



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)**

- (1) REPORTABLE: YES
- (2) OF INTEREST TO OTHER JUDGES: YES
- (3) REVISED.

SIGNATURE

DATE: 14 May 2025

Case no: 2024-065728

In the matter between:

SOURCEWORX (PTY) LTD

Applicant

and

DATACENTRIX (PTY) LTD

Respondent

Summary

In the absence of an enforceable restraint of trade, an agreement between two companies to alter an employee's working conditions merely to suit the wishes of the employee's former employer is contrary to public policy.

A court seized with an application to refer a factual dispute to the hearing of oral evidence or to trial under Rule 6 (5) (g) is of necessity also seized with the main application. Litigants should not attempt to enrol interlocutory applications for referrals to oral evidence or to trial separately from the main applications from which they arise.

JUDGMENT

WILSON J:

- 1 The question at the centre of this case is whether it is permissible, in the absence of an enforceable restraint of trade, for a company to agree to alter

an employee's working conditions merely to suit the wishes of the employee's former employer. I conclude that such an agreement is plainly contrary to public policy, and should not be enforced.

The dispute

- 2 The applicant, Sourceworx, is an IT company. Sourceworx employed Khumo Mosiane as one of its managers. Sourceworx then entered into an agreement with the respondent, Datacentrix, to provide IT maintenance services to Transnet. Datacentrix had been contracted by Transnet to provide a range of IT services. Sourceworx provides some of those services as a subcontractor of Datacentrix. In clause 18 of their subcontract, Datacentrix and Sourceworx agreed that neither would poach the other's employees for the duration of the contact, or for a period of 12 months after its termination.
- 3 Mr. Mosiane has apparently been providing IT services to Transnet as an employee of one of Transnet's contactors or subcontractors since 2008. His employment with Sourceworx was merely the latest iteration of his underlying relationship with Transnet. It is undisputed on the papers that, even though it does not employ him, Transnet has come to value Mr. Mosiane's work, and is keen that he be retained to work on its systems by whomever is contracted or subcontracted to do so.
- 4 In early November 2023, Mr. Mosiane became dissatisfied with his employment at Sourceworx. On 9 November, he resigned. No doubt realising Mr. Mosiane's value to its subcontract with Datacentrix, Sourceworx's managing director, a Mr. Dyasi, sought to persuade him to stay on at

Sourceworx. Mr. Dyasi's efforts were not successful. Mr. Mosiane refused to withdraw his resignation, and he went on his way.

5 On 8 November 2023, the day before Mr. Mosiane's resignation from Sourceworx, Datacentrix advertised a post as a service integration manager within its own structures. Mr. Mosiane applied for that position, together with 72 others. Mr. Mosiane turned out to be the successful candidate. He was offered the post on 12 December 2023, and accepted it more or less on the spot. He commenced his employment with Datacentrix on 18 December 2023.

6 Sourceworx read between the lines, and came to the conclusion that Datacentrix had poached Mr. Mosiane's services for itself, in breach of clause 18 of the subcontract. Datacentrix denies this. It puts up an affidavit from Mr. Mosiane, in which Mr. Mosiane says that he had been maltreated at Sourceworx, and that he resigned exclusively for that reason. The fact that Datacentrix happened to have advertised a post for which Mr. Mosiane was well-qualified the day before his resignation was, Mr. Mosiane and Datacentrix both say, a happy coincidence, rather than indicative of any strategy to lure Mr. Mosiane away from Sourceworx.

7 Whatever the truth, Mr. Dyasi saw what had been done as a breach of clause 18 of the subcontract. On 14 January 2024, Mr. Dyasi wrote to Datacentrix and demanded an undertaking that Mr. Mosiane no longer be engaged by Datacentrix on Datacentrix's work for Transnet, which had been partly subcontracted to Sourceworx. The demand was, in substance, that Mr. Mosiane not be permitted to work on Transnet's systems at Datacentrix. It seems clear from the papers that Datacentrix did not want this outcome. Mr.

Mosiane was valuable to Transnet, and, at least in Datacentrix's view, important to its work servicing Transnet's needs.

8 Datacentrix stalled for a while, but Mr. Dyasi was persistent. He threatened to cancel the subcontract because of what he said was a breach of clause 18. Finally, on 13 March 2024, Datacentrix offered to settle the dispute on the basis that Mr. Mosiane would be removed from the Datacentrix's Transnet work, and had in fact already been so removed. But Datacentrix added two conditions. It first stated that it made no admission that it had poached Mr. Mosiane, whether in breach of clause 18 or otherwise. Secondly, it asked that Mr. Mosiane's removal from the Transnet project be accepted in full and final settlement of any dispute on the subcontract. In other words, Datacentrix wanted to foreclose the possibility that Sourceworx would cancel the subcontract on the basis that Datacentrix had poached Mr. Mosiane from it. A settlement agreement on these terms was forwarded to Sourceworx for Mr. Dyasi's signature.

9 On 28 March 2024, Mr. Dyasi wrote an email to a Mr. Taljaard, Datacentrix's legal operations executive, in which he accepted Mr. Mosiane's removal from the Transnet project as "satisfying the undertaking" Mr. Dyasi had originally demanded. Mr. Dyasi nonetheless refused to sign the settlement agreement unless Datacentrix paid Sourceworx R200 000, which Mr. Dyasi described as the sum necessary to "compensate" Sourceworx. It is not clear on the papers what Sourceworx was being compensated for, but I need not decide that issue.

- 10 The correspondence dragged on. In an email sent on 23 April 2024, Mr. Taljaard declined to pay the amount Mr. Dyasi asked for. Mr. Taljaard told Mr. Dyasi that “Datacentrix will unfortunately not be entertaining this or any other additional requests in addition to the originally agreed settlement removing Mr. [Mosiane] from the Transnet account”. Mr. Taljaard reminded Mr. Dyasi that “Sourceworx initially tabled [Mr. Mosiane’s removal from the Transnet project] as a full resolution to amicably settle the dispute at hand and Datacentrix fulfilled this request”.
- 11 It seems that the negotiations reached stalemate at that point. However, it soon became clear that Mr. Mosiane had, Datacentrix’s representations to the contrary notwithstanding, continued to have some level of involvement in Datacentrix’s work for Transnet. Datacentrix says that Mr. Mosiane was “redeployed” from his management position in the Transnet project, to a position as a “solution architect”. While that position does not entail direct involvement with the Transnet project, Datacentrix admits that Mr. Mosiane “is from time to time consulted by other employees of [Datacentrix] in various matters involving various clients”. These matters may “from time to time include matters relating to the Transnet network project” (paragraph 56 of Datacentrix’s answering affidavit).
- 12 It is, in addition, impossible to read Mr. Mosiane’s affidavit as anything other than an admission that he still works on the Transnet project. In paragraph 35 of his affidavit, Mr. Mosiane “emphasise[s] that [he] does not work as part of the Transnet operational support team”. At paragraph 34, however, he confirms that being unable to work on the Transnet project in any capacity

whatsoever would “effectively preclude [him] from continuing [his] employment” with Datacentrix.

- 13 On any analysis of the Datacentrix’s case, then, Mr. Mosiane no longer works as part of the team within Datacentrix that is dedicated to Transnet work, but he does work on the project in a “consultative” capacity. Such is his involvement with the Transnet project that, by Mr. Mosiane’s own admission, he would not be able to continue to work for Datacentrix if he could not continue in that consultative role.

The urgent application

- 14 Appreciating this reality, Sourceworx took Mr. Mosiane’s continued involvement in the Transnet work as a breach of the undertaking that Mr. Mosiane had been removed from the Transnet project that Datacentrix had given in its 13 March 2024 letter.
- 15 On 14 June 2024, Sourceworx instituted an urgent application in this court, in which it sought two orders of substance. In the first place it asked that Datacentrix be interdicted for a period of 12 months from “directly or indirectly utilising the services or knowledge of Khumo Jacob Mosiane in any capacity whatsoever for purposes of the Transnet Project” as defined in the subcontract between Datacentrix and Sourceworx.
- 16 Secondly, it sought an interdict restraining Datacentrix from poaching any of its employees, also for a period of 12 months. This is, on the face of it, less than Sourceworx is entitled under clause 18 of the subcontract, but since Mr.

Stevens, who appeared for Sourceworx, confirmed in oral argument that this relief is no longer persisted with, I need not explore that anomaly.

17 On 25 June 2024, Windell J removed the application from her urgent roll.

The application to refer a dispute of fact to oral evidence

18 Sourceworx persists in the first order it sought, but it has identified what it says is a material dispute of fact on the papers. That dispute concerns the extent to which Mr. Mosiane continues to be involved in the Transnet project. In its founding affidavit, Sourceworx relies on emails between Transnet and Mr. Mosiane which, on their face, show that Mr. Mosiane was still directly involved in servicing network requests from Transnet in early May 2024. This is incompatible with the version put in Datacentrix's answering affidavit: that Mr. Mosiane merely "consults" with those of Datacentrix's employees who work on the project.

19 An interlocutory application to refer the question of the extent of Mr. Mosiane's involvement in the Transnet project to oral evidence was enrolled before me on 2 May 2025.

20 However, it is clear to me that no referral to oral evidence is necessary. While it is true that there is a dispute between the parties about the extent to which Mr. Mosiane is involved in the Transnet project, that dispute is plainly immaterial to the relief sought. Sourceworx asks for an order restraining Datacentrix from "directly or indirectly utilising the services or knowledge of [Mr. Mosiane] in any capacity whatsoever for purposes of the Transnet

Project” (my emphasis). Mr. Stevens confirmed that the full extent of this relief is persisted with.

21 In these circumstances, it makes no difference to Sourceworx’s case what Mr. Mosiane does on the Transnet project. If the undertaking not to engage him on the project is enforceable, and the requirements of interdictory relief have otherwise been met, Sourceworx is entitled to its relief.

22 Mr. Stevens and Mr. Kromhout, who appeared for Datacentrix, were agreed that, if I reached that conclusion, then I would be at large to decide the main application on the papers as they stand. In opposing the application to refer the matter to oral evidence, Datacentrix had originally suggested that, if there was to be a referral, it should be to a full trial of a broad range of issues. However, Datacentrix brought no formal application to refer the matter to trial, and Sourceworx opposed a referral of that breadth. In truth, I do not think that many of the issues Datacentrix raised were truly material to Sourceworx’s relief. For the most part, they did not amount to genuine factual disputes. They were mere disagreements of law. But I need not explore those issues further. Mr. Kromhout was ultimately content to argue the merits of the application on the papers as they stand.

23 The approach counsel agreed is consistent with Rule 6 (5) (g) of the Uniform Rules of Court. That Rule makes clear that a reference to trial, or to oral evidence on a discrete issue, is only appropriate once a court is satisfied that an application “cannot properly be decided on affidavit”. The party seeking such a referral – in this case Sourceworx – must first convince a court, having argued the merits of the application, that a resolution of those merits is

improper on the papers. That plainly entails the court having jurisdiction to decide the merits of the application, unless a dispute of fact prevents it from doing so. If a court has no jurisdiction over the merits of an application, it could have no jurisdiction over any application to refer those merits (or some part of them) to a trial of fact. Either I have jurisdiction over both the main application and the application to refer the main application to oral evidence, or I have jurisdiction over neither. It seems obvious to me that my jurisdiction extends to both applications.

24 It follows that it will seldom be appropriate to enrol an opposed application to refer a matter to oral evidence or to trial separately from the main application, since a reference to trial or oral evidence can only be made on the basis of a full appreciation of the merits of the main application, coupled with a determination that those merits cannot be decided without oral evidence.

25 Enrolling the two applications separately is in any event a waste of valuable judicial resources. It makes no sense to ask a Judge to restrict themselves to the question of whether or not a matter should be referred to trial or to oral evidence if the situation is that no such reference should be made, and the matter may be decided on the papers as they stand. Certainly, Rule 6 (5) (g) makes clear that a Judge may dismiss an application if a referral to trial or oral evidence is not appropriate. However, it seems plain to me that a Judge faced with an application for such a referral may also grant the relief pursued in the main application if the dispute of fact alleged turns out to be more apparent than real, or is not material to the relief sought. So long as the matter is fully and fairly argued, and the facts otherwise support the relief claimed, there can

be no barrier to granting the relief initially sought if it turns out that a referral to oral evidence or to trial was wrongly sought.

26 I now turn to the merits of the application.

The undertaking not to employ Mr. Mosiane on the Transnet Project is unenforceable

27 Mr. Kromhout argued that the undertaking that Mr. Mosiane had been removed from the project is unenforceable for at least four reasons. First, he argued that the undertaking was an entirely gratuitous effort to smooth things over with Mr. Dyasi. Datacentrix never intended or agreed to be bound by it. Second, it was argued that the undertaking is in any event unenforceable because it is contrary to public policy. Third, it was said that the undertaking cannot be enforced by way of a final interdict, because Sourceworx has not shown that any irreparable harm would otherwise result. Fourth, Mr. Kromhout contended that even if the undertaking could be enforced in principle, no order enforcing the undertaking could be granted without joining Mr. Mosiane.

28 In my view, Mr. Kromhout was correct on all four counts. I address each, in turn, below.

The undertaking was not binding

29 Like any contract, an undertaking is only enforceable if the person who gives it intends to be bound by it. In this case, there was plainly no such intent. The undertaking was initially proffered as part of the settlement agreement forwarded to Mr. Dyasi on 13 March 2024. The terms of that settlement agreement were not accepted, because Mr. Dyasi wanted, in addition, to be

compensated to tune of R200 000. The undertaking might nevertheless have become binding if it could be inferred from the papers that Datacentrix had made it, and Sourceworx had accepted it, unconditionally.

30 However, no such inference can be drawn. The facts suggest the opposite. In his email of 28 March 2024, Mr. Dyasi attempted to cherrypick a binding undertaking out of the 13 March 2024 draft settlement agreement, and to demand R200 000 in “compensation” as a condition of finally settling the matter. Mr. Taljaard’s response to this was clear: the only thing that Datacentrix was willing to concede in order to settle the matter was Mr. Mosiane’s removal from the Transnet project. And Datacentrix was only willing to remove Mr. Mosiane from the Transnet project if Mr. Dyasi abandoned his threat to cancel the subcontract and sue for damages. Since Mr. Dyasi was not willing to step back from his threat to cancel the subcontract in the absence of compensation, the undertaking to remove Mr. Mosiane from the Transnet project never became binding.

31 Nothing else on the papers even remotely suggests that Datacentrix intended to be contractually bound to keep Mr. Mosiane off the Transnet project. Datacentrix’s papers are replete with allegations to the contrary. Given that nobody has asked me to refer to trial the issue of whether Datacentrix intended to be bound irrevocably to remove Mr. Mosiane from the Transnet project, Datacentrix’s version on the facts must be accepted: there was never a binding undertaken given.

The undertaking was contrary to public policy

- 32 Even if binding, the undertaking could never have been consistent with public policy. Except possibly in the context of an enforceable restraint of trade to which the employee has agreed, corporations may not bargain with each other about an employee's conditions of service. Such trading in an employee's working conditions would transgress the prohibition on forced labour and servitude in section 13 of the Constitution, 1996, because it would entail the proposition that an employee's labour power is a commodity that may be traded independently of that employee's consent.
- 33 Of course, an employee compromises their control over their labour power by entering into a contract of employment. Conceivably, an individual's control of their labour power is also compromised when they join a union which then strikes a collective bargain about the employee's working conditions to which the employee themselves might not otherwise have agreed. But the undertaking Sourceworx seeks to enforce purports to take Mr. Mosiane's labour power entirely out of his hands. It was obviously contrary to the terms on which, and purpose for which, Datacentrix initially employed Mr. Mosiane, and the decision to remove him from the Transnet project was clearly coerced. Datacentrix complained in Mr. Taljaard's 23 April 2024 email about the "massive resistance" Transnet had put up to removing Mr. Mosiane from the project. In his affidavit, Mr. Mosiane himself says that actually enforcing the undertaking would spell the end of his employment with Datacentrix.
- 34 In these circumstances, there can be no suggestion that the undertaking is enforceable consistently with recognised "public norms" (*Barkhuizen v Napier*

2007 (5) SA 323 (CC) paragraph 96). Those norms must, it seems to me, be founded upon an objective value system inferred from the Constitution itself (*Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), paragraph 56). That system entails respecting the autonomy of individuals to shape their own path through life (see, by analogy, *NM v Smith* 2007 (5) SA 250 (CC), paragraph 131). Choosing the terms on which one's labour will be provided to others is constitutive of that autonomy. Those terms can only be defined by agreement, and the right to fair labour practices in section 23 of the Constitution requires that the terms of any labour contract, and everything done in terms of it, must be fair. Here there simply was no agreement from Mr. Mosiane that he could be removed from the Transnet project for no reason other than that it would please his former employer. It is also palpably unfair to remove Mr. Mosiane from that project in circumstances where Transnet and Datacentrix obviously wish to keep him there, and working on Transnet's network has defined his career for the last seventeen years.

35 It has, of course, long been recognised that some agreements in restraint of trade are enforceable. But this case is not about that. Sourceworx does not rely on such an agreement between it and Mr. Mosiane (a restraint agreement that was apparently in place has now expired). Even if it did, the starting point for the enforcement of an agreement in restraint of trade would have been the identification of a protectable interest in restraining the scope of Mr. Mosiane's work at Datacentrix (see, generally, *Basson v Chilwan* 1993 (3) SA 742 (A)).

36 Here, no such interest has been identified. It has not been shown that Mr. Mosiane has access to proprietary information that could be used to

Sourceworx's detriment if he were allowed to work on the Transnet project. And Sourceworx has no right to a post-employment restraint on Mr. Mosiane merely because he may have acquired skills and know-how in the course of his employment at Sourceworx. Sourceworx has no protectable interest in that. Mr. Mosiane sold his labour to Sourceworx, and nothing more.

No irreparable harm shown

- 37 Sourceworx has not, in any event, met the requirements for interdictory relief. Even if I could find that Sourceworx has a right to enforce Datacentrix's undertaking to remove Mr. Mosiane from the Transnet project, Mr. Kromhout was right to point out that Sourceworx does not identify the harm it would suffer if the undertaking is not enforced. This is really just another way of saying that Sourceworx has no protectable interest in restraining Mr. Mosiane's labour for Datacentrix, but given that this case does not involve the enforcement of a traditional restraint of trade, the point was worth making.
- 38 In its founding affidavit, Sourceworx says that Mr. Mosiane has knowledge of its pricing, and of its relationships with its customers and debtors. This, it is alleged, could be used at Datacentrix to "disrup[t]" Sourceworx's "strategic initiatives for growth" and to compromise its "brand". It is also said that Mr. Mosiane's work on the Transnet project for Datacentrix could affect Sourceworx's "internal stability" and "tarnish" its reputation (paragraphs 42 and 43 of the founding affidavit). Even if these generalities, taken at face value, had any meaning (they do not), Sourceworx does not explain how allowing Mr. Mosiane to continue work for Transnet would create any of these

forms of harm. Besides, it is not suggested that Mr. Mosiane's work at Datacentrix imperils the subcontract between Datacentrix and Sourceworx.

Non-joinder

39 Mr. Mosiane plainly had a direct and substantial interest in the relief Sourceworx sought in this application. He should have been joined in his own right from the outset. I intend to join him as the second respondent. My power to do so *ex mero motu* is well-established (see *Occupiers of ERF 101,102, 104 and 112, Shorts Retreat, Pietermaritzburg v Daisy Dear Investments (Pty) Ltd* [2009] 4 All SA 410 (SCA), paragraph 12). Given the conclusion to which I have come on the merits of the application, and the fact that Mr. Mosiane has filed an affidavit to which I have had regard in deciding the application, there is no need to postpone the matter to enable his further participation.

Order

40 Accordingly, neither the application to refer the matter for the hearing of oral evidence nor the main application can succeed. Counsel were agreed that costs should follow the result, and that counsel's costs should be taxed on the "B" scale.

41 For all these reasons –

41.1 Khumo Jacob Mosiane is joined as the second respondent in these proceedings.

41.2 The application to refer the matter for the hearing of oral evidence is dismissed.

41.3 The main application is dismissed.

41.4 The applicant will pay the costs of both applications. Counsel's costs may be taxed on the "B" scale.



S D J WILSON
Judge of the High Court

This judgment is handed down electronically by circulation to the parties or their legal representatives by email, by uploading it to the electronic file of this matter on Caselines, and by publication of the judgment to the South African Legal Information Institute. The date for hand-down is deemed to be 19 May 2025.

HEARD ON: 2 May 2025

DECIDED ON: 19 May 2025

For the Applicant: BD Stevens
Instructed by Morgan Law Inc

For the Respondent: E Kromhout
Instructed by Lowndes Dlamini Inc