits to locums and clients, billing rates, billing practices, margins and financial statements.

[48] In short, establishing whether a clause should be enforced involves considering whether the parties negotiated with equal bargaining power and understood what they agreed to. In this matter, it is uncertain whether the parties possessed equal bargaining power, and whether they understood the terms of the agreement.

[49] This means that a court may refuse to enforce specific contractual terms of an agreement where that term itself would be inconsistent with public policy.

[50] I cannot ignore what First Respondent says, he now has a different role with Second Respondent as a consultant. In the result, the facts demonstrate that the First Respondent may not have voluntarily consented to the terms of the subject restraint

covenant as Applicant intended it to be applied. This brings me briefly to the public policy considerations. In this context, public policy, fails to be constitutionally infused.

[51] For obvious reasons, this refusal by a court must be used sparingly. Generally, public policy dictates that parties should be bound by their contractual obligations embodied in a contract. This is primarily where the contract was entered into freely and voluntarily. In this case, the subject matter of the restraint covenants was specific and very limited in effect and the conclusion the agreement is questionable.

Conclusion

[52] There are limitations to confidential information, as was held in Arrow Altech Distribution (Pty) Ltd v Byrne and Another.²³

“[43]

I am of the view that the legal protection afforded to this type of confidential information is limited to a certain extent. It seems clear that the law, whilst prohibiting an employee from taking his employer's customer list, or deliberately committing its contents to memory, nevertheless recognises that, on termination of an employee's employment, some knowledge of his former employer's customers will inevitably remain in the employee's memory. This leaves the employee free to use and disclose such recollected knowledge, in his own interests, or in the interests of anyone else, including a new employer who competes with the old one: Freight

²³ Arrow Altech Distribution (Pty) Ltd v Byrne and Another [2008] 1 All SA 356 (D)

Bureau (Pty) Ltd v Kruger and another 1979 (4) SA 337(W) at 341E-F;
Roberts v Elwells Engineers Ltd [1972] 2 All ER 890 (CA) at 894f-h.

[71]

The relief sought by the applicant with regard to unlawful competition is very wide. It seeks an order interdicting and restraining the third and fourth respondents from competing unlawfully with the applicant. No mention is made of area or duration. The culpability of third and fourth respondents depended on the first and second respondent. They were the alleged conduit of the trade secrets and information about customer Connections. With their liability it is difficult to see how third and fourth respondents could be restrained from competing."

Constitutional imperatives

[53] Whilst parties are at liberty to contract the terms of employment, 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 Constitution 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.

It must be borne in mind that this very wide contract is applicable to every salaried employee from top to bottom of the applicant. The list of alleged trade secrets and

*confidential information and other matters is couched in the widest possible terms.'*²⁴

[54] In the result, the Application fails at urgency. Even if I am wrong on urgency, the fact that Vryburg signed a restraint at the end (appears in my view it was after) his termination of employment in the manner as alleged is a cause of concern.

[55] As for the issue of the margins, I agree that its secrecy by virtue of the disclosures in the pleadings are now in the public domain. In any event it is Vryburg's argument that there was nothing secretive about these margins because it is publicly available. However, suffice to point out that work in the public sector is by definition public. The appointment to render services to a public sector department is a process open to the public. The information a tenderer submits in support of its bid becomes public knowledge as soon as it enters the tender bidding process. That information is available to a member of the public on request in terms of the Public Access to Information Act.

[56] Vryburg admits that the public sector opportunities are pursued through the submission of a tender. He denies that the margins of Applicant are a trade secret. The rate a particular tenderer is willing to pay its locums is circumscribed and in any event in the public domain. The information is easily shared amongst companies that are appointed on the same tender by the department. Medical professionals pick and choose between different companies on the tender panel and disclose the rates of another company in order to negotiate a better rate. Also, the department, when a tenderer is appointed, in any event propose a rate it is willing to pay to a locum. The successful

²⁴ Supra Page 373 of [2008] 1 All SA 356 (D) para [79]

tenderer is then obliged to add its own "profit" to the charge out rate the department is willing to pay. This, Vryburg argued, hardly constitutes information of a confidential nature. He accepted that Applicants customer connections are important, however it has failed to show that he has been attempting to solicit any of its clients for the Second and Third Respondents benefit.

Ulterior motive

[57] Vryburg referred to an ulterior motive for the application. It was conceded by Applicant there is some animosity between Immploy and the Applicant. However, the animosity is not the reason why Applicant moved the application.

Conclusion

[58] In the case of Vryburg in my view I have difficulty to enforce a restraint in circumstances where, firstly, he was not subject to one during his employment. More importantly it was concluded after Vryburg's employment ended, when on 1 July 2024 the circumstances which led to Vryburg signing the Restraint, on Vryburg's version raises a public policy consideration. Whilst it is so that Restraints of trade can be concluded at any time during the employment term, it is the timing of this specific agreement which is questionable. Vryburg in his opposing affidavit, described the atmosphere at the meeting on 1 July 2024. I searched to find case law similar to the facts of this case, involving a restraint signed so late. In respect of unreasonableness it is quite apparent that it will be unreasonable to enforce a restraint in these circumstances. The whole notion of a restraint of trade is to protect some interest of the company, not to vindicate some personal vendetta to be able to keep another person out of a job.

[59] For obvious reasons, this refusal by a court must be used sparingly. Generally, public policy dictates that parties should be bound by their contractual obligations embodied in a contract. This is primarily where the contract was entered into freely and voluntarily. In this case, the subject matter of the restraint covenants was specific and very limited in effect.²⁵

[60] In *Simah Risk Advisors (Pty) Ltd v Van Niekerk and Others*²⁶, it was held that Public policy, in this context, falls to be constitutionally infused. This means that a court may refuse to enforce specific contractual terms of an agreement where that term itself, alternatively, the enforcement thereof, would be contrary to public policy. I take a dim view of the restraint being imposed on the First Respondent by the Applicant as such a late stage.

Counter application

[61] With regard to the counter application the First Respondent asked for restraint of trade be declared invalid and of no force and effect. Further, as to be reinstated as a director and for payment of monies owing, it was argued by the Applicant that this is untenable to the Applicant because he cannot be a director of the Applicant and a general manager of Immploy. I agree. Lastly there are insufficient facts before me regarding the alleged monies owing by Applicant to Vryburg.

²⁵ *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC)

²⁶ *Simah Risk Advisors (Pty) Ltd v Van Niekerk and Others (Reasons)* (15110/24) [2024] ZAWCHC 369 (14 November 2024)

Costs

[62] Costs should follow the event. The Applicant is to bear the costs of this application, excluding the wasted costs of 24 October 2024, which was occasioned by the Respondents, who did not adhere to the time frames of the Notice of Motion. The First Respondent did not adhere to the time frames set out in the Notice of Motion due to the conduct of First Respondent the matter was postponed on 24 October 2024.

Order

[63] Having heard counsel it is ordered that:

- 1) The Application is dismissed.
- 2) The Applicant is liable for legal costs on Scale B.
- 3) First Respondent to bear the costs of the postponement of 24 October 2024 on Scale B;
- 4) Prayer one of the Counter Application is upheld.



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.

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.