



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: J 850/2024

In the matter between:

MSA OUTSOURCING SOLUTIONS (PTY) LTD

Applicant

and

KEANAN STRYDOM

First Respondent

ASHLEY KLEIN

Second Respondent

EXCLUSIVE PREP (PTY) LTD

Third Respondent

Heard: 26 September 2024

Delivered: 22 May 2025

JUDGMENT

KUMALO, AJ

Introduction

[1] In these urgent proceedings, the applicant approached this Court seeking interdictory relief interdicting and restraining the first and second respondents from purportedly breaching the terms of the restraint of trade and confidentiality agreement concluded between the parties. The breach is alleged to have emanated from the first and second respondents having interests in the third respondent, which is alleged to be a direct competitor of the applicant.¹

[2] The application is opposed by the first and second respondents. The answering affidavit was filed belatedly, and the first and second respondents sought the condonation thereof. It must be accepted that the interests of justice dictate that condonation be granted. This is particularly since there is a reasonable, satisfactory and acceptable explanation for the minimal delay; there are reasonable prospects that the opposition will prevail; and the balance of convenience favours the granting of the application, and therefore good cause has been demonstrated for the delay.

[3] The first and second respondents opposed this application on diverse grounds including: (a) that the application lacks urgency on account of the urgency claimed being self-created; (b) that the application in its current form does not comply with rule 39 of the Rules of this Court²; (c) *albeit* the first and second respondent accepted that the first respondent incorporated the third respondent, they

¹ The The applicant formulated the relief sought was *inter alia* formulated in the following terms:

- ‘...
2. that the First and Second Respondents be interdicted and restrained until 29 September 2025 from:
2.1. Being directly or indirectly interested, engaged, concerned, associated with or employed, whether as a proprietor, partner, director, shareholder, member, employee, consultant, contractor, financier, principal, agent, representative, assistance, adviser, administrator, trustee trust beneficiary or otherwise, in any competitive business of the Applicant within the Republic of South Africa;
2.2. Attempting to solicit any business from, or otherwise interfere with or entice away from the Applicant, any prescribed customer,
2.3. Attempting to solicit any employee, member, agent or contractor from, or otherwise interfere with or entice away from the Applicant or offer any such person employment, whether temporary or permanent.
2.4. Continuing employment with the Third Respondent.
3. That the First and Second Respondents be interdicted and restrained from:
3.1. Disclosing any of the Applicant’s Confidential Information to any person other than to persons employed and/or authorised by the Applicant or associated Company;
3.2. Continuing the business operations of the Third Respondent...’

² GN 4775 of 2024: Rules Regulating the Conduct of the Proceedings of the Labour Court (effective, 17 July 2024).

nevertheless denied that the third respondent competes with the applicant. (d) Therefore, they asserted that they were not in breach of the restraint of trade and confidentiality undertakings; (e) they denied that there are interests worthy of protection; (f) furthermore, they contended that the restraint was unreasonable both on duration and territorial application.

[4] Lastly, the third respondent did not independently participate in these proceedings.

Background

[5] The applicant employed the first and second respondents with effect from 13 September and 28 September 2022, respectively. The first and second respondents resigned from the employ of the applicant with effect from 29 March 2024 and took up employment with the third respondent.

[6] The applicant is a company registered in terms of the relevant statutes of the Republic and conducts an administrative service business which conducts remote staffing solutions by assisting businesses in employing offshore personnel located in the Republic who provide employment services to entities predominantly in the United States of America and the United Kingdom. The applicant essentially provides foreign entities with specific departmental skilled individuals to occupy vacancies in those entities. The applicant's clients are in a variety of industries, including but not limited to health care services, contact centres, real estate, financial services, and administrative services.

[7] The applicant effectively remains the employer of the personnel and is responsible for their management whilst they remotely perform tasks on behalf of the foreign entities, payroll and other administrative functions related to the staffing solutions, industrial and employee relations, training and development of personnel, screening and interviewing of candidates. Thus, the applicant's *modus operandi* is to procure campaigns from its clients and provide the relevant and skilled personnel in its employ to complete and fulfil the said campaigns on behalf of the said clients.

[8] The first respondent is the applicant's erstwhile employee who was employed as a service agent responsible for rendering campaign services to the applicant's clients, as well as attending training to gain the necessary skills and knowledge on the specific campaign for the benefit of the applicant's clients. He is currently the third respondent's Chief Financial Officer, Managing Director and Co-Founder. The second respondent is also the applicant's erstwhile employee and was previously employed by the applicant as a service agent with similar functions to those of the first respondent. He is currently the third respondent's Director and Chief Operations Officer.

[9] The third respondent is a company registered in terms of the relevant statutes in the Republic, and the applicant averred that the third respondent is in Gauteng, but due to its nature of business, it has its reach across all provinces in the Republic and provides services in foreign jurisdictions. The applicant contended that the third respondent operates its business in a similar fashion to the applicant does and provides 'somewhat identical services' which are advertised in an 'extremely likewise manner'. Moreover, that the third respondent markets itself and advertises vacancies in a manner which attempts to 'create the exact type of business' like that of the applicant.

[10] Furthermore, that the third respondent advertises itself as a cost-effective outsourcing and offshore consulting solution and is involved in the administrative and management aspect of remote personnel that it employs and who in turn perform certain functions on behalf of its clients' business. Also like the applicant, the third respondent is involved in IT Support and Customer Care and further offers human resources solutions such as recruitment and selection, onboarding and offboarding, employee relations, performance management, training and development, policy compliance, employee engagement and HR Data Management.

Non-compliance with Rule 39

[11] The first and second respondents contended that the applicant failed to comply with Rule 39 of the Rules of this Court for a variety of reasons. These

included the applicant's failure to prescribe the time frames for the filing of the replying affidavit and the fourth additional affidavit.

[12] This point, in my view, must be disposed of swiftly. It is apparent that the provisions of Rule 39 of the Rules introduces a special procedure for the filing and determination of applications for the enforcement of restraint of trade agreements. This procedure abridges the timeframes for the filing of affidavits and provides for the expeditious hearing of the applications. It is apparent that applications in restraint of trade are inherently urgent,³ and Rule 39 constitutes a scheme by which the cumbersome requirements of urgency and the protracted timeframes of ordinary applications are alleviated. This is to afford applications in restraint of trade the urgent attention that they deserve without being bogged down by strict requirements or inordinate timeframes.

[13] However, this does not detract from the fact that an applicant may initiate any application provided for in the Rules in terms of the urgent procedure prescribed by Rule 38 of the Rules. This means that in circumstances where the applicant is of the view that its application must be heard on truncated periods, it must therefore initiate an application in accordance with Rule 38 and, moreover, satisfy the requirements thereunder.

[14] In this application, it is apparent from the notice of motion that the applicant seeks urgent relief. Therefore, its application must be considered in accordance with Rule 38, read together with Rules 35 and 39 of the Rules. This is since subrule 38(1) requires that the applicant must *inter alia* comply with the Rules related to applications in general. This entails that, in addition to any requirement in terms of Rule 38, the requirements of Rule 35 must also be complied with. It follows that in circumstances where the notice of motion does not prescribe the timeframes for the delivery of a specific document, the default position in terms of Rule 35 of the Rules of this Court must accordingly apply.

³ See: *Mozart Ice Cream Classic Franchises (Pty) Ltd v Davidoff and Another* (2009) 30 ILJ 1750 (C) at 1761D.

[15] As such, considering the circumstances of this application, in terms of Rule 35(9), the replying affidavit ought to have been delivered within five days from the date of the delivery of the answering affidavit. The answering affidavit was served on 3 September 2024. This means that the applicant had to deliver the reply within five days from that date. The reply was served on 4 September 2024. Equally, the provisions of Rule 39(3)(c) require that the fourth affidavit be delivered within five days from the date of the delivery of the replying affidavit. The fourth affidavit was served on 11 September 2024. It is apparent that this series of filings complied with both Rules 35(9) and 39(3)(c) of the Rules of this Court. In the absence of the prescribed timeframes in the notice of motion, the Rules nevertheless prescribed the applicable timeframes in respect of both documents.

[16] Manifestly, a global reading of the Rules indicates that where the notice of motion does not prescribe the timeframes for a certain conduct, the default position in terms of applications in general shall apply. In fact, the parties complied with the requirements of the Rules. Significantly, there is no discernible prejudice claimed by either of the parties because of the purported non-compliance. Therefore, the failure to prescribe the timeframe for the delivery of the replying affidavit is of no moment. This is particularly since the Rules militate against any procedural lacuna arising from the failure to prescribe a certain timeframe for the delivery of documents by reverting to a default position in respect of applications in general in such circumstances. Accordingly, the first and second respondents' point in this regard lacks merit and must be dismissed.

Urgency

[17] The first and second respondents contended that the urgency alleged in this application is self-created. The first and second respondents contended that the applicant ought to have been aware, some three to five months prior to the launching of this application, that the first and second respondents were involved in the operations of the third respondent. Moreover, even if it were accepted that the applicant became aware of their involvement a month prior to the launching of this application, there is nevertheless no justification for the inordinate one-month delay subsequent to being aware of their involvement to initiate this application. The first

and second respondents contended that there is no explanation as to why the applicant waited several months subsequent to being aware of their involvement prior to initiating this application. Therefore, it was argued that any urgency claimed in this application is manifestly self-created.

[18] The provisions of Rule 38(2)(a) require the applicant to succinctly provide the reasons for urgency and why urgent relief is necessary. This requires that the reasons which make the matter urgent be adequately set out in the founding affidavit, and in addition, whether substantial relief cannot be obtained at a hearing in due course. This entails that in all instances where urgency is alleged, the applicant must satisfy the Court that the application is indeed urgent by succinctly stating the reasons for urgency and to provide persuasive reasons as to why urgent relief is necessary.⁴

[19] The applicant in alleging urgency, contended that the application, based on its nature, was inherently urgent. This was to militate the continuing harm experienced by the innocent party because of the breach of restraint of trade and confidentiality undertakings. Moreover, that with each day that the first and second respondents are in the employ of the third respondent, it continues to suffer irreparable harm on account of their knowledge of the applicant's confidential information, and trade secrets which will be used to the benefit of the third respondent and effectively its proprietary interests are placed at extreme risk.

⁴ *Maqubela v SA Graduates Development Association and Others* (2014) 35 ILJ 2479 (LC) at para 32; See also *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others* [2011] ZAGPJHC 196 (*East Rock*) at paras 6 -7 where it was held:

'[6] The import thereof is that the procedure set out in rule 6(12) is not there for taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the Applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it will not obtain substantial redress.

[7] It is important to note that the rules require absence of substantial redress. This is not equivalent to the irreparable harm that is required before the granting of an interim relief. It is something less. He may still obtain redress in an application in due course but it may not be substantial. Whether an applicant will not be able obtain substantial redress in an application in due course will be determined by the facts of each case. An applicant must make out his cases in that regard.'

[20] It must be accepted that the applicant has proffered cogent reasons why this application deserves the urgent attention of this Court. This is since it is common cause that the first and second respondent are in the employ of the third respondent and moreover, that in the event that the purported breach persists, the proprietary interests of the applicant are at risk and the damage caused by the exposure to its trade secrets and confidential information cannot be undone by an interdict or claim for damages in due course.

[21] In *AMCU and Others v Northam Platinum Ltd and Another*,⁵ the Court held that a further consideration of whether to grant urgent relief is whether the applicant acted with the necessary haste in approaching the Court for relief. The Court moreover, held that where the applicant delays in seeking relief, the corresponding urgency shall similarly be diminished.

[22] In this application, the applicant contended that when the first and second respondents resigned from its employ on 29 March 2024, it was unaware of the potential breach of the restraint of trade and confidentiality agreements. The applicant did not aver when it became aware of the first and second respondents' employment with the third respondent. However, it averred that once it became aware of the breach, it instructed a firm of attorneys to deliver to the first and second respondents the letters dated 1 August 2024 for them to cease and desist from their breach. There is no explanation as to when the investigations were finalised, nor the date on which it was decided that the attorneys would be approached with instructions.

[23] On 1 August 2024, the applicant received a telephone call from the first respondent disputing that the third respondent was the applicant's competitor. On

⁵ *Association of Mineworkers and Construction Union and Others v Northam Platinum Ltd and Another* (2016) 37 ILJ 2840 (LC) at para 26, where the court held:

'A final consideration where it comes to urgency is expedition when taking action. In other words, the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency. But the longer it takes from the date of the event giving rise to the proceedings, the more urgency is diminished. In short, the applicant must come to Court immediately, or risk failing on urgency. In *Valerie Collins t/a Waterkloof Farm v Bernickow NO and Another* the Court held:

"... if the applicants seeks this Court to come to its assistance it must come to the Court at the very first opportunity, it cannot stand back and do nothing and some days later seek the Court's assistance as a matter of urgency." [Footnotes omitted]

5 August 2024, the applicant gave instructions for this application to be initiated, and the application was delivered on 8 August 2024. The matter was heard on 26 September 2024.

[24] The Court in *Ecolab (Proprietary) Limited v Thoabala and Others*⁶ re-emphasised that applicants in applications to enforce restraint of trade and confidentiality undertakings are not excused from the requirements of the Rules in respect of urgency merely on account of the nature of the application. The Court held that the applicants are equally required to succinctly provide the reasons that render the applications urgent and further must approach the Court with the necessary haste to seek relief. This principle was confirmed in *Volvo Financial Services Southern Africa (Pty) Ltd v Adamas Tkolose Trading CC*,⁷ where it was held that the purpose of urgent relief was to curtail the imminence and extent of the harm if urgent relief is not granted. This was not dependent on the inherent urgency associated with certain classes of actions and the category of rights being asserted by the applicant.

[25] It is correct, as averred by the first and second respondents, that it is not discernible when the applicant became aware of their employment with the respondent. Other than to deny that it became aware as of the date of the time

⁶ (2017) 38 ILJ 2741 (LC) at para 17 and 20 where it was held:

‘One cannot quarrel with the conclusion that there is indeed inherent threat and prejudice to an employer whose ex-employee flagrantly fails to comply with his or her confidentiality and restraint of trade undertakings, and particularly one that immediately joins a competitor. At the same time however, I did not understand the import of *Mozart Ice Cream* to be an erosion of the requirements of Rule 8 of this Court, read together with Clause 12 of the Practice Manual of this Court, or worst still, to imply that these disputes should enjoy special privileges in this or any other Court. To hold otherwise would lead to absurdity and unmitigated abuse of court processes, in that any party aggrieved by alleged non-compliance with restraint provisions may fold its arms and approach a Court at its leisure, and long after the alleged breach, to seek urgent intervention. In such circumstances obviously, any urgency claimed will be regarded as self-created. The Court should therefore refuse to assist an applicant who approaches it for urgent relief at its leisure and then claim that it did not matter how long it had known of the alleged breach.’

and

‘To summarize then, parties alleging breaches of restraint of trade agreements are not indemnified from satisfying the requirements in Rule. Thus, a mere contention that the enforcement of restraint of trade is inherently urgent and therefore must be treated as such by this court without any further consideration cannot by all accounts be sustainable. The fact that these disputes may have an inherent quality of urgency cannot be equated to a free pass to urgent relief on the already overburdened urgent roll in this court. Like all other urgent matters, more than a mere allegation that a matter is urgent is required. This therefore implies *inter alia* that the Court must be placed in a position where it must appreciate that indeed a matter is urgent, and also that an applicant in the face of a threat to it or its interests had acted with the necessary haste to mitigate the effects of that threat’.

[Footnotes omitted]

⁷ (2023/067290) [2023] ZAGPJHC 846 (1 August 2023) at paras 4 – 8.

stamps on the annexures to the founding affidavit, it does not precisely state the dates, but merely indirectly makes reference to July 2024. This is repeated in the heads of argument, where it is submitted that the applicant became aware at the conclusions of its investigation in July 2024.

[26] It is apparent that the applicant's assertion is extremely vague, particularly where the elected procedures require the applicant to act with the necessary haste in seeking urgent relief. Nevertheless, the first and second respondents averred that on the applicant's version, it took the applicant a period of a month to approach this Court for urgent relief.

[27] This, absent any averment to the contrary and on the approach enunciated in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*,⁸ it must be accepted that the applicant became aware of the employment relationship a month prior to the initiation of this application. This, as rightly contended by the first and second respondents, constituted a protracted delay in approaching the Court for urgent relief.

[28] It is also correct that the explanation for the delay was scant. Other than alleging that it became aware belatedly and that it initially attempted to solicit an undertaking to cease and desist, the applicant does not provide an account for the period between becoming aware of the purported breach and the date of delivery of the application. On its own version, the applicant became aware of the purported breach in July 2024 but only sought an undertaking on 1 August 2024. Clearly, the applicant's explanation is scant and does not account for a significant period of the delay.

[29] Accordingly, it is clear that the applicant has failed to proffer a reasonable explanation as to why it delayed in approaching the Court. It follows that the corresponding urgency may have diminished since the first and second respondents remained in the employ of the third respondent for a period of a month after the

⁸ 1984 (3) SA 623 (A) at 634E – I.

applicant became aware of the potential harm. Therefore, any urgency claimed in this regard is manifestly self-created.

[30] On that account, this application ought to be struck off the roll on account of the urgency claimed being self-created. However, as stated in *East Rock Trading 7 (Pty) Ltd and Another v Eagle Valley Granite (Pty) Ltd and Others*⁹, the question of whether there are sufficient reasons for the application to be heard urgently is underpinned by the absence of substantial redress in a hearing in due course and that the consideration is whether, despite the delay in approaching the Court, the applicant can or cannot obtain substantial redress in a hearing in due course. However, naturally, a delay may be rightfully conceived as an indication that the matter might not be urgent, but it may equally be rightfully conceived as an attempt by the applicant to settle the matter amicably.

[31] Therefore, based on the circumstances of this application, and *albeit* the applicant was dilatory in approaching the Court and further nonchalant in its explanation regarding the delay, it is nevertheless undeniable that this matter ought to be heard on an urgent basis. As mentioned above, the applicant proffered sufficient reasons why urgent relief is required. This is since, if proved, the alleged breach may cause imminent irreparable harm. This is exacerbated by the enrolment backlog in this Court since, effectively, the restraint of trade and confidentiality agreement may have lapsed by the time of the hearing in due course, and the applicant may not receive substantial redress on account of the unenforceability of expired terms of a contract.

⁹ *East Rock supra* at paras 6, 8 - 9 where the Court held:

[9] It means that if there is some delay in instituting the proceedings an Applicant has to explain the reasons for the delay and why despite the delay he claims that he cannot be afforded substantial redress at a hearing in due course. I must also mention that the fact the Applicant wants to have the matter resolved urgently does not render the matter urgent. The correct and the crucial test is whether, if the matter were to follow its normal course as laid down by the rules, an Applicant will be afforded substantial redress. If he cannot be afforded substantial redress at a hearing in due course then the matter qualifies to be enrolled and heard as an urgent application. If however despite the anxiety of an Applicant he can be afforded a substantial redress in an application in due course the application does not qualify to be enrolled and heard as an urgent application.

[32] In the end, on the equal consideration of the requirements of urgency, *albeit* the applicant did not approach the Court with the necessary haste to enforce the restraint of trade undertakings, nevertheless, cogent reasons have been proffered on why this matter deserves the urgent attention of the Court. Moreover, the objective facts demonstrate that the applicant is likely not to receive substantial redress in due course. Accordingly, this matter deserves to be heard urgently.

Restraint of trade and confidentiality undertakings

[33] The applicable principles in respect of the enforcement of restraint of trade agreements are trite. The starting point is that agreements in restraint of trade are valid and enforceable unless against public policy and thus, unreasonable. In that regard, a party who challenges the enforceability of the agreement bears the burden of alleging and proving that the restraint of trade is unreasonable.¹⁰ In this application, the first and second respondents did not dispute that they signed the employment contracts, which incorporated the restraint of trade and confidentiality undertakings. However, they contended that the restraint of trade was unreasonable and thus unenforceable.

[34] It is trite that the reasonableness of a restraint of trade and confidentiality undertakings must be considered based on a value judgment taking into account two considerations, *viz.*, the *maxim pacta servanda sunt* which entails that public policy requires that parties should comply with their contractual obligations; and the principle that the interests of the society dictate that all individuals should be productive and allowed to participate in trade or pursue their profession.¹¹

[35] In *Basson v Chilwan and Others*,¹² the Court held that the reasonableness of a restraint of trade must be considered against four questions, *viz.*: whether there is an interest of one party which deserves protection subsequent to the termination of the agreement; whether such interest is compromised by the other party; if so compromised, whether such interest quantitatively and qualitatively outweighs the

¹⁰ See: *Reddy v Siemens Telecommunications (Pty) Ltd* (2007) 28 ILJ 317 (SCA) (*Reddy*) at para 10.

¹¹ See: *Arrow Altech Distribution (Pty) Ltd v Byrne and Others* (2008) 29 ILJ 1391 (D) (*Arrow Altech Distribution*) at 1395A – C.

¹² 1993 (3) SA 742 (A) at 767G – H.

interest of the other party that she should not be economically inactive and unproductive; and whether there is another aspect of public interest which is independent of parties but requires that the restraint of trade be maintained or not. Moreover, where the other party's interest not to be economically inactive and unproductive outweighs the other party's protectable interest, the restraint of trade shall generally be considered to be unreasonable.¹³

Rivalry between the applicant and third respondent

[36] The first and second respondents dispute that the applicant and the third respondent are direct or indirect competitors. The first respondent averred that he founded the third respondent prior to his employment relationship with the applicant and that the applicant was aware of this fact at the commencement of the relationship.

[37] Moreover, the first and second respondents contended that the business of the third respondent was dissimilar to that of the applicant in that the operation of the third respondent is limited to recruiting and training potential employees. This was alleged to be distinguishable from the business of the applicant. Furthermore, that the *modus operandi* of the third respondent is limited to the selection for training of individuals and thereafter presenting those individuals to be employed by potential clients (employers) such as the applicant.

[38] Thus, unlike the applicant who employs the personnel directly, the said individuals are not enlisted as employees of the third respondent but rather are prepared for suitability for employment with employers such as the applicant. The third respondent also charges a once-off fee and not a monthly charge to the foreign entities for the clients for *inter alia* the human resources solutions, like the applicant. The contention was therefore that the third respondent is in fact the applicant's potential supplier ('resource') and not the competition.

¹³ See also: *Labournet (Pty) Ltd v Jankielsohn and Another* (2017) 38 ILJ 1302 (LAC) (*Labournet*) at para 42.

[39] It has been held that the enforcement of restraint of trade agreements must seek to protect some legally recognised interest of the party in whose favour the restraint is granted and must not be merely a measure of stifling competition.¹⁴ This is since the reasonableness of the restraint of trade must be weighed with reference to the circumstances of each case, and such circumstances are not limited to those which prevailed at the conclusion of the agreement but also extend to those which prevailed at the time of the enforcement of the restraint of trade and confidentiality undertakings.¹⁵

[40] In *Labournet (Pty) Ltd v Jankielsohn and Another*¹⁶, the Court held that the list of protectable interests is not closed but includes confidential information and customer connections as being such interests. Accordingly, seeking to enforce a restraint of trade merely to prevent an employee from competing with an employer is against public policy and thus, unreasonable. This is since the interests of society dictate that everyone should, as far as possible, be permitted to trade or pursue a profession, because it is to the detriment of society if an unreasonable bar is placed on a person's freedom of trade or to pursue a profession.¹⁷

[41] The applicant persisted that the third respondent is its competition. It relied on the marketing material to advance the contention that the latter advertises its outsourcing solutions, which mimic the business of the applicant. It must be accepted that the marketing material, as illustrated by annexures "MS1", "MS2" and "MS3" to the founding affidavit, demonstrated that the business operations of the third respondent are like those offered by the applicant.

[42] Flowing from the documents, it is incorrect that the third respondent merely deals in training and recruitment of personnel on behalf e.g. the applicant or similar companies. This is so since, arising from the documents, the third respondent holds itself to be a company interested in outsourcing solutions. These included the recruitment and employment of a salesforce admin to perform certain functions on

¹⁴ See: *New Justfun Group (Pty) Ltd v Turner and Others* (2018) 39 ILJ 2721 (LC) at para 8.

¹⁵ See: *J Louw and Co (Pty) Ltd v Richter and Others* 1987 (2) SA 237 (N) at 243D – E.

¹⁶ *Labournet supra* at para 41.

¹⁷ See: *Sunshine Records (Pty) Ltd v Frohling and Others* 1990 (4) SA 782 (A) (*Sunshine Records*) at 794C – E.

behalf of a client of the third respondent; offshore human resources, customer support services, administrative tasks, and payroll.

[43] This entails that if the annexures are accepted, the business of the third respondent would manifestly mimic that of the applicant. In the answering affidavit, the first and second respondents merely disputed that the third respondent trades in the same commodity as the respondent and reiterated that its operations are limited to training and recruitment.

[44] As restated in *Reddy v Siemens Telecommunications (Pty) Ltd*,¹⁸ in motion proceedings, and where there are disputed facts, a final order may only be granted where the facts as stated by the respondent, together with the admitted facts in the applicant's affidavits, justify the order, and this is applicable regardless of which party bears the *onus*. This is unless the respondent's denial of a fact alleged by the applicant was not of a nature which raises a real, genuine or *bona fide* dispute of fact. This approach is equally applicable to applications for the enforcement of restraint of trade and confidentiality agreements.¹⁹

[45] It must be stated that the first and second respondents merely denied the averments fortified by the annexures. They do not state whether the annexed advertisement material belongs to the third respondent, nor provide an explanation of the contents of the material. This is significant since the annexures debunk the assertion that the third respondent merely deals in training and recruitment. As rightly contended by the applicant, the first and second respondents' undertaking to take down these materials is indicative of the fact that the advertising material demonstrates the rivalry between the two entities. Accordingly, it follows that the first and second respondents' dispute of facts constitutes a bare denial, which must clearly be rejected on account of it constituting a bare denial.

[46] Thus, the applicant's contention that the third respondent's operations are identical to its business must prevail. Clearly, the third respondent, based on its profile as demonstrated in its marketing materials, is in fact the applicant's

¹⁸ See *Reddy supra* at para 4.

¹⁹ See: *Labournet supra* at para 40.

competition. Equally so, as the first and second respondents averred that its business is limited to the training and recruitment of agents, it is apparent from the facts that this aspect of the business also forms part of the applicant's business. Therefore, clearly, even on the first and second respondents' version, the third respondent competes with the applicant on some aspects of its business. In the end, the third respondent is manifestly in competition with the applicant.

[47] Nevertheless, it must be accepted that even though an employee who, by virtue of her employment would be able to exploit the erstwhile employer's customer connections for her own account subsequent to her departure (and subject to certain restrictions), is at liberty to compete with the erstwhile employer provided that such conduct is not restricted by contract. In this application, the third respondent being in competition with the applicant, the restraint of trade agreement would presumably restrain the first and second respondents from being interested in the third respondent. This is, nevertheless, subject to the existence of interests worthy of protection, or whether the restraint goes further than necessary to protect the interest.²⁰ This entails that a restraint is manifestly unreasonable where it restrains trade without the corresponding interest worthy of protection.²¹ Therefore, it follows that for an interdict to be competent, there must be trade secrets, confidential information or customer connections which, if exposed to a third party, would result in irreparable harm to the applicant.

Proprietary interests

[48] The restraint of trade agreement between the parties bars the first and second respondent for a period of 18 months from having interest in or being otherwise involved in a business in competition with the applicant; soliciting or otherwise interfering or enticing the applicant's customers; and soliciting or otherwise interfering or enticing the employees of the applicant. In contending that the restraint of trade was unreasonable, the first and second respondents contended that the applicant conducts a mere remote general business support service to international

²⁰ See: *Reddy supra* at para 17.

²¹ See: *Automotive Tooling Systems (Pty) Ltd v Wilkens and Others* 2007 (2) SA 271 (SCA) (*Automotive Tooling*) at para 8.

clients. Moreover, that the applicant's business objective is the reduction of costs associated with the outsourcing of the services.

[49] The contention was that the business of the applicant turned on *inter alia* the delivery of day-to-day generic ICT support, payroll packages and human relations services. Therefore, there was nothing unique in the applicant's business that ought to be sealed from the competition. As such, the requirement that there must be protectable interests worthy of protection for the restraint to be reasonable has not been satisfied.

[50] The applicant maintained that it provided a specialised and niche business to foreign clients and that an employment with the applicant results in the acquisition of a niche set of skills, which skills are the protectable interest of the applicant and which the first and second respondents utilised to establish and operate the third respondent following their resignation from the applicant.

[51] It must be accepted that it is inconsequential whether the applicant provides a general office support service business or a niche business. In any event, the applicant has not demonstrated how its operations are not generic as alleged by the applicant. It must be accepted that merely averring that the operations are niche without demonstrating the uniqueness is insufficient to vindicate the applicant's version. It is therefore difficult to consider whether the unstated unique business stratagem is worthy of protection, or if it is readily available on account of it being generic.²²

[52] Nevertheless, as mentioned above, what is of consequence in considering whether an interest is worthy of protection is whether the first and second respondents had access to business stratagem, pricing structures, customer connections, business know-how, customer and suppliers' information etc. which if disclosed to a third party (third respondent) would cause the applicant imminent irreparable harm. This is since a consideration of the reasonableness of the restraint of trade includes an assessment of whether the applicant's interests have been

²² See: *Automotive Tooling supra* at para 20.

compromised by the conduct or potential conduct of the first and second respondents.

[53] In this application, the applicant admits in the replying affidavit that the first and second respondents' duties were limited to the rendering of generic services to the applicant's clients. However, its case remained that, by virtue of the first and second respondents' erstwhile employment with the applicant, they formed part of the integral operational component of the applicant, which serviced clients and also had access to the applicant's trade secrets. These included procurement patterns and other sales information, systems, pricing, trade operations and industrial know-how, and the identity and information of clients.

[54] It is apparent that a consideration of these facts evinced that the first and second respondents were low-level employees with no access to the upper echelons of the applicant. This is significant since for there to be a protectable interest, the erstwhile employer's business stratagem must be capable of being transposed to the new employer and thus, subjecting the erstwhile employer to unfair competition. This is since an erstwhile employee is free to compete with her erstwhile employer, provided that there is no contract restricting such conduct.²³ Moreover, the enforcement of a contract is unreasonable where there are no interests worthy of protection, particularly since an erstwhile employee cannot be restrained from exercising her skills, knowledge and experience with a new employer even where the same has been gained through training by the erstwhile employer.²⁴

[55] Thus, the applicant having not shown that the first and second respondents were privy to the applicant's business stratagem, pricing structures, and supplier information, etc., it cannot, in these circumstances, be reasonable to enforce the restraint of trade agreement. This is primarily since other than a bold averment that by virtue of their positions, the first and second respondents had access to the applicant's trade secrets, there are no facts demonstrating that, despite being only responsible for the delivery of the product to the clients, the first and second respondents were nevertheless exposed to the applicant's trade secrets.

²³ See: *Sunshine Records supra* at 794C – E.

²⁴ See: *Labournet supra* at para 43.

Customer connections

[56] Equally, other than a bold allegation that a certain client's departure coincided with the first and second respondents' departure without more, is insufficient to vindicate the applicant's version that the latter would solicit or otherwise interfere with or entice the clients of the applicant. This is since the allegation manifestly constitutes conjecture. This is on the basis that there are no details on the circumstances of the client's departure or whether the client was indeed poached by the first and second respondents for the benefit of the third respondent.

[57] This is significant since the necessity to enforce the restraint arises from the erstwhile employee's contact with the erstwhile employer's clients affording him the ability to form a particular relationship with a client to an extent that when the erstwhile employee departs the employ of the latter, she (the employee) could entice the client to follow her to the new employer.²⁵ This entails the ability of the erstwhile employee to leave with the customer '*in the pocket*'.²⁶

[58] In considering whether the influence over the erstwhile employer's clients customers involves a variety of factors including, the frequency and duration of the interaction; the location of the interaction; the knowledge of the employee in relation to the customer's business needs; the extent of the rivalry between the competition; the nature of their business; the nature of the product; and the departure of some clients immediate to the departure of the erstwhile employee.²⁷

[59] In this application, the applicant, other than accepting that the first and second respondents were service agents with responsibilities of performing the support services and conducting training, contended that by virtue of the nature of the functions they were exposed to confidential information of significant commercial value; and formed strong trade connections with the applicant's client during their tenure. There is, however, no explanation on how these connections were formed;

²⁵ See: *Rawlins and Another v Caravantruck (Pty) Ltd (Rawlins)* 1993 (1) SA 537 (A) At 541C – E.

²⁶ *Bridgestone Firestone Maxiprest Ltd v Taylor* [2003] 1 All SA 299 (N) at 305.

²⁷ *Rawlins supra* at para 541G – I.

the frequency of the interaction or any other factors necessary to demonstrate that the erstwhile employees had forged a bond strong enough for the first and second respondents to be able to entice the clients of the applicant.

[60] Thus, it follows that the facts do not establish that the first and second respondents forged strong customer connections which established an interest worthy of protection in favour of the applicant. This is *inter alia* since the facts do not support the conclusion that the first and second respondents possessed influence over the customers of the applicant sufficient to induce the latter to follow the former to the third respondent.

[61] As mentioned above, restraint of trade agreements are not aimed at stifling competition but rather to protect the interests of the erstwhile employer from imminent irreparable harm. In this application, the applicant had to show that the first and second respondents had a close enough relationship with the clients to the point where the client would elect to depart with them if the client was so persuaded. Other than the speculation on the departure of a single client subsequent to the first and second respondents' departure, the pleadings are scant on the nature of the relationship between the erstwhile employees and the applicant's current or former clients and to what extent the erstwhile employees have influence over these clients. Accordingly, the enforcement of the restraint of trade would also in these circumstances be unreasonable.

Confidential information

[62] The applicant contended that by virtue of the first and second respondents' nature of employment, they were exposed to '*confidential information of high commercial value*'. This included *inter alia* information which was crucial to the applicant's competitiveness in the market; trade systems; contact with clients; and specialised training for clients' requirements. On the other hand, the first and second respondents averred that they did not undergo any specialised training and attended regular workshops; that their functions were limited to generic office support services; moreover, they denied that they were privy to any confidential information.

[63] In considering whether there is an interest worthy of protection, the facts have to demonstrate that there existed confidential information which the erstwhile employee had access to and which the erstwhile employee, as an act of allegiance, could transmit to the new employer should she decide to do so.²⁸ The information must not be in the public domain; not easily accessible; and conveyed tacitly or expressly as confidential.²⁹ This information may include the supplier and customer list which would be unreasonable for the erstwhile employee to compile and use for her own benefit during the confidentiality period.³⁰

[64] As mentioned above, the applicant does not explain the contents and context of the confidential information and therefore it is not discernible when and how the first and second respondents acquired the information, if any, and whether the information constituted confidential information which is worthy of protection. The bold allegation that the first and second respondents were privy to commercial information of high value is insufficient to vindicate the version that the applicant has an interest worthy of protection. This is in particular since the first and second respondents averred that they were mere service agents without any access to confidential information. Moreover, they rightly contended that the applicant did not demonstrate that the employees had taken possession of any material other than their skills, knowledge and experience, of which the erstwhile employees cannot be interdicted and restrained from exploiting for their own account.

[65] Therefore, the facts do not support the conclusion that the first and second respondents were privy to any confidential information worthy of protection. Consequently, the confidential information of the applicant has not been compromised by the first and second respondents having an interest in the third respondent.

Conclusion

²⁸ See: *Reddy supra* at para 20.

²⁹ See: *Arrow Altech Distribution supra* at paras 18 – 19.

³⁰ *Ibid* at para 22.

[66] In sum, *albeit* it might be correct that the applicant and the third respondent are in competition, nevertheless, the applicant's interests are not in any manner or form compromised by the first and second respondents joining the third respondent. This is since the first and second respondents, as low-level employees, were not exposed to any of the applicant's business stratagem, pricing structure, business know-how, suppliers' information, customer business needs and customer connections. In such circumstances, the first and second respondents being oblivious to the applicant's trade secrets, it cannot be said that the first and second respondents will compromise any of the applicant's interests, which are worthy of protection. Effectively, it cannot be said that the first and second respondents had useful business information which would enable the third respondent to unfairly compete with the applicant and ultimately cause the applicant imminent irreparable harm.

[67] Furthermore, the overall facts do not demonstrate that the first and second respondents had access to confidential information which, should it be disclosed to a third party (third respondent), would cause the applicant imminent irreparable harm. To reiterate, the first and second respondents were mere service agents responsible for implementing the business end of the applicant's products and services. They were not in the upper echelons of the applicant's hierarchy and thus, could not have obtained information which would cause unfair advantage to a third party (third respondent) and thus, cause the applicant irreparable harm.

[68] Furthermore, the trade secrets of the applicant having not been compromised, there is no necessity to consider whether, quantitatively and qualitatively, the interests of the first and second respondents not to be economically inactive and unproductive outweigh the interests of the applicant. Thus, the issue of the scope and extent of the restraint of trade becomes superfluous.

[69] In the end, the facts do not demonstrate that the applicant stands to suffer imminent irreparable harm as a result of the first and second respondents' engagement with the third respondent. Thus, the requirements justifying the granting of the final interdict have not been satisfied, and the application falls to be dismissed.

[70] In respect of the issue of costs, this application being a contractual dispute entails that the considerations within the contemplations of section 162 of the Labour Relations Act³¹ are not applicable, and the ordinary rule that costs follow the results finds application.³² Therefore, the applicant ought to be burdened with the costs of this application.

[71] In the premises, the following order should be made.

Order

1. The ordinary time periods, form, service and manner of service provided for in terms of the Rules be dispensed with and this application be heard as one of urgency in accordance with rule 38 of the Rules of this Court.
2. The late filing of the answering affidavit is condoned.
3. The first and second respondents' preliminary points are dismissed.
4. The application to enforce the restraint of trade and confidentiality agreement is dismissed.
5. The applicant is to pay the costs of this application.

M. P. Kumalo

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the applicant: Clifford Levin, of Clifford Levin Incorporated

For the first and second respondents: Adv. Kuvashkir Naidoo instructed by D. Reddy Incorporated

³¹ Act 66 of 1995, as amended.

³² *Skinner and Others v Nampak Products Limited and Others* (2021) 42 ILJ 838 (LAC) at para 47